

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.

**MERIT BRIEF OF RESPONDENT FRANKLIN COUNTY BOARD OF ELECTIONS IN
RESPONSE TO RELATOR MEHEK COOKE'S MERIT BRIEF**

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STATEMENT OF THE CASE AND FACTS

On May 31, 2022, Relators DeMora, Somani, Thien, Jackson, Tupes, and Martin filed a 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 filed an amended complaint one day later against the same Respondents. Relators requested specific relief against Respondents that would allow each Relator to be certified to the August 2, 2022 primary election ballot. All Respondents, including Respondent Franklin County Board of Elections, filed their merit brief on June 8, 2022. On June 10, 2022, Relators Shafron Hawkins and Mehek Cooke filed a motion for leave to intervene as relators in the matter, which this Court granted on June 13, 2022. Respondent Franklin County Board of Elections is submitting this merit brief in accordance with the Court's scheduling order and in response to the merit brief of intervening Relator Cooke.

Respondent Franklin County Board of Elections ("the Board") is responsible for conducting elections 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_EX. B). 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 27, 2022, the Court in *Gonidakis v. LaRose* issued an order stating, “[a]ssuming no map is approved by midnight on Saturday, May 28, we order Secretary of State Frank LaRose to push back Ohio’s state primaries to August 2, 2022 and to implement Map 3 for this year’s election’s *only*.” *Gonidakis v. LaRose*, S.D. Ohio No. 2:22-CV-0773, 2022 WL 1709146, *1. One day later, Secretary of State LaRose 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_EX. A). 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.*).

On June 7, 2022, the Board received a declaration of candidacy from Mehek Cooke indicating her desire to be a candidate for the 11th Ohio House District (REL_EVID_EX. F). This filing occurred 35 days after the originally scheduled date of the primary election; 11 days after the court in *Gonidakis* ordered the primary election for the offices of State Representative, State

Senator, and Member of State Central Committee to occur on August 2, 2022; and only one day before boards of elections were required to certify candidacies for the August 2, 2022 primary election. Pursuant to Directive 2022-34, the Board did not certify the candidacy of Relator Cooke on the grounds that her declaration of candidacy was not timely filed.

ARGUMENT

PROPOSITION OF LAW: AS A MATTER OF LAW, RELATOR COOKE IS NOT ENTITLED TO A WRIT OF MANDAMUS AGAINST RESPONDENT FRANKLIN COUNTY BOARD OF ELECTIONS

Relator Cooke filed an action in mandamus asking this Court to order the Board to certify Relator Cooke's candidacy for the Republican nomination for the 11th Ohio House District for the August 2, 2022 primary election. To be entitled to the requested writ of mandamus, Relator Cooke must establish (1) a clear legal right to certification of her candidacy and placement of her name 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 her candidacy and place her name 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 relator must show that the Board engaged in fraud, conspiracy, abuse of discretion, or clear disregard of the law. *Id.* at ¶ 9.

Relator Cooke does not allege, nor can she show, that the Board engaged in either fraud or conspiracy, abused its discretion, or acted in clear disregard of the law in not certifying her candidacy to the ballot. In fact, in not certifying Relator Cooke, 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 boards 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 boards 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, 2022 WL 1709146 (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_EX. A)(emphasis added).

Relator Cooke did not file her declaration of candidacy with the Board until June 7, 2022. Therefore, the Board was required to reject her candidacy pursuant to Directive 2022-34, which the Board has a legal duty to follow.

In addition to the clear language of Directive 2022-34 directing boards of elections to reject the candidacies of individuals that filed after the February deadlines as Relator Cooke indisputably

did, Relator Cooke waited an unreasonable amount of time to file her declaration of candidacy and petitions. Doing so on June 7, 2022, was not only well after the filing deadline of February 2, 2022, but 35 days after the primary election was originally set to take place, 11 days after the federal court order in *Gonidakis*, and only one day before boards of elections were required to certify candidacies for the August 2, 2022 primary election. Considering the already compact timeline of the 2022 election cycle, waiting that amount of time to file was not reasonable.

Notably, Relator Cooke concedes in her Merit Brief that Ohio law requires boards of elections to perform the duties prescribed by directives issued by the Secretary of State. (Relators' Merit Brief, p. 5, n. 3), and that Directive 2022-34 ordered boards of elections to reject candidates who filed after the February 2022 deadlines (*Id.* at p. 6). It is clear on the face of Relator's filings that the Board could do nothing but reject her candidacy. Under these circumstances, Relator Cooke has failed to show that the Board had a clear legal duty to certify her candidacy for the August 2, 2022 primary election or that she has a clear legal right to have her candidacy certified by the Board. Accordingly, Relator is not entitled to the requested writ 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 Relator's requested writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 14th 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.



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.¹ 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. 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.

¹ 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 and schedule a hearing immediately.

IV. LOGIC AND ACCURACY TESTING

If a board of elections has not started Logic and Accuracy (“L&A”) Testing² 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

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