

In the
Supreme Court of Ohio

LEAGUE OF WOMEN VOTERS OF OHIO, et al., :
:
: **Relators,** : **Case No. 2021-1193**
:
: **v.** : **Original Action Pursuant to**
: **Ohio Const., Art. XI**
OHIO REDISTRICTING COMMISSION, et al., :
: **Apportionment Case**
Respondents. :

BRIA BENNETT, et al., :
:
: **Relators,** : **Case No. 2021-1198**
:
: **v.** : **Original Action Pursuant to**
: **Ohio Const., Art. XI**
OHIO REDISTRICTING COMMISSION, et al., :
: **Apportionment Case**
Respondents. :

OHIO ORGANIZING COLLABORATIVE, et al., :
:
: **Relators,** : **Case No. 2021-1210**
:
: **v.** : **Original Action Pursuant to**
: **Ohio Const., Art. XI**
OHIO REDISTRICTING COMMISSION, et al., :
: **Apportionment Case**
Respondents. :

**SECRETARY OF STATE FRANK LAROSE'S RESPONSE TO
SYKES AND RUSSO'S MOTION TO MOVE THE PRIMARY ELECTION DATE**

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I. INTRODUCTION

Sykes and Russo's motion to move the primary election date is a thinly-veiled attempt to circumvent the power of the General Assembly and to achieve an alleged strategic advantage in the *Gonidakis* federal case. This Court lacks the authority to grant Sykes and Russo that relief and their motion should be denied.

This Court's original jurisdiction in these Apportionment Cases arises not in mandamus but under Article XI, Section 9 of the Ohio Constitution. Section 9 provides the sum total of remedies available to this Court – ordering the Commission to replace or revise a general assembly plan. It does not give this Court the authority to move the primary election date. What is more, R.C. 3501.40 specifically prohibits public officials, like the Secretary of State and your Honorable Justices, from moving an election date. That power is reserved exclusively for the General Assembly through legislative action. Any “inherent powers” that this Court might possess in equity does not rise high enough to overcome its clear lack of constitutional authority and the statutory prohibition against moving the primary election date.

Sykes and Russo correctly point out that Chief District Judge Marbley vacated the stay in *Gonidakis et al. v. LaRose*, S.D. Ohio No. 2:22-cv-773, and a three-judge panel was appointed to hear that case moving forward. True, the *Gonidakis* Plaintiffs have moved the *Gonidakis* panel to implement the February 24 plan via temporary restraining order. But that does not change one thing here. First, Sykes and Russo are Respondents in this case. They bring no legal claims and they articulate no alleged harms in *this* case that a postponement of the primary election would allegedly remedy. Second, they fail to explain how the *Gonidakis* case would impede the Commission's work to draft a general assembly plan that complies with this Court's decision invalidating the February 24 plan. The Commission is and will continue to work towards that goal through at least March 28, 2022. Nothing the *Gonidakis* panel does will frustrate that.

Ironically, Sykes and Russo are sitting legislators who can seek their legislative fix from their colleagues in the General Assembly. They apparently cannot muster enough support for legislation to move the primary election date so they've come here asking this Court, improperly, to do it. Again, this Court lacks authority, but even so, to grant Sykes and Russo's motion would be to trample on the powers vested exclusively to the General Assembly and to upset the separation of powers set forth in the Ohio Constitution. For these reasons, this Court should deny Sykes and Russo's motion to move the primary election date.

II. LAW AND ARGUMENT

A. This Court lacks authority to move the 2022 primary election date.

In essence, Sykes and Russo ask this Court for an injunction moving the 2022 primary election from May 3, 2022 to June 28, 2022. This Court lacks the authority to do so. The Apportionment Cases are original actions arising under Ohio Const., Article XI, Sect. 9(A). *See, LWV, et al. v. Ohio Redistricting Commission, et al.*, Ohio Sup. Ct. Case No. 2021-1193, *Bennett, et al. v. Ohio Redistricting Commission, et al.*, Ohio Sup. Ct. Case No. 2021-1198, *Ohio Organizing Collaborative, et al. v. Ohio Redistricting Commission, et al.*, Ohio Sup. Ct. Case No. 2021-1210. Thus, the scope of this Court's jurisdiction, including the availability of remedies, is limited by the provisions of Article XI, Section 9.

Section 9 limits this Court's remedial powers to ordering the Ohio Redistricting Commission to reconstitute, reconvene and remedy any alleged constitutional violations of a general assembly plan. In fact, in an apportionment case under Article XI, this Court has only one remedial power – to order the Commission to either amend a general assembly plan or adopt an entirely new plan. Ohio Const., Art. XI, Sect. 9(3)(a)-(c). This Court cannot even “order the commission to adopt a particular general assembly plan or to draw a particular district.” Sect. 9(D)(2). Nor can it “order, *in any circumstance*, the implementation or enforcement of any general

assembly district plan that has not been approved by the commission.” Sect. 9(D)(1)(emphasis added).

Further, the General Assembly has reserved to itself the authority to set the time and place of an election. R.C. 3501.40 provides: "Except as permitted under section 161.09 of the Revised Code, and notwithstanding any other contrary provision of the Revised Code, *no public official* shall cause an election to be conducted other than in the time, place, and manner prescribed by the Revised Code." (emphasis added). "Public Official" is defined as, "any elected or appointed officer, employee, or agent of the state or any political subdivision, board, commission, bureau, or other public body established by law." R.C. 3501.40. Violation of R.C. 3501.40 is a misdemeanor of the first degree.

The date for the primary election is set by the General Assembly in statute. In Ohio, “primary elections shall be held on the first Tuesday after the first Monday in May of each year except in years in which a presidential primary election is held.” R.C. 3501.01(E)(1). The General Assembly, through statute, set the 2022 primary election for May 3rd. When it enacted R.C. 3501.40, the General Assembly prohibited all public officials, which includes the judicial officers of this Honorable Court, from moving the primary election. R.C. 3501.40. Thus, only the General Assembly through legislative action may move the election.

Sykes and Russo ignore the two most glaring fatal flaws in their argument – that Art. XI, Sect. 9 provides no authority for moving the primary election, and that R.C. 3501.40 specifically prohibits it. Rather, they claim that this Court can move the primary election through its "inherent authority to issue an injunction and 'do all things reasonably necessary to the administration of justice in the case before it.'" Mot. to Move Primary Elect. Date, p. 3. None of the cases that Sykes and Russo cite support their notion that this Court possesses some “inherent authority” to move

the primary election date. For example, *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 was an eminent domain case where this Court recognized a court's inherent power to stay the destruction of a particular piece of property pending appeal. *Id.*

Clearly, *City of Norwood* is inapplicable here. The matter before this Court is a very particularized action to review constitutional provisions regarding decennial reapportionment of state legislative districts. The question of *when* the primary election occurs is irrelevant to the question of whether the district plan complies with the geographic and partisan requirements of the Ohio Constitution--so long as that election occurs sufficiently in advance of the general election so as to allow for its constitutional administration. Critically, Sykes and Russo are Respondents in this case. They assert no claims, much less a claim that existing election related deadlines somehow violate state or federal law. Nor could they, because the Ohio Supreme Court lacks jurisdiction over declaratory judgment actions. *See State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153, ¶ 14 (noting that the Ohio Supreme Court lacks original jurisdiction to grant a declaratory judgment).

Respondents' other citations of authority are also inapposite. *Infinite Security Solutions vs. Karam Properties II, Ltd.*, 143 Ohio St. 3d 346, 2015-Ohio-1101, 37 N.E.3d 1211 concerned the question of when a court retains jurisdiction to enforce a settlement agreement, and whether there exists such a thing as a "conditional dismissal." Mot. to Move Primary Elect. Date, p. 3. Finally, *Hale v. State*, 55 Ohio St. 210 (1896), which dealt with the court's ability to punish contempt of court of a party already before the court, offers no support whatsoever for this Court to order the Secretary of State to postpone the primary election in direct derogation of the Ohio Constitution and R.C. 3501.40. *Id.* at 3.

This Court's own precedent establishes that it lacks the authority to move the primary election when doing so contravenes both Ohio Const., Art. XI, Sect. 9 and R.C. 3501.40. In *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St. 3d 246; 2006-Ohio-5202, 855 N.E. 2d 1188, ¶ 37, this Court ruled that "if the General Assembly has provided a remedy for the enforcement of a specific new right, a court may not on its own initiative apply another remedy it deems appropriate." In *Blackwell*, the Ohio Democratic Party brought a mandamus action to compel the Secretary of State to perform certain acts allegedly required by Ohio's Campaign Finance Law. *Id.* ¶1. This Court dismissed the mandamus action for lack of jurisdiction because Ohio law gave the Ohio Election Commission exclusive jurisdiction over the campaign finance laws at issue. *Id.*, ¶ 39. In construing the relevant campaign finance laws, this Court's "paramount concern [was] legislative intent," *Id.*, ¶ 13 citing *State ex rel. Musial v. N. Olmsted*, 106 Ohio St.3d 459, 2005-Ohio-5521, 835 N.E.1243, ¶ 23. "To determine this intent, we read words and phrases in context and in accordance with the rules of grammar and common usage." *Id.*, ¶ 13 citing *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145, ¶ 37. The *Blackwell* Court found that, "had the General Assembly intended to authorize other tribunals or other courts to exercise the initial jurisdiction...it would have so provided, but it did *not*." *Id.*, ¶ 16. "Instead, the General Assembly employed broad, sweeping language to confer the exclusive initial jurisdiction..." *Id.*

Blackwell is relevant two ways - the limitations on this Court's authority under Section 9 and the limitations on *all* public officials set forth in R.C. 3501.40. If Section 9 intended to give this Court the authority to move election deadlines, it would say so. It does not. Similarly, if the General Assembly intended to give courts the authority to move election deadlines, it would have done so. It did not. Instead, it uses broad sweeping language to prohibit all public officials from

moving the date of an election. R.C. 3501.40. And, as in *Blackwell*, in so doing the General Assembly did not contravene jurisdiction, whether in mandamus or under Section 9, that the Supreme Court otherwise had. *Blackwell*, 111 Ohio St. 3d 246, ¶ 32. Instead, it simply reinforced the fact that it is the province of the General Assembly – not a court - to set Ohio’s election deadlines. Sykes and Russo have offered no legal support for their flawed notion that this Court can sidestep Ohio law and move the primary election under its “inherent authority” to do all things necessary. Indeed, *Blackwell* advises against it. This Court lacks the authority to order the Secretary of State to move the primary election and Sykes and Russo’s motion should be denied.

B. Sykes and Russo are seeking a strategic advantage in the *Gonidakis* federal case.

Sykes and Russo baldly ask this Court to move the primary date, not to remedy a present harm in *this* case, but to thwart the *Gonidakis* Plaintiffs’ motion for a temporary restraining order, which asks the federal court to implement the Ohio Redistricting Commission’s February 24 Plan. Mot. to Move Primary Elect. Date at 3. They believe that if this Court moves the primary election, it “would ensure that this Court can continue working with the Commission to make progress” on a general assembly plan “unimpeded by the federal litigation in *Gonidakis*.” *Id.* at 2. In other words, Sykes and Russo want this Court to issue an injunction, which it has no authority to issue, simply to assist them in their litigation strategy against the *Gonidakis* Plaintiffs.

Sykes and Russo are wrong on two fronts. First, they are wrong as a matter of law. As previously stated, Sykes and Russo offer no legal support for this Court’s authority to issue an injunction moving the primary election, regardless of the harm alleged. Second, they fail to explain how the *Gonidakis* federal case would impede the Commission’s work on drafting a general assembly plan that complies with this Court’s most recent decision invalidating the February 24 Plan. In that decision, this Court directed the Ohio Redistricting Commission to reconvene to draft

a new fourth plan. The Commission has followed this Court's order to the letter and is working to draft a new plan by the imposed deadline of March 28, 2022. Sykes and Russo are correct that the *Gonidakis* court has empaneled a three judge panel and the *Gonidakis* Plaintiffs have requested that the panel issue a temporary restraining order implementing the February 24 plan. But regardless of how the panel will rule on the *Gonidakis* Plaintiffs' motion for a temporary restraining order, the Ohio Redistricting Commission's work will continue at least through March 28. Even if this Court possessed the authority to move the primary election, which it does not, doing so would have no effect whatsoever on the Commission's work to draft a new fourth plan.

This Court's review and determination of the constitutionality of a fourth general assembly plan is unhindered by the primary election of all other state and local officers and voting on hundreds of local issues. Should the May 3 primary election occur as scheduled, the fourth attempt at reapportionment will continue to go forward. Granted, the primary election of legislators under an approved district plan would have to occur on a day other than May 3, but that is a matter for the General Assembly. Sykes and Russo claim no constitutional right to have legislative primaries on the same day as all other offices, for a very good reason - there is none. The Ohio Constitution does not even demand that a primary election be held *at all*. Ohio Const., Art. XI, Sect. 2 provides only that legislators be elected at biennial elections, which may be satisfied by the general election. Again, these are matters left exclusively to the General Assembly.

Sykes and Russo are currently serving legislators. Both have the power to introduce legislation to accomplish precisely what they request. In fact, just days ago Leader Sykes co-sponsored Senate Bill 316, which seeks to move the primary date to June 28, 2022. *See* S.B. 316, *available at*, https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb316/IN/00/sb316_00_IN?format=p

df. Other Democratic legislators also introduced House Bill 544, which would move the primary election date to June 7, 2022. See H.B. 544, *available at*, https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb544/IN/00/hb544_00_IN?format=pdf. These proposed *legislative* changes to the primary election date are the only appropriate avenues, not through this Court. But Sykes and Russo ask this Court to invade the separate authority of the General Assembly to accomplish for them an autocratic result. And one they believe will give them a strategic advantage in the *Gonidakis* case. By doing so, this Court would undermine our system of government as well as the doctrine of inherent constitutional power necessary to the function of the judiciary. This Court should reject Sykes and Russo's attempt to thwart the General Assembly's authority over these matters and deny their motion.

III. CONCLUSION

For the foregoing reasons, the Secretary of State requests that Sykes and Russo's Motion to Move the Primary Election Date be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, the *Secretary Of State Frank Larose's Response To Sykes And Russo's Motion To Move The Primary Election Date* was filed electronically. I further certify that a copy of the foregoing has been served via the electronic mail upon the following counsel for Relators.

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