

IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, *et al.*, :
: Case No. 2021-1193
Relators, :
v. : Original Action Filed Pursuant to Ohio
: Constitution, Article XI, Section 9(A)
Ohio Redistricting :
Commission, *et al.*, : [Apportionment Case Pursuant to S. Ct.
: Prac. R. 14.03]
Respondents. :
:
:

Bria Bennett, *et al.*, :
: Case No. 2021-1198
Relators, :
v. : Original Action Filed Pursuant to Ohio
: Constitution, Article XI, Section 9(A)
Ohio Redistricting :
Commission, *et al.*, : [Apportionment Case Pursuant to S. Ct.
: Prac. R. 14.03]
Respondents. :
:
:

The Ohio Organizing Collaborative, *et al.*, :
: Case No. 2021-1210
Relators, :
v. : Original Action Filed Pursuant to Ohio
: Constitution, Article XI, Section 9(A)
Ohio Redistricting :
Commission, *et al.*, : [Apportionment Case Pursuant to S. Ct.
: Prac. R. 14.03]
Respondents. :
:
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**SUPPLEMENTAL BRIEF OF RESPONDENTS VERNON SYKES AND EMILIA SYKES
IN RESPONSE TO THE COURT’S ORDER OF DECEMBER 13, 2021, TO ADDRESS
THE IMPACT OF ARTICLE XI, SECTION 8(C)(1) ON REMEDIES REQUESTED BY
RELATORS**

The Court has ordered the parties to provide supplemental briefing on how the provisions of Article XI, Section 8(C)(1) impact the authority of the Ohio Supreme Court to grant the relief requested by Relators when the Ohio Redistricting Commission adopted the district plan by a simple majority vote of the Commission. For the reasons more fully explained below, the provisions of Section 8(C)(1) do not prevent this Court from granting the relief requested by Relators.

I. ARTICLE XI, SECTION 8(C)(1) DOES NOT PROHIBIT THIS COURT FROM ORDERING THE OHIO REDISTRICTING COMMISSION TO REDRAW THE ADOPTED DISTRICT PLAN.

The Court has asked for supplemental briefing on whether Section 8(C)(1) prevents the Court from remedying the partisan gerrymandering evident in the adopted plan. Apparently, the Court is asking the parties to address the language in Section 8(C)(1) that provides in part that “. . . the plan [adopted under division section 8(A)(3)] shall take effect upon filing with the secretary of state and shall remain effective until two general elections for the house of representatives have occurred under the plan.”

The mandatory language of Section 8(C)(1) defines the effective dates of the adopted plan and does not expressly or implicitly prohibit a challenge to the adopted plan. The drafters of the Fair District Amendments knew how to limit this Court’s powers to overturn a district plan. Indeed, they did so in several sections, each time expressly circumscribing the Court’s authority. For example, Section 9(D)(1) provides: “No court shall order, in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the Commission in the manner prescribe by this article.” (emphasis added). Similarly, in

Sections 9(D)(2) states “No court shall order the Commission to adopt a particular general assembly district plan or to draw a particular district.” (emphasis added).

Section 8(C)(1) does not contain any comparably clear language limiting the power of this Court to remedy improper gerrymandering. In fact, Section 8(C)(1) does not even mention this Court or any remedies. If the drafters wanted Section 8(C)(1) to limit this Court’s authority to grant relief, it would have at least *mentioned* the Court.

Any argument that Section 8(C)(1) limits this Court’s power can be easily rejected because of Section 9(D)(3)(c). That section expressly requires this Court to evaluate “division (C) of Section 8 of this article” and, if two elements are met, to “order the Commission to adopt a new general assembly plan in accordance with this article[.]” Section 9(D)(3)(c). By its very terms, the Court can review a district plan adopted under Section 8(C)(1).

Under R.C. 1.51, “courts should construe conflicting statutes in a way that gives effect to both.” *West v. Bode*, 162 Ohio St.3d 293, 2020-Ohio-5473, 165 N.E.3d 298, ¶ 13 (citations omitted). This can be easily done by holding that Section 8(C)(1) provides the effective dates where a district plan was passed by simple majority vote and Section 9(D)(3)(c) provides a remedy if there is an improper amount of gerrymandering.

The language of Section 8(C)(1)(a) contains no language limiting the power of this Court to remedy partisan gerrymandering in a four-year map. The provisions of Section 8(C)(1)(a) starkly contrast with those of Section 8(C)(1)(b) dealing with the successor map for the last six years of the ten-year period. In Section 8(C)(1)(b) the drafters explicitly limited the remedial powers of this Court only to those powers spelled out in Section 9. No such limitation on the remedial power of this Court is contained in Section 8(C)(1). The language of Section 8(C)(1), providing when the adopted four-year plan “shall take effect,” does not limit the power of this

Court to exercise whatever remedial power it has that has not been explicitly prohibited in Section 8.

II. THE LANGUAGE OF SECTION 8(C)(1) SHOULD NOT BE READ IN ISOLATION FROM THE OTHER PROVISIONS, SUCH AS SECTION 8(C)(2), WHICH REQUIRES THE COMMISSION TO ISSUE A STATEMENT EXPLAINING HOW IT COMPLIED WITH THE PROPORTIONAL FAIRNESS PROVISIONS OF SECTION 6(B).

This Court should recall that Section 8(C)(2) requires that the Commissioners issue a statement essentially explaining there is no gerrymandering if a district plan is passed on a mere majority vote. The obvious reason for this requirement is to provide a record about potential gerrymandering for this Court to review if there is a legal challenge.

The Court should not read the provisions of Section 8(C)(1) in isolation from the other provisions of Article XI, particularly the provision which immediately follows, Section 8(C)(2). The core anti-gerrymandering provision of the Fair District Amendments of 2015 is the proportional fairness provisions of Section 6(B). The argument that the population and splitting requirements of Sections 2, 3, 4, 5, and 7 were somehow the key reforms to prevent partisan gerrymanders falls apart based on the record of this case. The original map produced by the Republican Legislative Commissioners Huffman and Cupp, which provided for 67 Republican seats in the General Assembly, complied with the population and splitting requirements of Sections 2, 3, 4, 5, and 7. But the map was more partisan than the 2011 map which gave rise to the Fair District Amendments of 2015. So partisan, that even Speaker Cupp expressed surprise at such a brazenly partisan map. *See* Dep. Stip. Ex. Vol. 7 at DEPO_01666:23-01667:11, (Cupp Tr.) (testifying at deposition that he “didn’t expect [the number of Republican seats] would be as – that high. . . . There were more Republican leaning seats [on the September 9 map] than there are current Republican members”).

Where the partisan majority decides to proceed by simple partisan vote and adopt a four year map, the drafters inserted Section 8(C)(2) to require the partisan majority to describe how it complied with the provisions of Section 6(B), namely, how the Commission (at least the partisan majority) determined the statewide preference of Ohio voters over the last ten years so that the statewide proportion of legislative districts could closely correspond to the statewide voter preference.

Reading Section 8(C)(1) to limit the remedial power of this Court would render Section 8(C)(2) meaningless, mere academic surplusage - an afterthought of the partisan majority of Commissioners. Even worse, the provisions of Section 8(C)(2) would require a useless task for the Commissioners to provide a statement to explain how their map was not a partisan gerrymander if this Court was powerless to provide any remedy when the explanation was as disingenuous (“asinine” according to Secretary LaRose).

Instead, original drafters who included Respondent Senator Vernon Sykes inserted the required statement on proportional fairness found in Section 8(C)(2) to provide a litmus test for this Court to evaluate the compliance or not of the partisan majority with the mandatory duty of the Commissioners to adopt a map which closely corresponds to the proportional preference of the Ohio voters. The requirements of Section 8(C)(2) make no sense if the immediately preceding Section 8(C)(1) is read to strip away power of this Court to provide the remedies sought by the Relators.

III. NONE OF THE MEMBERS OF THE OHIO REDISTRICTING COMMISSION READ THE PROVISIONS OF SECTION 8(C)(1) TO LIMIT THE POWER OF THIS COURT TO INTERPRET OR REMEDY VIOLATIONS OF SECTION 6(B) THE CORE ANTI-GERRYMANDERING PROVISION OF THE FAIR DISTRICT AMENDMENTS ENACTED BY OHIOANS IN 2015.

Although little bipartisan agreement existed among the members of the Ohio Redistricting Commission, there *is* agreement about whether this Court has authority to reject a district map that does not pass constitutional muster.

While there is sharp disagreement between the parties about whether there are any constitutional violations, none of the Respondents have argued that this Court categorically lacks authority if a four-year district map was passed under Section 8(C)(1).

None of the Commissioners testified in their depositions that they thought this Court lacked power to remedy violations of Article XI or lacked the authority to determine the meaning of proportional fairness as laid out in Section 6(B) or as explained by the partisan majority in their Section 8(C)(2) statement. Certainly, none of the Commissioners suggested that Section 8(C)(1) somehow deprived this Court of providing a remedy of sending an unconstitutional map back to the Commission to redo its work.

Governor DeWine admitted in his deposition that, despite his vote in favor of the map, he anticipated that this Court would ultimately decide the constitutionality of the adopted map. Dep. Stip. Ex. Vol. 1 at DEPO_00223:12-24 (DeWine Tr.).

Similarly, Senator Huffman, who principally directed the drawing of the adopted map, conceded in his deposition that the meaning of the terms and obligations created by the provisions of Article 6(B) would be determined by this Court. Dep. Stip. Ex. Vol. 7 at DEPO_01810:11-23 (Huffman Tr.). Huffman gave no indication that this Court would be rendered powerless by Section 8(C)(1)(a) from remedying an unconstitutional map by sending it back to the Commission to try again.

Secretary of State LaRose also acknowledged at the time of the partisan vote on the four year map and in his deposition that the courts would ultimately determine whether the adopted map was constitutional and whether the Commission would be gathered again to try to redraw a constitutional map for the general assembly districts. Dep. Stip. Ex. Vol. 1 at DEPO_00093:9-00095:4 (LaRose Tr.) Again, Secretary LaRose gave no hint that he believed that this Court lacked the power to remedy the unconstitutional map that had been adopted by the partisan majority.

Finally, Democratic Commission Co-Chair and Senator Vernon Sykes, has repeatedly testified in his deposition and repeatedly stated at the Commission hearings that the core of the Fair District Amendment, which he helped draft and led the campaign for passage, resided in the fairness provisions of Section 6, particularly the proportional fairness provisions of Section 6(B) Depo at 84, 110. The non-splitting and line drawing requirements of Sections 2, 3, 4, 5, and 7 do not prevent even the most blatant partisan gerrymandering, as evidenced by the initial map proposed by the Republican Legislative Commissioners. Both the initial map and the adopted four-year map complied with the technical splitting requirements, but were gerrymandered because they came nowhere near proportional fairness. Dep. Stip. Ex. Vol. 4 at DEPO_00934:6-18 (V. Sykes Tr.).

Reading Section 8(C)(1) to strip this Court of the power to remedy a violation of Section 6(B) would gut the purpose for the Section 8(C)(2) statement and the other anti-gerrymandering provisions of Article XI. Further, such a reading would likely surprise the Commissioners who acted throughout the process with the understanding that this Court would review the constitutionality of the adopted map and remedy any constitutional violations by sending the unconstitutional map back to the Commission to redraw in compliance with the constitutional parameters spelled out by this Court.

IV. CONCLUSION

Ohio voters overwhelmingly enacted the Fair District Amendments to reform the broken reapportionment process in Ohio and to attempt to limit as much as possible partisan gerrymandering. Here, the record demonstrates without question that the Republican Legislative Commissioners drew, and the Republican Commissioners adopted, a map as gerrymandered as the map of 2011 which gave rise to the reforms. To read the provisions of Section 8(C)(1) to deprive this Court of the power to remedy this gerrymander, even in the ways prescribed by Section 9, would render the entire Fair District Amendment meaningless. Surely this Court should not interpret Section 8(C)(1) to so neuter the Court's remedial power when there is no such express limitation in the text of that section that applies to a four- year partisan map.

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