

**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,**

and

**LIBERTARIAN PARTY OF OHIO,
Proposed Intervenor-Plaintiff,**

v.

Case No. 20-1638

Judge Watson

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

and

**STATE OF OHIO,
Intervenor-Defendant.**

**MOTION FOR TEMPORARY INJUNCTION/
PRELIMINARY RESTRAINING ORDER
OF INTERVENOR-PLAINTIFF
LIBERTARIAN PARTY OF OHIO TO INTERVENE**

The Libertarian Party of Ohio respectfully moves for a Temporary Restraining Order/Preliminary Injunction Plaintiffs pursuant to Federal Rule of Civil Procedure 65 (i) prohibiting enforcement of Ohio's February 18, 2020 registration deadline; (ii) directing Defendant-LaRose to comply with federal law by setting a registration deadline that is no more than 30 days before the date of the primary election; (iii) directing Defendant-LaRose to conduct

that election no later than May 12, 2020; and (iv) directing Defendant-LaRose to either bear the full costs associated with obtaining and voting ballots, or alternatively provide some reasonable alternative like "no excuse" in person voting before the close of the election to allow voters to cast their ballots at no cost.

Intervenor-Plaintiff certifies that counsel for Plaintiffs, Defendant and Intervenor-Defendant will be served with this Motion pursuant to this Court's electronic service system.

Respectfully submitted,

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**MEMORANDUM IN SUPPPORT OF MOTION
FOR TEMPORARY RESTRAINING ORDER/
PRELIMINARY INJUNCTION ON BEHALF OF
LIBERTARIAN PARTY OF OHIO**

Preliminary relief is warranted under Rule 65 upon balance of four factors: "(1) the likelihood that the plaintiff will succeed on the merits; (2) the potential for irreparable harm if the court does not issue the injunction; (3) the balance between the injury that the plaintiff seeks to avoid and any hardship that the injunction would cause to the defendant; and (4) the effect, if

any, that the court's ruling will have on the public interest." S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 1234 (2014). The bond requirement found in Rule 65 may be waived in the Court's discretion, and often is in public interest litigation. *Id.* at 1245. The Libertarian Party of Ohio accordingly respectfully requests that any bond be waived in this case.

STATEMENT OF FACTS

According to Ohio's General Assembly, the final day of in-person voting in Ohio's presidential, congressional and state-office primary elections is to "be held on the third Tuesday after the first Monday in March." *See* R.C. § 3501.01(E). For Ohio's 2020 congressional, presidential and state-office primary elections, this meant that the election would conclude with in-person voting at the close of the day on March 17, 2020. As far as Ohioans knew in the early morning hours of March 17, 2020, in-person voting would take place across the State that day as planned, and Ohio would by the end of the day conclude voting in its 2020 primaries.¹

In a press conference on the afternoon of March 16, 2020, Ohio Governor Mike DeWine and Respondent Secretary reinforced people's understanding that in-person voting would be open as planned. The Governor stated at this press conference that he (the executive branch) lacked the legal authority to change the date of Ohio's 2020 presidential primary election. However, just hours later, on or about 10:11 on that Monday evening, March 16, 2020, Ohio Governor DeWine announced that the Director of the Ohio Department of Health was closing the polling locations in the State of Ohio on Tuesday, March 17, 2020 due to concerns of exposure to COVID-19.

¹ The counting of votes, obviously, would have continued after this date. Absentee and Overseas Votes, for example, can still be received and counted under Ohio law after the in-person voting day closes the election.

Respondent then in the early morning hours of March 17, 2020 issued Directive 2020-16² and ordered local elections officials across Ohio to close their polling places.

Directive 2020-16 not only canceled the March 17, 2020 election, it also directed local elections officials to “remain open on March 17, 2020 to receive any absentee ballots at the boards of elections through 7:30 p.m.,” “to process any UOCAVA ballots,” “to process any-non UOCAVA absentee ballot post-marked by Monday, March 16, 2020 and received by the boards of elections through March 27, 2020,” and prohibited them from “tabulating and reporting any results until the close of polls on [the new election day] Tuesday, June 2, 2020.”

Pursuant to Directive 2020-16's new election schedule, local elections officials were ordered to “process absentee ballot applications received at the board of elections postmarked by Tuesday, May 26, 2020,” count absentee ballots “postmarked by June 1, 2020 and ... received by the boards of elections no later than Friday, June 12, 2020,” and count “UOCAVA absentee ballots ... submitted for mailing not later than 12:01 a.m. at the place where the voter completes the ballot, on Tuesday, June 2, 2020.” *Id.* On that Tuesday, June 2, 2020 -- the new election date announced by Respondent -- Directive 2020-16 ordered local elections officials to “conduct in-person voting at ... polls [which] will open at 6:30 a.m. and close at 7:30 p.m. on Tuesday, June 2, 2020.” *Id.*

In direct violation of federal law and Ohio's then-existing registration requirement, *see, e.g.*, O.R.C. § 3503.19(A) (“Voter registration applications, if otherwise valid, that are returned by mail to the office of the secretary of state or to the office of a board of elections must be postmarked no later than the thirtieth day preceding a primary, special, or general election in order for the person to qualify as an elector eligible to vote at that election.”), 52 U.S.C. §

² <https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-06.pdf>.

20507(a)(1)(B) (application must be accepted "if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election"), Directive 2020-06 also prohibited otherwise eligible voters from continuing to register up until 30 days before the new June 2, 2020 election date: "The boards of elections are prohibited from processing any new voter registrations for the June 2, 2020 presidential primary election. The February 18, 2020 voter registration deadline remains the voter registration deadline." *See* Directive 2020-06, *supra*, note 2.

Prior to Respondent's belated announcement of his Directive, his office either coordinated, or was at least complicit in, the filing of a lawsuit in the Franklin County Court of Common Pleas that sought judicial assistance in canceling the election. *See* Exhibit D attached to Relators' Complaint; Rick Rouan, *Misstatements from LaRose's office sparked elections eve chaos in Ohio*, COLUMBUS DISPATCH, March 19, 2020.³ Judge Frye in the Common Pleas Court, however, refused the invitation and would not cancel the election. Judge Frye's unexpected assertion of judicial independence reportedly caused "chaos" and "confusion" throughout Ohio's executive branch of Ohio's government, a state of chaos and confusion that the executive branch duly transmitted to local elections officials and eligible voters who had expected to vote.

Even before Judge Frye had announced his decision, Respondent's office had e-mailed local elections officials "to tell them (incorrectly) that Frye had granted the order sought by two elderly voters to stop the election on Tuesday. 'There will be no election tomorrow. We will provide further details regarding the order as soon as humanly possible.'" *Id.* Judge Frye's contrary conclusion reportedly "shocked" Respondent, *id.*, and apparently led him, the Governor,

³ <https://www.dispatch.com/news/20200319/misstatements-from-larosersquos-office-sparked-election-eve-chaos-in-ohio>.

and the Department of Health to pursue an extra-legal path to what they believed was a preordained end.

Respondent's office made this clear when it once again e-mailed local election boards to inform them that "[t]he judge denied the (temporary restraining order)," *id.*, but that "Governor DeWine and Secretary LaRose are working through next steps. We will update you as soon as possible." *Id.* These "next steps" were revealed at approximately 10:30 that evening, when Governor DeWine's Department of Health issued its order closing the polls. *Id.* Respondent quickly followed with Directive 2020-06 and began transmitting it to local elections officials later that night and into the early morning hours. *Id.* When voters awakened on the morning of March 17, 2020, they witnessed conflicting news reports about voting in Ohio, leading to anger and confusion. *See Coronavirus upends primary elections in Florida, Illinois and Arizona; vote postponed in Ohio*, L.A. TIMES, March 17, 2020 ("The election-eve maneuvers left many Ohio voters bewildered or angry after they woke up not knowing whether they should go to polling stations to cast ballots").⁴ Some even attempted to vote. *See Marty Schladen, A few Ohio voters still went to closed polls on Tuesday amid coronavirus confusion*, COLUMBUS DISPATCH, March 17, 2020.⁵

On March 17, 2020, the Ohio Democratic Party filed an original action in the Supreme Court of Ohio challenging Defendant-LaRose's action and seeking to have the previously scheduled March 17, 2020 primary concluded by April 28, 2020. Intervener-Plaintiff Libertarian Party of Ohio moved to intervene in that action on March 19, 2020, seeking to have the

⁴ <https://www.latimes.com/politics/story/2020-03-17/coronavirus-primary-election-confusion-florida-ohio-polling>.

⁵ <https://www.dispatch.com/news/20200317/few-ohio-voters-still-went-to-closed-polls-tuesday-amid-coronavirus-confusion>.

previously scheduled March 17, 2020 election concluded no later May 12, 2020. Importantly, the Libertarian Party also challenged not only Defendant-LaRose's authority under the federal Constitution to cancel the March 17, 2020 election, but also his authority under the Constitution to substitute his own Directive fixing Ohio's registration deadline as February 18, 2020. Its motion to intervene was granted over the Ohio Democratic Party's and Defendant-LaRose's objections on March 20, 2020.

On March 26, 2020, the Democratic Party moved the Ohio Supreme Court to dismiss it from the case following the General Assembly's having passed 2020 Am.Sub.H.B. No. 197 ("House Bill 197")—an emergency act that voided Directive 2020-06 and established how the primary election would proceed in Ohio. The Ohio Supreme Court granted the Democratic Party's application and dismissed its complaint on March 27. *State ex rel. Ohio Democratic Party v. LaRose*, ___ Ohio St.3d ___, 2020-Ohio1139, ___ N.E.3d ___. On March 31, 2020, it then dismissed Intervener-Plaintiff Libertarian Party of Ohio's challenge as moot, stating that should the Libertarian Party wish to press its argument that "House Bill 197 violates federal law (and thus does not render its claim moot)[,] ... that claim is for another day and another case." See *id.*, 2020-1253 at 3.

House Bill 197 was signed into law on or about March 30, 2020. It not only announced an April 28, 2020 election date, it also froze the registration deadline for this federal election on February 18, 2020, some seventy days before the election. Further, it converted Ohio's voting into absentee voting by mail and placed most of the costs of obtaining and voting ballots on the voters. According to Defendant-LaRose, "Voters who want to cast a ballot must [after receiving a post card] then either print out an absentee ballot request form themselves or call their county board and ask for one to be sent to them. Voters must then affix their own postage and send the

request to their county board of elections. Boards must then process the request, print the ballot and send it to the voter. Each voter must receive their ballot, cast their vote, and return the ballot in a postage-paid envelope, postmarked by April 27th." *LaRose Issues Statement on Legislation Finalizing Ohio's Primary Election*, March 25, 2020 (emphasis added).⁶

On March 30, 2020, this action was filed. The Ohio Democratic Party moved to intervene as a Defendant on April 1, 2020. Intervener-Plaintiff Libertarian Party of Ohio now moves to intervene as a Plaintiff challenging the legality of the General Assembly's statute. In sum, the Libertarian Party of Ohio agrees with Plaintiffs that House Bill's closing voter registration for the newly scheduled April 28, 2020 federal primary election violates federal law. The Libertarian Party of Ohio also agrees with Plaintiffs that some reasonable accommodation must be made for voters to cast ballots in person. Lastly, the Libertarian Party of Ohio agrees with Plaintiffs that Ohio must fully absorb the cost of conducting its massive absentee voting proposal.

Notwithstanding its agreement with Plaintiffs on these many points, the Libertarian Party of Ohio seeks to join this litigation to represent its interests under the First Amendment, *see Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981), and see that Ohio's primary election is concluded by May 12, 2020. The Libertarian Party's National Convention begins on May 21, 2020, and it is important to the Libertarian Party of Ohio to have Ohio's primary election concluded (in a lawful) fashion before this date. Concluding by May 12, 2020 should afford the State sufficient time to count votes and announce results (whether or not fully certified) by May 20, 2020.

⁶ <https://www.ohiosos.gov/media-center/press-releases/2020/2020-03-25/>.

ARGUMENT

Plaintiffs and Intervenor-Plaintiff are likely to prevail on the merits. First, House Bill 197 plainly violates federal law to the extent it fixes a February 18, 2020 deadline for registration for any election that occurs after March 17, 2020. No matter what corrective date is employed for the election, the registration period must be extended.

Second, House Bill 197's refusal to accommodate voters who cannot afford the costs associated with printing absentee applications and paying postage in order to receive absentee ballots constitutes an impermissible poll tax in violation of the Twenty-Fourth Amendment and the Fourteenth Amendment Equal Protection Clause. *See Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

Third, any extension of the election beyond May 12, 2020 threatens irreparable harm to the Libertarian Party of Ohio's First and Fourteenth Amendment rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). That a political party has the First Amendment right to organize its internal affairs in reliance on governmentally established rules cannot be questioned. *See Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981). As explained by this Court in *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, *7 (S.D. Ohio 2014) (striking down as violating Due Process Ohio's belated change to its election laws in 2014), moreover, "mov[ing] the proverbial goalpost in the midst of the game ... would be patently unfair." That wisdom is as true here and now as it was there and then.

Fourth, House Bill 197 and Defendant-LaRose's enforcement of it violates Article I, § 4 of the Constitution. That federal constitutional provision grants to the State legislatures the

authority to regulate the times and manner of federal elections, but reserves to the Congress the authority to make exceptions and changes to these restrictions. Because Congress has done so, and has barred States from requiring more than thirty days advance registration, House Bill 197 falls outside the delegated power of the General Assembly and violates Article I, § 4.

CONCLUSION

The Libertarian Party of Ohio respectfully moves that the Court award preliminary relief (i) prohibiting enforcement of Ohio's February 18, 2020 registration deadline; (ii) directing Defendant-LaRose to comply with federal law by setting a registration deadline that is no more than 30 days before the date of the primary election; (iii) directing Defendant-LaRose to conduct that election no later than May 12, 2020; and (iv) directing Defendant-LaRose to either bear the full costs associated with obtaining and voting ballots, or alternatively provide some reasonable alternative like "no excuse" in person voting before the close of the election to allow voters to cast their ballots at no cost.

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