

In the
Supreme Court of Ohio

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

**RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO WITHDRAW
PUTATIVE ANSWER OF SENATOR PAULA HICKS-HUDSON AND
REPRESENTATIVE TERRENCE UPCHURCH**

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RESPONSE IN OPPOSITION

Two non-prevailing Ballot Board members purported to respond to Relators' complaint in their official capacity—while representing that “the Ballot Board as a whole violated its constitutional duty.” Putative Answer at 5. In addition, they publicly called into question the Attorney General's representation of the Ballot Board, arguing that he violated his duties by refusing to assist them in litigating against the Ballot Board. *Id.* at 3. The non-prevailing members thus used their unauthorized filing to publicly broadcast their rejected position in a high-profile case, all under the cloak of official State action.

On September 3, 2024, the Ballot Board filed a motion to strike their putative answer. The non-prevailing members quickly backpedaled, filing a motion for leave to voluntarily withdraw their unlawful filing within the week. That motion is a strategic attempt to avoid this Court formally saying what the non-prevailing members now tacitly concede: they have no authority to litigate this case.

This Court should not reward the non-prevailing members' attempt to escape the legal consequences of their political maneuvering. If the Court allows the motion to voluntarily dismiss, then dismissal in a reasoned order is warranted—not because the non-prevailing members seek leave to voluntarily withdraw, but because the law prohibited their filing in the first instance. In the alternative, if the putative answer was an unlawful filing, then so is the motion to voluntarily dismiss, and the Court should grant the motion to strike.

In either event, this Court has authority to issue a published opinion saying so. Prudential reasons uniformly favor an opinion clarifying the law and precluding continuous attempts of non-prevailing board members to thwart it.

I. This Court has authority to issue an opinion explaining its dismissal of the putative answer.

Begin with the jurisdictional reality. This Court is considering the merits of Relators' claims against the Ballot Board. Because a live controversy exists between Relators and the Ballot Board, nothing has disturbed this Court's continuing jurisdiction to issue opinions in this matter. Even if the Court concludes that the non-prevailing members' motion to voluntarily dismiss moots the Ballot Board's *motion to strike*, it does not moot this *case or controversy*. And if the Court agrees that the non-prevailing members had no lawful authority to purport to become parties in the first place, then the Court can proceed to decision on the motion to strike. "Cases are not moot when an actual controversy exists between adverse litigants." *State ex rel. The Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St. 3d 513, 517–18 (1997) *superseded by statute on other grounds as stated in State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396 (2000).

Thus, nothing about the non-prevailing members' late-breaking motion to voluntarily dismiss affects this Court's jurisdiction or its concomitant authority to issue opinions in this case. *Cf. State ex rel. Ford v. Ruehlman*, 2016-Ohio-3529, ¶¶52–58 (per curiam) (holding mandamus action not mooted even though relator was dismissed from

underlying lawsuit). Indeed, courts routinely issue opinions in cases even after judgment is entered, such as decisions regarding awards of costs, fees, or sanctions. *See* Ohio R. Civ. P. 59(B). The controversy is very much live here, and there has been no decision on the merits.

In short, nothing bars this Court from issuing a reasoned opinion with a dismissal of the putative answer or with a decision on the motion to strike. And this Court should elect to do so. All prudential considerations favor an opinion from this Court that explains why dismissal is not only appropriate but required here.

II. Prudential reasons overwhelmingly favor a reasoned opinion from this Court regarding the authority of non-prevailing members of multimember bodies.

Three independent reasons support a published opinion granting dismissal of the putative answer. All three underscore the importance of issuing a reasoned decision on the legal questions implicated—and issuing it in this case.

First, an opinion of this Court is needed to affirm bedrock principles of our democratic system of government. The black-letter law could not be clearer: State multi-member bodies act only through majorities, *see, e.g.*, Ohio Const. art. XVI, §1; *Fed. Trade Comm'n v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967), and only the Attorney General is vested with power to represent the State in litigation, R.C. 109.02. Yet despite the unanimity of authorities on these points—both in this State and others (Mot. to Strike at 4-7)—this Court’s opinion is required to affirm that black-letter law is, indeed, black-letter

law. That is because politically motivated non-prevailing members of State boards continue to blatantly disregard it.

The importance of this issue cannot be overstated. These principles cut to the core of our democratic system and institutions. They ensure decisions of Ohio's public institutions reflect the will of the People. And they are worthy of an opinion of this Court decisively rejecting such high-profile attempts of non-prevailing State officers to ignore and undermine them.

Second, as indicated above, this is a recurring issue. Non-prevailing members of multi-member State bodies continue to attempt to litigate their losing positions in court. It has happened before in high-profile cases. *See, e.g., Collins v. DeWine*, No 23-CV-006611 (Franklin Cnty. Ct. of Com. Pl.). And it will likely continue to happen until this Court puts a decisive end to these unlawful efforts to subvert our democratic structure. These attempts are anything but harmless. When non-prevailing members purport to litigate on behalf of State bodies, they undermine our democratic institutions and negatively affect public perception of them. They inflict costs on Ohio taxpayers by drawing State resources to fight unlawful litigation efforts by rogue State officers. And they undermine the legal position of the State in real litigation with real potential costs to the State.

Third, this Court's reasoned dismissal of the putative answer is important because it leaves no doubt that the Court is reviewing the official action of the Ballot Board majority and that the views of non-prevailing members have no legal status.

The non-prevailing members have generated confusion through their highly publicized filing of a putative answer—purportedly in their official capacity as Board members—that directly contradicts the Board’s legal position. *See, e.g.*, Letter from Senate and House Minority Leaders to Att’y Gen. (Aug. 27, 2024), <https://perma.cc/5478-JDJF> (characterizing Attorney General’s refusal to appoint separate outside counsel as “miscarriage of justice”); Susan Tebben, *Dem members of Ohio Ballot Board criticize AG for representing them without notice in lawsuit*, Ohio Capital Journal (Aug. 30, 2024), <https://perma.cc/68S5-MJ4R>; Frank W. Lewis, *‘Absurd’: Two Ohio Ballot Board members distance themselves from Issue 1 ballot language controversy*, Signal Cleveland (Sept. 4, 2024), <https://perma.cc/JCD5-86A9>. This is a high-profile case closely followed by the public at large and other State officers, who cannot simply unsee that filing. *See, e.g.*, *Minority Ballot Board Members Ask Ohio Supreme Court to Rectify Republicans’ Conflict of Interest in Citizens Not Politicians Case*, Ohio House of Representatives (Aug. 29, 2024), <https://tinyurl.com/2rsktjap>. The non-prevailing members have thus sown confusion with their putative answer that cannot be undone by its dismissal *sub silentio*.

As with a jury that hears egregiously improper questioning, it is not enough for counsel to say “withdrawn.” Sometimes, the court needs to correct and cure the confusion with an instruction to disregard. *See, e.g.*, *State v. Johnson*, 71 Ohio St. 3d 332, 340 (1994).

So too here. In addition to addressing the merits of this case, it is paramount that the Court decisively reject the non-prevailing members' maneuver. It should clarify that the Board's only view is the one it expresses through majority vote, and that its only litigation positions are those taken by the Attorney General—the sole State officer charged with legally representing the State. The non-prevailing members cannot muddy the waters, and then strategically prevent this Court from clarifying them.

CONCLUSION

Regardless of how the Court disposes of the merits of Relators' claims against the Ballot Board, the Court should grant dismissal in a precedential, reasoned order making clear that the non-prevailing members of a multimember body may not litigate as parties. In the alternative, the Court should deny the motion to voluntarily dismiss and grant the motion to strike in a reasoned opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was served by e-mail this 6th day of September, 2024, upon the following counsel:

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Furthermore, I certify that a copy of the foregoing Motion was served by U.S. mail this 6th day of September, 2024, upon the following counsel:

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