

**In the
Supreme Court of Ohio**

LEAGUE OF WOMEN VOTERS OF OHIO, et al.,	:	
	:	
<i>Relators,</i>	:	Case No. 2021-1193
	:	
v.	:	Original Action Pursuant to
	:	Ohio Const., Art. XI
OHIO REDISTRICTING COMMISSION, et al.,	:	
	:	Apportionment Case
<i>Respondents.</i>	:	
<hr/>		
BRIA BENNETT, et al.,	:	
	:	
<i>Relators,</i>	:	Case No. 2021-1198
	:	
v.	:	Original Action Pursuant to
	:	Ohio Const., Art. XI
OHIO REDISTRICTING COMMISSION, et al.,	:	
	:	Apportionment Case
<i>Respondents.</i>	:	
<hr/>		
OHIO ORGANIZING COLLABORATIVE, et al.,	:	
	:	
<i>Relators,</i>	:	Case No. 2021-1210
	:	
v.	:	Original Action Pursuant to
	:	Ohio Const., Art. XI
OHIO REDISTRICTING COMMISSION, et al.,	:	
	:	Apportionment Case
<i>Respondents.</i>	:	

**MOTION FOR LIMITED INTERVENTION BY ATTORNEY GENERAL &
MOTION TO CONVERT "RESPONSE" TO AMICI BRIEF**

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MOTION

Ohio Attorney General Dave Yost moves, pursuant to S.Ct.Prac.R. 4.01 and Civil R. 24 (incorporated into Original Actions by S.Ct.Prac.R. 12.01(A)(2)(b)), to intervene in for the limited purpose of filing this motion, which seeks to convert the January 28, 2022 “Response of respondents Senator Vernon Sykes and House Minority Leader Allison Russo to the petitioners' objections” (“Response”) into an *amici curiae* filing.

As the Response itself thoroughly details, the Attorney General decided that only the Redistricting Commission itself should respond to the Petitioners’ Objections. No individual member was authorized to file in their official capacity. The Republican Statewide Office Holders were denied the right to file official separate responses. So were *both* legislative factions—Republican and Democrat alike. The actions of the Commission as a body were the subject of the Objections—not the separate actions of any individual member. Accordingly, as more fully discussed below, the Attorney General, as the Chief Law Officer of the State of Ohio, deemed that a single response was in order.

Of course, this Court regularly accepts filings by *amici curiae*. The self-described “pro se” filing is better categorized as an amicus filing by the individuals in their personal capacities. *See, e.g.*, S.Ct.Prac.R. 16.06. As such, the Attorney General requests he be permitted limited intervention to protect his powers as Chief Law Officer of the State of Ohio, and that the Response be deemed an amicus brief. *Derolph v. State*, 2001-Ohio-5092, 94 Ohio St. 3d 40, 43, 760 N.E.2d 351, 354; *See also, Id.* at 47-48, 357 (Cook, J., dissenting).

LIMITED STATEMENT OF RELEVANT FACTS

The Response was, as admitted by the filers, an unauthorized filing on behalf of a State entity. In response to the Court's Order, and subsequent Objections, no individual member of the Commission – Republican or Democrat – has been permitted to make an individual filing. The Commission speaks through its official actions and through its votes. Accordingly, Counsel to the Commission is the only counsel permitted to represent the Commission to respond to Petitioners' Objections.

Respondents Allison Russo and Vernon Sykes filed the *pro se* Response, asserting they were *denied* legal counsel in this proceeding. This is false. At all relevant times, the minority members of the Commission have had counsel. At their earlier request, the Attorney General assigned the then Democrat members of the Commission (prior to Commissioner Russo's substitution as a member) the outside counsel they requested— Ice Miller.

On Thursday, January 27, 2022, Respondents requested that their appointed counsel, Ice Miller, withdraw as counsel. On Friday January 28, 2022, Ice Miller complied with the request. Upon that withdrawal, Respondents Allison Russo and Vernon Sykes were still represented by counsel – the Attorney General's Office, their statutory counsel under R.C. §109.361. Indeed, a specific Assistant Attorney General, walled off from other in-house attorneys, was specifically tasked with representing Russo and Sykes should they have decided not to engage outside counsel. Importantly,

the “8(C) Minority Report” of Commissioners Sykes and Russo is of record with this court, setting forth their position.¹

The filers of the *pro se* Response knew and acknowledged that the Attorney General decided that only the Redistricting Commission, and no individual Commissioner would be authorized to file an official response on behalf of the State or any of its components. The *pro se* filers elected to proceed independently. As such, Respondents’ Response, agreeing with Petitioners’ Objections, should have been filed in the form of an amicus brief.

ARGUMENT

The Attorney General is the Chief Law Officer of the State of Ohio. R.C. §109.02. “[N]o state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested.” *Id.* The decisions of how to afford legal counsel, and how to conduct litigation, are within the control of the Attorney General. *Accord, Bd. of Trs. of the Tobacco Use Prevention & Control Found. v. Boyce*, 2010-Ohio-6207, ¶ 29, 127 Ohio St. 3d 511, 518, 941 N.E.2d 745, 753 (rejecting State

¹ A copy of the Minority Report is available as Exhibit 11 to the Commission’s Response (Jan 28, 2022).

Board's argument that the Attorney General "sabotaged" the board by declining to provide legal counsel for an executive session).

In the waning days of the *DeRolph* litigation, this Court ruled on the Attorney General's objection to the participation of certain State actor *amici* in court ordered mediation, citing the above law. This Court responded: "We acknowledge the import of these statutory provisions. What is surprising, however, is that the Attorney General in her November 26 response acknowledges that the counsel who have represented two Governors and four leaders of the houses of the General Assembly over the course of this appeal were not appointed special counsel pursuant to this statutory authority. She had not, however, objected before November 26 to the representation of any elected official as an amicus curiae by private counsel or rebutted the inference that the counsel had been appointed special counsel." *DeRolph*, 94 Ohio St.3d, at 42. The majority concluded, "The Attorney General has failed to timely object to numerous elected officials' appearing as amici in their official capacities," and found the argument waived. *Id.* at 43. The *DeRolph* majority recognizes the Attorney General's right to control State litigation, and thus, the need for his limited intervention here. Also here, the Attorney General has objected the very day after the unauthorized filing. Thus, there has been no waiver.

The dissent in *DeRolph* did not find waiver, and thus, reached the merits. Its analysis is informative here. "The majority does not explicitly find that the Attorney

General is wrong to seek to exclude the amici from settlement proceedings based on the status of those individuals. Rather, the majority contends that it is simply too late to object to the involvement of the amici to keep them from the negotiating table. But nowhere does the law accord amici the status of parties.” *Id.* at 48 (Cook, J., dissenting). The dissent concluded, “To treat the amici as if they were parties ignores this court's own rules and law on the subject.” *Id.* Where the majority and the dissent agree is that had the Attorney General timely asserted her right (the then Attorney General was female) to control litigation, she would have prevailed.

Of course, under Ohio law, dissenting members of a board or legislative body lack standing to challenge the action in their official capacity. *See ProgressOhio.org, Inc. v. JobsOhio*, 2012-Ohio-2655, ¶ 28, 973 N.E.2d 307, 316 (10th Dist.), (“The [Supreme] court indicated that a legislator voting in the minority would not have standing”), *citing State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007 Ohio 3780, ¶¶ 17-19, 20, 872 N.E.2d 912.

To do anything other than grant this motion will cause this Court (and others in the future) to be flooded with multiple, competing filings offering the purported legal positions of the State, or components thereof, thereby depriving the Attorney General of his longstanding statutory and inherent power to ensure the State speaks with one voice—or multiple voices only when so authorized. Granting this motion “serves to prevent the judicial process from being used to usurp the powers of the political

branches” by granting official governmental standing to a person who does not hold it. *Hollingsworth v. Perry*, 570 U.S. 693, 704-05, 133 S. Ct. 2652, 2661 (2013) Accordingly, the *pro se* filing should be treated as an amicus filing. *State ex rel. Citizen Action v. Hamilton Cty. Bd. of Elections*, 2007-Ohio-5379, ¶ 24, 115 Ohio St. 3d 437, 440, 875 N.E.2d 902, 906 (“Although we have denied the city's motion to intervene for the reasons previously set forth, the city is entitled to file an amicus curiae brief without leave of court.”)

Dated: January 31, 2022

Respectfully submitted,

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