

IN THE SUPREME COURT OF OHIO

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

BRIA BENNETT, et al.,	:	
	:	Case No. 2021-1198
Petitioners,	:	
	:	
v.	:	Original Action pursuant to
	:	Ohio Constitution, Article XI
	:	
OHIO REDISTRICTING COMMISSION, et al.,	:	<i>[Apportionment Case]</i>
	:	
Respondents.	:	

OHIO ORGANIZING COLLABORATIVE, et al.,	:	
	:	Case No. 2021-1210
Petitioners,	:	
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v.	:	Original Action pursuant to
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OHIO REDISTRICTING COMMISSION, et al.,	:	<i>[Apportionment Case]</i>
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INTRODUCTION

Petitioners want two bites at the apple and are trying to achieve that result in two different ways. The result they want is the same: to attack the Ohio Redistricting Commission and its members and to obtain a declaration that the most recently passed General Assembly-district plan is unconstitutional. One of these approaches—the objections—is the correct path to challenge the fourth Commission-passed General Assembly-district plan. The other approach—the show-cause motions—is not.

First, Petitioners filed their various motions to show cause claiming that the Ohio Redistricting Commission and its individual members violated the Court’s March 16 Order in *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Case No. 2021-1193, *Bennett v. Ohio Redistricting Comm.*, Case No. 2021-1198, and *Ohio Organizing Collaborative v. Ohio Redistricting Comm.*, Case No. 2021-1210, Slip Opinion No. 2022-Ohio-789. The March 16 Order invalidated the third General Assembly-district plan adopted by the Commission and ordered the Commission to draft and adopt another plan. The basis for the show-cause motions is not that the Commission did not timely draft and file a new map; instead, Petitioners argue that the most recently passed map is unconstitutional and, therefore, non-compliant with the March 16 Order. Then, on April 1, 2022, each of the Petitioners filed formal objections to the most recent Commission-passed map that, once again, allege that the map is unconstitutional and non-compliant with the Ohio Constitution and the Court’s prior decisions.

By filing these show-cause motions, Petitioners are distracting the Court from its constitutional duty to review the merits of the fourth Commission-passed General Assembly-district plan. That alone should be the basis for the Court to reject Petitioners’ show-cause motions. Additionally, there are a number of reasons why Auditor of State Keith Faber cannot be held in contempt that are explained in more detail below. Fundamentally, 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. In addition, Petitioners have not and will not be able to satisfy their burden to show that Auditor Faber disobeyed the Court's March 16 Order. Just the opposite is true. Auditor Faber and his staff were extremely active in assisting the Commission's map drawers in their quest to draw a constitutionally compliant General Assembly-district plan prior to the Court's March 28 deadline.

The Commission members engaged more thoroughly with their staff, the map drawers, and their fellow members during this fourth round of drafting and adopting a General Assembly-district plan that it had with any other plan in the redistricting process. The Commission vigorously and diligently undertook the Herculean task of drafting and adopting an entire General Assembly-district plan in the non-constitutionally required and, therefore, arbitrary twelve-day deadline imposed by the Court in the March 16 Order. However, they just ran out of time to consider and offer amendments to the independent map drawers' unified plan. To meet the Court's deadline, the Commission ultimately approved a different plan it believed complied with the Constitution that was timely presented to the Secretary of State and the Court. Auditor Faber voted against that plan. The Court has not yet passed judgment on whether that plan complies with the Constitution. Regardless of whether it does or does not, 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 of the March 16 Order.

STATEMENT OF THE FACTS

The facts of what transpired between March 16 and March 29 are not in dispute and have been widely reported. The characterization of the facts in Petitioners' motions, however, needs to be clarified. All of the facts in this Response are supported by publicly available minutes, transcripts, and documents of the Commission.

I. The Court’s March 16, 2022 Order.

After the Ohio Redistricting Commission submitted its third General Assembly-district plan (the “Third Plan”) in early March, the Court exercised its constitutional authority to determine whether the Third Plan complied with the Ohio Constitution. The Court found that the Third Plan did not. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-789, ¶ 44 (“*LWV III*”). The Court included the following in its March 16 order that found the Third Plan to be unconstitutional:

We order the commission to be reconstituted and to convene and that *the commission* 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) as we have explained those provisions in each of our three decisions in these cases. To promote transparency and increase public trust, 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 the court.

Id. (emphasis in original).

The Court gave the Commission until March 28, 2022 to file a new General Assembly-district plan with the Secretary of State and until the next morning to file the new plan with the Court. *Id.* at ¶ 45. As it had with the prior plans, Petitioners were given an opportunity to file objections to the new map and Respondents were given an opportunity to file a response. *Id.* at ¶ 46.

II. The Commission reconvenes and hires two independent map drawers.

Soon after the Court’s March 16 Order, the Commission reconvened as ordered. *See* Ohio Redistricting Commission March 19, 2022 Minutes, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-19-2022-236/minutes-1545.pdf>. The Commission members collectively discussed how to proceed, including the use of independent map drawers and mediators. *Id.* Ultimately, the Commission unanimously approved a motion that: (1) directed all Commission staff to abide by the Constitution

and the Court's decisions, (2) reconvene two days later to approve the hiring of independent map drawers and mediators, (3) schedule a meeting for three days later, (4) direct all current map drawers to meet and discuss how to collectively work together, and (5) schedule a meeting for four days later. *Id.* Auditor Faber also raised an amendment to the Commission's rules to allow for virtual hearing participation (which is permitted under recently enacted Sub. H.B. 51). *Id.*

The Commission ultimately retained two independent map drawers. Dr. Michael McDonald, from the University of Florida, was recommended by Senator Sykes. *See* Ohio Redistricting Commission March 21, 2022 Minutes, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-21st-257/minutes-1546.pdf>. Dr. Douglas Johnson, from the National Demographics Corporation, was recommended by Speaker Cupp. *Id.* The Commission unanimously approved and retained both Dr. McDonald and Dr. Johnson as independent map drawers. *Id.* In addition, Speaker Cupp indicated that the Sixth Circuit Court of Appeals would make its mediators available should a mediator be necessary. *Id.* The Commission made plans at its next meeting to meet every day between March 23 and March 28 (the deadline imposed by the Court). *See* Ohio Redistricting Commission March 22, 2022 Minutes, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-22nd-258/minutes-1550.pdf>.

III. The map drawing begins.

At the March 23 Commission meeting, Dr. McDonald and Dr. Johnson both introduced themselves and a discussion ensued as to how the independent map drawers would proceed. *See* Ohio Redistricting Commission March 23, 2022 Minutes, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-23-2022-276/minutes-1425.pdf>. The Commission also adopted a set of ground rules for the map

drawers to utilize in drafting a new map. *Id.*; *see also* Ohio Redistricting Commission's Ground Rules for Map Drawers, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-24-2022-277/ground-rules-for-map-drawers.pdf>.

Over the next two days, Dr. McDonald and Dr. Johnson took to map drawing. A livestream of the drawing room and the mirrored image of the actual computers where the map drawing took place were made available on the Ohio Channel for all to see. At both the March 24 and March 25 meetings, Dr. McDonald and Dr. Johnson provided updates on the map-drawing process. *See* Ohio Redistricting Commission March 24, 2022 Meeting Transcript, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-24-2022-277/transcript-1541.pdf>; *see also* Ohio Redistricting Commission March 25, 2022 Meeting Transcript, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-25-2022-278/transcript-1542.pdf>. Both Dr. McDonald and Dr. Johnson provided examples of their maps throughout the drawing process and explained their decisions to draw the map in a certain way, but both stressed that the maps being shown during Commission meetings were not yet final. *Id.* There was significant conversation amongst the Commission members and the map drawers at each meeting about challenges that had been experienced during the prior map-drawing processes. *Id.*

IV. The March 26 Meeting.

At the March 26 meeting, the Commission heard from both Dr. McDonald and Dr. Johnson about the progress of their map drawing. *See* Ohio Redistricting Commission March 26, 2022 Meeting Transcript, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-26-2022-279/transcript-1466.docx>.

The Commission members asked a number of questions and offered feedback on the House-district maps presented by the map drawers. *Id.* Both Dr. McDonald and Dr. Johnson indicated that the maps were not final drafts because they had not finalized the Senate-district maps and that would necessarily require changing the lines on the House-district maps. *Id.* Neither Dr. McDonald nor Dr. Johnson could offer a specific timeline for when they expected final versions of the complete General Assembly-district maps to be completed—just 48 hours prior to the deadline imposed by the Court’s March 16 Order. *Id.*

Auditor Faber was clear to the map drawers at the March 26 meeting that the *entire* Constitution needed to be complied with—not just the proportionality requirement in Article XI, Section 6(B). *Id.* In addition, Auditor Faber indicated that he did not want to micromanage the map drawers—who had been hired by the Commission to bring their expertise in map drawing to the Commission. *Id.* Auditor Faber invited the map drawers to draw competitive districts if it was possible to do so in a compact and politically competitive manner. *Id.* Finally, Auditor Faber stated that the map drawers needed to be left alone to actually draw maps so that the March 28-imposed deadline by the Court could be met. *Id.* He indicated a desire to have public comment on the maps, as suggested by the Court, but worried that the timeline would be too compressed if the maps were not completed soon. *Id.*

One other issue arose at the March 26 meeting. Senate President Huffman raised the possibility of the map drawers considering the addresses of incumbents—specifically the 17-incumbent senators who were elected in 2020 and, pursuant to the Constitution, must continue to represent their existing district (or, if combined with another incumbent’s district, the Commission must choose who continues representation of that district). *Id.*; *see also* Ohio Constitution, Article XI, Section 5. Both Senator Sykes and Minority Leader Russo objected to Senate President

Huffman's suggestion. *Id.* Because agreement amongst the Commission members could not be reached, Senator Sykes recommended that the issue be sent to the Sixth Circuit mediators. *Id.* Ultimately, the Commission *unanimously* adopted a mediation statement that indicated that the map drawers should consider the residence of non-term limited House and Senate incumbents and Senate incumbents in mid-term and avoid pairing incumbents and drawing districts to avoid Senators no longer living in their districts. *See Ohio Redistricting Mediation Agreement, available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-27-2022-280/2022-03-27-mediation-statement-instructions-as-adopted.pdf>. No identifying information for the incumbents was to be used. *Id.*

V. The March 27 Meeting.

The Commission reconvened on the evening of March 27 to hear from Dr. McDonald and Dr. Johnson on the progress they had made in drawing the maps. There was significant discussion amongst the Commission and the map drawers about issues that were being considered in the map-drawing process. *See Ohio Redistricting Commission March 27, 2022 Meeting Transcript, available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-27-2022-280/transcript-1543.pdf>. Auditor Faber once more raised concerns with certain elements of the map drawers' maps—specifically some of the splits within the city of Dayton. *Id.* Throughout the discussion, the map drawers indicated that they wished for additional input from the Commission on certain issues before being able to finalize their maps. *Id.*

Auditor Faber pointed out that between the unanimous mediation statement and the additional information provided to the map drawers during the March 27 meeting, it was imperative that Dr. McDonald and Dr. Johnson be given time to incorporate the additional information they had learned before looking at the proposed maps. *Id.* Auditor Faber also noted

that, even with a unified map from Dr. McDonald and Dr. Johnson, the Commission itself would likely have modifications to the unified map that would take additional time to assess and input into the system. *Id.*

VI. The March 28 Meetings.

The Commission convened a number of times on March 28—the deadline day. The Commission first met in the morning to receive an update from Dr. McDonald and Dr. Johnson. *See* Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 1, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-28-2022-281/transcript-part-1-1503.docx>. At the first meeting, the map drawers indicated that they did not have a final map completed but they were each working on different parts of the unified map to finalize it for the Commission’s review. *Id.*

The second March 28 meeting—in the afternoon—was much of the same. Dr. McDonald and Dr. Johnson indicated that they were working through issues with the maps, but were not yet done with the unified map. *See* Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 2, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-28-2022-281/transcript-part-2-1504.docx>. Dr. McDonald, the Democrat-selected map drawer, informed the Commission that he would have to leave at 5:00 p.m. for the airport to return to Florida. *Id.* That left just Dr. Johnson, the Republican-selected map drawer, to complete both the House-district and Senate-district maps and present them to the Commission. *Id.* All the while, Auditor Faber’s staff members were with the map drawers to assist with any issues or questions that arose. *Id.*

Because of the fast-approaching deadline and because the independent map drawers had not completed maps for approval, Senate President Huffman made a motion to allow Dr. Johnson to continue on the unified map while also having the Commission’s staff members work off the

Third Plan to create a map that complied with the Court's March 16 Order. *Id.* Auditor Faber noted that he still had not seen a set of maps from the independent map drawers to which he could offer amendments. *See* Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 3, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-28-2022-281/transcript-part-3.docx>. Auditor Faber reiterated that he and his staff had been in with the map drawers for most of the week to assist in the process. *Id.* The Commission ultimately approved Senate President Huffman's motion to allow Dr. Johnson to continue to work on the unified map while also having the Commission's staff members work on a different map to ensure that the Court's deadline was met. *Id.*

The Commission reconvened for a final update from Dr. Johnson at almost 9:30 p.m. *See* Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 4, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-28-2022-281/transcript-part-4.docx>. Dr. Johnson indicated that there were still not final House-district or Senate-district maps for the Commission to review. *Id.* Dr. Johnson also explained that it was unlikely that he would be able to incorporate any suggestions, edits, or amendments to the maps he was working on unless they were within the same map scheme. *Id.* For example, Dr. Johnson specifically discussed different suggestions that Auditor Faber had offered to him, but stated there was no way he could incorporate those amendments prior to the midnight deadline. *Id.*

It was during this reconvened session that, at approximately 10 p.m., the General Assembly-district map from the Commission's staff was presented to the Commission. *Id.* Senator Sykes and Minority Leader Russo strongly objected to the map. *Id.* There was significant discussion amongst the Commission as to the introduced map as opposed to waiting for the yet-

to-be-finalized independent map drawers’ House-district and Senate-district maps. *Id.* Auditor Faber again noted that his staff had been working with Dr. McDonald and Dr. Johnson throughout the day to incorporate Auditor Faber’s amendments to the unified map. *Id.* The reason? Auditor Faber took the Court’s directive for the Commission to partake in the map-drawing process seriously. *Id.*

Ultimately, the Commission adopted the map drafted by the Commission’s staff (the “Fourth Plan”). *Id.* Speaker Cupp, Senate President Huffman, Governor DeWine, and Secretary of State LaRose voted for the Fourth Plan. *Id.* Auditor Faber, Senator Sykes, and Minority Leader Russo voted against the Fourth Plan. *Id.* The Commission also voted to approve the Section 8(C)(2) statement in support of the Fourth Plan. *See* Ohio Redistricting Commission Section 8(C)(2) Statement, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-28-2022-281/minority-statement.pdf>. The vote in support of the statement was the same as the vote for the Fourth Plan, except that Auditor Faber abstained from the vote. *See* Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 5, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-28-2022-281/transcript-part-5.docx>.

After the Fourth Plan was approved, Dr. Johnson finally presented a General Assembly-district plan to the Commission. *Id.* The problem with the map drawers’ map, though, is that Dr. Johnson admitted it was not a final version and that it would need additional tweaks. *Id.* It also had not incorporated any of the suggestions, edits, or amendments from the Commission members. *Id.* Auditor Faber specifically called this concern out with the independent map drawers’ exercise—he was told that his amendments could not be considered prior to the midnight deadline.

Id. Auditor Faber spent considerable time discussing the map drawers’ plan and highlighting the same reality that the Commission had faced with the prior plans: the demands imposed by the Court on the Commission in the time allowed by the Court to meet those demands was an impossible task. *Id.* Ultimately, the Commission voted to reject the map drawers’ plan. *Id.*

VII. Petitioners file show-cause motions.

Shortly after the Fourth Plan was sent to the Secretary of State and filed with the Court, Petitioners in each of the three apportionment cases filed motions to show cause why the Commission and its members should not be held in contempt of the March 16 Order. *See* League of Women Voters’ of Ohio Motion in Case No. 2021-1193 (“LWV Petitioners’ Motion”); Bennett Motion in Case No. 2021-1198 (“Bennett Petitioners’ Motion”); and Ohio Organizing Collaborative Motion in Case No. 2021-1210 (“OOC Petitioners’ Motion”).

LAW AND ARGUMENT

Petitioners in these cases each seek to hold the Ohio Redistricting Commission and its individual members in contempt of court for allegedly failing to adhere to the Court’s March 16 Order. They seek this order of contempt under R.C. Chapter 2705 and under the Court’s inherent power of contempt. Each Petitioner also seeks an award of attorney fees under R.C. 2323.51.

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. 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, or any other action permitted under the Constitution.

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 March 16 Order.

II. Auditor Faber was not individually ordered to do anything in the Court’s March 16 Order; instead, it was the Ohio Redistricting Commission.

Petitioners allege that the Commission and its members failed to comply with paragraph 44 of the Court’s March 16 Order. *See generally* LWV Petitioners’ Motion; Bennett Petitioners’ Motion; OOC Petitioners’ Motion. The relevant language from the Court is this:

We order the commission to be reconstituted and to convene and that *the commission* 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) as we have explained those provisions in each of our three decisions in these cases.

To promote transparency and increase public trust, 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 the court.

LWV III, Slip Opinion No. 2022-Ohio-789, at ¶ 44 (emphasis in original).

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). The Commission—which is itself created by the Ohio Constitution and is performing a legislative task—was specifically ordered by the Court to comply with its March 16 Order.

Notably, the Court was very clear and narrow in what it ordered the Commission to do in the March 16 Order: that the Commission “be reconstituted and to convene and * * * draft and adopt” a new General Assembly-district plan and timely file it with the Secretary of State (no later than March 28) and the Court (no later than March 29). *LWV III* at ¶ 44-45. The Commission complied with that order. The remainder of the March 16 opinion simply states what the Commission *should* do: the Commission *should* promote transparency, the Commission *should* increase the public trust, the Commission *should* draw maps in public, and the Commission *should* convene frequent meetings. *Id.* While an order is mandatory, the word “should” is merely directory. See, e.g., *State ex rel. Badgett v. Mullen*, 177 Ohio App.3d 27, 2008-Ohio-2373, 893 N.E.2d 870, ¶ 26 (4th Dist.). At most, the Court ordered that the Commission draft and adopt a plan by March 28 and submit it to the Court by March 29. The Commission complied with that mandate. The Commission and its members should not be held in contempt.

III. Auditor Faber took all reasonable and necessary steps to comply with the Court's March 16 Order.

Despite being just a single member of the Commission, Auditor Faber did all that he could to comply with the Court's March 16 Order. Auditor Faber frequently noted that he and his staff were working with Dr. McDonald and Dr. Johnson to create a map that complied with the Constitution and the Court's opinions. *See* Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 2; Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 3; Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 4. Auditor Faber was frequently found in the map-drawing room talking with the map drawers in order to offer input, context, and suggestions to the map drawers in their General Assembly-district-plan drawing. During Commission meetings, Auditor Faber routinely stated that he desired to make amendments to the map drawers' maps in order to comply with the Court's order that the Commission draft a General Assembly-district plan. *See* Ohio Redistricting Commission March 27, 2022 Meeting Transcript; Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 3; Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 4. Throughout the Commission's meetings, Auditor Faber raised what he felt were constitutional defects with the approach taken by the map drawers—that they were drawing maps strictly based upon the proportionality requirement to the detriment of other constitutional requirements, notably the compactness requirement. *See* Ohio Redistricting Commission March 26, 2022 Meeting Transcript; Ohio Redistricting Commission March 27, 2022 Meeting Transcript; Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 4.

Even on March 28, Auditor Faber and his staff were working with Dr. McDonald and Dr. Johnson to work towards a constitutionally compliant plan. Auditor Faber was the only Republican to have staff available to the map drawers throughout the entire day on March 28. *See*

Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 2; Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 4. It was also Auditor Faber that provided amendments to the map drawers' map and was told by the map drawers, on March 28, that his amendments could not and would not be incorporated by the midnight deadline. *See* Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 4; Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 5. Auditor Faber also noted that it was apparent that the map drawers ran into the same issue that the Commission had in the prior attempts to draft and adopt a constitutionally compliant General Assembly-district plan: the political geography of Ohio makes it near impossible to comply with all of the constitutional requirements, especially in a such a short period permitted by the Court in its March 16 Order. *See* Ohio Redistricting Commission March 28, 2022 Meeting Transcript Part 5.

Auditor Faber took all reasonable steps to facilitate the Commission's compliance with the Court's March 16 Order. He acted diligently and in good faith to approve a constitutional map. He proposed amendments to the independent map drawers' maps and was told they would not be considered. He provided guidance to heed all of the constitutional provisions at play in the apportionment process. He and his staff worked with the map drawers. Ultimately, Auditor Faber did not vote for the Fourth Plan because he felt that it did not comply with all of the Constitution's requirements for a General Assembly-district plan. The Court should not—and cannot—hold Auditor Faber in contempt.

IV. 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.

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 United States and 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.

Petitioners’ motions to show cause essentially ask the Court to hold the Commission and its individual members in contempt for not passing a constitutionally compliant General Assembly-district plan. *See, e.g.,* LWV Petitioners’ Motion at 24-25 (“The Commission should be ordered to get back to work adopting a plan pursuant to the Court’s guidance, so as to permit the Commissioners to purge themselves of their contempt.”). The conduct giving rise to contempt argued by Petitioners is not passing a constitutional plan. Basically, Petitioners are saying this to the Commission: pass a constitutional General Assembly-district plan or otherwise be held in contempt by the Supreme Court of Ohio.

This Hobbesian choice cannot stand. *First*, 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. *Second*, the Commission passed a General Assembly-district plan that is currently before the Court. That is the correct avenue for the Court to judge whether or not the Fourth Plan complies with the Constitution—not Petitioners’ show-cause motions. *Third*, the Constitution 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.

In fact, the Court’s March 16 Order is the likely reason that the Commission did not adopt a version of the independent map drawers’ unified plan. There simply wasn’t enough time. The *entire* Commission engaged more vigorously in this process than it had previously and, as evidenced by the work of the Commission and its map drawers, it was close to being in a position to consider and potentially adopt the unified map. But the Court’s March 16 Order—especially the March 28 deadline that would not, under any circumstance, be extended—always hung like a dark cloud over the Commission’s head. When it became apparent that the independent map drawers would not be able to accomplish their work and solicit input from the Commission on the maps prior to the deadline, the Commission had to move on to another map to meet the Court’s deadline.

The Commission simply cannot be held in contempt for not approving and submitting a particular map that Petitioners (or even the Court) would prefer.

V. 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).

Petitioners’ show-cause motions ask the Court to interfere with the Commission’s decisions in its legislative task of adopting a General Assembly-district plan. This is simply an improper use of contempt proceedings. In addition, Article XI of the Constitution dictates that the

constitutionality of the Fourth Plan will be determined by the Court in the process the Court is already engaged in—evidenced by Petitioners filing their objections to the Fourth Plan.

The practical implications of this are far reaching—even beyond the Ohio Redistricting Commission. If the Court holds the Commission and its individual members in contempt, it will find three statewide constitutional officeholders in contempt for something that no one individual has control over. A second consequence is that the Court will be finding a constitutionally convened body in contempt for not completing a legislative task in the way that the Court would prefer. This runs the risk of creating precedent that could be used by this Court and courts across Ohio to find the entire General Assembly or a city council or any other legislative body in contempt for passing a piece of legislation that a court disagrees with and believes might be unconstitutional. This could upend the constitutional balance among the three branches of government unnecessarily. There is already a process outlined in the Ohio Constitution where, as here, a citizen might believe a law, lower court case, or other enactment to be unconstitutional: a challenge in the appropriate court on the merits. That process, of course, is not unique to redistricting and could easily infiltrate other areas of the law. A final unintended consequence of entertaining and granting Petitioners' show-cause motions is the reluctance it will create amongst Ohioans to serve at any level of government if they could be subjected to a show-cause order and the potential consequences if found in contempt for making a decision a court deems to be wrong.

The Court simply should not accept Petitioners' invitation to hold the Commission and its individual members in contempt.

VI. Petitioners are not entitled to recover their attorney's fees; instead, Auditor Faber is entitled to recover his own attorney's fees for responding to these frivolous show-cause motions.

Each of the Petitioners include a demand to recover their attorney's fees pursuant to a finding of bad faith and/or R.C. 2323.51 against the Commission, its members jointly or severally,

or apportioned between Respondents, as the Court deems appropriate. *See* LWV Petitioners' Motion, at 25¹; Bennett Petitioners' Motion, at 20; OOC Petitioners' Motion, at 2. Petitioners do not provide any legal or factual basis for their attorney-fee demand. Nor could they against Auditor Faber.

Throughout the period at issue, Auditor Faber took all reasonable steps to comply with the Court's March 16 Order. He is but a single member of the Commission and cannot act on behalf of the Commission as an individual member. There are no allegations in Petitioners' show-cause motions that Auditor Faber acted in bad faith or was otherwise engaged in egregious, overzealous, unjustifiable, and frivolous action. *See, e.g., Turowski v. Johnson*, 68 Ohio App.3d 704, 706, 589 N.E.2d 462 (9th Dist.1990). Not only did Auditor Faber and the Commission comply with the Court's March 16 Order—it wasn't even close. There is simply no basis for Petitioners' show-cause motions. They were filed not based upon merit, but to obviously harass the Commission and its individual members.

As a result, it is not Auditor Faber that engaged in frivolous conduct. It was Petitioners—by filing their show-cause motions with no legal or factual basis to support a finding of contempt against the Auditor. That is why Auditor Faber reserves the opportunity to recover the attorney's fees that Auditor of State was forced to incur because of these show-cause motions.

¹ The LWV Petitioners initially seek attorney's fees against the four Commission members, jointly or severally, who voted in favor of the Fourth Plan (Senate President Huffman, Speaker Cupp, Governor DeWine, and Secretary LaRose). LWV Petitioners' Motion, at 25. But the LWV Petitioners also indicate they're willing to recover their fees as apportioned against all Respondents if the Court deems that appropriate. *Id.*

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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