Supreme Court of Ohio Clerk of Court - Filed June 10, 2022 - Case No. 2022-0661

IN THE SUPREME COURT OF OHIO

STATE EX REL. WILLIAM DEMORA, *et al.*	**Case No. 2022-0661**
Relators,	**Original Action in Mandamus**
-v-	**Expedited Election Matter Under S.Ct.Prac.R. 12.08**
OHIO SECRETARY OF STATE FRANK LAROSE, *et al.*	
Respondents.	

RELATORS' REPLY BRIEF

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INTRODUCTION

This case ultimately presents a straightforward question of statutory interpretation, and that question is whether the candidate filing deadlines set forth in R.C. 3513.05 and 3513.041 change when the date of the primary election changes. As set forth in Relators' Merit Brief, the plain language of these statutes clearly provides that the filing deadlines are tied to the day of the primary election, whenever that day is; R.C. 3513.05 requires declarations of candidacy and petitions to be filed by 4 p.m. on the 90th day before the "day of the primary election, and R.C. 3513.041 requires declarations of intent to be a write-in candidate by 4 p.m. on the 72nd day "preceding the election at which such candidacy is to be considered." This means that if the day of the primary election changes, then the filing deadlines change in tandem. As a result, when the date of the 2022 primary election for General Assembly and State Central Committee candidates changed to August 2, 2022, the applicable filing deadlines changed, too.

In response, Respondent Ohio Secretary of State Frank LaRose does not dispute that the applicable filing deadlines are those set forth in R.C. 3513.05 and 3513.041, nor does he dispute that he lacks the authority to change these deadlines. Further, none of the Respondents dispute that Relators Bill DeMora, Anita Somani, Bridgette Tupes, and Gary Martin filed their declarations of candidacy and petitions by 4 p.m. on the 90th day before August 2, 2022 or that Relators Elizabeth Thien and Leronda Jackson filed their declarations of intent to be a write-in candidate by 4 p.m. on the 72nd day before August 2, 2022.

Nevertheless, Secretary LaRose maintains that the filing deadlines for the August 2, 2022 primary election should be calculated based on May 3, 2022 rather than August 2, 2022. But as set forth below, Secretary LaRose's argument is nonsensical and devoid of any basis in the law. Because of this, the Court should reject the Secretary LaRose's argument and issue the requested

writ of mandamus compelling the Secretary to correct his directive and compelling the Respondent Boards of Elections to take the steps necessary to certify Relators' candidacies for the August 2, 2022 primary election.

ARGUMENTS IN RESPONSE

I. Relators established that Secretary LaRose acted in clear disregard of applicable law and/or abused his discretion in calculating the candidate filing deadline based on May 3, 2022 instead of August 2, 2022.

Secretary LaRose has one main argument in support of his directive: He argues that Relators' filings "were not valid when they filed them because at those times, August 2 was not the primary election date." LaRose Br. at 2. In other words, Secretary LaRose's contends that, as a matter of law, the filing deadlines set forth in R.C. 3513.05 and 3513.041 can change in tandem with the change in the date of the election only when the change in the date of the election occurs before what would otherwise be the filing deadlines for that new election date. However, Secretary LaRose offers no legal authority in support of his proposition, nor does he explain why the timing of the change in the date of the primary election in this instance carries any significance. Instead, Secretary LaRose haphazardly contends that the statutes are ambiguous and that the Court, therefore, "must" defer to his interpretation because he is the Secretary of State. But Secretary LaRose's position is wrong, and the Court must reject it.

A. Nothing in Ohio law supports Secretary LaRose's interpretation.

Secretary LaRose failed to identify *any* statutory provision or case law that lends credence to his contention that the primary election had to be rescheduled for August 2, 2022 before Relators could file to run at the election. *See* LaRose Br. at 10. Indeed, he even conceded that the Ohio Revised Code does not contain any language expressly differentiating what happens in "circumstances where an election date is set after the passage of the standard elections deadlines."

LaRose Br. at 10. In other words, Secretary LaRose admitted that his instructions in Directive 2022-34 as to the candidate filing deadlines are not supported by anything in Ohio law.

To be sure, Secretary LaRose devoted several pages to discussing Sub.H.B. 93 ("H.B.93"), the emergency legislation passed in January 2022 to deal with the uncertainty of congressional and General Assembly districts. *See* LaRose Br. at 4-5, 11-12, 16. But H.B. 93 says nothing at all to the effect of the filing deadlines for General Assembly and State Central Committee candidates remaining tied to May 3, 2022 even if the date of the primary election changes to a different date. It does, however, confirm that Secretary LaRose cannot change the candidate filing deadlines for the May 3, 2022 primary. *See* H.B. 93, Section 4(G)(1). But given that he would not have had the authority to change the deadlines anyways, H.B. 93 does not contain any changes in the law that are relevant to the instant action. It is also important to note that H.B. 93, by its own terms, applied only "to the primary election to be held on May 3, 2022"—its provisions do not carry over to the August 2, 2022 primary election. H.B. 93, Section 4. Thus, H.B. 93 has no bearing on the instant matter other than demonstrating that the General Assembly believed that elections officials could process [congressional] candidates' filings within just 60 days before an election. *See* Rel. Br. at 20.

B. Secretary LaRose failed to explain why the timing of the change in the date of the primary election altered the statutory filing deadlines.

Lacking any legal support for his position, Secretary LaRose baldly asserts that "[a] person cannot file a valid declaration of candidacy and petition for an election date that does not legally exist." LaRose Br. at 10. This statement is illogical for several reasons.

First, if Secretary LaRose's proposition is correct, then none of the declarations filed by General Assembly and State Central Committee candidates prior to the initial February 2 deadline

are valid for the August 2, 2022 primary election either. This is because everyone who filed to run in the 2022 primary election did so before the August 2, 2022 primary election "legally existed."

Second, and more to the point, it was always known that a primary election for General Assembly and State Central Committee candidates would be held at some point in 2022—by May 27, the *Gonidakis* Court's order scheduling the primary election for August 2, 2022 was a surprise to no one. Indeed, it was a slow march to changing the primary election date to August 2, 2022. This Court had raised the possibility of the May 3, 2022 primary election date changing as early as February 7 when the Court invalidated the Ohio Redistricting Commission's second General Assembly district plan. *League of Women Voters of Ohio v. Ohio Redistricting Commission* ("*League II*"), Slip Opinion No. 2022-Ohio-342, ¶ 66 (explaining that the General Assembly had the authority to move the primary election date, "should that action become necessary."). Secretary Larose then put the final nail in the coffin for the May 3, 2022 primary election on March 23, 2022 when he ordered boards of elections to remove all General Assembly and State Central Committee contests from the May 3 ballot. *See* Directive 2022-31 at 1 (REL_EVID_012). Subsequently, the *Gonidakis* Court announced on April 20, 2022 that it would set August 2, 2022 as the primary election date if the State had not otherwise worked out the redistricting impasse by May 28. As a result of this drawn out process, everyone involved, including Secretary LaRose, the county boards of elections, and Relators, was on notice that the primary election date would change from May 3, 2022 to August 2, 2022 well before what would become the filing deadlines for the August 2, 2022 primary election.

Finally, Secretary LaRose fails to explain how it would make any difference if the federal court had issued its decision formally scheduling the primary election for August 2, 2022 prior to

May 4 rather than on May 27. Either way, the primary election would still be on August 2, 2022 and the 90th day before the August 2, 2022 primary would remain May 4.

C. Secretary LaRose's interpretation is not entitled to any deference.

Even though he could not identify any legal authority in support of his position, Secretary LaRose insists that the Court "must" defer to his interpretation of the law because he is the Secretary of State. LaRose Br. at 9. But deference to the Secretary is not appropriate here.

1. The meaning of the statutes is clear, and deference is, therefore, unnecessary.

Secretary LaRose's interpretation is not entitled to any deference primarily because the statutes at issue are not ambiguous. Last year, in *State ex rel. Ferrara v. Trumbull Cty. Bd. of Elections*, this Court made clear that although the Secretary has the authority to issue rules, directives, or advisories to the boards of elections, "only the judiciary has ultimate authority to interpret the law" and that courts "must jealously guard that division of power." 166 Ohio St.3d 64, 2021-Ohio-3156, 182 N.E.3d 1142, ¶ 21 (DeWine, J.) (emphasis added). The Court explained that the "only" set of circumstances when it is permissible to even "consider" the Secretary's interpretation is "when a statute is truly ambiguous." *Id.*

Here, there is no ambiguity as to the meaning of R.C. 3513.05 or 3513.041, which Secretary LaRose agrees are the only relevant statutes. LaRose Br. at 1-2. It is uncontroverted that R.C. 3513.05 requires candidates to file declarations of candidacy and petitions "not later than four p.m. of the ninetieth day before the day of the primary election." LaRose Br. at 2, 10. It is uncontroverted that R.C. 3513.041 requires write-in candidates to file declarations of intent to be write-in candidates "before four p.m. of the seventy-second day preceding the election at which such candidacy is to be considered." LaRose Br. at 2, 10. It is uncontroverted that these statutes do not contain any special provisions setting forth a different rule in circumstances where the

primary election date changes. LaRose Br. at 10. It is uncontroverted that Secretary LaRose is "not permitted to move those deadlines or create a new filing deadline." LaRose Br. at 1. And it is uncontroverted that *Gonidakis* left the statutory deadlines intact and in place. Given all this, the only reasonable interpretation of R.C. 3513.05 and 3513.041, applied to the August 2, 2022 primary election, is that because the "day of the primary election" changed to August 2, 2022, then the filing deadlines changed in tandem to the 90th and 72nd days before August 2, 2022.

The only way to make these provisions ambiguous would be to add the words or concepts that Secretary LaRose argues for in his brief that the filing deadlines are based on a specified number of days before the day of the primary election *unless the day of the primary election is subsequently changed.* But as Secretary LaRose conceded, there is no language to this effect in either R.C. 3513.05 or 3513.041, and neither he nor this Court can add words not used in a statute or create ambiguity where none exists. Accordingly, the plain language of R.C. 3513.05 and 3513.041 is all the Court needs to decide the case, and deference to Secretary LaRose is unnecessary.

2. Secretary LaRose's interpretation is unreasonable and would lead to absurd results.

Even if the meaning of R.C. 3513.05 or 3513.041 were ambiguous, Secretary LaRose's interpretation of the statutes would still not be entitled to any deference. This is because his interpretation is unreasonable and would lead to absurd results. *See, e.g., State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, ¶ 17 (declining to defer to the secretary's interpretation of a statute on the basis that it is "not reasonable" and would "lead to absurd results).

As previously discussed, the interpretation is not supported by anything in the Revised Code or any case law, and Secretary LaRose offered no explanation as to why the timing of the *Gonidakis* Court's decision changing the date of the primary election has any significance here.

Secretary LaRose's interpretation is unreasonable for the additional reason that it is replete with double standards. Again, he argues that Relators did not have a right to file their declarations because "[a]t the time that each of them filed, there was no August 2 primary election scheduled." LaRose Br. at 1. But the same is true for the candidates who filed by February 2, 2022. Yet, Secretary LaRose concluded that only Relators' filings were untimely. True, the May 3 primary existed when those candidates filed, but that was then and this is now—and the now is that Relators and the other candidates are all subject to an August primary that did not officially exist when any of them filed to run. Similarly, while Secretary LaRose argues that Relators cannot file before the primary election date is scheduled, he expects candidates to have filed before the districts were even created by the Ohio Redistricting Commission and later re-imposed by the federal court. Such an interpretation is patently unreasonable.

Additional reasons establishing the unreasonable and absurd consequences of Secretary LaRose's interpretation are set forth more fully in Relators' merit brief. These include the following: there is no valid justification for setting filing deadlines at 181 and 161 days before the day of the primary election when the General Assembly already determined that elections officials need only half—or even a third—of that time to prepare for an election; it would cement filing deadlines that expired before the districts even existed; it would amount to a retroactive application of a ballot access requirement; and it is inconsistent with the other deadlines set forth in Directive 2022-34. *See* Rel. Br. at 20-22. Assuming *arguendo* that Respondent Secretary had a choice, he went with the one that leaves Democratic voters in five out of six races with no one to vote for on August 2 and virtually guarantees that the Republican candidates in two House races and one Senate race will win in November despite the partisan make up of those districts.

In his brief, Secretary LaRose responds only to the claim that the filing deadlines in Directive 2022-34 are internally inconsistent. *See* LaRose Br. at 17. As noted in Relators' Merit Brief, Directive 2022-34 states that the 90th day "before the day of the primary election" for General Assembly candidates was February 2, 2022, but that the 90th day "before the day of the primary election" for local ballot measures and local options was May 4, 2022. Rel. Br. at 18-19; Directive 2022-34 at 1-2 (REL_EVID_002-003). Secretary LaRose contends that this is not an inconsistency because August 2 is a "regularly-scheduled special election date" at which local option questions could be submitted anyways. *See* LaRose Br. at 17. He is wrong. Local options can be submitted only at a general election or a special election "held on a day on which a primary election may be held." R.C. 4301.33(B), 4301.332(B), 4301.333(A), 4301.334(A), 4301.356. This means that local options can appear on the August 2, 2022 ballot only because the primary election date was changed to August 2, 2022. Thus, although Secretary LaRose correctly determined that local options submitted to boards of elections by May 4, 2022 could be placed on the August 2, 2022 primary election ballot—even though the federal court had not yet moved the primary election to August 2—he inconsistently determined that declarations of candidacy had to be filed by February 2, 2022 for the same election. This was another unreasonable double standard.

3. Secretary LaRose's interpretation is at odds with the Court's duties to liberally construe ballot access requirements in favor of those seeking to hold office and to avoid unduly technical interpretations of election laws.

If the Court determines that there is ambiguity as to the meanings of R.C. 3513.05 and 3513.041, Secretary LaRose's interpretation should be rejected for the additional reasons that it contradicts two important duties of the Court: (1) "to liberally construe words limiting the right of a person to hold office in favor of those seeking to hold office so that the public may have the benefit of choice from all qualified persons," *State ex el. Bender v. Franklin Cty. Bd. of Elections,*

157 Ohio St.3d 120, 2019-Ohio-2413, 132 N.E.3d 664, ¶ 15 quoting *State ex rel. Reese v. Cuyahoga Cty. Bd. of Elections*, 115 Ohio St.3d 126, 2007-Ohio-4588, 873 N.E.2d 1251, ¶ 34; and (2) to avoid "unduly technical interpretations [of election laws] that impede the public policy favoring free, competitive elections," *see, e.g., State ex rel. Eshleman v. Fornshell*, 125 Ohio St.3d 1, 2010-Ohio-1175, 925 N.E.2d 609, ¶ 22.

D. The Secretary's policy arguments are irrelevant when the law plainly requires him to calculate candidate filing deadlines based on the day of the primary election.

Secretary LaRose makes several policy-based arguments concerning the State's "competing" and "compelling" interests in closing candidate filings after February 2. But if the Court determines that Secretary LaRose had a clear legal duty to correctly instruct the boards of elections to accept candidates' declarations filed by May 4 and write-in candidates' declaration filed by May 22, then such policy-based arguments are irrelevant. *See State ex rel. Grumbles v. Delaware Cty. Bd. of Elections*, 165 Ohio St.3d 552, 2021-Ohio-3132, 180 N.E.3d 1099, ¶ 18 (rejecting a board of elections' argument in a mandamus action "because it is grounded in supposed policy considerations that are not set forth in the [relevant] statutes").

Moreover, Secretary LaRose's policy arguments lack any merit. His primary contention is that it is "too late" to certify even just the Relators for the August 2, 2022 primary election. LaRose Br. at 18-20. He does not make this argument in the context of raising laches; indeed, none of the Respondents raised laches in their briefs. Instead, Secretary LaRose asserts that Relators' claims are barred by the "Purcell principle" and due to the fact that UOCAVA ballots for the August 2, 2022 primary election must be ready by June 17. *Id.*

As to the "Purcell principle," Relators are not aware of any decision in which this Court or any other Ohio court has invoked the "Purcell principle" to preclude the issuance of a writ of mandamus. This makes sense given that a court's concern in a mandamus action is whether the

respondent failed to perform a required legal duty; holding otherwise would incentivize public officials to run out the clock on performing mandatory duties. In this case, Relators instituted their action on the first business day after Secretary LaRose issued Directive 2022-34. If that was "too late," as Secretary LaRose argues, then the Secretary would effectively be given carte blanche once an election nears.

Secretary LaRose's arguments about UOCAVA ballots are similarly misplaced. For one, he offers no explanation as to how or why the 21 days in between the federal court's May 27 order setting August 2, 2022 as the primary election date and the June 17 deadline to have UOCAVA ballots ready is an insufficient amount of time. This argument seems especially dubious given that, for the May 3, 2022 primary election, the General Assembly had allowed congressional candidates to file up until the 60th day before the primary election, leaving elections officials with 14 days to prepare UOCAVA ballots. *See* H.B. 93, Section 4(A).

It should also be noted that the petition signature requirements for General Assembly and State Central Committee candidates are relatively minimal. General Assembly candidates need the signatures of 50 qualified electors, R.C. 3513.05, third paragraph, State Central Committee candidates need the signatures of 5 qualified electors, *id*., sixth paragraph, and write-in candidates do not need any signatures. Thus, verifying Relators' filings would take little time.

Additionally, this Court has, on multiple occasions, issued writs of mandamus ordering elections officials to place candidates on a ballot after UOCAVA voting, and even non-UOCAVA absentee voting, had begun. *See, e.g.*, *State ex rel. Scott v. Franklin Cty. Bd. of Elections*, 139 Ohio St.3d 171, 2014-Ohio-1685, 10 N.E.3d 697 (issuing writ of mandamus on April 21, 2014 ordering candidate on the May 6, 2014 primary election ballot); *State ex rel. Stevens v. Fairfield Cty. Bd. of Elections*, 152 Ohio St.3d 584, 2018-Ohio-1151, 99 N.E.3d 376 (issuing writ of mandamus on

March 29, 2018, five days into the start of UOCAVA voting, ordering a candidate on the May 8, 2018 primary election ballot).

Further, concerns about the impact of issuing writs of mandamus close to the start of UOCAVA voting are mitigated by the fact that five of the Relators filed for races in which no other candidate was certified for placement on the primary election ballot. *See State ex rel. O'Neill v. Athens Cty. Bd. of Elections*, 160 Ohio St.3d 128, 2020-Ohio-1476, 154 N.E.3d 44, ¶ 33 (finding that a board of elections was not prejudiced by the timing of a candidate's mandamus action, in part, because "the only question is whether votes cast for her unopposed candidacy will be counted after the conclusion of absentee voting."). As a result, the outcome of Relators' elections could not be called into question by the timing of a favorable decision in this action.

Lastly, Secretary LaRose has unclean hands when it comes to raising timing concerns. As a member of the Ohio Redistricting Commission, he voted to approve unconstitutional General Assembly district plans on five occasions and played an active role in running out the clock so that the *Gonidakis* Court would impose a district plan that this Court had twice invalidated. *See, e.g., League of Women Voters of Ohio v. Ohio Redistricting Commission* ("*League V*"), Slip Opinion No. 2022-Ohio-1727, ¶ 1, 4. Certainly more so than Relators, Secretary LaRose is responsible for the pressures that have been placed on elections officials during this cycle.

II. Relators established that the Boards of Elections Respondents clearly disregarded applicable law and/or abused their discretion by following Directive 2022-34.

The Boards of Elections Respondents all argue that a writ of mandamus cannot issue against them because they were simply following Secretary LaRose's instructions in Directive 2022-34. Relators agree with the general point that Secretary LaRose is chiefly responsible for their candidacies not being certified for placement on the ballot. And it is Relators' position that if

they prevail, costs should be assessed exclusively against Secretary LaRose. *See* Compl., Prayer for Relief at ¶ J.

Still, the fact that the Boards of Elections Respondents were following Secretary LaRose's instructions does not prevent the Court from issuing writs of mandamus against the Boards when the instructions are clearly in disregard of applicable law and/or an abuse of discretion. Indeed, this Court has issued writs of mandamus compelling boards of elections to take steps to certify candidacies when the boards had merely followed the Secretary's directives. In *Ferrara*, for instance, this Court held that a board of elections erred in invalidating a candidate's part-petition based on instructions in a directive issued by Secretary LaRose. *Ferrara*, at ¶ 8-23. The Court determined that the Secretary's instructions were not supported by Ohio law, yet still issued a writ of mandamus to compel the *board* to take steps necessary to certify the candidate's name for placement on the ballot, including reviewing the signatures on the part-petition that had been invalidated. *Id.* at ¶ 24-25; *see also Bender*, at ¶ 16 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."). Here, if the Court agrees that Directive 2022-34's instructions are in disregard of applicable law and/or an abuse of discretion, then, in addition to ordering Secretary LaRose to correct his instruction, the Court should order the Boards of Elections Respondents to take whatever steps necessary to certify Relators' candidacies.

CONCLUSION

For all the reasons set forth above and in Relators' Merit Brief, Relators respectfully request the Court to issue a writ of mandamus compelling Secretary LaRose to correct his instructions to the boards of elections and compelling Relators' respective boards of elections to

certify their candidacies. As an alternative remedy, Relators request the Court to set a new filing deadline for all candidates at the August 2, 2022 primary election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief was sent via email this 10th day of June, 2022 to the following:

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