

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.	:	
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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.	:	
	:	
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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.	:	
	:	

OHIO SECRETARY OF STATE FRANK LAROSE’S COMBINED RESPONSE TO PETITIONERS’ MOTION TO ENFORCE THE COURT’S MAY 25, 2022 ORDER AND REQUIRE RESPONDENTS TO EXPLAIN THEIR FAILURE TO COMPLY WITH SUCH ORDER, OOC PETITIONERS’ JOINDER AND MOTION FOR AN ORDER DIRECTING RESPONDENTS TO APPEAR IN PERSON FOR A HEARING, AND PETITIONERS’ MOTION FOR AN ORDER REQUIRING RESPONDENTS TO EXPLAIN THEIR FAILURE TO COMPLY WITH THE COURT’S MAY 25, 2022 ORDER

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I. INTRODUCTION

Secretary of State Frank LaRose (“Secretary LaRose”) intends to be brief in this response. The issues raised pursuant to Petitioners’ latest round of Motions have already been exhaustively briefed in these cases and the relief they request is barred. Moreover, Secretary LaRose has not engaged in any contemptuous conduct and there is no basis to find him in contempt or order him to appear before this Court. That has been true throughout this litigation and remains true. Petitioners’ Motions lack merit and should be denied for the reasons set forth below and in Secretary LaRose’s prior briefs in this matter.

II. BACKGROUND

A. INCORPORATION OF SECRETARY LAROSE’S PRIOR FILINGS

As this Court is aware, the issues related to Petitioners’ most recent Motions have been extensively briefed in the above-captioned cases. Accordingly, Secretary LaRose incorporates herein by reference, as if fully rewritten, all of his prior filings and arguments in these cases.

B. BACKGROUND

On May 5, 2022, the Commission resubmitted the Third Plan/Map 3 (*i.e.*, the plan adopted by the Commission on February 24, 2022) to this Court. In the prior briefing in these cases, Secretary LaRose and other members of the Commission have explained that Map 3 is a stop-gap measure for the 2022 elections and it is not possible to implement, for a primary election on August 2, 2022, a new General Assembly plan past April 20, 2022, based upon, *inter alia*, election deadlines and the absence of emergency legislation changing the statutory elections calendar. *See, e.g., Secretary LaRose’s Combined Response to Motions for Contempt filed 5/12/22.*

On May 25, 2022, this Court invalidated Map 3 and ordered the Commission to be reconstituted, to convene, and to draft and adopt an entirely new General Assembly district plan

and to file it with the Secretary of State and this Court by June 3, 2022. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-1727, ¶¶ 5-7. This Court also denied Petitioners' last round of motions related to alleged contempt.

On May 27, 2022, the court in *Gonidakis v. LaRose*, S.D. Ohio No. 2:22-cv-0773, 2022 WL 1175617 (Apr. 20, 2022) ("*Gonidakis*") ordered the implementation of Map 3 for the 2022 elections. The following day, Secretary LaRose issued a Directive to the county Boards of Elections regarding the implementation of Map 3 for 2022 and holding primary elections on August 2, 2022 in accordance with the *Gonidakis* decision and his statutory duty to administer Ohio elections. *Exhibit A* (Directive 2022-34).

In the midst of and immediately after the foregoing, minority members of the Commission, Senator Sykes and Representative Russo, asked the Commission to reconvene and reengage mapmakers to draw new General Assembly plans. *See League of Women Voters of Ohio's Motion filed on 6/8/22*, Exhibits 2-3. The Commission's Co-Chair, Representative LaRe, responded that adopting a new map before the August 2 elections will sow confusion among Ohioans. *Id.* at Exhibit 1. He also communicated the view that, under Section 5 of Article XI of the Ohio Constitution, now that a map is in place for the 2022 elections, it is not possible to draw a new General Assembly district plan until the results of the November elections are known. *Id.* On June 3, 2022, Secretary LaRose communicated to the members of the Commission his concurrence with Representative LaRe's assessment that there is no immediate need to draw new districts that will not apply to this year's elections, and Secretary LaRose further stated, *inter alia*:

I acknowledge the Court's authority to review and, if necessary, invalidate a General Assembly district plan, and I recognize the need to reconvene the Ohio Redistricting Commission for the purpose of adopting a new plan for use in future statewide elections. The timeline for doing so will be established by the Commission, according to the co-equal authority granted to it by the Ohio Constitution.

Id. at Exhibit 5.

The Commission did not file a new General Assembly district plan with the Secretary of State and this Court on June 3, 2022, and Petitioners' latest round of Motions followed on June 7 and June 8, 2022.

III. LAW & ARGUMENT

A. THERE ARE NO GROUNDS TO FIND SECRETARY LAROSE IN CONTEMPT OR ORDER HIM TO APPEAR BEFORE THIS COURT

As has been true throughout this dispute, Secretary LaRose has not engaged in any contemptuous conduct. There are no grounds to find him in contempt or order him to appear before this Court pursuant to Petitioners' Motions. The Motions should be denied for the reasons established in the prior briefing and below.

i. The Separation of Powers Doctrine prohibits this Court from controlling the manner in which the Commission adopts a General Assembly district plan and prohibits this Court from holding a hearing requiring the Commission to explain itself for not adopting a plan by June 3

Petitioners' demands for relief essentially ask this Court to compel the Commission to enact legislation and/or explain why it did not enact legislation in the manner provided by this Court. *See League of Women Voters of Ohio's Motion filed 6/8/22*, p. 9; *Bennett Petitioners' Motion filed 6/7/22*, pp. 3-4; *OOC Petitioners' Motion filed 6/8/22*, p. 6. This Court ordering such relief is prohibited by the Separation of Powers Doctrine.

Judicial power is conferred upon the courts of Ohio by Article IV, Section 1 of the Ohio Constitution. "It is emphatically the province and duty of the judicial department to say what the law is." *Adams v. DeWine*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, quoting *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). The courts cannot tell the legislature what the law should be or dictate how the General Assembly should carry out its constitutional duties. *State ex*

rel. Jones v. Ohio State House of Representatives, Slip Opinion No. 2022-Ohio-1909, ¶ 10. “It is a fundamental principle of the separation of powers that ‘the legislative branch [of government] is the “ultimate arbiter of public policy.”’” *Id.*, quoting *Gabbard v. Madison Local School Dist. Bd. of Edn.*, 165 Ohio St.3d 390, 2021-Ohio-2067, 179 N.E.3d 1169, ¶ 39. “As such, the General Assembly has the power to enact, amend, and repeal statutes, Ohio Constitution, Article II, and ‘[t]his lawmaking prerogative cannot be delegated to or encroached upon by the other branches of government[.]’” *Id.* at ¶ 7, quoting *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 26.

This Court’s recent decision in *State ex rel. Jones, supra*, is instructive. In *Jones*, the relators sought similar relief and this Court dismissed the case based upon separation of powers. The relators in *Jones* alleged Ohioans were subjected to ongoing violations of Article I, Section 21(A) of the Ohio Constitution due to, *inter alia*, being forced to wear medical devices. *State ex rel. Jones* at ¶ 2. The relators asked this Court to issue a writ of mandamus compelling the House of Representatives respondents to defend Article I, Section 21 “against any passage of legislation which may possibly conflate, obfuscate or otherwise subvert the clarity of rights conveyed by” Article I, Section 21. *Id.* at ¶ 3. In reviewing the relators request for relief, this Court explained that it interpreted the request as one to compel the House respondents to enact legislation prohibiting the practices to which relators object or as a request to prohibit them from enacting legislation that would conflict with Article I, Section 21. *Id.* at ¶ 6. This Court found it had no jurisdiction to grant the requested relief under either scenario:

A writ of mandamus will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control. In other words, we have no jurisdiction to order the General Assembly to enact a specific piece of legislation....

Under the same theory, we also have no jurisdiction to preemptively order the General Assembly *not* to enact legislation because the separation-of-powers doctrine precludes courts from enjoining the General Assembly from exercising its legislative power to enact laws....

For similar reasons, we may not order the General Assembly to compel the attorney general to perform his duties in a certain fashion. The attorney general is an independently elected executive-branch official. We express no opinion as to the scope of the General Assembly’s authority to control how the attorney general performs his duties, except to say that if the General Assembly were to impose restraints on an executive-branch official, it would have to do so through the passage of legislation. And the separation-of-powers doctrine precludes us from telling the General Assembly what legislation it should enact.

Id. at ¶¶ 8-9, 11 (quotations and citations omitted); *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 20 (“Article XI was enacted to permit the apportionment board to perform the duty... to apportion seats in the General Assembly. In effect, the apportionment board is performing what was previously a legislative function. [D]istricting and apportionment are legislative tasks in the first instance[.] Not only do enactments that carry the force of law traditionally originate in the legislature, but the process of redistricting is itself traditionally viewed as a legislative task[.]”) (quotations and citations omitted).

In this case, there have arguably already been separation-of-powers infringements by way of this Court dictating deadlines for adopting and filing new General Assembly district plans. Petitioners now ask this Court to impermissibly take matters a step further in that direction by requiring members of the Commission, an entity with co-equal governmental authority, to appear and establish why they did not enact legislation in a manner directed by this Court. *See, e.g., League of Women Voters of Ohio’s Motion filed 6/8/22*, p. 9; *Bennett Petitioners’ Motion filed 6/7/22*, pp. 3-4; *OOC Petitioners’ Motion filed 6/8/22*, p. 6. This Court should follow its analysis in *State ex rel. Jones, supra*, and again hold that Ohio’s Constitution does not empower it to

interject itself in such a way in the legislative process. Even Chief Justice O'Connor's concurring opinion in this Court's May 25, 2022 decision recognizes constraints on the role of this Court:

...Indeed, if Article XI of the Ohio Constitution allowed for this court to have a seat at the commission's table, perhaps we would not be where we are today.... But as we have recognized, this court's role in remedying the issue of an unconstitutional map is limited by Article XI, Section 9(D) of the Ohio Constitution, which provides:

(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.

(2) No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.

League of Women Voters of Ohio v. Ohio Redistricting Comm., Slip Opinion No. 2022-Ohio-1727 ¶ 14; *id.* at ¶ 20 (“The remedy... must be to craft a resolution... by those with the authority to do so—the commission and the legislature”); *State ex rel. Jones*, 2022-Ohio-1909 at ¶ 10 (“[T]he courts cannot tell the legislature what the law *should be* or dictate how the General Assembly should carry out its constitutional responsibilities”); *Wilson*, 134 Ohio St.3d 221 at ¶ 20 (“[D]istricting and apportionment are legislative tasks”).

Based upon separation-of-powers, this Court simply cannot grant Petitioners' requested relief. Furthermore, the *Gonidakis* court ordered Map 3 to be implemented for the 2022 elections and Secretary LaRose is duty-bound to administer the election, accordingly. While Petitioners may not like the stop-gap outcome for 2022, that does not provide them an avenue to have this Court force the enactment of a new plan. *Supra*; Constitution, Art. XI, § 9(D); *see, e.g., State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 633, 716 N.E.2d 704 (1999) (denying a writ of mandamus because the Separation-of-Powers Doctrine prohibits a court from directing the legislature to perform duties that were “purely legislative in character”). Petitioners' Motions fail and should be denied.

ii. Legislative immunity prohibits a finding for contempt

Legislative immunity strictly prohibits this Court from finding Secretary LaRose in contempt. *See Bennett Petitioners' Motion filed 6/7/22*, p. 4 (suggesting “the Court has additional tools... including finding the Commission and... individual Respondents in contempt”). Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity, including the Commission members’ actions pertaining to adopting General Assembly district plans. *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998); *Hicksville v. Blakeslee*, 103 Ohio St. 508, 517 (1921) (explaining “[t]hat legislative officers are not liable personally for their legislative acts is so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared.”) It is also not this Court’s role to inquire into Secretary LaRose’s motives as only one member of the Commission that can only act by majority vote. Constitution, Art. XI, § 1(B)(1); *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (“The privilege would be of little value if [Commission members] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury’s speculation as to motives.”); *see State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 502 (1941) (“[i]t is not within the judicial province to nullify a statute or ordinance merely because of the alleged impropriety or mistaken beliefs underlying the legislators’ reasons for enacting it.”). Accordingly, legislative immunity applies and protects Secretary LaRose, and Petitioners’ Motions fail.

iii. Secretary LaRose cannot be held individually liable for the action of the Commission and he cannot be required to speak on behalf of the Commission

The Commission is a constitutionally defined legislative body and only acts with regard to adopting maps by majority vote. Constitution, Art. XI, § 1(B)(1). Secretary LaRose is but one

member of the Commission who cannot exert unilateral control over the actions of the Commission. Accordingly, and pursuant to his legislative immunity discussed above, Secretary LaRose cannot and should not be brought before this Court to individually explain his conduct as a Commission member. (Notably also, unlike the other members of the Commission, Secretary LaRose is the State's chief election officer who is legally and duty bound to administer timely and trustworthy elections no matter what the Commission does as a whole.) This Court has consistently recognized the distinction between obligations of individual commissioners and the Commission itself by directing its orders to the Commission and not individual members. *See, e.g., 5/25/22 Orders*. Therefore, Petitioners' request that this Court order individual members of the Commission, including Secretary LaRose, to appear in person and explain the basis for their legislative conduct has no merit, and Secretary LaRose cannot be held individually liable for the conduct of the Commission in any event. Accordingly, the Motions fail and should be denied.

iv. The impossibility defense still applies

It is impossible to implement a new General Assembly district plan for the 2022 elections. As previously agreed by Petitioners, Ohio is past the point where it can implement a brand new plan and still meet 2022 election deadlines. *See, e.g., Gonidakis*, p. 2 (“[T]he so-called ‘drop dead’ date of April 20. That is when every party to this litigation agrees a map would have to be in place for the state to conduct a primary that both complies with state election law and allows for an orderly general election in November”). Passing a new General Assembly district plan is also impossible because Section 5 of Article XI prohibits passing a new plan until the results of November elections are known. *See Art. XI, § 5*. Consequently, the impossibility defense negates the relief sought by Petitioners and bars a finding of contempt against Secretary LaRose. *See State*

ex rel. Johns v. Board of County Comm'rs, 29 Ohio St. 2d 6, 8, 278 N.E.2d 19 (1972); *Topletz v. Skinner*, 7 F.4th 284, 295-96 (5th Cir. 2021).

IV. CONCLUSION

In accordance with the foregoing, and for the reasons previously briefed by Secretary LaRose, Petitioners' Motions should be denied.

Respectfully submitted,

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