

IN THE SUPREME COURT OF OHIO

THE OHIO ORGANIZING COLLABORATIVE, <i>et al.</i> ,	:	Case No. 2021-1210
	:	
	:	
<i>Relators,</i>	:	APPORTIONMENT CASE
	:	
v.	:	Filed pursuant to S.Ct.Prac.R. 14.03(A)
	:	and section 9 of Article XI of the Ohio
OHIO REDISTRICTING COMMISSION, <i>et al.</i> ,	:	Constitution to challenge a plan of
	:	apportionment promulgated pursuant to
	:	Article XI.
<i>Respondents.</i>	:	
	:	
	:	

**RELATORS' MOTION TO APPOINT A MASTER COMMISSIONER FOR
RESOLUTION OF DISCOVERY DISPUTES**

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**RELATORS' MOTION TO APPOINT A MASTER COMMISSIONER FOR
RESOLUTION OF DISCOVERY DISPUTES**

Pursuant to S.Ct.Prac.R. 14.03(C)(1), relators the Ohio Organizing Collaborative *et al.* hereby move this Court for an order referring this apportionment case to a master commissioner for resolution of discovery disputes. A discovery dispute has arisen in this apportionment case and in the other two apportionment cases filed contemporaneously with this one, case nos. 2021-1193 and 2021-1198. Counsel for relators in these cases met and conferred with counsel for respondents on Friday, October 1, 2021, concerning discovery. At that meeting, respondents' counsel stated that they construed this Court's scheduling orders as foreclosing discovery and that, on that basis, respondents would not respond to any of relators' document requests or interrogatories or sit for depositions absent an order from this Court. Although respondents expressed a willingness to reach a compromise on terms satisfactory to them, no compromise was reached nor realistically can be reached so long as respondents contend that they have no legal obligation to respond to any discovery whatsoever.

Because respondents' stated position presents a concrete, threshold legal dispute—whether discovery is allowed in this apportionment case—relators respectfully request the appointment of a master commissioner. If the Court grants the motion, relators also request a discovery hearing before the master commissioner at the earliest possible date, as time is of the essence. Respondents should not be able to avoid their discovery obligations by running out the clock. A memorandum in support of this motion is attached.

Dated: October 4, 2021

Respectfully submitted,

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MEMORANDUM IN SUPPORT

This is an apportionment case arising under Article XI, Section 9 of the Ohio Constitution and S.Ct.Prac.R. 14.03. The question presented by this motion is whether relators may take discovery in this apportionment case. This Court should answer that question in the affirmative and appoint a master commissioner to resolve discovery disputes. *See* S.Ct.Prac.R. 14.03(C)(1).

BACKGROUND

The Ohio Constitution prohibits partisan gerrymandering. In 2015, Ohio citizens amended the Constitution to create new judicial remedies for any violation of the Ohio Constitution, including any violation of Ohio's bill of rights under Article I. *See* Ohio Const., Art. XI, §§ 3(B)(2), 9(B), 9(D)(3). And Section 6 of Article XI of the Ohio Constitution further provides that the Ohio Redistricting Commission "shall attempt to draw a general assembly district plan" that meets three standards, so long as meeting those standards would not violate the district standards described in Sections 2, 3, 4, 5, and 7 of Article XI. *See* Ohio Const., Art. XI, § 6. One of the three "Section 6" standards is that "[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party." Ohio Const., Art. XI, § 6(A). Another one of the Section 6 standards is that "[t]he 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 Const., Art. XI, § 6(B).

Relators' complaint in this apportionment case asserts three causes of action. In the first, relators allege that the Commission's General Assembly district plan violates Article I, Section 2 of the Ohio Constitution because the plan does not institute government or draw districts for the

equal protection and benefit of the people. Compl. ¶¶ 71-76. In the second, relators allege that the Commission’s plan violates Article I, Sections 3 and 11 of the Ohio Constitution because the plan subjects relators and organizational members who tend to vote for Democratic candidates to disfavored treatment because of their expression of political views and voting history. Compl. ¶¶ 77-80. In the third, relators allege that the Commission’s plan violates Article XI, Sections 6 of the Ohio Constitution because the Commission did not attempt to draw a General Assembly district plan that comports with the standards in that Section. Compl. ¶¶ 81-84.¹

On September 27, 2021, relators filed their motion for a scheduling order, asking this Court to adopt a schedule that provided deadlines for expert disclosures, document requests, and interrogatories. The Commission’s response to the motion argued that “fact discovery should be stayed” so that the Court could “first consider threshold legal issues pertaining to Relators’ Complaint” Commission Opp. 1. The Commission also argued that discovery deadlines were unnecessary because the parties could work together to complete discovery and “to the extent unresolvable discovery disputes arise as this case proceeds, a Master Commissioner could be appointed to resolve those disputes in a timely fashion to keep the case on schedule.” *Id.* at 2.

Respondents DeWine, LaRose, and Faber responded to relators’ motion for a scheduling order in this apportionment case by referring the Court to their response in the *League of Women Voters* case (No. 2021-1193), in which they argued that the proposed schedule “contains numerous (and unnecessary) internal discovery deadlines.” Response to Relators’ Motion for

¹ The other apportionment cases contemporaneously filed in this Court (Nos. 2021-1193 and 2021-1198) do *not* assert a claim based on violations of Article I, Section 2 of the Ohio Constitution (equal protection and benefit) or a claim based on violations of Article I, Sections 3 and 11 of the Ohio Constitution (free speech and assembly). Accordingly, while discovery in the three apportionment cases will be similar and is based on a common nucleus of operative facts, relators the Ohio Organizing Collaborative *et al.* need to brief their distinct claims separately and plan to file a motion for oral argument on their distinct claims at an appropriate time.

Scheduling Order by Respondents DeWine, LaRose and Faber, at 2, *League of Women Voters of Ohio v. Ohio Redistricting Commission*, No. 2021-1193 (Sept. 28, 2021). “The Statewide Elected Officials propose that a master commissioner be utilized to handle any unresolved discovery matters that may arise during the discovery period.” *Id.*

Respondents Huffman and Cupp responded to relators’ motion for a scheduling order in this apportionment case by referring the Court to their response in the *League of Women Voters* case (No. 2021-1193), in which they asserted that “[t]his action is patently improper because it relies solely on Section 6 of Article XI of the Ohio Constitution.” Response of Respondents Matt Huffman, President of the Ohio Senate, and Robert R. Cupp, Speaker of the Ohio House of Representatives, to Relators’ Motion for Scheduling Order, at 2, *League of Women Voters of Ohio v. Ohio Redistricting Commission*, No. 2021-1193 (Sept. 28, 2021). Respondents Huffman and Cupp asked the Court to stay discovery and set a briefing schedule on their proposed motion to dismiss. *See id.* Alternatively, they requested an extension of deadlines contemplated in relators’ scheduling motion. *See id.* at 2-3.

This Court concluded, *sua sponte*, that S.Ct.Prac.R. 14.03(B) required it to issue an order setting a schedule for the filing of briefs and evidence in the case. Accordingly, it set a schedule for filing evidence and briefs and denied the scheduling motion as “moot.” Order, *Ohio Organizing Collaborative v. Ohio Redistricting Commission*, No. 2021-1210 (Sept. 29, 2021).

On October 1, 2021, relators’ counsel met and conferred with counsel for (1) the Commission; (2) respondents DeWine, LaRose, and Faber; and (3) respondents Huffman and Cupp. At that meeting, counsel for respondents Huffman and Cupp stated that respondents construed this Court’s scheduling orders as foreclosing discovery and that, on that basis, respondents would not respond to any of relators’ document requests or interrogatories or sit for

depositions absent an order from this Court. Although respondents expressed a willingness to reach a compromise on terms satisfactory to them, no compromise was reached.

LAW & ARGUMENT

This Court's ruling is necessary to resolve the threshold legal question of whether Ohio law permits *any* discovery in this apportionment case. This Court should conclude that Ohio law authorizes discovery in this and other apportionment cases. And it should appoint a master commissioner to resolve particular discovery disputes among the parties.

I. This Court's Rules and Orders Allow Discovery

The Court's order in this case dated September 27, 2021, states that "Rules of Practice of the Supreme Court of Ohio shall govern the procedure and form of documents filed in this action" and "[t]he Ohio Rules of Civil Procedure shall supplement the Rules of Practice of the Supreme Court of Ohio for this case, unless clearly inapplicable." This Court's Rules of Practice provide that the Court "may refer apportionment cases to a master commissioner for any purpose, including resolution of *discovery disputes*." S.Ct.Prac.R. 14.03(C)(1) (emphasis added). This provision would be superfluous if Ohio law does not permit discovery in apportionment cases. After all, without discovery, there can be no discovery disputes. Therefore, this Court's rules contemplate and authorize discovery.

In addition, "[p]arties have a right to liberal discovery of information under the Rules of Civil Procedure." *Ward v. Summa Health Sys.*, 2010-Ohio-6275, 128 Ohio St. 3d 212, 214, 943 N.E.2d 514, 517, ¶ 9. The Ohio Rules of Civil Procedure provide that parties may obtain discovery by deposition, document requests, requests for admission, and interrogatories. Ohio R. Civ. P. 26(A). Unless otherwise limited by court order, parties may obtain discovery regarding any non-privileged matter that is relevant and proportional to the needs of the case. Ohio R. Civ.

P. 26(B). No court order limits discovery here. This Court denied relators' motion for a scheduling order as "moot," but that order was not a ruling on the merits of the proposed scheduling deadlines, much less was it an order foreclosing discovery. This Court does not "give opinions upon moot questions" [*Miner v. Witt*, 82 Ohio St. 237, 238, 92 N.E. 21, 22 (1910)] and, having determined that relators' motion for a scheduling order was moot, it gave no opinion on the underlying merits of that motion.

II. The Master Commissioner Should Decide Whether Relators' Document Requests Are Relevant and Proportional to the Needs of This Case

The Commission and individual Commissioners have facts in their possession that are relevant to relators' claims because the Constitution charges them with the obligation to "draft the proposed plan in the manner prescribed in [Article XI]." Ohio Const. Art. XI, § 1(C). The Commissioners have personal knowledge of whether and how they evaluated and drafted the plan that they introduced to the public and ultimately adopted. If they did not participate in drafting the plan or have no knowledge of the plan that they voted to adopt as Ohio's plan, that too would be relevant.

Relators seek discovery to determine whether the facts in respondents' sole possession show that, in enacting the General Assembly district plan, respondents intended to subject relators to disparate treatment based on their political affiliations and expression and whether respondents made any attempt to comply with the standards set forth in Section 6 of Article XI of the Ohio Constitution. Relators will argue that Ohio's Constitution prohibits intentional gerrymandering of districts to dilute the votes of citizens affiliated with a disfavored political party. *See* Compl. ¶¶ 71-84. The Commissioners' participation in drafting the adopted plan, if any, is relevant to these claims.

Thus far, respondents have not asserted an objection that all of relators' document requests and interrogatories are legally irrelevant or seek only privileged information—in fact, they have taken the position that they need not respond at all. Respondents may oppose this motion, however, by arguing that respondents seek irrelevant information or that their requests are overly burdensome. If respondents make that argument in opposition, this Court should reject it. The master commissioner should decide, at a hearing on a motion to compel discovery, whether respondents' anticipated objections have any merit. The master commissioner will be in a position to rule on objections after respondents make them, assuming they do, on a request-by-request basis and set reasonable parameters for responding to relators' discovery requests.

CONCLUSION

For the foregoing reasons, relators respectfully request that this Court appoint a master commissioner and set a discovery hearing before the master commissioner at the earliest possible date to resolve discovery disputes and instruct the parties on their discovery obligations.

Dated: October 4, 2021

Respectfully submitted,

/s/ Danielle L. Stewart

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CERTIFICATE OF SERVICE

I, Danielle L. Stewart, hereby certify that on October 4, 2021, I caused a true and correct copy of the foregoing Relator's Motion to Appoint a Master Commissioner for Resolution of Discovery Disputes to be served by email upon the following:

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