

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
Original Action pursuant to
Ohio Constitution, Article XI
[Apportionment Case]

BRIA BENNETT, et al., :
 :
 Petitioners, :
 :
 v. :
 :
 OHIO REDISTRICTING COMMISSION, et al., :
 :
 Respondents. :

Case No. 2021-1198
Original Action pursuant to
Ohio Constitution, Article XI
[Apportionment Case]

OHIO ORGANIZING COLLABORATIVE, et al., :
 :
 Petitioners, :
 :
 v. :
 :
 OHIO REDISTRICTING COMMISSION, et al., :
 :
 Respondents. :

Case No. 2021-1210
Original Action pursuant to
Ohio Constitution, Article XI
[Apportionment Case]

AUDITOR OF STATE KEITH FABER'S RESPONSE TO SHOW CAUSE

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Captioned otherwise, Petitioners again filed show-cause motions asking the Court to require the Ohio Redistricting Commission and its individual members to file a written statement and appear before the Court to explain why Respondents did not comply with the Court’s May 25 Order in *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Case No. 2021-1193, *Bennett v. Ohio Redistricting Comm.*, Case No. 2021-1198, and *Ohio Organizing Collaborative v. Ohio Redistricting Comm.*, Case No. 2021-1210, Slip Opinion No. 2022-Ohio-1727 (“*LWV V*”). The Court is well aware of the facts and the law surrounding this case and governing consideration of these show-cause motions. In the interest of brevity, Auditor of State Keith Faber points to his prior responses filed with the Court.

Auditor Faber is but one member of the seven-member Ohio Redistricting Commission. Acting alone he cannot compel the Commission to take any action; instead, it requires at least three other members to act with him. Over the last few months, Auditor Faber has routinely taken proactive steps to help the Commission comply with the Court’s various orders—including its most recent May 25 Order. And again, Petitioners have not and cannot satisfy their burden to show that Auditor Faber should be held in contempt. The Court should reject the invitation to hold the Auditor of State—a duly elected constitutional officeholder and constitutionally assigned member of the Ohio Redistricting Commission—in contempt.

I. The Court’s May 25 Order and What Has Transpired Since.

The facts of what happened since the Court’s May 25 decision are not in dispute. This Court issued its decision in *LWV V* on May 25, 2022. Like it had previously, the Court “order[ed] the commission to be reconstituted, to convene, and to draft and adopt an entirely new General Assembly-district plan that meets the requirements of the Ohio Constitution, including Article XI, Sections 6(A) and 6(B).” *Id.* at ¶ 5. The Court gave the Commission until the morning of June 3

to file a General Assembly-district plan with the Secretary of State and until noon to file the plan with the Court. *Id.* at ¶ 6. As it had with prior plans, Petitioners were given an opportunity to file objections to the map and Respondents had an opportunity to file a response. *Id.* at ¶ 7. And like in *LWV IV*, the Court allowed the Commission to seek an extension of time, for good cause, to file the General Assembly-district plan with the Secretary of State. *Id.* at ¶ 8.

In its May 25 decision, the Court also acknowledged that a three-judge federal court panel stated that if Ohio did not pass a new General Assembly-district plan that satisfied federal law by May 28, the federal court would order the primary election for General Assembly races to be moved to August 2 and order the use of the Third Plan that was previously adopted by the Commission on February 24. *Gonidakis v. LaRose*, S.D. Ohio No. 2:22-cv-0773, 2022 WL 1175617, *2-3, 30. When no new map was passed and implemented prior to May 28, the federal court did, in fact, order that the Third Plan be implemented only for the 2022 election cycle. *Gonidakis v. LaRose*, S.D. Ohio No. 2:22-cv-0773, 2022 WL 1709146, *1.

Auditor Faber took a number of proactive steps to comply with the Court's May 25 Order. Prior to the June 3 deadline, Auditor Faber reached out to each of the Commission members to urge them to reconvene in order to comply with the Court's May 25 Order. Auditor Faber instructed his staff to do the same with their counterparts. In addition, Auditor Faber suggested using the map he circulated prior to the re-adoption of the Third Plan as a starting point for the Commission. He also encouraged fellow Commission members to seek an extension from this Court. Ultimately, Auditor Faber could not convince three of his fellow Commission members to agree with him to do anything. As a single member of the Commission, there was nothing that the Auditor could have done on his own to force the Commission to act.

II. The Court cannot hold the Commission and its individual members in contempt.

The law on this issue has been thoroughly briefed by all of the parties in previous motions that were rejected by the Court. Rather than entirely reproduce those arguments here, Auditor Faber reiterates three points.

First, the only way that the Ohio Redistricting Commission can act is for a majority of its seven members to approve any action. Ohio Constitution, Article XI, Section 1(B)(1). Auditor Faber is but a single member of the Commission and, therefore, cannot act on behalf of the Commission to draft and adopt a General Assembly-district plan.

Second, Auditor Faber was not individually ordered to do anything in the Court's May 25 Order. Even so, Auditor Faber took a number of proactive steps to comply with the May 25 Order. He asked each of his fellow Commission members to convene a meeting. He asked the Commission to consider the map he and his staff had drawn—which, in part, was based upon the independent map drawers' incomplete map—as a starting point. He asked his staff to work with their counterparts. He asked his fellow Commission members if the Commission could seek an extension as provided for in the May 25 Order. Auditor Faber was actively trying to get the Commission to comply with the Court's order.

Third, the Commission is its own constitutionally created entity and the Court cannot hold the Commission in contempt for failing to exercise its legislative duties in a way that the majority of this Court might desire. *See Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 27 (“The separation-of-powers doctrine therefore precludes the judiciary from asserting control over ‘the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control.’ ”). If the Court held the Commission and its individual

members in contempt, there would be significant separation-of-powers concerns that would have long-lasting effects across the State.

III. The Ohio Constitution does not permit this Court to impose arbitrary deadlines and rules on the Ohio Redistricting Commission's duty to pass a General Assembly-district plan.

In some form, Petitioners each argue that the Court has the authority to impose arbitrary deadlines and restrictions on *when* and *how* the Commission must enact a General Assembly-district plan. They largely rely upon the Court's inherent authority to manage its docket to further this argument. *See, e.g.,* Bennett Petitioners' Motion, at 1; League of Women Voters Petitioners' Motion, at 3-4; Ohio Organizing Collaborative Petitioners' Motion, at 1.

But as noted above, the Commission is its own constitutionally created branch of government that has solely been delegated by the Ohio Constitution with the legislative function of apportionment. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Case No. 2021-1193, *Bennett v. Ohio Redistricting Comm.*, Case No. 2021-1198, and *Ohio Organizing Collaborative v. Ohio Redistricting Comm.*, Case No. 2021-1210, Slip Opinion No. 2022-Ohio-65, at ¶ 76, 79; *see also Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 18-24. The Commission is independent of the judiciary and must be afforded the same independence to discharge its duties as any other constitutionally created branch of government.

Petitioners overstate their argument by suggesting that the Court's ability to control *its docket* is equal to requiring a separate branch of government to carry out its constitutional duty in a certain fashion by a certain date. It is one thing to say that a motion must be filed within ten days; it is something else entirely to require the Commission to draft and adopt a General Assembly-district plan and file it with the Court within ten days. Nothing in Article XI authorizes the Court to control the mechanics of the Commission's adoption of a General Assembly-district plan.

Just the opposite is true. It is the plain language of Article XI, Section 9(B) itself that provides that in these circumstances “the commission shall be reconstituted *as provided in Section 1 of this article*, convene, and ascertain and determine a general assembly district plan * * * .” (Emphasis added.) Article XI, Section 8 reinforces that it lies within the authority of the Commission itself that it “shall be reconstituted as provided in Section 1 of this article * * * .” The authority to reconstitute and reconvene, then, is within the express, exclusive constitutional authority of the Commission—not this Court’s inherent authority or otherwise. Instead, the Court only has the authority to determine whether a General Assembly-district plan approved by the Commission complies with the requirements of the Ohio Constitution. Ohio Constitution, Article XI, Section 9. The Court has fulfilled that constitutional duty. There is nothing more for the Court to do until the Commission drafts and adopts another General Assembly-district plan to be used for the 2024 election cycle or longer and a challenge to that map is filed with the Court.

This Court previously acquiesced with allowing a two-year map for just this cycle when it permitted the Congressional races to go to the ballot in May. The Court did that because of the practical realities of the election calendar. Those same realities exist here and the Court should similarly allow the Third Plan to proceed for this two-year cycle. The federal panel already ordered that the Third Plan would be used in the primary election on August 2—a date previously set by the General Assembly for special elections—so that the deadlines and dates for the November general election would not be impacted. The Court cannot accept Petitioners’ argument that the Court use its inherent authority to manage its docket to overturn the federal three-judge panel. While the Commission certainly still has work to do in drafting and adopting a General Assembly-district plan that this Court finds constitutional, the federal court ruling has changed the

Commission's timeline. More importantly, there is simply no immediate need to pass new maps before the November 2022 election without the risk of creating further voter confusion.

IV. Conclusion.

In addition to the arguments raised here, Auditor of State Keith Faber points to the prior responses that he has filed that more thoroughly explain why the Court cannot and should not hold him or the Ohio Redistricting Commission in contempt. For all of these reasons, Auditor Faber respectfully requests that the Court deny Petitioners' show-cause motions.

Respectfully submitted,

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