

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
Original Action pursuant to
Ohio Constitution, Article XI
[Apportionment Case]

BRIA BENNETT, et al., :
 :
 Petitioners, :
 :
 v. :
 :
 OHIO REDISTRICTING COMMISSION, et al., :
 :
 Respondents. :
 :

Case No. 2021-1198
Original Action pursuant to
Ohio Constitution, Article XI
[Apportionment Case]

OHIO ORGANIZING COLLABORATIVE, et al., :
 :
 Petitioners, :
 :
 v. :
 :
 OHIO REDISTRICTING COMMISSION, et al., :
 :
 Respondents. :
 :

Case No. 2021-1210
Original Action pursuant to
Ohio Constitution, Article XI
[Apportionment Case]

AUDITOR OF STATE KEITH FABER'S RESPONSE TO SHOW CAUSE

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INTRODUCTION

The Ohio Redistricting Commission filed a General Assembly-district plan with the Court by the arbitrary deadline imposed in the Court’s April 14 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-1235. The basis for Petitioners’ show-cause motions is not that the Commission didn’t timely adopt a General Assembly-district plan; instead, Petitioners argue that it isn’t their preferred map. They ask the Court to entirely disregard both the authority it is granted and the authority the Commission is granted in the Ohio Constitution. Petitioners do this through show-cause motions instead of solely filing objections to the General Assembly-district plan with the Court, which is provided for by Article XI of the Ohio Constitution. In their motions, Petitioners ask the Court to find the Commission in contempt, to implement Petitioners’ preferred plan, and to impose other extraordinary relief—none of which is authorized or provided for in the Constitution.

This all is just too far beyond what this Court can and should do. These show-cause motions unnecessarily pull the Court away from what the Constitution actually requires it to do: review the merits of a Commission-passed General Assembly-district plan. That alone should be the basis for the Court to reject Petitioners’ show-cause motions. There are a number of other reasons why Auditor of State Keith Faber cannot be held in contempt. 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. Auditor Faber was proactive in his efforts to help the Commission to comply with the Court’s April 14 Order—he sought to convene a meeting and he proposed a plan his office had drawn. Finally, Auditor Faber voted *against* the Resubmitted Third Plan.

In short, Petitioners have not and cannot satisfy their burden to show that Auditor Faber disobeyed or ignored the Court’s April 14 Order. 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 facts of what transpired between the Court’s April 14 decision and the submission of a General Assembly-district plan to the Court on May 6 are not in dispute. The characterization of those facts may be in dispute, particularly since Petitioners either minimized or entirely ignored Auditor Faber’s efforts over the last few weeks. Auditor Faber will present the relevant facts that are readily available in the public domain within the appropriate context for the Court to decide Petitioners’ show-cause motions.

The most pertinent problem with Petitioners’ show-cause motions is that they seek to hold the Commission and its individual members in contempt for failing to draft, adopt, and file a General Assembly-district plan that Petitioners might prefer.

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 sole constitutional authority under Article XI of the Ohio Constitution: determining 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 finding 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 General Assembly-district plan with the Secretary of State and until noon to file the plan with the Court. *Id.* at ¶ 79. As it had with the prior plans, Petitioners were given an opportunity to file objections to the map and Respondents had 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.

Soon after the Court's decision, Auditor Faber spoke with each member of the Commission

urging that it convene and begin work on a new General Assembly-district plan. Auditor Faber also instructed his staff to stay in close contact with their counterparts on the Commission in hopes of securing a meeting date and making progress on new maps. 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 then 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/commission-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/commission-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>.

Consistent with his long-stated goal of having the Commission propose new maps, Auditor Faber instructed his staff to create a plan that could be shared with the various map drawers working with the legislative members of the Commission to hopefully spur conversations about additional modifications and amendments to the map. This draft General Assembly-district plan proposed by the Auditor was shared with each of the legislative members of the Commission and

their respective map drawers 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.* He 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.*

Regrettably, Auditor Faber did not receive sufficient feedback or an indication from the legislative members of the Commission and their map drawers that his proposed plan would be acceptable to use as a base line plan for introduction and formal amendments.

VI. The May 5 Meeting.

The Commission reconvened on May 5 to continue working towards passing a new General Assembly-district plan. To start the meeting, Leader Russo introduced a motion to adopt the independent map drawers' map that was modified by Dr. Jonathan Rodden—a consultant hired by the National Democratic Redistricting Committee and first presented to the Court by the Bennett Petitioners. *See* Ohio Redistricting Commission May 5, 2022 Meeting Transcript, *available at* <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-5-2022-316/transcript-1642.pdf>. Auditor Faber expressed concerns with this Dr. Rodden-modified map because it had not actually been completed by the independent map drawers. *Id.* In fact, Auditor Faber pointed out that the independent map drawers had told Auditor Faber and the other Commission members that they would not be able to incorporate any amendments offered to the original. *Id.* Dr. Rodden's map didn't do that either. *Id.* The motion to adopt Dr. Rodden's map did not pass. *Id.*

Governor DeWine then asked for Secretary LaRose, the State's chief elections officer, to explain the practical implications and the impossibility of adopting and implementing a General Assembly-district plan other than the Third Plan this close to the August 2 primary election. *Id.* Secretary LaRose spent considerable time explaining why the Third Plan was the only feasible

option. *Id.* Secretary LaRose also provided a joint statement by the Ohio Elections Officials Association—a bipartisan group of Ohio’s elections officials—which explained the same point.

After additional discussion, the Commission moved to resubmit the Third Plan only for use in the 2022 election (the “Resubmitted Third Plan”). *Id.* Senator McColley, Representative LaRe, Governor DeWine, and Secretary of State LaRose voted for the Resubmitted Third Plan. *Id.* Auditor Faber, Senator Sykes, and Minority Leader Russo voted against the Resubmitted Third Plan. *Id.* Consistent with the Court’s April 14 Order, the Resubmitted Third Plan was filed with the Secretary of State and this Court prior to the May 6 deadline.

VII. Petitioners’ objections and show-cause motions.

The day that the Resubmitted Third Plan was filed with the Court, Petitioners in each of the three apportionment cases filed objections. *See* League of Women Voters’ of Ohio Petitioners’ Objections in Case No. 2021-1193; Bennett Petitioners’ Objections in Case No. 2021-1198; and Ohio Organizing Collaborative Petitioners’ Objections in Case No. 2021-1210. Petitioners each argued that the Resubmitted Third Plan should be invalidated as the Third Plan had been.

Each of the Petitioners also filed show-cause motions. *See* League of Women Voters’ of Ohio Petitioners’ Motion in Case No. 2021-1193 (“LWV Petitioners’ Motion”); Bennett Petitioners’ Motion in Case No. 2021-1198 (“Bennett Petitioners’ Motion”); and Ohio Organizing Collaborative Petitioners’ Motion in Case No. 2021-1210 (“OOC Petitioners’ Motion”).

LAW AND ARGUMENT

We first must distill what Petitioners are asking this Court to do with their show-cause motions. First, they ask the Court to hold the Ohio Redistricting Commission in contempt because it did not adopt the General Assembly-district plan that Petitioners might prefer—specifically Dr. Rodden’s plan. Second, the Bennett Petitioners seek to hold *all* of the Commission’s individual members in contempt, Bennett Petitioners’ Motion at 27-28, 35-36, whereas the LWV Petitioners

and the OOC Petitioners only seek to hold in contempt the four Commission members who voted for the Resubmitted Third Plan, LWV Petitioners' Motion at 22-23, 30-32; OOC Petitioners' Motion, at 18-19. Third, Petitioners ask this Court to implement its *own* General Assembly-district plan. Fourth, Petitioners seek other extraordinary, unauthorized remedies. All of this is done in the name of contempt, rather than the Court's review of the constitutionality of the plan before it.

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, 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—a point that Petitioners either minimize or entirely ignore. But even if those three members of the Commission had convened and reached consensus on a plan, they couldn't have actually 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.

II. 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* LWV Petitioners' Motion; Bennett Petitioners' Motion; OOC 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 General Assembly-district plan and timely file it with the Secretary of State and the Court by May 6. *LWV IV* at ¶ 78-79. The Court also acknowledged what it cannot order: *how* the Commission accomplishes its task of drawing and adopting a General Assembly-district plan. *See id.* at ¶ 77 (“Just as in *League III*, when we recommended that the commission take certain steps * * * .”); *see also 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 * * * .”). The Court’s April 14 Order was clear: adopt a plan and submit to the Court by May 6. The Commission complied with that mandate. Neither the Commission nor Auditor Faber should be held in contempt.

III. 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. Soon after the Court’s decision, Auditor Faber spoke with each member of the Commission urging that it convene and begin work on a new General Assembly-district plan. Auditor Faber also instructed his staff to stay in close contact with their

counterparts on the Commission in hopes of securing a meeting date and making progress on new maps.

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 and four members are required to act.

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 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.**

Despite Petitioners’ minimization or flat-out ignoring his efforts, 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 directed his staff to work with the staff of the legislative members of the Commission. 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. Ultimately, Auditor Faber did not vote for the Resubmitted Third Plan because he felt that it did not comply with all of the constitutional provisions required 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 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 ask this Court to entirely ignore clear constitutional language and implement the plan they prefer—a plan that has *never* been adopted by the Commission and was not drafted by the Commission. Petitioners claim that the “unique” and “present” circumstances require the Court to ignore the plain language of Article XI, Section 9(D) that explicitly prohibits the Court from implementing its own plan or ordering the Commission to adopt a certain plan. *See, e.g.*, Bennett Petitioners’ Objections, at 7-8. Petitioners make this claim in the name of searching for the legislative intent of the constitutional provision. *Id.* at 7. Rather than start with the text, Petitioners selectively cite to this Court’s prior decisions to argue the Court’s true goal is give effect to the intent of the electorate. *Id.* That, of course, is not how the Court determines the meaning of a constitutional provision. As with statutory construction, the Court starts with the text. *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 13.

As the Court has acknowledged in its prior decisions, it doesn’t have the constitutional authority to order the Commission to adopt a particular kind of map. *See LWV IV*, 2022-Ohio-1235, at ¶ 64-65, 72; *see also* 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. *See, e.g., id.* at ¶ 77 (discussing a recommendation on how the Commission should proceed). 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 solely empowered to judge whether the *result*—the actual approved and submitted map—complies with the Constitution.

The plain language of the Constitution is clear: the Commission approves a General Assembly-district plan and the Court judges it. The process the Commission follows to approve a plan is not subject to review by the Court. The Commission and its individual members simply cannot be held in contempt for not engaging in the process that Petitioners or a majority of this Court might 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, delegated by the Constitution with the legislative function of apportionment. *LWV I*, Slip Opinion No. 2022-Ohio-65, at ¶ 76, 79; *see also Wilson*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, at ¶ 18-24. The Ohio Constitution created the Commission to draft and adopt a 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 branch of government. In that way, the Commission is no different from the Governor, the General Assembly, or this Court. Any attempt by the Court to hold the Commission in contempt with regard to the legislative duties of the Commission outlined in the Constitution would create significant separation-of-power issues.

Contrary to Petitioners’ assertions, *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).

Petitioners’ reliance on a bevy of mandamus and court-funding cases is inapplicable. Those cases stand for the proposition that the legislative and executive branches cannot encroach on the judiciary’s function by refusing to or otherwise underfunding the court’s functions. *See, e.g., State ex rel. Turner v. Bremen*, 118 Ohio St. 639, 163 N.E. 302 (1928). But such a line of cases cannot apply to legislative, discretionary duties that the Constitution affords to the Commission. *See Grendell* at 633 (“A writ of mandamus will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control.”). The Commission has the sole authority to adopt a General Assembly-district plan. This Court can pass judgment on the constitutionality of that plan, but it cannot impose its own map or require the Commission to adopt a particular kind of map.

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 motions ask the Court to interfere with the Commission’s legislative task. This is a blatant disregard of the Constitution and is an entirely improper use of contempt proceedings. It distracts the Court from its exclusive role in the redistricting process laid out by Article XI: evaluating the constitutionality of a Commission-approved General Assembly-district plan. 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.

The Bennett 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. *See* Bennett Petitioners’ Motion, at 35. Petitioners do not provide any legal or factual basis for their attorney-fee demand. Throughout the period at issue, Auditor Faber took all reasonable steps to comply with the Court’s April 14 Order. 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). Nor could there be. Auditor Faber asked the Commission to convene so it could comply with the Court’s April 14 Order. Auditor Faber drafted and circulated a General Assembly-district plan. And Auditor Faber did not vote in favor of the Resubmitted Third Plan.

It is not Auditor Faber that engaged in frivolous, bad-faith 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 and by asking the Court to entirely disregard the Ohio Constitution. 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 these show-cause motions.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent email transmission this 12th 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 6th 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 3rd 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 13th 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