

IN THE SUPREME COURT OF OHIO

STATE OF OHIO *ex. rel.*
TERPSEHORE P. MARAS

Relator,

-vs.-

FRANK LAROSE
In His Official Capacity as
Ohio Secretary of State

Respondent.

CASE NO.: 2022-1270

(Expedited Election Case
Under S.C.R.P. 12.08)

MERIT BRIEF OF RELATOR TERPSEHORE P. MARAS

Respectfully submitted,

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I. STATEMENT OF FACTS

A. Relator Maras is a Valid Elector and Certified Candidate for Ohio Secretary of State.

Relator Terpsehore P. Maras (“Maras”) is a certified independent candidate for Ohio Secretary of State in the 2022 general election. Maras’s candidacy was certified by this Court on September 20, 2022, after a dispute involving the signatures present on her candidacy petition. *State ex rel. Maras v. LaRose*, 2022-Ohio-3295, ¶ 30. Maras is a U.S. citizen, domiciled and registered to vote in Cuyahoga County, Ohio; therefore, Maras is a valid elector, within the meaning of R.C. § 3505.21(N), in the Ohio 2022 general election. Maras Aff. ¶ 2.

B. Ohio Created a Five Candidate Rule for Non-Party Affiliated Candidates.

In August 2012, Ohio statutorily implemented a Five Candidate Rule for non-party affiliated candidates to appoint election observers. Under R.C. § 3505.21(B), at “any primary, special, or general election, any political party ... and any group of five or more candidates may appoint to the board of elections or to any of the precincts in the county or city one person, a qualified elector, who shall serve as an observer for such party...during the casting of the ballots and during the counting of the ballots; provided that separate observers may be appointed to serve during the casting and during the counting of the ballots.” (emphasis added). In other words, “any political party supporting candidates” or “any group of five or more candidates” may appoint an observer. Thus, the only way someone outside the political party structure may appoint an observer is to submit a Notice of Appointment form to the Ohio Secretary of State containing the signatures of four other independent or party affiliated candidates. *Id.* To date, the Five Candidate Rule has not been constitutionally challenged.

C. Maras Attempted and Failed to Join with Other Party-Affiliated Candidates to Appoint Election Observers.

Independent Candidate Maras is the only non-party affiliated candidate on the 2022 Ohio general election ballot. Seeking to comply with the Five Candidate Rule, Independent Candidate Maras contacted eight party-affiliated candidates present on the 2022 Ohio general election ballot. Maras Aff. ¶ 3. Verified Petition, ¶ 16. Unsurprisingly, none agreed to join her in appointing a single observer since their respective parties already provide observers. Thus, in an election without five non-party affiliated candidates, Independent Candidate Maras has no practical means under the Five Candidate Rule to appoint her own election observers.

D. Secretary Larose Does Not Allow Election Observers to Observe or Inspect the Counting of Votes.

According to Respondent's pleading admissions, election observers "are allowed to observe and inspect the counting of ballots," but the "software and source code for the tabulating machines" cannot be made public (*i.e.*, transparently observed). Answer of Respondent, ¶ 24. *See Bohan v. McDonald Hopkins, LLC*, 2021 Ohio 4131, ¶ 25 (Ct. App. Cuyahoga Cnty. 2012) ("[A] statement of fact by a party in his pleading is an admission that the fact exists as stated, and, as such, is admissible against him in favor of his adversary.") (citation omitted). According to another one of Respondent's admissions, allowing access to the software and source code used by the tabulating machines to count votes "would greatly increase the risk of tabulating machines being tampered with by malicious domestic and foreign actors who wish to disrupt our elections." Answer of Respondent, ¶ 24. Thus, according to Respondent, the mechanism by which ballots are counted (*i.e.*, the tabulating machine software) cannot be transparently observed without exposing the mechanisms themselves to excessive risk of domestic and foreign actor tampering. This contrived Catch 22 situation sets up a false narrative pitting ballot counting transparency against ballot counting security.

Software cannot be subject to “malicious domestic and foreign actors” unless it can be accessed by such actors. This is an alarming admission that our election security can be compromised by anyone with access to the code. In other words, the Ohio Secretary of State cannot have his cake and eat it – either elections are open to compromise via online access, or they are not. Independent Candidate Maras is entitled to observe the election in a meaningful manner that addresses this exact security vulnerability. Any other “observation” is nothing less than window dressing.

II. LAW AND ARGUMENT

A. Legal Standard

To receive a writ of mandamus, Maras must establish by clear and convincing evidence that (1) she has a clear legal right to the requested relief, (2) Secretary LaRose has a clear legal duty to provide it, and (3) she does not have an adequate remedy in the ordinary course of the law. *State ex rel. Maras v. LaRose*, 2022-Ohio-3295, ¶ 24.

Maras lacks an adequate remedy in the ordinary course of the law due to the proximity of the election, which is less than thirty days away. *See Id.* The first two elements require the Court to determine whether Respondent engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable law. *Id.* at ¶ 25. By way of her petition, Maras does not allege fraud or corruption but properly asserts Respondent abused his discretion and acted in clear disregard of applicable Constitutional law.

B. The Five Candidate Rule Violates Ohio and U.S. Equal Protections

The Five Candidate Rule theoretically allows non-party affiliated candidates to appoint election observers equal to party-affiliated candidates, but in practice, this right is illusory – especially when there are less than five non-party affiliated candidates on the general election ballot. Independent Candidate Maras current situation exposes the absurd construct of the Five

Candidate Rule. She is the only independent candidate on the general election ballot; therefore, she has no similarly situated non-party affiliated candidates with a common interest to approach. Instead, she must gain consent from party affiliated candidates who already have their own election observers appointed by their respective parties and lack political incentive to assist an opposing candidate.

In the case of Independent Candidate Maras, the Ohio Republican Party actively opposed her independent candidacy by filing a written protest against her nominating petition and the Ohio Democrat Party is ideologically opposed to her as a former Republican. Maras' advocacy for a transparent and secure election by way of paper ballot voting is not on either party's agenda. Thus, it comes as no surprise that not a single of the eight party-affiliated candidates she approached agreed to sign her Notice of Appointment form. As a non-party affiliated candidate, Independent Candidate Maras does not have equal access under the Five Candidate Rule to appoint election observers as party-affiliated candidates.

The Federal and Ohio Equal Protection Clauses are to be construed and analyzed identically. *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 60 (1999). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall...deny to any person within its jurisdiction the equal protection of the laws." Ohio's Equal Protection Clause, Section 2, Article I of the Ohio Constitution, states, "All political power is inherent in the people. Government is instituted for their equal protection and benefit..." The Equal Protection Clauses do not forbid classifications. *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 183 Ohio App.3d 390, 407 (Ct. App. Franklin Cnty 2009) (citation omitted). They simply keep governmental decisionmakers from treating differently persons in all relevant respects. *Id.*

Courts apply varying levels of scrutiny to equal-protection challenges depending on the rights at issue and the purportedly discriminatory classifications created by the law. *Id.* The right to vote is a precious and fundamental right – meriting higher scrutiny. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). Indeed, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). *See also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (finding that the right to vote is “preservative of all rights”). “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (*quoting Bush v. Gore*, 531 U.S. 98, 104 (2000)). “[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush*, 531 U.S. at 104–05. *See also Wesberry*, 376 U.S. at 17 (“Our Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote.]”). The rights of Maras as an elector and as a candidate overlap. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (“[T]he rights of voters and the rights of candidates do not lend themselves to neat separation.”) (*quoting Bullock v. Carter*, 405 U.S. 134, 143 (1972)); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (noting associational and voting rights are “different, although overlapping, kinds of rights”).

Observers serve the important state interests of deterring and detecting voter fraud, deterring voter intimidation, and safeguarding voter confidence. *See Ohio Republican Party v. Brunner*, 120 Ohio St.3d 250, 256 (2008) (emphasizing that “[p]oll observers play an important role in assuring the public that election processes are open and transparent, affecting public trust

of the process, and thus, the potential for future participation in the democratic process.”) (*citing* Secretary of State Directive 2008-29 (Feb. 25, 2008)). As observers are critical to election integrity, precluding the ability of non-party affiliated candidates to appoint election observers has a real and appreciable impact on and impermissibly interferes with the right to vote and therefore merits strict scrutiny analysis. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). In turn, the Five Candidate Rule must be narrowly tailored to promote a compelling governmental interest to survive strict scrutiny. *Harrold v. Collier*, 107 Ohio St.3d 44, ¶ 39 (2005).

Imposing extraordinarily burdensome requirements for non-party affiliated candidates to appoint observers versus none for those affiliated with political parties adversely impacts both candidates and those voters who vote for them. In effect, citizens who vote for non-party affiliated candidates lack the benefit of observers appointed by the candidate they support. By allowing political parties to freely appoint observers while mandating non-party independent candidates satisfy difficult or near impossible criteria denies non-party affiliated candidates and those electors who support them, protection afforded them under the Ohio and United States Constitutions. *See c.f., Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (finding unconstitutional an Ohio statute that required an independent candidate for President, John Anderson, to file both a statement of candidacy and a nominating petition in March to appear on the general election ballot in November).

The State cannot meet its burden under the strict scrutiny analysis as the Five Candidate Rule does not promote a compelling government interest. Curtailing the ability of certified non-party affiliated candidates to appoint their own observers will not lead to a flood of appointed statewide observers given that under Ohio law, an independent candidate running for state-wide office must in the first place collect no less than five thousand signatures on his or her nominating

petition to receive certification as a candidate. R.C. § 3513.257(A). This is obviously a stringent prerequisite since only Relator Maras has been able to meet it this election cycle. To appear on the ballot, Relator Maras put forth extraordinary effort and garnered the support of thousands of people across the State of Ohio. If she was allowed to appoint observers in the same manner that affiliated candidates are now able to do so, each county and precinct would have three observers instead of two – a marginal increase in observers.

Even if limiting the number of election observers statewide is a compelling government interest, the Five Candidate Rule is not narrowly tailored. For example, it could be more narrowly tailored if it were to require non-party affiliated statewide candidates to jointly submit a Notice of Appointment form to the Ohio Secretary of State containing the signatures of all non-party affiliated statewide candidates. By this means, the statewide election observers would always be limited to election observers per county or precinct equal to the number of political parties plus one (i.e., the non-party affiliated observer). This narrowly tailored rule would have allowed Maras as the only non-party affiliated candidate to appoint her own observers, while preventing a flood of appointed statewide observers in future elections where multiple non-party affiliated candidates are on the ballot. Further, the simplicity and logic of this narrowly tailored rule exposes the invalid nature of the Five Candidate Rule.

Given the Five Candidate Rule fails the strict scrutiny standard, R.C. § 3505.21(B) as currently written is unconstitutional under the Ohio and U.S. equal protection clauses. Accordingly, Secretary LaRose has a clear legal duty to allow Independent Candidate Maras as the only non-party affiliated candidate to appoint statewide election observers on her behalf without the required four signatures by at least four other party-affiliated candidates. Relator Maras is respectfully entitled to a writ of mandamus from this Court ordering Secretary LaRose to allow

Maras to submit the Notice of Appointment form and accept her appointed election observers without the four signatures of at least four other party-affiliated candidates.

C. Certified Observers Must Be Allowed to Observe and Inspect the Counting of Votes in Automatic Tabulating Machines

As recognized by the United States Supreme Court, “the right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *Bush v. Gore*, 531 U.S. 98, 104-5 (2000). One part of electors exercising their right to vote is transparency in counting votes. Under Ohio law, electors of any party, or no party, must be able to observe and inspect vote counting processes under state and federal equal protection and associational rights.

Acknowledging the importance of observers, R.C. § 3505.21 allows properly certified observers to proceed “in and about the applicable polling place during the casting of the ballots and shall be permitted to watch every proceeding of the precinct election officials from the time of the opening until the closing of the polls.” In the age of electronic voting using computer systems, the mere observation of someone casting a ballot is of no benefit unless the actual underlying voting process is scrutinized.

Ohio Revised Code § 3505.21 provides that observers may “inspect the counting of all ballots in the polling place or board of elections from the time of the closing of the polls until the counting is completed and the final returns are certified and signed.” Black’s Law Dictionary defines an “inspection” as a “careful examination of something.” INSPECTION, Black's Law Dictionary (11th ed. 2019).

And, Ohio Election Manual Section 1.08(5), “Observers”, further elaborates on Ohio law:

The role of observers is limited to observing the proceedings of an election. Accordingly, while observers are permitted to watch and inspect, observers are never permitted to handle any election materials.

Observers are permitted to move freely about the polling location or any area where ballots are being cast, processed, counted, or recounted at a board of elections office, as applicable, to the extent that they do not engage in any prohibited activity. A board may deny an observer access to parts of its office where ballots are not being cast, processed, counted, or recounted.³⁴

Footnote 34: Observers at a precinct are permitted to “watch every proceeding of the precinct election officials from the time of the opening until the closing of the polls.” Observers are also permitted to “**inspect the counting of all ballots in the polling location or board of elections from the time of the closing of the polls until the counting is completed and the final returns are certified and signed.**” R.C. 3505.21 (emphasis added).

Ohio Election Manual Section 1.08(6) further elaborates that “observers are permitted to...gather information about the process”.

According to Ohio’s Secretary of State, every county in the State of Ohio uses automatic tabulating equipment to administer their elections manufactured by and purchased or leased from private companies. These companies include Election Systems & Software, Hart, Dominion, and others.¹

Gone are the days when an observer could meaningfully inspect the counting of votes by walking around and watching poll workers tally and mark. As is apparent to all in-person voters in Ohio, voting tabulations are now done strictly using computers and the task of counting has been mechanized. An army of observers merely watching from afar people walking to and from a machine does not constitute the inspection of any voting because such “observation” provides no insight regarding the processes taking place within these black boxes. Watching the ballots go in a machine and then watching ballots come back out is also not a meaningful inspection process for certified observers. The situation is akin to a counting room with a locked door where workers from private companies take the ballots in, supposedly count them, and return to the onlookers outside with assurances that nothing untoward took place within the confines of the locked

¹ https://www.ohiosos.gov/globalassets/elections/maps/votingsystembyvendor_june_8_2022.pdf

counting room. And, in those twelve counties using direct recording machines even the casting of ballots is unobservable because there is no paper ballot to even view go into a machine.

Voting and counting technology has changed over the past twenty years; however, the State of Ohio, and specifically Secretary LaRose, failed to provide observers with any new tools to perform their critical functions under Ohio law. It should be non-controversial that observers must be allowed to observe and inspect the counting of votes. Given this counting now takes place within automatic tabulating machines reliant on software, it should be similarly non-controversial that observers must now be allowed to inspect and carefully examine all pertinent software at its human readable source code level to adequately observe “the counting of the votes.”

Opaque voting and counting methods performed by machines running uninspected computer code is a primary cause of mistrust of election results and the basis for claims of election fraud. Distrust in elections will end if Ohio law were strictly followed and meaningful access given to certified observers. Respondent denies that “no certified election observers have been permitted to sufficiently observe or inspect [the] voting and counting machines.” Answer of Respondent, ¶ 19. Respondent also claims that “only qualified election officials, who are aided by technology, count votes.” Answer of Respondent, ¶ 21. This is a fiction. Election officials no more count votes than someone holding a calculator performs long division, or an owner of a timepiece counts seconds to keep the time. The core function of counting votes is now undeniably mechanized. Perhaps an election official records the results after the tabulator’s finished “counting”, but in no way is an official doing any counting themselves.

To say that an observer may observe and inspect the counting of votes only by watching an election official run digital ballots through a tabulating machine removes all meaning and utility from the law. Further, it is no salve to the issue to state that the machines have been tested and

certified by the federal government. Answer of Respondent, ¶ 18. It is a classic Red Herring because the Help America Vote Act of 2002 (“HAVA”) did not in any way repeal or preempt Ohio law when it comes to election observers. That HAVA may have provided compliance rules that applied to Ohio elections makes no difference because the rules did not and do not conflict with the requirement under Ohio law to allow the observation and meaningful inspection of the votes cast by Ohioans.

III. CONCLUSION

For the foregoing reasons, Relator Terpsehore P. Maras respectfully requests this Court **GRANT** her petition and issue a writ of mandamus ordering Secretary of State Frank LaRose to follow his legal imperative and 1) allow certified non-party affiliated candidates, including Relator, to appoint election observers in the same manor afforded to party affiliate candidates under R.C. § 3505.21; and 2) allow election observers to observe and inspect the automatic tabulating machines in the manner described in part b. of Relator’s prayer for relief.

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CERTIFICATE OF SERVICE

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