

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

LEAGUE OF WOMEN VOTERS OF OHIO,
OHIO A. PHILIP RANDOLPH INSTITUTE,
LASHUNDA LEE, MUNIA MOSTAFA,
AUDRIANNA VICTORIAN RODRIGUEZ,
and HANNAH TUVELL,

Plaintiffs,

v.

FRANK LAROSE, in his official capacity as
Secretary of State of Ohio,

Defendant,

and

THE OHIO DEMOCRATIC PARTY,

Intervenor-Defendant.

CASE NO. 2:20-cv-1638

JUDGE MICHAEL H. WATSON
Magistrate Judge Elizabeth Preston Deavers

**INTERVENOR DEFENDANT OHIO DEMOCRATIC PARTY'S
MEMORANDUM IN PARTIAL SUPPORT AND PARTIAL OPPOSITION TO
PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER**

Intervenor-Defendant the Ohio Democratic Party ("ODP") joins this action to protect its' members rights to participate in the Ohio primary election and to ensure Ohio complies with statutory requirements for voter registration.

Specifically, ODP asks that this Court deny the Plaintiffs' request to change the date of Ohio's primary election for the fourth time; grant Plaintiffs' request to extend the voter registration deadline to March 30, 2020; deny Plaintiffs' request that Secretary of State LaRose be ordered to send multiple ballots to every voter; order Secretary LaRose to include an absentee ballot application, postage prepaid, with the postcard he is already sending to every voter; and order

Secretary LaRose to direct the county boards of elections to accept ballot applications submitted online or by email if they meet all other requirements.

STATEMENT OF FACTS

Ohio's 2020 presidential primary election was set to occur on March 17, 2020. At this election, Ohio's Republicans and Democrats would nominate candidates at the federal, state, and local level, including candidates for Congress, the Ohio Supreme Court, and the Ohio General Assembly. Voters would also elect delegates to the parties' national conventions who would, in turn, select their parties' presidential nominees. Voters would also participate in the organization of their state and county political parties by selecting party committee members. And, important to local communities throughout the state, voters would weigh in on local ballot issues, including funding for public schools and public transportation.

At approximately 2:53 p.m. on Monday, March 16, 2020, Secretary LaRose and Governor DeWine held a joint news conference. See The Ohio Channel, *Governor Mike DeWine - 3-16-2020 - COVID-19 Update*, <https://ohiochannel.org/video/governor-mike-dewine-3-16-2020-covid-19-update>. Governor DeWine announced that he was advising people age 65 or older to isolate themselves and, further, that it was unsafe to hold the March 17, 2020 election. *Id.* Governor DeWine and Secretary LaRose then announced their "recommendation" that the March 17, 2020 election be postponed. *Id.* Secretary LaRose and Governor DeWine both conceded that they lacked the legal authority to postpone the election on their own. *Id.*

They explained that because they lacked the authority to change the date of the election, some citizens would file a lawsuit to postpone the election. *Id.* Secretary LaRose stated further that he had instructed the Ohio Attorney General to not oppose the lawsuit and that he would provide the court with his recommended remedy of postponing the election until June 2, 2020. *Id.*

The lawsuit was filed in the Franklin County Court of Common Pleas late in the afternoon on March 16. A judge held an emergency hearing on the motion that evening and ultimately denied it as untimely and unlikely to succeed on the merits. The Judge also stated that it was up to the legislature to act.

At approximately 9 p.m., Secretary LaRose and Governor DeWine issued a joint statement that read as follows:

The only thing more important than a free and fair election is the health and safety of Ohioans. The Ohio Department of Health and the CDC have advised against anyone gathering in groups larger than 50 people, which will occur if the election goes forward. Additionally, Ohioans over 65 and those with certain health conditions have been advised to limit their nonessential contact with others, affecting their ability to vote or serve as poll workers. Logistically, under these extraordinary circumstances, it simply isn't possible to hold an election tomorrow that will be considered legitimate by Ohioans. They mustn't be forced to choose between their health and exercising their constitutional rights.

March 16, 2020 Joint Statement of Secretary LaRose and Governor DeWine, Exhibit A.

Other than stating that "it simply isn't possible to hold an election tomorrow," the joint statement offered no indication as to what, if anything, was next.

An hour later, at approximately 10:11 p.m., Dr. Amy Acton, the Director of the Ohio Department of Health, issued an order closing the State of Ohio's polling locations. Exhibit B. The Order stated that it would take effect immediately and "remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of Ohio Department of Health rescinds or modifies this Order." *Id.*

Shortly after Director Acton's order, at approximately 10:30 p.m., Secretary LaRose sent Directive 2020-06 to the county boards of elections. Exhibit C. In Directive 2020-06, Secretary LaRose stated that he was issuing the Directive "in response to Ohio Governor Mike DeWine's

and Ohio Director of Health Dr. Amy Acton's order closing polling places on March 17, 2020." *Id.* The Directive then states "[t]he March 17, 2020 Presidential Primary Election is suspended until June 2, 2020." *Id.* at 1 (emphasis added). The Directive also refers twice to "the June 2, 2020 presidential primary election." *Id.* at 1, 3 (emphasis added).

Despite being in the middle of a pandemic, the Ohio General Assembly met on March 25, 2020 – just 8 days after the primary was supposed to be held – and unanimously passed comprehensive emergency legislation, in the form of HB 197, to address a number of issues related to the coronavirus, including Ohio's primary election. Leaders of both parties spoke in support of HB 197's provisions related to the election, which set a primary date of April 28, 2020 and gave Ohioans an unprecedented additional 40 days to cast a ballot by mail, return postage prepaid. At the same time, it addressed the needs of candidates, parties, and school districts and other government subdivisions for finality in the election by not drawing out the election any longer than necessary. The General Assembly acted swiftly and decisively in unanimous, bipartisan fashion to address bringing the primary election to a conclusion and provide additional time for voting.¹

ARGUMENT

I. Delaying the election further will disenfranchise ODP's members from having a say in their party's national convention and further confuse voters.

"[I]n exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). A State's broad power to regulate the time, place, and manner of elections "does not extinguish the state's responsibility to observe the limits established by the First

¹ Prior to the General Assembly enacting HB 197, the ODP brought an action for a writ of prohibition in the Ohio Supreme Court against Defendant LaRose's unilateral extension of the election to June 2. The action was brought by ODP in order to safeguard its ability to send delegates to the Democratic Party's national convention. ODP voluntarily dismissed the action after the General Assembly passed HB 197.

Amendment rights of the State's citizens." *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 216 (1989). The Democratic Party's "Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than *any* interest of an individual State." *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975) (emphasis added).

1. ODP requires several weeks after the primary election is certified to ensure its delegation meets Democratic Party rules and is seated at the Democratic National Convention.

ODP is a major political party that serves as the Ohio branch of the national Democratic Party. It is affiliated with the Democratic National Committee (the "DNC"), the governing body of the national Democratic Party. The national Democratic Party's convention (the "Convention"), where the party will select a presidential nominee and approve a platform outlining the Democratic Party's ideology and policy goals, is scheduled to occur in Milwaukee, WI on July 13-16, 2020. Each state Democratic Party sends a delegation to the Convention to vote on the nominee and the platform, as well as various other issues related to party governance and ideology. In Ohio, the majority of these delegates are determined based on the outcome of Ohio's primary election, which was originally scheduled to occur on March 17, 2020. Exhibit D. The DNC sets the Convention's rules. In August 2018, the DNC approved the Call to Convention which included the Convention's governing rules. Two of these rules included setting a June 20, 2020 deadline for state parties to certify to the DNC's Secretary the state party's delegations to the Convention. Exhibit E. States who fail to meet this deadline risk not being able to participate in the Convention.

The DNC's rules for the Convention also include requiring state parties to submit a detailed delegate selection plan, including measures to ensure each state's delegation is representative of the Democratic Party's diverse membership. Well before the current pandemic began, ODP's

governing committee approved, and ODP submitted, a delegate selection plan that included approximately eight weeks of post-primary actions to ensure ODP's delegation meets the DNC's requirements. The delegate selection plan approved by ODP's executive committee includes the following post-primary election timeline:

1. Primary results certified.
2. Within three calendar days post-certification: ODP certifies delegates awarded to presidential candidates based on congressional district level primary results.
3. 8 days post-certification: Special post-primary caucuses held if needed.
4. 12 days post-certification: ODP's chair certifies special post-primary caucus results to the Secretary of the DNC.
5. 23 days after primary results certified: Deadline for candidates for Party Leader and Elected Official ("PLEO") and at-large delegates to file their declaration of candidacy with ODP's chair
6. 27 days post-certification: ODP's chair files the list of PLEO and at-large candidates with each presidential campaign eligible to receive PLEO and at-large delegates
7. 29 days post-certification: Presidential campaigns file list of approved candidates for PLEO and at-large delegates with ODP's chair
8. 31 days post-certification: ODP's executive committee elects PLEO and at-large delegates. Note that, per ODP bylaws, this meeting requires advance notice.
9. 40 days post-certification: Presidential campaigns submit list of standing committee candidates to ODP's chair.
10. 40 days post-certification: ODP's chair certifies the list of elected PLEO and at-large delegates to the DNC's secretary.
11. 43 days post-certification: ODP's convention delegation meets and elects standing committee members and the delegation chair.
12. 47 days post-certification: ODP's chair certifies the elected standing committee members and the delegation chair to the DNC.

Exhibit D.

- 2. Extending voting beyond April 28 will deprive Relators of their First and Fourteenth Amendment rights to participate in their political party's affairs.**

“The...Democratic Party and its adherents enjoy a constitutionally protected right of political association. There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments...The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Moreover, any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.” *Cousins*, 419 U.S. 477, 487-88 (1975) (internal citations omitted).

By seeking to extend the primary indefinitely, the Plaintiffs overlook “the significant fact that the suffrage was exercised at the primary election to elect delegates to a National Party Convention...The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice President of the United States...*The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State.*” *Cousins*, 419 U.S. at 489-490 (emphasis added). Extending or rescheduling Ohio’s primary election day beyond April 28 and the certification of results beyond mid-May will deprive ODP’s members of their right to participate in the selection of their party’s presidential nominee.

3. Changing the date of the election again will result in voter confusion and cause voters to be disenfranchised.

Ohioans have already been told that the election will occur on three separate dates. First, they were told for months that voting would end on March 17. Less than 12 hours before the polls opened, the Ohio Department of Health issued an unprecedented order shuttering the polls and

preventing Ohioans from voting on the previously scheduled election day. Exhibit B. Almost immediately thereafter, Defendant LaRose unilaterally extended voting to June 2. Exhibit C.

Less than a week later, despite the logistical difficulties in assembling 132 elected officials during a pandemic – much less getting them to unanimously agree - the Ohio General Assembly unanimously passed HB 197 which, among other things, set April 28, 2020 as the last day for voting in Ohio’s primary election. HB 197 gave voters an additional 40 days of voting by mail, in addition to the 28 days they already could have taken advantage of during Ohio’s statutory early in-person voting period.

“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). Now, two weeks after this saga began, and nearly a week after the Ohio General Assembly unanimously and decisively addressed the issue, the Plaintiffs ask this Court to further confuse voters about when and how they can vote. Plaintiffs do not even propose a date, they merely ask this Court to set a new date sometime in the distant future future, after “sufficient” time for voting has elapsed.

4. The Plaintiffs’ proposal to send multiple ballots to voters is unworkable, unconstitutional, and likely to result in disenfranchisement of voters.

Because this is a primary election, voters must request the ballot of the party they wish to be affiliated with. Plaintiffs propose to short circuit this by sending every voter in the state who has not yet voted each party’s ballot in the same envelope. There are several million voters in Ohio who have not yet voted. That would require printing several million Democratic ballots, several million Republican ballots, and several million Libertarian party ballots, mailing them all to voters, and then hoping the voter reads the instructions saying to only fill one out. In addition, voters who do not wish to be affiliated with any political party may request an issue-only ballot.

If these voters are not sent an issue-only ballot as well as these partisan ballots, those voters are forced to either affiliate with a political party against their wishes, or be deprived of their right to vote. Sending an issue-only in addition to the partisan ballots would result in some voters being confronted with up to four ballots to choose from.

Sending multiple ballots is also likely to result in a significant number of voters being confused and having their votes thrown out. In every election, there is some percentage of voters who inadvertently spoil their ballot by misunderstanding or failing to follow instructions. Under the Plaintiffs' proposal, voters – many of whom, by the Plaintiffs' own admission are unfamiliar with mail-in voting – would be confronted with up to four separate ballots. At least some, and likely a sizable number, of these voters will fill out more than one ballot and send it back to the board. This error will not be detected until the voters' ballot has been opened and separated from the absentee envelope, at which time these ballots must be discarded and the voter has lost their right to vote.

Moreover, the only way for an Ohio voter to formally affiliate with a political party is to request that party's ballot at a partisan primary election. Once the voter requests that ballot, the voter is identified as a member of the political party on the state's voter rolls. Parties use these rolls to identify members and communicate with them about ways to become more involved and about the party's candidates for office. The Plaintiffs' proposal to send partisan ballots to each voter, without that voter identifying which party the voter wishes to affiliate with, will effectively deny voters their first and fourteenth amendment rights to affiliate with ODP, and ODP's first and fourteenth amendment rights to identify and communicate with ODP's new members. *Cousins*, 419 U.S. at 487.

II. Anyone who returned their voter registration form on or before March 30, 2020 should be permitted to vote in the primary election.

By passing a bill establishing April 28 as the last day for voting, the Ohio General Assembly effectively set a new date for Ohio's primary election. Article I, Section 4, c. 1, U.S. Constitution ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations").

Article V, Section 1 of the Ohio Constitution states in pertinent part that "Every citizen of the United States, of the age of eighteen years, who...has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections." This requirement largely comports with the requirements of the National Voter Registration Act, which provides that Ohio shall "ensure that any eligible applicant is registered to vote in an election" if the person mailed or returned their voter registration form at least 30 days prior to the date of the election. 52 U.S.C. § 20507(a).

There is no justification for preventing people who registered to vote between February 19 and March 30 from being able to vote in the April 28, 2020 primary election.

III. Secretary LaRose is already planning to a postcard to voters instructing them how to request an absentee ballot application; it would impose no additional burden to order him to include a tear off absentee ballot application, return postage prepaid, as part of the postcard and creating a way for voters to apply for absentee ballots online.

The Ohio General Assembly included a requirement for Secretary LaRose to send a postcard to all registered Ohio voters instructing them on how to request and return an absentee ballot application to the voters' county boards of elections. This Court should order LaRose to include an absentee ballot application as part of that postcard. Under the plain text of R.C. 3509.03(B), the application "need not be in any particular form" so long as it includes the required information.

At the same time, nothing in R.C. 3509.03 requires that voters submit a paper application. Ohio already allows UOCAVA voters to apply for absentee ballots online, and this does not seem to overly burden boards of elections, despite having one of the nation's largest military bases - Wright-Patterson Air Force Base - located in Ohio. There is no reason why allowing non-UOCAVA voters to apply online would create any more burden on boards of elections than allowing those voters to apply by mail or by dropping off an absentee ballot application in person – which Ohio already does. As in *Obama for America v. Husted*, “[t]he State's asserted goal of accommodating the unique situation of members of the military...[is] certainly a worthy and commendable goal. However, while there is a compelling reason to provide more opportunities for military voters to [apply for] their ballots, there is no corresponding satisfactory reason to prevent non-military voters from [applying for] their ballots as well.” *Obama for America v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012).

The Court should order that Secretary LaRose both include a ballot application on the postcard being submitted to voters, and that Secretary LaRose direct boards of elections to accept absentee ballot applications submitted online, so long as all the necessary fields are filled out.

CONCLUSION

For the reasons listed above, the Court should deny the Plaintiffs' request for a new election date, extend the voter registration deadline to March 30, 2020, deny the Plaintiffs' request to send every voter multiple ballots; order Secretary LaRose to include an absentee ballot application, return postage prepaid, on the postcard he is already sending to each registered voter; and order Secretary LaRose to direct the county boards of elections to accept absentee ballot applications submitted online.

Respectfully submitted,

/s/ N. Zachary West

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2020, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

Respectfully submitted,

/s/ N. Zachary West
N. Zachary West (0087805)