

IN THE SUPREME COURT OF OHIO

Bria Bennett, et al.,

Petitioners,

v.

Ohio Redistricting Commission, et al.,

Respondents.

Case No. 2021-1198

Original Action Filed Pursuant to Ohio
Constitution, Article XI, Section 9(A)

*[Apportionment Case Pursuant to S. Ct.
Prac. R. 14.03]*

**PETITIONERS' RESPONSE TO RESPONDENTS MCCOLLEY & LARE'S
MOTION TO DISMISS AND VACATE**

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I. Introduction

Just one month ago, Respondents McColley and LaRe represented to this Court that they “agree with Petitioners that this Court’s review of the Commission’s adopted map and its constitutionality is specifically contemplated by the order of May 25, 2023 [sic]” and that “such review is important to the people of the State of Ohio, to the State’s Government including its General Assembly, to the redistricting process, and to the credibility of whatever plan determines districts for the next election.” Resp’ts McColley & LaRe’s Resp. to Pet’rs’ Mot. for Scheduling Order (Sept. 26, 2023) at 1. Indeed, they went so far as to proclaim that “this Court’s review of the next set of maps is particularly important” because “[w]ithout such review, the 2024 General Assembly election cycle could be delayed, as happened in 2022, or conducted under the same cloud of suspicion that districts were not appropriately drawn as the State experienced in 2022.” *Id.* Accordingly, Respondents McColley and LaRe asked that this Court adopt an expedited schedule for the Ohio Redistricting Commission to file the adopted plan, for Petitioners to file objections (if any), and for Respondents to file responses to any such objections. *Id.*

Respondents McColley and LaRe now do an about-face, arguing in their October 19, 2023 motion both that there is no “operative complaint” before this Court and that it has not had subject-matter jurisdiction “from the outset” of this case in September 2021. Resp’ts McColley & LaRe’s Mot. to Dismiss and Vacate (Oct. 19, 2023) at 11. Respondents ask this Court to dismiss the action and vacate the Court’s five previous decisions in this case as a result. In the process, Respondents not only contradict their own filing from last month, but two years of litigation over Ohio’s General Assembly plans—including five opinions issued by this Court. And, in their motion seeking this sweeping ruling, they do not even articulate a legal standard that would render that relief available and appropriate. Notably, despite touting the Commission’s “unanimous” plan, Respondents

McColley and LaRe filed this motion alone, without the Commission or its other five co-equal members.

This Court's original jurisdiction is a fundamental part of Article XI's checks and balances, including as they relate to Article XI's provisions that safeguard against partisan gerrymandering. The Court should exercise, rather than abdicate, its constitutional authority and promptly rule on Petitioners' pending motions for leave to file objections. Doing so is consistent with Article XI's framework, the Court's prior orders, and the position that Respondents McColley and LaRe took just last month. Respondents McColley and LaRe should be barred from arguing now that there is no operative complaint, after consenting to this Court's retained jurisdiction over this matter for two years. Finally, the basis of their subject-matter jurisdiction argument has already been rejected by this Court and is thus precluded under the law of the case doctrine. As such, the motion to dismiss and vacate should be denied.

II. Factual & Procedural Background

The facts of this case have been extensively documented by this Court, *see, e.g., League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 168 Ohio St.3d 522, 2022-Ohio-1727, 200 N.E.3d 197, ¶ 1–4 (“*League V*”), and Petitioners do not repeat them here. As relevant to the consideration of this motion, in the first half of 2022, this Court issued five opinions, each of which (1) struck down a Commission-adopted General Assembly plan that did not comply with the requirements set forth in the newly amended Article XI of the Ohio Constitution, (2) ordered the adoption of a new plan, and (3) retained jurisdiction to review the same. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St.3d 255, 2022-Ohio-65, 192 N.E.3d 379, ¶ 2, 137 (“*League F*”); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 168 Ohio St.3d 28, 2022-Ohio-342, 195 N.E.3d 974, ¶ 67–68 (“*League II*”); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 168 Ohio St.3d 309, 2022-Ohio-789, 198 N.E.3d 812, ¶ 2,

45 (“*League III*”); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 168 Ohio St.3d 374, 2022-Ohio-1235, 199 N.E.3d 485, ¶ 2, 79 (“*League IV*”); *League V* at ¶ 5–6. Each time, the Court retained jurisdiction to hear further challenges, rather than requiring petitioners to file a new complaint to challenge each new plan. Compare *League I* at ¶ 137 (“We also retain jurisdiction to review the plan that the commission adopts for compliance with our order.”); *League II* at ¶ 68 (“We retain jurisdiction for the purpose of reviewing the new plan.”); *League III* at ¶ 45 (same); *League IV* at ¶ 79 (same); *League V* at ¶ 6 (same), with *Adams v. DeWine*, 166 Ohio St.3d 1431, 2022-Ohio-871, 184 N.E.3d 111 (denying petitioners’ motion to enforce and leave to amend complaint in congressional redistricting case because court “did not retain jurisdiction to review any plan passed”).

In each opinion, this Court considered whether, among other things, the plan at issue complied with Article XI, Section 6(B) of the Ohio Constitution. This section provides that the Commission “shall attempt” to draw a district plan that meets the following standard: “The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.” Ohio Constitution, Article XI, Section 6(B). And in each subsequent opinion, this Court reapplied the holding in its very first opinion—that compliance with Article XI, Section 6 is “mandatory,” *League I* at ¶ 84–90; see also *id.* at ¶ 88 (“If it is possible for a district plan to comply with Section 6 and Sections 2, 3, 4, 5, and 7, the commission *must* adopt a plan that does so.” (emphasis added)), and that claims brought under Section 6 are actionable, *id.* at ¶ 91–101; see *id.* at ¶ 94 (“Section 9(A) allows review of a district plan for compliance with any provision in Article XI, including Section 6.” (emphasis omitted)).

This Court most recently struck down a Commission-adopted General Assembly plan on May 25, 2022. *League V* at ¶ 5. As before, the Court ordered the Commission to reconvene and

pass a plan by June 3. *Id.* at ¶ 6. And the Court retained jurisdiction to review that plan. *Id.* The Commission ignored the Court’s order and refused to reconvene until September 13, 2023—more than sixteen months after the Court-ordered deadline.

When it became clear that the Commission was poised to pass a new plan, Petitioners filed a motion for scheduling order in this case, seeking a prompt and expedited schedule to facilitate this Court’s review of the new plan under its retained jurisdiction. Pet’rs’ Mot. for Scheduling Order (Sept. 25, 2023) (“Petitioners move this Court for a new schedule that will facilitate, if necessary, this Court’s orderly review of the new plan *under its retained jurisdiction.*”) (emphasis added). The next day, on September 26, Respondents McColley and LaRe responded, agreeing that this Court had jurisdiction to review the new plan and requesting a similar schedule. Resp’ts McColley & LaRe’s Resp. to Pet’rs’ Mot. for Scheduling Order (Sept. 26, 2023) at 1 (“Representative LaRe and Senator McColley . . . agree with Petitioners that this Court’s review of the Commission’s adopted map and its constitutionality is specifically contemplated by the order of May 25, 202[2]” (citing *League V* at ¶ 6 (“This court retains jurisdiction for the purpose of reviewing the new plan”))); *see also supra* Part I.¹

Later that same day, the Commission unanimously adopted the September 2023 Plan. The Ohio Channel, *Ohio Redistricting Comm’n – 9-26-2023* (Sept. 26, 2023), at 2:29:40–2:31:51, <https://www.ohiochannel.org/video/ohio-redistricting-commission-9-26-2023>.² This Court summarily denied Petitioners’ motion for scheduling order on September 29, 2023. *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 2023-Ohio-3502, 171 Ohio St. 3d 1450, 218 N.E.3d 959. That afternoon, the Commission made a technical amendment to its September 26 maps and, notwithstanding the lack of scheduling order, promptly filed the final September

¹ The other Respondents did not file responses to Petitioners’ motion for scheduling order.

² As of this filing, a transcript of the Commission’s September 26, 2023 meeting is not yet available.

2023 Plan with this Court and the Secretary of State on October 2. Resp't Ohio Redistricting Comm'n's Notice of Filing of Adopted General Assembly Plan (Oct. 2, 2023). Petitioners in this case and two related cases—*League of Women Voters v. Ohio Redistricting Commission*, Case No. 2021-1193, and *Ohio Organizing Collaborative v. Ohio Redistricting Commission*, Case No. 2021-1210—filed motions for leave to file objections to the September 2023 Plan on October 5. Pet'rs' Mot. for Leave to File *Instanter* Objs. to the Sept. 2023 Plan (Oct. 5, 2023). Respondents McColley and LaRe responded to Petitioners' motion with a substantive response to the objections themselves. Resp'ts McColley & LaRe's Corrected Mem. in Opp'n to Mots. for Leave to File Objs. (Oct. 16, 2023).³ Nowhere in that response did Respondents McColley and LaRe argue that this Court lacks subject-matter jurisdiction over Petitioners' challenge to the newly filed plan. *See id.*

Three days later, Respondents McColley and LaRe filed the present motion to dismiss.

III. Argument

In the guise of a procedurally improper “motion to dismiss and vacate,” Respondents McColley and LaRe ask the Court to dismiss the entire action and reconsider both its original *League I* opinion and its four subsequent opinions applying and reaffirming *League I*. The Court should reject the motion out of hand. First, neither the Ohio Civil Rules nor the Rules of this Court allow for the relief Respondents now seek. Second, basic equitable principles preclude Respondents' belated argument that this Court cannot consider the merits of Petitioners' challenge to a remedial plan without a new complaint. And third, the Court has already rejected Respondents'

³ Respondents the Governor, the Auditor of State, the Secretary of State, and the Ohio Redistricting Commission joined Respondents McColley and LaRe's Response to Petitioners' Motion for Leave. Resp'ts Gov., Auditor of State, Sec'y of State, & Ohio Redistricting Comm'n's Mem. in Opp'n to Mots. for Leave to File Objs. (Oct. 16, 2023). Respondents Antonio and Russo filed a separate response. Resp. of Resp'ts Sen. Minority Leader & House Minority Leader to Pet'rs' Mots. for Leave Filed Oct. 5, 2023 (Oct. 16, 2023).

argument that it never had subject-matter jurisdiction to consider standalone violations of Article XI, Section 6 of the Ohio Constitution; the Court’s prior rulings are law of the case.

A. Respondents’ motion is not permitted under the Ohio Civil Rules or the Rules of this Court.

Respondents McColley and LaRe’s self-styled “motion to dismiss and vacate” is improper under the Supreme Court Practice Rules and the Ohio Civil Rules. Respondents’ eleventh-hour attempt to wipe away two years of litigation should be rejected.

First, Respondents cite Supreme Court Practice Rule 14.03(B), as revised earlier this year, which they argue now contemplates the filing of a “motion to dismiss.” But that rule simply notes that “[a]fter a complaint is filed pursuant to division (A) of this rule, the Supreme Court shall issue an order setting a schedule for the filing of answers or motions to dismiss, briefs, and evidence in the case.” S.Ct.Prac.R. 14.03(B)(2). This case was filed and proceeded under the predecessor version of the rule. And there is no scheduling order in place for this case that authorizes Respondents’ motion. The only scheduling orders issued in this case have been for the filing of evidence and briefs on the merits, *Bennett v. Ohio Redistricting Comm’n*, 2021-Ohio-3424, 164 Ohio St.3d 1450; and for remedial plans, objections, and responses, *see, e.g., League II*, 168 Ohio St.3d 28, 2022-Ohio-342, 195 N.E.3d 974, at ¶¶ 67–70. Nor have Respondents filed their motion within the default timeline for answers and motions to dismiss under Supreme Court Practice Rule 12.04, which provides that “the respondent shall file an answer to the complaint or a motion to dismiss within twenty-one days of service of the summons and complaint.” The Court need not rewind the clock to the very beginning of a case that has been litigated for more than two years and entertain a motion to dismiss that is not authorized by a scheduling order.

Second, Respondents cite Ohio Civil Rules 12(B)(1) and 12(B)(6), but they fail to address the legal standard that this Court must apply to such a motion. For good reason. The standard is well-established and does not favor Respondents here. A motion to dismiss may be granted only

in limited circumstances: specifically, in the Rule 12(B)(1) context, when no “cause of action cognizable by the forum has been raised in the complaint,” *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989), and, in the Rule 12(B)(6) context, “only when the complaint, when construed in the light most favorable to the plaintiff and presuming all the factual allegations in the complaint are true, demonstrates that the plaintiff can prove *no set of facts* entitling him to relief,” *State ex rel. Belle Tire Distributors, Inc. v. Indus. Comm’n of Ohio*, 154 Ohio St.3d 488, 2018-Ohio-2122, 116 N.E.3d 102, ¶ 17 (emphasis added). Respondents do not even attempt to explain how they could meet either of these standards here. And Respondents’ cursory references to “subject-matter jurisdiction” as the basis for the motion to dismiss miss the mark. Under Article XI, Section 9(A), the Court has jurisdiction “in all cases arising under this article.”⁴

Finally, Respondents cite Ohio Civil Rule 54(B) to support vacating all five of this Court’s opinions in this case, which they characterize as interlocutory orders. But they ignore that *League I* was expressly a final judgment: It granted Petitioners’ requested relief, *see League I*, 167 Ohio St.3d 255, 2022-Ohio-65, 192 N.E.3d 379, at ¶ 139 (“Relief granted.”), and assessed costs to Respondents, Decision, *Bennett v. Ohio Redistricting Comm’n*, No. 2021-1198 (Ohio, Jan. 12, 2022), something which is only done “at the conclusion of the case,” *see* S.Ct.Prac.R. 13.05(A)(1), 18.05(A)(2). That the Court retained jurisdiction “to issue further remedial orders,” *League I* at ¶ 136, and that those remedial proceedings are still in process, does not change the fact that *League I* adjudicated “all the claims or the rights and liabilities of . . . all the parties,” Civ. R. 54(B); *cf. Singleton v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 5691156, at *45 (N.D. Ala. Sept. 5, 2023) (“[I]t would be unprecedented for us to relitigate [liability] during remedial proceedings.”).

⁴ Respondents’ reliance on Article XI, Section 9(D) likewise misses the mark. As explained below, and as the Court already held, Section 9(D)(3) sets out specific remedies if a plan fails to comply with particular sections. The issue of available remedies is separate and distinct from whether the Court has subject-matter jurisdiction in the first place.

Rather than support their motion, the rules Respondents cite underscore the fundamental confusion in their position. They simultaneously suggest that there is no operative complaint and that the complaint should be dismissed. And they argue both that the case is over and that there has never been a final judgment. In doing so, they reveal that what they actually seek is not a motion to dismiss or vacate, but a motion for reconsideration of this Court's prior decisions setting forth a procedure for the ongoing remedial process. But such a motion is barred as untimely under the Supreme Court Rules: A motion for reconsideration must be brought within 10 days of the opinion in question. S.Ct.Prac.R. 18.02.

Ultimately, the overreach of Respondents McColley and LaRe's requests of this Court is obvious on the face of their motion. The lack of a vehicle to bring such arguments merely confirms it.

B. Equitable considerations bar Respondents from arguing that this Court erred in reaching the merits of Petitioners' previous challenges to the Commission's General Assembly plans.

As the procedural history of this case makes clear, any argument that this Court previously erred in reaching the merits of Petitioners' objections is far too late for this Court to consider. *See supra* Part II. Under this Court's direction, Petitioners have objected to each Commission-adopted remedial plan, and Respondents have responded to those objections without making the argument that there was no operative complaint. *See* Resp't Ohio Redistricting Comm'n's Resp. to Pet'rs' Objs. (Jan. 28, 2022); Resp'ts Huffman & Cupp's Resp. to Pet'rs' Objs. (Mar. 3, 2022); Resp'ts Huffman & Cupp's Resp. to Pet'rs' Objs. (Apr. 4, 2022); Resp'ts McColley & LaRe's Resp. to Pet'rs' Objs. (May 6, 2022). Indeed, just last month, Respondents McColley and LaRe *asked* this Court to review the new plan under precisely the same procedure that they now challenge. *See supra* Part I. Petitioners should scarcely be punished because they followed the procedures mandated by this Court's orders by filing objections rather than new complaints.

And equitable considerations bar Respondents from arguing at this late stage that there is no operative complaint, as it contradicts Respondents' position over the last twenty months. To be sure, after Respondents have repeatedly acquiesced to the Court's retained jurisdiction throughout the long history of this case, asserting now that this Court cannot adjudicate the merits of Petitioners' objections to a remedial plan without a new complaint "abus[es] the judicial process through cynical gamesmanship." *Greer-Burger v. Temesi*, 2007-Ohio-6442, 116 Ohio St.3d 324, 879 N.E.2d 174, ¶ 25; *cf. id.* (holding judicial estoppel "forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding" (internal quotation marks omitted)); *State ex rel. Case v. Indus. Comm'n of Ohio*, 28 Ohio St.3d 383, 385, 504 N.E.2d 30 (1986) ("[A] court will not aid in enforcing stale demands, 'where the party has slept upon his rights, or acquiesced for a great length of time.'" (quoting *Piatt v. Vattier*, 34 U.S. 405, 416 (1835))); *In re R.K.*, 152 Ohio St.3d 316, 2018-Ohio-23, 95 N.E.3d 394, ¶ 5 ("Waiver is an intentional relinquishment or abandonment of a known right." (internal quotation marks omitted)).

If this Court accepts Respondents' argument after they waited twenty months to make it—and all the while took the opposite position, including just last month—Petitioners and all Ohio voters that relied on the Court's remedial orders would face significant prejudice. There is simply no justification for Respondents' change in position or significant delay.

C. This Court has already considered and rejected Respondents' arguments regarding Article XI, Section 6(B).

Finally, this Court has already considered the very "subject-matter jurisdiction" arguments Respondents recycle in this motion. *See League I* at ¶ 92 ("Senate President Huffman, House Speaker Cupp, and the statewide officeholders argue that Article XI, Section 9(D)(3) limits our jurisdiction and remedial power by permitting us to invalidate a plan only when the plan violates Section 2, 3, 4, 5, or 7. Section 6, they contend, comes into play only if we are reviewing a four-

year plan adopted under Section 8(C). And they argue that even then, we may review only whether the plan complies with Section 6(B)—and still only if there was a predicate violation of Section 2, 3, 4, 5, or 7. Thus, they contend that Article XI does not allow this court to invalidate a plan when the challengers allege only a failure to comply with Section 6.”). And it has already rejected them. *See id.* at ¶ 83 (“Section 6 imposes enforceable duties on the commission. And the inclusion of specific remedies in Section 9(D)(3) if a plan fails to comply with other sections does not preclude us from declaring a plan invalid if it fails to comply with Section 6.”); *id.* at ¶ 94 (“Because neither Section 9(A) nor Section 9(B) limits the bases on which this court may declare a plan invalid, Section 9(A) allows review of a district plan for compliance with any provision in Article XI, including Section 6.”). Moreover, this Court has specifically rejected the notion that a plan is immune from challenge under Section 6(B) if it was passed with support from Commissioners of both parties, *see id.* at ¶ 111 (“[E]ven if commission members of the minority party agreed to a proposed plan, this does not necessarily mean that the agreed-upon plan would comply with Section 6.”), or that plans passed under certain procedural provisions are exempt from review, *see id.* at ¶ 64–75 (holding that “Section 9 more specifically addresses this court’s jurisdiction and remedial authority” and that there would be no “plausible justification” for certain plans being reviewable over others).

In other words, the Court held back in January 2022 that it had jurisdiction to consider Petitioners’ claims. The Court’s prior decisions are the law of the case. *See, e.g., State ex rel. Gallagher v. Collier-Williams*, 2023-Ohio-748, ¶ 13. The law-of-the-case doctrine “is necessary to ensure consistency of results in a case” and “to avoid endless litigation by settling the issues.” *Giancola v. Azem*, 153 Ohio St.3d 594, 2018-Ohio-1694, 109 N.E.3d 1194, ¶ 14. There is no reason or basis to disturb the law of the case now. In effect, Respondents are asking the Court to abandon the fundamental jurisprudential principle of *stare decisis*, but they clearly cannot fulfill the three

conditions set forth by this Court in *Westfield v. Galatis*, 100 Ohio St. 2d 216, 2003-Ohio-5849, all of which must be met. *See* Pet'rs' Objs. to the Sept. 2023 Plan (Oct. 5, 2023) at 10–12.

IV. Conclusion

For the foregoing reasons, Petitioners respectfully request that this Court deny Respondents McColley and LaRe's motion to dismiss. This Court should instead take all action necessary to ensure that Ohioans are able to vote under a constitutional General Assembly plan in 2024.

Dated: October 30, 2023

Respectfully submitted,

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