

IN THE SUPREME COURT OF OHIO

THE OHIO ORGANIZING COLLABORATIVE, <i>et al.</i> ,	:	Case No. 2021-1210
	:	
	:	APPORTIONMENT CASE
<i>Petitioners,</i>	:	
v.	:	Filed pursuant to S.Ct.Prac.R. 14.03(A)
	:	and Section 9 of Article XI of the Ohio
OHIO REDISTRICTING COMMISSION, <i>et al.</i> ,	:	Constitution to challenge a plan of
	:	apportionment promulgated pursuant to
	:	Article XI.
<i>Respondents.</i>	:	
	:	

**RESPONSE TO MOTION TO MOVE THE PRIMARY ELECTION DATE
OF PETITIONERS THE OHIO ORGANIZING COLLABORATIVE, ET AL.**

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RESPONSE

Senator Vernon Sykes and House Minority Leader Allison Russo ask this Court to move the primary election date to June 28, 2022, or another date that allows sufficient time for the Ohio Redistricting Commission to adopt a new General Assembly district plan. Petitioners here, The Ohio Organizing Collaborative, et al., agree with Senator Sykes and Leader Russo that this Court has the power to move the primary date and that the primary election for General Assembly offices must be moved because it cannot go forward on May 3, 2022. Petitioners respectfully submit, however, that this Court may await the results of its March 16, 2022 order directing the Commission to enact a new General Assembly district plan before entering any further order directing the Secretary of State to conduct the primary election on a particular date. After the Commission adopts a new plan on March 28, 2022, petitioners will determine whether to file objections. Whether the primary election should go forward on June 28, or some other date, depends on whether the Commission complies with this Court's order and the Ohio Constitution. The Commission's work and statements since March 16 have been encouraging, but whether it will ultimately enact a constitutional plan remains to be seen.

Petitioners here respectfully suggest the following procedure: If petitioners file objections to the new plan that the Commission adopts on March 28, then they will address the need to move the primary election and an appropriate date in their objections and request for relief. Conversely, if none of the challengers in these apportionment cases (Nos. 2021-1193, 2021-1198, and 2021-1210) file objections *and* the General Assembly does *not* set a new primary election date by Monday, April 4, 2022, then this Court should order respondents to show cause, on an expedited basis, why the Court should not order respondent Secretary of State Frank LaRose to conduct the primary election on the next Tuesday that is fifteen weeks after the Court's order.

This procedure would give the General Assembly and this Court time to review and respond to the next district plan and take into account potential further objections, should any be necessary.

We explain these suggestions in greater detail below.

I. This Court Has Authority to Direct the Secretary of State to Conduct the Primary Election on a Different Date to Effectuate Its Orders

For the reasons stated in the motion filed by Senator Sykes and Leader Russo, petitioners agree that this Court has the equitable authority to direct the Secretary of State to conduct the primary election on a postponed date. *See* Sykes-Russo Mot. at 3. In fact, this Court's orders *already* have effectively required the primary election date to be moved to a later date because invalidating the third plan meant that conducting the primary election on May 3, 2022, would be impossible. Ordering the specific date on which the primary election will take place, if the other branches fail to do so, is a logical and necessary corollary of this Court's constitutional authority to invalidate the General Assembly district plan in the first instance.

As the Secretary of State has recognized, he cannot conduct a primary election with a General Assembly district plan that this Court has declared to be unconstitutional. *See* Secretary LaRose's Response to Plaintiffs' Motion for a Temporary Restraining Order to Maintain the Third Plan at 1, *Gonidakis v. LaRose*, No. 2:22-CV-773 (ECF No. 88 Mar. 22, 2022) (acknowledging that this Court "invalidated" the Commission's third plan, leaving him no choice but to "pause" implementation of that plan). In his federal court filing, Secretary LaRose seems to invite the federal court to order him to implement the Commission's third plan, but further acknowledges that if the federal court does *not* order him to implement the third plan by close of business on March 23, "he will have to instruct the boards of election to proceed with the 2022 primary election without the state legislative races being part of that election." *Id.* at 3. There is

no legitimate basis for the federal court to override ongoing state redistricting proceedings, which means the primary election for General Assembly offices cannot take place on May 3.

At the same time, all parties on both sides agree that there will be a primary. If the General Assembly fails to set a new primary date, then this Court should enter an order that is necessary and proper to carry out its constitutional mandate and orders.

II. This Court May Wait Until After the Commission Adopts Its New Plan Before Considering Whether and How to Exercise its Authority to Move the Primary

Because the May 3 primary election date inevitably must change to a later appropriate date, if this Court determines that moving the date now is necessary to effectuate its orders, petitioners would not oppose or object to that course of action. But petitioners respectfully suggest that the Court may wait for further developments and limited briefing relating to those developments, if necessary, before it acts. The Commission has scheduled public meetings every day from March 23 through March 28.¹ It has hired independent mapmakers to assist the Commission in drafting a fourth plan.² And it has accepted the assistance of two mediators from the Sixth Circuit to help the Commission reach consensus on a new plan.³ On March 28, the Commission may adopt a constitutional plan. If and when it does so, the General Assembly can be expected to set an appropriate primary election date. In that scenario, this Court would not need to exercise its authority to set the primary election date.

¹ <https://redistricting.ohio.gov/meetings>.

² <https://www.wcbe.org/wcbe-news/2022-03-22/redistricting-commission-agrees-to-consultants-for-latest-effort-to-redraw-maps>; <https://ohiocapitaljournal.com/2022/03/22/ohio-redistricting-commission-adds-two-new-mapmakers>.

³ <https://www.news5cleveland.com/news/election-2022/ohio-redistricting-commission-adds-federal-mediators-to-work-with-mapmakers>.

It is also possible, however, that the Commission may not enact a constitutional plan. If the Commission were to default or enact an unconstitutional plan, then litigation would continue. In that circumstance, the June 28, 2022 primary election date proposed by Senator Sykes and Leader Russo likely would come too soon. For instance, Ohio law requires candidates to file a declaration of candidacy and requires the Secretary of State to certify the form of ballots to be used in the primary election, together with the names of candidates to be printed on the ballots. Rev. Code § 3513.05. The General Assembly has the power to modify these deadlines and to delegate authority to the Secretary of State to adjust them (*see* 134th General Assembly, H.B. 93, Section 4), but regardless of statutory deadline, the Secretary of State and county boards of elections will need time to receive updates to declarations of candidacy, certify ballots, and print and mail absentee ballots.

How much time? Judging by the Secretary of State's directive to county boards to conduct the May 4, 2022 primary election based on the February 24, 2022 plan,⁴ 69 days (the difference between these dates) is sufficient time to prepare for a primary election after adopting a new plan. Thus, if litigation concerning the fourth plan continues in this Court, then the primary election should be held about 69 days after further litigation could be expected to conclude. For example, if litigation were expected to conclude on June 15, then a primary election on August 23, 2022, would afford the State and counties sufficient time to conduct the primary on that later date. Because these calculations based on further litigation are currently hypothetical, however, the Court may make its determination, if necessary, with further input from the parties based on the outcome of the Commission's redistricting proceedings on March

⁴ *See* Ohio Secretary of State, Directive No. 2022-26 (Feb. 26, 2022), <https://www.ohiosos.gov/globalassets/elections/directives/2022/directive-2022-26.pdf>.

28. Petitioners would address the proper date for the primary election in any objections to the fourth plan and respondents would have an opportunity to respond.

Finally, as noted, if the Commission enacts a plan on March 28 and petitioners do *not* file objections to the plan, the possibility that the General Assembly would fail to set a new primary election date would remain. In that scenario, the Court would need to act to carry out its orders invalidating the third plan, which effectively postponed the May 3 primary *sine die*, so that Ohioans can vote in a primary election for General Assembly seats in 2022. Petitioners suggest that in that scenario, the Court should order respondents to show cause why Secretary of State LaRose should not conduct the primary election on the next Tuesday fifteen weeks after the Court issues its order. If it issued such an order on April 5, 2022, for example, the proposed primary election date (subject to the Secretary's response) would be July 19, 2022.

CONCLUSION

Petitioners respectfully submit that this Court has authority to move the primary date and do not oppose the motion, but respectfully suggest that this Court may await the outcome of its March 16 ruling before deciding whether and how to exercise its authority.

Dated: March 23, 2022

Respectfully submitted,

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