

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

Bria Bennett, *et al.*,

Petitioners,

v.

Ohio Redistricting Commission, *et al.*,

Respondents.

Case No. 2021-1198

Ohio Organizing Collaborative, *et al.*,

Petitioners,

v.

Ohio Redistricting Commission, *et al.*,

Respondents.

Case No. 2021-1210

**RESPONDENTS HUFFMAN AND CUPP'S RESPONSE TO RESPONDENTS RUSSO
AND SYKES' MOTION TO MOVE THE PRIMARY ELECTION DATE**

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INTRODUCTION

Respondents Russo and Sykes' Motion to Move the Primary Election encourages this Court to violate Article XI of the Ohio Constitution, the Ohio Revised Code, separation of powers principles inherent in the Ohio Constitution, and relies upon inapposite, mostly out of state cases to support their position. Additionally, Respondents Russo and Sykes make this motion, despite this Court already denying Petitioners the same relief sought, and in spite of the election chaos it would create. The Court should deny this baseless motion.

BACKGROUND

At every stage of this litigation, Petitioners have requested this Court enjoin the general assembly district plans adopted by the Commission. And at every stage of this litigation, this Court has declined to grant the injunctive relief requested by Petitioners.

All three sets of Petitioners requested the Court enjoin elections under the original legislative plan in their respective Complaints. After fully litigating the matter, this Court declined to grant injunctive relief and instead retained jurisdiction “to issue further remedial orders in an effort to have the redistricting commission adopt a plan that complies with Article XI in time.” *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-65, ¶¶ 135–39 (“*League I*”).

After the Commission enacted a new general assembly districting plan on January 22, 2022 (“First Revised Plan”), the Ohio Organizing Collaborative and Bennett Petitioners¹ requested the Court enjoin elections under the plan. (Objections of Petitioners the *Ohio Organizing Collaborative*, p 12; *Bennett* Petitioners’ Objections p 33). *Bennett* Petitioners further asked the

¹ League of Women Voters Petitioners did not expressly request injunctive relief; instead, they simply stated that the Court could “direct the legislature and secretary of state to make the necessary adjustments to the election schedule” without citing any authority. (Petitioners’ Objection to the Ohio Redistricting Commission’s Revised Map p 17).

Court to “stay or postpone the Feb 2, 2022 deadline for candidates for legislative offices to submit petitions and declarations of candidacy.” (*Bennett* Petitioners’ Objections p 33). Again, this Court declined to enjoin the any statutory deadlines or even the use of legislative plan at issue. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-342, ¶¶ 66–68 (“*League II*”). The majority also noted that the General Assembly has the authority to alter the statutorily-set primary election dates. *Id.* at ¶ 66.

Then, after the Commission enacted a new general assembly districting plan on February 24, 2022 (the “Second Revised Plan”), Petitioners renewed their requests for injunctive relief. (*LWV* Petitioners’ Objections to General Assembly District Plan Adopted on February 24, 2022 p 37-38; Objections and Request for Remedies of Petitioners the *Ohio Organizing Collaborative*, pp 15–20; *Bennett* Petitioners’ Objections to General Assembly District Plan Adopted on February 24, 2022 p 31). *League of Women Voters* Petitioners requested this Court “strike down the February 24 Plan and enjoin its implementation, including Secretary LaRose’s apparent instructions that election officials prepare for the May 3 primary utilizing the February 24 Plan.” (*LWV* Petitioners’ Objections to General Assembly District Plan Adopted on February 24, 2022 p 31). *Ohio Organizing Collaborative* Petitioners noted that “Should it become necessary, this Court can also direct the Secretary of State and General Assembly to make the required adjustments”² – but requested as a last resort that “if this Court determines that it cannot secure compliance with its rulings, then it should declare an impasse, after which a federal court will provide federal remedies, with due respect for this Court’s rulings on the meaning of Ohio law.” (Objections and

² The full remedy requested by the Ohio Organizing Collaboration stated that the Court “should invalidate and enjoin the use of the February 24 Plan, declare that the Rodden Plan is valid, and direct the Commission to state whether it will adopt the Rodden Plan and if not, why it refuses to do so. It should retain jurisdiction should further relief be necessary, and if the Commission refuses to enact a constitutional plan, the Court should schedule a contempt hearing to determine appropriate sanctions.”

Request for Remedies of Petitioners the Ohio Organizing Collaborative, et al. p 20). Lastly, *Bennett* Petitioners, citing Pennsylvania law, asked the Court to exercise its “authority to suspend or modify election-related deadlines until Ohioans are able to vote under constitutional maps.” (*Bennett* Petitioners’ Objections to General Assembly District Plan Adopted on February 24, 2022 p 31).³ This Court unilaterally declined to entertain Petitioners’ requests for injunctive relief, and again declined to move any election deadlines. See *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-789, ¶¶ 44-46 (“*League III*”).

Therefore Respondents Russo and Sykes’ Motion to Move the Primary Election date does nothing but waste this Court’s time relitigating issues raised by Petitioners at every stage of this litigation, that the Court has consistently declined to entertain.

ARGUMENT

I. This Court Has Already Resolved That it Does Not Have the Authority to Move the Primary.

Article XI, Section 9 of the Ohio Constitution explicitly provides what this Court may and may not do with regard to Ohio’s general assembly districting plan. This Court has the power to invalidate a general assembly district plan adopted by the Commission (Article XI, Section 9(D)(3)), but in doing so the Court may not order the Commission to adopt a particular district plan, may not draw a particular district, and shall not order “in any circumstance” the implementation of any general assembly district plan that has not been approved by the Commission (Article XI, Section 9,(D)(1-2). No provision of Article XI provides that the Court may move election deadlines, or otherwise usurp the power of the general assembly to regulate the

³ The full remedy requested by the Bennett Petitioners is for the Court to “invalidate the February 24 Commission Plan, enjoin its implementation, declare the Rodden III Plan constitutional, and issue any other remedies it deems appropriate and necessary to ensure that Ohioans are able to vote under constitutional General Assembly districts—up to and including ordering the adoption or implementation of the Rodden III Plan or some other constitutional plan itself.”

time, place, and manner of elections conducted in Ohio. Ohio R.C. 3501.01(E)(1) provides that the primary election “shall be held on the first Tuesday after the first Monday in May....” This year that falls on May 3, 2022.

In fact, Ohio R.C. 3501.40 specifically states that “no public official shall cause an election to be conducted other than in the time, place, and manner prescribed by the Revised Code.” Ohio R.C. 3501.40 defines “public official” as an “elected or appointed officer, employee, or agent of the state or any political subdivision, board, commission, bureau, or other public body established by law.” Clearly, under Ohio R.C. 3501.40, state court judges and Justices of the Ohio Supreme Court are “public officials” who may not grant Respondents Russo and Sykes their requested relief without violating Ohio R.C. 3501.40, and well-established separation of powers principles. Furthermore, this Court has also recognized that it is the general assembly, not this Court, which has the sole authority to set the election date and related deadlines.

The General Assembly established the date of the primary election, see R.C. 3501.01(E)(1), and it has the authority to ease the pressure that the commission’s failure to adopt a constitutional redistricting plan has placed on the secretary of state and on county boards of elections by moving the primary election, should that action become necessary.

League II, 2022-Ohio-342, ¶ 66.

For this Court to do reverse its prior holding now would violate the law of the case doctrine. *See Reid v. Cleveland Police Dep’t*, 151 Ohio St.3d 243, 2017-Ohio-7527, 87 N.E.3d 1231, ¶ 10 (O’Connor, J.) (“This court has long recognized the law-of-the-case doctrine is necessary to ‘ensure consistency of results in a case, to avoid endless litigation by settling the issues...’”). This Court has already decided this issue and there is no need to revisit the Court’s prior ruling. In fact, doing so could violate the due process rights of the other Commission members who have relied upon the Court’s previous holdings to inform their actions. *Reich v. Collins*, 513 U.S. 106, 111

(1994) (holding that a state supreme court reconfiguring its scheme in the middle of an election amounts to a “bait and switch” violating federal due process rights).

Furthermore, in both remedial proceedings, the Court only retained jurisdiction “for the purpose of reviewing the new plan.” *League I*, at ¶ 68; *League II*, at ¶ 45. This is consistent with the plain meaning of Article XI, Section 9 of the Ohio Constitution. *See* Ohio Const. Art. XI, §§ 9(D)(1) (“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 prescribed by this article.”), § 9(D)(2) (“No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.”).

II. Cases Cited by Respondents Russo and Sykes are Inapposite.

Respondents Russo and Sykes note (at footnote 3) that “[o]ther state high courts have recently suspended or modified election-related deadlines to ensure that voters may vote under constitutional maps.” But the cases cited by Respondents Russo and Sykes: *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022); *In the Matter of 2022 Legislative Districting of the State*, Misc. Nos. 21, 23, 25, 26, 27 Sept. Term 2021 (Md. Mar. 15, 2022); *Harper v. Hall*, 379 N.C. 656, 865 S.E.2d 301 (Dec. 8, 2021) actually show why this Court is barred from granting the requested relief.

Neither Pennsylvania, nor North Carolina, have statutes similar to Ohio R.C. 3501.40 expressly forbidding public officials from moving the time, place, or manner of an election. Nor do these states have a constitutional provision expressly limiting the power of their states’ courts with regard to redistricting plans. In fact, Petitioners have already cited to the *Carter* case as the only authority offered for their flawed premise that this Court can “direct the Secretary of State and General Assembly” to adjust the primary schedule. Not only did the Court decline to grant

petitioners relief along these lines, Justice Fischer noted that “*Carter* does not point to any authority allowing this Ohio court to modify Ohio’s primary-election date or schedule, especially considering that Ohio has a specific constitutional amendment that spells out this court’s role in the General Assembly-redistricting process.” *League III*, 2022-Ohio-789 ¶196. (Fischer, J. dissenting). If the same argument, based on the same case law has already failed, it is unclear why Respondents Russo and Sykes’ argument should now prevail.

The Maryland opinion cited by Respondents Russo and Sykes fares no better. Maryland’s constitution has an express provision that gives the Court of Appeals original jurisdiction and includes a “catch-all” provision that the appellate courts may “grant appropriate relief” in redistricting matters. *See* Maryland Constitution, Article III, Section 5. Ohio Const. Art. XI, §9 contains no such “catch-all” provision, and thus this Court “can exercise only such powers as [Ohio Const. Art. XI, §9] itself confer[s]...[and] [] can derive no power elsewhere.” *Kent v. Mahaffy*, 2 Ohio St. 498, 499 (1853).

Furthermore, the facts and the timing of each of the opinions cited by Respondents Russo and Sykes are inapposite. In *Harper v. Hall*, the North Carolina Supreme Court, which again, has no restriction by statute or constitution of the Court’s authority to move election deadlines, moved the primary two months later at the outset of the case. This allowed for a full trial on the merits, including a full discovery period with cross-examination of expert witnesses and time for appeals. This timetable allowed the North Carolina Board of Elections to administer the new plans and meet this new primary deadline with minimal election chaos for North Carolinians. *Harper*, 865 S.E.2d at 302-03. The order extending the primary was entered three full months before North Carolina’s previously scheduled primary, and before the close of candidate filing. *Id.* at 302. The Maryland Court moved a primary for gubernatorial elections, from June 28, 2022 to July 19, 2022.

Not only did the Maryland Court of Appeals issue this order over three months before the previously scheduled primary, it did so shortly before a scheduled hearing on the merits of the case. And the Pennsylvania Supreme Court in *Carter*, moved only filing deadlines, not a primary, in its opinion issuing a final plan to be used and implemented by the Secretary of the Commonwealth. Not only was this final opinion issued almost three months before the primary, it was, in fact, a final opinion settling the issue of which districts would be used in the 2022 elections. The opinion was also issued before the close of candidate filing.

Here, we are 41 days away from Ohio's primary election, and candidate filing closed over two weeks ago. There is no trial or merits hearing pending. There has been no true discovery throughout this case, and it does not appear that any will be ordered. Particularly, Respondents have had no opportunity to cross examine simulations experts regarding their opinions and data, including the experts that this Court has relied upon in previous opinions. Nor is there any final judgment or plan for the Secretary of State to administer in sight. But the 2022 election cycle is already well under way— it is simply too late seek this relief.⁴

Nor are Respondents Russo and Sykes' arguments that this Court has the inherent authority to move the primary date convincing. In fact, their arguments are expressly inconsistent with Ohio's constitution and law. This Court already recognized that it is the general assembly, not this Court, which has the exclusive authority to set the election date and related deadlines. *See League II*, ¶66. Thus, Petitioners' arguments on this subject have already failed. It is unclear why Respondents Russo and Sykes' feel that their arguments are any different or any better. They are, in fact, not any different, nor are they any better.

⁴ A point which LWVO Petitioners concede in their new Congressional challenge filed on March 22, 2022.

As discussed more fully in Respondents Huffman and Cupp's Response Opposing Petitioners' Motions to Enforce in case nos. 2021-1449 and 2021-1428, *Infinite Sec. Sols., L.L.C. v. Karam Properties, II, Ltd.*, 143 Ohio St. 3d 346, 353, 37 N.E.3d 1211, 1219, 2015-Ohio-1101, deals with the Courts ability to enter post-dismissal orders in connection with enforcing settlement agreements. *Hale v. State*, 55 Ohio St. 210, 213, 45 N.E. 199 (1896) deals with the court's "inherent" authority to "secure the attendance of witnesses." There is nothing so routine as securing witnesses or enforcing settlement agreements here. Nor do any provisions of the Ohio Constitution or any Ohio statute expressly govern the Court's ability to secure witness attendance or enforce settlement agreements. Comparing these cases to Respondents Russo and Sykes' request to move a primary nearly two months is comparing apples to oranges.

Grove v. Emison, 507 U.S. 25, 33, 133 S. Ct. 1075, 122 L.Ed. 2d 388 (1993), cited by Respondents Russo and Sykes, has no relevance. Whether the federal court should abstain or defer its exercise of jurisdiction in the pending impasse lawsuit is a question for the federal court to decide. *Id.* at 32. The issue in *Grove* was whether a federal court should defer to a state court proceeding where there was a chance that the state court litigation could resolve the federal issues in time for elections to proceed as scheduled. *Id.* at 36-37. Here, where these issues have been litigated for five months already, it is not at all clear that the state court litigation will resolve the issues in time for the election to proceed in an orderly fashion. Furthermore, the Court in *Grove* was not dealing with delaying the elections or moving the primary. However, the *Grove* Court held that it would be permissible for the federal court to put scheduling constraints on the state court, and even adopt its own plan if it were clear that the state court could not, or would not, be able to develop a plan. *Id.*

Finally, Respondents Russo and Sykes' citation to *City of Norwood v. Horney*, 110 Ohio St. 3d 535, 2006 Ohio 3799, 853 N.E.2d 1115, ¶119, is also misplaced. There, the statute in question forbade an injunction on appeal in certain eminent domain actions. In determining that statute unconstitutional for violation of separation of powers, the Court noted the inherent authority it had over appeals and the appellate system, which was delegated to the Court by the Ohio Constitution. No one is usurping the power of the Court here. The limit on the Court's power here is Article XI itself, which unless Respondents Russo and Sykes are arguing is unconstitutional, does not support the position that the Court may take action not provided for in the Ohio Constitution, and expressly forbidden by the Ohio Revised Code.

CONCLUSION

For the reasons stated herein, the Court should deny Respondents Russo and Sykes' Motion to Move the Primary Election.

Respectfully submitted this the 23rd day of March, 2022

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