

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

OHIO DEMOCRATIC PARTY,

Plaintiff,

v.

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

Defendant.

Case No. 2:19-cv-3774
Judge James L. Graham

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff Ohio Democratic Party (“ODP”), by and through counsel, hereby files this Memorandum of Law in Support of its Motion for a Temporary Restraining Order and Preliminary Injunction.

I. INTRODUCTION

Defendant, Frank LaRose, has ordered county boards of elections to purge more than 235,000 Ohioans from the voting rolls on September 6, 2019. As a result, tens of thousands of eligible Ohio voters risk being disenfranchised, through no fault of their own, as soon as the September 10 primary elections.

This risk is not merely hypothetical. As many as 30,600 eligible Ohio voters have been identified as being wrongly included in the Defendant’s purge list.¹ Defendant has admitted that

¹ Rick Rouan, *Dozens of Ohio Voters improperly purged in Franklin County*, The Columbus Dispatch (Aug. 5, 2019); Ohio League of Women Voters, *Voting Rights Advocates urge Ohio Secretary of State to immediately stop voter purges*, available at <https://my.lwv.org/ohio/article/voting-rights-advocates-urge-ohio-secretary-state->

more than 100 eligible voters have already been purged as early as January of this year,² and that thousands more should not be on the purge list. However, Defendant refuses to halt or delay the upcoming purge, and instead has said that “the problem is proof that his plan to assemble a statewide list of voter registrations facing cancellation from Ohio’s 88 county boards of elections is working.”³

Ohio allows municipalities to hold primary elections for local offices in either May or September of odd-numbered years. Numerous municipalities, including the city of Toledo, elect to hold their local primary elections in September. This year, the September primary elections are scheduled to occur on September 10, less than one week after Defendant is scheduled to purge nearly a quarter million Ohioans. While an eligible voter who was wrongly purged by Defendant can still vote a provisional ballot, this is not an adequate remedy. In order for a provisional ballot to be counted, the voter must fill out an affirmation that includes printing the voter’s name, birthdate, registration address, driver’s license number or last four digits of their social security number, and signature. If these fields do not match exactly as the voter’s information appears in the voting rolls, the ballot is discarded, and the voter’s vote is not counted.

Without injunctive relief, there is a near certainty that eligible Ohio voters will be wrongly purged from Ohio’s voter rolls, and that those wrongly purged voters may be disenfranchised a second time by having their provisional ballots discarded for trivial errors. At this time, ODP seeks to enjoin Defendant’s purging of eligible Ohio voters, or in the alternative, to order that all

[immediately-stop-voter-purges](#) (Accessed August 29, 2019); Ohio House Democratic Caucus, *Letter to Ohio Secretary of State Frank LaRose*, Aug. 19, 2019.

² Rick Rouan, *Dozens of Ohio Voters improperly on purge list in Franklin County*, The Columbus Dispatch (Aug. 5, 2019)

³ Doug Caruso, *Vendor’s errors lead to hundreds of voters targeted for purge in Ohio*, The Columbus Dispatch, (Aug. 25, 2019).

provisional ballots cast by a purged voter be counted if the voter can be positively identified, regardless of the five-fields requirement.

Courts have consistently recognized that the right to vote is a fundamental right. ODP respectfully submits that in order to protect this fundamental right, the Court should grant the relief requested in this motion, so that no eligible voter is denied their fundamental right as a result of the Defendant's actions or inactions.

II. FACTUAL BACKGROUND

a. After thousands of eligible voters are wrongly included on the purge list. Defendant announces he intends to move forward with the purge.

Defendant first announced his intent to purge voters on June 26. Since the purge list was published in July, there have been regular discoveries of thousands of eligible voters who were included in error. On August 2, Defendant announced that more than 1,400 voters were wrongly included on the purge list.⁴ On August 5, it was reported that more than 120 eligible voters in Franklin County were wrongly purged as early as January 2019.⁵ On August 15, the League of Women Voters and other voter advocacy groups announced the discovery of an additional 4,000 eligible voters on the purge list, as well as 17,500 voters who voted as recently as November 2018.⁶ On August 19, the Ohio House Democratic Caucus sent Defendant a letter identifying at least 6,500 newly discovered eligible voters who were wrongly scheduled to be purged.⁷ After these errors were discovered, Defendant held a press conference on August 20 in which he stated

⁴ Ohio Secretary of State, *Discrepancies in county voter list data discovered, solved by Secretary of State's office* (Aug. 2, 2019) available at <https://www.sos.state.oh.us/media-center/press-releases/2019/2019-08-02/> (Accessed Aug. 29, 2019).

⁵ Rick Rouan, *Dozens of Ohio Voters improperly purged in Franklin County*, The Columbus Dispatch (Aug. 5, 2019)

⁶ League of Women Voters, Letter to Frank LaRose re: Ohio's Scheduled September 6, 2019 voter purge, (Aug. 15, 2019), available at <https://my.lwv.org/ohio/article/voting-rights-advocates-urge-ohio-secretary-state-immediately-stop-voter-purges> (accessed August 29, 2019).

⁷ Ohio House Democratic Caucus, *Letter to Ohio Secretary of State Frank LaRose*, Aug. 19, 2019.

that “The process we laid out is working, and I’m happy about that...”⁸ On August 23, Defendant reiterated that he would not delay the purge and that the system was working.⁹ On August 25, another 1,641 eligible voters were identified as being wrongly included on the list due to a vendor’s error.¹⁰ If each of these errors is a unique voter, Defendant has wrongly included at least 30,600 eligible voters on the list, more than 10% of the total.

b. Wrongly purged voters forced to vote a provisional ballot may be at risk of being double disenfranchised.

Ohio allows voters who do not show up in the rolls, or whose information does not match what is in the voter rolls, to vote what is called a provisional ballot. This provisional ballot requires the voter to fill out an affirmation form including the voter’s printed name, birthdate, the address at which they are registered to vote, the voter’s drivers’ license number or the last four digits of their social security number, and the voter’s signature. If any of these fields do not match what is in the vote rolls, the ballot is discarded without being counted, even if the voter can be identified, and even if the information is used to update the voter’s registration so that they may vote in the future. This Court has previously found that Ohio discards provisional ballots for trivial errors “such as a wrongly entering a mailing address instead of a registration address...or writing a name in cursive instead of print.”¹¹ Other ballots have been discarded for errors such as a person writing their birthday in date/month/year format instead of month/date/year format, even when the voter could be identified.¹² While, wrongly purged

⁸ Andrew J. Tobias, *Rebutting activist’s ‘purge’ concerns, Ohio Secretary of State Frank LaRose says outreach to inactive voters is working*, Cleveland Plain Dealer (Aug. 20, 2019).

⁹ *Ohio Secretary of State won’t delay voter purge*, NBC 4 TV (Aug. 23, 2019) available at <https://www.nbc4i.com/news/ohio-secretary-of-state-wont-delay-voter-roll-purge/>

¹⁰ Doug Caruso, *Vendor’s errors lead to hundreds of voters targeted for purge in Ohio*, The Columbus Dispatch, (Aug. 25, 2019).

¹¹ *NEOCH v. Husted*, Case 2:06-cv-00896, Order at 35, June 7, 2016, ECF No. 691.

¹² *Id.* at 31.

eligible voters may still cast a provisional ballot under the settlement agreement in *A. Phillip Randolph Inst. v. Husted*, they are at a high risk of being doubly disenfranchised through no fault of their own.

III. ARGUMENT

ODP seeks a Temporary Restraining Order (“TRO”) pursuant to Fed. R. Civ. P. 65(b) to enjoin Defendant from removing any voters from the voter rolls, or, alternatively, to enjoin Defendant from discarding any provisional ballots cast by a purged voter as a result of errors with the five identification fields if the voter can be identified.

To obtain a TRO or preliminary injunction, a plaintiff must “must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of the equities tips in his favor, and (4) that an injunction is in the public interest.” *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012)(quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).

Immediate relief should be granted here because (1) ODP is likely to succeed on the merits of its claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) irreparable harm to ODP and its members and voters will occur in the absence of immediate relief; (3) the balance of equities tip in favor of temporary relief preventing Defendant from removing potential eligible voters from the rolls less than a week before a primary election; and (4) an injunction barring wrongful disenfranchisement is in the public interest.

a. **The Ohio Democratic Party is likely to succeed on the merits.**

ODP has asserted federal and state constitutional and statutory claims. Although each is slightly different, at their core, all of these claims boil down to whether the Defendant can risk

disenfranchising an eligible voter by executing a deeply flawed purge process where more than 10% of affected voters have been shown to be included in error. ODP is likely to succeed on these claims, and to establish that the Defendant's actions violate the U.S. and Ohio constitutions, the federal Help America Vote Act, and Ohio state law.

The Due Process Clause prohibits states from engaging in activities “that render the voting system ‘fundamentally unfair.’” *Ne. Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (quoting *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008)). It is fundamentally unfair to disenfranchise voters whose only error was relying on the actions and instructions of state actors. See *Ne. Ohio Coalition for the Homeless*, 696 F.3d at 597 (quoting *League of Women Voters of Ohio*, 548 F.3d at 478) (finding that it was “fundamentally unfair” to disenfranchise voters due to improper instructions by poll-workers at no fault of the voters); *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 243 (6th Cir. 2011) (same).

Here, Defendant's actions have significantly increased the risk that eligible voters will be unjustifiably disenfranchised through no fault of their own. Out of the 235,000 voters included in Defendant's purge list, as many as 30,000 – or 10% – have been identified as being wrongly included. Defendant's failure to properly maintain this list, and his insistence on moving forward with the purge despite the thousands of known errors, have materially increased the risk that eligible voters will be unlawfully removed from the State voter rolls in violation of their constitutional rights and the Defendant's legal duty. This increased potential for disenfranchisement, coupled with Ohio's history of discarding provisional ballots for trivial errors, risks denying eligible Ohio voters' right to vote in violation of the Fourteenth Amendment's Due Process Clause.

b. Plaintiff will suffer irreparable harm absent a TRO.

A plaintiff demonstrates irreparable harm where, as here, the harm is “based upon a violation of the plaintiff’s constitutional rights.” *Overstreet v. Lexington-Fayette Urban Cty. Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002); see *ACLU of Kentucky v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (same). A restriction on the fundamental right to vote...constitutes irreparable injury.” *Obama for Am. v. Husted*, 697 F.3d 423,436 (6th Cir. 2012) That injury includes both the loss of the loss of votes by Plaintiff’s supported candidates, and the loss of voting rights suffered by wrongly disenfranchised voters associated with the Plaintiff. See, e.g., *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (citing *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (“The Democratic Party also has standing to assert the rights of those of its members who will be prevented from voting...”)); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004). The Third Circuit found irreparable harm in the context of an upcoming election based on the notion that denial of “voting and associational rights”—including the ability to “vote for candidates who represent their beliefs”—“cannot be alleviated after the election.” *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997). That is because “[t]here can be no ‘do-over’ or redress of a denial of the right to vote after an election,” so “denial of the right to vote constitutes a strong showing of irreparable harm.” *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (irreparable harm where “over 18,000 Kansans stood to lose the right to vote in the coming general elections”); see, e.g., *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) (“Courts routinely deem restrictions on fundamental voting rights

irreparable injury. . . . This makes sense generally and here specifically because whether the number is thirty or thirty-thousand, surely some North Carolina minority voters will be disproportionately adversely affected in the upcoming election. And once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done”); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) (finding irreparable harm based on the notion that denial of “voting and associational rights”—including the ability to “vote for candidates who represent their beliefs”—“cannot be alleviated after the election”); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (“The registration applicants in this case would certainly suffer irreparable harm if their right to vote were impinged upon.”).

Former Ohio Secretary of State Jon Husted is fond of saying “One vote matters.” He’s right. Between 2013 and 2017, Ohio had 141 local elections result in either a tie¹³ or a one-vote margin of victory.¹⁴ Defendant’s actions create a very a real risk not just of disenfranchising voters, but of directly and irreversibly affecting the outcome of the September 10 primary elections. There is no remedy – monetary or otherwise – capable of curing the harm that eligible voters, candidates, and Plaintiff will suffer if they are wrongly disenfranchised by Defendant’s actions.

c. The balance of equities weighs heavily in favor of injunctive relief.

The balance of equities tips heavily in ODP’s favor. In the absence of the requested injunctive relief, the likely injury to the interests of Ohio’s voters is significant and irreparable, as explained above. As the Supreme Court has stated, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as

¹³ If there is a tie after a recount, the election is determined by lots. Ohio Rev. Code. § 3505.33.

¹⁴ Politifact, *Ohio Secretary of State Jon Husted’s tweets about close elections is accurate* (Jan. 23, 2018) available at <https://www.politifact.com/ohio/statements/2018/jan/23/jon-husted/ohio-secretary-state-jon-husteds-tweets-about-clos/> (Accessed Aug. 29, 2019).

good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). ODP has already expended, and will continue to expend, considerable resources and volunteer-time it would otherwise devote to its other organizational activities due to these voter purges. See Compl. ¶ 5.

Any burden imposed on Defendant by granting the requested relief is minimal. Defendant’s only requirement is not to remove voters from the rolls, or, in the alternative, to count provisional ballots that Defendant already should have counted.

d. Injunctive relief is in the public interest.

Plaintiff’s requested relief would enforce state and federal law securing the right to vote, which advances the public interest. “In the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights, including the voting and associational rights of...candidates, and their potential supporters.” *Hooks*, 121 F.3d at 883-84. “By definition, [t]he public interest...favors permitting as many qualified voters to vote as possible.” *League of Women Voters*, 769 F.3d at 247; see *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (the public has a “strong interest in exercising the fundamental political right to vote”) (internal quotation marks omitted); *Husted*, 697 F.3d at 437 (“That interest is best served by favoring enfranchisement and ensuring that qualified voters’ exercise of their right to vote is successful.”). The State’s interest in maintaining accurate voting rolls is also advanced by granting injunctive relief, which ensures that eligible voters will not be removed from the voting rolls less than a week before an election.

IV. CONCLUSION

Plaintiff seeks a TRO to protect the fundamental right of its members to vote for their preferred candidates. Plaintiff is likely to succeed on the merits. Public policy favors protecting

the fundamental right to vote. This Court should grant Plaintiff's motion for a TRO and/or preliminary injunctive relief.

Respectfully submitted,

/s/N. Zachary West

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CERTIFICATE OF SERVICE

I certify that on August 30, 2019, I filed the foregoing document using the Court's online-filing system, which will send a copy of the foregoing to all counsel of record, and caused courtesy copies to be served by electronic mail on Counsel for Defendant who have not yet appeared in this matter.

/s/N. Zachary West

N. Zachary West, *Attorney for Plaintiff*