The Supreme Court of Ohio

CASE ANNOUNCEMENTS

May 25, 2022

[Cite as *05/25/2022 Case Announcements #4*, 2022-Ohio-1750.]

MOTION AND PROCEDURAL RULINGS

2021-1193. League of Women Voters of Ohio v. Ohio Redistricting Comm.
On complaint invoking this court's original jurisdiction pursuant to Article XI, Section 9 of the Ohio Constitution. On petitioners' motion for an order directing respondents to show cause for why they should not be held in contempt of the court's April 14, 2022 order and second motion for an order directing respondents to show cause for why they should not be held in contempt of the court's April 14, 2022 order. Motions denied.

Kennedy, J., concurs, with an opinion.
Fischer, J., concurs, with an opinion.
DeWine, J., not participating.

2021-1198. Bennett v. Ohio Redistricting Comm.
On complaint invoking this court's original jurisdiction pursuant to Article XI, Section 9 of the Ohio Constitution. On petitioners' motion for an order directing respondents to show cause, motion to schedule contempt hearing, and motion for attorney fees. Motions denied.

Kennedy, J., concurs, with an opinion.
Fischer, J., concurs, with an opinion.
DeWine, J., not participating.

2021-1210. Ohio Organizing Collaborative v. Ohio Redistricting Comm.
On complaint invoking this court's original jurisdiction pursuant to Article XI, Section 9 of the Ohio Constitution. On petitioners' motion for an order directing respondents to show cause why they should not be held in contempt. Motion denied.

Kennedy, J., concurs, with an opinion.
Fischer, J., concurs, with an opinion.
DeWine, J., not participating.

KENNEDY, J., concurring.

{¶ 1} I agree with the majority's decision to deny petitioners' motions for orders directing respondents, the Ohio Redistricting Commission and its individual members, Governor Mike DeWine, Secretary of State Frank LaRose, Auditor of State Keith Faber, Senator Robert McColley, Representative Jeffrey LaRe, Senator Vernon Sykes, and House Minority Leader Allison Russo, to show cause why they should not be held in contempt of this court's April 14 order in *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, __ Ohio St.3d __, 2022-Ohio-1235, __ N.E.3d __ ("*League IV*"). I write to explain why.

{¶ 2} In *League IV*, a majority of this court invalidated the commission's fourth General Assembly–district plan and ordered 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) as [the majority had] explained those provisions in each of [its] four decisions in these cases." *Id.* at ¶ 78. The majority further ordered the commission to file the new district plan with the secretary of state by 9:00 a.m. on May 6, 2022, and to file it with this court by noon on the same date. *Id.* at ¶ 79.

{¶ 3} In a parallel matter in a federal district court, a three-judge panel announced on April 20, 2022, that if the commission did not adopt a plan by May 28, 2022, the federal court would order a primary election to be held on August 2, 2022, and would order that a map previously rejected by a majority of this court be used to define the districts of members of the Ohio House of Representatives and the Ohio Senate for the 2022 election cycle. *See Gonidakis v. LaRose*, S.D.Ohio No. 2:22-cv-0773, 2022 WL 1175617, *30 (Apr. 20, 2022). The map the district court would impose is the General Assembly–district plan adopted on February 24, 2022 ("Map 3"), *id.*, which is the same plan a majority of this court found unconstitutional in *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, __ Ohio St.3d __, 2022-Ohio-789, __ N.E.3d __ ("*League III*").

{¶ 4} On May 5, 2022, the commission voted four to three to readopt Map 3. The four members in favor of readoption of Map 3 were Governor DeWine, Secretary LaRose, Senator McColley, and Representative LaRe. Auditor Faber, Senator Sykes, and House Minority Leader

Russo voted against it. Petitioners in all three cases have filed objections to the readopted plan, and those objections have been addressed in a separate opinion, *see League of Women Voters of Ohio v. Ohio Redistricting Comm.*, __ Ohio St.3d __, 2022-Ohio-1727, __ N.E.3d __ ("*League V*"). In each of the three cases, the petitioners have also filed a motion for orders directing respondents to show cause why they should not be held in contempt of this court's April 14 order in *League IV* based on the commission's readoption of Map 3. The *Bennett* petitioners also seek an award of attorney fees for what they allege is respondents' "bad faith" and "frivolous conduct" under R.C. 2323.51. Respondents oppose the motions.

This court lacks the power to declare the commission to be in contempt

{¶ 5} This court does not have the power to hold the commission or its members in contempt. "The separation-of-powers doctrine * * * 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.' " *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 27, quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 633, 716 N.E.2d 704 (1999). In *Toledo*, this court held that "separation-of-powers principles prevent the judiciary from enjoining the legislative branch of government from enacting laws." *Id.* at ¶ 25.

{¶ 6} Respondents argue that *Toledo* applies here because granting petitioners' requested relief would be tantamount to exercising authority over the performance of legislative duties over which the commission has exclusive control under Article XI of the Ohio Constitution. Petitioners argue, however, that separation-of-powers principles support finding the commission in contempt because of the commission's "flagrant disregard" of this court's rulings in these cases. Moreover, petitioners argue that Article XI, Section 9(B) contemplates the exercise of judicial power over the commission, undermining the notion that legislative redistricting is within the commission's "exclusive" control.

{¶ 7} Although Article XI, Section 9 contemplates a role for this court in the redistricting process, that role is limited to a judicial one: reviewing the plan adopted by the commission and determining whether it is constitutional, *see* Article XI, Section 9(B) and (D). If a majority of this court determines (as it has four times before in these cases) that the commission's plan does not comply with Article XI, then the remedy is for the commission to be reconstituted and to try again. *See* Article XI, Section 9(B) and (D)(3). And Article XI does not provide a mechanism to

end the process of redistricting other than the commission's adoption of a plan and, if challenged, this court's upholding of the plan as constitutional. Accelerating the process through the imposition of contempt sanctions is not a course of action that Article XI, Section 9 contemplates.

{¶ 8} "Adherence to the defined roles of each branch is essential to the functioning of our representative democracy. Therefore, maintaining respect for the enumerated powers granted expressly to the commission precludes this court from interfering with the exercise of those powers or attempting to supervise the commission's work through the threat of contempt." *League IV*, __ Ohio St.3d __, 2022-Ohio-1235, __ N.E.3d __, at ¶ 97 (Kennedy, J., dissenting). A majority of this court has set deadlines for the commission to perform its duties following the invalidation of the previous plans in these cases, and I have disagreed with the majority's determination that this court retains jurisdiction after invalidating a plan. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, __ Ohio St.3d __, 2022-Ohio-342, __ N.E.3d __, ¶ 130 ("*League II*") (Kennedy, J., dissenting). The setting of deadlines for the commission's performance of acts that it is constitutionally committed to perform under Article XI, Section 9(B) is a far cry from what petitioners' motions seek. Petitioners' motions to show cause go far beyond what Article XI empowers this court to do in its exercise of judicial authority. What petitioners ask—that we hold the commission in contempt and levy sanctions that can be purged only by the adoption of a plan that meets this court's approval—would require this court to "assert[] control over 'the performance of duties that are purely legislative in character,' " *Toledo*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, at ¶ 27, quoting *Grendell*, 86 Ohio St.3d at 633, 716 N.E.2d 704. In my view, this court should not enter that political thicket.

{¶ 9} This court had no authority to tell the commission whom to hire or how to do its work; therefore, it follows that the court cannot hold the commission in contempt. Redistricting is a political process. Article XI contains political solutions to political problems—for instance, a plan adopted without bipartisan support remains in place for only two election cycles rather than an entire decade. Article XI never contemplated this court's becoming a super-commission that would be the final arbiter of electoral fairness and diviner of the commission's subjective intent. Our role was to ensure that the objective line-drawing rules of Article XI, Sections 2, 3, 4, 5, and 7 had been followed. *See* Article XI, Section 9(D)(3). It is because this court has

ignored the separation of powers set forth in Article XI that we stand where we are today: past the primary date with no General Assembly–district plan.

This court has no contempt powers over the individual members of the commission

{¶ 10} *Some* petitioners ask the court to fine the individual members of the commission daily until a new plan is adopted. Some of the other petitioners assert that any sanctions could be purged only if this court finds the plan constitutional. However, as established above, contempt proceedings would run afoul of separation-of-powers principles. Further, the very basis of contempt proceedings makes them inapplicable to the individual members of the commission.

{¶ 11} " 'The power of contempt is inherent in a court, such power being necessary to the exercise of judicial functions.' " *Toledo*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, at ¶ 22, quoting *Denovchek v. Trumbull Cty. Bd. of Commrs*., 36 Ohio St.3d 14, 15, 520 N.E.2d 1362 (1988). A court's " 'authority and proper functioning' " is the " 'primary interest involved in a contempt proceeding.' " *Id*., quoting *Denovchek* at 16. Therefore, a court may hold a litigant in contempt for conduct that " ' "brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions," ' " *id*., quoting *Denovchek* at 15, quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55, 271 N.E.2d 815 (1971), paragraph one of the syllabus.

{¶ 12} " 'If a valid restrictive order has been issued, a court has the statutory and inherent power to entertain contempt proceedings and punish disobedience of that order.' " *Toledo* at ¶ 23, quoting *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St.3d 56, 61, 556 N.E.2d 157 (1990). "But a court order cannot be enforced in contempt unless the order was 'clear and definite, unambiguous, and not subject to dual interpretations.' " *Id*., quoting *State ex rel. Cincinnati Enquirer v. Hunter*, 138 Ohio St.3d 51, 2013-Ohio-5614, 3 N.E.3d 179, ¶ 25.

{¶ 13} The order at issue here does not clearly and definitely address the individual members of the commission. None of the petitioners dispute that *League IV*'s order for the commission to be reconstituted and adopt an entirely new General Assembly–district plan was directed only at the commission. The *Bennett* and *Ohio Organizing Collaborative* petitioners contend, however, that the individual commissioners may be held in contempt because Ohio courts have recognized the power of a court to hold in contempt anyone who takes actions in defiance of an order. *See, e.g., State ex rel. DeWine v. C & D Disposal Technologies*, 2016-Ohio-476, 58 N.E.3d 614, ¶ 21 (7th Dist.) (contemnor was managing member of the corporations bound by the order). And in this case, the individual respondents are parties to this action as

members of the commission. However, petitioners have not cited a case in which this court has held that individual members of a state legislative body can be held in contempt for the body's failure to comply with a court order. Moreover, holding individual members in contempt is problematic because no single member of the commission has the power to bind the commission or act (much less adopt a district plan) on behalf of the commission. The commission can adopt a General Assembly–district plan only by majority vote. *See* Ohio Constitution, Article XI, Section 1(B)(1).

{¶ 14} Relatedly, for a civil-contempt sanction to be proper, a contemnor must have the opportunity to purge himself of contempt through compliance with the court's order. *See Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253, 416 N.E.2d 610 (1980) ("The contemnor is said to carry the keys of his prison in his own pocket"). As noted above, some petitioners seek to hold the individual members in contempt and propose that they may purge the contempt by adopting a constitutional plan. And some other petitioners propose fines of $10,000 per contemnor per day until the commission adopts a constitutional plan. None of the individual commission members, however, has authority to control the commission. Therefore, the individual members do not *carry the keys* of their prison in their *own pockets* with respect to the proposed purge conditions. Whether the contempt is purged depends not on the acts of the contemnor but on the acts of the commission as a whole.

{¶ 15} Therefore, for the above reasons, I agree with this court's decision to deny petitioners' motions to show cause as to the individual members of the commission.

When a plan is not challenged under Article XI, Sections 2, 3, 4, 5, or 7, no order of contempt can issue

{¶ 16} This court has the authority under Article XI, Section 9(D) to invalidate a redistricting plan only if it violates the objective map-drawing requirements set forth in Article XI, Sections 2, 3, 4, 5, or 7. *League III*, at ¶ 118 (Kennedy and DeWine, JJ., dissenting). The majority has found no such violation with regard to Map 3—either on its first adoption on February 24, 2022, or on its readoption on May 5, 2022. Therefore, because the majority invalidated Map 3 without constitutional authority, neither the commission nor its individual members can be held in contempt for readopting it.

Conclusion

{¶ 17} For all the above reasons, I agree with the majority's decision to deny the petitioners' motions for orders directing respondents to show cause why they should not be held in contempt.

FISCHER, J., concurring.

{¶ 18} I concur in this court's judgments denying the petitioners' show-cause and related motions in these cases, and I join paragraphs 1 through 7 of the other concurring opinion concerning those motions. I write separately to emphasize two points.

{¶ 19} First, the petitioners in these cases are trying to do what legislative immunity forbids: hold certain individual members of respondent Ohio Redistricting Commission individually liable for their legislative actions.

{¶ 20} For example, in arguing against the applicability of legislative immunity, the petitioners in *Ohio Organizing Collaborative v. Ohio Redistricting Comm.* (Supreme Court case No. 2021-1210) ("*OOC* petitioners") argue that the commission is not a legislative body and should not be treated like one. They argue that the commission "is an agency created by the Ohio Constitution for the limited purpose of drawing General Assembly districts consistent with the affirmative commands of Article XI and congressional districts consistent with Article XIX." They characterize the commission's function as "remedial" rather than legislative.

{¶ 21} This court correctly rejects the *OOC* petitioners' argument. In *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, ¶ 76, 79 ("*League I*"), this court affirmed the principle that legislative apportionment "is a legislative task," albeit one now delegated to the commission under Article XI of the Ohio Constitution. *See also Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 18-24. The Ohio Constitution's committal of the apportionment task to a constitutionally created body rather than to the General Assembly does not make the task any less legislative. It simply means that the Ohio Constitution delegates this discrete legislative function to the commission. *See League I* at ¶ 79.

{¶ 22} The United States Supreme Court has strongly cautioned courts against sanctioning individual legislators:

> The imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests. Even though an individual legislator took the extreme position—or felt that his constituents took the extreme position—that even a huge fine against the city was preferable to enacting the Affordable Housing Ordinance, monetary sanctions against him individually would motivate him to vote to enact the ordinance simply because he did not want to be out of pocket financially. Such fines thus encourage legislators, in effect, to declare that they favor an ordinance not in order to avoid bankrupting the city for which they legislate, but in order to avoid bankrupting themselves.
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> This sort of individual sanction effects a much greater perversion of the normal legislative process than does the imposition of sanctions on the city for the failure of these same legislators to enact an ordinance. In that case, the legislator is only encouraged to vote in favor of an ordinance that he would not otherwise favor by reason of the adverse sanctions imposed on the city. A councilman who felt that his constituents would rather have the city enact the Affordable Housing Ordinance than pay a "bankrupting fine" would be motivated to vote in favor of such an ordinance because the sanctions were a threat to the fiscal solvency of the city for whose welfare he was in part responsible. This is the sort of calculus in which legislators engage regularly.

Spallone v. United States, 493 U.S. 265, 279-280, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990). Based on this reasoning, the United States Supreme Court reversed a contempt finding against city council members who had voted against a resolution of intent to adopt a housing-assistance ordinance, despite the existence of a federal district-court order compelling the city to adopt such an ordinance. *Id.* at 271-272, 280.

{¶ 23} Through their requests for contempt sanctions against the individual respondents, petitioners attempt to accomplish indirectly what legislative immunity forbids them from accomplishing directly: imposing sanctions against individual legislative officers for their legislative actions. This court must and does deny petitioners' motions as to the individual respondents.

{¶ 24} Second, I write once again, *see League of Women Voters v. Ohio Redistricting Comm.*, 166 Ohio St.3d 1444, 2022-Ohio-957, 184 N.E.3d 133, ¶ 1-6 (Fischer, J., concurring), to remind all counsel not to file baseless motions. The petitioners in *Bennett v. Ohio Redistricting Comm.* (Supreme Court case No. 2021-1198) seek an award of attorney fees under R.C. 2323.51 for alleged frivolous conduct or bad faith on the part of the commission, and they ask this court to set a hearing on their request for attorney fees for the same time as a contempt hearing. As set forth in this court's judgment entries and for the reasons stated above and in the other concurring opinion, the petitioners in these cases are not entitled to the relief they seek in their motions to show cause. Thus, there is no predicate bad faith or frivolous conduct upon which to base a motion for attorney fees under R.C. 2323.51. Additionally, and more significantly, the *Bennett* petitioners do not explain how R.C. 2323.51 applies here. That statute applies only to "civil action[s]." This proceeding is not a civil action as that term is understood in Ohio jurisprudence. *See In re Wyckoff's Estate*, 166 Ohio St. 354, 357, 142 N.E.2d 660 (1957) (the term "civil action" means actions at law or suits in equity). Rather, it is a special proceeding. *See Wilson*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, at ¶ 43.

{¶ 25} The bottom line is that baseless motions requesting attorney fees should not be filed, or opposing parties may, in turn, decide to seek their own awards of attorney fees. As the colloquial phrase goes: "People in glass houses should not throw stones." Quality lawyering avoids wasting judicial resources, and the petitioners should refrain from doing the same.