The Supreme Court of Ohio

CASE ANNOUNCEMENTS

March 29, 2022

[Cite as *03/29/2022 Case Announcements #3*, 2022-Ohio-1016.]

MOTION AND PROCEDURAL RULINGS

2022-0298. Neiman v. LaRose.
On complaint invoking this court's original jurisdiction pursuant to Article XIX, Section 3 of the Ohio Constitution. On petitioners' motion for scheduling order. Sua sponte, the following schedule is set for the filing of answers, evidence, and merit briefs: Answers shall be filed in accordance with S.Ct.Prac.R. 12.04(A)(1), and dispositive motions are prohibited. The parties shall file any evidence they intend to present within 25 days of the date of this entry; petitioners shall file a brief within 10 days of the filing of the evidence; respondents shall file a brief within 20 days after the filing of petitioners' brief; petitioners may file a reply brief within 7 days after the filing of respondents' briefs. Sua sponte, case consolidated with 2022-0303, *League of Women Voters of Ohio v. LaRose*. Any disputes concerning discovery shall be addressed to the court by motion. No requests or stipulations for extension of time shall be filed, and the clerk of the court shall refuse to file any requests or stipulations for extension of time. All documents filed in this case shall be served on the date of submission for filing by personal service, facsimile transmission, or email.

Kennedy, Fischer, and DeWine, JJ., concur in part and dissent in part, with an opinion.

KENNEDY, FISCHER, and DEWINE, JJ., concurring in part and dissenting in part.

{¶ 1} The court today correctly denies petitioners'[1] motion for a scheduling order—a motion that sought to cabin respondents'[2] opportunity for discovery and argument to mere days. We also agree with the court's order to consolidate this case with case No. 2022-0303, *League of Women Voters of Ohio v. LaRose*. Nevertheless, the majority still issues an unnecessarily truncated scheduling order that unduly limits the time in which the parties may conduct discovery. Because there is no need for such a rushed schedule, we dissent and would issue an order that allows for a fair presentation of this case.

{¶ 2} There is no reason to expedite this case. At this juncture, it is abundantly clear that this case will not be litigated prior to the 2022 primary election. The drafters of Article XIX of the Ohio Constitution anticipated that the time provided for the determination, adoption, and judicial review of a congressional-district plan could affect regularly scheduled elections. They therefore provided a stop-gap protection in Article XIX, Section 1(J): if a plan enacted by the General Assembly or adopted by the Ohio Redistricting Commission expires or is invalidated by the court under Article XIX, the boundaries that the congressional-district plan created shall continue to be used for holding elections until a new plan is enacted or adopted. The prior district boundaries do not lapse until new ones are in place.

{¶ 3} The May primary election is quickly approaching. Pursuant to R.C. 3509.01(B)(1) and (2) and a waiver granted to the state under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. 20302, the state must finalize and mail absentee ballots by April 5, 2022. In addition, in-person absentee voting starts the same day. R.C. 3509.01(B)(3) (in-person absentee voting begins on the first day after the close of voter registration). Given this timeframe, it is virtually certain that Ohioans will vote for congressional representatives using the district boundaries that the commission adopted in the March 2, 2022 congressional-district plan. The outcome of the litigation before us challenging the map cannot change those boundaries. If this court upholds the plan, the district map remains in place for the next two election cycles. And if this court rejects the plan, the same district boundaries will continue nonetheless for purposes of

1. Petitioners in this case are Meryl Neiman, Regina C. Adams, Bria Bennett, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Carrie Kubicki, Dana Miller, Holly Oyster, Constance Rubin, Solveig Spjeldnes, and Everett Totty.

2. Respondents are Secretary of State Frank LaRose, Senate President Matt Huffman, Speaker of the House Robert Cupp, and the Ohio Redistricting Commission.

conducting elections pursuant to Article XIX, Section 1(J) of the Ohio Constitution until either (1) a new plan is enacted by the General Assembly and becomes law or (2) a new plan is adopted by the commission and filed with the secretary of state. Given the logistical hurdles of enacting legislation, the possibility of it being subject to referendum, and the 30-day delay before the commission may adopt a plan if the General Assembly fails to do so, any plan adopted to replace the current plan will come too late to use for the May primary.

{¶ 4} Both Ohio law and the United States Constitution prohibit this court from moving election dates established by the General Assembly and Congress. And because the same district boundaries must be used for both the primary and general elections, it is too late for this court to enter any order that would affect the 2022 election cycle. *See Wilson v. Kasich*, 131 Ohio St.3d 249, 2012-Ohio-612, 963 N.E.2d 1282, ¶ 8 ("*Wilson I*") (denying attack on decennial apportionment plan "based on laches insofar as [petitioners] attempt to challenge the use of the apportionment plan for the 2012 election cycle").

{¶ 5} In light of this reality, it makes little sense for the majority to issue an order that unduly limits discovery. Given the need to schedule depositions for numerous fact and expert witnesses, we believe that 25 days is insufficient. This case most likely will turn on the credibility of expert testimony. The cases addressing both the General Assembly and the congressional redistricting have demonstrated the need for expert opinions to be tested, as numerous alternative plans have been submitted that did not comply with the basic map-drawing requirements imposed by the Ohio Constitution. Allowing the adversarial process time to unfold is essential to our fair review. Sometimes in election cases it is necessary to decide the case on an expedited basis, but this is not one of those cases. Therefore, we should not compress the discovery period.

{¶ 6} This case presents a question of importance to all Ohioans, and there is no reasonable basis to expedite this case and decide it without the discovery, argument, deliberation, and adversarial testing that it deserves. In addition, we would schedule a date for oral argument now. Because the majority does not, we dissent from that part of the scheduling order.

Background

{¶ 7} The General Assembly enacted the first congressional-district plan on November 18, 2021, and Ohio's governor signed it into law two days later. *Adams v. DeWine*, ___ Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, ¶ 21. However, on January 12, 2022, a majority of this court held that "the General Assembly did not comply with Article XIX, Sections 1(C)(3)(a) and (b) of

the Ohio Constitution in passing the congressional-district plan," "declar[ed] the plan invalid," and "order[ed] the General Assembly to pass a new congressional-district plan." *Id.* at ¶ 102.

{¶ 8} After the General Assembly failed to pass a revised plan within the 30-day period provided by Article XIX, Section 3(B)(1), the commission convened and adopted a congressional-district plan on March 2, 2022. The petitioners in *Adams* moved to enforce the January 12 order, but we unanimously denied the motions as "procedurally improper." ___ Ohio St.3d ___, 2022-Ohio-871, ___ N.E.3d ___.

{¶ 9} On March 21, 2022, petitioners filed this case to invalidate the March 2 plan. Petitioners also moved this court for an expedited scheduling order, proposing an abbreviated schedule that would allow the case to be fully briefed by March 30, 2022, mere days before April 5, the deadline for mailing absentee ballots under UOCAVA and R.C. 3509.01(B)(1) and (2) as well as the first day of in-person absentee voting, R.C. 3509.01(B)(3). Although petitioners contend that discovery will not be needed beyond expert disclosures, they admit that their proposed scheduling order contemplates this court's rescheduling the primary election. Secretary of State LaRose responds that it is now too late to change the election processes for the May primary. And Senate President Huffman and House Speaker Cupp argue that petitioners' claims are barred by laches and that discovery, including depositions and cross-examination of petitioners' experts, is needed to contest petitioners' challenge on the merits. They therefore urge this court to deny petitioners' motion for a scheduling order and to allow the 2022 election cycle to continue under the March 2 plan.

Expedited Briefing Is Wholly Unnecessary

{¶ 10} Conducting an election requires election officials to comply with federal and state laws that establish the dates of elections as well as deadlines for filing candidate petitions and preparing ballots that are tied to the dates of each election.

{¶ 11} Article I, Section 4, cl. 1 of the United States Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Exercising its authority under the Elections Clause, Congress has provided that election day for federal offices is the first Tuesday after the first Monday in November in even numbered years. 2 U.S.C. 1; 2 U.S.C. 7; 3 U.S.C. 1. The General Assembly has followed suit. R.C. 3501.01(A). No one asserts that this

court has the authority to move the date of the general election in contravention of these statutes. *See* United States Constitution, Article VI, cl. 2.

{¶ 12} Article V, Section 7 of the Ohio Constitution states, "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law * * *." The General Assembly has provided that primary elections shall be "held for the purpose of nominating persons as candidates of political parties for election to offices" and "shall be held on the first Tuesday after the first Monday in May of each year except in years in which a presidential primary election is held." R.C. 3501.01(E)(1); *see also* R.C. 3513.01(A). R.C. 3501.40 removes any doubt that this court lacks authority to change the date of a primary election: "Except as permitted under section 161.09 of the Revised Code [pertaining to enemy attacks], and notwithstanding any other contrary provision of the Revised Code, no public official shall cause an election to be conducted other than in the time, place, and manner prescribed by the Revised Code."

{¶ 13} Changing the date of the primary and general elections is therefore not an option for this court in reviewing the claims advanced in this case. Nor is it possible to use a district map for the general election that is different than the one used in the primary. Once candidates have been nominated at the May primary for the November election, they will be certified to appear on the ballot at the general election "as the nominee of a political party because the candidate has won the primary election of the candidate's party for the public office the candidate seeks," R.C. 3501.01(K).

{¶ 14} The drafters of Article XIX were no doubt aware of the statutory dates for primary and general elections, yet they nonetheless contemplated that congressional redistricting would be a deliberative process. The timelines for adopting a plan are drawn out, and Article XIX, Section 1(C)(1) of the Ohio Constitution gives the General Assembly until November of a year ending in the number one at the latest to enact a plan. The Constitution then permits a party to challenge the plan in this court, without explicitly including any time requirements for filing or for this court to reach a decision. *Id.*, Section 3(A). If the plan is invalidated by this court, the Constitution grants the General Assembly 30 days to enact a new plan. *Id.*, Section 3(B)(1). But for the plan to go into immediate effect—and not be subject to the people's right of referendum for at least 90 days, Article II, Section1(c)—it would have to be passed as emergency legislation by a two-thirds vote of each house of the General Assembly, Article II, Section 1d. If the General Assembly fails to

enact a new plan within 30 days after a plan has been declared invalid, then the commission has another 30 days to adopt a plan. Article XIX, Section 3(B)(2). Nothing in the text of Article XIX precludes the General Assembly or the commission—or both—from using the full number of days allotted for preparing a congressional-district plan. And as the proceedings in this case and in *Adams*, ___ Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, show, even when this court expedites apportionment challenges, it is possible that a decision will not be issued until soon before the statutory deadlines for conducting elections, regardless of the diligence of all involved.

{¶ 15} At this time, there is no realistic possibility that this court could decide the case in time to ensure that voting at the May primary is not disrupted. Indeed, if further evidence of the unreasonableness an expedited scheduling order is needed, consider the fact that it took the court 53 days to decide *Adams* on the first go-around. How can the majority expect respondents to submit evidence and respond to petitioners' evidence in less than half the time it took the court to decide the last case? The petitioners in a companion case to this one are more pragmatic and concede that it would be unreasonable for this court to invalidate the revised plan and expect a new plan to be enacted and reviewed in time for the 2022 elections. *See* petitioners' Motion for Scheduling Order filed on March 22, 2022, in Supreme Court case No. 2022-0303, *League of Women Voters of Ohio v. LaRose*. They recognize that "at some point, an election must be held. The Ohio Constitution sets forth a 60-day process following the invalidation of an enacted plan by this Court. Seeking relief for elections after 2022 respects that timeline."

{¶ 16} Based on these circumstances, it is not surprising that the parties call on us to weigh the legitimate need to definitively resolve the constitutionality of the March 2 plan against the very real concern that an expedited decision by this court will throw the 2022 election cycle into chaos. This, however, is a false dichotomy.

{¶ 17} The drafters of Article XIX were far-sighted and provided that "[w]hen a congressional district plan ceases to be effective under this article, the district boundaries described in that plan shall continue in operation for the purpose of holding elections until a new congressional district plan takes effect in accordance with this article." Ohio Constitution, Article XIX, Section 1(J). That is, even when a congressional-district plan expires or is invalidated by a court of competent jurisdiction, its district boundaries must be used for congressional elections until a new plan is either (1) enacted by the General Assembly and becomes law or (2) is adopted by the commission and filed with the secretary of state. *See* Article XIX, Sections 1(D) and (E).

{¶ 18} So here, the district boundaries outlined in the commission's March 2 plan should remain in place for the upcoming May primary. That plan is currently in effect, and it is presumptively constitutional, *Wilson v.* Kasich, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 18 ("*Wilson II*"). And the Ohio Constitution does not require this court to approve a duly enacted plan before it is used in an upcoming election. *See* Article XIX, Section 1(J). Rather, if this court were to reject the revised congressional-district plan, Ohioans would still elect their representatives to the United States House of Representatives using that plan's district boundaries until new ones are drawn.

{¶ 19} None of this is new or extraordinary. The petitioners in *Wilson* challenged the congressional-district plan adopted following the 2010 federal decennial census under former Article XI. *See Wilson II* at ¶ 4-6. They moved for an order to maintain the status quo by preventing the state of Ohio from implementing the plan at the March 2012 primary election, the first election after the adoption of the plan that followed the 2010 census. *See* Motion for Order Protecting the Court's Jurisdiction filed on January 13, 2012, in Supreme Court case No. 2012-0019, *Wilson v. Kasich*. This court denied the motion, and based on laches, it dismissed the challenge to the extent that it attacked the use of the 2011 district plan for the 2012 election cycle. *See Wilson I*, 131 Ohio St.3d 249, 2012-Ohio-612, 963 N.E.2d 1282, at ¶ 8. That decision allowed the allegedly unconstitutional plan to be implemented for the 2012 primary and general elections while the litigation continued regarding the use of the plan for 2014, 2016, 2018, and 2020. There is precedent, then, to use the plan adopted on March 2, even though petitioners claim it is unconstitutional, during the 2022 election cycle, while allowing the challenge to that plan for future election cycles to be fully developed, without undue haste, by the presentation of evidence and argument.

Expediting This Case Would Hinder the Parties' Ability to Fairly Litigate It

{¶ 20} Compelling reasons justify establishing a case schedule that allows respondents to conduct meaningful discovery. Senate President Huffman and House Speaker Cupp request an opportunity to cross-examine petitioners' experts. In the decision invalidating the General Assembly's first congressional-district map, *Adams*, ___ Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, at ¶ 51, 62, 66, 69, the court heavily relied on petitioners' experts to conclude that the first congressional-district plan violated Article XIX of the Ohio Constitution. Respondents point out that petitioners' experts present conflicting evidence and that some of their alternative district

plans may not have complied with constitutional requirements. They ask for nothing more than a full and fair opportunity to engage in meaningful discovery. Meaningful discovery—including, most significantly, the opportunity to depose experts—"is a vital aspect of the truth-seeking mechanism of the adjudicative process," *In re Carey*, 89 S.W.3d 477, 497 (Mo.2002), and is therefore essential to the adversarial process.

{¶ 21} Indeed, by now this court should be acutely aware of the dangers of proceeding based solely on opinions by professional experts who have not been subjected to adversarial testing. In the previous go-round (as well as in the General Assembly-redistricting cases), the majority placed tremendous reliance on Dr. Kosuke Imai's description of 5,000 simulated maps that he prepared and on his purported comparison of the enacted plan with those maps. But his simulations were nowhere to be found in the record. There was no way for respondents to test Dr. Imai's assumptions through a critical examination of his simulated maps or through cross-examination. And Dr. Imai's simulations were misleading insofar as he allowed for a population variance among districts of roughly 4,000 people, whereas the district-population variance in the first enacted plan never exceeded one person. *Adams* at ¶ 190 (Kennedy, Fischer, and DeWine, dissenting) ("To compare Dr. Imai's maps to the enacted plan (as is central to the majority's analysis) is rather like comparing watermelons to walnuts").

{¶ 22} Moreover, in the first General Assembly-redistricting case, the majority placed great weight on an expert report prepared by Dr. Jonathan Rodden. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, ¶ 112, 126, 130. Based on Dr. Rodden's representations, the majority held out his proposed plan as more proportional than the enacted plan and as meeting all constitutional standards. It did not. *See* petitioners' Notice of Correspondence filed on Jan. 20, 2022, in Supreme Court case No. 2021-1198, *Bennett v. Ohio Redistricting Comm*. (confessing "technical issues" in the plan that may have resulted in splits of municipal corporations and townships not "permitted by the strict language of Article XI"). In a wiping-egg-from-the-face footnote, the majority admitted as much in the second General Assembly-redistricting case. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d ___, ¶ 14, fn. 5. To save this court from the embarrassment of another such incident, we should afford the parties time for meaningful discovery. That cannot be accomplished on a 20-day schedule.

{¶ 23} The majority's heavy reliance on petitioners' experts in our recent redistricting cases exacerbates respondents' need to submit their evidence to adversarial testing. Indeed, in that same footnote, the majority criticized respondents' failure to "contest" Dr. Rodden's unconstitutional proposal. *Id.* But now, respondents highlight contradictions in the expert evidence presented by petitioners that raise questions about its validity. Deposing petitioners' experts will assist respondents' effort to sort fact from fiction. This court should not be in the position of making important constitutional decisions based on untested expert assertions.

{¶ 24} The truncated schedule is particularly unreasonable in light of the fact that the blame for the time-crunch lies squarely with petitioners. They waited more than 20 days after the revised redistricting plan was enacted before they filed their complaint. Instead of promptly filing a lawsuit challenging the new plan, petitioners filed a motion that sought to reopen a final judgment and obtain relief against a body that was not a party to that action. By any reading of the law, such a motion was plainly improper. *See Spiegel v. McClintic*, 916 F.3d 611, 619 (7th Cir.2019) (holding that a party cannot seek leave to amend a complaint after entry of judgment unless the judgment is first vacated or set aside); *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir.2011) (same); *Morse v. McWhorte*r, 290 F.3d 795, 799 (6th Cir.2002) (same); *Faith Properties, L.L.C. v. First Commercial Bank*, 988 So.2d 485, 490 (Ala.2008) (same); *Chokel v. Genzyme Corp.*, 449 Mass. 272, 278-279, 867 N.E.2d 325 (2007) (same). This court recognized as much when it *unanimously* dismissed the unlawful filing. *See Adams v. DeWine*, ___ Ohio St.3d ___, 2022-Ohio-871, ___ N.E.3d ___.

{¶ 25} Petitioners have no legitimate excuse for their 20-day delay, and that delay prejudices their adversaries. By needlessly "expediting an election case" the majority " 'restricts respondents' time to prepare and defend against [their] claims,' " and burdens the state's " 'ability to prepare, print, and distribute appropriate ballots because of the expiration of the time for providing absentee ballots.' " *State ex rel. Syx v. Stow City Council*, 161 Ohio St.3d 201, 2020-Ohio-4393, 161 N.E.3d 639, ¶ 14, quoting *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, 836 N.E.2d 536, ¶ 18.

{¶ 26} The majority's scheduling order is an improvement over the one proposed by petitioners, but in our view, it unnecessarily limits the time for discovery to 20 days. As explained above, this case will undoubtably involve a battle of expert testimony. And the majority has demonstrated in the General Assembly- and congressional-redistricting cases that the process by

which the plan is adopted will be scrutinized as much or more than the actual partisan result. Sufficient discovery is essential to allowing the adversarial process to properly function, and there is no reason to rush discovery under the circumstances of this important case.

Conclusion

{¶ 27} "[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426, 128 S.Ct. 1970, 170 L.Ed.2d 837 (2008). At this juncture, the primary election is upon us and it is not possible for this court to rule on petitioners' objections to the constitutionality of the plan prior to that election. We should therefore take guidance from what we did in *Wilson I* and what the United States Supreme Court did in *Merrill v. Milligan*, ____ U.S. ____, 142 S.Ct. 879, ____ L.Ed.2d ____ (2022): allow the congressional election to proceed under the duly adopted and presumptively constitutional plan and handle this litigation in a posture commensurate with the care and attention to detail a challenge of this magnitude requires.

{¶ 28} Because the majority's scheduling order elevates expediency and politics over accuracy and fairness, we dissent. We see no reason that this case should not proceed under a scheduling order that recognizes this case's complexity and importance. We would issue an order as follows:

- Answer to be filed within 21 days
- Expert reports to be exchanged within 20 days of filing of the answer
- All fact and expert discovery to be completed within 45 days of filing of the answer
- Petitioners' brief to be filed within 10 days of discovery cutoff
- Respondents' brief to be filed within 21 days thereafter
- Petitioners' reply to be filed within 7 days thereafter

{¶ 29} This matter also fits comfortably within our criteria for conducting oral argument. *See State ex rel. Pilarczyk v. Geauga Cty.*, 157 Ohio St.3d 191, 2019-Ohio-2880, 134 N.E.3d 142, ¶ 23. We therefore would schedule oral argument forthwith.