

**IN THE SUPREME COURT OF OHIO**

STATE EX REL. WILLIAM DEMORA, et al.,

Relators,

CASE NO. 2022-0661

v.

Original Action in Mandamus

OHIO SECRETARY OF STATE  
FRANK LAROSE, et al.,

Expedited Election Matter Under  
S.Ct.Prac.R. 12.08

Respondents.

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**MERIT BRIEF OF RESPONDENT FRANKLIN COUNTY BOARD OF ELECTIONS**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE AND FACTS.....1

ARGUMENT.....3

PROPOSITION OF LAW: AS A MATTER OF LAW, RELATORS ARE NOT  
ENTITLED TO A WRIT OF MANDAMUS AGAINST RESPONDENT FRANKLIN  
COUNTY BOARD OF ELECTIONS.....3

CONCLUSION.....5

CERTIFICATE OF SERVICE.....6

APPENDIX.....7

**TABLE OF AUTHORITIES**

**Cases**

*Gonidakis, et al., v. LaRose, et al.*,  
S.D. Ohio No. 2:22-cv-0773 (May 27, 2022).....4

*State ex rel. Allen v. Warren Cty. Bd. of Elections*,  
115 Ohio St.3d 186, 2007-Ohio-4752, 874 N.E.2d 507.....3

*State ex rel. Donegan v. Cuyahoga Cty. Bd. of Elections*,  
136 Ohio App.3d 589, 596, 737 N.E.2d 545 (8th Dist. 2000).....4

**Statutes**

R.C. 3501.053.....3

R.C. 3501.11.....4

R.C. 3513.041.....1

R.C. 3513.05.....1

## STATEMENT OF THE CASE AND FACTS

On May 31, 2022, Relators filed the instant complaint in mandamus against the Ohio Secretary of State, the Franklin County Board of Elections, the Montgomery County Board of Elections, and the Licking County Board of Elections. Relators subsequently filed an amended complaint one day later against the same Respondents. Relators request specific relief against Respondents that would allow each Relator to be certified to the August 2, 2022 primary election ballot. On June 1, 2022, this Court issued a scheduling order governing this expedited election matter. In accordance with that schedule, the Franklin County Board of Elections filed an answer to Relators' Complaint on June 2, 2022. Relators filed their brief on June 6, 2022.

Respondent Franklin County Board of Elections ("the Board") is responsible for conducting election in Franklin County, Ohio and does so in accordance with the requirements set forth in Ohio Revised Code Chapter 35, in addition to any direction provided by the Ohio Secretary of State and requirements imposed by federal statute or regulations. Ohio law requires that candidates for a party nomination at a primary election must file a declaration of candidacy and petition no later than 4 P.M. on the ninetieth day before the day of the primary election. R.C. §3513.05. A person desiring to be a write-in candidate must file a declaration of intent to be a write-in candidate before 4 P.M. on the seventy-second day preceding the election at which they desire to be a write-in. R.C. §3413.041. Applying these statutory deadlines, the deadline to file a declaration of candidacy was February 2, 2022, while the deadline to file a declaration of intent to be a write-in candidate was February 22, 2022.

On March 23, 2022, the Ohio Secretary of State issued Directive 2022-31, which informed boards of elections that the offices of Ohio House, Ohio Senate, and State Central Committee would not appear on the May 3, 2022 primary ballot. (REL\_EVID\_012-015). Then, on April 1,

2022, the Ohio Secretary of State issued Directive 2022-32, which directed boards of elections to move forward with the May 3, 2022 primary election without including the offices of Ohio House, Ohio Senate, or State Central Committee on the ballot. (APPENDIX).

On May 4, 2022, the Board received a declaration of candidacy from William Demora indicating his desire to be a candidate for the 25<sup>th</sup> Ohio Senate District. (REL\_EVID\_019-035), a declaration of candidacy from Anita Somani indicating her desire to be a candidate for the 11<sup>th</sup> Ohio House District, (REL\_EVID\_039-059), and a declaration of candidacy from Bridgette Tupes indicating her desire to be a candidate for the State Central Committee as a member of the Democratic Party from the 15<sup>th</sup> Senate District. (REL\_EVID\_070-072). On May 16, 2022, the Board received a declaration of intent to be a write-in candidate from Elizabeth Thien indicating her desire to be a write-in candidate for the 25<sup>th</sup> Ohio Senate District. (REL\_EVID\_063).

At the time the Board received the aforementioned filings from Relator DeMora, Relator Somani, Relator Tupes, and Relator Thien, no instructions had yet been provided to the Board regarding when an election for the offices of Ohio House, Ohio Senate, or State Central Committee would take place. The Board retained the filings while awaiting further instruction but did not review the validity or sufficiency of the filings, as they had been submitted past the statutory deadlines.

On May 28, 2022, the Ohio Secretary of State issued Directive 2022-34, which instructed boards of elections to proceed with an August 2, 2022 primary election for the offices of State Representative, State Senator, and member of State Central Committee. (REL\_EVID\_002-010). The directive advised boards of elections that the February 2, 2022 deadline to submit a declaration of candidacy and the February 22, 2022 deadline to submit a declaration of intent to be a write-in candidate remained operative, and that “the board must reject the candidacy” of any person who

filed after those deadlines. (*Id.*). Pursuant to Directive 2022-34, the Board did not certify the candidacies of Relator DeMora, Relator Somani, Relator Thien, or Relator Tupes.

### ARGUMENT

#### **PROPOSITION OF LAW: AS A MATTER OF LAW, RELATORS ARE NOT ENTITLED TO A WRIT OF MANDAMUS AGAINST RESPONDENT FRANKLIN COUNTY BOARD OF ELECTIONS**

Relators filed an action in mandamus asking this Court to order the Board to certify the following candidacies for the August 2, 2022 primary election: Relator DeMora for the Democratic nomination for the 25<sup>th</sup> Ohio Senate District; Relator Somani for the Democratic nomination for the 11<sup>th</sup> Ohio House District; Relator Thien as a write-in for the Democratic nomination for the 25<sup>th</sup> Ohio Senate District; and Relator Tupes for the Ohio Democratic Party State Central Committee from the 15<sup>th</sup> Ohio Senate District. To be entitled to the requested writs of mandamus, the Relators must establish (1) a clear legal right to certification of their candidacies and placement of their names on the August 2, 2022 primary election ballot; (2) a corresponding clear legal duty on the part of the board of elections and its members to certify their candidacies and place their names on the ballot; and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Allen v. Warren Cty. Bd. of Elections*, 115 Ohio St.3d 186, 2007-Ohio-4752, 874 N.E.2d 507, ¶ 8. To establish the requisite legal right and legal duty, the relators must show that the Board engaged in fraud, conspiracy, abuse of discretion, or clear disregard of the law. *Id.* at ¶ 9.

Relators do not allege, nor can they show, that the Board engaged in either fraud or conspiracy, abused its discretion, or acted in clear disregard of the law in not certifying Relators to the ballot. In fact, in not certifying Relators, the Board followed Ohio law and the directives issued by the Ohio Secretary of State. The Ohio Secretary of State has the authority to issue instructions to members of the board of elections regarding the conducting of elections. R.C.

§3501.053. Boards of elections are statutorily required to “make and issue rules and instructions, not inconsistent with law or the rules, directives, or advisories issued by the secretary of state, as it considers necessary for the guidance of election officers and voters” and “perform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state” R.C. §3501.11. The instructions of the Secretary of State issued to boards of elections by way of directives or advisories are binding upon board of elections such that violation of a directive by a board of elections could constitute grounds for removal. *State ex rel. Donegan v. Cuyahoga Cty. Bd. of Elections*, 136 Ohio App.3d 589, 596, 737 N.E.2d 545 (8th Dist. 2000). The board of elections “is the supervisor of elections under the direction of the Secretary of State.” *Id.*

The Ohio Secretary of State issued Directive 2022-34 on May 28, 2022, which directed boards of elections to proceed with a primary election on August 2, 2022 in accordance with the federal court order issued on May 27, 2022. *See Gonidakis, et al., v. LaRose, et al.*, S.D. Ohio No. 2:22-cv-0773 (May 27, 2022). Directive 2022-34 further instructed boards of elections that the federal court order in *Gonidakis* did not alter the partisan candidate filing deadlines. As such, the Directive reiterated the filing deadlines set by Ohio law and instructed:

The filing deadline for candidates for State Representative, State Senator, or Member of State Central Committee to file a declaration of candidacy was 4:00 p.m. on February 2, 2022. Write-in candidates for the primary election were required to file their declaration of intent to be a write-in candidate by February 22, 2022. If a declaration of candidacy or declaration of intent to be a write-in candidate was filed after those filing deadlines, the board **must reject** the candidacy. (REL\_EVID\_002-010)(emphasis added).

Relator DeMora, Relator Somani, and Relator Tupes filed their declaration of candidacies on May 4, 2022. Relator Thien filed her declaration of candidacy to be a write-in candidate on May 16, 2022. All filings were received after the filing deadlines of February 2, 2022 and February 22,



2022, respectively. Therefore, the Board was required to reject their candidacies pursuant to Directive 2022-34, which the Board has a legal duty to follow.

It bears noting that Relators, in their Merit Brief, concede that Ohio law requires boards of elections to perform the duties prescribed by directives issued by the Secretary of State. (Relators' Merit Brief, p. 6, n. 2) It is clear on the face of Relators' filings that the Franklin County Board of Elections could do nothing but reject Relators' candidacies. Under these circumstances, Relators have failed to show that the Board had a legal duty to certify their candidacies for the August 2, 2022 primary election or that Relators have a clear legal right to have their candidacies certified by the Board. Accordingly, Relators are not entitled to the requested writs of mandamus against the Franklin County Board of Elections.

### **CONCLUSION**

For the foregoing reasons, Respondent Franklin County Board of Elections hereby requests this Court to deny Relators' requested writs of mandamus.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on the 8th day of June, 2022, the foregoing was filed with the Court's electronic filing system and served via electronic mail on:

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## APPENDIX

### **R.C. 3501.053 – Instructions and temporary directives**

(A) The secretary of state may issue instructions as to the proper method of conducting elections to members of the boards of elections by permanent or temporary directives.

(1) The secretary of state shall establish a process to allow public review and public comment of proposed directives. Prior to issuing any permanent directive, the secretary of state shall provide reasonable notice of the issuance of the directive and allow a reasonable amount of time for public review and public comment of the proposed directive under this division.

No permanent directive shall be issued during the period beginning ninety days prior to the day of an election and ending on the fortieth day following the day of that election.

(2) Temporary directives shall only be issued, and shall only have effect, during the period beginning ninety days prior to the day of an election and ending on the fortieth day following the day of that election. Temporary directives shall not be subject to public review and public comment under division (A)(1) of this section.

A temporary directive shall not become a permanent directive unless the temporary directive is proposed as a permanent directive and subject to public review and public comment under division (A)(1) of this section.

If the situation prompting the establishment of a temporary directive appears likely to recur, the secretary of state shall establish a permanent directive addressing the situation.

(B) In addition to any other publication of directives and advisories issued by the secretary of state, the secretary of state shall publish those directives and advisories on a web site of the office of the secretary of state as soon as is practicable after they are issued, but not later than the close of business on the same day as a directive or advisory is issued. The secretary of state shall not remove from the web site any directives and advisories so posted. The secretary of state shall provide on that web site access to all directives and advisories currently in effect and maintain an archive of all directives and advisories previously published on that web site.

### **R.C. 3501.11 – Duties of board**

Each board of elections shall exercise by a majority vote all powers granted to the board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall do all of the following:

- (A) Establish, define, provide, rearrange, and combine election precincts;
- (B) Fix and provide the places for registration and for holding primaries and elections;
- (C) Provide for the purchase, preservation, and maintenance of booths, ballot boxes, books, maps, flags, blanks, cards of instructions, and other forms, papers, and equipment used in registration, nominations, and elections;
- (D) Appoint and remove its director, deputy director, and employees and all registrars, precinct election officials, and other officers of elections, fill vacancies, and designate the ward or district and precinct in which each shall serve;
- (E) Make and issue rules and instructions, not inconsistent with law or the rules, directives, or advisories issued by the secretary of state, as it considers necessary for the guidance of election officers and voters;
- (F) Advertise and contract for the printing of all ballots and other supplies used in registrations and elections;
- (G) Provide for the issuance of all notices, advertisements, and publications concerning elections, except as otherwise provided in division (G) of section 3501.17 and divisions (F) and (G) of section 3505.062 of the Revised Code;
- (H) Provide for the delivery of ballots, pollbooks, and other required papers and material to the polling places;
- (I) Cause the polling places to be suitably provided with voting machines, marking devices, automatic tabulating equipment, stalls, and other required supplies. In fulfilling this duty, each board of a county that uses voting machines, marking devices, or automatic tabulating equipment shall conduct a full vote of the board during a public session of the board on the allocation and distribution of voting machines, marking devices, and automatic tabulating equipment for each precinct in the county.
- (J) Investigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons; administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and report the facts to the prosecuting attorney or the secretary of state;
- (K)(1) Review, examine, and certify the sufficiency and validity of petitions and nomination papers, and, after certification, return to the secretary of state all petitions and nomination papers that the secretary of state forwarded to the board;
- (2) Examine each initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.
- (L) Receive the returns of elections, canvass the returns, make abstracts of them, and transmit those abstracts to the proper authorities;
- (M) Issue certificates of election on forms to be prescribed by the secretary of state;

- (N) Make an annual report to the secretary of state, on the form prescribed by the secretary of state, containing a statement of the number of voters registered, elections held, votes cast, appropriations received, expenditures made, and other data required by the secretary of state;
- (O) Prepare and submit to the proper appropriating officer a budget estimating the cost of elections for the ensuing fiscal year;
- (P) Perform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state;
- (Q) Investigate and determine the residence qualifications of electors;
- (R) Administer oaths in matters pertaining to the administration of the election laws;
- (S) Prepare and submit to the secretary of state, whenever the secretary of state requires, a report containing the names and residence addresses of all incumbent county, municipal, township, and board of education officials serving in their respective counties;
- (T) Establish and maintain a voter registration database of all qualified electors in the county who offer to register;
- (U) Maintain voter registration records, make reports concerning voter registration as required by the secretary of state, and remove ineligible electors from voter registration lists in accordance with law and directives of the secretary of state;
- (V) Give approval to ballot language for any local question or issue and transmit the language to the secretary of state for the secretary of state's final approval;
- (W) Prepare and cause the following notice to be displayed in a prominent location in every polling place:  
“NOTICE  
Ohio law prohibits any person from voting or attempting to vote more than once at the same election.  
Violators are guilty of a felony of the fourth degree and shall be imprisoned and additionally may be fined in accordance with law.”
- (X) In all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the director or chairperson shall submit the matter in controversy, not later than fourteen days after the tie vote or the disagreement, to the secretary of state, who shall summarily decide the question, and the secretary of state's decision shall be final.
- (Y) Assist each designated agency, deputy registrar of motor vehicles, public high school and vocational school, public library, and office of a county treasurer in the implementation of a program for registering voters at all voter registration locations as prescribed by the secretary of state. Under this program, each board of elections shall direct to the appropriate board of elections any voter registration applications for persons residing outside the county where the board is located within five days after receiving the applications.
- (Z) On any day on which an elector may vote in person at the office of the board or at another site designated by the board, consider the board or other designated site a polling place for that day. All requirements or prohibitions of law that apply to a polling place shall apply to the office of the board or other designated site on that day.
- (AA) Perform any duties with respect to voter registration and voting by uniformed services and overseas voters that are delegated to the board by law or by the rules, directives, or advisories of the secretary of state.



**DIRECTIVE 2022-32**

April 1, 2022

To: All County Boards of Elections  
Board Members, Directors, and Deputy Directors

Re: May 3, 2022 Primary Election Instructions

**SUMMARY**

On March 30, 2022, the United States District Court for the Southern District of Ohio held a hearing in *Gonidakis, et al. v. LaRose, et al.* regarding the Ohio General Assembly redistricting plan.<sup>1</sup> The federal court decided that they would not intervene at this time to select new Ohio House and Senate district plans, nor would the court move the primary election date for all other races not affected by General Assembly redistricting so there could be a single primary date. Thus, this Directive provides instructions to proceed with the May 3, 2022 Primary Election without the offices of Ohio House, Ohio Senate, and State Central Committee on the ballot.

**INSTRUCTIONS**

**I. TRANSMITTING UOCAVA BALLOTS FOR MAY 3, 2022 PRIMARY**

Boards must proceed with a primary election on May 3, 2022 without the contests for the Ohio House, Ohio Senate, and State Central Committee. [Directive 2022-31](#) required all county boards of elections to prepare their ballots without those contests and notify my Office as soon as the ballots were reprogrammed and finalized, but prior to sending any ballots.

Boards are now authorized to issue ballots to Uniformed Services and Overseas Citizens' Absentee Voting Act ("UOCAVA") voters as soon as possible, but no later than April 5, 2022 and should work over the weekend to achieve this requirement.

Boards must submit the Form 12-M accompanying this Directive no later than 4:00 p.m. on April 5, 2022 via ElectCollect. After submitting the Form 12-M, the Director and Deputy Director must print, sign, and email the Form 12-M to [Results@OhioSoS.gov](mailto:Results@OhioSoS.gov). If a board transmits ballots to UOCAVA voters before April 5, 2022, the board should still wait until April 5, 2022 to complete and submit the form. This ensures that the Secretary of State's Office can accurately report the number of requested and transmitted UOCAVA ballots to our federal partners.

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<sup>1</sup> Case No. 2:22-CV-773 (S.D. Ohio 2022).

## **II. UPDATED FEDERAL WRITE-IN ABSENTEE (“FWAB”) NOTICE**

Each board must update the 46-Day FWAB notice to include the following information:

“The offices of State Senator, State Representative, and Member of State Central Committee will not appear on the May 3, 2022 Primary Election ballot.”

Form 120 (updated 04-22) is updated to include this language. The offices and candidates for State Senator, State Representative, and Member of State Central Committee must be removed from the FWAB for the May 3, 2022 Primary Election.

## **III. RESOLVING ANY OUTSTANDING PROTESTS**

Any protests filed against candidates for offices *other than* Ohio House, Ohio Senate, and State Central Committee should already be resolved. If a board of elections has not yet resolved a protest affecting the May 3, 2022 Primary Election, the board must notify our Office via [Intake@OhioSoS.gov](mailto:Intake@OhioSoS.gov) and schedule a hearing immediately.

## **IV. LOGIC AND ACCURACY TESTING**

If a board of elections has not started Logic and Accuracy (“L&A”) Testing<sup>2</sup> for the May 3, 2022 Primary, it must first complete L&A testing for every component of the voting system to be used for in-person absentee voting and the scanning of absentee ballots received by mail. Once that is complete, the board must immediately proceed to perform L&A testing for all other voting machines and automatic tabulating equipment to be used on Election Day.


## **V. ORDERING BALLOTS**

If a board of elections has not already done so, the board must immediately place its print order for Election Day ballots. If the board outsources the printing and mailing of absentee ballots, the board must communicate with its vendor to ensure absentee ballots are properly tested and ready for mailing as soon as possible. Boards must review [Chapter 5](#), Section 5.07 of the Election Official Manual regarding appropriate ballot quantities.

Boards must provide a copy of each absentee ballot (candidates and questions and issues) by April 5, 2022 to the Secretary of State’s Office. Boards must upload ballots to SharePoint.

If you have any questions regarding this Directive, please contact the Secretary of State’s elections counsel at (614) 728-8789.

Yours in service,

  
Frank LaRose  
Ohio Secretary of State

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<sup>2</sup> See [R.C. 3506.14](#) and [Chapter 5](#), Section 5.08 of the Election Official Manual.