IN THE SUPREME COURT OF OHIO

STATE EX REL. OHIO DEMOCRATIC PARTY, ET AL,	:	
Relators,	:	Case No. 2020-0388
v.	:	Original Action in Prohibition
OHIO SECRETARY OF STATE FRANK LAROSE,	:	
Respondent.	:	

MERIT BRIEF OF RESPONDENT OHIO SECRETARY OF STATE FRANK LAROSE

Respectfully submitted,

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"It is full speed ahead until a staffer yells 'Iceberg.'"

This is one Democratic National Committee member's view of the Democratic Party's decision-making on whether the spread of COVID-19 will cause the Party to postpone its National Convention scheduled to begin July 13, 2020 in Milwaukee, Wisconsin. *See* David Siders, "DNC insists its convention is on – but many Democrats aren't buying it," Politico, *available at* www.politico.com/news/2020/03/23/dnc-insists-democratic-convention-on-144714.

The unprecedented fight to stop the spread of COVID-19 has upended much of our lives. Ohioans have been ordered to stay at home except when conducting essential activities. We must maintain social distancing of at least six feet from any other person, and we must not gather together in groups larger than ten people. Other businesses that are very important to people such as restaurants, bars, fitness gyms, and other places of public amusement where people gather together are shuttered. All K-12 schools are closed. Everyday Ohioans have had to postpone cherished events like high school proms, baby showers, and family reunions. It is no wonder that our presidential primary election has been impacted in ways few people ever expected.

Ohio provides multiple options for voting, including liberal periods for early in-person and absentee voting, but nearly 85% of Ohio voters *still* vote in person at their assigned polling location on election day. So, during the evening of March 16 when Ohio Department of Health Director Dr. Amy Acton closed all the polling locations that were to be used the next day, millions of voters who had planned to show up and vote on March 17 would be disenfranchised and their voices would be silenced if Secretary LaRose did not act to allow them to vote in a safe manner.

Secretary LaRose didn't wait for a staffer to yell "Iceberg!"—he acted immediately, and within his authority under Ohio law by issuing Directive 2020-06. Through Directive 2020-06, Secretary LaRose provides a process by which millions of Ohio voters who would have undoubtedly voted on March 17 in ordinary times will still be able to cast their votes in the 2020

presidential primary election. True, Secretary LaRose's decision is unprecedented. These are unprecedented times. But his decision was *not* without legal authority. As Ohio's Chief Elections Officer, Secretary LaRose was duty bound and legally authorized to take the only action he could to preserve Ohioans' right to vote.

The Ohio Democratic Party, the Libertarian Party of Ohio and a registered voter, Kiara Sanders, bring this original action in prohibition claiming that Secretary LaRose had *no* authority to issue a directive that provided alternatives for voting when in-person voting became an impossibility. Each Relator asks this Court to implement voting schedules that are uniquely tailored to fit their individual—and competing—political preferences to accommodate the delegate selection process for their national conventions, even as there is doubt that the conventions can be held as scheduled.

Relators' action fails for several reasons. First, Relators' action should be dismissed because they fail to establish that they are entitled to a writ of prohibition. Secretary LaRose did not take judicial or extra-judicial action, his directive was authorized by law, and Relators have an adequate remedy at law in the form of a prohibitory injunction or an action for declaratory relief. The Libertarian Party of Ohio also lacks associational and individual standing because it fails to show that it or one of its members has suffered a direct and concrete injury. It does not even premise its "harm" on the impact the 2020 presidential primary election will have on in its delegate selection process for its national convention.

But even if Relators are entitled to a writ of prohibition, despite failing to demonstrate any of the required factors, the Court should not grant their proposed relief. Each Relator's requested relief contradicts the other's, and the relief requested is not even internally consistent on a Relator-by-Relator basis. Why haven't these political parties been able to coalesce around the fight to

protect all Ohioans' right to vote? Because they only seek a voting schedule that fits within their own special interests. And their preferred voting schedules are all centered around the current dates for their national conventions. The Relators' national conventions may still be postponed if and when one of their staffers finally yells "Iceberg!"

As stated above, this Court should dismiss this case. But, if this Court finds it necessary to fashion some relief, it should defer to the judgment of the Secretary of State and the General Assembly, should the General Assembly act on this issue, in setting an administratively achievable election schedule. Today, the General Assembly is in session to consider legislation that provides for a conclusion of the 2020 presidential primary election. But one thing is clear - Secretary LaRose did not wait for the iceberg. He has laid out a path towards securing the right to vote for all Ohio registered voters in this primary election.

BACKGROUND

Ohio's presidential primary elections are set by statute. Revised Code 3501.01 defines a presidential primary election as a primary election "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." R.C. 3501.01(E)(2). The Revised Code further specifies that when "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." *Id*. In 2020, the third Tuesday after the first Monday in March fell on March 17.

As March 17 approached, so too did the novel coronavirus named COVID-19. COVID-19, a new strain of coronavirus that had not been previously identified in humans, is a respiratory disease that can result in serious illness or death. *See* Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio, *available at* https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limit-and-or-prohibit-mass-gatherings-in-the-state-of-

ohio. Ohio Department of Health Director Dr. Amy Acton announced the first cases of COVID-19 on March 9, 2020, just over a week before the scheduled primary. *Id.* Every day as the primary drew nearer, Dr. Acton announced more and more cases of COVID-19 throughout Ohio.

Dr. Acton Closed the Polls to Slow the Spread of COVID 19.

As the Director of the Department of Health, Dr. Acton has extremely broad authority to regulate the spread of infectious diseases like COVID-19. The Revised Code gives the Director of the Ohio Department of Health "supervision of all matters relating to the preservation of the life and health of the people," including "ultimate authority in matters of quarantine and isolation." R.C. 3701.13. The Director may also "make special or standing orders or rules . . . for preventing the spread of contagious or infectious diseases." *Id*. And "[t]he director of health shall investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it." R.C. 3714(A) (emphasis added).

Since March 12, 2020, Ohio Department of Health Director Dr. Acton has made necessary use of her authority to curb the spread of COVID-19 in Ohio. First, she issued an order prohibiting mass gatherings in the State of Ohio pursuant to her authority under R.C. 3701.13. *See* Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio, *available at* https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limit-and-or-prohibit-mass-gatherings-in-the-state-of-ohio. The order seeks to "prevent the spread of COVID-19 into the State of Ohio" by prohibiting mass gatherings. It defines a mass gathering as "any event or convening that brings together one hundred (100) or more persons in a single room or single space at the same time, such as an auditorium, stadium, arena, large conference room, meeting

hall, theater, or any confined indoor or outdoor."[1] *Id.* The order urged all persons to "maintain social distancing (approximately six feet away from other people) whenever possible." *Id.*

As the threat mounted, the Director took more aggressive steps, including closing K-12 schools in Ohio (many of which serve as polling places) until April, and eliminating visitor access to nursing homes. *See* Order the Closure of all K-12 Schools in Ohio, *available at* https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-the-closure-of-all-k-12-school-in-the-state-of-ohio; Order to Limit Access to Ohio's Nursing Homes and Similar Facilities, *available at* https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limit-access-to-ohios-nursing-homes-and-similar-facilities. Within days, these orders proved insufficient to slow the spread of COVID-19 in Ohio. So, on Sunday March 15, the Director closed restaurants for dine-in customers and shuttered Ohio's pubs and bars. Order Limiting the Sale of Food and Beverages, Liquor, Wine, and Beer to Carry-Out and Delivery Only, *available at* https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/health-director-order-limit-food-alcohol-sales-to-carry-out-delivery-only.

Each order reiterated the need to maintain social distancing of six feet from other persons. The orders also noted that while the coronavirus is most contagious when carriers are symptomatic, spread can occur before a carrier shows symptoms. These coronavirus characteristics posed obvious risks to in-person voting, where asymptomatic virus carriers could nonetheless spread the

[1] As the virus spread, Dr. Acton later revised the definition of mass gatherings down to fifty or more people. *See* Amended Order, *available at* https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limit-prohibit-mass-gatherings-ohio-amended. The Centers for Disease Control and Prevention recommends that gatherings not exceed ten people. *See* CDC, "Resources for Large Community Events & Mass Gatherings," *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html.

virus to voters and poll workers. Secretary LaRose instructed the boards of election to mitigate these risks by sanitizing the voting machines and pledged to reimburse the boards for any supplies purchased for this purpose. Press Release, *available at* https://www.sos.state.oh.us/media-center/press-releases/2020/2020-03-132/.

Prior to that, Secretary LaRose took the extraordinary step on March 9 – just 8 days prior to the election – to instruct the boards of elections to relocate any polling locations that were to be housed within senior residential living facilities. *See* Directive 2020-03 *available at* www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-03.pdf. Secretary LaRose took this proactive step because individuals over the age of 65 are at an especially high risk of suffering more severe illness or even death due to COVID 19.

On the afternoon of March 16, 2020, Governor DeWine, Dr. Acton, Lieutenant Governor Jon Husted, and Secretary LaRose held a press conference. For the first time since the COVID-19 outbreak began, Dr. Acton and Governor DeWine recommended that Ohioans over the age of 65 *not* appear in person at the polls for Ohio's March 17, 2020 primary. *See* 3-16-20 COVID-19 Update, *available at* http://ohiochannel.org/collections/governor-mike-dewine. A press release followed, noting that while pre-March 16 guidance "indicated it would be safe to vote on election day . . ., new information has led ODH to recommend Ohioans who are 65 and older to self-quarantine in their homes." Press Release, *available at* https://www.sos.state.oh.us/media-center/press-releases/2020/2020-03-16/. This virus is fifteen times more likely to be fatal for vulnerable populations, which includes those over the age of 65.

Shortly after the press conference and press release were issued, two Ohioans over age 65 sued the Secretary of State in the Franklin County Court of Common Pleas, seeking to postpone the primary election scheduled for the next day, March 17, 2020. *Reardon v. LaRose*, No. 20 CV

002105 (F.C.C.P. Mar. 16, 2020). The plaintiffs alleged that they faced the following choice: (1) forfeit their federal constitutional right to vote in the primary under the First and Fourteenth Amendments or (2) expose themselves and others to an uncontained and uncured coronavirus in direct contravention of ODH's medical advice. The court denied the TRO, ruling that postponing or extending voting was the duty of the General Assembly, not the Franklin County Common Pleas Court.

Without some state intervention, the election would have proceeded in a matter of hours, bringing hundreds of voters together in small polling places across the State. Many of these voters might have already had COVID-19 without showing symptoms and thus had the potential to widely spread COVID-19 among the voting population, and beyond. Proceeding with the primary had one clear result: exposing thousands, perhaps millions, of Ohio voters and their families to COVID-19. Finding the increased risk of transmission of COVID-19 medically untenable, the Director issued the following order late Monday evening approximately two hours after the denial of the TRO:

> Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions, I hereby **ORDER** all polling locations in the State of Ohio **closed** on March 17, 2020. This Order shall 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 the Ohio Department of Health rescinds or modifies this Order.

Closure of the Polling Locations in the State of Ohio on Tuesday March 17, 2020, *available at* https://coronavirus.ohio.gov/wps/wcm/connect/gov/c6a47eea-ce8a-4eff-bad3-d4141216bf9b/ODH+Director%27s+Order+Closure+of+the+Polling+Locations.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-c6a47eea-ce8a-4eff-bad3-d4141216bf9b-n3ELaWW.

With the Polls Shut Down and Election Day Voting an Impossibility, Secretary LaRose Issued Directive 2020-06.

When Director Acton issued her order on the evening of March 16, the time for requesting an absentee ballot had passed. For most voters, Saturday, March 14, 2020, was the deadline to request an absentee ballot by mail. R.C. 3509.03(D).[2] Likewise, early in-person voting at the county boards of elections had concluded at 2:00 p.m. earlier that day. R.C. 3509.051; Directive 2019-28 § 1.04. Due to the Director's order, Ohio's polling places could not open at 6:30 a.m. on March 17, 2020, as contemplated by R.C. 3501.01(E)(2) and R.C. 3501.32(A). Thus, registered Ohio voters who had not cast absentee ballots—either by mail or in person—and planned to vote at their polling place on election day had no remaining alternative method to vote. And worse, these voters had no notice until it was too late. As of March 16, just 523,522 of the 7,776,063 Ohioans who were registered to vote in the 2020 presidential primary had voted. Affidavit of Amanda Grandjean ¶ 7. This left 7.2 million registered Ohio voters, through no fault of their own, without a way to vote.

This very real disenfranchisement of up to 7.2 million voters led Secretary LaRose to act. Unlike several other states, the General Assembly has failed to provide any procedure or mechanism in the Revised Code for an election to be extended or postponed by an executive officer of the state in the event of an unforeseen public health crisis, natural disaster, or emergency declared on or just before a scheduled election day.[3] *See, e.g.*, Ky. Rev. Stat. § 39A.100(1)(l); La. Rev. Stat. § 18:401.1.A. The General Assembly simply left Secretary LaRose without other options once Dr. Acton closed the polls.

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[2] Unexpectedly hospitalized voters can request absentee ballots until 3:00 p.m. on election day. R.C. 3509.08.

[3] Governor DeWine may change the date of an election under R.C. 161.09, which applies only in the event of an "attack" by a foreign power. The General Assembly has created no other emergency exceptions.

Secretary LaRose is the Chief Election Officer for the State of Ohio. R.C 3501.04. "The secretary of state is the chief election officer of the state, with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV of the Revised Code." R.C. 3501.04. He may issue directives to the boards of elections "as to the proper methods of conducting elections" and to "prepare rules and instructions for the conduct of elections." R.C. 3501.05(B)-(C). Further, the Secretary, like every elected official, took an oath of office in which he swore to "support the constitution of the United States and the constitution of [Ohio,] and faithfully to discharge the duties of the office." R.C. 3.23. He also must instruct the boards of elections on the applicable requirements of federal law. *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 2011-Ohio-35, 941 N.E.2d 782, ¶ 37. In the absence of emergency authority to change an election date from the General Assembly, these statutory duties qualify Secretary LaRose to issue directives to prevent widespread, and unprecedented, disenfranchisement.

After Dr. Acton issued her Order closing all the polling locations, Secretary LaRose used these powers to issue Directive 2020-06, which suspended in-person voting in the primary election until June 2, 2020. *See* Directive 2020-06, *available at* https://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-06am.pdf. The Secretary ordered the boards of election to "post notice on their websites, social media, at the board of elections, and at polling places that in-person voting for the March 17, 2020 Presidential Primary Election is suspended." *Id*. Secretary LaRose ordered boards of elections to accept absentee ballot applications until Tuesday, May 26, 2020, and to count any absentee ballot postmarked by June 1, 2020, and received by the boards no later than June 12, 2020. The Directive included special instructions for UOCAVA absentee ballots and voters experiencing unforeseen hospitalizations.

The Directive ordered the boards to "conduct in-person voting at polling locations in their county. The polls will open at 6:30 a.m. and close at 7:30 p.m. on Tuesday, June 2, 2020." The Directive specifically prohibited boards "from tabulating and reporting any results until the close of polls on Tuesday, June 2, 2020," and set forth a timeline for official canvassing "[c]onsistent with current law" and based upon the conclusion of in-person voting on June 2. Nothing about the Directive altered the election date or canceled it.

In the early hours of March 17, shortly after the Director closed the polls and Secretary LaRose issued Directive 2020-06, this Court dismissed a petition for writ of mandamus "compelling [Secretary LaRose] to hold the . . . primary on March 17, 2020." *See State ex rel. Speweik v. LaRose*, S. Ct. No. 2020-0382 (Ohio Mar. 16, 2020), Compl. ¶ 16. Secretary LaRose moved to dismiss the petition, arguing that he "will not violate a clear legal duty by complying with an order from Ohio's Health Director in the midst of a pandemic." *Id*. Motion to Dismiss at 2. Although this Court struck the motion to dismiss as prohibited by Rule 12.08(A)(3) of the Rules of Practice, it also denied the writ of mandamus. *State ex rel. Speweik v. LaRose*, S. Ct. No. 2020-0382, 2020-Ohio-997 (Mar. 17, 2020).

The States that Held in Person Voting Experienced Havoc, Chaos and Low Voter Turnout.

March 17, 2020, proceeded with the Director's order in effect. The polls were closed and there was no in-person voting that day. Hindsight shows that Ohio was prudent to close the polls on March 17 and to try for in-person voting on June 2, 2020, or such other schedule as the General Assembly may adopt. Arizona, Florida, and Illinois made the tough calls to proceed with their primaries on March 17 in the midst of the COVID-19 pandemic, and even with the most recent public health guidance. These states saw chaos and havoc. In Chicago, Illinois, "the realities of holding a primary amid a pandemic settled in as the entity overseeing the city's primary grappled

with shortages of election judges as well as complaints over failure to comply with sanitary guidelines of wiping down voting areas." *See* Natasha Korecki, "Coronavirus wreaks havoc on Tuesday primaries," Politico, *available at* www.politico.com/news/2020/03/17/coronavirus-wreaks-havoc-tuesday-primaries-134124. Voters who showed up at polling locations reported that they were unable to vote due to a lack of voting supplies and poll workers. *See* Molly Hensley-Clancy, "The Coronavirus Outbreak Has Made Voting in Illinois Today A Full Mess," Buzzfeed News, *available at* www.buzzfeednews.com/article/mollyhensleyclancy/coronavirus-illinois-primary-voting-election. Other polling locations reported little to no cleaning supplies: "Some precincts had zero hand sanitizer, voters said, or only a few bottles that had been brought in by poll workers themselves." *Id.* In Florida, polling locations did not open at all because poll workers did not show up and others were forced to close when poll workers did not show up. *See* "Coronavirus upends primary elections in Florida, Illinois and Arizona; vote postponed in Ohio," Los Angeles Times, *available at* www.latimes.com/politics/story/2020-03-17/coronavirus-primary-election-confusion-florida-ohio-polling. One election official stated, "If it wasn't so tragic, it would be comical, the numbers of errors we're seeing today." *Id.* The same happened in Arizona. Eighty voting sites were closed without notice because of a lack of poll workers or cleaning supplies to disinfect the sites. *See* Bill Theobald, "Coronavirus chaos at the polls as primaries proceed in 3 of 4 states," The Fulcrum, *available at* www.thefulcrum.us/coronavirus-primaries.

Arizona, Florida, and Illinois also saw historically low voter turnout, suggesting that the failure to provide voters with a safe option chilled the franchise. Turnout in Florida was "skimpy" and the numbers in Chicago fell "below even the pace of mayoral contests, which are typically low-turnout affairs." *See* Natasha Korecki, "Coronavirus wreaks havoc on Tuesday primaries,"

Politico, *available at* www.politico.com/news/2020/03/17/coronavirus-wreaks-havoc-tuesday-primaries-134124. The low turnout in Chicago mirrored the low turnout in the entire state of Illinois. *Id.* In all three states, "despite the high stakes and months of polling showing strong emotions in the presidential contest, polling locations often featured short lines, empty booths – and the unmistakable sign of the times, bottles of hand sanitizer." *See* Geoff Earle, "Voter turnout is low amid coronavirus outbreak in three states holding presidential primaries Tuesday as Chicago avoids 'rush hour' throngs and 800 volunteers in Palm Beach stay home," The Daily Mail, *available at* www.dailymail.co.uk/news/article-8119907/uncertainty-surrounds-Democratic-primary-Ohio-scraps-vote.html.

The effect of the primaries on COVID-19 infection rates in Arizona, Florida, and Illinois cannot be stated with any certainty. But it bears mentioning that, as of March 22, Michigan reported triple the cases of COVID-19 compared to Ohio. *See* Laura Johnston, "Ohio has 351 coronavirus cases, compared to 1,035 in Michigan: Compare the timeline of restrictions," Cleveland.com, available at https://www.cleveland.com/news/2020/03/compare-coronavirus-cases-in-ohio-michigan.html. Ohio reported its first cases on March 9, and Michigan followed the next day. Schools closed the same day in both states, and Governor DeWine and Governor Whitmer banned mass gatherings and shuttered restaurants and bars just one day apart. Both Michigan's and Ohio's reported cases crept up in unison until Michigan's cases exponentially spiked on March 19. The main difference between Michigan and Ohio? Michigan conducted in-person voting for the 2020 presidential primary on March 10.

Most Ohioans Still Vote in Person on Election Day.

Ohio provides multiple options for voting, including liberal periods for early in-person and absentee voting, but nearly 85% of Ohio voters still vote on "election day". *See* Affidavit of Amanda Grandjean, ¶ 26. In two of the last three presidential primary elections – 2008 and 2016

– more than three million voters showed up at their polling locations on "election day" and cast their votes. *Id.* at ¶ 25. But without the swift action by Director Acton and Secretary LaRose on March 16, there is little doubt that the same chaos and confusion present in Arizona, Florida, and Illinois would have affected election officials here. And like those states, historically low voter turnout likely would have resulted. Low election-day turnout, considering Ohioans' overwhelming preference for election-day voting, would have chilled Ohioans' exercise of their right to vote. And once election day passed, no opportunity existed to remediate the effects of the pandemic for the millions of Ohio voters who would undoubtedly have stayed home rather than going to the polls and voting.

This is why Directive 2020-06, in the unprecedented circumstances facing Secretary LaRose, was the last, best option. Directive 2020-06 outlines a process for Ohio voters, many of whom would have undoubtedly voted in person in ordinary times, to still be able to safely cast a vote. Because Ohio lacks a statutory provision to extend voting in the event of a declared emergency other than an enemy attack, Directive 2020-06 was the only way to prevent the disenfranchisement of millions of Ohio voters while at the same time providing them with a safer opportunity to vote.

Relators Seek a Writ of Prohibition to Get a Voting Schedule That Satisfies Their Own Special Interests.

Relators now show up as the proverbial Monday morning quarterbacks, outlining what they think Secretary LaRose, Director Acton, and Governor DeWine *should have done* in the waning hours before millions of Ohioans would congregate in small polling locations to vote in the 2020 presidential primary election. Relators ODP and Sanders bring an original action in prohibition against Secretary LaRose complaining that he was "patently and unambiguously without jurisdiction and legal authority to suspend, move, or set the date of Ohio's 2020 presidential

primary election." ODP Compl. ¶ 13. Likewise, Relator LPO claims that Secretary LaRose "lacks jurisdiction and legal authority under Ohio law to fix the date(s) of Ohio's state-office primary and general elections." LPO Compl. at 4 .

But that is where the similarities between ODP and LPO end. First, ODP claims that only the judiciary possesses the authority to extend voting opportunities, ODP Merit Brief at 18, while LPO claims that it is strictly a legislative function, which can be modified by courts to remedy constitutional violations. LPO Merit Brief at 6-9. And Amicus Curiae offer still more interpretations of the authority to set election schedules. Disability Rights Ohio claims that "[i]t is the State's responsibility under the ADA to ensure that reasonable modifications are in place to ensure that individuals with disabilities enjoy a full and equal opportunity to vote." Disability Rights Brief at 1. On the other side of the coin, the Primary Election Candidates assert that suspending and/or extending voting opportunities is strictly a legislative function over which this Court has no authority in prohibition to remedy. Primary Election Candidates Brief at 7-9.

Relators all agree, however, that Secretary LaRose, as the Chief Elections Officer, had *no* authority to issue a directive that provided alternatives for voting when in-person voting became an impossibility. And Relators all claim that this Court has the power to compel Secretary LaRose to adopt a voting schedule that fits each Relator's individual political preference. As set forth below, the Relators' Complaints fail for myriad reasons, both jurisdictional and on the merits. And even if the Relators have set forth a viable claim for a writ of prohibition, this Court should show deference to the General Assembly and Secretary LaRose in fashioning a remedy.

LAW AND ARGUMENT

I. Relators have not demonstrated the elements of a prohibition action.

"Three elements are necessary for a writ of prohibition to issue: the exercise of judicial (or quasi-judicial) power, the lack of authority to exercise that power, and the lack of an adequate

remedy in the ordinary course of the law." *State ex rel. Save Your Cohouse Commt. v. City of Medina*, 157 Ohio St.3d 423, 2019-Ohio-3737, 137 N.E.3d 1118, ¶ 23. And when a prohibition action targets "a decision of the secretary of state, the standard is whether the secretary engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable law." *State ex rel. Lucas Cty. Republican Party Executive Commt. v. Brunner*, 125 Ohio St.3d 427, 2010-Ohio-1873, 928 N.E.2d 1072, ¶ 9. Relators here can satisfy none of three writ-of-prohibition elements.

A. Judicial or quasi-judicial action.

Relators' claim never leaves the ground because they fail to establish the "fundamental" first element: the exercise of judicial or quasi-judicial power. *Save Your Courthouse* at ¶ 26.

This Court has held that judicial and quasi-judicial authority refer to "the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial." *Id*. ¶ 26, quoting *State ex rel. Wright v. Ohio Bureau of Motor Vehicles*, 87 Ohio St.3d 184, 186 (1999). Markers of a hearing resembling a judicial trial include sworn testimony, the receipt of evidence, or other conduct resembling that of a judicial trial. *State ex rel. Baldzicki v. Cuyahoga Cty. Bd. of Elections*, 90 Ohio St.3d 238, 242, 736 N.E.2d 893 (2000). Without these markers, even administrative hearings do not qualify as a judicial or quasi-judicial proceeding for purposes of a prohibition action. For example, a hearing before a board of elections regarding an ordinance's placement on an election ballot was not a quasi-judicial proceeding. *Id*. Although counsel made oral arguments, this Court determined that this alone did not suffice. Without sworn testimony or evidence, "the board did not conduct a hearing sufficiently resembling a judicial trial in denying relators' protest." *Id*. Thus, "because the board did not exercise quasi-judicial authority in denying relators' protest, prohibition will not lie." *Id*. This Court has also determined that the Secretary's issuance of a directive is not a judicial or quasi-judicial act. *State ex rel. Parrott v. Brunner*, 117 Ohio St.3d 175, 2008-Ohio-813, 882 N.E.2d 908, ¶ 8.

When there is no hearing at all, it is even clearer that prohibition does not lie. For example, a petition committee sought a writ of prohibition against the City of Medina, seeking to invalidate a city ordinance. *Save Your Courthouse* at ¶ 24. That ordinance allowed the city to enter into an agreement with the county to design and construct a shared courthouse. *Id*. at ¶ 5. A petition committee, after unsuccessfully attempting to gather signatures to put the ordinance on the ballot, sought to undo the ordinance through a writ of prohibition. *Id*. at ¶ 24. The committee claimed that the city exceeded its authority under the city charter's emergency powers in passing the ordinance. *Id*. at ¶ 25. Because it claimed that the ordinance was an unlawful exercise of the city's authority, the committee sought a writ of prohibition. This Court dismissed the prohibition claim because "the committee cannot satisfy the first and fundamental element of a prohibition claim: the exercise of judicial or quasi-judicial power." *Id*. at ¶ 26. The city exercised its *legislative* authority in passing the challenged ordinance, and "because that power was legislative in nature, not judicial, it is not subject to restraint by prohibition." *Id*. at ¶ 31. Importantly, this Court did not need to decide whether the city actually exceeded its legislative authority under the city charter; it sufficed, for purposes of the prohibition action, to decide that the challenged action was not judicial or quasi-judicial in nature. *Id*. at ¶ 32. The inquiry ended there.

Here, Relators cannot show that issuing Directive 2020-06 constituted a judicial or quasi-judicial action. Relators never allege that a hearing occurred or was required, that evidence was received, or that testimony was taken or solicited. Nor do Relators allege that Secretary LaRose adjudicated rights between any parties. Although Secretary LaRose took an action that had legal *effect* in issuing Directive 2020-06, this Court has specifically found that insufficient to state an action in prohibition when the markers of a judicial trial are absent. *See id*. at ¶ 28 (dismissing a

prohibition action when "[a]lthough the city took an action that had legal ramifications, it did not receive evidence, place witnesses under oath, or take any other actions that qualify as judicial.").

In fact, Relators' own complaints reveal that the first element of a prohibition action is absent here. Relator ODP alleges that "the legal authority to set the date of Ohio's 2020 presidential primary election rests with the Ohio General Assembly." ODP Compl. ¶ 15. Of course, the General Assembly exercises "the legislative power of the state." Const. art. II § 1. And ODP alleges that Secretary LaRose asserted jurisdiction over the General Assembly's legislative authority in Directive 2020-06. ODP Compl. ¶ 16. Stated differently, ODP here alleges that Secretary LaRose usurped the *legislative authority* of the General Assembly, so a writ of prohibition must issue. Whether Relators are right or wrong about that—and they are wrong, as the Secretary will explain *infra*—the allegation itself shows that no judicial or quasi-judicial action is at issue. According to Relators' own complaint, this action centers on the purported unlawful exercise of legislative, not judicial, authority. Under these circumstances, this Court has found that prohibition does not lie, whether or not Secretary LaRose ultimately exceeded his authority. *See Save Your Courthouse* at ¶ 32 ("Because the city did not exercise quasi-judicial authority, prohibition is not available to block the ordinance. In reaching this decision, we express no opinion as to the merits of the committee's claim that the passage of this ordinance . . . violated the city charter.").

Perhaps sensing that its complaint was inadequate on this point, Relator ODP switched gears in its merits brief. There, it claims Secretary LaRose exercised judicial power by determining that the closing of the polls likely would result in violations of voters' constitutional rights and issuing a directive extending the statutory voting period in order to remedy the constitutional violation. ODP Merits Brief at 18. Secretary LaRose performed a judicial function, according to ODP, because courts often do the same thing by way of injunctive relief. That is, courts decide

whether polls must remain open after the statutorily mandated closing time of 7:30 p.m. in order to prevent unconstitutional disenfranchisement. ODP cites over half a dozen cases in which courts in Ohio issued injunctions keeping the polls open or otherwise suspending certain election laws to preserve Ohioans' right to vote. ODP Merit Brief at 18-22. Because courts can keep polls open after hours, ODP claims, Secretary LaRose exercised judicial power when he did just that.

ODP fundamentally misunderstands the judicial power at issue in the cases it cites. In those cases, the judicial power was not the underlying constitutional analysis; it was the power to *issue an injunction* to remedy the pleaded constitutional claim. *See, e.g.*, *State ex rel. Lomaz v. Court of Common Pleas*, 36 Ohio St.3d 209, 212, 522 N.E.2d 551 (1988) ("Furthermore this Court has determined the issuance of injunctive relief to be an exercise of judicial power sufficient to establish the first element of the prohibition standard."); *State ex rel. Dayton v. Kerns*, 49 Ohio St.2d 295, 297, 361 N.E.2d 247 (1977) ("Since issuing an injunction clearly involves the exercise of judicial power . . . , the first prerequisite for prohibition is met."). If Secretary LaRose had purported to issue an injunction to move the primary date, ODP might have a point on the judicial-power element. But Secretary LaRose did no such thing, and ODP does not even contend he did. He issued a *directive* to the boards of elections—an action that falls squarely within his statutory powers. *See* R.C. 3501.05(B). This Court has already determined that the Secretary's issuance of a directive is not a judicial or quasi-judicial power. *See Parrott* at ¶¶ 7-8.

Accepting ODP's theory of judicial power would result in absurdity. ODP's theory of judicial power goes thus: if a court can issue an injunction to force or prevent a certain act, any state official who does the same act through other means must be exercising judicial power.[4] But

[4] ODP appears to believe that the constitutional analysis underpinning a court's decision to grant or deny injunctive relief is itself judicial power. But legislative and executive officials can also use constitutional analysis to inform their decisionmaking without engaging in judicial acts. The

this could transform nearly every state action into a judicial action. Governor DeWine's authority to move polling hours because of "enemy attack," for example, would be a judicial act because a court can also issue an injunction that changes polling hours. And if and when the General Assembly sets a new election schedule or confirms the existing one, it too, will be exercising judicial power under ODP's view. Because a court can alter an election schedule by way of injunction to prevent constitutional violations, under ODP's theory of this case, any state actor doing the same is really exercising judicial power. This Court's prohibition precedents do not demand this absurd result.

Because Relators have failed to show that Secretary LaRose took a judicial or quasi-judicial action in issuing Directive 2020-06, this prohibition action fails, and the writ should be dismissed.

B. Secretary LaRose exercised his statutory authority to issue directives as to the proper method of conducting elections after Dr. Acton closed the polls.

But even if the Court believes that this case somehow involves the exercise of judicial or quasi-judicial authority, Relators' claim still fails. After Dr. Acton closed all the State's polling locations, Secretary LaRose took the only action left open to him to prevent the unavoidable disenfranchisement of millions of Ohioans—he lawfully exercised his statutory authority to issue a directive preserving the right to vote. A step-by-step examination of the unprecedented circumstances, and Dr. Acton and Secretary LaRose's respective authority in the face of them, demonstrates why.

General Assembly, for example, might delete sections from a bill after determining that federal law would likely preempt those sections under the Supremacy Clause. But no one would contend that the General Assembly's action—passing a law—is really a judicial action because the General Assembly used constitutional principles in the process.

1. Dr. Acton unquestionably had the authority to close the polls.

Dr. Acton possesses broad authority to "make special or standing orders or rules" for "preventing the spread of infectious diseases." R.C. 3701.13. She also must "investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it." R.C. 3701.14(A). The Ohio Supreme Court observed that the "right of the state through the exercise of its police power to subject persons and property to reasonable and proper restraints in order to secure the general comfort, health and prosperity of the state is no longer open to question." *Ex parte Company*, 106 Ohio St. 50, 55, 139 N.E. 204 (1922). The state may regulate "those who by conduct and association contract such disease as makes them a menace to the health and morals of the community" under this power. *Id*. at 57. The United States Supreme Court agreed, "distinctly recogniz[ing] the authority of a State to enact quarantine laws," and "to prevent the spread of contagious disease." *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 35 (1905). Although the exercise of the state's power may be "distressing, inconvenient or objectionable to some," state authorities must prioritize the comfort and safety of the many in the face of a pandemic. *Id*. at 28. The Director's authority under R.C. 3701.13 extends to the closure of polling places to contain the spread of an uncured, highly contagious disease.[5] She exercised that authority here.

[5] LPO claims that Dr. Acton exceeded her statutory authority under R.C. 3701.13 in closing the polls. In support of this argument, LPO cites (1) a case in which a court found that the Director exceeded her authority under R.C. 3709.21, *see D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health,* 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, (2) a law preventing closures of the highway, R.C. 3707.05, and (3) a law preventing the Director from interfering with public officers not afflicted with or directly exposed to contagious disease, R.C. 3707.05. First, none of these authorities says anything about the Director's authority under R.C. 3701.13, a wholly different statute. And second, R.C. 3707.05 specifically allows the Director to "interfere" with public officials when they are, as here, directly exposed to a contagious or infectious disease.

2. Secretary LaRose did not "set" the 2020 presidential primary election, but issued a directive that secured the conduct of the election.

Given the unprecedented circumstances, Secretary LaRose acted within the authority granted him by Ohio law. Secretary LaRose was faced with the unexpected and unprecedented closure of all Ohio's polling places mere hours before the would-be opening of the polls. The Ohio Department of Health Director's decision left Secretary LaRose in the following predicament only hours before the polls were scheduled to open: there would be no in-person voting and millions of Ohioans would be disenfranchised, and yet as Ohio's chief elections official, Secretary LaRose was required to ensure a free and fair election.

Ohioans who planned to vote in person on election day still had a clear, unambiguous *federal constitutional* right to vote. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The United States Supreme Court has held that "when the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). A general right to vote is "implicit in our constitutional system," *Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999) and is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). At bottom, "the right to suffrage is a fundamental matter in a free and democratic society." *Reynolds*, at 561-62. Voting in an unimpaired manner is the bedrock of America's political system, and a voter prohibited from voting may claim a constitutional violation has occurred. *Id*.

Knowing all this, and knowing that he would face criticism no matter which option he chose, Secretary LaRose issued Directive 2020-06 to allow voting beyond the scheduled election

date of March 17, 2020, to prevent the disenfranchisement of up to 7.2 million Ohioans. Ohio law permits Secretary LaRose to take such actions. "The secretary of state is the chief election officer of the state, with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV of the Revised Code." R.C. 3501.04. He may issue directives to the boards of elections "as to the proper methods of conducting elections" and to "prepare rules and instructions for the conduct of elections." R.C. 3501.05(B)-(C). Further, the Secretary, like every elected official, took an oath of office in which he swore to "support the constitution of the United States and the constitution of [Ohio,] and faithfully to discharge the duties of the office." R.C. 3.23. He also must instruct the boards of elections on the applicable requirements of federal law. *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 2011-Ohio-35, 941 N.E.2d 782, ¶ 37.

Here, the Secretary's order instructed the boards how to continue to conduct a constitutional primary election by ordering them not to tabulate votes and to continue to accept absentee-ballot applications and completed ballots. Further, the Directive instructed the boards how to address the closure of the polls on March 17, which would have, if not for Directive 2020-06, resulted in widespread disenfranchisement. As such, the order falls within the Secretary's statutory authority. R.C. 3501.05; 3.23; *Painter* at ¶ 37.

Indeed, this Court recognized—at least implicitly—the Secretary's authority to suspend in-person voting. On March 16, a judicial candidate for the Wood County Court of Common Pleas filed a petition for a writ of mandamus forcing Secretary LaRose to adhere to the March 17, 2020 primary date and force in-person voting to occur on that date. *State ex rel. Speweik v. Wood County Board of Elections*, No. 2020-0382 (Ohio Mar. 16, 2020). In response, Secretary LaRose argued that he did not "violate a clear legal duty by complying with an order from Ohio's Health Director

in the midst of a pandemic" and suspending the in-person voting portion of the primary on March 17. *See id*. Secretary LaRose's Motion to Dismiss at 2. This denied the writ without a written opinion, at least implicitly recognizing the Director's authority to close the polling places and the Secretary's duty to comply with such orders. *See State ex rel. Speweik v. Wood Cty. Bd. of Elections*, No. 2020-0382, 2020-Ohio-997. ODP attempts to avoid *Speweik* by noting that the mandamus case preceded the Director's order and Directive 2020-06. But the order closing all polling locations and Directive 2020-06 both took effect before this Court's decision issued. Further, Secretary LaRose specifically apprised the Court of the Director's order shuttering the polls. *State ex rel. Speweik v. Wood County Board of Elections*, No. 2020-0382 (Ohio Mar. 16, 2020), Motion to Dismiss at 2.

Relators reject these authorities, insisting that Secretary LaRose unlawfully reset the primary for June 2, 2020. To be clear, Secretary LaRose did not "set" the 2020 presidential primary election when he issued Directive 2020-06. The 2020 presidential primary election was set in accordance with R.C. 3501.01(E)(2) for March 17, 2020. Secretary LaRose did not change that. He did not cancel or reschedule the primary election, which could have required throwing out votes already cast and starting over. Here, all early in-person and absentee votes are being held and will be counted.

Instead, under these extraordinary and unprecedented circumstances and to account for Dr. Acton's closure of polling locations, the Secretary took the only action he could to preserve Ohioans' right to vote in this election; he suspended the in-person voting component of the primary under Dr. Acton's Order and extended opportunities to vote until June 2, 2020. Neither Relator disputes the fact that, absent Directive 2020-06, nothing would have prevented the boards from tabulating votes on March 17. Without Directive 2020-06, up to 7.2 million Ohioans would have

been unable to vote. Relators gloss over these facts. Secretary LaRose ensured that Ohio registered voters who were unable to vote on March 17, 2020 have the opportunity to vote through the alternative date of June 2, 2020, or any other date the General Assembly may establish.

Further, LPO's reliance on *Libertarian Party of Ohio v. Brunner,* 567 F.Supp.2d 1006 (S.D. Ohio 2008) to argue that Secretary LaRose lacked the authority to extend voting once Dr. Acton closed the polls is misplaced. In *Brunner,* then-Secretary of State Jennifer Brunner issued a directive that created an entirely "new structure for minor party ballot access" after the Sixth Circuit struck down the prior structure in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), and the General Assembly had not passed new legislation filling in the gaps on minor party ballot access. *Id.* at 1010, 1012. LPO filed for a preliminary injunction claiming that the Secretary's new directive usurped the General Assembly's authority to regulate elections and created an unconstitutional barrier to ballot access in violation of its First and Fourteenth Amendment rights. *Id.* at 1011. The court struck down the directive, finding that the Secretary lacked authority to issue rules as a substitute for a lack of state legislative action where the legislature simply chose not to act. *Id.* at 1015. According to the court, "the Secretary of State's authority does not . . . extend to filling a void in Ohio's election law caused by the legislature ignoring a judicial pronouncement declaring a state statute unconstitutional." *Id.* at 1012. Further, the directive severely burdened LPO's First and Fourteenth Amendment rights.

The circumstances surrounding Secretary LaRose's issuance of Directive 2020-06 and the issuance of the *Brunner* directive in 2008 cannot be more different. The need for Directive 2020-06 arose when in-person voting for millions of Ohio registered voters became an *impossibility* less than twelve hours before the polls were set to open. The scheme for presidential primary elections is set forth in law, and Directive 2020-06 did not change that framework. Instead, Directive 2020-06 is

an interpretation of the existing laws as they apply to our current unprecedented public health emergency, and it provides a lawful avenue to respect and uphold the franchise within the very real, imminent public health crisis in Ohio. Moreover, unlike the *Brunner* directive, Directive 2020-06 causes no barriers to voting. In fact, its sole intent is to ensure that all registered voters who were disenfranchised by the poll closure are provided with the opportunity to vote, a right guaranteed by Ohio law and the Ohio and United States Constitutions. Accordingly, *Brunner* says little about the unprecedented emergency at issue here.

Because Secretary LaRose fulfilled his statutory obligation to set rules for conducting elections, he acted within his authority, and Relators' writ of prohibition fails.

C. Adequate Remedy at Law.

Finally, all of the Relators have an adequate remedy at law in the form of a prohibitory injunction or action for declaratory relief in a federal district court or state common pleas court. This Court has repeatedly affirmed that actions for prohibitory injunctions constitute adequate remedies at law in the election context. *See, e.g.*, *Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 2004-Ohio-3701, 811 N.E.2d 1130, ¶ 18; *State ex rel. Barton v. Butler Cty. Bd. of Elections*, 39 Ohio St.3d 291, 292, 530 N.E.2d 871 (1988) ("Prohibition does not lie to correct an allegedly erroneous exercise of properly assumed quasi-judicial authority by a board of elections in approving referendum petitions for the ballot; injunction is the proper remedy in such a case."). True, this Court sometimes permits extraordinary writs in the election context when the proximity of an election would not afford relators sufficient time to pursue relief in common pleas court. *See State ex rel. Evans v. Blackwell,* 111 Ohio St.3d 1, 2006-Ohio-4334, 854 N.E.2d 1025, ¶ 42. But Relators here could seek emergency relief and expedited consideration before the June 2 in-person voting date. Relators offer no reason why either a federal or state court could not resolve such a case expeditiously.

Relators can establish none of the elements for a writ of prohibition, and their claim in prohibition fails.

II. Relators' actions fall outside this Court's original action jurisdiction.

Relators style their complaints as writs of prohibition, but neither complaint truly tracks the elements of that writ. In reality, Relators want this Court to issue a declaratory judgment that Directive 2020-06 is unlawful, to find that Secretary LaRose violated the United States and Ohio Constitutions, and to enjoin him from enforcing Directive 2020-06. But Relators do not assert these constitutional claims openly because they do not fall within this Court's original-action jurisdiction. Relators have dressed their claims up as prohibition claims, but their essence remains.

This Court has long recognized, at least in the mandamus context, that if the allegations in a complaint indicate that the real object sought in a complaint for an extraordinary writ are declaratory judgment and a prohibitory injunction, the complaint must be dismissed. *State ex rel. Evans* at ¶ 19; *see also State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 716 N.E.2d 704 (1999); *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 72 Ohio St. 3d 69, 70, 647 N.E.2d 769 (1995). In *Evans*, this Court refused to grant a writ of mandamus against then-Secretary Blackwell's decision to transmit an initiated statute to the Ohio General Assembly before all protests were completed in the common pleas courts. The Court recognized that what Evans really sought was a declaratory judgment that the Secretary's actions violated Ohio law and a prohibitory injunction against the clerks in the General Assembly from keeping the initiated statute on their rolls. *Evans*, 2006-Ohio-4334 at ¶¶ 17-19. No reason exists to treat prohibition actions any differently than mandamus actions in this context, particularly where, as here, no judicial power is involved. When the subject of a prohibition complaint is really a declaratory judgment that the Secretary violated Ohio or federal law, prohibition should not lie.

Here, ODP truly seeks a declaratory judgment that Directive 2020-06 is unlawful and a prohibitory injunction preventing the Secretary from enforcing it. As in *Evans*, Relators "had an adequate legal remedy by an action for a declaratory judgment that the secretary's" directive was improper and "a prohibitory injunction preventing . . . the Secretary of State from further acting" on the directive in violation of the United States and Ohio Constitutions. *Evans* at ¶ 45. ODP offers no evidence that such an action would not provide "a complete, beneficial, and speedy remedy." *Id*. ODP's complaint is not a true writ of prohibition, and it should be dismissed.

For its part, LPO does not even pay lip service to the standard for granting a writ of prohibition in its brief, neglects to set forth the factors for prohibition, and offers no substantive argument for any of them. Instead, LPO urges this Court to find that Secretary LaRose violated Articles I and II of the United States Constitution in issuing Directive 2020-06. According to LPO, this Court has jurisdiction over LPO's claims because it "is empowered to exercise original jurisdiction over election claims that arise under Ohio law." LPO Brief at 17 n.11. Thus, "it is required to also exercise its original jurisdiction over election challenges that arise under the Constitution of the United States." *Id*. LPO offers no authority for these propositions, and they are flatly contradicted by Article 4 of the Ohio Constitution, which gives this Court original jurisdiction only in the following cases: quo warranto, mandamus, habeas corpus, prohibition, procedendo, in any cause on review as may be necessary to its complete determination, and matters relating to the practice of law. Const. art. 4 § 2(B)(1). The list does not include election challenges arising under the United States Constitution. In fact, the Ohio Constitution specifically states that cases involving "questions arising under the constitution of the United States" fall within this Court's *appellate* jurisdiction. *Id*. § 2(B)(2)(a)(iii). LPO should not be permitted to circumvent

the Ohio Constitution to present a federal constitutional case in the garb of an original action in prohibition.

Relators couch their requested relief as writs of prohibition. But ODP's complaint asks the Court to exercise original-action prohibition jurisdiction in a declaratory-judgment case, and LPO's complaint asks the Court to hear a federal constitutional action under its original-action prohibition jurisdiction. Both are far afield of this Court's original jurisdiction. Prohibition does not include these types of claims, and this Court should dismiss Relators' claims for want of jurisdiction.

III. LPO lacks standing.

"'It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.'" *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 18, quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999). "The essence of the doctrine of standing is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Id.*, quoting *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.*, 28 Ohio St.3d 317, 321, 503 N.E.2d 1025 (1986); *ProgressOhio.org, Inc., v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 1. Thus, courts must conduct a preliminary inquiry into whether a person seeking relief has standing to bring an action in the first place. *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 12.

A. LPO lacks associational standing to bring a claim on behalf of disenfranchised voters.

LPO purports to represent the rights of "registered voters who seek [*sic*] in its primary elections for congressional and state-office candidates and who did not vote by absentee ballot in the March 17, 2020 Libertarian congressional and state-office primary and who were eligible to vote in person on March 17, 2020 in that primary" to be afforded an "adequate alternative" to vote in the 2020 presidential primary election. LPO Compl. ¶ 3. LPO fails to identify a single member who was disenfranchised and, therefore, it lacks associational standing to bring this action on behalf of its member voters. "An association has standing on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit." *State ex rel. Am. Subcontractors Assn v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011-Ohio-2881, 950 N.E.2d 535, ¶ 12, quoting *Ohio Contrs. Assn. v. Bicking,* 71 Ohio St. 3d 318, 320, 643 N.E. 2d 1088 (1994). This Court has emphasized that, "to have standing, the association must establish that its members have suffered actual injury." (internal citation omitted) *Id*. That is, "[a]t least one of the members of the association must be actually injured." *Id*.

LPO does not identify even one of its members in this action, let alone a member that alleges an injury. See *id*. Instead, LPO broadly claims to represent all "registered voters". LPO Compl. ¶ 3. Even if LPO had identified a member that has been injured, LPO still cannot possess standing to represent the interests of "registered voters" in general, especially considering that LPO requests relief that is advantageous only to its own primary election process. *See* LPO Compl. ¶ 14 ("The Libertarian Party's National Convention which will select its presidential ticket begins on May 21, 2020, and it is important to Intervener-Relator that its Ohio primary be concluded no

later than the beginning of this National Convention."). LPO simply has not demonstrated any factors that would confer associational standing in this case and therefore, LPO's claims on behalf of "registered voters" should be dismissed.

B. LPO itself lacks a direct and concrete injury.

LPO fails to identify any direct and concrete injury it suffered as a minor political party that was caused by Dr. Acton's closure of the polls on March 17, 2020 or by the Secretary's issuance of Directive 2020-06. LPO specifically admits that it "does not use Ohio's presidential primary to select its delegates" for the Libertarian Party Convention. LPO Brief at 5. LPO only asserts that "it is important" that Ohio conclude voting "no later than the beginning of [LPO's] National Convention." LPO Compl. ¶ 14. LPO offers no specific reason why "it is important" to receive Ohio's primary results before the convention; it just vaguely asserts that the results "provide critical information," and "critically facilitate[s]" LPO's participation in the convention. LPO Brief at 6. LPO does not explain what critical information the primary results provide to it, how those results facilitate the national convention, or what sort of harm it will suffer if the national convention goes forward as scheduled.

LPO's preference for one resolution over another in this matter is insufficient to confer standing here. An injury sufficient to confer standing is "concrete and not simply abstract or suspected." *State ex rel. Food & Water Watch v. State*, 2018-Ohio-555, 100 N.E.3d 391, ¶ 20, quoting *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994). A party lacks standing to challenge a legislative enactment that "does not cause or threaten direct and concrete injury to the party asserting the challenge." *Preterm-Cleveland, Inc. v. Kasich,* 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461, ¶ 27. "A bare allegation that plaintiff fears that some injury will or may occur is insufficient to confer standing." *Wurdlow v. Turvy*, 2012-Ohio-4378,

977 N.E.2d 708, ¶ 15 (10th Dist.), citing *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325, 712 N.E.2d 1258 (10th Dist. 1998).

In *Preterm-Cleveland*, this Court dismissed an abortion facility's constitutional challenge to provisions in a 2013 budget bill for lack of standing because the facility failed to allege a direct or concrete injury. *Preterm-Cleveland* at ¶ 31. There, the abortion facility challenged three newly enacted provisions that regulated, restricted, or made criminal certain acts with respect to abortion activities. *Id*. at ¶ 4. The facility claimed that it possessed standing to challenge all three provisions because the provisions caused the facility "new administrative burdens, limit[ed] the number of hospitals with which it could have such an agreement, and plac[ed] its license at greater risk of loss or revocation than before." *Id*. at ¶ 22. The facility expressed fear of future harms including criminal and civil liability and reduced ability to continue to provide the same level of services. *Id*. at ¶ 22, 26. The Court found that the facility lacked standing because it failed to show that it "has suffered or is threatened with direct and concrete injury[,]" but rather, the facility "offered unsubstantiated, conclusory averments about those provisions…[A]nd it only speculates that it might be injured." *Id.* at ¶ 22. As to the facility's fear of future harm, this Court stated, "although [the facility] presented evidence that it altered its conduct due to its fear of criminal and civil liability pursuant to those provisions, it neither suffered nor is threatened with a direct and concrete injury because of them." *Id*. at ¶ 26.

So too here, LPO does not allege any concrete injuries but instead advocates for a voting schedule for an Ohio primary that *it does not use,* LPO Brief at 5, that it claims fits its national convention schedule. LPO does not allege that it will be actually injured by a resolution that does not follow its preferred timeline. General and unspecific allegations of injury—like LPO's here—

do not establish standing. *See Walgate*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240 at ¶ 26. Accordingly, LPO's complaint should be dismissed for this additional reason.

IV. Even if relators are entitled to a writ of prohibition, despite failing to demonstrate any of the required factors, the Court should not grant their proposed relief.

Each Relator's requested relief contradicts each other's, and the relief requested is not even internally consistent on a Relator-by-Relator basis. Thus, even if this Court accepts Relators' legal theories and grants a writ of prohibition, it should not adopt either of the alternative schedules proposed by Relators. Under both ODP's and LPO's own legal theories, the Secretary has no authority to prescribe dates and deadlines different from those in the Revised Code. If Relators are correct, an alternative election schedule set by the *General Assembly* is the only lawful outcome.

Relators each ask this Court to order Secretary LaRose to rescind Directive 2020-06 and to instead order the boards to alter certain statutory absentee-ballot deadlines. ODP Compl. at Prayer for Relief; LPO Compl. at Prayer for Relief. ODP asks for an order compelling boards of elections to send absentee ballots applications to all registered voters who have not yet voted, to accept absentee ballot applications until April 25, 2020, and to count absentee ballots postmarked by April 28, 2020, and received by the boards by May 8, 2020. ODP Compl. at Prayer for Relief; ODP Compl. Ex. A Proposed Order at ¶¶ 4-5. LPO would prefer a later schedule, with boards accepting absentee ballot applications until May 8, 2020, and counting all absentee ballots postmarked by May 12, 2020, and received by the boards by May 20, 2020. LPO Compl. at Prayer for Relief. Both ask this Court to settle their dispute.

Absentee-ballot deadlines, like the date of elections, are set by statute and are tied to the date of an election. Absentee-ballot applications must be received by the boards of elections no

later than noon on Saturday before election day. R.C. 3509.03(D). Voters must postmark[6] absentee ballots no later than the day before election day, and the boards must receive the ballots ten days after the election. Ohio Rev. Code § 3509.05(B)(1). For the March 17, 2020 primary election, these dates fell on March 14, March 16, and March 27, respectively.

Relators allege that only the General Assembly may establish these dates and that Secretary LaRose may do nothing to alter them—even though his inaction would have resulted in the disenfranchisement of 7.2 million Ohio voters. Accordingly, if Relators' theory of relief is correct and Secretary LaRose cannot disturb a statutory election date or deadline, the above absentee-ballot deadlines must remain unless and until the General Assembly alters them. Secretary LaRose, according to Relators, cannot set alternative dates, through Directive 2020-06 or by an order setting the alternative dates preferred by Relators. Thus, even if the Court accepts Relators' argument that a writ of prohibition must issue, the Court should not order Secretary LaRose to set absentee-ballot deadlines different from the deadlines in the Revised Code. It should take Relators at their word that only the General Assembly may do so. And, unless and until it does, voting is over. Relators' proposed relief flatly contradicts their own legal theory, and the Court should not grant them their requested relief.

In fact, under Relators' theory, even an order from this Court establishing election-related dates and deadlines would be unlawful. By ordering absentee-ballot deadlines that differ from the deadlines set forth by the General Assembly in the Revised Code, the Court would usurp any alternative election schedule the General Assembly might vote to adopt. The General Assembly exercises the legislative authority of this State, and "the separation-of-powers doctrine precludes

[6] With the exception of overseas military and civilian voters ("UOCAVA voters") whose ballots need not be postmarked by the foreign country in which they marked their absent voter's ballots.

courts from enjoining the General Assembly from exercising its legislative power to enact laws." *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, ¶ 2.

Relator ODP seeks to avoid this result by invoking Section 2(B)(1)(f) of Article IV of the Ohio Constitution. Section 2(B)(1)(f) gives this Court original jurisdiction "in any cause on review as may be necessary to its complete determination." This provision, according to ODP, allows this Court to set a new election schedule to afford the parties here clarity, finality, and a "complete determination" of the issues.

But ODP misinterprets Section 2(B)(1)(f) and the cases cited in its brief. None of the cases involved a situation, like here, where the complaint completely failed to invoke the Court's original jurisdiction. Instead, in each case, the Court already had jurisdiction over the underlying case, but did not have the power to afford complete relief without Section 2(B)(1)(f).

For example, in *State ex rel. Polcyn v. Burkhart*, 33 Ohio St.2d 7, 292 N.E.2d 883 (1973), the Court granted a writ of mandamus ordering the submission of certain charter amendments to the electorate. But the proposed amendments contained certain ministerial errors, and the Court could not correct those errors within the mandamus framework. Instead, the Court used its authority under Article IV Section 2(B)(1)(f) to correct the charter amendments' errors before submitting them to the electorate. *Id*. at 12; *see also State v. Steffen*, 70 Ohio St.3d 399, 408-410, 639 N.E.2d 67 (1994) (using Section 2(B)(1)(f) to prevent frivolous filings when the Court had original jurisdiction over the action because it involved supervisory power over the state courts); *State ex rel. Owens v. Campbell*, 27 Ohio St.2d 264, 267 (1971) (using Section 2(B)(1)(f) to retain jurisdiction of a writ of habeas corpus until the proper parties could be joined). None of the cases cited by Relator ODP used Section 2(B)(1)(f) to circumvent the requirement of original jurisdiction

or to confer original jurisdiction where none would have otherwise existed. The Court need not permit such a drastic extension of its original jurisdiction here.

Thus, to the extent that this Court accepts Relators' theory of relief that only the General Assembly possesses the authority to set election-related dates and deadlines, the Court cannot order Secretary LaRose to adopt alternative dates and deadlines. Under Relators' own theory, this too would usurp the General Assembly's authority.

V. If this Court decides to fashion relief, it should defer to Secretary LaRose and the General Assembly.

To the extent the Court finds it necessary to fashion some relief for Relators, it should defer to the judgment of the General Assembly and/or Secretary of State in setting an administratively achievable election schedule. On the date of this brief's filing, the General Assembly will be in session to consider legislation that provides for the conclusion of the 2020 presidential primary election. *See* Anna Staver, "Ohio lawmakers at odds on what should be in coronavirus bill," Columbus Dispatch, *available at* https://www.dispatch.com/news/20200323/ohio-lawmakers-debate-what-should-be-in-coronavirus-bill. Secretary LaRose sent a letter to the members of the General Assembly asking them to support a bill he had drafted called the "Ohio Voters First Act," calling it "a path forward to complete this election as quickly as possible that will simultaneously protect public safety and ensure every eligible Ohio voter has the opportunity to have their voice heard." *See* Grandjean Aff. ¶ 24, Exh. B. As part of this bill, the Secretary is asking the General Assembly to appropriate sufficient funds for his office to mail an absent voter's ballot *application* (not an absent voter's *ballot*) to all 7.2 million registered Ohio votes who did not vote early prior to March 17, either in-person or via mail, and for those voters to have a postage-paid return envelope for both returning their application and later returning their ballot. This Court should

first give the Secretary and the General Assembly time to consider these very important and very pressing issues.

Directive 2020-06 sets out a viable avenue to provide *all* registered voters the greatest opportunity to vote in the 2020 presidential primary election regardless of their political affiliation. It includes both extended absentee voting through June 2, 2020 *and* a day of in person voting on June 2, 2020, if the public health professionals deem it is then safe to do so. This dual approach is appropriate and reasonable considering the fact that most Ohioans still prefer to vote in person on election day. *Id.* at ¶ 26. And, it is a plan that Secretary LaRose's office can actually execute. Accordingly, it is reasonable to assume that the General Assembly will shortly adopt something like this into Ohio law.[7] This Court should give the General Assembly the opportunity to do so before weighing in.

Portions of Relators' requested relief, on the other hand, are simply impossible to execute within the timeframe for this election. Instead of holding a day of in-person voting, Relators demand that Secretary LaRose create and mail out absentee ballot applications to every registered voter that has not already cast his or her vote in the 2020 presidential primary election. ODP Compl. at Prayer for Relief. There is simply not enough time for this process to accommodate 7.2 million voters before April 28. Grandjean Aff. ¶ 23. To achieve Relators' desired results, Secretary LaRose would need to compile the data necessary for mailing the application, supply that data to a vendor, wait for the vendor to mail applications to voters, allow the voters to return their applications to the relevant boards, instruct the boards to provide the proper absentee ballot

[7] Deferring to the General Assembly will also allow full consideration of the issues raised in the League of Women Voters and A. Philip Randolph Institute's amicus brief, including providing all Ohioans who have not yet voted a cost-free opportunity to vote and the logistics of extending absentee-ballot deadlines.

style for each voter, mail the ballots to the voters, and allow the voters sufficient time to complete the ballots. *Id.* at ¶¶ 8-22. In a normal election, this process takes months to plan and execute; Relators want it done in four weeks. *Id*. at ¶ 21. It simply is not possible.

Finally, Relators' claims that extending absentee voting and in-person voting to June 2, 2020 will harm their parties' national conventions process are dubious at best. First, LPO admits that it does not even *use* Ohio's presidential primary election to select its delegates to its national convention. LPO Brief at 5. For its part, ODP argues that it takes several weeks after the primary election to complete the delegate selection process to be ready for its national convention, which is scheduled for July 13-16, 2020. Beswick Aff. ¶¶ 4-6. ODP argues that June 2, 2020 is far too late of a date to end the presidential primary election. ODP Brief at 33. ODP does not explain, however, how it cannot prepare for its national convention when state democratic parties in states that hold their presidential primary elections on June 2, 2020 will be ready. Indeed, four states, Montana, New Jersey, New Mexico and South Dakota and the District of Columbia hold their presidential primary elections on June 2, 2020. Grandjean Aff. ¶ 27, Exh. C. And other states have delayed their primaries to June 2 as well: Connecticut, Indiana, Maryland, and Rhode Island. Nick Corasaniti, "2020 Democratic Primary Election: Voting Postponed in 9 States and Territories," New York Times, available at https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html. Louisiana and Kentucky delayed their primaries even later in June. *Id*. These state parties all demonstrated the flexibility to cope with a once-in-a-generation global pandemic. And it seems that the national party shares this flexibility: one democratic official describing the scheduling of the national convention as "fluid." Reid Epstein, "Democratic Convention Planners Look at Contingency Options," New York Times, available at

https://www.nytimes.com/2020/03/23/us/politics/democratic-convention-milwaukee-coronavirus.html. Only ODP, it seems, cannot bend.

Again, this Court should defer to the judgment of the General Assembly and Secretary LaRose in setting an administratively achievable voting schedule.

CONCLUSION

Relators failed to establish even a single element of a writ of prohibition, and the writ must be denied. Alternatively, if the Court finds the elements are met, the Court should not adopt the non-statutory scheduled proposed by Relators. If only the General Assembly can set election-related dates and deadlines, as the Relators argue, then only the General Assembly may act.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that *Merit Brief of Respondent Ohio Secretary of State Frank LaRose* was electronically filed and a true and accurate copy was served on March 25, 2020, via email upon the following:

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