

**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.

CASE NO. 2:20-cv-1638

JUDGE MICHAEL H. WATSON
Magistrate Judge Elizabeth Preston Deavers

**EXPEDITED TREATMENT
REQUESTED**

**PLAINTIFFS' EMERGENCY MOTION
FOR TEMPORARY RESTRAINING
ORDER AND PROPOSED ORDER AND
MEMORANDUM IN SUPPORT**

**TELEPHONIC CONFERENCE
REQUESTED**

Plaintiffs, through their counsel, respectfully move this Court, pursuant to Fed. R. Civ. P. 65, S.D. Ohio Civ. R. 65.1, and for the reasons contained in the Memorandum of Law being submitted herewith, for an emergency temporary restraining order to prevent qualified Ohio voters from being denied their right to register to vote and to vote in Ohio's 2020 primary election, currently set to conclude on April 28, 2020. Defendant will be provided actual notice of this motion.

WHEREFORE, Plaintiffs respectfully request that this Court issue an emergency temporary restraining order mandating that:

- (1) Any qualified Ohio elector who submitted a voter registration application or updated their registration information between February 19, 2020, and 30 days prior to the day on which the 2020 primary election is set to conclude shall have their registration information processed and be permitted to vote in the 2020 Primary Election;

- (2) At least 21 days prior to the close of polls for the 2020 primary election, county boards of elections shall mail all registered electors who have not already voted in the election a primary ballot for each party with candidates on the ballot, return postage pre-paid, with instructions to cast only one ballot and return the ballot in the official pre-paid postage envelope;
- (3) Any elector who has not received a mail absentee ballot at least 14 days prior to the close of polls for the 2020 primary election may submit a request for such a ballot to their local board of election by phone;
- (4) Any elector who qualifies for in-person voting pursuant to H.B. 197, § 32(D)(1), and who received a mail absentee ballot, can vote a regular ballot in-person ballot if they bring their absentee ballots to their local board of election;
- (5) Any elector who does not receive their mail absentee ballot prior to the postmark date for mail absentee ballots shall be permitted to vote a provisional ballot in person at their local board of election;
- (6) Any elector will be permitted to cure any deficiencies in their provisional ballots or absentee ballot identification envelopes by mail, phone, or email up through the day prior to the day the official canvass is required to begin;
- (7) The conclusion of the 2020 primary election be set at such a time as will allow election officials to provide orderly notice to electors and administer the election in the manner provided for herein;
- (8) Defendant LaRose to issue a directive notifying Ohio's eighty-eight county boards of elections of the aforementioned requirements; and

(9) Defendant LaRose to educate and inform electors about: the timeline and process for voting in the upcoming election; and that if they did not receive an absentee ballot in the mail they may contact their boards of elections and (a) confirm whether they have been sent a ballot, and (2) if they have not received a ballot, request a ballot by phone.

Dated: March 31, 2020

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**motions for admission pro hac vice
forthcoming*

MEMORANDUM OF LAW

I. INTRODUCTION

The spread of COVID-19 has altered our patterns of life, including the conduct of Ohio’s primary election. But this public health crisis must not also become a crisis for our democracy. Ohio’s plans for conducting a virtually all vote-by-mail election on April 28, 2020—over admonitions from the Secretary of State and the bipartisan Ohio Association of Election Officials that the required steps cannot be completed by that date—will disenfranchise thousands of voters, in violation of statutory and constitutional requirements protecting the fundamental right to vote. These include the requirement that eligible persons may register to vote at least until 30 days before the election, pursuant to Section 8 of the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C § 20507(a)(1), and that they have sufficient opportunity to cast a ballot in the election, as guaranteed by the First and Fourteenth Amendments to the United States Constitution. Emergency relief to protect these rights is imperative.

The night before the scheduled primary election day of March 17, 2020, Ohio’s top executive officers announced that the primary would not proceed as scheduled, citing the threat to public safety from the spread of COVID-19. After Defendant Secretary of State Frank LaRose (“Secretary LaRose”) rescheduled the election for June 2, the Ohio General Assembly chose to convert the 2020 Ohio primary election to an almost entirely vote-by-mail election on April 28. In doing so, the General Assembly barred the registration of any voter who submitted an application after February 18, in violation of the NVRA, and erected a multi-step process requiring design and production of an informational postcard and a minimum of four mailings within 32 days, to reach up to 7.7 million voters. The process imposes greater burdens on voters without computers, internet

access, printer capability, or postage. These conditions will render it impossible for many Ohioans to vote.

There are straightforward solutions to the threat of disenfranchisement created by the General Assembly, solutions that have been implemented by numerous other states: send absentee ballots to all voters, allow them to register to vote up until the time required by federal law, schedule the election for a date that allows election officials to educate the public and conduct the election in an orderly and safe manner, and allow an in-person voting option for those voters who are unable to vote by mail. That is the relief Plaintiffs seek.

II. STATEMENT OF FACTS

A. COVID-19's Impact on Ohio's 2020 Primary Election

On March 9, 2020, Ohio Governor Mike DeWine declared a state of emergency “to protect the well-being of the citizens of Ohio from the dangerous effects of COVID-19.” Exec. Order 2020 O1D, (Mar. 9, 2020).¹ On the eve of the scheduled March 17 primary, the Governor announced that state officials had determined it was unsafe to hold the election on Tuesday, and Ohio Department of Health Director Dr. Amy Acton ordered all polls closed.² Shortly thereafter, Secretary LaRose issued Directive 2020-06, postponing the March 17, 2020, primary election to June 2, 2020, and further stating that “[t]he 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.” Ohio Sec’y of State, *Directive 2020-06* (Mar. 16, 2020). On March 18, Plaintiffs League of Women Voters of Ohio (“LWVO”) and

¹ Following the declaration, Secretary LaRose ordered county boards of elections to relocate all polling places out of residential senior citizen facilities to protect that high-risk demographic. Ohio Sec’y of State, *Directive 2020-03* (Mar. 9, 2020).

² Ohio Governor Mike DeWine, *Statement from Ohio Governor Mike DeWine on the March 17, 2020 Election*, (Mar. 16, 2020), <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/dewine-statement-on-march-17-2020-election>.

the Ohio A. Philip Randolph Institute (“Ohio APRI”) formally notified Secretary LaRose— copying Ohio House and Senate leadership —that failing to shift the voter registration deadline to within 30 days of any new primary date violates Section 8 of the NVRA, 52 U.S.C. § 20507(a).³

On March 22, Governor DeWine and Dr. Acton issued a “stay at home order” requiring Ohioans to remain at home except for essential business from March 23 through April 6.⁴ Mail delivery is considered an essential business operation under the order, but the order does not name libraries or other places that may offer free or low-cost printing and hence these establishments are unlikely to remain open during the duration of the stay-at-home-order.⁵

B. House Bill 197 Is Enacted

On March 25, with the lawsuits surrounding the timing of the election pending, the Ohio legislature passed a bill establishing an April 28 vote-by-mail-only primary election. H.B. 197. Governor DeWine signed the bill into law on March 27 (“the Act”).

The Act, like Defendant’s Directive 2020-06, retained the February 18 voter registration deadline and explicitly prohibited boards of elections from processing voter registration applications submitted after that date. *Id.* § 32(B)(3), (C)(1). This prevents thousands of Ohioans who submitted voter registration forms after February 18 from voting in the 2020 primary election. Ex. A, Tuvell Decl. ¶¶ 5–6, 9; Ex. B, Shack Decl. ¶¶ 12, 20 (Ohio Organizing Collaborative submitted voter registration applications for 2,233 Ohioans register to vote between February 19 and March 13).

³ On March 17, two legal actions challenged the Secretary’s authority to set a new election date. *State ex rel. Ohio Democratic Party v. LaRose*, No. 2020-0388 (Ohio Sup. Ct., filed Mar. 17, 2020); *Reardon v. LaRose*, No. 20-cv-2105 (Franklin Cty. Ct. Com. Pl. Mar. 17, 2020) (answer and cross-claim). Plaintiffs LWVO and Ohio APRI submitted a brief as amici curiae in the Ohio Supreme Court action, alerting the court and parties to the NVRA violation in Directive 2020-06 and requesting that the court ensure that any relief protect Ohio electors who would find it prohibitively challenging to exercise their right to vote given the state’s restrictive mail voting practices. Ex. C.

⁴ Ohio Dep’t of Health, *Director’s Stay at Home Order*, (March 22, 2020).

⁵ *See id.*

The Act also establishes a multi-step process that must be completed on a short timeline for Ohio electors to participate in the vote-by-mail-only election.⁶ First, the Secretary must send a postcard to all registered voters informing them of the new election date and the mail-ballot only election. H.B. 197, § 32(C)(2). Second, voters must acquire absentee ballot applications, either by downloading and printing applications from the Secretary’s website or requesting that their boards of elections mail applications. Third, voters must acquire and apply postage since applications are not postage pre-paid. Fourth, voters must mail their applications to their county boards of elections, which must arrive by noon April 25. *Id.* § 32(C)(3). Fifth, county boards must process applications and determine completeness.⁷ If election officials determine an application is “invalid,” they must notify the applicant who then must cure the purported defect by April 25. *Id.* § 32(C)(5). Sixth, assuming the applications are valid, boards of elections must mail absentee ballots to voters. *Id.* § 32(C)(6). Seventh, voters must cast their ballots. Eighth, and finally, the voters must return their ballots, which has pre-paid postage, to county boards of elections, postmarked by April 27 or dropped off in person by 7:30 p.m. on April 28. *Id.* § 32(E)(1). Voters must cure any deficiencies in their absentee ballot identification envelopes by May 5. *Id.* § 32(F)(1).

In passing the Act, the legislature rejected Secretary LaRose’s proposal to set a June 2 primary, allow for in-person voting on that date, and mail every registered voter a postage pre-paid absentee ballot application.⁸ In his letter explaining that proposal, Secretary LaRose stated that “June 2 is the earliest date [for the election] due to the logistical realities of conducting a vote-by-

⁶ Only voters who are disabled or unable to receive mail at their residences are eligible to vote in person at the board of elections, and only on April 28. H.B. 197, § 32 (D)(1).

⁷ In addition, if the ballot request is deemed invalid “because the applicant is an elector who has moved or had a change of name without updating the elector’s registration . . . or for any other reason,” the board of elections is required to provide the applicant with a pre-paid provisional ballot. *Id.* § 32(C)(7).

⁸ See Ohio Sec’y of State, *Letter to Members of the Ohio General Assembly* (March 21, 2020), Ex. D (“Secretary LaRose Letter”).

mail election, the ever-evolving health realities of protecting against the spread of Coronavirus and the sacred responsibility we have as public officials to preserve the integrity of our election.”

Secretary LaRose Letter. Noting the difficulty of contacting up to 7.7 million Ohio voters,

Secretary LaRose continued:

No date before June 2nd is logistically possible. We simply cannot put a postage-paid absentee ballot request in the hands of each eligible voter and afford them a reasonable time to cast a ballot any earlier. A plan that does not afford every Ohioan an opportunity to vote free of charge would be unconstitutional A plan that sets unattainable timelines for mailing absentee requests to voters, or calls for inadequate procedures for ensuring every voter has an opportunity to cast a ballot at no charge, would likely fail a legal challenge. Such a decision would both create greater confusion for voters and almost certainly ensure that your authority as legislators is usurped by a federal court who will order a new plan that could extend well beyond June 2nd.

Id. The legislature also acted contrary to the pleas of county elections officials. On March 24, while legislation was pending, the bipartisan Ohio Association of Election Officials (“OAE0”) sent a letter to the leaders of the Ohio legislature stating that “April 28th is too soon to conclude the election” and recommending “that the election conclude no earlier than May 19th.”⁹ The request for more time was based on the multi-step process being considered (and ultimately adopted) for voters to request, receive, and return absentee ballots. For example, the OAE0 expressed concern that the initial postcard mailing “could take 2–3 weeks under the best of circumstances to produce, proof, and mail” and then an additional 3–5 days to arrive at voters’ residences. OAE0 Letter.

If election officials and voters are able to perfectly follow the process set out by the Act, using the most favorable estimates put forth by the OAE0 (including the fastest production time for postcards and optimal postal delivery times for each step), voters would be able to send back their absentee ballots only two days before the postmark deadline.¹⁰ But there is every reason to

⁹ Ohio Ass’n of Election Officials, Letter to Legislative Leaders, (March 24, 2020), Ex. E (“OAE0 Letter”).

¹⁰ Under this timeline, the Secretary would mail postcards on April 9 (less than 14 days from the Act’s passage); postcards would arrive to voters on April 12 (three days, including Easter Sunday); voters would take a single

believe the process will not work perfectly and proceed at that pace, as both Secretary LaRose and the OAEO made clear. The process leaves no room for delay or error by the postal service or overloaded county elections boards.

C. Hurdles to Voting Under the Process Set Forth in H.B. 197

Many Ohio voters are accustomed to voting in person,¹¹ had planned to do so in this year's primary election, and are unfamiliar with the absentee voting process. Exs. F, Lee Decl. ¶ 6; G, Moore Decl. ¶ 8; H, Mostafa Decl. ¶ 9. Many were unaware that, although they can register to vote online, requests for absentee ballots must be submitted by mail. Exs. F, Lee Decl. ¶ 8; G, Moore Decl. ¶ 11.

In addition, many Ohioans do not have the supplies to print and mail absentee ballot applications. Exs. F, Lee Decl. ¶ 9; I, Rodriguez Decl. ¶¶ 17–18. And, those who do not own either printers or cars will find it especially burdensome to quickly secure absentee ballot applications when many printing locations are closed and taking public transportation may present serious health risks. Exs. F, Lee Decl. ¶ 11; H, Mostafa Decl. ¶ 15. In this era of digital correspondence, many Ohioans also do not have proper postage at home, and under the current public health crisis are concerned about leaving home to acquire postage.¹² Ex. H, Mostafa Decl. ¶¶ 11, 14.

day to print absentee ballot applications, acquire postage, and mail their applications on April 14 to arrive at elections boards on April 17; elections boards would take 24 hours to process these applications over the weekend and mail ballots to voters on April 20; voters would receive absentee ballots on April 23; and voters would take 24 hours to complete the ballots and mail them on April 25.

¹¹ In the 2016 Primary Election, 450,901 voters cast absentee ballots either in-person during the early voting period or by mail, out of 3,302,832 ballots cast in the election. Ohio Sec'y of State, 2016 Official Election Results, <https://www.sos.state.oh.us/elections/election-results-and-data/2016-official-elections-results/> (comparing the voter turnout by county and absentee supplemental reports for the March 15, 2016, primary election).

¹² Further, while voters may contact their local board of elections and request an absentee ballot application be submitted sent to them—adding one more mailing to the process—boards may not be equipped to respond to these requests. For example, when one registered voter attempted to call the Franklin County Board of Elections to request an absentee ballot application, they were he was directed to an automatic recording that was on a loop but did not provide an option to request an application, speak with an official, or leave a voicemail. Ex. G, Moore Decl. ¶¶ 15–16. While the voter eventually pressed “0” without prompting, he was placed on hold for 10 minutes

If voters do not fill out their absentee ballot applications perfectly, boards must notify them of any deficiencies and the voters must forward additional information to their boards prior to the April 25 ballot request deadline, H.B. 197, § 32(C)(5)(a), requiring at least one additional minimum-three-day trip through the mail—adding further uncertainty to the process. Further, if voters vote a provisional ballot that requires additional information or make any errors or omissions on their absentee ballot identification envelopes they may find it impossible to cure their ballots within the seven-day statutory window, *id.* § 32(F), given that this cure may require two trips through the mail. This window and method is imposed despite the fact that counties are not required to begin the official canvass until May 13, Ohio Sec’y of State, *Directive 2020-07* (Mar. 27, 2020), and OAE0 has suggested allowing fixes by phone and email, OAE0 Letter, Ex. E; *see also* Ex. H, Mostafa Decl. ¶ 16. (“I am also worried that if I make a mistake because I am not familiar with voting this way that there will not be enough time for me to fix that mistake.”); Ex. J, Miller Decl. ¶¶ 25–26.

There are also indications that boards of elections and postal services are not working at optimal speeds during this public health emergency. COVID-19 infections among postal workers in Ohio threaten to slow mail delivery over the next month.¹³ Boards of elections, meanwhile, will need to process an influx of absentee ballot applications and ballots from voters who had planned to vote in-person on Election Day. Some will do this with staggered shifts for their staffs to allow for social distancing and reduce the likelihood of contracting or spreading COVID-19, and “[f]ewer than half of Ohio’s county elections offices . . . have the equipment to print absentee

and when he finally got through to someone at the board of elections he was ultimately patched through to an automated system. *Id.* ¶ 16. The voter was not able to confirm the information provided or directly speak to anyone about his application request. *Id.*

¹³ *See* Courtney Shaw, *Beachwood Mail Carrier Tests Positive for COVID-19*, News 5 Cleveland (Mar. 22, 2020), <https://www.news5cleveland.com/news/continuing-coverage/coronavirus/beachwood-mail-carrier-tests-positive-for-covid-19>.

ballots in-house,” while the other offices must rely on four outside vendors who have been approved to print absentee ballots.¹⁴ Even in mid-March, when many Ohioans were still planning to vote in-person on March 17, and when the boards would have been receiving and processing far fewer absentee ballot requests, it took more than a week for some voters receive a ballot after submitting an application.¹⁵ Ex. K, Savage Decl. ¶ 12 (8 days to receive ballot). And many registered Ohio voters—including college students forced to leave in response to the COVID-19 pandemic—may have their mail even more delayed because they are trying to receive their ballots outside Ohio. *See* Exs. L, Jeter Decl. ¶¶ 18–20; M, Riley Decl. ¶¶ 12–13.

D. Plaintiffs

Plaintiff LWVO is a non-partisan, non-profit organization with approximately 3,000 members across 30 local leagues. LWVO works to promote civic engagement, including by registering citizens to vote and providing information to citizens about how to vote. The spread of COVID-19 has required LWVO to divert its resources towards making sure that prospective voters are not disenfranchised. Ex. J, Miller Decl. ¶¶ 3–4, 14–15, 18, 20, 21, 33, 35–43.

Plaintiff Ohio APRI is a state chapter of the A. Philip Randolph Institute, a national organization for African-American trade unionists and community activists established in 1965 to forge an alliance between the civil rights and labor movements. Ohio APRI has eight chapters, including in Columbus, and members across the State. Its mission includes voter outreach, voter education, and voter registration; the majority of Ohio APRI’s resources are dedicated to voter

¹⁴ The Editorial Board, *Reset the Date*, The Blade (Mar. 29, 2020, 12:00AM), <https://www.toledoblade.com/opinion/editorials/2020/03/29/reset-the-date-ohio-primary-2020-election-voting/stories/20200329030>.

¹⁵ If the election had proceeded to on March 17, 2020, Ms. Savage would not have been able to submit her ballot by the deadline. As the state moves the primary election to mail, it is making no provision for voters who have not received mail absentee ballots to still obtain and cast a ballot. *See* H.B. 197, § 32(D)(1).

engagement work, and this included efforts leading up to the scheduled March 2020 primary election. Ex. N, Washington Decl. ¶¶ 11–16.

Plaintiff Lashunda Lee is a regular voter and Ohio resident. Ms. Lee has never voted by mail, planned to vote in person in the 2020 primary, and lacks easy access to a printer. Ex. F, Lee Decl. ¶¶ 5, 7, 9, 11. Plaintiff Munia Mostafa has been registered to vote in Ohio since she became a naturalized citizen in 2017. Ms. Mostafa has never voted by mail, planned to vote in person in the 2020 primary, lacks easy access to a printer, and is limiting trips outside her home so as not to expose her children to COVID-19. Ex. H, Mostafa Decl. ¶¶ 4, 7–8, 11–14. Plaintiff Audrianna Victorian Rodriguez is a regular voter who moved to a different precinct within Cuyahoga County and intended to update her address when she voted in person on March 17. On March 28, Ms. Rodriguez submitted a voter registration application through the State’s online portal to update her address. She does not own a printer or have stamps and fears that she will not be able to complete the ballot request process in time. Ex. I, Rodriguez Decl. ¶¶ 5–6, 9, 12, 17–18. Plaintiff Hannah Tuvell is a life-long Ohio resident who has never registered to vote before and would like to vote in the 2020 primary election. Ms. Tuvell submitted a voter registration application on the Secretary of State’s website on March 29, 2020. She received confirmation that the application had been forwarded to her board of election. Ex. A, Tuvell Decl. ¶¶ 2–4, 5–6.

E. Practices Followed by Other Vote-By-Mail Jurisdictions

Five states—Colorado, Hawaii, Oregon, Washington, and Utah—conduct elections entirely by mail.¹⁶ These states still require county boards to establish vote centers or voting booths

¹⁶ Colo. Rev. Stat. § 1-7.5-104 (all counties “shall” conduct general, primary, odd-year, coordinated, recall, and congressional vacancy elections by mail ballot); Haw. Rev. Stat. § 11-101 (all elections “shall be conducted by mail” beginning with the 2020 primary election); Or. Rev. Stat. § 254.465 (“[c]ounty clerks shall conduct all elections in this state by mail”); Wash. Rev. Code § 29A.40.010 (in every general, special, or primary election, each active registered voter “shall receive a ballot by mail” unless the voter is removed from the rolls); Utah

for a period of time leading up to and on Election Day, so that voters have the option to vote in-person.¹⁷

At least 16 states authorize local governments to opt into a vote-by-mail system,¹⁸ allow all-mail absentee voting in local or special elections,¹⁹ or permit certain jurisdictions to conduct elections by mail based on population size.²⁰ In these sixteen jurisdictions, which conduct either all or at least some of their elections by mail and require voters to register, boards of elections automatically mails ballots to registered voters without requiring voters to apply for absentee ballots. Of the five states with all-mail elections, Colorado allows some voters—those who are unaffiliated—to cast a ballot in either party’s primary. These voters receive the ballots of both major political parties during a primary election—but may only cast one ballot.²¹

Code Ann. § 20A-3-302 (authorizing election officers to mail a ballot to each active voter in the precinct). In 2020, all of Utah’s 21 counties opted into the mail-ballot only.

¹⁷ Colo. Rev. Stat. § 1-7.5-102(2) (“[r]ecognizing the continued need for in-person voting options through early voting and on election day, the general assembly finds that mail ballot elections conducted by the county clerk and recorder must include voter service and polling centers so voters can register to vote, update voter registration information, and vote in person.”); Haw. Rev. Stat. § 11-92.1 (election officials must establish voter service centers across the state); Or. Rev. Stat. § 254.474 (county clerks at each primary and general election must maintain “voting booths” in the county); Wash. Rev. Code § 29A.40.160(1) (“[T]he voting center shall be open during business hours during the voting period, which begins eighteen days before, and ends at 8:00 p.m. on the day of, the primary, special election, or general election.”).

¹⁸ See, e.g., Utah Code Ann. § 20A-3-302 (authorizing election officers to mail a ballot to each active voter in the precinct); Cal. Elec. Code § 4005 (authorizing all-mailed ballot elections, including mailing each registered voter a ballot); N.D. Cent. Code § 16.1-11.1-01 (authorizing mailed ballots).

¹⁹ See, e.g., Alaska Stat. § 15.20.800 (director may conduct any election other than a general, party primary, or municipal election by mail and “shall” send a ballot to every registered voter); Ariz. Rev. Stat. Ann. §§ 16-409, 16-558.01 (a city, town or school district may conduct a mail ballot election and “shall send by nonforwardable mail all official ballots” to each qualified voter); Fla. Stat. § 101.6102 (same); Kan. Stat. Ann. § 25-432 (vote-by-mail only in certain elections); Md. Code Ann. § 9-501 (same); Mo. Rev. Stat. § 115.652 (same); Mont. Code Ann. § 13-19-104 (same); Wyo. Stat. Ann. § (same).

²⁰ See, e.g., Neb. Rev. Stat. § 32-960 (certain counties can apply to conduct all-mailed ballot elections and upon approval, must mail ballots to registered voters); Idaho Code § 34-308 (precincts with fewer than a certain number of voters may be designated as vote-by-mail only); Nev. Rev. Stat. § 293.213 (same); N.M. Stat. Ann. § 1-6-22.1 (same); Minn. Stat. § 204B.45 (municipalities with fewer than a certain number of voters may be designated as vote-by-mail only jurisdictions); N.J. Stat. Ann. § 19:62-1 (same).

²¹ Colo. Sec’y of State, *Primary Elections FAQs*, <https://www.sos.state.co.us/pubs/elections/FAQs/primaryElectionsFAQ.html> (last visited Mar. 28, 2020).

III. ARGUMENT

A. Standard of Review

The standard governing the issuance of a temporary restraining order is the same as that of a preliminary injunction. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). A plaintiff must establish (1) a likelihood of success on the merits, (2) a likelihood of suffering irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in plaintiff's favor, and (4) that issuing a restraining order is in the public interest. *Obama for Am. v. Husted* (“OFA”), 697 F.3d 423, 428 (6th Cir. 2012). When plaintiffs mount a constitutional challenge, “the likelihood of success on the merits often will be the determinative factor” because “irreparable injury is presumed” where “constitutional rights are threatened or impaired.” *Id.* at 436. Moreover, when plaintiffs seek injunctive relief against the government, the balance of equities and public interest “merge” because both the government and the public benefit when courts ensure state action is lawful. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

In the instant case, Plaintiffs satisfy each of the four criteria for a temporary restraining order. H.B. 197 cuts off voter registration and prohibits counties from processing voter registration applications submitted after February 18 and fails to administer a workable vote-by-mail scheme that would allow all eligible Ohioans to participate in the primary election.

B. Plaintiffs Are Likely to Succeed on the Merits of Their Claims

To prevail on a motion for a preliminary relief, “a plaintiff must show more than a mere possibility of success,” *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007), but “is not required to prove his case in full.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Plaintiffs easily meet this standard.

1. Plaintiffs Have Standing

Article III standing requires (1) an “injury in fact,” *i.e.*, an invasion of a legally protected interest which is concrete and particularized and actual and imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) that a favorable decision will “likely” redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). It is only necessary to establish standing on behalf of one plaintiff for each cause of action. *ACLU v. Nat’l Sec. Agency*, 493 F.3d 644, 652–53 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008).

As set forth in their declarations, Organizational Plaintiffs LWVO and Ohio APRI have diverted significant resources, and will divert more absent judicial relief, educating their members and other voters about the Act’s cumbersome vote-by-mail process and cramped timeline, and scrambling to help voters apply for, obtain, and cast absentee ballots before it is too late. Ex. J, Miller Decl. ¶¶ 14–15, 18, 20, 21, 33, 35–43; Ex. N, Washington Decl. ¶¶ 23, 25, 29. LWVO and Ohio APRI also have associational standing because their members are unduly burdened by Ohio’s procedures for the primary. *Id.* These facts clearly give rise to Article III standing for Plaintiffs. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (“[A]n overhaul of the get-out-the-vote strategy of an organization that uses its limited resources helping [] voters cast ballots” constitutes Article III standing). Likewise, Individual Plaintiffs have established Article III standing as they have convincingly alleged that they will either be severely burdened in exercising their fundamental right to vote in the April 28 election, Ex. H, Mostafa Decl. ¶ 17; Ex. F, Lee Decl. ¶ 14; Ex. I, Rodriguez Decl. ¶ 20, or that they will be outright disenfranchised because

they submitted their registrations or updated a change of address after February 18, Ex. A, Tuvell Decl. ¶ 9; *see also LWVO v. Brunner*, 548 F.3d 463, 466 (6th Cir. 2008).²²

2. The National Voter Registration Act Requires the State to Process Registrations Received After February 18, 2020

The National Voter Registration Act (“NVRA”) was designed to “increase the number of eligible citizens who register to vote in elections for Federal office.”²³ 52 U.S.C. § 20501(b)(1). To achieve this end, Section 8(a)(1) of NVRA provides that “each State shall . . . ensure that any eligible applicant is registered to vote in an election” for Federal office “if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election.” 52 U.S.C. § 20507(a)(1); *see also U.S. Student Ass’n Found. v. Land*, 546 F.3d 373, 376 (6th Cir. 2008) (“Section 8 of the NVRA [requires] state election officials must ‘ensure that any eligible applicant is registered to vote in an election’ whenever a valid voter registration form is . . . received by the appropriate state official no later than 30 days before the date of the election.”).

H.B. 197 violates this clear mandate. The Act prohibits all elections officials from “[p]rocessing any voter registration application submitted after February 18, 2020,” and prohibits voters not registered by February 18 from participating in the federal primary election for which voting is presently set to conclude on April 28, 2020. H.B. 197, § 32(B)(3), (C)(1)(a), (E)(1). This sets the voter registration deadline *70 days* prior to the close of polls for Ohio’s 2020 Federal

²² H.B. 197’s restriction on registration is an ongoing violation of the NVRA occurring within 30 days of a federal election, allowing Plaintiffs to seek relief without providing prior notice. 52 U.S.C. § 20510(b)(3).

²³ Under the NVRA, an “election” is defined as “a general, special, primary, or runoff election,” 52 U.S.C. § 20502(1) (citing 52 U.S.C. § 30101(1)), and “Federal office” is defined as “the office of President or Vice President, or of Senator or Representative in, or Delegate of Resident Commissioner to, the Congress, 52 U.S.C. § 20502(2) (citing 52 U.S.C. § 30101(3)). In *Fish v. Kobach*, the Tenth Circuit noted that because the NVRA relies on the Federal Election Campaign Act to define the terms, “election” and “Federal office,” the NVRA “applies expressly to all federal general and primary elections, including presidential elections.” 840 F.3d 710, 719 n.7 (10th Cir. 2016).

Primary Election. Under Section 8(a)(1) of the NVRA, Ohio must allow any eligible person to vote if they are registered 30 days prior to the primary. That means the registration deadline for an April 28 primary may be no earlier than March 29, 2020.

When elections move, for whatever reason, the strong protections of the NVRA move with them. Federal courts consistently find the NVRA violated where state registration deadlines extend more than thirty days before an election. In Georgia, a district court held that because the date of a special runoff election was more than 30 days after the original voter registration deadline set for the general election, this original voter registration deadline violated Section 8 of the NVRA and had to be extended. *See Ga. State Conf. of the NAACP v. Kemp*, No. 1:17-cv-1397, 2018 WL 2271244, Order at 3 (N.D. Ga. Apr. 11, 2018); *see also Ga. State Conf. of the NAACP v. Kemp*, No. 1:17-cv-1397 (N.D. Ga. Oct. 17, 2017), Consent Decree, ECF No. 42, at *2–3 (extending preliminary injunction to all future federal elections including runoffs). Similarly, a district court ruled that Arizona violated the NVRA because its deadline to register by mail was 31 days before the election and the deadline to register in-person at some state agencies was 32 days before the election. *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *13–14 (D. Ariz. Nov. 3, 2016). The NVRA’s registration deadline is so clear that states typically comply without incident.²⁴

Ohio cannot avoid the NVRA by redefining its election date. Under the NVRA, the April 28, 2020, deadline represents an “election,” not a mere technical extension of the deadline for receiving ballots. As discussed above, a primary purpose of the NVRA was to reduce barriers to

²⁴ For example, the Secretary of State of Mississippi moved the voter registration deadline to 30 days before the runoff election in response to an NVRA notice letter pointing out that an earlier registration deadline for the runoff election violated Section 8 of the NVRA. Response Letter from Miss. Sec’y of State Jim Hood to NVRA Notice of Non-Compliance Letter from the Lawyers’ Comm. for Civil Rights Under Rule of Law (July 12, 2018), <https://lawyerscommittee.org/wp-content/uploads/2018/07/MS-SOS-letter-re-NVRAcompliance.pdf>.

registration. Moreover, a state cannot proffer its own definitions to evade the NVRA. For example, when Michigan argued that it had not violated the NVRA's restrictions on voter-list maintenance because it defined "registrant" more narrowly under its state law, the Sixth Circuit rejected this argument and instead applied a broad construction of "registrant" under the NVRA. *Land*, 546 F.3d at 381–82. The Sixth Circuit rejected Michigan's state-law definition because allowing a state to narrowly define election terms "would frustrate the NVRA's purpose" and allow states to "completely ignore . . . the NVRA." *Id.* at 383. Similarly, if Ohio is permitted to set an election for one date, prohibit the vast majority of registrants from actually voting on that date, and later force them to vote absentee by a later date, then "election" will cease to have meaning and Section 8(a)(1) of the NVRA will become a hollow promise of voter registration protection. Plaintiffs are likely to succeed on the merits of their NVRA claim.

3. H.B. 197 Unconstitutionally Burdens the Fundamental Right to Vote

H.B. 197 severely burdens the Plaintiffs' First and Fourteenth Amendment rights in connection with the right to vote. H.B. 197 also burdens LWVO's and Ohio APRI's members' right to vote. In evaluating these claims, courts "weigh 'the character and magnitude of the asserted injury' against the 'precise interests put forward by the State . . . taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.'" *OFA*, 697 at 433 (6th Cir. 2012) ((quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))). In *OFA*, the Sixth Circuit affirmed the grant of a preliminary injunction enjoining Ohio's Secretary of State and Attorney General from enforcing a statute that prohibited the use of in-person, early voting for nonmilitary voters in the last seventy-two hours before the election. The court held that there was a "particularly high" burden upon the estimated 100,000 voters (disproportionately women, older, and of lower income and educational

attainment) who would choose to vote in that three-day period even though they could vote prior to the three-day period or on Election Day. *Id.* at 431.

The magnitude of injury in this case is far greater. Virtually all Ohio voters will have no choice other than to vote by mail in the 2020 primary. The State's multi-step process must be executed perfectly by election officials, printing services, the postal service, and voters for citizens to cast their ballots and have them counted. Compared to states with widespread vote by mail, Ohio's process creates far fewer options for voting and requires more steps to be executed by election officials, the postal service, and voters in less time and at greater cost to voters.

To begin, H.B. 197 requires the Secretary of State to take the unnecessary step of designing, printing, and mailing out up to 7.7 million postcards informing voters of the new procedures and deadlines. Clearing up confusion is important, but this mailing will only delay the process and leave voters with insufficient time to obtain and cast their ballots.

In addition, unlike the vote-by-mail states that send ballots to all registered voters, Ohio is requiring voters to submit applications first. This requirement itself creates a severe burden and will likely disenfranchise hundreds of thousands of voters. The burden is particularly severe on voters such as Plaintiffs Mostafa, Lee, and Rodriguez who do not own printers, know anyone else with printers, or have ink and postage to be able to mail their absentee ballot requests. It also falls hard on voters, such as college students, now voting from outside Ohio due to the pandemic.

The burden on voters is exacerbated by the compressed timeframe in which the election is occurring. Other states that postponed their primaries because of COVID-19 set the new election date for June (Connecticut, Indiana, Maryland, Pennsylvania, Rhode Island, Louisiana, New York,

Kentucky), except for Georgia, which postponed its primary to May 19.²⁵ In Alaska, Wyoming, and Kansas, elections were not postponed but are now vote-by-mail, voters do not have to apply for a vote by mail ballot.²⁶ Unlike other states who have responded to the COVID-19 crisis, Ohio is a complete outlier in making vote by mail unnecessarily and unjustifiably burdensome.

Ohio is also limiting in-person voting in a way that will leave many voters with no opportunity to cast a ballot. The Act restricts in-person voting on April 28 to voters with disabilities and those with no place to receive mail. This will disenfranchise voters who are unable to cast a mail ballot before the election, including those who submit an absentee ballot request form but do not receive a ballot before the election concludes, as well as those who have insufficient time to cure deficiencies in their requests. *See* OAEO Letter, Ex. E, at 2 (“This is an especially prevalent issue for primaries, as voters frequently forget to designate a party preference on the application.”). Black and brown voters are more likely to have unreliable mail delivery, and young voters and voters of color are more likely to have their ballots rejected due to deficiencies. *See* Daniel A. Smith, *Vote-By-Mail Ballots Cast in Florida*, ACLU Florida at 3 (September 19, 2018), https://www.aclufl.org/sites/default/files/aclufl_-_vote_by_mail_-_report.pdf.

The Sixth Circuit has held that while certain “requirements may only impose a reasonable burden on constitutional rights,” the proper analysis looks at “the combination of these laws,” which taken together can constitute “a severe burden.” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 595 (6th Cir. 2006); *see also* *Libertarian Party of Ohio v. Husted*, No. 2:13-cv-953, 2015 WL 12967768, at *9 (S.D. Ohio Mar. 16, 2015) (holding that the “aggregate effect” of election

²⁵ Nick Corasaniti & Stephanie Saul, *12 States and Territories Have Postponed Their Primaries Because of Coronavirus. Here’s a List*, N.Y. Times (Mar. 28, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>.

²⁶ *Id.*; *see also* *Kansas Democrats to Hold May Primary Completely by Mail*, KSHB Kansas City (Mar. 30, 2020), <https://www.kshb.com/news/coronavirus/kansas-democrats-to-hold-may-primary-completely-by-mail>.

law requirements “severely burdened associational rights”); *Am. Ass’n of People with Disabilities*, 690 F. Supp. 2d at 1219–20 (holding the court “must address the burdens the law poses collectively” as it cannot “parse out” the requirements that “in the aggregate impose an undue burden”).

Moreover, federal courts have moved similar election deadlines that were rendered burdensome by emergencies. *See Fla. Dem. Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (finding the state imposed a “severe burden on the right to vote” when a hurricane impeded voter registration); *Ga. Coal. for the Peoples’ Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (extending voter registration deadline after a hurricane).

Taken together, the provisions of H.B. 197—the April 28 deadline and multiple steps required for casting an absentee ballot—place a severe burden on Plaintiffs’ ability to vote. Given this severe burden, Ohio must justify H.B. 197 under strict scrutiny. *Burdick*, 504 U.S. at 434; *OFA*, 697 F.3d at 429. In light of how other states have approached a similar situation, it is clear that Ohio’s voting restrictions are not narrowly tailored to serve a compelling state interest. But even if the standard were more relaxed, Ohio cannot justify why it has enacted a process for its primary election that will likely result in mass disfranchisement, particularly when even its own state and local elections officials have warned the state against it.

C. In the Absence of Injunctive Relief, Plaintiffs Will Suffer Irreparable Harm Because They Will Not Be Able to Vote in the 2020 Primary Election

The individual Plaintiffs, LWVO and Ohio APRI’s members and constituents, and voters across Ohio will be unable to vote if this Court does not grant emergency relief. As the Sixth Circuit recognized, “a restriction on the fundamental right to vote . . . constitutes irreparable injury.” *OFA*, 697 F.3d 423, 436 (6th Cir. 2012); *see also ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (“[I]f it is found that a constitutional right is being threatened or

impaired, a finding of irreparable injury is mandated.”); *Mich. State A. Philip Randolph Inst. v. Johnson*, 16-CV-11844, 2016 WL 3922355, at *13 (E.D. Mich. July 21, 2016) (“[Because t]he case at bar deals with the right to vote . . . this factor is presumed satisfied.”).

Plaintiffs have presented substantial evidence that they—and, in the case of the Organizational Plaintiffs, their members—are at serious risk of not being able to exercise their fundamental right to vote. They have demonstrated the severe obstacles to their and thousands of Ohioans’ casting a ballot in the upcoming election due to Ohio’s burdensome process. For example, more than 2000 new voter registrants whose applications a single nonprofit, Ohio Organizing Collaborative, submitted between February 19 and March 13 will not be able to vote because the Act prohibits counties from processing voter registrations submitted after February 18. Ex. B, Shack Decl. ¶¶ 12, 20. Without this Court’s intervention, untold numbers of voters could lose their right to vote either because boards cannot process their registrations; the absentee ballot process is so cumbersome, confusing, and logistically infeasible that they are unable to vote by mail; or they need to vote in person and cannot under H.B. 197’s unduly narrow provisions.

D. The Balance of Harms Weighs in Favor of Plaintiffs

Absent a court order that directs Defendant to accept voter registration applications submitted after February 18, reset the voter registration deadline to 30 days prior to the new election date, and modify H.B. 197’s absentee voting procedures, Plaintiffs and at least hundreds of thousands of other Ohioans will not be able to vote in an election in which they are eligible to vote. This substantially outweighs any harm, presumably cost and administrative burden, that would be imposed on the State if the injunction is granted. *OFA*, 697 F.3d at 436-37. The relief here “eliminates a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process.” *Land*, 546 F.3d at 388–89.

E. The Public Interest Is Served by Ensuring that Plaintiffs Can Exercise Their Right to Vote

The public interest factor primarily addresses the impact on non-parties. *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011). In general, “the public has a strong interest in exercising the fundamental political right to vote. That interest is best served by favoring enfranchisement and ensuring that qualified voters’ exercise of their right to vote is successful.” *OFA*, 697 F.3d at 436–437. “The public interest therefore favors permitting as many qualified voters to vote as possible,” *id.* at 437, and enforcing voter registration obligations set forth in the NVRA, *see, e.g., Ass’n of Communities for Reform Now v. Scott*, 2008 WL 2787931 (W.D. Mo. July 15, 2008); *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1150 (D. Kan. 2016).

When, as here, the state severely burdens or constructively denies the right to vote through its policies, it harms not just those individuals who are disenfranchised but the public interest as a whole in conducting free and fair elections.

IV. CONCLUSION

For the reasons stated above, this Court should enter an order providing the relief described above and as outlined in Plaintiffs’ Motion for Temporary Restraining Order.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, I served the foregoing on counsel for Defendant
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