

Case No. 2019-1626

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## In The Supreme Court of Ohio

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Appeal from the Court of Appeals  
Second Appellate District  
Montgomery County, Ohio  
Case No. 28401

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Peter K. Newman  
*Appellant*

v.

Ohio Civil Rights Commission, et al.  
*Appellees*

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### Memorandum In Response Opposing Jurisdiction of Appellees Ohio Civil Rights Commission, et al.

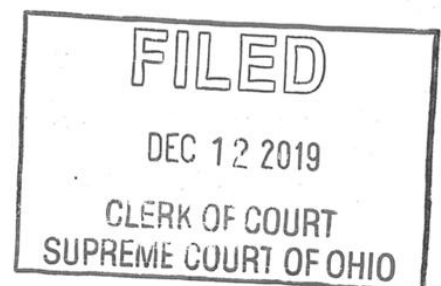
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## **Memorandum In Response Opposing Jurisdiction**

**This case does not involve a question of public or great general interest, nor does it involve a substantial constitutional question.**

The only issue addressed by the lower courts – and thus the only issue properly raised in Appellant Peter Newman’s jurisdictional memorandum – is whether Newman was required to serve his two R.C. 4112.06 petitions for judicial review through the clerk of courts within one year of filing them. This issue does not involve a question of public or great general interest, as this Court answered Newman’s question just four years ago, in *Hambuechen v. 221 Mkt. N., Inc.*, 143 Ohio St.3d 161, 2015-Ohio-756, 35 N.E.3d 502. The answer provided by *Hambuechen* is yes – Newman was required to serve his two R.C. 4112.06 petitions for judicial review through the clerk of courts within one year of filing them. Because he failed to do this, his petitions were dismissed for lack of jurisdiction.

To create a constitutional question where none exists, Newman presents arguments that were never addressed in the courts below. In fact, Newman admits that the appellate court never addressed his constitutional claims. (Memorandum in Support of Jurisdiction, p. 15). As a result, this case does not involve a constitutional question – substantial or otherwise.

### **Statement of the Case and Facts**

There are only two facts relevant to the lower courts’ decisions – the date Newman filed his petitions in the court of common pleas, and whether Newman served those petitions on the necessary parties through the clerk of courts within one year of filing them.

Newman filed his two petitions in the Montgomery County Court of Common Pleas on March 5, 2018.<sup>1</sup> *Newman v. Ohio Civ. Rights Comm.*, 2d Dist. Montgomery No. 28401, 2019-

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<sup>1</sup> Newman erroneously states that he filed his petitions on May 19, 2017 (Memorandum in Support of Jurisdiction, p. 8).

Ohio-4183, ¶¶ 5, 13. Although Newman served his petitions on the Commission through the clerk of courts, he did not do the same with his former employer, the University of Dayton (“the University”). *Newman*, 2019-Ohio-4183, ¶ 13,

After one year passed, and Newman still had not served his petitions on the University through the clerk of courts, the common pleas court dismissed Newman’s petitions due to lack of jurisdiction. *Newman*, 2019-Ohio-4183, ¶¶ 8-13.

### **Law and Argument**

#### **Service is a jurisdictional requirement under R.C. 4112.06.**

Revised Code 4112.06(A) authorizes judicial review of Commission decisions, and R.C. 4112.06(B) outlines the specific steps necessary for invoking a court of common pleas’ jurisdiction to conduct that review:

Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section **and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission.** Thereupon the commission shall file with the court a transcript of the record upon the hearing before it. The transcript shall include all proceedings in the case, including all evidence and proffers of evidence. **The court shall thereupon have jurisdiction of the proceeding \*\*\*.** R.C. 4112.06(B) [emphasis added].

Thus, as R.C. 4112.06(B) specifically conditions a court’s jurisdiction on prior service “upon the commission and upon all parties who appeared before the commission,” a reviewing court will lack jurisdiction unless that service is accomplished.

As Newman admits, the University appeared before the Commission. (Memorandum in Support of Jurisdiction, p. 7). As a result, per the statutory requirements, Newman was required to serve his petitions not only on the Commission, but also on the University (as a party “who appeared before the commission”).

**In *Hambuechen*, this Court held that service of a R.C. 4112.06 petition must be through the clerk of courts within one year of filing.**

This Court has already decided the only issue Newman properly raises in his jurisdictional memorandum: a R.C. 4112.06 petition for judicial review must be served through the clerk of courts within one year of filing the petition. In so holding, this Court simply applied the Rules of Civil Procedure to the statute:

The Rules of Civil Procedure apply to proceedings initiated pursuant to R.C. 4112.06; therefore, the petition for review of an order of the Civil Rights Commission must be served by a clerk of courts on all parties who appeared before the commission and on the commission itself within one year of the date that the petition was filed, as required by Civ.R. 3(A). *Hambuechen*, 2015-Ohio-756, 35 N.E.3d 502, ¶ 11.

Newman failed to serve his petitions upon the University through the clerk of courts. *Newman*, 2019-Ohio-4183, ¶ 13. Due to the passage of one year's time, it was no longer possible for Newman to satisfy the statute's jurisdictional requirements, and so the court of common pleas dismissed Newman's petitions due to lack of jurisdiction pursuant to *Hambuechen*. The Second District rejected Newman's arguments to disregard the jurisdictional requirement, *Newman*, 2019-Ohio-4183, ¶¶ 8-9, 11-20, and declined to address his due process argument, deeming it moot in light of the lower court's lack of jurisdiction. *Newman*, 2019-Ohio-4183, ¶ 22.

**Because Newman failed to satisfy the statutory jurisdictional requirements, he asks this Court to simply ignore them.**

At its core, Newman's position is that courts should simply ignore the jurisdictional requirements of R.C. 4112.06(B). Each of his arguments is a variation on this theme: the lower courts should not "blindly follow" the precedent of *Hambuechen*; his case should be "decided on its merits" despite the lack of jurisdiction; a "balancing of equities" should create jurisdiction where there otherwise is none; the Civil Rules should be applied to create jurisdiction after the one-year jurisdictional window had already closed; the Attorney General's Office "betrayed" the



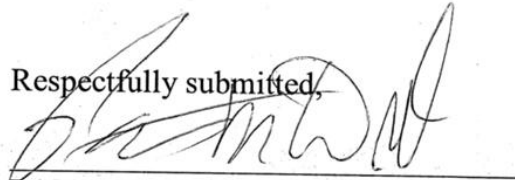
Commission's mission statement when it initially raised the lack of jurisdiction issue, and; this Court improperly "legislated from the bench" when it decided *Hambuechen* in the first place. (Memorandum in Support of Jurisdiction, 15-17).

Where there is a lack of jurisdiction, dismissal is the only proper action, as jurisdiction cannot be created where it does not exist. *Douglas v. E.G. Baldwin & Assocs.*, 150 F.3d 604, 608 (6th Cir.1998) ("quite simply, subject matter jurisdiction cannot be created where none exists."). Because there is no reason for this Court to revisit *Hambuechen*, and because the lower courts properly applied *Hambuechen*, this Court should decline jurisdiction.

### **Conclusion**

Newman failed to serve his petitions on the University of Dayton through the clerk of courts within one year, and the common pleas court properly determined that it lacked jurisdiction due to Newman's failure. As a result, the Commission respectfully requests that this Court decline jurisdiction in this matter.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

This is to certify that the foregoing Memorandum in Response has been served by regular U.S. Mail upon Appellant Peter K. Newman, 594 Garden Road, Dayton, Ohio 45419, on this 12<sup>th</sup> day of December, 2019.



PATRICK M. DULL (0064783)