

IN THE SUPREME COURT OF OHIO

STATE EX REL. WILLIAM DEMORA,
ET AL.

Relators,

-v-

OHIO SECRETARY OF STATE FRANK
LAROSE, ET AL.

Respondents,

-v-

STATE EX. REL. SHAFRON HAWKINS,
ET AL.

Intervening Relators,

-v-

OHIO SECRETARY OF STATE FRANK
LAROSE, ET AL.

Respondents.

Case No. 2022-0661

Original Action in Mandamus

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

INTERVENING RELATORS' REPLY BRIEF

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INTRODUCTION

For years, states have struggled to maintain control of their affairs while defending against unnecessary intrusion from their federal counterparts. Unfortunately, the significance of this battle is never greater than in the context of elections. While we have the utmost respect for the United States District Court for the Southern District of Ohio, this Court is not required to abdicate its power nor must it accept non-binding recommendations from federal courts, particularly when state law arguments were not considered.

On May 28, 2022, the Southern District of Ohio forcibly implemented the Ohio Redistricting Commission’s unconstitutional “Third Plan” to accommodate a limited primary election, including offices for the Ohio General Assembly. *See Gonidakis v. LaRose*, Case No. 2:22-cv-0773, 2022 WL 1709146 (S.D. Ohio May 27, 2022).¹ In doing so, the primary election was postponed until August 2, 2022. Postponing the primary election, as a matter of law and equity, requires the extension of candidate filing deadlines. Respondent LaRose, however, maintains that candidacy deadlines are calculated based upon the initial election date of May 3, 2022. Respondent LaRose cites federal opinions in support of this proposition. However, even the most recent federal court decision is not based upon an interpretation of Ohio law. *Giroux v. LaRose*, Case No. 1:22-cv-00309, Slip. Op. at 9 (S.D. Ohio June 14, 2022) (noting that “Plaintiffs assert their claims solely under the First and Fourteenth Amendments. That is, Plaintiffs are not advancing a state-law claim That makes sense, as [caselaw], would preclude this Court from instructing Secretary LaRose to follow state law.”).

For the reasons set forth herein, Intervening Relators respectfully seek writs of mandamus to compel Secretary LaRose to rescind his instructions to the boards of elections and to compel

¹ Twice this plan was held to be unconstitutional by the Ohio Supreme Court.

certification of their candidacies. As an alternative remedy, Intervening Relators request the Court to order Secretary LaRose to direct the boards of elections to accept, until 4:00 p.m. of the tenth day following the issuance of such Order, Judgment, and/or Writ, the filing of declarations of candidacy for the General Assembly and statements of write-in candidacy for the General Assembly for all General Assembly districts. Lastly, as a final alternative remedy, Intervening Relators request that this Court postpone the August 2, 2022 primary election to allow compliance with R.C. 3513.05 and R.C. 3513.041—which govern the timing of candidates’ declarations.

ARGUMENTS IN RESPONSE

I. Intervening Relators have established that Secretary LaRose acted in clear disregard of applicable law and/or abused his discretion in calculating filing deadlines for the August 2, 2022 primary election.

Respondent LaRose’s alleged compliance with federal court decisions does not, in itself, equate proper application of Ohio law. To the contrary, federal courts lack authority to instruct the Ohio Secretary of State on such matters. *See Giroux v. LaRose*, Case No. 1:22-cv-00309, Slip. Op. at 9 (S.D. Ohio June 14, 2022) (noting that “Plaintiffs assert their claims solely under the First and Fourteenth Amendments. That is, Plaintiffs are not advancing a state-law claim That makes sense, as [caselaw], would preclude this Court from instructing Secretary LaRose to follow state law.”).

Consequently, Intervening Relators seek a writ of mandamus compelling Secretary LaRose to rescind Directive 2022-34 concerning the deadlines to file for candidacy in the August 2, 2022 primary election.

A writ of mandamus will issue when the relator can establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondents to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law.

See, e.g., State ex rel. Ohioans for Secure and Fair Elections v. LaRose, 159 Ohio St.3d 568, 2020-Ohio-1459, 152 N.E.3d 267, ¶ 13. When reviewing the decisions of the Ohio Secretary of State, the standard is whether he engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions. *See, e.g., id.* at ¶ 14.

Respondent LaRose avers that Intervening Relators “can point to no statute” justifying their requested relief. Intervening Relators can point to at least two—R.C. 3513.05 and 3513.041. Secretary LaRose acted arbitrarily and with complete disregard of these statutes and equitable principles when he ordered that candidate deadlines be based upon a May 3rd election. These statutes provide a minimum number of days upon which a candidate may file for election. There is no dispute that a General Assembly district map was not finalized until May 28, 2022. By the time that potential candidates were informed of the district boundaries, they were already precluded from seeking election.

Furthermore, Respondent LaRose has argued that Original Relators “do not have a clear legal right to the requested relief. At the time that each of them filed, there was no August 2, primary election scheduled.” Merit Brief of Respondent Ohio Secretary of State Frank LaRose at 2 (June 8, 2022). Respondent LaRose further asserted that “[a] **person cannot file a valid declaration of candidacy and petition for an election date that does not legally exist.**” *Id.* at 10. By virtue of this argument, Secretary of State concedes that Intervening Relators could not seek inclusion in the August 2nd primary until after May 28, 2022—a holiday weekend and the date on which the federal court adopted the Third Plan and officially rescheduled the primary election.

II. Intervening Relators' requests for relief should be granted

Intervening Relators echo the need for swift action by this Court. However, the existence of upcoming deadlines does not nullify Secretary LaRose's hand in causing the present time constraints. As a member of the Ohio Redistricting Commission, Respondent LaRose was in the best position to control the constitutionality of the district map and influence timing of its implementation. Now, he seeks to reap the benefit of this delay by advising relators that there simply is not enough time for him to comply with upcoming deadlines. The Ohio Supreme Court has already rejected arguments that August 2, 2022, is the final day to hold a primary election:

We are mindful of representations made by or on behalf of the secretary of state in the pending *Gonidakis* federal court proceedings that a district plan must be in place by April 20 for the last possible primary-election date for the 2022 election, August 2, to be feasible. However, we fail to see how this contention should motivate us—or the federal court for that matter—to adopt a plan for the 2022 state legislative elections by April 20. **It is unclear as to why August 2, 2022, is the last available date for a primary election in Ohio.⁹ We note that several states will have primary elections on August 16, 2022, or later, including four states that will have their primary elections in September.** National Conference of State Legislatures, 2022 State Primary Election Dates and Filing Deadlines (Apr. 4, 2022), <https://www.ncsl.org/research/elections-and-campaigns/2022-state-primary-election-dates-and-filing-deadlines.aspx> (accessed Apr. 12, 2022) [<https://perma.cc/Y73V-2TSB>]. Thus, on the record before us, the so-called April 20 “deadline” for implementing a General Assembly–district plan appears to be an artificial deadline that is based on a speculative, potential primary-election date for state legislative races.

League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 2022-Ohio-1235.

Therefore, is entirely feasible to further postpone the primary election currently scheduled for August 2, 2022. Secretary LaRose insists that neither he nor the Ohio Supreme Court possess the power to reschedule the primary election. This is an inartful recitation of this Court's opinion in *League of Woman Voters of Ohio*, wherein the Court noted that “[t]he authority for setting the date

for a primary election belongs to the General Assembly, not to the Ohio Supreme Court, the secretary of state, **or a federal court**. See R.C. 3501.40 and 3501.01(E)(1). Principles of federalism and comity cut against a *federal* court ordering the date of a primary election for purely *state* offices due to a dispute over the validity of *state* legislative maps under the *state* constitution.” *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-1235 (emphasis added).

This point is moot, however, in a circumstance where the federal court has already rescheduled the primary election without legislative involvement. In *Gonidakis*, the federal court moved the election because it determined that the federal court could “restore a lawful and orderly election by ensuring Ohio voters, candidates, and officials know the districts that will apply....” *Gonidakis v. LaRose*, No. 2:22-CV-0773, 2022 WL 1175617, at *2 (S.D. Ohio Apr. 20, 2022). So even though this Court was originally opposed to the primary being moved by anyone other than the General Assembly, the fact of the matter is that the federal court postponed the primary election. As a result, it is imperative that this Court restore a lawful and orderly election by ordering Intervening Relators’ candidacies to be certified or by further postponing the primary election. A failure to intervene at this junction will deprive not only the Intervening Relators’ due process, but also deprive the electors of the 11th and 15th Districts the right to elect their chosen candidate.

The sanctity of the democratic system must be preserved above all else. Limitations on the right of a person to hold office are to be given a liberal construction in favor of those seeking to hold office, in order that the public may have the benefit of choice from all those who are in fact and in law qualified. See, e.g., *State ex rel. Schenck v. Shattuck*, 1 Ohio St.3d 272, 274, 439 N.E.2d 891 (1982). In this matter, justice requires that Respondent LaRose, with respect to the August 2, 2022 primary election, direct the county board of elections to accept, until 4:00 p.m. of the tenth day following the issuance of such Order, Judgment, and/or Writ requiring the same, the filing of declarations of candidacy for the General Assembly and statements of write-in candidacy for the

General Assembly for **all General Assembly districts**. In the alternative, justice requires that the August 2nd primary be reschedule.

III. Intervening Relator Hawkins, through counsel, has undertaken all reasonable steps to serve the Cuyahoga County Board of Election thereby subjecting it to this Court's ruling.

Respondent Cuyahoga County Board of Elections argues that it has not been properly served with the summons and as a result any order of this Court against it in this action is void.

This is an expedited election case under Rule 12.08 of the Supreme Court Rules of Practice. Ordinarily, the Clerk of the Supreme Court is tasked with the issuance and service of summons and a copy of the complaint by certified mail to the respondent. S.Ct. Pract. R. 12.01(A). Intervening Relator Hawkins filed his Motion to Intervene and proactively attached a Verified Petition, Affidavit, Merit Brief, and Evidence. All of these documents were served upon counsel for the Cuyahoga County Board of Elections via email on June 10, 2022. S.Ct. Pract. R. 3.11(C)(service may be by e-mail); S.Ct. Pract. R. 12.08 (“[a]ll documents in **expedited election cases**, except those filed to initiate a case under this rule, shall be served on the date submitted for filing by personal service, facsimile transmission, or e-mail.”). The Court granted Hawkins’ Motion on June 13, 2022 and ordered his Verified Complaint filed instanter.

While the Clerk may not have served the summons upon Respondent by certified mail yet, the Court’s order in this expedited election case will still be binding upon Respondent because it has not been adversely affected by the lack of service of the summons. *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 997 N.E.2d 524, 526, 137 Ohio St.3d 62, 64, 2013 -Ohio- 4490, ¶ 17 (Ohio,2013).

On June 10, 2022, Intervening Relator Hawkins served the Verified Petition, Affidavit, Merit Brief, and Evidence upon Prosecutor Michael C. O’Malley of Cuyahoga County, statutory attorney

for the Cuyahoga Board of Elections.² On June 13, 2022, Mike Weston of the Cuyahoga County Prosecutor's office, verbally advised that the prosecutor's office was aware of Intervening Relator's Complaint, that the prosecutor's office had "been monitoring the docket," and that the office was familiar with this Court's order instituting a 5:00 p.m. deadline for June 14, 2022. Respondent then filed its response prior to the Court's deadline. As a result, Cuyahoga Board of Elections as not demonstrated any harm from the improper service. Thus, any procedural deficiency in the service of the summons should be set aside in this expedited election case. *State ex rel. N. Main St. Coalition v. Webb*, 835 N.E.2d 1222, 1227, 106 Ohio St.3d 437, 440, 2005 -Ohio- 5009, ¶ 20 (Ohio,2005)("making procedural motions normally inapplicable" in expedited election cases. In any event, the Clerk will have the summons served upon Cuyahoga Board of Elections within the next few days.

IV. Intervening Relators have established that their respective Respondent Boards of Elections clearly disregarded applicable law and/or abused their discretion by following Directive 2022-34.

Respondents Cuyahoga and Franklin County Boards of Elections, in their own right, argue that relief against them is improper on the sole basis that they followed Directive 2022-34, issued by Respondent Secretary of State LaRose. Not unlike the Original Relators, Intervening Relators generally agree that Secretary LaRose is chiefly responsible for excluding their candidacies from the August 2, 2022 primary election. Nevertheless, the Respondent Boards of Elections are not immune from writs of mandamus by virtue of following Secretary LaRose's instructions when said

² R.C. 309.09(A) states that "The prosecuting attorney shall prosecute and defend all suits and actions that any . . . board [of elections] . . . directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section [305.14](#) of the Revised Code."

directives disregard applicable law and/or result from an abuse of discretion. To the contrary, this Court has repeatedly issued writs of mandamus compelling boards of elections to certify candidates despite conflicting directives from the Secretary of State.

For example, in *Ferrara*, a board of elections invalidated a candidate's part-petition based heavily upon "guidance it received from the secretary of state interpreting that provision. . . ." *State ex rel. Ferrara v. Trumbull Cnty. Bd. of Elections*, 2021-Ohio-3156, 166 Ohio St. 3d 64, 66, 182 N.E.3d 1142, 1144. This Court determined that the Secretary's instructions contravened Ohio law, and therefore issued a writ of mandamus compelling the **board of elections** to review the petition signatures and take all steps necessary to certify the candidate's name for placement on the ballot.. *Id.*, 166 Ohio St. 3d at 69, 182 N.E.3d at 1147; see also *State ex rel. Bender v. Franklin Cnty. Bd. of Elections*, 2019-Ohio-2854, 157 Ohio St. 3d 120, 125, 132 N.E.3d 664, 669 (citing *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 34 ("to the extent that the secretary of state's directives in his election manual may support a contrary interpretation, those directives lack authority.")).

Consistent with this precedent, the Court should order that Respondent Boards of Elections certify Intervening Relators' candidacies since Respondent LaRose's Directive 2022-34 was issued in disregard of applicable law and/or resulted from an abuse of discretion.

V. The Sore Loser Rule does not inhibit Relator Hawkins from running for election in the August 2, 2022 primary election.

In a last-ditch effort to avoid certifying his write-in candidacy, Respondents LaRose and Cuyahoga County Board of Elections claims that Relator Hawkins is barred from the August 2nd primary election pursuant to Ohio's "sore loser statute" (identified as R.C. 3513.04) and/or because Respondent lacks a mechanism to reinstate his declaration to run for elected office. Ohio law does not expressly restrict the avenues for which a candidate may **reinstate** a prior declaration of

candidacy. While the relator in *State ex. Rel. Coble v. Lucas Cty. Bd. Of Elections* chose to file a new declaration following his withdrawal, the holding does not designate such filing as the sole avenue by which to pursue later candidacy.

Assuming, *arguendo*, that Intervening Relator was required to file a secondary declaration, Respondent has recently refused to accept any declarations –thereby creating a cyclical argument where Respondent criticizes relators for not taking specific action while simultaneously preventing such action from occurring.

R.C. 3513.04 states as follows:

No person who seeks party nomination for an office or position at a primary election by declaration of candidacy or by declaration of intent to be a write-in candidate . . . shall be permitted to become a candidate by nominating petition, . . . by declaration of intent to be a write-in candidate, or by filling a vacancy . . . at the following general election for any office other than the office of member of the state board of education, office of member of a city, local, or exempted village board of education, office of member of a governing board of an educational service center, or office of township trustee.

R.C. 3513.04.

“ “[P]ublic policy favors free competitive elections, in which the electorate has the opportunity to make a choice between candidates’ as opposed to blindly enforcing ‘each technical requirement in the petition form.’” *State ex rel. Ernst v. Brunner*, 2007-Ohio-7265, ¶ 24, 145 Ohio Misc. 2d 73, 81–82, 882 N.E.2d 990, 997 (internal citations omitted). As such, a Court may compel certification when the circumstances of an election are so unusual as to deprive voters of their choice in candidates. *See Id.* 145 Ohio Misc. 2d at 79-80, 882 N.E.2d at 995-96 (stating that it would be harsh to eliminate candidates from the general election who indicated interest in public offices that no longer existed).

The circumstances surrounding the August primary election are unprecedented and restricting candidates’ certification based upon a failure to act upon unknown maps and deadlines

deprives voters of a free competitive election and their choice in candidates. The fact remains that Relator Hawkins **would not have withdrawn his candidacy**, nor would he have run for alternative office, but for the State’s failure to institute a timely General Assembly district map that complied with the Ohio Constitution.³

CONCLUSION

For the reasons set forth above and in Intervening Relators’ Merit Brief, Intervening Relators respectfully request that this Court issue a writ of mandamus to compel Secretary LaRose to rescind his instructions to the boards of elections and to compel their respective boards of elections (Cuyahoga County Board of Elections and Franklin County Board of Elections) to certify the Intervening Relators’ candidacies. As an alternative remedy, Intervening Relators request the Court to order Secretary LaRose to direct the boards of elections to accept, until 4:00 p.m. of the tenth day following the issuance of such Order, Judgment, and/or Writ, the filing of declarations of candidacy for the General Assembly and statements of write-in candidacy for the General Assembly for all General Assembly districts. Lastly, as a final alternative remedy, Intervening Relators request that this Court order postponement of the August 2, 2022 primary election to allow compliance with R.C. 3513.05 and R.C. 3513.041—which govern the timing of candidates’ declarations.

Respectfully submitted,

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By: /s/ Michael G. Simon
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³ Respondent LaRose’s references to Sub. House Bill 93 in response to Original Relators are neither relevant nor compelling as that language specifically applies “to the primary election to be held on May 3, 2022.” Sub. H.B. No. 93 at 30.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Verified Complaint was sent via email, as set forth below, on this 15th day of June 2022 to the following:

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