IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, *et al.*, Petitioners, v. Ohio Redistricting Commission, *et al.*, Respondents.	Case No. 2021-1193
Bria Bennett, *et al.*, Petitioners, v. Ohio Redistricting Commission, *et al.*, Respondents.	Case No. 2021-1198
Ohio Organizing Collaborative, *et al.*, Petitioners, v. Ohio Redistricting Commission, *et al.*, Respondents.	Case No. 2021-1210

CORRECTED MEMORANDUM OF SENATE PRESIDENT HUFFMAN AND HOUSE SPEAKER CUPP IN OPPOSITION TO PETITIONERS' MOTIONS FOR AN ORDER TO SHOW CAUSE

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INTRODUCTION

House Speaker Cupp and Senate President Huffman hereby respond to the Motion to Show Cause of the League of Women Voters of Ohio Motion ("League Mot."), the Renewed Motion to Show Cause of Bria Bennett, et al. ("Bennett Renewal"), and the Joinder in Renewed Motion to Show Cause of the Ohio Organizing Collaborative ("OCC Joinder"). Petitioners' motions for an order to show cause are not warranted. The Commission carried out each task this Court directed it to do in its March 16 Order including:

- meeting daily;
- developing map-drawing and mediation processes;
- retaining independent mapdrawers to work around the clock in full public view; and
- passing a general assembly plan that complies with the Constitution and getting it filed with the Secretary of State by the Court-imposed midnight March 28 deadline.

Petitioners' real complaint is that, when it became clear hours before the deadline that the independent mapdrawers may not have completed maps in time, the Commission agreed to also work on a "failsafe" that would allow it to comply with the Constitution and this Court's order. Ultimately, the "failsafe" plan was the only one completed in time to comply with this Court's order and the Constitution. And it was the only one passed by the Commission.

The Republican Commission members did not "hijack" the process or "stop" working with the independent mapdrawers as Petitioners suggest. Rather those members offered numerous amendments and suggestions throughout the process. But the transcripts of the public meetings and video of the public workroom sessions along with the separately filed Affidavit of independent mapdrawer, Dr. Johnson, confirm that the Republicans' proposed changes and suggestions were neither considered nor implemented. Affidavit of Dr. Doug Johnson, April 3, 2022, ¶¶13-14; 20(b) ("Johnson Aff.").

It is undisputed that the independent mapdrawers ran out of time to draw a map "from scratch" that met the requirements of this Court's order and the Ohio Constitution. Only after that became clear did the Commission adopt the "failsafe" plan that complies with the Constitution. There is no contempt. Only a good faith effort to comply with this Court's orders.

STATEMENT OF FACTS

As petitioners concede, in the days following its entry, the Commission worked in a bipartisan manner to comply with the process directives of the Court's March 16 Order—setting a schedule of frequent meetings, hiring independent mapdrawers (Drs. Michael McDonald and Doug Johnson, the first identified by Democratic members of the Commission, and the second by Republican members), and ensuring that all Commission members could participate in each step of drawing a new plan. (League Mot., 4.) Live-streaming their own meetings, the Commission also set up a workroom for the mapdrawers with 24-hour live-stream access through the Ohio Channel. https://ohiochannel.org/collections/ohio-redistricting-commission. They also agreed upon a mediator, provided by Sixth Circuit Chief Judge Sutton, to help resolve differences that arose. And the Commission adopted detailed ground rules for the mapdrawers—rules that "directly sought to respond to the Court's Order." (League Mot., 4.) Then all Commission members and their staff set themselves to the task of getting "an entirely new General Assembly-district plan" drafted that the Commission could review, amend, adopt and file with the Secretary of State "no later than" midnight, March 28, 2022. March 16 Entry.

All parties agree that, as of the morning of March 28, they had made progress. With help from the mediator, they had agreed on a process to deal with double-bunking of incumbents. And the two mapdrawers were working to combine their individual efforts to produce a combined House map and Senate map for the Commission members to review, consider, make

suggestions and amendments to, and ultimately to vote on. As described by the mapdrawers appearing at the first of five Commission meetings on the final day, March 28 (10:58 am):

> Dr. Douglas Johnson [00:01:31] … The big question in our mind is a process question for the day. Obviously, a big goal today is for you to really make this your map by giving us your questions, your suggestions and requests and directions. And so wanted to, I think a good thing that could come out of this meeting would be a decision on that process, if that's possible.

(Tr. p 170 (emphasis added)).[1] As the morning meeting ended, the mapdrawers agreed to distribute versions of their maps to the Commission members at 2:00 pm, and the Commission would reconvene with thoughts and comments on the maps at 3:00 pm. (Tr. pp 172–73).

Through no fault of anyone, that schedule slipped. The mapdrawers kept working on the House map addressing incumbent residences, improper jurisdictional splits, compactness and other issues as the afternoon wore on. A version 3 of the House map was uploaded at 2:36 pm, and then another, version 4, at 3:26 pm. There was still no Senate map. At 4:24 pm the Commission reconvened and the mapdrawers reported:

> Dr. Doug Johnson [00:00:10] Co-chairs and members of the commission. We have an update for you, obviously. So we have been working through the challenges of the pairings first with the House and doing some geographic cleanup of county splits and compactness and things like that as much as we can, as we as we make those changes. ***At this point we have gone through, I***

[1] References to "Tr." refer to the transcripts of the meetings of the Commission that are available from its website, https://redistricting.ohio.gov/meetings. The attached Exhibit A is a collection of those meetings, for March 19, 21, 22, 23, 24, 25, 26, 27, and 28 (5 parts), in chronological order with page numbers added.

Because the independent mapmaker who were working in the Workroom participated in parts 1, 2 and 4 of the March 28 meetings, those meetings were also recorded in the livestream of the Workroom, which reflected the time of each meeting. Those times are also included on pages 169 (part1 meeting), 175 (part 2 meeting), and 192 (part 3 meeting) of the Transcript.

> ***believe, the entire state, except for the seven counties in the Northeast and made all of the House side improvements that we believe we can make in terms of avoiding pairings.*** And we have the proposal that everyone has for how to handle the seven counties that we've been looking through that and seeing what we're what we think works and doesn't work for us in that proposal. We've not yet implemented that. But but we're close (inaudible). And so we have not yet tackled the Senate issues to the degree possible. We've tried to keep those in mind as we work on the house, but ***we have not done any in-depth Senate work yet***.
>
> Dr. Michael McDonald [00:01:27] And I would just add that this has been a good exercise, not just for resolving incumbent bearings, but this has forced us to take another look at the map. And as we are resolving these incumbency pairings, I would say my impression is is that the overall character of the map is that is now splitting fewer counties, fewer local jurisdictions and is more compact. And its character
>
> Dr. Doug Johnson [00:01:57] In to Sen. Huffman's point the other day, and I believe others are made it that Ohio has the most, some of the most complicated geographic challenges, certainly the most strict geographic rules and also the most complicated Senate rules for how this process is handled. So we are getting through this as fast as we can, but it is a slow process.

(Tr. p. 175 (emphasis added)). And at that point, Dr. McDonald had to leave at 5:00 pm to fly home to teach class the next day. (Tr. p 178).

Faced with the looming deadline and still facing difficulties in northeast Ohio's seven counties, Democratic consultant Chris Glassburn gave the independent map drawers a "seven counties' map he had previously drawn," including a configuration for "Mahoning County." (Johnson Aff. ¶¶ 12, 14.) Because use of that map violated the agreed upon Commission rules,[2] the mapdrawers agreed to use that "seven counties map" "on the condition that it would be run

[2] Rule 4 provides: "The Independent map drawers shall produce an entirely new general assembly district plan that has not been previously submitted…The independent map drawers **shall not include or consider** any general assembly plan proposals or **work product produced prior to Wednesday, March 23, 2022** when drafting the entirely new general assembly district plan." (League Mot., 5 (emphasis added).)

past the commission members' staff or the Commission." (*Id.*, ¶ 14). No Republican Commission member or staff approved the mapdrawers' use of that "seven counties map." (*Id.*, ¶ 12). To the contrary, Republican Commission staff specifically objected to the "configuration of the districts in Mahoning County." (*Id.*) But the mapdrawers "ran out of time" and used the "seven counties map" anyway because without it they "would never have come close to finishing a map in time for the midnight deadline." (*Id.*, ¶¶ 12; 14; 15.)

With 7 hours to go until this Court's deadline, and still no final House map to review and no Senate map even started, the Commission was running out of time. They faced the practical reality that the mapdrawers would not finish maps in time for the Commission to review it yet alone time to propose and implement any changes, adopt a plan, and then have the necessary documents created, assembled and delivered to the Secretary of State by midnight. Senate President Huffman (correctly) believed it would take at least an hour to prepare the secretary of state filing after a plan was agreed upon. (Tr. pp 185–86, 200).

With that tight timeframe, President Huffman suggested a little after 5:00 pm that the Commission needed a "failsafe" to have something that could be filed by midnight, if the mapdrawers ran out of time. The Commission voted 5-2 to approve President Huffman's motion that the staff begin the work—at the Commission's direction—of modifying the prior plan. (Tr. p 191). The Commission adjourned, set to reconvene at 9:00 pm. It was nearing 6:00 pm.

At 7:20 pm, a fifth version of the House map was uploaded onto the website. About a half hour later, Dr. Johnson told a Senate staffer that he was "just getting started" on the Senate map and that he was "a little freaked out" because the House map took 7.5 hours of work that day. ((March 28 video, 3:00 pm to 11:00 pm, at 4:48-4:48:09).

At 9:23 pm, the Commission reconvened. Dr. Johnson reported his progress:

> Dr. Doug Johnson [00:00:22] So co-chairs members of the commission, as you've hopefully seen throughout an hour, I guess about two hours ago now we did finish a full house map and distributed that and have moved on to the Senate map. As you know, the Senate rules are extremely complex, so we have taken a first pass kind of hit the expected roadblocks. ***And just about 20 minutes ago, we hit the expected roadblocks and jump back to the House plan to try to clear those roadblocks so that a Senate map can be drawn that will work. We do not yet have a Senate map***, put together a full Senate map to show you. But we are making progress as fast as humanly possible and effort to get this done this evening. ***But so we do have a house map. It will need some changes,*** mostly in the northwest. …

(Tr. p 192 (emphasis added)). When asked about an Article XI, Section 3 violation in the most recent House map, splitting two jurisdictions within the same House district, Dr. Johnson pointed to reports he could run to "to look for all the city splits and city pairing that we can then go through … and catch things like what you describe and those reports in those reviews take time. … But yes, that is …one of the steps. And I'm not to that step yet." (Tr. p 193). Dr. Johnson ran out of time before the midnight deadline and never ran those reports. (Johnson Aff., ¶ 19).

As 10 pm neared, Senate President Huffman recognized the reality the Commission faced:

> Senate President Matt Huffman [00:36:19] As I indicated in the timeline here, we have to have a set of information to the Secretary of State's Office before midnight tonight. It's going to take about an hour to prepare that and the amendments. … And I think if we go down the path of beginning to take a recess, beginning to take amendments, we're going to go well past what essentially is a 10 30 deadline.

(Tr. p. 200). Speaker Cupp noted that it was not feasible to expect Dr. Johnson to have a complete plan finished in time for proper evaluation to ensure it was constitutional—particularly in the Senate with its complex rules. (Tr. p 195). Thus, Speaker Cupp moved that the Commission adopt the map prepared by the staff following the vote that afternoon and designated this map as the 3/28 Cupp Plan. (Tr. p 195). That passed with 4 in favor, 3 against (the "Fourth Plan"). (Tr. pp 204–05).

Dr. Johnson and Mr. Glassburn, the Democratic consultant, continued drawing. Just before 10:00 pm, Dr. Johnson speculated that the **House map** was complete. ((March 28 video, 3:00 pm to 11:00 pm, at 6:57-6:58:20). Mr. Glassburn said he was sure there will be a mistake or two in the final product, but the question is how substantial they are. (*Id.* at 6:58-6:59:30). Then, shortly after 10 pm, Dr. Johnson spotted a non-contiguous portion of House District 98 that he had to go back and adjust. (*Id.* at 7:02:15-7:02:50). At around 10:25 pm Dr. Johnson stated that he had reached a finished product in terms of drawing, but had not completed a review of Section 5 compliance and Senator assignments. (*Id.* at 7:23-7:24).

At 10:46 pm, the first Senate map was uploaded to the Commission website. But the workroom video shows Dr. Johnson continuing to work on the verification of combining House districts and working through Senate district assignments. (3/28/22 11pm Recording at 1-1:25). That particular process stopped at about 11:15 pm, (*id.* at 14:08), but Mr. Glassburn continued to discuss matters with Democratic Commission staff member Randall Routt. Dr. Johnson commented that he told Dr. McDonald that they "addressed but didn't necessarily fix" the incumbent issues. (*Id.* at 20:05-20:30).

A little after 11:00 pm, the Commission reconvened to consider and adopt majority and minority statements under Section 8(C) of Article XI. Co-Chair Sykes moved that the Commission pass the plan purportedly "completed" by Dr. Johnson, allow more work to be done to the updated map if necessary, and that the Commission would not dissolve for four weeks to work on further improvements to the map.[3] (Tr. pp 206–07).

[3] Petitioners suggest that Co-Chair Sykes' resolution was to "replace" the 3/28 Cupp Plan "by instead adopting the 'Independent Plan.'" (League Mot., 14). Not so. The resolution contained no request to "replace" anything and Co-Chair Speaker Cupp confirmed as much:

Unanswered questions; incomplete work.

Petitioners represent that the plan Dr. Johnson was working on was "complete – before the Court's deadline." (League Mot., 13). But Co-Chair Sykes' motion with its specific inclusion of "allow[ing], if necessary, additional work to be conducted through an updated map" and keeping the Commission in place for four weeks to "work on further improvements to the map" confirmed that no one believed that the 10:46 uploaded plan was anything other than an incomplete plan. Leader Russo acknowledged the same: "My understanding is that the files, if they are not already completed, can be within the next 15 to 20 minutes." (Tr. p 201.) Which is to say, Democratic members of the Commission proposed adopting a map that was not complete and that Commission members had not seen, commented upon, amended, or in any way made their own. Instead, they were to continue to "update" or "make any improvements on" the map through April 24. The proposal would mean submitting a second map to the Secretary of State (and to this Court of course) that would not even be the map used for the upcoming elections. The proposal could not comply with the spirit or letter of this Court's order.

Throughout the final day, Auditor Faber had questioned the large numbers of splits of municipal corporations across the state, contrary to what he believed express provisions in Article IX required and contrary to what witnesses had frequently spoken about in public hearings before the Commission. (Tr. pp. 180-183). He was told that there was no time to address those issues. (Tr. p 194 (Dr. Johnson: "there's no way I'm going to be able to get to

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> **Co-chair Speaker Bob Cupp** [00:07:44] Mr. Co-chair, I'm not sure I understand what the motion is. Is it to also adopt this map and upload it to the secretary of State ***in addition to the one we've already done*** this evening? (emphasis added)
>
> **Co-chair Senator Vernon Sykes** [00:08:03] Yes.

(Tr. p 208).

those before midnight")). President Huffman, Co-Chair Cupp, and Governor DeWine questioned compactness issues in the incomplete plan. (Tr. pp 209–10). Governor DeWine noted that the goal of the constitutional amendment was specifically to create more compact district boundaries. (Tr. p 209). And, Auditor Faber was perplexed by the partisan approach reflected in what he was seeing: "I think it was impossible to do everything that the constitution demands and that the court asked in the time period that the court required us to do it. [The independent mapmakers] were doing what the court asked, which is why their questions started with the premise of eliminating republicans where republicans could be eliminated, and I think that's why the maps that we've seen took every effort to eradicate suburban Republican Representatives in Ohio." (Tr. p 210).

Dr. Johnson acknowledges that he and Dr. McDonald "did not have time to run and review the reports that would confirm" that they "followed all federal, state constitution and Ohio Supreme Court direction." (Johnson Aff., ¶19.) There was also no time for:

a. Balancing the compactness and partisan symmetry requirements of Section 6 as directed by the Ohio Supreme Court;

b. Addressing any of the Commission's requested revisions to the map (the change in Mahoning County and the Auditor's requested alternative map with redrawn House districts in Toledo and Cincinnati);

c. Delivering the map for any substantive review by Commission staff, much less by the Commission members themselves, such as the review that led to Senator Huffman's note in the afternoon meeting that the House map at the time unconstitutionally split Cleveland Heights;

d. Reviewing the maps to determine if there was a way to eliminate any relevant pairings among the three House districts and four Senate districts that contained pairings.

(Johnson Aff., ¶ 20.)

The "Johnson McDonald Independent 328 Final" plan was not fully uploaded to the Commission website until 11:37 pm—after the Commission meeting had adjourned.

https://redistricting.ohio.gov/assets/district-maps/district-map-1154.zip. At 11:41 pm, Heather Blessing, on behalf of Co-Chair Cupp, emailed the Secretary of State's office all required files, thereby complying with the Court's Order for transmittal before midnight. On March 29, 2022, at about 8:50 am, the Commission filed the required "Notice of Filing of Adopted General-Assembly plan of The Ohio Redistricting Commission" with the Ohio Supreme Court, thereby complying with the 9:00 am Court deadline.

ARGUMENT

I. The contempt standard and why Petitioners cannot satisfy it.

"To support a contempt finding, the moving party must establish by clear and convincing evidence that a valid court order exists, that *the* offending party had knowledge of the order, and that the offending party violated such order." *In re A.A.J.*, 2015-Ohio-2222, 36 N.E.3d 791, ¶ 12 (12th Dist.) If—and only if—the petition establishes a prima facie case of contempt, then the respondent must show that he could not comply with the order. *Id.*

The Court's March 16 Order directed the Commission to "draft and adopt an entirely new General Assembly–district plan that conforms with the Ohio Constitution." *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___ Ohio St.3d ___, 2022-Ohio-789, ___ N.E.3d ___, ¶ 44 ("*League III*"). The Court placed three requirements on the Commission:

1. That "*the commission*" draft and adopt the plan. *Id.* (emphasis in the original).

2. That "the drafting should occur in public and the commissioners should convene frequent meetings to demonstrate their bipartisan efforts to reach a constitutional plan within the time set by this court." *Id.* (emphasis added).

3. That the Commission file "the plan" with the Secretary of State "no later than Monday, March 28, 2022."

Id. The Court expressly forbade any "requests or stipulations for extension of time," and directed the clerk of court to refuse to file any such requests. *Id.* ¶ 47.

Thus, this Court can hold Speaker Cupp and Senate President Huffman in contempt only if Petitioners show by "clear and convincing evidence" that they were subject to and violated the three requirements in the Court's order, and that they could have complied by the Court's unambiguous and inflexible deadline. Petitioners fail to do so for three reasons: (1) the separation of powers doctrine precludes this Court from holding a co-equal branch of government and its members in contempt for failing to carry out its constitutional duties in a certain manner; (2) Speaker Cupp and Senate President Huffman were not ordered to do anything, and because redistricting is a legislative activity, both have sovereignty immunity for carrying out activities on the Commission; and (3) the Commission complied with every requirement in the March 16 Order.

1. Holding the Commission or its individual members in contempt violates separation of powers.

The Ohio Redistricting Commission is, like the Supreme Court of Ohio, a creation of the Ohio Constitution. Ohio Constitution Art. XI, section 1. So it is a part of the Ohio government co-equal with the Supreme Court. Article XI sets out the various duties of the Commission and the Supreme Court in the redistricting process. The Commission is "responsible for the redistricting of this state for the general assembly." Ohio Constitution Art. XI, section 1. This task was previously delegated to the Ohio apportionment board, yet has long been recognized as a legislative function. *See Wilson v. Kasich*, 134 Ohio St. 3d 221, 228, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 20 ("In effect, the apportionment board is performing what was previously a legislative function"); *see also Ely v. Klahr*, 403 U.S. 108, 114, 91 S.Ct. 1803, 29 L.e.2d 352 (1971) ("districting and apportionment are legislative tasks in the first instance").

In contrast, Article XI of the Constitution limits the Supreme Court's involvement with Ohio's general assembly redistricting process to determining whether a plan approved by the

Commission complies with Article XI. If the Court determines that a plan does not comply with Article XI, the Ohio Constitution limits the Supreme Court's authority to directing the Commission to (1) "amend the plan to correct the violation," or to (2) "adopt a new general assembly district plan." *Id*., § 9(D)(3) ("If the supreme court of Ohio determines that [a plan is unconstitutional], the available remedies shall be as follows. . . ."). The Constitution is clear:

> No court shall order, in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the commission in the manner prescribed by this article.
>
> No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.
>
> Ohio Constitution, Art. XI, section 9(D)(1),(2).

The separation of powers doctrine "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of government." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 42. Under that doctrine, powers belonging to one branch should not "possess directly or indirectly an overruling influence over the others." *Id.* at ¶ 44. When it comes to the judiciary, judges should "not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison v. Olso*n, 487 U.S. 654, 680, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). And the judiciary must "respect the fact that the authority to legislate is for the General Assembly alone." *Id.* at ¶ 52. So when the judiciary determines whether legislative actions are constitutional, "the judicial function does not begin until after the legislative process is completed." *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999).

Petitioners' contempt motion asks this Court to ignore its long-standing principle that one co-equal branch of government may not tell another how to perform its function. But this Court

has regularly recognized and applied this principle, not ignored it. For example, in *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997), *opinion clarified*, 78 Ohio St.3d 419, 678 N.E.2d 886 (1997), *and order clarified*, 83 Ohio St.3d 1212, 699 N.E.2d 518 (1998), this Court held that Ohio's school funding system was unconstitutional. *Id*. at 212. Yet the Court declined to "instruct the General Assembly as to the specifics of the legislation it should enact" to fix the problem. *Id*. at 212–13. And in a later opinion, the Court clarified that it did not retain exclusive jurisdiction over the case to review any remedial legislation: "Given the separate powers entrusted to the three coordinate branches of government, both this court and the trial court recognize that it is not the function of the judiciary to supervise or participate in the legislative and executive process." *DeRolph v. State*, 78 Ohio St.3d 419, 420, 678 N.E.2d 886 (1997).

Similarly, less than four years ago, this Court unanimously recognized the limits of judicial contempt in the face of discretionary authority delegated to a coordinate branch. In *City of Toledo v. State*, this Court held that the trial court abused its discretion in holding the State of Ohio and the Attorney General in contempt following the General Assembly's enactment of new traffic cameras statutes after the trial court declared similar statutes unconstitutional. 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 1. As this Court explained, "[t]he separation-of-powers doctrine . . . precludes the judiciary from asserting control over 'the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control.'" *Id*. at ¶ 27. And the Court declared that a court "can no more prohibit the General Assembly from enacting a law than it can compel the legislature to enact, amend, or repeal a statute." *Id.* at ¶ 27. *See also State ex rel. Slemmer v. Brown*, 34 Ohio App. 2d 27, 28, 295 N.E.2d 434, 435 (10th Dist. 1973) (courts cannot order "the General Assembly to adopt joint

resolutions" since "the judicial function is limited to a determination of the effect and validity of joint resolutions adopted by the General Assembly").

Other states also caution against the judiciary's interfering with the functions of the legislative or executive branches. *See, e.g.*, *State v. Dist. Ct. In & For Ramsey Cty.*, 156 Minn. 270, 273, 194 N.W. 630 (1923) (court had no power to "control or restrain the action of the Governor in calling the election in question"); *Plaquemines Par. Govt. v. Hinkley*, No. 2019-CA-0929, 2020 WL 1937301 (La.App. 4 Cir. April 22, 2020), writ denied, 309 So.3d 345 (La. 2021) (under Louisiana constitution, "the district court offended the separation of powers between the branches when it held Appellant [a political subdivision] in contempt for its failure to pay the underlying sanctions judgment"); *State v. Dist. Ct., Second Jud. Dist.*, 141 Minn. 1, 12, 168 N.W. 634 (1918) (when asked to hold Governor as member of the Minnesota Public Safety Commission in contempt for disregarding order closing of licensed saloon: if the Governor acted "in discharge of official duties, requiring the exercise of judgment and discretion, and imposed upon him as chief executive by the Constitution, he is not amenable to punishment"); *Mandel v. Myers*, 29 Cal.3d 531, 542, 629 P.2d 935, 174 Cal.Rptr. 841 (1981) (separation of powers doctrine "restrict[s] a court from directly ordering the Legislature to enact an appropriation law").

As *DeRolph*, *City of Toledo*, *Slemmer*, and precedent from other states show, the judiciary cannot tell the legislative branch how to fulfill its constitutional responsibilities or dictate that the legislature act in certain ways. Doing so would mean that the Court is injecting itself in the midst of the legislative process—but "the judicial function does not begin until after the legislative process is completed." *Sheward* at 469.

The responsibilities that the Ohio Constitution gives to the Commission—and the restrictions that is places on the judiciary—confirm that the judiciary cannot dictate how the Commission makes a general assembly district plan. Article XI commands that only the Commission has the power to adopt legislative districts for the general assembly. *See* Ohio Const. Art. XI, Sec. 1(A). And a court cannot indirectly command through contempt what it cannot accomplish directly. *New Orleans Water Works Co., v. New Orleans*, 164 U.S. 471, 481, 17 S.Ct. 161, 41 L.Ed.518 (1896).

2. The Speaker and the President have not been ordered to do anything and have therefore not violated any order.

Nothing in the Court's March 16 Entry or Opinion requires any individual member of the Commission to do anything. The Court ordered that "the **Ohio Redistricting Commission** shall be reconstituted and shall convene and that the commission shall draft and adopt an entirely new General Assembly-district plan that conforms with the Ohio Constitution, including Article XI, Sections 6(A) and 6(B)." Entry. The Court also declared that "the drafting shall occur in public and the commission should convene frequent meetings to demonstrate their bipartisan efforts to reach a constitutional plan." *Id*.

Indeed, the Court's order could only direct the Commission as a whole because it is the Commission as a whole, and not its individual members, that holds the power to adopt a general assembly district plan. *See* Article XI, Sec. 1(A). The Speaker and President are members of the Commission, but they do not comprise the Commission itself. Since the March 16 Entry did not direct the Speaker or President to take any action, the Speaker and President could not violate the Court's order.

Even if the Court's March 16 Entry could be construed as putting obligations on the Commission's individual members (it cannot), it still makes no sense to hold the Speaker, the

President, or any individual member in contempt. No one individual member is vested with the power to act unilaterally. Indeed, the very point of a multi-person Commission is to take collective—and not—individual actions.

Further, Speaker Cupp and Senate President Huffman serve on the Commission only because they are two of the four members appointed by the General Assembly. Holding any of the four legislative members in contempt ignores the immunity to which they are entitled. As the United States Supreme Court has observed, "It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott Harris*, 523 U.S. 44, 46, 118 S. Ct. 966, 969 (1998). In performing its redistricting responsibilities, the Commission is performing a legislative function. *See Wilson v. Kasich*, 134 Ohio St. 3d 221, 228, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 20 ("In effect, the apportionment board is performing what was previously a legislative function."); *see also Ely v. Klahr*, 403 U.S. 108, 114, 91 S.Ct. 1803, 29 L.e.2d 352 (1971) ("districting and apportionment are legislative tasks in the first instance"). Since the Speaker and President are exercising a legislative function through the Commission, they have immunity for their actions and votes on the Commission's work. *See Incorporated Village of Hicksville v. Blakeslee*, 103 Ohio St. 508, 518, 134 N.E. 445, 449 (1921) (applying legislative privilege to protect a municipal legislator from liability). They cannot be coerced in the performance of these duties.

3. Even if the Court could hold individual Commission members in contempt, the evidence shows that the Commission and its members complied with this Court's March 16 Order.

The parties agree that through the afternoon of March 28, the Commission had diligently tried to comply with this Court's order in good faith. The dispute turns on what happened after the Commission reconvened its public meeting just before 4:30 that afternoon. (Bennett Renewal, at 5-8; League Motion, at 3-9.)

With just hours remaining to comply with the Court's midnight deadline, Dr. Johnson reported that they were not yet finished with the House map, had "not done any in-depth Senate work yet," that drawing a general assembly district plan was a "slow process" owing to the "complicated geographic challenges" and "most complicated Senate rules." (Tr. p 175.) According to Dr. Johnson, they were "still a couple of hours, at least" from completing "the incumbency issues in the House and the Senate," one part of the process and not the entire process—"if it goes smoothly." (*Id.*) And while Dr. Johnson had to leave at 5:00 pm to catch a plane home to teach a class the next day, he thought he could be available by Zoom "probably around 11:00 pm." Tr. p 178.

Understanding that they had "to have a set of information to the Secretary of State's office before midnight tonight," that it would take "about an hour to prepare that," and that therefore "essentially" they had a "10:30 deadline" to enact a map (Tr. p 200), the Commission was rightly skeptical that the mapdrawers could finish in time to comply with the March 16 Order. So a little after 5:00 pm, Senate President Huffman proposed a "failsafe" to comply with the Order—making additional changes to the February 24 map to "more closely comport with the decisions of the Supreme Court." (Tr. p 186) The Commission approved the motion, and Blake Springhetti, one of the Republican staff members who had been working with the mapdrawer team, began working on one of the work room computers (in full view of the live stream) while the independent mapdrawers also continued working.

By 10:00 pm, the Commission still had no map to review. Senate President Huffman recognized the impending 10:30 deadline and argued that the Commission could neither recess nor amend the yet-to-be produced map and still meet its deadline. (Tr. p 200.)

Co-Chair Sykes and Leader Russo moved to have the Commission request from this Court a 12-hour extension of the deadline to draw a map. (League Motion, at 13.) Of course, this Court's March 16 order expressly forbade any request for an extension of time. Indeed, had the Commission asked for an extension, the clerk of court would not have accepted it for filing—per this Court's order. *League III*, ___ Ohio St.3d ___, 2022-Ohio-789, ___ N.E.3d ___, at ¶ 47

At 10:17pm, the Commission reasonably felt it had to act. With no map from the independent mapdrawers, the Commission turned to the "failsafe" plan prepared by Mr. Springhetti and adopted it (Tr. p 205).

The first Senate map would not be loaded to the website and made available to the Commission members until 10:46 pm, yet the mapdrawers kept working on it even after that point, not stopping until they uploaded their last set of maps at 11:33 pm. At 11:01pm, Co-Chair Sykes moved to adopt the plan "completed" by Dr. Johnson, and to "allow, if necessary, additional work to be conducted through an updated map" through the next four weeks. (Tr. p 206.)

The only accurate prediction of the day was how long it would take between the Commission's adopting a plan and submitting the necessary plan files to the Secretary of State. The Commission adopted the back-up plan at 10:17 pm and submitted the files to the Secretary of State at 11:41pm, just about the hour and a half that previously had prompted Senate President Huffman to conclude "what essentially is a 10 30 deadline." Tr. p 200.

The Court asked the Commission to hold frequent meetings and follow a transparent process to create a new General Assembly district plan. The Petitioners admit that the Commission did so. And the Commission worked in good faith to produce an "entirely new General Assembly–district plan." Petitioners suggest that rather than adopt the "failsafe" plan to

produce a map for this Court, the Commission should have ignored this Court's deadline and continued working on it for the next four weeks. The Commission chose instead to adopt a plan that met the requirements of the Constitution and the unambiguous time requirements in the March 16 Order. Doing so does not violate that Order. It is compliance.

CONCLUSION

For the above reasons, there is no reason or basis for this Court to grant petitioners the remedy they seek. The motions should be denied.

Respectfully submitted this 6th day of April, 2022.

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