

IN THE SUPREME COURT OF OHIO

STATE EX REL. OHIO DEMOCRATIC
PARTY, et al.

Relators,

-v-

FRANK LAROSE.

Respondent.

CASE NO. 2020-0388

ORIGINAL ACTION IN
PROHIBITION

ALTERNATIVE AND
PEREMPTORY WRITS
REQUESTED

Expedited Election Matter
Under S.Ct.Prac.R. 12.08

MERIT BRIEF OF RELATORS
OHIO DEMOCRATIC PARTY AND KIARA DIANE SANDERS

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INTRODUCTION

Relators bring this action to address the Ohio Secretary of State's lack of legal authority to change the date of the primary election or extend voting deadlines, and for judicial relief necessary to ensure that Ohio electors will not be deprived of their right to cast ballots in Ohio's presidential primary election.

STATEMENT OF FACTS

Ohio's 2020 presidential primary election was set to occur on March 17, 2020. Compl. ¶ 7. 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 ballot issues to fund local issues, including for public schools and public transportation. But at approximately 10:30 p.m. on Monday, March 16, 2020—just *eight hours* before polls were scheduled to open the following morning for Ohio's 2020 presidential primary election—Ohio Secretary of State Frank LaRose issued Directive 2020-06 “suspending” the election until June 2, 2020. Answer ¶ 10; Directive 2020-06 (Relators' Exh. A-1).

I. The Parties

Relator Ohio Democratic Party (the “ODP”) is one of Ohio's two legally recognized major political parties, which is nominating candidates for local, state, and federal offices at Ohio's 2020 primary election. Compl. ¶ 4.

Relator Kiara Diane Sanders is a registered elector of Franklin County, Ohio who is eligible to vote in Ohio's 2020 primary election. *Id.* ¶ 5; *see also* Affidavit of Kiara Diane Sanders attached to Complaint. She has not yet voted in the primary election, but she wanted and had intended to vote in-person at her assigned polling location, which is located next to her home, on March 17, 2020. *Id.* Relator Sanders intended to vote in the Democratic Primary. *Id.*

Respondent Frank LaRose is the Ohio Secretary of State and Chief Elections Officer of Ohio. Compl. ¶ 6; *see also* R.C. 3501.05 (setting forth the election duties of the Secretary of State).

II. The Lead Up to March 16, 2020

The events leading up to Secretary LaRose issuing Directive 2020-06 were fraught with conflicting statements from the Secretary about whether the March 17, 2020 election would proceed as scheduled in light of the COVID-19 pandemic. As quick background, the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern on January 30, 2020, and on January 31, 2020, the U.S. Health and Human Services Secretary declared the outbreak a national public health emergency. And on March 9, 2020, Ohio Governor Mike DeWine declared a State of Emergency in Executive Order 2020-01D. Relators' Exh. A-2.

As early as March 2, 2020, it was reported that Secretary LaRose was prepared to issue an order suspending Ohio's March 17, 2020 presidential primary election in response to the COVID-19 outbreak. A Politico.com article quoted Secretary LaRose as telling an election conference, "If there's one thing that's more important than a fair and honest election, it's life and health and safety. . . That's when very difficult decisions have to be made, including whether there needs to be an order to suspend election day. Let's hope we don't have to, but we're ready for it." Alice Miranda Ollstein, *Some states encourage mail-in ballots as coronavirus worries grow*, Politico

(March 2, 2020), <https://www.politico.com/states/california/story/2020/03/02/some-states-encourage-mail-in-ballots-as-coronavirus-worries-grow-1264722> (Relators' Exh. A-3).

Still, in the two weeks following the report that Secretary LaRose was “ready” to “suspend” the election and his issuance of Directive 2020-06, Secretary LaRose repeatedly insisted that the March 17, 2020 election would occur as scheduled. For instance, on March 9, 2020, Secretary LaRose announced that polling locations in senior citizen living and nursing facilities be relocated for the March 17, 2020 election. Frank LaRose, *Important Announcement Regarding Voting and Coronavirus*, YouTube (March 9, 2020), https://www.youtube.com/watch?v=_qPVL06fo4Y. In this same announcement, Secretary LaRose urged Ohioans to consider “taking advantage” of the state’s “ample early voting opportunities,” and he reminded voters that absentee ballots must be postmarked by March 16, 2020, the day before the election. *Id.* He concluded his announcement by stating that “the voice of every Ohioan will be heard” on March 17, 2020. *Id.*

Secretary LaRose’s March 9, 2020 announcement was accompanied by a directive from Secretary LaRose, Directive 2020-03 that formalized much of what Secretary LaRose stated in his announcement. *See* Directive 2020-03, Relators’ Exh. A-4.

Secretary LaRose also issued a second directive on March 9, 2020, Directive 2020-04, which set forth the procedures that all boards of elections must follow when conducting the Unofficial and Official Canvasses of the March 17, 2020 Primary Election. *See* Directive 2020-04, Relators’ Exh. A-5.

Among other instructions, Directive 2020-04 reminded the boards of elections of their statutory duty to begin the Official Canvass no earlier than the 11th day after the election (Saturday, March 28, 2020) and no later than the 15th day after the election (Wednesday, April 1, 2020). *Id.* The Directive also reminded the boards of elections of their duty to complete their official

canvasses and certify the results of the March 17, 2020 no later than the 21st day after the election (Tuesday, April 7, 2020). *Id.*

On March 13, 2020, Secretary LaRose issued a joint statement from with the chief elections officials of Arizona, Illinois, and Florida on the status of the March 17, 2020 primary elections scheduled to occur in those states. *See* March 13 Joint Statement, Relators' Exhibit A-6. This statement insisted that the presidential primary elections would continue in these states as planned, and concluded with the following:

Americans have participated in elections during challenging times in the past, and based on the best information we have from public health officials, we are confident that voters in our states can safely and securely cast their ballots in this election, and that otherwise healthy poll workers can and should carry out their patriotic duties on Tuesday.

Id.

Secretary LaRose also made several other announcements on March 13, 2020 related to the March 17, 2020 going forward as scheduled. *See* March 13, 2020 Announcements, Relators' Exh. A-7. These announcements included the following: a statement that polling locations had been relocated pursuant to his prior order, a notice that "it is safe for schools to continue to serve as polling locations on election day," and another reminder that for those voting by mail, ballots must be postmarked by Monday, March 16, 2020. *Id.*

Late on Sunday, March 15, 2020, Secretary LaRose issued another directive to the county boards of elections, Directive 2020-05, which again reiterated that the March 17, 2020 election would occur as scheduled. *See* Directive 2020-05, Relators' Exh. A-8.

Directive 2020-05 set forth instructions regarding absentee ballot requests for those unforeseeably confined or hospitalized, curbside voting on Election Day, and best practices for in-person voting on Election Day. *Id.* Governor DeWine reportedly approved the measures set forth

in this directive. Andrew Tobias, Seth Richards, Laura Hancock, Jeremy Pelzer, *Inside the chaos that engulfed Ohio's postponed primary election*, Cleveland.com (March 17, 2020), <https://www.cleveland.com/open/2020/03/inside-the-chaos-that-engulfed-ohios-postponed-primary-election.html> (Relators' Exh. A-9).

III. March 16, 2020

Secretary LaRose was scheduled to give a news conference at 10 AM on Monday, March 16, 2020. It had been reported that Secretary LaRose would discuss the measures he set forth in Directive 2020-05. *See id.* Secretary LaRose ultimately cancelled this news conference, however. *Id.* It was reported that shortly before the news conference was to begin, Lt. Governor Jon Husted called Secretary LaRose and told him that it was no longer safe to conduct the election. *Id.* Still, there was no immediate announcement or indication from Secretary LaRose or anyone else that the election would *not* be held as planned. *Id.*

A. Afternoon Press Conference

Then, 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>; Rick Rouan, *Misstatements from LaRose's office sparked election eve chaos in Ohio*, Columbus Dispatch (March 19, 2020) <https://www.dispatch.com/news/20200319/misstatements-from-larosersquos-office-sparked-election-eve-chaos-in-ohio> (Relators' Exh. A-10). 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. *See id.* Governor DeWine and Secretary LaRose then announced their “recommendation” that the March 17, 2020 election be postponed. *See id.*

Critically, Secretary LaRose and Governor DeWine both conceded that they lacked the legal authority to postpone the election on their own. Governor DeWine, for instance, stated:

Now I do not have the power to extend an election as I am suggesting. My understanding, and I will paraphrase the statute, [is] that this only can occur if we are invaded.

See The Ohio Channel, *supra*, at 06:16.

Shortly thereafter, Secretary LaRose stated:

And as the Governor mentioned, the power to the suspend an election - the power to delay an election - is not one that we have. It rests with the legislature [and] with the courts.

See id at 13:14.

They explained that because they lacked the authority to “extend,” “suspend,” or “delay” the election, some citizens would file a lawsuit to postpone the election. *See 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. *See id*; Rouan, *supra* (Exh. 10).

Secretary LaRose followed up this news conference with a press release explaining the plan for a lawsuit to be filed and reiterating that he lacks the legal authority to suspend an election:

. . . Because the authority to shift election day does not reside with the Ohio Secretary of State, this change must be enacted by either a legal order or an act of the state legislature. . . If ordered by the court, Secretary LaRose is prepared to implement an alternative to the March 17 election. . . If a judge were to order the primary election should not be held on March 17, Secretary LaRose is prepared to recommend moving election day to June 2. . . . If ordered, by moving Ohio’s election day we can ensure Ohio voters have every opportunity to have their voice heard and stay healthy in the process.

March 16, 2020 Press Release, Relator’s Exh. A-11.

In this same press release, Secretary LaRose’s office stated that he was basing his decision upon expert findings from the Ohio Department of Health. *Id.* The press release stated that Secretary LaRose has utilized “expert counsel and advice to execute every available option at his disposal,” that he “has implemented the guidance of the Ohio Department of Health every step of the way,” and that “[a]s the situation has evolved, we are once again following expert consultation in order to keep Ohioans safe.” *Id.*

B. Lawsuit in Franklin County

The promised lawsuit was not filed until several hours later at approximately 5:37 p.m. on March 16, 2020. *See Rouan, supra*, Exh. A-10; Complaint, *Jill Reardon, et al v. Frank LaRose*, Franklin C.P. Case No. 20-cv-002105 (March 17, 2020). It was filed in the Franklin County Court of Common Pleas, and it alleged that holding Election Day the following day would force the plaintiffs to choose between their health and their constitutional right to vote. *See id.* Shortly after the lawsuit was filed, Secretary LaRose’s Elections Director reportedly sent an email to the boards of elections with copies of the lawsuit and other documents filed in court. *See Rouan, supra*, Exh. A-10. The assigned judge, Judge Richard Frye, began the hearing at approximately 6:27 p.m.. *Id.*

At approximately 6:59 p.m., Secretary LaRose’s Elections Director emailed the county boards of elections incorrectly telling them that Judge Frye had granted the order sought by the plaintiffs to stop the election. *See id.*

Upon receiving this email from Secretary LaRose’s office, county boards of elections reportedly started operating as if the election was not happening. *See, Tobias, et al, supra*, Exh. A-9. The Franklin County Board of Elections, for instance, reportedly sent a text message and email to its poll workers telling them not to arrive at their polling locations the following day and that the primary had been moved to June 2. *See id;* Rouan, *supra*, Exh. A-10. Additionally, the Stark

County Board of Elections website reportedly had a notice telling voters that the election was off. *See*, Tobias, et al, *supra*, Exh. A-9.

Judge Frye, however, did not grant the requested order. At approximately 7:05 p.m., Judge Frye announced that he was denying the plaintiffs' requested relief. *Id.* The next day, in a journal entry filed, Judge Frye wrote that no evidence was presented to him other than two "short" affidavits from the plaintiffs. March 17, 2020 Journal Entry, *Jill Reardon, et al v. Frank LaRose*, Franklin C.P. Case No. 20-cv-002105 (March 17, 2020) (Relators' Exh. A-12). He stated further that nothing from the Governor or the Director of the Department of Health had been conveyed to the court. *Id.*

At approximately 7:09 p.m., Secretary LaRose's office reportedly sent an email to the county boards of elections stating that the information in the earlier email "may not be final." *See*, Tobias, et al, *supra*, Exh. A-9.

At approximately 7:53 p.m., Secretary LaRose's office reportedly sent another email correcting its mistake. Rouan, *supra*, Exh A-10. This email stated that Judge Frye had denied the requested relief, and that Secretary LaRose was "working through the next steps" and would update the boards "as soon as possible." *Id.*

Boards of elections then reportedly began to correct the instructions they had given poll workers based upon Secretary LaRose's office's incorrect statement that the election had been suspended. In Franklin County, for instance, poll workers reportedly received an email at 9:01 p.m. telling them that Judge Frye had denied the requested order that the election was still scheduled to take place the next day. *Id.*

Other than the 7:53 p.m. correction from Secretary LaRose's office, there was "radio silence" from Secretary LaRose for approximately two hours. Tobias, et al, *supra*, Exh. A-9. At

approximately 9 p.m., Secretary LaRose and Governor DeWine issued a vague 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, Relators' Exh. A-13.

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.

C. The Ohio Health Director's Ordered Closure of Polling Locations for March 17, 2020

An hour later, at approximately 10:11 p.m., Dr. Amy Acton, the Director of the Ohio Department of Health, announced that she was ordering the closure of polling locations in the State of Ohio on Tuesday, March 17, 2020. Order, Relators' Exh. A-14. 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.*

D. Directive 2020-06

Shortly after Director Acton's order, at approximately 10:30 p.m., Secretary LaRose sent Directive 2020-06 to the county boards of elections. Answer, ¶ 10; Directive 2020-06, Exh. A-1. 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).

Directive 2020-06 noticeably did not cite any authority for Secretary LaRose’s “suspension” of the election and setting June 2, 2020 as “the” new date of the election. After all, the Directive was issued just hours after Secretary LaRose had repeatedly stated that he lacked the authority to issue such an order.

Still, Directive 2020-06 instructed the boards of elections on how to proceed with “the” June 2, 2020 presidential primary election. For instance, the Directive instructs boards of elections to continue accepting absentee ballot applications until Tuesday, May 26, 2020, and that absentee ballots must be postmarked by June 1, 2020. *Id.* at 2. The Directive instructs that boards of elections “must conduct in-person voting at polling locations in their county” on June 2, 2020 from 6:30 a.m. to 7:30 p.m. *Id.* at 2. The Directive instructs boards to not tabulate or report any results “until the close of polls on Tuesday, June 2, 2020.” *Id.* at 1. The Directive instructs boards on the post-election period to when absentee and provisional voters can cure any mistakes on their ballots. *Id.* at 2-3. The Directive also “adjusted” the post-primary election campaign finance reporting deadline “according to the Tuesday, June 2, 2020 presidential primary election” to make the report due on Friday, July 10, 2020. *Id.* at 3.

Critical to obtaining the official results of the election, Directive 2020-06 sets forth a timeline for official certification that is well beyond the timeline set forth in Ohio law. As Secretary LaRose had previously instructed in Directive 2020-04, state law provides that the official canvass must begin between the 11th and 15th day after the election, and that the results must be certified no later than the 21st day after the election. Directive 2020-04, *supra*, Exh. A-5. Directive 2020-

06, however, instructs that the official canvass must begin between the 21st and 25th day after election, and that the results must be certified no later than the 31st day after the election, on Friday, July 3, 2020. Directive 2020-06, at 3, Exh. A-1.

Directive 2020-06 also promised additional instructions in the future regarding “the administration of in-person voting, Election Night Reporting on June 2, 2020, and official canvass.” *Id* at 3.

IV. Following March 16, 2020

On March 17, 2020, Ohio’s presidential primary election did not occur. However, voters who had not heard the prior night’s news still showed up to their polling locations. *See* Marty Schladen, *A few Ohio voters still went to closed polls Tuesday amid coronavirus confusion*, Columbus Dispatch (March 17, 2020), <https://www.dispatch.com/news/20200317/few-ohio-voters-still-went-to-closed-polls-tuesday-amid-coronavirus-confusion> (Relators’ Exh. A-15).

Relators filed their Complaint on March 17, 2020. Following the filing of the Complaint, Secretary LaRose’s explanation of Directive 2020-06 began to shift. This is demonstrated by four different versions of a coronavirus “Fact Sheet” available on the Secretary’s website: the original version, plus the “v2,” “v3,” and “v4” versions. *See* Relators’ Exhs. A-16, A-17, A-18, and A-19.¹ For instance, in “v4,” the Secretary’s office most recently amended the title-heading of the document:

¹ The original version of the Fact Sheet is available online at <https://www.sos.state.oh.us/globalassets/media-center/news/2020/coronafacts/updateelectiondayshift.pdf> (last accessed 3/22/20); The “v2” version is available online at https://www.sos.state.oh.us/globalassets/media-center/news/2020/coronafacts/updateelectiondayshift_v2.pdf (last accessed 3/22/20); The “v3” version is available online at https://www.sos.state.oh.us/globalassets/media-center/news/2020/coronafacts/updateelectiondayshift_v3.pdf (last accessed 3/22/20). The “v4” versions is available online at https://www.sos.state.oh.us/globalassets/media-center/news/2020/coronafacts/updateelectiondayshift_v4.pdf (last accessed 3/22/20)

Original: OHIO MOVES ELECTION DAY TO JUNE 2

v4: PRIMARY EXTENDED TO JUNE 2

The Secretary's office also initially included a statement that the Secretary lacked the authority to "shift" election day, but removed this statement by "v2":

Original: Because the authority to shift election day does not reside with the Ohio Secretary of State, it was necessary for a legal order to require the election day change.

v2: (removed)

The Secretary's office has also repeatedly revised its description what happened:

Original: the new election day will be June 2nd

v2: Secretary LaRose took action by directing the county boards of elections to hold the primary election on June 2

v4: Secretary LaRose took action by directing the county boards of elections to extend the primary election to June 2nd

A similar shift occurred in the conclusory sentence of the Fact Sheet:

Original: By moving Ohio's election day we can ensure...

V4: By extending Ohio's primary election to June 2nd election day we can ensure...

On March 19, 2020, Secretary LaRose followed up Directive 2020-06 with Advisory 2020-04, which provided "further guidance" on Directive 2020-06. *See* Advisory 2020-04, Relators' Exh. A-20.

On March 21, 2020, Secretary LaRose sent a letter to the General Assembly encouraging them to support legislation he drafted effectively to codify Directive 2020-06. *See* March 21, 2020 Letter to General Assembly, Relators' Exh. A-21. In this letter, Secretary LaRose once again conceded that he lacked the authority to change the date of the election and denied having done so despite his earlier statements otherwise:

It was not feasible for the governor to call the legislature into session for the purpose of setting a new election date – a power that only you have – in the time necessary to protect people’s health and safety while simultaneously protecting our democracy. I respect that only the legislature has the authority to change the date of an election. That is why I did not change the date of the election - which would have exceeded the powers granted to my office.

Id.

ARGUMENT

I. Relator Sanders Has Legal Standing.

In his Answer to the Complaint, the Secretary’s Sixth Defense asserts that Relator Sanders lacks standing. However, she clearly is injured by the Secretary’s actions and has standing to bring this action for redress. She is a registered Ohio voter who intended to vote in the Democratic Party primary election at her polling place on March 17, 2020 but was precluded from doing so. *See* Affidavit of Relator Sanders attached to Complaint. She will vote by mail if provided the opportunity to do so through issuance of an Order by the Court. Further, the Secretary’s decision to extend the primary until June 2, 2020 will effectively deprive Relator Sanders of her First and Fourteenth Amendment rights to participate in the election of delegates to the DNC presidential nominating convention for reasons explained herein. Relator Sanders has been harmed by the Respondent’s actions and has standing to sue. *See e.g. Bachur v. Democratic National Party*, 836 F.2d 837, 840 (4th Cir. 1987) (Primary voter has standing to sue where they are unable to vote for delegates of their choosing).

II. Relators Are Entitled To A Writ of Prohibition.

Relators seek an extraordinary writ of prohibition for Secretary LaRose’s extraordinary abuse of power.

A. Legal Standard

The writ of prohibition was first added to the Court’s original jurisdiction in 1912 when it was adopted by Ohio voters as part of Article IV, Section 2 of the Ohio Constitution. Shortly thereafter, the Court set forth the basic purpose and scope of the writ in its seminal 1915 decision, *State ex rel. Nolan v. ClenDening*, 93 Ohio St. 264, 112 N.E. 1029 (1915). In *Nolan*, the Court explained that three different scenarios warrant granting a writ of prohibition:

The writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to [1] an inferior tribunal properly and technically denominated such, or [2] to an inferior ministerial tribunal possessing incidentally judicial powers and known as a quasi-judicial tribunal, or [3] even in extreme cases to a purely ministerial body, commanding it to cease abusing or usurping judicial functions. A writ of prohibition is a prerogative writ to be used with great caution and forbearance for the furtherance of justice, and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy. The legitimate scope and purpose of the writ is to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon the jurisdiction of other tribunals.

State ex rel. Nolan v. ClenDening, 93 Ohio St. 264, 270, 112 N.E. 1029 (1915).

To be entitled to a writ of prohibition in any of the three scenarios identified in *Nolan*, a relator must demonstrate the following: (1) “That the court, officer or person against whom it is sought is about to exercise judicial or quasi-judicial power”; (2) “That the exercise of such power is unauthorized by law”; and (3) “That it will result in injury for which no other adequate remedy exists.” *Nolan*, 93 Ohio St. at 271. Relators here meet this standard.

B. Secretary LaRose’s unauthorized extension of the March 17, 2020 presidential primary election is an extreme case where a ministerial officer abused or usurped judicial functions.

The Court in *Nolan* recognized that, in “extreme cases,” a writ of prohibition must issue when a purely ministerial body has abused or usurped judicial functions. *Nolan*, 93 Ohio St. at

270. This now-longstanding principle has been reiterated by the Court several times in the more than 100 years since *Nolan*. See *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, 854 N.E.2d 1025, ¶ 31; *State ex rel. Masterson v. Ohio State Racing Com.*, 164 Ohio St. 312, 315, 130 N.E.2d 829 (1955); *State ex rel. Wanamaker v. Miller*, 164 Ohio St. 174, 176, 128 N.E.2d 108 (1955). The instant action, in which the Secretary of State unilaterally “suspended” a statewide election—an action without legal or historical precedent in this State—presents such an extreme case of a ministerial officer abusing or usurping judicial functions.

1. The right to vote in Ohio’s presidential primary election is set by the U.S. Constitution, the Ohio Constitution and the Ohio General Assembly—not the Secretary of State.

The right to vote in an election is guaranteed by the First and Fourteenth Amendments of the U.S. Constitution, as well as Article V, Section 1 of the Ohio Constitution. In turn, the authority to set the “time, places, and manner” of voting in Ohio elections rests with the State’s legislative branch—not the Secretary of State.

The General Assembly’s authority to set the rules for an election involving Congressional candidate stems from the Elections Clause of the U.S. Constitution, which provides as follows:

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 I, Section 4, c. 1, U.S. Constitution (emphasis added).

Further, it is well-settled that the Elections Clause extends to primary elections at which Congressional candidates are nominated. See *United States v. Classic*, 313 U.S. 299, 320 (1941) (“a primary election which involves a necessary step in the choice of candidates for election as representative in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the [Elections Clause]”). Accordingly, under the Elections Clause,

and unless Congress has acted otherwise, the authority to set the “time” of a primary election at which Congressional candidates are nominated rests with a state’s legislature.

Congress did not take any action to set the date of Ohio’s 2020 presidential primary election, and, therefore, the time of the election “shall be prescribed” by the Ohio General Assembly. Pursuant to this authority, the General Assembly established both the date and the hours of voting for Ohio’s 2020 presidential primary election. The date of the presidential primary election was set forth in R.C. 3501.01(E)(2), which provides in relevant part:

In years in which a presidential primary election is held, all primary elections shall be held on the third Tuesday after the first Monday in March except as otherwise authorized by a municipal or county charter.

For 2020, the “third Tuesday after the first Monday in March” was March 17, 2020.

In turn, the hours for voting at the March 17, 2020 presidential primary election (and any other election day) were set forth by the General Assembly in R.C. 3501.32, which provides in full:

- (A) Except as otherwise provided in division (B) of this section, on the day of the election the polls shall be opened by proclamation by the voting location manager, or in the manager's absence by a voting location manager chosen by the precinct election officials, at six-thirty a.m. and shall be closed by proclamation at seven-thirty p.m. unless there are voters waiting in line to cast their ballots, in which case the polls shall be kept open until such waiting voters have voted.
- (B) On the day of the election, any polling place located on an island not connected to the mainland by a highway or a bridge may close earlier than seven-thirty p.m. if all registered voters in the precinct have voted. When a polling place closes under division (B) of this section the voting location manager shall immediately notify the board of elections of the closing.

As is apparent, nothing in either of these provisions indicates that the Ohio Secretary of State has any ability to set the date or hours of voting for Ohio’s presidential primary election.

Indeed, nothing in any provision of Ohio law provides that the Secretary may exercise such power—something the Secretary has repeatedly conceded. For instance, in his March 16, 2020 joint press conference with Governor DeWine, Secretary LaRose stated “as the Governor mentioned, the power to the suspend an election - the power to delay an election - is not one that we have. It rests with the legislature [and] with the courts.” *See* The Ohio Channel, *supra*, at 13:14. In his initial coronavirus “Fact Sheet,” the Secretary wrote “Because the authority to shift election day does not reside with the Ohio Secretary of State, it was necessary for a legal order to require the election day change.” Relators’ Exh. A-16. And in his March 21, 2020 letter to members of the General Assembly, Secretary LaRose wrote “I respect that only the legislature has the authority to change the date of an election.” Relator’s Exh. A-21. To try to avoid a claim that he usurped legislative power, Secretary LaRose has shifted his explanation of Directive 2020-06 from “moving” the date of the election from March 17, 2020 to June 2, 2020 to “extending voting” at the primary election until June 2, 2020. But the Secretary does not have the power to unilaterally “extend voting” either.

2. The authority to “extend” the right to vote beyond the date and times set by the General Assembly rests with the judiciary, not the Secretary of State.

In the absence of express constitutional authority otherwise, the power to extend the right to vote beyond the date and times set by the General Assembly in the Ohio Revised Code is purely a judicial function.

a. The Secretary is patently and unambiguously without the legal authority to “extend” the right to vote beyond the date and times set by the General Assembly.

Nothing in the U.S. Constitution, the Ohio Constitution, or the Ohio Revised Code delegates or in any way authorizes the Ohio Secretary of State to unilaterally extend the right to vote beyond the date and times set by the General Assembly. To be sure, Title 35 of the Revised

Code gives the Secretary the *general* authority to “[i]ssue instructions by directives and advisories in accordance with section 3501.053 of the Revised Code to members of the boards as to the proper methods of conducting elections” (R.C. 3501.05(B)) and to “[p]repare rules and instructions for the conduct of elections,” (R.C. 3501.05(C)). But in the absence of an express delegation of authority, courts have been unwilling to “assume” that the General Assembly intended to vest the Secretary of State with authority otherwise given to the other branches of government. *See Libertarian Party of Ohio v. Brunner*, 567 F.Supp.2d 1006, 1012-1013 (S.D. Ohio 2008) (holding that the Secretary’s general, statutory authority in R.C. 3501.05 “cannot, as to Articles I and II of the [U.S.] Constitution, serve as a substitute for state legislative action regarding the election of federal officials.”).

b. Interpreting Ohioans’ constitutional right to vote to extend voting beyond the time set forth in the Ohio Revised Code is a function of the judiciary.

Interpreting Ohioans’ constitutional right to vote to determine whether it includes a right to vote beyond the date and times set forth by the General Assembly—that is, to “say what the law is”—is “emphatically the province and duty of the judicial department.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 116 quoting *Beagle v. Walden*, 78 Ohio St.3d 59, 62, 676 N.E.2d 506 (1997) (“interpretation of the state and federal Constitutions is a role exclusive to the judiciary.”) For this reason, and due to the lack of express authority for the Secretary to act otherwise, when a sudden emergency arises that threatens Ohioans’ right to vote, Ohioans must seek redress from the courts. *See also* Article I, Section 16, Ohio Constitution (providing for redress in courts); Article IV, Section 1, Ohio Constitution (vesting Ohio’s judicial power in the courts).

The present situation is far from being the first time than an unexpected emergency has threatened Ohioans’ ability to exercise their right to vote in accordance with the time, place and

manner established by the General Assembly. Since at least the 2004 general election, Ohioans, including one of the Secretary's predecessors, have repeatedly and successfully obtained emergency relief from the courts to protect Ohioans' right to vote.

On the day of Ohio's 2004 general election, there was a shortage of voting equipment in Franklin and Knox Counties that caused wait times of several hours for many citizens. In response, Relator Ohio Democratic Party successfully brought emergency litigation in the U.S. District Court for the Southern District of Ohio to require the boards of elections in Franklin and Knox Counties to provide paper ballots or another mechanism to afford voters an adequate opportunity to vote, and to require the boards to keep the polls open for voters who were waiting in line when the polls closed at 7:30 p.m. *See Ohio Democratic Party v. Blackwell*, Case No. 2:04-cv-1055, 2005 U.S. Dist. LEXIS 18126 at *2-4 (S.D. Ohio Aug. 26, 2005) (describing the procedural history of the case).

On the day of Ohio's 2006 general election, several polling locations in Cuyahoga County opened late due to unfamiliarity by the poll workers with new voting equipment, resulting in voters waiting for more than hour to vote. Relator Ohio Democratic Party brought an emergency lawsuit in the U.S. District Court for the Northern District of Ohio to extend the voting hours from 7:30 p.m. until 9:00 p.m. *See Complaint, Ohio Democratic Party v. Cuyahoga Cnty. Bd. of Elections*, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006). At 7:25 p.m.—5 minutes before the polls were set to close—the judge ordered that 16 polling locations stay open until 9:00 p.m. Temporary Restraining Order, *Ohio Democratic Party v. Cuyahoga Cnty. Bd. of Elections*, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006).

On the day of a special congressional election in 2007, voting machines loaned to the Putnam County Board of Elections after the Board's office flooded were experiencing

“intermittent failures.” See *Brunner files suit to keep Putnam County polls open*, Toledo Blade (November 6, 2007), <https://www.toledoblade.com/Politics/2007/11/06/Brunner-files-suit-to-keep-Putnam-County-polls-open.html> (Relators’ Exh. A-22). This led to the Board of Elections asking the Secretary of State to extend the hours of voting by 90 minutes. See *id.* Lacking the authority to unilaterally extend hours, then-Secretary of State Jennifer Brunner brought a (friendly) lawsuit against the Putnam County Board of Elections in the Franklin County Court of Common Pleas to extend the voting hours. See *id.*; *Jennifer Brunner v. Putnam County Bd. of Elections*, Franklin C.P. Case No. 07-cv-015136 (Nov. 7, 2007). The court granted the Secretary’s requested relief. See Directive 2007-24, Relators’ Exh. A-23.²

On the day of Ohio’s 2008 presidential primary election, several emergency lawsuits were successfully brought to extend voting in response to unexpected emergencies. On the night before the election, heavy rains in Jefferson County resulted in severe flooding that required at least three polling locations to be relocated at 9:30 p.m. (i.e., nine hours before they were scheduled to open). Citing the lack of procedures in Ohio law to address the situation when polling locations have to be moved due to emergency circumstances, Secretary Brunner filed an emergency lawsuit in the Franklin County Court of Common Pleas against the Jefferson County Board of Elections to allow voters whose precinct had been relocated to cast a provisional ballot at the Jefferson County Board of Elections. See Complaint and Order, *Jennifer Brunner v. Jefferson County Bd. of Elections*, Franklin C.P. Case No. 08CVH03-03264 (March 4, 2008), Relators’ Exh. A-24. Finding that there would be irreparable harm if voters were not given the ability to vote at the board of elections office, the judge granted the requested relief. *Id.*

² Although Directive 2007-24 states that the order issued by the court is attached, the version of the Directive available on the Secretary of State’s website does not contain a copy of the order. See <https://www.sos.state.oh.us/globalassets/elections/directives/2007/dir2007-24.pdf>.

Secretary Brunner filed a second emergency lawsuit on the day of Ohio’s 2008 presidential primary election. In Sandusky County, a printer that created the ballots for the county’s voting machines failed and a replacement part was not available, leaving voters unable to cast ballots. In response—and lacking the authority to act unilaterally—Secretary Brunner brought an emergency lawsuit in the Sandusky County Court of Common Pleas against the Sandusky County Board of Elections to extend voting hours until 9:00 p.m. The judge agreed to the request. *See* Secretary of State Directive 2008-36 (containing copies of the complaint and order), Relators’ Exh. A-25.

A third emergency lawsuit was filed on the day of Ohio’s 2008 presidential primary election. This one was brought by Barack Obama’s presidential campaign in the U.S. District Court for the Northern District of Ohio against three boards of elections and the Secretary of State. The lawsuit alleged that severe weather conditions rendered voters unable to reach the polls by 7:30 p.m., and that there were ballot shortages that could not be cured by 7:30 p.m., in part due to the severe weather. As a result, the court ordered that voting times be extended by 90 minutes for 21 polling locations in Cuyahoga County. *See* Directive 2008-37, Relators’ Exh. A-26.

Another emergency lawsuit was filed on the day of Ohio’s 2015 general election after there were a number of reported problems in Hamilton County related to the introduction of new electronic poll books and a shortage of provisional ballots. *See* Howard Wilkinson, *Sorting Out Hamilton County’s Election Day Mess May Take Time*, WVXU (Nov. 8, 2015), <https://www.wvxu.org/post/sorting-out-hamilton-countys-election-day-mess-may-take-time> (Relators’ Exh. A-27). In response, supporters of a statewide ballot issue filed an emergency lawsuit in the Hamilton County Clerk of Courts to extend voting hours beyond 7:30 p.m. *See* Howard Wilkinson, *Judge Extends Hamilton County Voting Hours Until 9 P.M.*, WVXU (Nov. 3, 2015) <https://www.wvxu.org/post/judge-extends-hamilton-county-voting-hours-until-9-pm>

(Relators' Exh. A-28). The judge granted the request and extended voting in the county until 9:00 p.m. *Id*; see also Directive 2015-21 (Relators' Exh. A-29) (informing the boards of elections that a "lawsuit was filed in Hamilton County Common Pleas Court resulting in an Order to keep voting locations in Hamilton County ONLY open until 9:00 PM") (emphasis sic).

The numerous instances of emergency election litigation demonstrate that the courts have both the responsibility and the capacity to determine whether Ohioans' constitutional right to vote requires voting to be extended beyond the times set forth by the General Assembly.

c. Prior Secretaries of State have not asserted the authority Secretary LaRose claims to have to suspend elections set by the General Assembly.

Significantly, and as evidenced by the previously described lawsuits seeking to extend voting hours, none of the Secretary's predecessors appear to have ever taken the position that they had the authority to unilaterally extend the right to vote beyond the times set by the General Assembly.

Although "long settled and established practice" is not necessarily "binding on the judicial department," (*Pocket Veto Case*, 279 U.S. 655, 689 (1929)), it can be highly persuasive. As Justice Holmes put it, "a page of history is worth a volume of logic." *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921). This is true especially when the government has historically *declined* to assert a power. As explained by the U.S. Supreme Court, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941). Accordingly, an official's assertion of power never before claimed or exercised should be looked at with skepticism. See *BankAmerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("In the

circumstances of this case, the Government’s failure for over 60 years to exercise the power it now claims under § 8 strongly suggests that it did not read the statute as granting such power.”)

It does not appear that any of the Secretary’s predecessors have ever asserted the authority to unilaterally extend Ohioans’ right to vote beyond the times provided for by the General Assembly. Indeed, as previously explained, one of the Secretary’s predecessors implicitly conceded time and again that the office lacks the authority to unilaterally expand voting hours given that she, herself, brought several emergency lawsuits on the days of elections to extend opportunities to vote. If the Secretary of State possessed the authority to unilaterally extend voting, then these lawsuits would have been unnecessary.

d. Secretary LaRose has repeatedly taken the position that the authority to extend the right to vote beyond the date and times established by the General Assembly rests with the judiciary.

Prior to issuing Directive 2020-06, Secretary LaRose had repeatedly taken the position that the authority to extend Ohioans’ right to vote beyond the times established by the General Assembly rests with the judiciary. Indeed, he stated this to the public, and he stated this to the boards of elections in directives.

Earlier in the day on March 16, 2020, before he issued Directive 2020-06, Secretary LaRose *repeatedly* conceded that he did not have the authority to do what he ultimately ordered in Directive 2020-06. Secretary LaRose and the Governor conceded this lack of authority in their joint press conference, and Secretary LaRose repeated it again in a press release issued shortly thereafter. *See*, Relators’ Exh. A-11. (“Because the authority to shift election day does not reside with the Ohio Secretary of State, this change must be enacted by either a legal order or an act of the state legislature.”) (emphasis added). Hours later, he contradicted himself by issuing Directive 2020-06.

Secretary LaRose has also issued two separate directives that remain effect in which he has directed the boards of elections that voting can be extended “only” by court order. In the Secretary’s Directive 2019-15, which concerns “Election Day Voting” and is Chapter 7 of the Ohio Elections Official Manual, he directs boards of elections that on Election Day:

All polls must close at 7:30 p.m., unless a court order extends the voting period.

Directive 2019-15, Section 1.09 at *7-27 available at https://www.sos.state.oh.us/globalassets/elections/directives/2019/eom_12-2019/eom_ch7_2019-12-18.pdf (Relators’ Exh. A-30) (emphasis added).

Directive 2019-15 goes on to direct that any ballots cast by voters who arrive to vote between 7:30 p.m. and the “court-ordered closing of the polling location” must vote a provisional ballot. *Id* at *7-27. The Directive also instructs that poll workers are required to write the following note on the identification envelope of such a provisional ballot: “After Close of Polls by Order of the Court.” *Id*. Similarly, the Directive provides that “[i]n case of a court order only,” poll workers must count and record the total number of provisional ballots cast by voters who arrived after 7:30 p.m. *Id* (emphasis added).

Secretary LaRose reiterated that only a court order can “extend” voting hours in Directive 2019-16, which concerns “Canvassing the Vote” and is Chapter 8 of the Ohio Elections Official Manual. This Directive repeats much of what was included in Directive 2019-15. For instance, in Section 1.01 of Directive 2019-16, Secretary LaRose directed:

Each board of elections must train its precinct election officials (PEOs) on how to close a polling location properly and on what steps need to be taken if voting hours are extended by court order. All polls close at 7:30 p.m. unless a court order extends the voting period.

Directive 2019-16, section 1.01 at *8-7, available at <https://www.sos.state.oh.us/globalassets/elections/directives/2019/>

[eom_12-2019/eom_ch8_2019-12-18.pdf](#) (Relators' Exh. A-31)
(emphasis added).

Directive 2019-16 similarly provides instructions on what to do “if there is a court order to keep a polling location open past 7:30 p.m.,” including reiterating that the instructions only apply “in case of a court order only.” *Id.* at *8-7 to 8-9 (emphasis added).

Given Secretary LaRose’s history of conceding and directing “only” the courts have the ability to “extend” voting beyond the times established by the General Assembly, the Court owes no deference to the Secretary’s sudden assertion that he, too, has such authority. The Court has previously explained that although it generally defers to the Secretary’s “reasonable” interpretation of Ohio’s election laws, the Court has no such obligation when the Secretary has “vacillated” on his interpretation of the law. *Ohio Manufacturers’ Assn. v. Ohioans for Drug Price Relief Act*, 149 Ohio St.3d 250, 2016-Ohio-5377, ¶¶ 26-29 (citing conflicting directives and instructions issued by the Secretary). Moreover, some Justices on the Court have questioned whether the Court should ever defer to the Secretary’s interpretation of Ohio law. *See State ex rel. McCann v. Del. Cty. Bd. of Elections*, 155 Ohio St.3d 14, 2018-Ohio-3342, 118 N.E.3d 224, ¶¶ 30-34 (DeWine, J., concurring in judgment only) (explaining that in deferring to an administrative agency’s interpretation of the law, the courts “abandon our role as an independent check on the executive branch”); *In re Application of 6011 Greenwich Windpark, LLC*, 157 Ohio St.3d 235, 2019-Ohio-2406, 134 N.E.3d 1157 (Kennedy, J., dissenting) quoting *McCann*, ¶ 31 (DeWine, J., concurring in judgment only). Under either approach, the result is the same: the Court owes no deference to the Secretary’s sudden interpretation of his power to include the ability to “extend” voting beyond what the is set forth by the General Assembly.

3. Directive 2020-06 is an extreme and unauthorized usurpation of judicial power.

If ever there was an “extreme case” of an executive officer abusing or usurping judicial power, this is it.

As set forth above, the power asserted by Secretary LaRose to extend voting beyond what the General Assembly has provided rests only with the Court—the Secretary patently and unambiguously lacks such legal authority. And by asserting a power that rests only with the Court, Secretary LaRose has abused or usurped judicial power.

Several factors make the Secretary’s usurpation of judicial power uniquely troubling. For one, he usurped judicial power in order to suspend the key mechanism of our system of representative government: elections. If the Secretary has the authority to unilaterally suspend Ohio’s presidential primary election, then nothing is stopping him or any future Secretaries of State from suspending future elections, including general elections.

At approximately 10:30 p.m., Secretary LaRose issued Directive 2020-06 asserting the unilateral authority to suspend the presidential primary election set to just begin eight hours later. Ultimately, more than twelve hours passed in between when Secretary LaRose purportedly concluded that the election could not be held and when he issued Directive 2020-06. By waiting until 10:30 p.m. the night before the election to issue a Directive that he had just hours earlier conceded he lacked the authority to issue, he ensured that no one would be able to timely challenge his decision. He effectively left Ohio with a *fait accompli* of a cancelled election. In so doing, Secretary LaRose’s unauthorized usurpation of judicial power effectively forces the other branches of government to accept his unilateral decision to suspend voting. Indeed, even if this Court or another court concludes that Secretary LaRose’s suspension of the election was unauthorized by law, the only way to provide any relief would be to allow voting at a later date. The fact that

Secretary LaRose did all this only after having failed to obtain a court order suspending the election makes it all the more troubling.

Adding to the extreme nature of Secretary LaRose's conduct is his incorrect assertion to the county boards of elections that this Court already "upheld" Directive 2020-06. In Advisory 2020-04, Secretary LaRose claimed to the boards of elections that the Court's early morning denial of the requested writ of mandamus in *State ex rel. Corey Speweik v. Wood Cty. Bd. of Elections, et al.*, Case No. 2020-0382 on March 17, 2020 "effectively . . . upheld" his decision to suspend the election. *See* Advisory 2020-04, Relators' Exh. A-20. This assertion, however, omits several key details of which debunk his claim to have already been vindicated by this Court. Critically, the lawsuit referenced was filed *before* Secretary LaRose had issued Directive 2020-06, and the Directive was, therefore, not part of the complaint before the Court. Moreover, the Court's decision to deny the requested writ was announced in an opinion without a written decision. *See 03/17/2020 Case Announcements, 2020-Ohio-997*. The Court, therefore, has not yet weighed in on whether the Secretary was authorized to issue Directive 2020-06, and the Secretary's statement otherwise further highlights the extreme nature of his conduct in usurping judicial power.

For these reasons, Secretary LaRose's issuance of Directive 2020-06 to suspend the March 17, 2020 presidential primary election just eight before polls were scheduled to open presents an "extreme case" under *Nolan* requiring the issuance of a writ of prohibition.

C. In the alternative, the Secretary exercised *de facto* quasi-judicial power that was not authorized by law.

Alternatively, the Secretary exercised quasi-judicial power to suspend the election that was not authorized by law. Ordinarily, for the Secretary of State to have exercised quasi-judicial power, the Secretary would have had to conduct a quasi-judicial hearing resembling a judicial trial, which may include receiving expert testimony. *See State ex rel. Upper Arlington v. Franklin Cty. Bd. of*

Elections, 119 Ohio St.3d 478, 2008-Ohio-5093, ¶ 16, 895 N.E.2d 177. But as set forth above, the Secretary of State is not acting pursuant to any legal authority and he did not conduct a quasi-judicial hearing in a formal or customary sense.

The Secretary did, however, exercise *de facto* quasi-judicial power by appointing himself as the trier of fact and law to determine whether to “extend” Ohioans’ constitutional right to vote beyond the date and times established by the General Assembly. In this unique and novel circumstance, the Secretary made a decision based after weighing the expert medical opinion of the State’s Director of Health that it would have been unsafe to keep the polls open on March 17, 2020. He also made his decision based upon a stated legal conclusion that with the polls having been closed by the Director of Health, voters who had intended to vote in-person on March 17, 2020 would have been denied equal protection of laws. *See Rouan, supra*, Exh. A-10. The Secretary engaged, at a minimum, in a quasi-judicial inquiry.

This is admittedly not the traditional situation involving the Secretary’s exercise of quasi-judicial power given that he was acting without *any* statutory authority whatsoever. But the unique circumstances should be considered an exception to the judicially created element for a writ of prohibition that quasi-judicial power can be exercised only when a statute requires a hearing. Expanding the scope of the writ of prohibition to include this unique situation is well within the Court’s power, and this is a situation that calls out for such an expansion.³

³ A writ of prohibition is an extraordinary writ within the jurisdiction of this Court that deals with abuses of power. Given that the contours of the writ are determined by this Court, the Court can expand its use in appropriate circumstances that call out for it, like the unprecedented set of facts in the instant action.

D. Relators lack an adequate remedy at law.

Relators lack an adequate remedy at law due to the timing of the underlying actions and the need to conclude the presidential primary election. *See State ex rel. Craig v. Scioto Cty. Bd. of Elections*, 117 Ohio St.3d 158, 2008-Ohio-706, 882 N.E.2d 435, ¶ 25, quoting *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 291-292, 649 N.E.2d 1205 (1995) (“given the proximity of the election, an injunction would arguably not constitute an adequate remedy at law because any appellate process would last well past the election”). Ohio’s presidential primary election was supposed to have occurred on March 17, 2020, the day Relators filed the instant action. And although judicial relief obviously cannot restore the ability to vote on March 17, 2020, the election still needs to be brought to a timely and fair conclusion so that Ohioans can nominate their local, state, and federal candidates for the general election, select their delegates to the national party conventions, determine who will lead their local and state parties, and decide whether to approve local funding questions. Given this timing—as well as the approaching “postponed” June 2, 2020 election date—seeking an injunction would not constitute an adequate remedy because any appellate process would last well past the June 2, 2020 election.

For this reason, Relators lack an adequate remedy at law and are entitled to requested writ of prohibition.

III. Relators’ Requested Relief

In this action, Relators seek affirmative relief to address the deprivation of rights resulting from the cancellation of voting on March 17, 2020 and the “extension” of voting until June 2, 2020 proposed by the Secretary. The Court has the jurisdiction to provide all the requested relief.

Article IV, Section 2(B)(1)(f) of the Ohio Constitution gives the Court original jurisdiction “in any cause on review as may be necessary to its complete determination.” This Court has

explained that it interprets this provision to authorize judgments in the Court that are “necessary to achieve closure and complete relief in actions pending before the court.” *State v. Steffen*, 70 Ohio St.3d 399, 407-408, 639 N.E.2d 67 (1994). In *Steffen*, the Court identified the following examples of relief ordered pursuant to Article IV, Section 2(B)(1)(f): “*State ex rel. Polcyn v. Burkhart* (1973), 33 Ohio St.2d 7, 62 O.O.2d 202, 292 N.E.2d 883 (ordering Clerk of the Toledo City Council to correct initiative proposition to allow inclusion on ballot, because existing statutory procedures did not authorize appellant board of elections to make corrections); *State ex rel. Owens v. Campbell* (1971), 27 Ohio St.2d 264, 56 O.O.2d 158, 272 N.E.2d 116, overruled on other grounds, *State v. Thomas* (1980), 61 Ohio St.2d 254, 15 O.O.3d 262, 400 N.E.2d 897 (entering judgment ordering prison warden to release appellant-prisoner, despite failure of appellant to join warden as nominal party).” See *Steffen* 70 Ohio St. 3d at 407-408. Based on these cases, the Court in *Steffen* concluded that this constitutional provision “authorizes this court to enter such judgments in causes it hears on review as are necessary to provide a complete and final determination thereof.” *Id.*

Relators’ remedies balance and protect all of the various interests at play in this case: the state’s interest in protecting the public health and the right to vote, the public’s right to associate with and participate in the affairs of their preferred political party, and the national interest in ensuring the ODP participates in the nomination of national officers. Respondent’s interests ultimately protect none of these.

A. Respondent’s “Extension” of the Primary Election to June 2, 2020 uniquely harms Relator Ohio Democratic Party and its Voters, including Relator Sanders.

“[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 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. Relator ODP requires several weeks after the primary election is certified to ensure its delegations meets Democratic Party rules and is seated at the Democratic National Convention.

ODP is a major political party that serves as the Ohio wing 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 priorities, 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. *See* Beswick Affidavit, Relators' Exh A; Relators' Exh. A-32. 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. *See* Beswick Affidavit, Relators' Exh A; Relators' Exh. A-33. 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, the ODP's governing committee approved, and the ODP submitted, a delegate selection plan that included approximately eight weeks of post-primary actions to ensure the ODP's delegation meets the DNC's requirements. *See* Beswick Affidavit, Relators' Exh A. The delegate selection plan approved by the ODP's executive committee includes the following post-primary election timeline:

1. Certification of primary results
2. Less than three calendar days after certification of results: Deadline for the ODP's certification of 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: Deadline for the ODP chair to certify 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 the ODP's chair
6. 27 days post-certification: the 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 the ODP chair
8. 31 days post-certification: the ODP's executive committee elects PLEO and at-large delegates. Note that, per the ODP bylaws, this meeting requires advance notice.
9. 40 days post-certification: Presidential campaigns submit list of standing committee candidates to the ODP chair.
10. 40 days post-certification: The ODP chair certifies the list of elected PLEO and at-large delegates to the DNC's secretary.

11. 43 days post-certification: the convention delegates meet and elect standing committee members and the delegation chair.

12. 47 days post-certification: the ODP chair certifies the elected standing committee members and the delegation chair to the DNC.

See Beswick Affidavit, ¶ 6, Relators' Exh. A.

2. Respondent's action delaying the conclusion of voting until June 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. at 487-88 (internal citations omitted).

By rescheduling or extending the election until June 2, the Respondent overlooks “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 until June 2, and certification of results until June 21, will effectively deprive the Relators of their ability to participate in the selection of candidates for national office.

3. States cannot compel political parties to ignore or change party rules.

Respondent has suggested that the Democratic Party should change its rules to accommodate Respondent's preference to extend voting until June 2, 2020. Respondent's suggestion – really more of an order – cannot be reconciled with the Relators' first and fourteenth amendment rights as outlined in *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981). Wisconsin law required a primary process contrary to the Democratic Party's rules for delegates. Wisconsin's Attorney General brought an original action in the Wisconsin Supreme Court and obtained an order against the Democratic Party that Wisconsin's primary process was binding on the Party, that the Party must seat Wisconsin's delegates in contravention of Democratic Party rules, and that the Wisconsin delegation must cast their votes in accordance with Wisconsin state law, not the Democratic Party's rules. *Id.* at 113-114. On appeal, the U.S. Supreme Court determined that the relevant "issue is whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party. And this issue was resolved, we believe, in *Cousins v. Wigoda*...The State argues that its law places only a minor burden on the National Party. The National Party argues that the burden is substantial...But it is not for the courts to mediate the merits of this dispute. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *Id.* at 123-124.

Here, the DNC made a judgment in August of 2018 that, for the Convention to proceed, state parties must certify their delegations to the DNC by June 20, 2020. Relators' Exh. A-33. Even if Respondent is correct that it is possible to change the Democratic Party's rules – and this is by no means certain given the bans on public gatherings, travel, etc. – Respondent cannot use the power of the state to force the Democratic Party to change its rules or seat Ohio's delegation. See

e.g. *Ferency v. Austin*, 666 F.2d 1023, 1026 (6th Cir. 1981) (citing *Cousins*, the panel found that a Michigan statute could not override the Democratic Party’s rules and force the Michigan delegation to be seated because “the right of the National Democratic Party and its adherents to freedom of association under the First and Fourteenth Amendments must be given paramount effect.”)

Relators’ proposed April 28 postmark deadline and a mid-May certification date will also protect the Relators’ interest in participating in their presidential nominating convention by providing Relator the time post-certification of the election results to perform tasks required to have its delegates seated at the convention.

B. Rescheduling voting at the polls is unrealistic and will only lead to more confusion.

Even Respondent admits that there is no guarantee that in-person voting will be any more feasible on June 2 than it was on March 17. Respondent further asks that Ohioans experience the uncertainty of whether there will or will not be voting at the polls. If a new date is scheduled, Respondent acknowledges that it could be cancelled again, meaning that Ohio will be in the same dilemma it now finds itself. If voting at the polls is cancelled a second time, it will be necessary to extend absentee voting beyond that second date to give voters who would have voted at the polls, the opportunity to vote. Allowing Respondent’s plan to remain in place will lead to more voter confusion and ultimately increases the risk that Ohioans will be disenfranchised due to Respondent’s unsupported assertion that they can wait until June 2 to cast a ballot at their polling place. The Relators’ proposed remedy removes this uncertainty by moving to an entirely vote by mail option in which every voter may either return their ballot by mail - postage prepaid - or by dropping the ballot in a secured drop box at their local board of elections. At no time would it

require voters or poll workers to risk exposure to the coronavirus by encouraging them to wait and vote in person or be disenfranchised, as Respondent's directive could.

Relators' remedy largely mirrors existing state law, and simply extends the timelines as much as possible without impairing Relators' First and Fourteenth Amendment rights to participate in the national convention, or the national interest in having Relators participate in the presidential nominating convention. Relators propose requiring boards to process absentee ballot applications for mail in-absentee ballots received no later than noon on April 25, 2020; accepting and counting all valid absentee ballots returned to the board by April 28, or postmarked on or before April 28 and received by the board on or before May 8; providing prepaid postage for all absentee ballot requests and absentee ballots returned by mail; providing a secure drop box outside the board office for voters to return applications and absentee ballots directly; requiring boards of elections to provide assistance to voters with disabilities or who are illiterate; and requiring boards to canvass and certify the election in accordance with the timelines otherwise provided under Ohio law. The deadlines for returning absentee ballot applications mirror current law, which sets a deadline of noon the Saturday before the end of voting for all absentee requests by mail. R.C. 3503.16(G). The April 28 postmark deadline and May 8 deadline for boards to receive mailed absentee ballots likewise mirrors state law, which sets a deadline of ten days after the end of voting for mailed absentee ballots to be received by the board. R.C. 3509.05(B).

The temporal relationship between the Relators' proposed dates is the same as provided by statute. Further, Ohio has allowed unrestricted vote by mail for the past fourteen years, and Ohioans are well acquainted with the process.

CONCLUSION

For all of the foregoing reasons, Relators respectfully pray the Court to issue the requested Writ of Prohibition per its authority under Art. IV, Sec.2(B)(1)(d) of the Ohio Constitution and to grant the requested affirmative relief necessary to a complete determination of this matter per its authority under Art. IV, Sec. 2(B)(1)(f).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Merit Brief was sent via email this the 23rd day of March, 2020 to the following:

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IN THE SUPREME COURT OF OHIO

**STATE EX REL. OHIO DEMOCRATIC
PARTY, et al.**

Relators,

-v-

FRANK LAROSE.

Respondent.

CASE NO. 2020-0388

**ORIGINAL ACTION IN
PROHIBITION**

**ALTERNATIVE AND
PEREMPTORY WRITS
REQUESTED**

**Expedited Election Matter
Under S.Ct.Prac.R. 12.08**

**RELATORS' APPENDIX OF CITED CONSTITUTIONAL
AND STATUTORY AUTHORITY**

U.S. Constitution, Article I, Section 4

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, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ohio Constitution, Article I, Section 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio Constitution, Article IV, Section 1

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

Ohio Constitution, Article V, Section 1

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

R.C. 3501.01

As used in the sections of the Revised Code relating to elections and political communications:

(A) "General election" means the election held on the first Tuesday after the first Monday in each November.

(B) "Regular municipal election" means the election held on the first Tuesday after the first Monday in November in each odd-numbered year.

(C) "Regular state election" means the election held on the first Tuesday after the first Monday in November in each even-numbered year.

(D) "Special election" means any election other than those elections defined in other divisions of this section. A special election may be held only on the first Tuesday after the first Monday in May, August, or November, or on the day authorized by a particular municipal or county charter for the holding of a primary election, except that in any year in which a presidential primary election is held, no special election shall be held in May, except as authorized by a municipal or county charter, but may be held on the third Tuesday after the first Monday in March.

(E)

(1) "Primary" or "primary election" means an election held for the purpose of nominating persons as candidates of political parties for election to offices, and for the purpose of electing persons as members of the controlling committees of political parties and as delegates and alternates to the conventions of political parties. Primary elections shall be held on the first Tuesday after the first Monday in May of each year except in years in which a presidential primary election is held.

(2) "Presidential primary election" means a primary election as defined by division (E)(1) of this section at which an election is held for the purpose of choosing delegates and alternates to the national conventions of the major political parties pursuant to section 3513.12 of the Revised Code. Unless otherwise specified, presidential primary elections are included in references to primary elections. In years in which a presidential primary election is held, all primary elections shall be held on the third Tuesday after the first Monday in March except as otherwise authorized by a municipal or county charter.

(F) "Political party" means any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the formation and existence of a political party.

(1) "Major political party" means any political party organized under the laws of this state whose candidate for governor or nominees for presidential electors received not less than twenty per cent of the total vote cast for such office at the most recent regular state election.

(2) "Minor political party" means any political party organized under the laws of this state that meets either of the following requirements:

(a) Except as otherwise provided in this division, the political party's candidate for governor or nominees for presidential electors received less than twenty per cent but not less than three per cent of the total vote cast for such office at the most recent regular state election. A political party that meets the requirements of this division remains a political party for a period of four years after meeting those requirements.

(b) The political party has filed with the secretary of state, subsequent to its failure to meet the requirements of division (F)(2)(a) of this section, a petition that meets the requirements of section 3517.01 of the Revised Code.

A newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president.

(G) "Dominant party in a precinct" or "dominant political party in a precinct" means that political party whose candidate for election to the office of governor at the most recent regular state election at which a governor was elected received more votes than any other person received for election to that office in such precinct at such election.

(H) "Candidate" means any qualified person certified in accordance with the provisions of the Revised Code for placement on the official ballot of a primary, general, or special election to be held in this state, or any qualified person who claims to be a write-in candidate, or who knowingly assents to being represented as a write-in candidate by another at either a primary, general, or special election to be held in this state.

(I) "Independent candidate" means any candidate who claims not to be affiliated with a political party, and whose name has been certified on the office-type ballot at a general or special election through the filing of a statement of candidacy and nominating petition, as prescribed in section 3513.257 of the Revised Code.

(J) "Nonpartisan candidate" means any candidate whose name is required, pursuant to section 3505.04 of the Revised Code, to be listed on the nonpartisan ballot, including all candidates for judicial office, for member of any board of education, for municipal or township offices in which primary elections are not held for nominating candidates by political parties, and for offices of municipal corporations having charters that provide for separate ballots for elections for these offices.

(K) "Party candidate" means any candidate who claims to be a member of a political party and who has been certified to appear on the office-type ballot at a general or special election as the nominee of a political party because the candidate has won the primary election of the candidate's party for the public office the candidate seeks, has been nominated under section 3517.012, or is selected by party committee in accordance with section 3513.31 of the Revised Code.

(L) "Officer of a political party" includes, but is not limited to, any member, elected or appointed, of a controlling committee, whether representing the territory of the state, a district therein, a county, township, a city, a ward, a precinct, or other territory, of a major or minor political party.

(M) "Question or issue" means any question or issue certified in accordance with the Revised Code for placement on an official ballot at a general or special election to be held in this state.

(N) "Elector" or "qualified elector" means a person having the qualifications provided by law to be entitled to vote.

(O) "Voter" means an elector who votes at an election.

(P) "Voting residence" means that place of residence of an elector which shall determine the precinct in which the elector may vote.

(Q) "Precinct" means a district within a county established by the board of elections of such county within which all qualified electors having a voting residence therein may vote at the same polling place.

(R) "Polling place" means that place provided for each precinct at which the electors having a voting residence in such precinct may vote.

(S) "Board" or "board of elections" means the board of elections appointed in a county pursuant to section 3501.06 of the Revised Code.

(T) "Political subdivision" means a county, township, city, village, or school district.

(U) "Election officer" or "election official" means any of the following:

(1) Secretary of state;

(2) Employees of the secretary of state serving the division of elections in the capacity of attorney, administrative officer, administrative assistant, elections administrator, office manager, or clerical supervisor;

(3) Director of a board of elections;

(4) Deputy director of a board of elections;

(5) Member of a board of elections;

(6) Employees of a board of elections;

(7) Precinct election officials;

(8) Employees appointed by the boards of elections on a temporary or part-time basis.

(V) "Acknowledgment notice" means a notice sent by a board of elections, on a form prescribed by the secretary of state, informing a voter registration applicant or an applicant who wishes to change the applicant's residence or name of the status of the application; the information necessary to complete or update the application, if any; and if the application is complete, the precinct in which the applicant is to vote.

(W) "Confirmation notice" means a notice sent by a board of elections, on a form prescribed by the secretary of state, to a registered elector to confirm the registered elector's current address.

(X) "Designated agency" means an office or agency in the state that provides public assistance or that provides state-funded programs primarily engaged in providing services to persons with disabilities and that is required by the National Voter Registration Act of 1993 to implement a program designed and administered by the secretary of state for registering voters, or any other public or government office or agency that implements a program designed and administered by the secretary of state for registering voters, including the department of job and family services, the program administered under section 3701.132 of the Revised Code by the department of health, the department of mental health and addiction services, the department of developmental disabilities, the opportunities for Ohioans with disabilities agency, and any other agency the secretary of state designates. "Designated agency" does not include public high schools and vocational schools, public libraries, or the office of a county treasurer.

(Y) "National Voter Registration Act of 1993" means the "National Voter Registration Act of 1993," 107 Stat. 77, 42 U.S.C.A. 1973gg.

(Z) "Voting Rights Act of 1965" means the "Voting Rights Act of 1965," 79 Stat. 437, 42 U.S.C.A. 1973, as amended.

(AA) "Photo identification" means a document that meets each of the following requirements:

(1) It shows the name of the individual to whom it was issued, which shall conform to the name in the poll list or signature pollbook.

(2) It shows the current address of the individual to whom it was issued, which shall conform to the address in the poll list or signature pollbook, except for a driver's license or a state identification card issued under section 4507.50 of the Revised Code, which may show either the current or former address of the individual to whom it was issued, regardless of whether that address conforms to the address in the poll list or signature pollbook.

(3) It shows a photograph of the individual to whom it was issued.

(4) It includes an expiration date that has not passed.

(5) It was issued by the government of the United States or this state.

R.C. 3501.05

The secretary of state shall do all of the following:

- (A) Appoint all members of boards of elections;
- (B) Issue instructions by directives and advisories in accordance with section 3501.053 of the Revised Code to members of the boards as to the proper methods of conducting elections.
- (C) Prepare rules and instructions for the conduct of elections;
- (D) Publish and furnish to the boards from time to time a sufficient number of indexed copies of all election laws then in force;
- (E) Edit and issue all pamphlets concerning proposed laws or amendments required by law to be submitted to the voters;
- (F) Prescribe the form of registration cards, blanks, and records;
- (G) Determine and prescribe the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and forms and blanks required by law for use by candidates, committees, and boards;
- (H) Prepare the ballot title or statement to be placed on the ballot for any proposed law or amendment to the constitution to be submitted to the voters of the state;
- (I) Except as otherwise provided in section 3519.08 of the Revised Code, certify to the several boards the forms of ballots and names of candidates for state offices, and the form and wording of state referendum questions and issues, as they shall appear on the ballot;
- (J) Except as otherwise provided in division (I)(2)(b) of section 3501.38 of the Revised Code, give final approval to ballot language for any local question or issue approved and transmitted by boards of elections under section 3501.11 of the Revised Code;
- (K) Receive all initiative and referendum petitions on state questions and issues and determine and certify to the sufficiency of those petitions;
- (L) Require such reports from the several boards as are provided by law, or as the secretary of state considers necessary;
- (M) Compel the observance by election officers in the several counties of the requirements of the election laws;
- (N)

(1) Except as otherwise provided in division (N)(2) of this section, investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of election laws to the attorney general or prosecuting attorney, or both, for prosecution;

(2) On and after August 24, 1995, report a failure to comply with or a violation of a provision in sections 3517.08 to 3517.13, 3517.20 to 3517.22, 3599.03, or 3599.031 of the Revised Code, whenever the secretary of state has or should have knowledge of a failure to comply with or a violation of a provision in one of those sections, by filing a complaint with the Ohio elections commission under section 3517.153 of the Revised Code.

(O) Make an annual report to the governor containing the results of elections, the cost of elections in the various counties, a tabulation of the votes in the several political subdivisions, and other information and recommendations relative to elections the secretary of state considers desirable;

(P) Prescribe and distribute to boards of elections a list of instructions indicating all legal steps necessary to petition successfully for local option elections under sections 4301.32 to 4301.41, 4303.29, 4305.14, and 4305.15 of the Revised Code;

(Q) Adopt rules pursuant to Chapter 119. of the Revised Code for the removal by boards of elections of ineligible voters from the statewide voter registration database and, if applicable, from the poll list or signature pollbook used in each precinct, which rules shall provide for all of the following:

(1) A process for the removal of voters who have changed residence, which shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 and the National Voter Registration Act of 1993, including a program that uses the national change of address service provided by the United States postal system through its licensees;

(2) A process for the removal of ineligible voters under section 3503.21 of the Revised Code;

(3) A uniform system for marking or removing the name of a voter who is ineligible to vote from the statewide voter registration database and, if applicable, from the poll list or signature pollbook used in each precinct and noting the reason for that mark or removal.

(R) Prescribe a general program for registering voters or updating voter registration information, such as name and residence changes, by boards of elections, designated agencies, offices of deputy registrars of motor vehicles, public high schools and vocational schools, public libraries, and offices of county treasurers consistent with the requirements of section 3503.09 of the Revised Code;

(S) Prescribe a program of distribution of voter registration forms through boards of elections, designated agencies, offices of the registrar and deputy registrars of motor vehicles, public high schools and vocational schools, public libraries, and offices of county treasurers;

(T) To the extent feasible, provide copies, at no cost and upon request, of the voter registration form in post offices in this state;

(U) Adopt rules pursuant to section 111.15 of the Revised Code for the purpose of implementing the program for registering voters through boards of elections, designated agencies, and the offices of the registrar and deputy registrars of motor vehicles consistent with this chapter;

(V) Establish the full-time position of Americans with Disabilities Act coordinator within the office of the secretary of state to do all of the following:

(1) Assist the secretary of state with ensuring that there is equal access to polling places for persons with disabilities;

(2) Assist the secretary of state with ensuring that each voter may cast the voter's ballot in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters;

(3) Advise the secretary of state in the development of standards for the certification of voting machines, marking devices, and automatic tabulating equipment.

(W) Establish and maintain a computerized statewide database of all legally registered voters under section 3503.15 of the Revised Code that complies with the requirements of the "Help America Vote Act of 2002," Pub. L. No. 107-252, 116 Stat. 1666, and provide training in the operation of that system;

(X) Ensure that all directives, advisories, other instructions, or decisions issued or made during or as a result of any conference or teleconference call with a board of elections to discuss the proper methods and procedures for conducting elections, to answer questions regarding elections, or to discuss the interpretation of directives, advisories, or other instructions issued by the secretary of state are posted on a web site of the office of the secretary of state as soon as is practicable after the completion of the conference or teleconference call, but not later than the close of business on the same day as the conference or teleconference call takes place.

(Y) Publish a report on a web site of the office of the secretary of state not later than one month after the completion of the canvass of the election returns for each primary and general election, identifying, by county, the number of absent voter's ballots cast and the number of those ballots that were counted, and the number of provisional ballots cast and the number of those ballots that were counted, for that election. The secretary of state shall maintain the information on the web site in an archive format for each subsequent election.

(Z) Conduct voter education outlining voter identification, absent voters ballot, provisional ballot, and other voting requirements;

(AA) Establish a procedure by which a registered elector may make available to a board of elections a more recent signature to be used in the poll list or signature pollbook produced by the board of elections of the county in which the elector resides;

(BB) Disseminate information, which may include all or part of the official explanations and arguments, by means of direct mail or other written publication, broadcast, or other means or combination of means, as directed by the Ohio ballot board under division (F) of section 3505.062 of the Revised Code, in order to inform the voters as fully as possible concerning each proposed constitutional amendment, proposed law, or referendum;

(CC) Be the single state office responsible for the implementation of the "Uniformed and Overseas Citizens Absentee Voting Act," Pub. L. No. 99-410, 100 Stat. 924, 42 U.S.C. 1973ff, et seq., as amended, in this state. The secretary of state may delegate to the boards of elections responsibilities for the implementation of that act, including responsibilities arising from amendments to that act made by the "Military and Overseas Voter Empowerment Act," Subtitle H of the "National Defense Authorization Act for Fiscal Year 2010," Pub. L. No. 111-84, 123 Stat. 3190.

(DD) Adopt rules, under Chapter 119. of the Revised Code, to establish procedures and standards for determining when a board of elections shall be placed under the official oversight of the secretary of state, placing a board of elections under the official oversight of the secretary of state, a board that is under official oversight to transition out of official oversight, and the secretary of state to supervise a board of elections that is under official oversight of the secretary of state.

(EE) Perform other duties required by law.

Whenever a primary election is held under section 3513.32 of the Revised Code or a special election is held under section 3521.03 of the Revised Code to fill a vacancy in the office of representative to congress, the secretary of state shall establish a deadline, notwithstanding any other deadline required under the Revised Code, by which any or all of the following shall occur: the filing of a declaration of candidacy and petitions or a statement of candidacy and nominating petition together with the applicable filing fee; the filing of protests against the candidacy of any person filing a declaration of candidacy or nominating petition; the filing of a declaration of intent to be a write-in candidate; the filing of campaign finance reports; the preparation of, and the making of corrections or challenges to, precinct voter registration lists; the receipt of applications for absent voter's ballots or uniformed services or overseas absent voter's ballots; the supplying of election materials to precincts by boards of elections; the holding of hearings by boards of elections to consider challenges to the right of a person to appear on a voter registration list; and the scheduling of programs to instruct or reinstruct election officers.

In the performance of the secretary of state's duties as the chief election officer, the secretary of state may administer oaths, issue subpoenas, summon witnesses, compel the production of books, papers, records, and other evidence, and fix the time and place for hearing any matters relating to the administration and enforcement of the election laws.

In any controversy involving or arising out of the adoption of registration or the appropriation of funds for registration, the secretary of state may, through the attorney general, bring an action in

the name of the state in the court of common pleas of the county where the cause of action arose or in an adjoining county, to adjudicate the question.

In any action involving the laws in Title XXXV of the Revised Code wherein the interpretation of those laws is in issue in such a manner that the result of the action will affect the lawful duties of the secretary of state or of any board of elections, the secretary of state may, on the secretary of state's motion, be made a party.

The secretary of state may apply to any court that is hearing a case in which the secretary of state is a party, for a change of venue as a substantive right, and the change of venue shall be allowed, and the case removed to the court of common pleas of an adjoining county named in the application or, if there are cases pending in more than one jurisdiction that involve the same or similar issues, the court of common pleas of Franklin county.

Public high schools and vocational schools, public libraries, and the office of a county treasurer shall implement voter registration programs as directed by the secretary of state pursuant to this section.

The secretary of state may mail unsolicited applications for absent voter's ballots to individuals only for a general election and only if the general assembly has made an appropriation for that particular mailing. Under no other circumstance shall a public office, or a public official or employee who is acting in an official capacity, mail unsolicited applications for absent voter's ballots to any individuals.

R.C. 3501.32

(A) Except as otherwise provided in division (B) of this section, on the day of the election the polls shall be opened by proclamation by the voting location manager, or in the manager's absence by a voting location manager chosen by the precinct election officials, at six-thirty a.m. and shall be closed by proclamation at seven-thirty p.m. unless there are voters waiting in line to cast their ballots, in which case the polls shall be kept open until such waiting voters have voted.

(B) On the day of the election, any polling place located on an island not connected to the mainland by a highway or a bridge may close earlier than seven-thirty p.m. if all registered voters in the precinct have voted. When a polling place closes under division (B) of this section the voting location manager shall immediately notify the board of elections of the closing.

R.C. 3503.16

(A) Except as otherwise provided in division (E) of section 111.44 of the Revised Code, whenever a registered elector changes the place of residence of that registered elector from one precinct to another within a county or from one county to another, or has a change of name, that registered elector shall report the change by delivering a change of residence or change of name form, whichever is appropriate, as prescribed by the secretary of state under section 3503.14 of the Revised Code to the state or local office of a designated agency, a public high school or vocational school, a public library, the office of the county treasurer, the office of the secretary of state, any office of the registrar or deputy registrar of motor vehicles, or any office of a board of elections in person or by a third person. Any voter registration, change of address, or change of name application, returned by mail, may be sent only to the secretary of state or the board of elections.

A registered elector also may update the registration of that registered elector by filing a change of residence or change of name form on the day of a special, primary, or general election at the polling place in the precinct in which that registered elector resides or at the board of elections or at another site designated by the board.

(B)

(1)

(a) Any registered elector who moves within a precinct on or prior to the day of a general, primary, or special election and has not filed a notice of change of residence with the board of elections may vote in that election by going to that registered elector's assigned polling place, completing and signing a notice of change of residence, showing identification in the form of a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the name and current address of the elector, and casting a ballot.

(b) Any registered elector who changes the name of that registered elector and remains within a precinct on or prior to the day of a general, primary, or special election and has not filed a notice of change of name with the board of elections may vote in that election by going to that registered elector's assigned polling place, completing and signing a notice of a change of name, and casting a provisional ballot under section 3505.181 of the Revised Code. If the registered elector provides to the precinct election officials proof of a legal name change, such as a marriage license or court order that includes the elector's current and prior names, the elector may complete and sign a notice of change of name and cast a regular ballot.

(2) Any registered elector who moves from one precinct to another within a county or moves from one precinct to another and changes the name of that registered elector on or prior to the day of a general, primary, or special election and has not filed a notice of change of residence or change of name, whichever is appropriate, with the board of elections may vote in that election if that registered elector complies with division (G) of this section or does all of the following:

(a) Appears at anytime during regular business hours on or after the twenty-eighth day prior to the election in which that registered elector wishes to vote or, if the election is held on the day of a presidential primary election, the twenty-fifth day prior to the election, through noon of the Saturday prior to the election at the office of the board of elections, appears at any time during regular business hours on the Monday prior to the election at the office of the board of elections, or appears on the day of the election at either of the following locations:

(i) The polling place for the precinct in which that registered elector resides;

(ii) The office of the board of elections or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location instead of the office of the board of elections.

(b) Completes and signs, under penalty of election falsification, the written affirmation on the provisional ballot envelope, which shall serve as a notice of change of residence or change of name, whichever is appropriate;

(c) Votes a provisional ballot under section 3505.181 of the Revised Code at the polling place, at the office of the board of elections, or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location instead of the office of the board of elections, whichever is appropriate, using the address to which that registered elector has moved or the name of that registered elector as changed, whichever is appropriate;

(d) Completes and signs, under penalty of election falsification, a statement attesting that that registered elector moved or had a change of name, whichever is appropriate, on or prior to the day of the election, has voted a provisional ballot at the polling place for the precinct in which that registered elector resides, at the office of the board of elections, or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location instead of the office of the board of elections, whichever is appropriate, and will not vote or attempt to vote at any other location for that particular election.

(C) Any registered elector who moves from one county to another county within the state on or prior to the day of a general, primary, or special election and has not registered to vote in the county to which that registered elector moved may vote in that election if that registered elector complies with division (G) of this section or does all of the following:

(1) Appears at any time during regular business hours on or after the twenty-eighth day prior to the election in which that registered elector wishes to vote or, if the election is held on the day of a presidential primary election, the twenty-fifth day prior to the election, through noon of the Saturday prior to the election at the office of the board of elections or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location instead of the office of the board of elections, appears during regular business hours on the Monday prior to the election at the office

of the board of elections or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location instead of the office of the board of elections, or appears on the day of the election at the office of the board of elections or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location instead of the office of the board of elections;

(2) Completes and signs, under penalty of election falsification, the written affirmation on the provisional ballot envelope, which shall serve as a notice of change of residence;

(3) Votes a provisional ballot under section 3505.181 of the Revised Code at the office of the board of elections or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location instead of the office of the board of elections, using the address to which that registered elector has moved;

(4) Completes and signs, under penalty of election falsification, a statement attesting that that registered elector has moved from one county to another county within the state on or prior to the day of the election, has voted at the office of the board of elections or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location instead of the office of the board of elections, and will not vote or attempt to vote at any other location for that particular election.

(D) A person who votes by absent voter's ballots pursuant to division (G) of this section shall not make written application for the ballots pursuant to Chapter 3509. of the Revised Code. Ballots cast pursuant to division (G) of this section shall be set aside in a special envelope and counted during the official canvass of votes in the manner provided for in sections 3505.32 and 3509.06 of the Revised Code insofar as that manner is applicable. The board shall examine the pollbooks to verify that no ballot was cast at the polls or by absent voter's ballots under Chapter 3509. or 3511. of the Revised Code by an elector who has voted by absent voter's ballots pursuant to division (G) of this section. Any ballot determined to be insufficient for any of the reasons stated above or stated in section 3509.07 of the Revised Code shall not be counted.

Subject to division (C) of section 3501.10 of the Revised Code, a board of elections may lease or otherwise acquire a site different from the office of the board at which registered electors may vote pursuant to division (B) or (C) of this section.

(E) Upon receiving a notice of change of residence or change of name, the board of elections shall immediately send the registrant an acknowledgment notice. If the change of residence or change of name notice is valid, the board shall update the voter's registration as appropriate. If that form is incomplete, the board shall inform the registrant in the acknowledgment notice specified in this division of the information necessary to complete or update that registrant's registration.

(F) Change of residence and change of name forms shall be available at each polling place, and when these forms are completed, noting changes of residence or name, as appropriate, they shall

be filed with election officials at the polling place. Election officials shall return completed forms, together with the pollbooks and tally sheets, to the board of elections.

The board of elections shall provide change of residence and change of name forms to the probate court and court of common pleas. The court shall provide the forms to any person eighteen years of age or older who has a change of name by order of the court or who applies for a marriage license. The court shall forward all completed forms to the board of elections within five days after receiving them.

(G) A registered elector who otherwise would qualify to vote under division (B) or (C) of this section but is unable to appear at the office of the board of elections or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which registered electors may vote, at that other location, on account of personal illness, physical disability, or infirmity, may vote on the day of the election if that registered elector does all of the following:

(1) Makes a written application that includes all of the information required under section 3509.03 of the Revised Code to the appropriate board for an absent voter's ballot on or after the twenty-seventh day prior to the election in which the registered elector wishes to vote through noon of the Saturday prior to that election and requests that the absent voter's ballot be sent to the address to which the registered elector has moved if the registered elector has moved, or to the address of that registered elector who has not moved but has had a change of name;

(2) Declares that the registered elector has moved or had a change of name, whichever is appropriate, and otherwise is qualified to vote under the circumstances described in division (B) or (C) of this section, whichever is appropriate, but that the registered elector is unable to appear at the board of elections because of personal illness, physical disability, or infirmity;

(3) Completes and returns along with the completed absent voter's ballot a notice of change of residence indicating the address to which the registered elector has moved, or a notice of change of name, whichever is appropriate;

(4) Completes and signs, under penalty of election falsification, a statement attesting that the registered elector has moved or had a change of name on or prior to the day before the election, has voted by absent voter's ballot because of personal illness, physical disability, or infirmity that prevented the registered elector from appearing at the board of elections, and will not vote or attempt to vote at any other location or by absent voter's ballot mailed to any other location or address for that particular election.

R.C. 3509.05

(A) When an elector receives an absent voter's ballot pursuant to the elector's application or request, the elector shall, before placing any marks on the ballot, note whether there are any voting marks on it. If there are any voting marks, the ballot shall be returned immediately to the board of elections; otherwise, the elector shall cause the ballot to be marked, folded in a manner that the stub on it and the indorsements and facsimile signatures of the members of the board of elections on the back of it are visible, and placed and sealed within the identification envelope received from the director of elections for that purpose. Then, the elector shall cause the statement of voter on the outside of the identification envelope to be completed and signed, under penalty of election falsification.

If the elector does not provide the elector's driver's license number or the last four digits of the elector's social security number on the statement of voter on the identification envelope, the elector also shall include in the return envelope with the identification envelope a copy of the elector's current valid photo identification, a copy of a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the name and address of the elector.

The elector shall mail the identification envelope to the director from whom it was received in the return envelope, postage prepaid, or the elector may personally deliver it to the director, or the spouse of the elector, the father, mother, father-in-law, mother-in-law, grandfather, grandmother, brother, or sister of the whole or half blood, or the son, daughter, adopting parent, adopted child, stepparent, stepchild, uncle, aunt, nephew, or niece of the elector may deliver it to the director. The return envelope shall be transmitted to the director in no other manner, except as provided in section 3509.08 of the Revised Code.

When absent voter's ballots are delivered to an elector at the office of the board, the elector may retire to a voting compartment provided by the board and there mark the ballots. Thereupon, the elector shall fold them, place them in the identification envelope provided, seal the envelope, fill in and sign the statement on the envelope under penalty of election falsification, and deliver the envelope to the director of the board.

Except as otherwise provided in division (B) of this section, all other envelopes containing marked absent voter's ballots shall be delivered to the director not later than the close of the polls on the day of an election. Absent voter's ballots delivered to the director later than the times specified shall not be counted, but shall be kept by the board in the sealed identification envelopes in which they are delivered to the director, until the time provided by section 3505.31 of the Revised Code for the destruction of all other ballots used at the election for which ballots were provided, at which time they shall be destroyed.

(B)

(1) Except as otherwise provided in division (B)(2) of this section, any return envelope that is postmarked prior to the day of the election shall be delivered to the director prior to the eleventh

day after the election. Ballots delivered in envelopes postmarked prior to the day of the election that are received after the close of the polls on election day through the tenth day thereafter shall be counted on the eleventh day at the board of elections in the manner provided in divisions (C) and (D) of section 3509.06 of the Revised Code or in the manner provided in division (E) of that section, as applicable. Any such ballots that are received by the director later than the tenth day following the election shall not be counted, but shall be kept by the board in the sealed identification envelopes as provided in division (A) of this section.

(2) Division (B)(1) of this section shall not apply to any mail that is postmarked using a postage evidencing system, including a postage meter, as defined in 39 C.F.R. 501.1.