

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

**RESPONDENTS HUFFMAN AND CUPP'S RESPONSE TO PETITIONERS' LATEST
MOTION FOR AN ORDER TO SHOW CAUSE**

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INTRODUCTION

Petitioners' Motion immediately calls to mind fables like the Boy Who Cried Wolf or Chicken Little—they are either feigning emergency for attention or reacting hysterically over a misunderstanding. As it turns out, there is no wolf, and the sky is not falling. Regardless of which tale Petitioners tell, at bottom, Petitioners have once again dashed breathlessly into court to seek its involvement unnecessarily, this time based on an aggressive and incorrect interpretation of this Court's April 14, 2022 Order. Petitioners ask this Court to require the Commission's immediate convening and rehiring of Drs. McDonald and Johnson to assist. Predictably, Petitioners' requested relief is now moot, as the Commission has convened without need for this Court's involvement. Moreover, Petitioners' interpretation of the April 14 Order is incorrect, and contempt would be wholly inappropriate. Respondents Cupp and Huffman¹ request that Petitioners' Motion be denied.

BACKGROUND

This is the third time these Petitioners have asked this Court to issue a show cause order. In their two prior motions, they were joined by the petitioners in the other two related cases before this Court. This time, they come alone. And for good reason. What they seek is contrary to the terms of the Order they seek to enforce – and contrary to what this Court has authority to require.

Moreover, Petitioners' principal complaint in their Motion was that the Commission had not yet met when they filed. Since Petitioners filed their Motion, the Commission convened on Wednesday, May 4, thus mooting Petitioners' motion.

¹ On May 3 and 4, 2022, Senate President Huffman and Speaker Cupp, each named as a Respondent in this action in his official capacity as member of the Ohio Redistricting Commission, relinquished their positions and, pursuant to Section 1(A) of Article XI of the Ohio Constitution, appointed Senator Rob McColley and Representative Jeff LaRe as members of the Commission. Ohio Civil Rules supplement this Court's Rules of Practice for this action. Order entered September 24, 2021, 2021-Ohio-3377. Pursuant to Civil Rule 25(D)(1), "the public officer's successor is automatically substituted as a party."

ARGUMENT

Petitioners' requested relief should be denied for at least the following reasons:

First, the Commission did not violate the April 14 Order, which did not specify a date certain by which the Commission must convene.

Second, Petitioners' requested relief is moot.

Third, neither the Speaker nor the President may be held in contempt as the April 14 Order does not direct either of them to do anything in his individual capacity.

Fourth, the Court cannot grant the relief Petitioners seek based on separation of powers principles and Article XI of the Ohio Constitution.

I. Standard of Review

Ohio courts “may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice.” Ohio Rev. Code Ann. § 2705.01. This requires proof of three elements by clear and convincing evidence: (1) “a prior order of the court”; (2) “proper notice to the alleged contemnor”; and (3) “failure to abide by the court order.” See *Brown v. Exec. 200, Inc.*, 64 Ohio St. 2d 250, 253, 416 N.E.2d 610, 613 (1980); *Armco, Inc. v. United Steel Workers of Am.*, No. 00-CA-95, 2001 WL 1773858, at *3 (3rd Dist. June 21, 2001); see also *Abernethy v. Abernethy*, 2010-Ohio-435, 2010 WL 457133, ¶ 27 (5th Dist. Feb. 11, 2010) (internal citations omitted). “[A] court order cannot be enforced in contempt unless the order was ‘clear and definite, unambiguous, and not subject to dual interpretations.’” *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 23 (quoting *State ex rel. Cincinnati Enquirer v. Hunter*, 138 Ohio St.3d 51, 2013-Ohio-5614, 3 N.E.3d 179, at ¶ 25).

II. The Commission did not violate the April 14 Order.

The April 14 Order and Petitioners' briefing itself illustrate why Petitioners' Motion is baseless. Petitioners' entire argument is based on their belief that the April 14 Order required the

Commission to *immediately* convene. However, this is nowhere in the April 14 Order. The only deadline this Court set in that order was the May 6, 2022 deadline to file the “entirely new General Assembly-district plan” that the reconstituted and convened Commission drafts and adopts. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-1235, ¶ 79. The Court did not set a deadline by which the Commission was required to convene, nor should it have. *Id.* at ¶ 78. The deadline to file a new district plan necessarily requires the convening of the Commission at some point prior to that deadline, and that was apparently sufficient for the Court.

Nor could Petitioners’ interpretation of that order as requiring the *immediate* reconvening of the Commission warrant an order of contempt. If so interpreted, the April 14 Order would not be clear and definite, but rather would be ambiguous and subject to dual interpretations—characteristics that this Court has found preclude enforcing a court order in contempt. *Toledo*, 2018-Ohio-2358 at ¶ 23. In other words, Petitioners’ interpretation would require that the April 14 Order be too vaguely worded to permit an order of contempt for any supposed violation.

Petitioners further ignore the April 14 Order—and reveal their true motive—by requesting that this Court do what it refused to do three weeks ago: order the Commission, after convening immediately, to re-engage Drs. Johnson and McDonald whom the Commission previously utilized no later than April 29, 2021. This Court recognized in the April 14 Order that it did not have the authority to order the Commission to do so, despite its stated belief that the Commission “should” undertake certain steps including retaining Drs. Johnson and McDonald and using their prior work “as a starting point for the next plan.” *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-1235, ¶¶ 74–77. All of these statements were only suggestions from the Court, however, in a section titled “*Possible* approach for the commission.” *Id.* (emphasis added). The fact that the Commission did not immediately formally convene, or convene on a timetable

preferred by Petitioners, should not and does not change this Court's prior holding that it lacks authority to grant the relief Petitioners now seek.

III. Petitioners' requested relief is moot.

An order of contempt could not provide Petitioners with the relief they seek in the Motion, as the requested relief has been mooted by events since their hastily filed Motion. The purpose of civil contempt sanctions is "remedial or coercive" and "often employed to compel obedience to a court order. Thus when compliance with the court's order has become moot, as when the case has been settled, civil contempt sanctions are no longer appropriate." *Nat'l Equity Title Agency, Inc. v. Rivera*, 2001-Ohio-7095, ¶ 13, 147 Ohio App. 3d 246, 252, 770 N.E.2d 76, 80 (citing *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 555, 740 N.E.2d 265, 269 (2001)); *State ex rel. Gaylor v. Goodenow*, 2010-Ohio-1844, ¶ 10, 125 Ohio St. 3d 407, 410, 928 N.E.2d 728, 731 ("It is not the duty of the court to answer moot questions, and when, pending proceedings * * * in this court, an event occurs, without the fault of either party which renders it impossible for the court to grant any relief, it will dismiss the petition * * *." (quoting *Miner v. Witt* (1910), 82 Ohio St. 237, 92 N.E. 21)); *Carver v. Deerfield Twp.*, 139 Ohio App. 3d 64, 77, 742 N.E.2d 1182, 1191 (2000) (citing *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791, 600 N.E.2d 736, 738) ("It is well established that courts cannot entertain jurisdiction over a moot question").

Petitioners ask this Court to order the Commission to meet and rehire Drs. McDonald and Johnson. Setting aside the fact that this Court declined to enter such an order on April 14, 2022, such relief at this stage would be futile. As of the date of this filing, the Commission *has* met and voted not to rehire Drs. McDonald and Johnson. Thus, an order of contempt requiring the Commission to convene would not remedy or coerce the Commission into convening; it has already done so.

IV. The Speaker and the President cannot be held in contempt because this Court did not order them to do anything.

As with Petitioners' prior efforts to have individual members held in contempt, the Speaker and the President have violated no order of this Court because this Court did not order them to do anything. As a result, this Court cannot hold them in contempt. *See Abernethy*, 2010-Ohio-435, at ¶ 27. In response to Petitioners' prior efforts, the Speaker and President explained why the Court cannot hold the Commission or its members in contempt. They will not belabor the point here. This Court's prior opinion clarified that the Commission is the only necessary party in this matter, and it has directed its orders only to the Commission itself rather than individual members. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinions Nos. 2022-Ohio-65, ¶ 61, and 2022-Ohio-342. Without an order directed to the Speaker and the President, the Court cannot hold them in contempt, as the existence of an order is a prerequisite to the exercise of the contempt power. *See Abernethy*, 2010-Ohio-435, at ¶ 27 ("The prima facie elements of civil contempt include the existence of a court order and the party's noncompliance with the terms of that order.").

Moreover, the actions of the Speaker and the President in redistricting are legislative, *Wilson v. Kasich*, 134 Ohio St. 3d 221, 228, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 20, and they are "entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott Harris*, 523 U.S. 44, 46, 118 S. Ct. 966, 969 (1998); *see also Costanzo v. Gaul*, 62 Ohio St.2d 106, 403 N.E.2d 979 (1980) (per curiam) (noting the similarity of the speech and debate provisions of the Ohio and federal constitutions); *Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 496, 760 N.E.2d 876, 877 (8th Dist. 2001) (same); *Dublin v. State*, 138 Ohio App.3d 753, 742 N.C.2d 232 (10th Dist. 2000) (same). Petitioners argue that the Court can hold individual members of the Commission in contempt (and certainly Petitioners appear to prefer the Court holding some, but

not all, of the Commissioners in contempt), but apparently have been unable to find any authority for the proposition that the Court can violate separation of powers principles to hold individual commissioners in contempt. Petitioners cite a lone 1886 Ohio Supreme Court case involving a municipal corporation, which spoke to potential contempt for holding “the members of council [of the municipality], or any of them” to be punished for contempt if they violated the injunction. *Forsythe v. Winans*, 44 Ohio St. 277, 7 N.E. 13 (1886). Of course, Petitioners neglect to mention that such a violation of the injunction could only be “after notice thereof has been served on them,” certainly implying that the injunction would need to be directed at the individual council members for contempt to be appropriate. *Id.* Regardless, the members of a municipal council do not exercise the same authority as members of the Commission, and do not enjoy the same legislative immunity. What’s more, Petitioners’ federal cases are inapposite, as they all deal with corporations—private actors—rather than the public officials who are operating pursuant to their constitutional authority. In short, the Court cannot hold individual members of the Commission, each exercising legislative authority, in contempt where the order is not directed at them and where doing so would violate separation of powers and legislative immunity.

V. The Court does not have the authority to grant Petitioners’ requested relief.

1. The Ohio Constitution, not the Court, requires the reconstituting and convening of the Commission.

The requirement that the Commission reconvene upon the invalidation of a redistricting plan derives from the Ohio Constitution, not the Court:

In the event that any section of this constitution relating to redistricting, *any general assembly district plan made by the Ohio redistricting commission*, or any district *is determined to be invalid by an unappealed final order* of a court of competent jurisdiction *then*, notwithstanding any other provisions of this constitution, *the commission shall be reconstituted* as provided in Section 1 of this article, *convene, and ascertain and determine a general assembly district plan* in conformity with such provisions of this constitution as are then valid, including

establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next time for redistricting under this article in conformity with such provisions of this constitution as are then valid.

Ohio Constitution, Article XI, Section 9(B) (emphasis added). In other words, the only proper role of the Court in the redistricting process is to determine the validity of the redistricting plan; the Ohio Constitution, rather than the Court, instructs the Commission to reconstitute, convene, and determine a constitutionally-complaint plan.

While Petitioners contend that Article XI “confers on this Court robust oversight authority over the redistricting process” and that Section 9(B) in particular “expressly contemplates that . . . the Court may ‘order’ the Commission to take specific legislative actions,” that authority is nowhere to be found in the Ohio Constitution. Importantly, because the requirement that the Commission be reconstituted and convene derives from the Constitution, the Court cannot (through its contempt power or otherwise) order the Commission to convene by a date certain or “re-engage” any particular expert or consultant. As the Court has recognized, these are mere observations, recommendations, or suggestions for a “possible approach for the commission” that the Court is without constitutional authority to enforce. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-1235, ¶ 74. Instead, the Court’s only constitutional authority is to invalidate plans presented to it which it deems unconstitutional. *Id.* ¶¶ 63-66, 72, 74.

2. A finding of contempt would violate separation of powers doctrine.

Troublingly, as in their earlier contempt motions, Petitioners continue to invite this Court to trample well-established separation of powers principles in their quest to domineer the remapping process with the Court’s assistance. This Court should decline that invitation, as the separation of powers principles at issue in the prior briefing relating to contempt ring just as true in the instant motion. Incredibly, they argue that the only way for a Commission member to avoid

contempt is to “simply vote for a course of action that complies with the Court’s order.” Petitioners’ Br. At 9. That is exactly what this Court has repeatedly held to violate separation of powers doctrine.

As argued in the prior contempt proceedings, the Court here should avoid encroaching on the legislative power, as the Court can neither prohibit nor require the adoption of a law. *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶¶ 26-28. “[T]he 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)). The legislative process mandated by the Ohio Constitution is still ongoing. This Court should refrain from interfering with that process. *See DeRolph v. State*, 93 Ohio St. 3d 309, 2001-Ohio-1343, 754 N.E.2d 1184, 1211–12 (Douglas, J., concurring) (counseling against holding the legislature in contempt), *rec’d*, 93 Ohio St. 3d 628, 758 N.E.2d 1113, 2001-Ohio-1896, *and vacated on reconsideration by*, 97 Ohio St. 3d 434, 2002-Ohio-6750, 780 N.E.2d 529.

Moreover, as discussed above, Article XI, Section 9(B) requires the Commission to reconstitute and convene after a plan is invalidated – tasks that are assigned to the Commission in its exercise of legislative authority. *Wilson v. Kasich*, 134 Ohio St. 3d 221, 228, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 20. For the Court to require this to be done within a certain time, and to require it to be accomplished in a certain manner, as Petitioners request, would be to exercise legislative discretion through judicial fiat. The Court should not and cannot micromanage the Commission in the exercise of its constitutional mapdrawing authority; for just as it would violate separation of powers principles for the Court to specify how the maps should be drawn, it would similarly violate separation of powers principles for the Court to require the exercise of legislative discretion by demanding the Commission to meet on a certain date and hire certain consultants. The Court

avoided this separation of powers violation in its April 14 Order by appropriately opting to allow the Commission to set its own schedule to ensure compliance with the May 6 deadline. It should not reopen this issue by granting Petitioners' requested relief.

CONCLUSION

Petitioners' interpretation of the April 14 Order is incorrect, and their requested relief is moot. There is no reason or authority supporting a finding of contempt. This Court should deny Petitioners' Motion.

Respectfully submitted this the 5th day of May, 2022.

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