In the
Supreme Court of Ohio

STATE OF OHIO, ex rel. CITIZENS NOT POLITICIANS, et al.,	:	Case No. 2024-1200
Relators,	:	Original Action in Mandamus
v.	:	
OHIO BALLOT BOARD, et al.,	:	Expedited Elections Case
Respondents.	:	

MOTION TO STRIKE PUTATIVE ANSWER OF SENATOR PAULA HICKS-HUDSON AND REPRESENTATIVE TERRENCE UPCHURCH

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MOTION TO STRIKE

This Court should strike the purported answer because it threatens settled first principles of our representative government. The non-prevailing members of a multimember public body may not appear in court to challenge the actions of that body. They cannot do so with a lawyer and obligate taxpayers to foot the bill, nor can they purport to act *pro se* in order to claim party status and initiate or lengthen litigation. For the reasons set out in this Motion, this Court should reaffirm its precedent, all of which confirms a fundamental truth: a multi-member body speaks only through its majority vote, and non-prevailing members may not resort to the judiciary to relitigate their loss.

The pernicious policy proposed by these putative parties—whereby any government officer may choose to litigate a governmental action or decision he or she does not like—threatens to grind all government business to a halt. Who else is entitled to relitigate their losses after debate, hearing, and vote? Members of the General Assembly? All of them? What about members of City or Village Councils? Members of the Ohio Air Quality Development Authority? The county budget commission? The dissenting members of a public university board of trustees? Such a policy would destroy democratic institutions and the separation of powers by substituting the judiciary for all forms of government. This must not stand.

On the other hand, there is no cost to limiting the official litigating voice of multimember institutions of the State to its majority votes, as represented by the Attorney

General. To the extent judicial review of such multimember decisions—whether unanimous or divided—may be warranted, there is no shortage of litigants with legal standing to ensure such review, as the facts of this very case prove.

A motion to strike is usually a brief procedural sideshow fit for summary treatment. But this motion spotlights a key dispute over the nature of majoritarian political bodies that warrants a published opinion by this Court. The non-prevailing members of Ohio's multimember bodies have continued to act as if they have authority that they do not have. *See Collins, et al. v. DeWine, et al.*, No 23-cv-006611 (Franklin Cnty. Ct. of Com. Pl.). As that case and this one show, some non-prevailing members of multimember bodies continue to regard their capacity to appear in court to challenge the actions of their own body at taxpayer expense as an open question. It is not. The Court should strike this purported answer in a reasoned order making as much clear.

BACKGROUND

The State Ballot Board is statutorily comprised of five members—two from each major party, plus the Secretary of State. R.C. §3505.061(A). The Ohio Constitution requires that "ballot language for [] proposed amendments shall be prescribed by a majority of the Ohio ballot board." Ohio Const. art. XVI., §1. Relevant here, the Board voted 3-2 to approve ballot language for a proposed constitutional amendment related to state and congressional redistricting. Two non-prevailing members objected to the language the Board ultimately approved.

Relators brought this action against the Ballot Board and its members in their official capacities. The Attorney General defended the Board and all its members and filed an answer. He also denied a request from the two non-prevailing Board members to appoint and fund outside counsel to represent them individually. The non-prevailing Board members then filed an answer *pro se*, endorsing the view of those challenging the Ballot Board's action. Their response admits every assertion in the complaint of which they have personal knowledge and urges the Court to grant Relators' requested relief.

ARGUMENT

The Ohio Constitution specifies who speaks on behalf of the sovereign People, in what context, and how. Multimember bodies speak for the People through decisions reached by majority votes of their members. In turn, the Attorney General of Ohio alone is vested with authority to speak for the People in court through control over the course of litigation involving the State and the decisions of its public institutions. Together, this means that non-prevailing members of multimember bodies may not assert themselves as parties in litigation, whether at taxpayer expense or *pro se*.

I. The People of Ohio have delegated their sovereign authority through the Ohio Constitution to specify how public institutions speak on their behalf.

Begin with first principles: "All political power is inherent in the people." Ohio Const. art. I, §2. By a "Republican Form of Government," U.S. Const. art. IV, §4, the Constitution meant to establish in each State "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the

legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Duncan v. McCall*, 139 U.S. 449, 461 (1891). The People of Ohio thus "have the right to alter, reform, or abolish" the State government and its laws, Ohio Const. art. I, §2, and thus through the State Constitution, the People have specified who speaks for them, and how. For example, the Governor speaks for the People in the exercise of their powers of clemency. *Id*. art. III, §11. Only the General Assembly may act on the behalf of the sovereign People to enact statutes. *Id*. art. II, §1. And the Chief Justice of this Court speaks for the People when she discharges the duty to exercise "general superintendence over all courts in the state" "in accordance with rules promulgated by the Supreme Court," *id*. art. IV, §5(A)(1).

A. Multimember bodies speak for the People through majority vote.

Consistent with these principles of representative government, every multimember body in the State—from the General Assembly to this honorable Court itself—speaks only through majority or supermajority vote. *See* art. II, §15(A) ("no bill shall be passed without the concurrence of a majority of the members elected to each house"); *see also* art. IV, §2(A) ("A majority of the Supreme Court shall be necessary to constitute a quorum or to render a judgment."). It is the same with every inferior body, from the Ballot Board to the Library Board. *See* art. XVI, §1; *see also* R.C. 3375.35 ("The purchase of any real property requires a two-thirds vote of the full membership of the [Library] board making such purchase.").

Ohio is no exception in requiring majoritarian decision making by multimember bodies. The "almost universally accepted common-law rule is … [that] in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body." *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967). Because multimember bodies speak for the People through the majority votes of their members, it follows logically that non-prevailing members of such bodies cannot officially speak on behalf of their multimember bodies.

B. The Ohio Constitution vests authority over litigation in the Attorney General.

Turn next from decision-making by multimember bodies to litigation over such decisions. Once a decision has been made on behalf of the People by another designated officer or multimember body, who holds the separate authority to decided how best to defend and enforce such decisions?

That authority been allocated by the People through the Ohio Constitution to a single executive officer. Just as the Governor speaks for the People in some matters, such as clemency, and the General Assembly speaks for the People in other matters, such as legislation, it is the Ohio Attorney General who alone wields authority to speak for the sovereign People in court.

As established above, Ohio has the sovereign authority to "structure its executive branch," *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1011 (2022). Consistent with principles of representative democracy, a State may choose to "speak with a single

voice, often through an attorney general," in litigation. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022) (quotation omitted). Like many States, Ohio has an elected Attorney General. Ohio Const. art. III, §1; R.C. 109.01. The Attorney General has power as the "chief law officer for the state and all its departments." R.C. 109.02. Indeed, Ohio law is explicit that outside narrow exceptions, "no 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." *Id.*

Like the highest court of many other States, this Court holds that the Attorney General retains all common-law powers of attorneys general unless they are expressly taken away. *State es rel. Cordray v. Marshall*, 2009-Ohio-4986 ¶¶18–19; *see* 2 Edward M. Thornton, A Treatise on Attorneys at Law 1143–45 (1914). "The office of attorney general is of ancient origin." *Wilentz v. Hendrickson*, 133 N.J. Eq. 447, 454 (Ch. 1943). Such traditional powers include "the authority to control litigation involving state and public interests." William C. Haflett, Tice v. Department of Transportation: *A Declining Role for the Attorney General?*, 63 N.C .L. Rev. 1051, 1053 (1985).

As part of pursuing the public interest, the Attorney General often fulfills a "dual role" as both the attorney for State officers and Chief Law Officer for the People. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 240 (2002). But the Attorney General remains bound to the public interest foremost. *See* Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 Colum. J.L. & Soc.

Probs. 365, 378 (2005). For that reason, the Attorney General alone must "control the litigation." *Id.* When a public official "recommends a course of action, the Attorney General must consider the ramifications" to the State and the public. *Sec'y of Admin. & Fin. v. Att'y Gen.*, 367 Mass. 154, 163 (1975). "To fail to do so would be an abdication of official responsibility," *id.*, because the "public interest is the *actual* client," Davids, *State Attorneys General* at 378.

The Ohio Rules of Professional Conduct reinforce these principles. Indeed, they recognize that the Attorney General's role is unique from that of private attorneys, and that such Rules "do not abrogate any such authority" he has been given by law. *Ohio Rules of Professional Conduct* at 3; *see, e.g.*, *id.* (recognizing government attorneys may represent multiple clients in same dispute). The People of Ohio have given the Attorney General "authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships," *id.*, including control over the conduct of litigation. Any other understanding of the Attorney General's power would divest Ohioans of their right to elect a "chief legal officer." R.C. 109.02.

* * *

Now, consider together the three propositions established above: in the Ohio Constitution, the People have wielded their political power to decide who speaks for them and how. They have decided that multimember bodies wield delegated sovereign power through majority votes to reach decisions on behalf of the State. And they have

decided that the Attorney General wields delegated sovereign power to speak for the State in litigation.

II. Non-prevailing members of a multimember body may not pursue litigation as parties to advance their personal views.

From these premises above, the conclusion is clear: non-prevailing members of a multimember body may not wield the official authority of their respective bodies, nor may they wield the legal authority of the State through litigation. But that is exactly what the putative "answer" filed here seeks to do.

Most directly, the non-prevailing Board members seek to arrogate the Attorney General's power over litigation to themselves. They would do so by either (1) forcing the Attorney General to open State coffers to fund their outside representation, or (2) taking on the mantle of State legal officers as official parties in litigation themselves. But non-prevailing Board members are not entitled to State-funded representation, and in no event may other State officers assume the role of Attorney General by inserting themselves as parties in the courts.

Ohio law vests enumerated powers and duties in "the Ohio ballot *board*"—not its constituent members. R.C. 3505.062 (emphasis added). And by law, the Board acts only by "the concurrence of three members," a majority. R.C. 3505.061(D). That non-prevailing members feel their political "interests diverge" from those of the Board (Answer at 2) is thus irrelevant to the AG's representation of *the Board*. While the

Attorney General may determine that the public interest requires representing the Ballot Board, it does not entail representing the rejected views of non-prevailing members, too.

It follows that non-prevailing Board members may not use tax dollars to advance their own (losing) political position. The Attorney General alone has the statutory authority to decide whether to hire outside counsel for any State entity. R.C. 109.07. Here, the non-prevailing members do not even represent a State entity, or any official State action. Regardless, allowing other State officers and institutions to "dictate a course of conduct to the Attorney General" would "prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy," *Feeney*, 373 Mass. at 365–66, and render the "status of chief legal officer meaningless." Davids, *State Attorneys General* at 378. It also would inject "chaos into the area of legal representation of the State." *Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n*, 174 Conn. 308, 320 (1978) (quotation omitted). This Court should reject this and all such attempts.

For the same reasons, the non-prevailing members may not litigate *pro se*. First and foremost, that decision directly contravenes the operative decision of the Ballot Board, made through a majority vote. The non-prevailing Board members' "response" merely echoes Relators' complaint against the Board. In addition, *pro se* litigation similarly disregards the Attorney General's exclusive legal authority by making a litigation decision at odds with those he has taken in representing the Ballot Board. And

here, funding such duplicative and politically motivated filings would raise costs to taxpayers without offering any additional value, either to the public or the Court.

To be clear, requiring Board members to stay in their lane does not prevent them from speaking publicly on issues before the Ballot Board. Non-prevailing members remain free to persuade their fellow board members before a vote. They remain free to use the bully pulpit of the press to voice their views, like any citizen. Under certain circumstances, they may even be able to submit an amicus brief in their personal capacities, prepared on their own time and dime—an open question not implicated by their actions here. What they may *not* do is seize the machinery of government (and the purse of government) for their own message by acting as separate parties to this or any other litigation.

III. The non-prevailing Board members' attempt to litigate on behalf of the State undermines Ohio's governmental structure and has no limiting principle.

To allow this purported answer to inject the non-prevailing members of the Ballot Board into this litigation would radically alter the structure and operation of Ohio's government. Under the non-prevailing members' view, any disgruntled member of a multimember body may relitigate the proceedings and votes of those State entities in court. In effect, Ohio courts would subsume all political decisions of State agencies and officers, eroding the separation of powers and the People's right to structure their government how they choose. Political decisions of the Board are rightfully decided in the meetings of the Board, not the chambers of this Court. Under Robert's Rules of Order,

which are used by virtually every multimember State body, the non-prevailing members *cannot even make a motion for reconsideration* of their losing position. Robert's Rules of Order §37:35 (12th ed. 2020). It is astonishing that these non-prevailing Board members nevertheless believe they are entitled to litigate their losing position before this Court.

It is not that this question cannot be heard in litigation. Challenges to a Board decision may be raised in court, of course—but by non-State parties with standing. Indeed, the State has already answered the original complaint, and later today, will file a brief on the merits. Without doubt, a decision from this Court will be forthcoming. But non-prevailing Board members may not get a second bite at the apple by turning to the courts every time they are on the losing side of a Board vote. That would subvert the democratic system. Indeed, it would undermine the entire rationale for multimember boards making decisions by a majority vote.

Such a practice also is rife with perverse incentives. Ohio's government is structured such that multimember State entities are productive only through majority vote. But the non-prevailing members' view of their own authority multiplies incentives to dissent. If a dissenting vote means access to a lawyer on the taxpayer's dime to amplify dissenting views in court and simultaneously elevate the stature of the dissenter in the press, then individual members of State entities will find their recalcitrance rewarded at every turn. Obstinance will lead to opportunity—to make a political name through litigation bankrolled by the public's purse.

If non-prevailing members of boards, commissions, and legislatures can litigate whenever they lose, there is no limit to the mischief this would work. A single member of any multimember State board could threaten to challenge and derail any and all of that board's decisions. Consider Ohio State University's 15-member Board of Trustees. If eight members vote to take an action on behalf of the University, the non-prevailing members could file suit to tie up the university board's action indefinitely. If those non-prevailing members had different views, each might be entitled to separate counsel, leaving the court to wade through seven different briefs. Similarly, any member of any State entity could override the Attorney General's litigation decisions, clogging the courts with unlawful suits or appeals. If, for example, the Liquor Control Commission loses an appeal in the Tenth District that the Attorney General decides not to further appeal, a single commissioner could seek review in this Court regardless of whether it merits jurisdiction, taxing the patience and resources of the judiciary.

That way lies madness. This Court should say so in a published opinion. This is not the first time non-prevailing members of a multi-member State board have demanded outside representation and a hearing. *See* Compl. ¶¶17–23, *Collins v. DeWine, et al.*, No 23-cv-006611 (Franklin Cnty. Ct. of Com. Pl. Sept. 19, 2023); Oct. 5, 2023 Brief of State at 2, *Collins*, No. 23-006611. And unless this Court puts a stop to it, it will not be the last. The significance of this issue, and the continued waste of taxpayer dollars and judicial resources it causes, merit this Court's decisive rejection of such attempts in a precedential,

reasoned order. And even if this Court disagrees and permits the non-prevailing Board members to litigate in this case (again, it should not), the Court should still issue an opinion articulating the limiting principle to this authorization, if any.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was served by e-mail this 3rd day of September, 2024, upon the following counsel:

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