

**IN THE SUPREME COURT OF OHIO**

<b>LEAGUE OF WOMEN VOTERS OF OHIO, et al.,</b>	:	
	:	Case No. 2021-1193
Petitioners,	:	
	:	Original Action pursuant to
v.	:	Ohio Constitution, Article XI
	:	
<b>OHIO REDISTRICTING COMMISSION, et al.,</b>	:	<i>[Apportionment Case]</i>
	:	
Respondents.	:	

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**AUDITOR OF STATE KEITH FABER'S RESPONSE TO SHOW CAUSE**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

INTRODUCTION ..... 1

STATEMENT OF THE FACTS ..... 2

    I.    The Court’s April 14, 2022 Order..... 3

    II.   Governor DeWine contracts COVID-19 ..... 4

    III.  The May 3 Primary Election..... 4

    IV.   Auditor Faber asks the Commission to convene..... 4

    V.    The Commission reconvenes. .... 5

LAW AND ARGUMENT ..... 7

    I.    The show-cause motion is premature. .... 8

    II.   Auditor Faber cannot on his own act on behalf of the Ohio Redistricting Commission to enact a General Assembly-district plan and, therefore, cannot be held individually in contempt. .... **Error! Bookmark not defined.**9

    III.  Auditor Faber was not individually ordered to do anything in the Court’s April 14 Order; instead, it was the Ohio Redistricting Commission ..... 10

    IV.   Auditor Faber took all reasonable and necessary steps to comply with the Court’s April 14 Order..... **Error! Bookmark not defined.**11

    V.    The Ohio Constitution only gives the Court the authority to judge whether a Commission-passed General Assembly-district plan is constitutionally compliant and, as a result, the Court cannot compel the Commission to enact a particular General Assembly-district plan in a particular manner ..... 13

    VI.   The Commission is its own constitutionally created entity and the Court cannot exercise control over the constitutional duties of the Commission through a finding of contempt..... 14

    VII.  Auditor Faber is entitled to recover his own attorney’s fees for responding to this frivolous show-cause motion ..... 15

CONCLUSION..... 16

## INTRODUCTION

Petitioners are just a broken record at this point—an endless loop that complains that the Ohio Redistricting Commission ignores this Court’s orders. This time, Petitioners ask the Court to find the Ohio Redistricting Commission and its individual members in contempt for not complying with a deadline that hasn’t yet arrived and for not doing something that wasn’t even ordered of them in the first place. This round of show-cause briefing is no different from the last: meritless and not based in fact. The Commission and its members, including Auditor of State Keith Faber, have not disobeyed the Court’s April 14 Order in *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Case No. 2021-1193, and, therefore, cannot be held in contempt. Much like the Court’s prior unanimous denial of Petitioners’ show-cause motion, this motion should be denied.

The show-cause motion asks the Court to do two things. First, Petitioners ask the Court to hold the Commission and its individual members in contempt for failing to reconvene and draft and adopt a General Assembly-district plan by the May 6 deadline imposed by the Court in its April 14 Order. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-1235, ¶ 78-79. There is just one problem with Petitioners’ request: their show-cause motion was filed 11 days prior to the Court’s May 6 deadline and the Commission has reconvened and is actively taking steps to comply with the Court’s April 14 Order. The show-cause motion is entirely premature and baseless.

Second, Petitioners ask the Court to require the Commission to reengage the independent map drawers who attempted to draw, but did not complete, a General Assembly-district plan the last time around. But the Court did not and cannot *order* the Commission to reengage the independent map drawers; instead, the Court merely recommended the incomplete independent

map drawers' unified plan might be a starting point for the Commission in this fifth attempt to draft and adopt a General Assembly-district plan. *Id.* at ¶ 77.

This show-cause motion is just the latest attempt by Petitioners to harass the Commission and its individual members and distract the Commission from its constitutional duty of drafting and adopting a General Assembly-district plan. That itself is enough for the Court to reject the motion. But there are plenty of other reasons why Auditor of State Keith Faber cannot be held in contempt that are explained in more detail below. Petitioners' show-cause motion is premature because the date of performance—May 6—has not yet arrived. In addition, Auditor Faber is but one member of the seven-member Ohio Redistricting Commission and cannot compel the Commission to do whatever it is he desires. Petitioners have not and will not be able to satisfy their burden to show that the Auditor disobeyed the Court's April 14 Order. Auditor Faber has actually taken a number of proactive steps to comply with that order.

Because the process hasn't moved as quickly as Petitioners might like is not a sufficient reason to hold the Commission and its members in contempt. The Commission still has time to comply with the Court's April 14 Order—it may draft, adopt, and file a General Assembly-district plan with the Secretary of State and this Court by May 6 or it may seek an extension from the Secretary of State to file the Fifth Plan at a later date as contemplated by the Court's order. Regardless of what happens, the Court should reject the invitation to hold the Auditor of State—a duly elected constitutional officeholder and constitutionally assigned member of the Ohio Redistricting Commission—in contempt.

### **STATEMENT OF THE FACTS**

The most pertinent fact to Petitioners' show-cause motion is that it seeks to hold the Commission and its individual members in contempt for failing to draft, adopt, and file a General

Assembly-district plan by May 6. The show-cause motion, of course, was filed 11 days prior to May 6 on April 25.

Petitioners' motion fails to account for what has transpired over the last ten days. They can't be blamed for that—their premature filing simply did not allow for them to know that the Commission would meet and work towards adopting and drawing a General Assembly-district plan. All of the facts in this Response are supported by publicly available documents.

### **I. The Court's April 14, 2022 Order.**

After the Ohio Redistricting Commission submitted its fourth General Assembly-district plan (the "Fourth Plan") at the end of March, the Court exercised its constitutional authority to determine whether the Fourth Plan complied with the Ohio Constitution. The Court found that the Fourth Plan did not. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-1235, ¶ 78 ("*LWV IV*"). The Court included the following in its April 14 Order that found the Fourth Plan to be unconstitutional:

We further order the commission to be reconstituted, to convene, and to draft and adopt an entirely new General Assembly-district plan that meets the requirements of the Ohio Constitution, including Article XI, Sections 6(A) and 6(B) as we have explained those provisions in each of our four decisions in these cases. As we suggested in *League III*, to promote transparency and increase public trust, the drafting of the plan is best accomplished in public view with frequent meetings to demonstrate the commission's bipartisan efforts to reach a constitutional plan.

*Id.*

The Court gave the Commission until the morning of May 6, 2022 to file a new General Assembly-district plan with the Secretary of State and until noon to file the new plan with the Court. *Id.* at ¶ 79. As it had with the prior plans, Petitioners have an opportunity to file objections to the new map and Respondents will have an opportunity to file a response. *Id.* at ¶ 80. Different from its prior decisions, the Court allowed the Commission to seek an extension of time, for good cause, to file the General Assembly-district plan with the Secretary of State. *Id.* at ¶ 81.

## **II. Governor DeWine contracts COVID-19.**

The day prior to the Court's decision that invalidated the Fourth Plan, Governor DeWine announced that he had tested positive for COVID-19. Both the Governor and First Lady Fran DeWine ultimately tested positive and, consistent with health guidelines, quarantined for a period of time. Governor DeWine remained quarantined until April 25—ten days after it was announced that he tested positive for COVID-19.

## **III. The May 3 Primary Election.**

As a result of the Court's prior decisions invalidating the General Assembly-district plans, Ohio was forced to split its primaries. All non-General Assembly and state central committee elections proceeded to the May 3 primary election. Two of the three statewide officeholders on the Commission—Governor DeWine and Secretary LaRose—were in contested statewide primaries. Secretary LaRose, as the State's chief election officer, was responsible for administering the nearly 1.6 million votes cast across Ohio's 88 counties in the May 3 primary.

## **IV. Auditor Faber asks the Commission to convene.**

Once Governor DeWine recovered from COVID-19, Auditor Faber sent a letter to the members of the Commission to implore that a meeting be scheduled to take steps to comply with the Court's April 14 Order. *See* Exhibit A, April 26, 2022 Letter from Keith Faber to Ohio Redistricting Commission. Auditor Faber's letter joined calls from Senator Sykes and Minority Leader Russo for the Commission to meet. *Id.* While the Commission's rules permit a meeting to be called by three members of the Commission, action can only be taken by a majority of the Commission—four members. The April 26 letter acknowledged that Governor DeWine had been sidelined with COVID-19 and also recognized the impending primary election, but still



encouraged the Commission to use electronic means to allow the Commission to meet remotely if at all possible. *Id.*

Auditor Faber's letter outlined a path forward for the Commission to draft and adopt a General Assembly-plan consistent with the Court's April 14 Order. First, Auditor Faber proposed seeking an extension until May 13 to allow the Commission time to work towards completing (and adopting) a constitutional Fifth Plan. *Id.* Second, the letter proposed setting a firm meeting schedule that included an option that permitted remote attendance of the Commission's members. *Id.* Finally, Auditor Faber suggested coming up with a plan of attack for the drafting of a General Assembly-district plan—importantly including a process for the Commission members to offer amendments to any plan and also to allow the Commission members *and the public* time to review the plan prior to adoption. *Id.*

Auditor Faber concluded his letter with optimism in working collectively with the other members of the Commission to comply with the Court's April 14 Order. *Id.*

## **V. The Commission reconvenes.**

Just a few days after Auditor Faber's letter, the Commission's co-chairs, Speaker Cupp and Senator Sykes, announced that the Commission would have a meeting the day after the May 3 primary election. *See* Ohio Redistricting Commission May 4, 2022 Meeting Notice, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/committee-meeting-may-4-2022-296/committee-notice.pdf>. Prior to the May 4 meeting, two members of the Commission—Speaker Cupp and Senate President Huffman—resigned and appointed two different members of the General Assembly in their stead. First, Senate President Huffman appointed Senator McColley. *See* Ohio Redistricting Commission Appointment of Senator McColley, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/committee-meeting-may-4-2022-296/senator-robert-mccolley-appointment>.

pdf. Second, Speaker Cupp appointed Majority Whip LaRe. *See* Ohio Redistricting Commission Appointment of Representative LaRe, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-4-2022-296/ohio-redistricting-commission-appoint-rep-lare.pdf>. Majority Whip LaRe was appointed to replace Speaker as co-chair of the Commission. *See* Ohio Redistricting Commission Appointment of Co-Chair LaRe, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-4-2022-296/co-chair-appointment-rep-lare.pdf>.

Auditor Faber proposed a General Assembly-district plan that the Auditor's office had drafted and shared it with each of the Commission members prior to the Commission's meeting on May 4. *See* Andrew Tobias (@AndrewJTobias), Twitter, May 4, 2022 at 1:55 p.m., *available at* <https://twitter.com/AndrewJTobias/status/1521911309096275968>. The maps drawn by Auditor Faber's office used the independent map drawers' unified map as a starting point, but tweaked it to (1) finish it and (2) attempt to bring it in compliance with the Ohio Constitution. *See* Andrew Tobias (@AndrewJTobias), Twitter, May 4, 2022 at 4:14 p.m., *available at* <https://twitter.com/AndrewJTobias/status/1521946427240321024>.

The Commission members then got to work. Much of the time on May 4 was spent discussing three matters: (1) the allocation of funds for each caucus, (2) whether to rehire the independent map drawers, and (3) the practical implications of passing a new map and implementing it in time for the August 2 primary. *See* Ohio Redistricting Commission May 4, 2022 Agenda, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-4-2022-296/agenda-1601.pdf>. The Commission spent considerable time discussing these issues, particularly the ability of the Commission to adopt

a map that could be adopted and implemented for the August primary. *See* The Ohio Channel Video Archive of the Ohio Redistricting Commission May 4, 2022 Meeting, *available at* <https://ohiochannel.org/collections/ohio-redistricting-commission>.

Auditor Faber raised two points worth mentioning. First, Auditor Faber took issue with the process the independent map drawers utilized in drawing their unified map prior to submission of the Fourth Plan. *Id.* Auditor Faber noted that the independent map drawers made no effort to implement any comments or recommendations from the members of the Commission. *Id.* The independent map drawers also repeatedly mentioned how difficult map drawing was in Ohio because of all of the rules outlined in this Court’s various decisions. *Id.* Second, Auditor Faber noted the impossibility (as described by the Secretary of State) of adopting and implementing *any* new General Assembly-district plan this close to the August 2 primary election other than the Third Plan. *Id.*

### **LAW AND ARGUMENT**

Petitioners seek to hold the Ohio Redistricting Commission and its individual members in contempt of court for allegedly failing to adhere to the Court’s April 14 Order. They only seek this order of contempt under R.C. Chapter 2705. Petitioners have failed, once again, to show that Auditor Faber should be held in contempt.

Contempt, of course, is disobedience of a court order. *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 740 N.E.2d 265 (2001). “It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.” *Denovcheck v. Trumbull Cty. Bd. of Commrs.*, 36 Ohio St.3d 14, 15, 520 N.E.2d 1362 (1988), quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55, 56, 271 N.E.2d 815 (1971), paragraph one of the syllabus. The burden of proof for a moving party in civil-contempt proceedings is proof by clear and convincing evidence. *Brown v. Executive 200, Inc.*, 64 Ohio

St.2d 250, 253, 416 N.E.2d 610 (1980); *see also Pugh v. Pugh*, 15 Ohio St.3d 136, 139, 472 N.E.2d 1085 (1984).

**I. The show-cause motion is premature.**

An elementary principle of contempt is that a party must have actually violated a court order prior to being found in contempt. *Board of Ed. of Brunswick City School Dist. v. Brunswick Ed. Assn.*, 61 Ohio St.2d 290, 294, 401 N.E.2d 440 (1980). “ ‘There is, in our jurisprudence, no doctrine of ‘anticipatory contempt.’ ” *Id.*, quoting *United States v. Bryan*, 339 U.S. 323, 341 (1950). As a result, “ ‘an adjudication of contempt should relate to past conduct, not prospective conduct.’ ” *Id.*, quoting *Wright v. Wright*, 331 So.2d 395 (Fla.App.1976). A party cannot be held in contempt if the “time for performance has not arrived.” *Id.* at 295.

But while it seems straightforward that a court cannot find a party in contempt for failing to meet a deadline that has not yet arrived, that’s exactly what Petitioners ask the Court to do here. The Court ordered that the Commission “be reconstituted, to convene, and to draft and adopt an entirely new General Assembly-district plan that meets the requirements of the Ohio Constitution \* \* \*.” *LWV IV*, Slip Opinion No. 2022-Ohio-1235, at ¶ 78. The requirement to reconstitute and convene did not—and cannot under the Ohio Constitution—say *how* or *when* the Commission should reconstitute and convene. The Court did order the Commission to file the General Assembly-district plan with the Secretary of State and the Court on May 6. *Id.* at ¶ 79. But that “date of performance” was 11 days after Petitioners filed their show-cause motion and still had not come by the time this Response was filed.

The show-cause motion filed by Petitioners is baseless and premature. *See Brunswick Ed. Assn.* at 294-295; *see also Kirk v. Kirk*, 172 Ohio App.3d 404, 2007-Ohio-3140, 875 N.E.2d 125, ¶ 5 (“A prior disobedience to a trial court’s order is a necessary antecedent to the filing of the motion to show cause.”). The Commission did not violate any part of the Court’s April 14 Order

by not convening its first meeting until May 4. The Commission also did not violate the April 14 Order by not filing a new General Assembly-district plan by a yet-to-be-reached date in the future.

**II. Auditor Faber cannot on his own act on behalf of the Ohio Redistricting Commission to enact a General Assembly-district plan and, therefore, cannot be held individually in contempt.**

The Ohio Constitution establishes the seven-member Ohio Redistricting Commission. Ohio Constitution, Article XI, Section 1(A). The only entity with the constitutional authority to enact a General Assembly-district plan is the Commission. Ohio Constitution, Article XI, Section 1(A). Auditor of State Keith Faber is one of the members of the Commission. Ohio Constitution, Article XI, Section 1(A)(2). A simple majority of its members must approve any action by the Commission. Ohio Constitution, Article XI, Section 1(B)(1). An individual member of the Commission has no authority to act on behalf of the Commission—whether that be to enact a General Assembly-district plan, to allocate Commission funds, to hire independent map drawers, or any other action permitted under the Constitution.

Petitioners make a point that Senator Sykes and Leader Russo called for the Commission to meet so that a General Assembly-district plan could be drafted and adopted. So did Auditor Faber. But even if those three members of the Commission had convened and agreed on a plan, they couldn't have done anything—four members (a majority) of the Commission are required for any action. Ohio Constitution, Article XI, Section 1(B)(1).

Plainly, Auditor Faber cannot act on behalf of the Commission to enact a General Assembly-district plan on his own. The only way that an individual member of the Commission can do so is as part of a majority of the members of the Commission. Auditor Faber, individually, should not—and cannot—be held in contempt of the Court's April 14 Order.

**III. Auditor Faber was not individually ordered to do anything in the Court’s April 14 Order; instead, it was the Ohio Redistricting Commission.**

Petitioners allege that the Commission and its members failed to comply with paragraph 78 of the Court’s April 14 Order. *See generally* Petitioners’ Motion. The relevant language from the Court is this:

We further order *the commission* to be reconstituted, to convene, and to draft and adopt an entirely new General Assembly-district plan that meets the requirements of the Ohio Constitution, including Article XI, Sections 6(A) and 6(B) as we have explained those provisions in each of our four decisions in these cases. As we suggested in *League III*, to promote transparency and increase public trust, the drafting of the plan is best accomplished in public view with frequent meetings to demonstrate the commission’s bipartisan efforts to reach a constitutional plan.

*LWV IV*, Slip Opinion No. 2022-Ohio-1235, at ¶ 78 (emphasis added).

*The Commission* was the only party ordered by the Court to do something. Auditor Faber was not. This makes sense, of course, because the Commission is the only necessary party to this litigation. *League of Women Voters of Ohio, Inc. v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-65, ¶ 61 (“*LWV I*”). A party can only be subject to contempt when an order exists that directs a party how to proceed or act. *S. Euclid Fraternal Order of Police, Lodge 80 v. D’Amico*, 29 Ohio St.3d 50, 52, 505 N.E.3d 50 (1987). Auditor Faber individually was not ordered to do anything by the April 14 Order; instead, it was the Commission—which is itself created by the Ohio Constitution and is performing a legislative task—that was specifically ordered by the Court to comply with its April 14 Order.

Notably, the Court was very clear and narrow in what it ordered the Commission to do in the April 14 Order: that the Commission “be reconstituted, to convene and to draft and adopt” a new General Assembly-district plan and timely file it with the Secretary of State and the Court by May 6. *LWV IV* at ¶ 78-79. May 6, of course, has not yet come. The Commission and its members cannot be found in contempt for not completing a task prior to the date of performance. It’s entirely

possible—and, in fact, likely—that the Commission will comply with what the Court ordered it do by May 6: either draft, adopt, and file a General Assembly-district plan with the Secretary of State and the Court *or* seek an extension of time to do so with the Secretary of State.

Even more, the Commission and its members cannot be held in contempt for things that the Court didn't even order. The Court apparently recognized that it cannot order *how* the Commission accomplishes its task of drawing and adopting a General Assembly-district plan in its most recent decision. *See id.* at ¶ 78 (“As we suggested in *League III* \* \* \* .”); *see also id.* at ¶ 83 (Donnelley, J., concurring) (“The commission commendably seemed to heed our suggestion \* \* \* .”). Petitioners nonetheless ask the Court to *require* the Commission to reengage the independent map drawers. But that was never ordered by the Court's April 14 Order. *See id.* at ¶ 78. And, as a result, neither the Commission nor Auditor Faber can be held in contempt for having not reengaged the independent mapmakers.

#### **IV. Auditor Faber took all reasonable and necessary steps to comply with the Court's April 14 Order.**

Despite being just a single member of the Commission, Auditor Faber did all that he could to comply with the Court's April 14 Order. Auditor Faber's April 26 letter to other members of the Commission made clear that he desired to meet *as soon as possible* in order to conduct the Commission's work and to comply with the Court's April 14 Order. *See* Exhibit A. The April 26 letter outlined *how* the Commission could convene remotely to allow all members to attend—even with the impending May 3 primary election. *Id.* It also explained *what* steps the Commission could take to ensure that it could work collaboratively to draft and adopt a new General Assembly-district plan. *Id.* And it expressed a need to allow for proper time to review and comment on the proposed map by the Commission *and* the public. *Id.* But Auditor Faber could not convene a

meeting of the Commission by himself—the Commission’s rules require more than just a single person’s request to convene a meeting.

Prior to the Commission’s May 4 meeting, Auditor Faber was the *only* Commission member to offer a set of maps for consideration. Auditor Faber’s office drafted a General Assembly-district plan and proposed the maps to the other members of the Commission. *See* Andrew Tobias (@AndrewJTobias), Twitter, May 4, 2022 at 1:55 p.m., *available at* <https://twitter.com/AndrewJTobias/status/1521911309096275968>. But the Commission did not act on Auditor Faber’s proposed maps at the May 4 meeting.

Once the Commission convened, Auditor Faber willingly and actively participated in the Commission’s work. He pointed out the need for *the Commission* to be involved in the actual drafting of the maps—or at least working alongside the map drawers to ensure that the Commission’s recommendations and comments could be incorporated in the drawing process. *See* The Ohio Channel Video Archive of the Ohio Redistricting Commission May 4, 2022 Meeting, *available at* <https://ohiochannel.org/collections/ohio-redistricting-commission>. Auditor Faber also wanted to ensure that the steps taken by the Commission to draft and adopt a General Assembly-district plan could practically be implemented by the State’s election officials. *Id.*

Auditor Faber took all reasonable steps to facilitate the Commission’s compliance with the Court’s April 14 Order. He called on the other Commission members to convene a meeting. He proposed a plan to draft and adopt a General Assembly-district plan. He actually drafted a General Assembly-district plan. He actively participated in the Commission’s meetings. The Court should not—and cannot—hold Auditor Faber in contempt.



**V. The Ohio Constitution only gives the Court the authority to judge whether a Commission-passed General Assembly-district plan is constitutionally compliant and, as a result, the Court cannot compel the Commission to enact a particular General Assembly-district plan in a particular manner.**

The authority granted to the Court in General Assembly-apportionment cases is limited. Ohio Constitution, Article XI, Section 9(A). The Court only has the authority to determine whether the General Assembly-district plan complies with the requirements of the Ohio Constitutions. *See* Ohio Constitution, Article XI, Section 9. The Court cannot “order, in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the commission.” Ohio Constitution, Article XI, Section 9(D)(1). The Court also cannot “order the commission to adopt a particular general assembly district plan or to draw a particular district.” Ohio Constitution, Article XI, Section 9(D)(2). In short, the Court can determine whether a General Assembly-district plan adopted by the Commission is constitutionally compliant, but it cannot order the Commission to adopt a particular map or prescribe a specific process for drafting and adopting a map.

Petitioners’ motion to show cause literally asks the Court to hold the Commission and its individual members in contempt for something the Court has *no* authority over: the process in which the Commission drafts and adopts a General Assembly-district plan. *See* Petitioners’ Motion at 1 (“It is April 25. There have been no meetings. No meetings have been scheduled. The independent map drawers have not been reengaged.”). Not only did the Court not order the Commission to act as Petitioners want, the Court has no authority to do so in the first place.

The Constitution does not give the Court the authority to order the Commission to adopt a particular kind of map. *See* Ohio Constitution, Article XI, Section 9(D). The Court can only judge the merits of a Commission-passed map. The Constitution also does not give the Court the authority to dictate *how* the Commission reaches an approved General Assembly-district plan.

Article XI, Section 9 makes no mention of and does not otherwise grant the Court with authority to tell the Commission how to draw a map or how to expend resources or when it must adopt maps or anything of the sort. Instead, the Commission has the sole authority to draft and adopt a General Assembly-district plan. The Court is empowered to judge whether the *result*—the actual approved and submitted map—complies with the Constitution.

The Commission and its individual members simply cannot be held in contempt for not engaging in the process that Petitioners might prefer, especially when the Court did not (and could not) order the Commission to engage in that process in its April 14 Order.

**VI. The Commission is its own constitutionally created entity and the Court cannot exercise control over the constitutional duties of the Commission through a finding of contempt.**

The Commission is effectively its own branch of government, tasked with the legislative task of apportionment. *LWV I*, Slip Opinion No. 2022-Ohio-65, at ¶ 76, 79; *see also Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 18-24. The Ohio Constitution created the Commission to draft and adopt a new General Assembly-district plan. Ohio Constitution, Article XI, Section 1(A). As a result, the Commission is independent of the judiciary and must be afforded the same independence to discharge its duties as any other constitutionally created office or entity. Any attempt by the Court to hold the Commission in contempt with regard to the duties of the Commission outlined in the Constitution would create significant separation-of-power issues.

*Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, is instructive. There, the Court determined that it cannot compel the legislature to act in a certain way—whether that be enacting a law, amending a law, or repealing a law—and cannot enjoin the legislature from passing a law. *Id.* at ¶ 27-28. “The separation-of-powers doctrine therefore 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, quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 633, 716 N.E.2d 704 (1999). Instead, “the judicial function does not begin until after the legislative process is completed.” *Id.*, quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999).

This separation-of-powers principle exists regardless of whether “such action \* \* \* is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law.” *Id.* at ¶ 28, quoting *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 899, 179 P.3d 366 (2008). In fact, a “court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character.” *New Orleans Water Works Co. v. New Orleans*, 164 U.S. 471, 481 (1896). This separation-of-powers makes sense; which is why the Court described that “legislative officers are not liable personally for their legislative acts” as “so elementary, so fundamentally sound, and \* \* \* so universally accepted.” *Hicksville v. Blakeslee*, 103 Ohio St. 508, 517, 134 N.E. 445 (1921).

Petitioners’ show-cause motion asks the Court to interfere with the Commission’s process in its legislative task of adopting a General Assembly-district plan. This is simply an improper use of contempt proceedings. The Court simply should not accept Petitioners’ invitation to hold the Commission and its individual members in contempt.

**VII. Auditor Faber is entitled to recover his own attorney’s fees for responding to this frivolous show-cause motion.**

Petitioners’ show-cause motion has no basis in law or fact. It seeks to hold the Commission and its members in contempt for not complying with a date that hasn’t even arrived yet. A fundamental requirement of contempt is failure to comply with a court order. Because the date of performance has not yet arrived, there is literally no way that the Commission can be held in contempt.

Once again, Petitioners' show-cause motion was not filed based upon merit, but to harass the Commission and its individual members. Petitioners have again engaged in frivolous conduct by filing a show-cause motion with no legal or factual basis to support a finding of contempt against the Auditor. When a party files a show-cause motion prior to the date of performance, it is premature, frivolous, and sanctionable under Ohio Rule of Civil Procedure 11. *See Kirk*, 172 Ohio App.3d 404, 2007-Ohio-3140, 875 N.E.2d 125, ¶ 6. That is why Auditor Faber reserves the opportunity to recover the attorney's fees that the Auditor of State was forced to incur because of this show-cause motion. Auditor Faber does not make that statement lightly—but enough is enough. These unsupported show-cause motions must stop.

### **CONCLUSION**

For the reasons stated above, Auditor of State Keith Faber respectfully requests that the Court deny Petitioners' show-cause motions.

Respectfully submitted,

*/s/ Brodi J. Conover*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was sent via email transmission this 5th day of May, 2022 to the following:

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April 26, 2022

Members of the Ohio Redistricting Commission:

I join with other members of the Ohio Redistricting Commission in calling for a meeting to be scheduled - as soon as possible. The Supreme Court of Ohio's May 6<sup>th</sup> deadline is fast approaching and it is time for us to get to work.

Scheduling a meeting has proven to be a challenge over the past week, with a member of the Commission sidelined with COVID and others preparing for the May 3<sup>rd</sup> primary. But, the Commission has shown the ability to conduct our meetings remotely and I encourage this option be afforded for each meeting moving forward to increase availability and participation.

I propose we address the following items at our next meeting:

- 1) Discuss having the Attorney General request an extension from the Court to May 13<sup>th</sup> for the Commission to draft and adopt a new state legislative redistricting plan.
- 2) Set a firm meeting schedule moving forward, subject to recess, with a virtual option;
- 3) Deliberate over which redistricting plan will serve as the starting point for the Commission's adoption of a plan; including, agreeing on the process Commission members shall use to offer formal amendments to any plan adopted subject to amendment – while also providing sufficient time for Commission members and the public to review and consider the plan prior to final adoption.

I look forward to working with each of you to meet our shared obligations of the Court's deadline and the public's expectations.

Very truly yours,

A handwritten signature in black ink that reads "Keith Faber".

Keith L. Faber  
Ohio Auditor of State