

**IN THE SUPREME COURT OF OHIO**

STATE EX REL. OHIO DEMOCRATIC :  
PARTY, *et al.*, :  
 :  
Relators, : Case No. 2020-0388  
 :  
v. :  
 : ORIGINAL ACTION IN  
FRANK LAROSE, in his official capacity : PROHIBITION  
as Ohio Secretary of State, :  
 : Expedited Election Matter Under  
Respondent. : S. Ct. Prac. R. 12.08

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**BRIEF OF AMICUS CURIAE REPRESENTATIVE JASON STEPHENS  
IN SUPPORT OF NEITHER SIDE**

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## **I. STATEMENT OF INTEREST**

Jason Stephens is a State Representative in the Ohio House of Representatives from the 93rd District. Representative Stephens and the other members of the General Assembly are acting right now to protect Ohioans' fundamental right to vote in primary elections. Statutory language is being introduced in the General Assembly *today* to restore voting rights that were denied to voters by members of the Executive Branch. (*See* Exhibit A attached hereto).

Jason Stephens files this amicus brief because the legislature has the right and the duty to legislate, without a non-legislative branch of the government—whether the Executive Branch or the Judicial Branch—acting contrary to Ohio's constitution by purporting to enact legislation without legislative authority.

## **II. INTRODUCTION**

Amicus Stephens agrees that Secretary of State Frank LaRose acted unlawfully when he directed boards of election to close all voting locations for the March 17, 2020 primary election, and when he purported to direct boards of elections to conduct a new primary election on June 2, 2020. However, Amicus Stevens disagrees with the notion that this was a “quasi-judicial” act. Rather, it was a “quasi-legislative” act—and one for which there is an adequate remedy at law. Thus, a writ of prohibition is not warranted.

Further, the request that the Ohio Supreme Court rewrite Ohio's statutes to suit one or another of the parties or amici—*while the General Assembly is already considering and acting on appropriate legislation*—is astonishing in its disregard of fundamental separation of powers principles. Such a request (*i.e.*, a “legislative wish list”) has nothing to do with writs of prohibition, and nothing to do with legitimate judicial functions. Rather, the complexity and variety of the quasi-legislative proposals that have been submitted to the Court show why legislation should be left to the legislature.

The Court's role as a co-equal branch of government is to decide cases, not policy. For yet another branch of government to unilaterally redo election regulations is contrary to the Ohio Constitution and would set a terrible precedent to be abused in the future. For these reasons, the Court should deny the requested extraordinary writ and the requested remedy.

### **III. STATEMENT OF FACTS**

The General Assembly established the date of the primary election, March 17, 2020, eight months ago. Until March 16, 2020, the eve of the primary election, the Secretary of State declared that the primary election would go on as planned. That afternoon, Secretary LaRose announced that he did not want the election to take place on March 17, 2020, but lacked authority to suspend it. And later that night, after his attempt to get a judge to suspend the election failed, Secretary LaRose told boards of election to close all voting locations and later purported to move the date of the primary election. This late-night bureaucratic fiat upended the most fundamental of democratic traditions: voting. No equivalent action in the history of Ohio or the United States has been taken by a member of the Executive Branch. Now, the General Assembly must act and is acting to provide post-primary election opportunities for Ohioans. The General Assembly, not the Court, should provide this remedy.

#### **A. Secretary LaRose Says That He Cannot Change The Primary Election Date From March 17, 2020 To June 2, 2020.**

On July 17, 2019, the General Assembly set the primary election date for March 17, 2020. *See* Am. Sub. H.B. 166. This accords with its constitutional obligations. *See* Ohio Constitution, Article V, Section 7. As a result, boards of elections across the state spent months preparing to conduct a primary election on that date. That was the understanding of the public until the afternoon of March 16, 2020, the day before the primary election. That afternoon, the Executive Branch legislated in real time on television. Secretary LaRose and Governor DeWine announced



that the primary election could not go on. Yet they also announced that there was no Executive power to move the primary election. That is why, they explained, Ohio’s court system was necessary. Secretary LaRose said that his office would not oppose a request for a temporary restraining order moving the primary election to June 2, 2020.

**B. Court Denies Request For Temporary Restraining Order To Move Primary To June 2.**

After announcing to the public that it would be unsafe to conduct a primary election, the Executive Branch sought to ratify its determination. As the Executive Branch announced, two plaintiffs sought a temporary restraining order in *Reardon v. Ohio Secretary of State Frank LaRose*, Case No. 20CV002105.<sup>1</sup> The court held a hearing that night—12 hours before the primary election was statutorily required to be begin. *See* R.C. 3501.01(E). Secretary LaRose did not defend the State against the requested restraining order. Instead, Secretary LaRose asked the court to grant Plaintiffs’ extraordinary remedy—moving the primary election to June 2. In other words, Secretary LaRose asked a court of common pleas to do at 6:30 p.m., the eve of an election, what he acknowledged he could not. The court denied the request for a temporary restraining order. The Court found the last-minute effort untimely and the benefit of a June 2, 2020 primary election too speculative.

**C. Secretary LaRose Issues Unilateral Order To Purportedly Reschedule Primary Election Despite Denied TRO.**

Secretary LaRose was not deterred. Hours before the primary election was statutorily set to begin, Secretary LaRose issued Directive 2020-06 (the “Directive”).<sup>2</sup> According to the

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<sup>1</sup> Representative Stephens appeared at the hearing and moved to intervene in the pending case.

<sup>2</sup> Director of Health Amy Acton also issued a March 16, 2020 order closing polling locations, apparently in coordination with Secretary LaRose.

Directive, the “March 17, 2020 Presidential Primary Election is suspended until June 2, 2020.” (See Relators’ Complaint, Exhibit C). Secretary LaRose also went on cable television to announce the March 17, 2020 primary would not take place. Not surprisingly, chaos ensued.<sup>3</sup> As reported by *The Columbus Dispatch*, voters were turned away from polling places the day of the primary election.<sup>4</sup>

But the Directive did not “suspend” or move the primary election. The primary election took place on March 17, 2020. To suspend or move the primary election would require altering the entire statutory framework regulating primary elections. Everything from election finance to statements of candidacy to candidate replacement would need to be redone. Because Secretary LaRose, under the Ohio Constitution, lacked power or authority to make those changes, March 17, 2020 remained the primary election date and legislative action is now needed—and is now taking place—to restore voting rights that were wrongfully denied.

#### **IV. ARGUMENT**

##### **A. The General Assembly Makes Election Policy So The Court Should Deny The Request For An Extraordinary Writ.**

###### ***1. The Primary Election Occurred On March 17, 2020 Because Secretary LaRose Cannot Change The Date Of The Primary Election.***

Secretary LaRose did not move the primary election because only the General Assembly has that power. See Ohio Constitution, Article V, Section 7; U.S. Constitution, Article I, Section

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<sup>3</sup> Rick Rouan, *Misstatements From LaRose’s Office Sparked Election Eve Chaos In Ohio*, THE COLUMBUS DISPATCH, March 19, 2020, available at <https://www.dispatch.com/news/20200319/misstatements-from-larosersquos-office-sparked-election-eve-chaos-in-ohio> (timeline of statements of Secretary LaRose’s office to take unilateral action).

<sup>4</sup> Marty Schladen, *A Few Ohio Voters Still Went To Closed Polls Tuesday Amid Coronavirus Confusion*, The Columbus Dispatch, March 17, 2020, available at <https://www.dispatch.com/news/20200317/few-ohio-voters-still-went-to-closed-polls-tuesday-amid-coronavirus-confusion>.

4. Ohioans are expressly granted the right to vote in primary elections by the Ohio Constitution. *See* Ohio Constitution, Article V, Section 7. These primary elections must be “as provided by law.” *Id.* (emphasis added). Because the election is provided by law, the General Assembly develops “reasonable regulations for the exercise of the elective franchise.” *State ex rel. Gottlieb v. Sulligan*, 175 Ohio St. 238, 242, 193 N.E.2d 270 (1963); *see also Libertarian Party of Ohio v. Husted*, 2017-Ohio-7737, 97 N.E.3d 1083, ¶ 39 (10th Dist.). It is the General Assembly—and the General Assembly alone—that regulates these functions. *See State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St.2d 159, 162, 224 N.E.2d 906 (1967) (General Assembly legislative powers are only limited by the Ohio Constitution).

In other words, the General Assembly, not the Secretary of State, protects Ohioans’ right to vote in primary elections. While the Secretary of State may issue directives that *interpret* statutes, he cannot make law. The Court explicitly recognizes this limitation. *See State ex rel. Stokes v. Brunner*, 120 Ohio St.3d 250, 2008-Ohio-5392, 898 N.E.2d 23, ¶ 29 (The Court “need not defer to the secretary of state’s interpretation because it is unreasonable and fails to apply the plain language [of the statute.]”) (citation omitted). The Ohio Constitution requires the plain language of the Revised Code to prevail over the Secretary of State because the General Assembly regulates primary elections. *See* Ohio Constitution, Article V, Section 7.

Because the General Assembly scheduled the primary election for March 17, 2020, that is when it took place. *See* Am. Sub. H.B. 166; R.C. 3501.01(E). It does not matter that Secretary LaRose issued the Directive. A directive issued by the Secretary of State must reflect laws passed by the General Assembly. *See Stokes, supra*, ¶29; *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1013 (S.D. Ohio 2008). Here, no statute authorized Secretary LaRose to issue the Directive, which purportedly suspended the primary election and modified its attendant

regulations. Secretary LaRose admitted as much in a letter to the General Assembly: “That is why I did not change the date of the election—which would have exceeded the powers granted to my office.” (Relators’ Exhibit A-21, Secretary LaRose letter dated March 21, 2020, p. 2). As a result, while Secretary LaRose closed the polls on March 17, 2020, he did not stop the primary election. *See* Ohio Constitution, Article V, Section 7.

## ***2. Secretary LaRose Improperly Attempted To Exercise Legislative Power.***

While the current COVID-19 pandemic presents extraordinary challenges, it still does not provide Secretary LaRose the chance to legislate. *Id.* First, we know that the Secretary of State cannot legislate during a pandemic because the General Assembly did not grant such powers. Based on legislation in other states, this omission is intentional. Iowa, for example, allows the chief election officer to “exercise emergency powers” when a “natural or other disaster or extremely inclement weather has occurred.” *See* Iowa Code 47.1(2). Similarly, Florida law allows the governor to “suspend or delay any election” in an emergency. *See* Fla. Stat. Ann. 101.733(1)–(2).<sup>5</sup> General Assemblies in these states decided, through the political process, and in limited circumstances, to delegate powers to the chief election officer in an emergency. Ohio’s General Assembly did not. Because the General Assembly did not delegate emergency powers, they do not exist for Secretary LaRose. Even during a pandemic. For these reasons, Secretary LaRose cannot unilaterally suspend the primary election during a pandemic, and his attempt to do so was contrary to law.

Second, Director of Health Amy Acton’s March 16, 2020 order did not authorize the Directive. The Ohio Constitution provides, “No power of suspending laws shall ever be exercised,

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<sup>5</sup> *See Michael T. Morley, Election Emergencies: Voting In the Wake Of Natural Disasters And Terrorist Attacks*, 67 EMORY L.J. 545, 610 (2018) (discussing state election powers in an emergencies).

except by the General Assembly.” *See* Ohio Constitution, Article I, Section 18. So the General Assembly regulates primary elections, and the General Assembly—not the Executive Branch—may suspend them. *Id.* There is no exception for a pandemic. While Director Acton’s order and the Directive may have closed polling locations, the primary election continued, and its attendant regulations remain in effect. Any other conclusion would strip the General Assembly of its election powers provided by the Ohio Constitution. *See* Ohio Constitution, Article V, Section 7.

Finally, no other obligations required Secretary LaRose to issue the Directive. As discussed above, the Directive was not authorized by state law or the Ohio constitution. It was also not authorized by the federal constitution. The federal constitution restricts *government* action. *See Bethea v. Deal*, S.D.Ga. No. CV216-140, 2016 U.S. Dist. LEXIS 144861, at \*7 (Oct. 19, 2016). So if a natural disaster burdens an individual’s right to vote, the federal constitution does not require changing the election date. *Id.* (denying extension of voter registration following a hurricane). That is because a natural disaster—like the COVID-19 pandemic—is not government action. *Id.*; *Peterson v. Cook*, 175 Neb. 296, 301, 121 N.W.2d 399 (1963) (denying extension of election following a blizzard). There was therefore no source of law—state or federal—that authorized Secretary LaRose to issue the Directive.<sup>6</sup> As a result, Secretary LaRose’s attempts to legislate failed and the March 17, 2020 took place as provided by the Revised Code. *See* R.C. 3501.01(E).

### ***3. The General Assembly Is Ready Right Now To Protect Voters’ Rights.***

The March 17, 2020 primary election took place. Neither Secretary LaRose nor the Court can rewrite history, or the legislation necessary to provide Ohioans post-primary election remedies.

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<sup>6</sup> Even if there were a duty under the federal constitution for Secretary LaRose to act (which there was not), then the duty was to convene the General Assembly in an emergency session to make any needed changes to the Revised Code. *See* Ohio Constitution, Article II, Section 8 (allowing the Executive Branch to call emergency sessions of the General Assembly).

The General Assembly must act. And it is acting now. On Wednesday, March 25, 2020, the General Assembly introduced statutory language to protect Ohioans' right to vote. (Exhibit A). This statutory language provides practical post-primary election solutions. Under this pending legislation, the Secretary of State will send a postcard to each registered voter in the State. The postcard will explain the procedures for obtaining an absentee ballot and the deadline to return an absentee ballot. Absentee ballots may be received by the boards of elections until April 28, 2020. The statutory language also provides additional methods of voting for Ohioans with disabilities, as well as other measures to provide voters access to their fundamental right.

The General Assembly anticipates protecting Ohioans right to vote by passing this statutory language, or something similar, very soon *as emergency legislation*. The proposed legislation flows from the General Assembly's responsibility to regulate activity related to primary elections. *See* Ohio Constitution, Article V, Section 7; *State ex rel. Gottlieb v. Sulligan*, 175 Ohio St. 238, 242, 193 N.E.2d 270 (1963); *see also State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St.2d 159, 162, 224 N.E.2d 906 (1967). And as the General Assembly must do, it will be passed after balancing the interests, practicalities, and necessities related to protecting Ohioans' right to vote. *Id.*

**B. The Court Should Deny The Extraordinary Writ Because It Decides Cases, Not Policy.**

Relators and Amici ask the Court to legislate: to rescind the Directive *and* draft new election regulations. (*See, e.g.,* Relators' Complaint, Exhibit A). This is not a proper remedy. While Secretary LaRose should not attempt to legislate, the solution is legislation from the General Assembly, not the Court.

### ***1. The Court Does Not Legislate From The Bench.***

The foundation of our republican government is that the “legislative, executive, and judiciary departments ought to be separate and distinct.” *See* Federalist No. 47. The separation-of-powers is “designed to prevent a primary and intrinsic threat: the concentration of power in a single branch of government.” *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 153 Ohio St.3d 581, 2018-Ohio-1602, 109 N.E.3d 1184, ¶ 27 (Fischer, J., concurring in judgment only) (citing Federalist No. 47). In other words, “There can be no liberty where the legislative and executive powers are united in the same person or body.” *See* Federalist No. 47. Similarly, “[w]here the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be the *legislator*.” *Id.* (emphasis in original).

The separation-of-powers is why the Court neither compels nor prohibits legislation by the General Assembly. *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, ¶ 2. It is a “deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches.” *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114 (citation omitted).

It is also why the Legislative Branch—the General Assembly—must be allowed to legislate. *See City of Toledo, supra*, ¶ 2. One advantage of the General Assembly legislating is that it is directly accountable to the people. *See* Federalist No. 57. Terms are brief so the General Assembly “will maintain a proper responsibility to the people.” *Id.* Moreover, representatives can be assumed to have a “fidelity to their constituents.” *Id.*

It is also why the Court, even when it may not agree with policy outcomes, should not legislate from the bench:

- “The General Assembly chose not to specify a time limit other than the one prescribed by the Rules of Civil Procedure and this court will not legislate from

the bench.” See *Hambuechen v. 221 Mkt. N., Inc.*, 143 Ohio St.3d 161, 2015-Ohio-756, 35 N.E.3d 502, ¶ 7.

- “As members of the judicial branch, whose authority is limited to giving effect to the law as written—not rewriting it or legislating from the bench—writing ‘investigative value’ into the statute is beyond our authority.” *State ex rel. Cincinnati Enquirer v. Pike Cty. Coroner’s Office*, 153 Ohio St.3d 63, 2017-Ohio-8988, 101 N.E.3d 396, ¶ 92 (Kennedy, J., dissenting).
- “It offends the law and our constitutions when a judge legislates from the bench in order to increase the confinement period that may be imposed on a child merely because the judge believes that the confinement period allowed under the statute is too lenient in a particular situation.” *In re H.V.*, 138 Ohio St.3d 408, 2014-Ohio-812, 7 N.E.3d 1173, ¶ 65 (O’Connor, C.J., dissenting).
- “This holding constitutes a usurpation of the role of the legislative branch of government and amounts to judicially legislating from the bench.” *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153, ¶ 29 (O’Donnell, J., dissenting)

Here, the General Assembly is working on a solution to fix the unprecedented election problems created by the attempted end-around the Legislative Branch by Secretary LaRose. See Federalist No. 47 (“There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates.”). The General Assembly is accountable to the people and must be allowed to act. That is not say that the Court may not have a role in the future “to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). However, it should decline to say what the law ought to be. For these reasons, the Court should deny the extraordinary writ and the requested remedies. *Id.*

## ***2. There Is No Judicially Reasonable Outcome Because A Decision Would Be Arbitrary.***

The need to avoid legislating from the bench is clear when considering the options here. Secretary LaRose unilaterally tried to move the March 17, 2020 primary election to June 2, 2020. (Relators’ Complaint, Exhibit C). The assumption was that June 2 will be safer for Ohioans than



March 17. But as noted by Judge Frye in *Reardon v. Ohio Secretary of State Frank LaRose*, Case No. 20CV002105, the supposed increase in safety by moving from March 17 to June 2 is speculative, at best.<sup>7</sup> Relators also seek their own post-primary election alternatives. (Relators' Brief, Exhibit A).

Regardless, there is no evidence here to determine whether either requested post-primary election approach is best for Ohioans. This tribunal lacks sufficient information and evidence to balance the costs, practicalities, and impact of these choices, and any other possible post-primary election remedies. As a result, legislation from the Court would be arbitrary. *See* Federalist No. 47. Therefore, the Court should deny the extraordinary writ and decline to adopt the election regulations proposed by Relators and Secretary LaRose.

### ***3. There Is No Urgency For The Court To Act.***

There is no need for the Court to act. For one, the March 17, 2020 primary election is past. It cannot be redone. So there is no urgent need for the Court to step in. In rare circumstances, a court may prolong election day voting before it concludes. (*See* Relators' Brief, pp. 18–22) (citing cases in which election day voting was prolonged by court action). That is not the case here. Because Secretary LaRose cannot move the primary election, it is over, and there is no need for the Court to act.

There are several other reasons why there is no urgency for the Court to act. As discussed above, the General Assembly is prepared to act now so any decision by the Court may be undone by legislative action. Additionally, should the General Assembly fail to act, there is a pending case in the Franklin County Court of Common Pleas that will address these very issues—and that court is better situated to receive and consider evidence. Finally, each day the Court waits to decide is

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<sup>7</sup> *See, e.g.*, press conference with President Donald J. Trump on March 16, 2020 with the Coronavirus Task Force indicating the effects of COVID-19 could extend through August 2020.

another day experts learn more about the COVID-19 pandemic and the available solutions. Those experts may then inform the General Assembly. The Court cannot engage in similar independent fact-finding. For these reasons, the Court should not adopt the election regulations proposed by Relators or Secretary LaRose.

#### ***4. The Court's Involvement Would Set Terrible Precedent.***

Finally, while Secretary LaRose's actions are unprecedented, extraordinary challenges during an election are not. There are hurricanes. *See Bethea v. Deal*, S.D.Ga. No. CV216-140, 2016 U.S. Dist. LEXIS 144861, at \*7 (Oct. 19, 2016). There are blizzards. *See Peterson v. Cook*, 175 Neb. 296, 301, 121 N.W.2d 399 (1963); *State v. Marcotte*, 148 Me. 45, 47, 89 A.2d 308 (1952). And there are even presidential inaugurations that fall on election day. *See Republican Party of Delaware v. Dep't of Elections*, 792 A.2d 224, 227 (Del.Super.Ct. 2001) ("The Court is satisfied that the General Assembly did not intend for the Board of Elections to change the date of a special election once it has been proclaimed pursuant to 15 Del. C. § 7105. If the legislature chooses to provide for a different result under extreme circumstances, the Court is confident that it will do so."). In each case, the plaintiffs sought extraordinary relief—changing election dates—based on these extraordinary circumstances. The COVID-19 pandemic is the next extraordinary circumstance. Should the Court enter the fray now, then it would be called to do so again. That is why the Court should reject the election regulations proposed by Relators and Secretary LaRose.

#### **C. Relators' Arguments Cannot Carry The Day So The Court Should Deny The Request For An Extraordinary Writ.**

Relators seek a writ of prohibition. *See State ex rel. Balas-Bratton v. Husted*, 138 Ohio St.3d 527, 2014-Ohio-1406, 8 N.E.3d 933, ¶ 15. A writ of prohibition is an extraordinary writ that requires the exercise of quasi-judicial power and the lack of an adequate remedy at law. *Id.* Because Secretary LaRose's actions were not quasi-judicial and there is adequate remedy at law, the

extraordinary writ should be denied. *See State ex rel. LetOhioVote v. Brunner*, 125 Ohio St.3d 420, 2010-Ohio-1895, 928 N.E.2d 1066, ¶ 22. Further, the Court should deny the extraordinary writ because Secretary LaRose failed to move the primary election. *See State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, 854 N.E.2d 1025, ¶ 46.

***1. Secretary LaRose Did Not Engage In Quasi-Judicial Action So The Extraordinary Writ Should Be Denied.***

Because Secretary LaRose failed to conduct a hearing, the extraordinary writ should be denied. *See State ex rel. LetOhioVote v. Brunner*, 125 Ohio St.3d 420, 2010-Ohio-1895, 928 N.E.2d 1066, ¶ 22. When a party seeks to challenge the authority of the Secretary of State, a prohibition injunction in the court of common pleas is the remedy. *Id.* That is because the Secretary of State merely exercising (or attempting to exercise) authority does not require quasi-judicial action. *Id.* Quasi-judicial action is “the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial.” *State ex rel. Potts v. Comm. on Continuing Legal Edn.*, 93 Ohio St.3d 452, 455, 2001-Ohio-1586, 755 N.E.2d 886 (quoting *State ex rel. Wright v. Ohio Bur. of Motor Vehicles* (1999), 87 Ohio St. 3d 184, 186, 718 N.E.2d 908, 910). Without a hearing and considering evidence, there is no quasi-judicial action and an extraordinary writ must be denied. *Id.*

Here, Secretary LaRose issued the Directive without a hearing—legislation rather than quasi-judicial action. *See LetOhioVote v. Brunner, supra*, ¶ 22. Because Secretary LaRose did so without a hearing, the extraordinary writ must be denied. *Id.* Relators’ attempts to side-step this issue are unavailing. Relators argue that because the Judicial Branch may extend in-person voting during an election, and the Directive purports to reschedule the primary election, Secretary LaRose engaged in quasi-judicial activity. (Relators’ Brief, p. 26). But this argument fails—it is an attempt

to strip power from the Legislative Branch yet again. The General Assembly provides elections regulations, not the Court.

There is also little similarity between extending in-person voting hours, as courts have done, to rewriting all the regulations controlling the primary election, which courts have not. (Relators' Brief, pp. 18–22). So Relators' analogy is faulty. The last-minute nature of the Directive cannot save the analogy either—the General Assembly can also provide emergency relief if called to do so. *See* Ohio Constitution, Article II, Section 8. Finally, Relators fail to identify a single hearing, witness, or judicial trial that would make the Directive “quasi-judicial.” *See LetOhioVote, supra*. Accordingly, Secretary LaRose failed to engage in quasi-judicial action and the extraordinary writ should be denied. *State ex rel. Potts v. Comm. on Continuing Legal Edn.*, 93 Ohio St.3d 452, 455, 2001-Ohio-1586, 755 N.E.2d 886.

***2. There Is An Adequate Remedy At Law So The Extraordinary Writ Should Be Denied.***

A request for an extraordinary writ must fail when there is a pending declaratory judgment action. *See State ex rel. Schroeder v. City of Cleveland*, 150 Ohio St.3d 135, 2016-Ohio-8105, 80 N.E.3d 417, ¶ 18 (citation omitted). Here, there is a pending request for declaratory judgment in the Franklin County Court of Common Pleas, Case No. 20CV002105. Accordingly, because there is an adequate remedy at law, the Court should deny the request for an extraordinary writ. *Id.*; *See State ex rel. LetOhioVote v. Brunner*, 125 Ohio St.3d 420, 2010-Ohio-1895, 928 N.E.2d 1066, ¶ 22.

Relators argue that there is no adequate remedy at law by citing *State ex rel. Craig v. Scioto Cty.*, 117 Ohio St.3d 158, 2008-Ohio-706, 882 N.E.2d 435, ¶ 26. But *Craig* does not apply. In *Craig*, there was an impending primary election, so the relator's only option was to go before the Court. *Id.*, ¶25. Here, there is not an impending primary election. As Relators concede, March 17,

2020 and the primary election are in the rearview mirror. (Relators’ Brief, p. 29). There is no election emergency. And further, Relators fail to even identify a specific date that would make it an election emergency. (Relators’ Brief, p. 29) (suggesting “mid-May certification” may be necessary). Accordingly, because there is an adequate remedy at law—declaratory relief—and no pending emergency, the Court should deny the extraordinary writ. *See State ex rel. Schroeder v. City of Cleveland*, 150 Ohio St.3d 135, 2016-Ohio-8105, 80 N.E.3d 417, ¶ 18.

**3. Relators Fail To Connect The Dots Between Moving The Primary Election And The Directive So The Extraordinary Writ Should Be Denied.**

Secretary LaRose failed to exercise power so the request for an extraordinary writ must be denied. *State ex rel. Gerhardt v. Krehbiel*, 38 Ohio St.2d 90, 95, 310 N.E.2d 251 (1974). In *Gerhardt*, the Court denied a writ of prohibition because the relator failed to show a law director filing a lawsuit was about to “exercise judicial or quasi-judicial power.” *Id.* (emphasis in original). The Court concluded that a law director who “merely files a lawsuit” is not amenable to an extraordinary writ. *Id.* Similarly, an extraordinary writ is denied when the alleged harm never took place. *See State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, 854 N.E.2d 1025, ¶ 46.

Here, Secretary LaRose lacks the power to move the primary election, he merely issued the Directive, so the extraordinary writ should be denied. *See* Ohio Constitution, Article V, Section 7. It is undisputed Secretary LaRose lacks the power to move the primary election. (Relators’ Brief, p. 17) (“Nothing . . . authorizes the Ohio Secretary of State to unilaterally extend the right to vote beyond the date and times set by the General Assembly.”); (Relators’ Exhibit A-21, p. 2). Still, Relators insist that the Directive did exactly that. Relators argue in one hand that it was impossible for Secretary LaRose to move the primary election and in another they seek a remedy to fix it. But you cannot fix what did not happen. There is an easy way for the Court to avoid this circular logic:

find that Secretary LaRose merely issued the Directive rather than moved the primary election. *State ex rel. Gerhardt v. Krehbiel*, 38 Ohio St.2d 90, 95, 310 N.E.2d 251 (1974).

Relators' requested remedy shows that the Court should deny the extraordinary writ because the Directive did not move the primary election. Rather than ask the Court to compel Secretary LaRose to issue new election regulations—through a mandamus action—Relators seek the Court to issue new election regulations. That is because Secretary LaRose cannot issue election regulations in the first place. *See* Ohio Constitution, Article V, Section 7. Indeed, this is the charge of the General Assembly. Relators cannot compel Secretary LaRose do something he cannot do. Because he cannot issue election regulations that would move the primary election, Secretary LaRose merely issued the Directive. As a result, the Court should find that Secretary LaRose could not move the primary election and deny the extraordinary writ. *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, 854 N.E.2d 1025, ¶ 46.

**D. The General Assembly Is Best Suited To Solve The Complicated Policy And Legal Issues Identified By Relators And Amici.**

There is no shortage of policy considerations when regulating primary elections. Relators and Amici raise concerns regarding state and federal election law, access to voting for Ohioans with disabilities, and potential challenges for mail-in absentee voting, among others. These are all valid policy concerns. They are also a sliver of the thousands of other concerns weighed by the General Assembly when it adopts primary elections regulations consistent with the Ohio Constitution and the U.S. Constitution. Yet these groups would have the Court remake the law in their own image. But as pointed out by Alexander Hamilton, tyranny exists when judging and legislating are combined. *See* Federalist No. 47. That is not the Court's role. The General Assembly that must—and will—balance these issues in providing a post-primary election future for Ohioans.

V. **CONCLUSION**

For the reasons above, the Court should deny the request for an extraordinary writ and defer to the General Assembly as it seeks to protect Ohioans' fundamental right to vote.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was sent via email this 25th of March, 2020 to the following:

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# **Exhibit A**

I\_133\_2619-7

133rd General Assembly  
Regular Session  
2019-2020

. B. No.

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**A BILL**

To extend absent voting by mail for the March 17, 1  
2020, primary election to April 28, 2020, to 2  
make an appropriation, and to declare an 3  
emergency. 4

**BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:**

**Section 1.** Notwithstanding any contrary provision of the 5  
Revised Code: 6

(A) Secretary of State Directive 2020-06, issued on March 7  
16, 2020, is void. 8

(B) During the period beginning on the effective date of 9  
this section and ending at 7:30 p.m. on April 28, 2020, no board 10  
of elections, and no election official, shall do any of the 11  
following: 12

(1) Count any ballots cast in the March 17, 2020, primary 13  
election, or in any special election held on the day of the 14  
primary election; 15

(2) Release the count or any portion of the count of any 16



ballots cast in the March 17, 2020, primary election, or in any 17  
special election held on the day of the primary election; 18

(3) Process any voter registration application submitted 19  
after February 18, 2020. 20

(C) (1) (a) An elector who has not already cast a ballot in 21  
the March 17, 2020, primary election, or in any special election 22  
held on the day of the primary election, and who was registered 23  
to vote in this state as of February 18, 2020, may cast absent 24  
voter's ballots for that election in accordance with this 25  
section. 26

(b) An elector who was registered to vote in this state as 27  
of February 18, 2020, and who cast a ballot at any time before 28  
the effective date of this section in the March 17, 2020, 29  
primary election, or in any special election held on the day of 30  
the primary election, shall have the elector's ballot counted if 31  
it is received at the office of the board not later than the 32  
applicable deadline specified in division (F) of this section 33  
and is otherwise eligible to be counted. 34

(2) As soon as possible after the effective date of this 35  
section, the Secretary of State shall send a postcard to each 36  
registered elector in this state, notifying the elector of the 37  
methods by which the elector may obtain an application for 38  
absent voter's ballots, the procedures and deadlines to apply 39  
for absent voter's ballots under this section, and the 40  
procedures and deadline to return voted absent voter's ballots 41  
to the office of the board of elections under this section. 42

(3) An elector described in division (C) (1) (a) of this 43  
section may apply by mail to the appropriate board of elections 44  
for absent voter's ballots. If the elector is eligible to cast 45

absent voter's ballots with the assistance of election officials 46  
under section 3509.08 of the Revised Code, the elector may 47  
include with the elector's application a request that the board 48  
of elections assist the elector in casting the elector's ballots 49  
in accordance with section 3509.08 of the Revised Code. All 50  
applications submitted under this division shall be received at 51  
the office of the board not later than noon on April 25, 2020, 52  
except that an application submitted by an elector described in 53  
division (C) (1) (a) of this section who would be eligible to 54  
apply for absent voter's ballots not later than 3:00 p.m. on the 55  
day of an election under section 3509.08 of the Revised Code 56  
shall be received at the office of the board not later than 3:00 57  
p.m. on April 28, 2020. Any application received after the 58  
applicable deadline shall be invalid. 59

(4) At the end of each day, the board of elections shall 60  
compile and transmit to the Secretary of State a list of all 61  
applications the board received that day, provided that the list 62  
shall exclude all information that is not considered a public 63  
record under the laws of this state. The Secretary of State 64  
shall make the list available to the public upon request. 65

(5) If a board of elections receives an application under 66  
this section that does not contain all of the required 67  
information, the board promptly shall notify the applicant of 68  
the additional information required to be provided by the 69  
applicant to complete that application. In order for the 70  
application to be valid, the applicant shall provide that 71  
additional information to the board not later than the 72  
applicable deadline under division (C) (3) of this section. 73

(6) If the board of elections determines that an 74  
application submitted under this section is valid, the board 75

promptly shall deliver absent voter's ballots to the elector. 76  
The board shall deliver those ballots by mail, except as 77  
otherwise provided in division (D) of this section and except in 78  
the case of an elector whom the board assists in casting the 79  
elector's ballots in accordance with section 3509.08 of the 80  
Revised Code. When the board delivers those ballots by mail, it 81  
shall prepay the return postage for the ballots. 82

(D) (1) Only the following electors may apply for and cast 83  
absent voter's ballots in person at the office of the board of 84  
elections not later than 7:30 p.m. on April 28, 2020, instead of 85  
applying to receive those ballots by mail: 86

(a) An elector to whom division (C) (1) (a) of this section 87  
applies, who has a disability, and who wishes to cast absent 88  
voter's ballots using a direct recording electronic voting 89  
machine or marking device that is accessible for voters with 90  
disabilities, including nonvisual accessibility for the blind 91  
and visually impaired, in a manner that provides the same 92  
opportunity for access and participation, including privacy and 93  
independence, as for other voters. Each board shall have at 94  
least one such machine or device available for use at the office 95  
of the board. 96

(b) An elector to whom division (C) (1) (a) of this section 97  
applies and who is unable to receive mail at the place where the 98  
elector resides or at another location. 99

(2) All eligible electors waiting in line to cast absent 100  
voter's ballots in person under division (D) of this section as 101  
of 7:30 p.m. on April 28, 2020, shall be permitted to cast 102  
absent voter's ballots. 103

(E) (1) If an individual applies for absent voter's ballots 104

under this section and the individual's application is received 105  
not later than the applicable deadline, but the board determines 106  
that the individual is not eligible to cast absent voter's 107  
ballots under this section, the board shall permit the 108  
individual to cast a provisional ballot in person at the office 109  
of the board not later than 7:30 p.m. on April 28, 2020. All 110  
individuals waiting in line at the office of the board to cast 111  
provisional ballots under this division as of that time shall be 112  
permitted to cast provisional ballots. 113

(2) If an individual who is eligible to cast a provisional 114  
ballot under division (E) (1) of this section is unable to appear 115  
at the office of the board on account of personal illness, 116  
physical disability, or infirmity, the board shall permit the 117  
individual to cast a provisional ballot with the assistance of 118  
election officials, in the manner described in section 3509.08 119  
of the Revised Code, not later than 7:30 p.m. on April 28, 2020. 120

(F) (1) Absent voter's ballots cast at any time before or 121  
after the effective date of this section by an elector who was 122  
registered to vote in this state as of February 18, 2020, for 123  
the March 17, 2020, primary election, or for any special 124  
election held on the day of the primary election, shall be 125  
eligible to be counted if they are received at the office of the 126  
appropriate board of elections not later than 7:30 p.m. on April 127  
28, 2020. The board shall place a secure receptacle outside the 128  
office of the board for the return of absent voter's ballots 129  
under this section. Except as otherwise provided in divisions 130  
(F) (2) and (3) of this section, absent voter's ballots received 131  
after 7:30 p.m. on April 28, 2020, shall not be counted. 132

(2) Absent voter's ballots received by mail at the office 133  
of the board after 7:30 p.m. on April 28, 2020, and not later 134

than May 8, 2020, are eligible to be counted if they are 135  
postmarked on or before April 27, 2020, and are not postmarked 136  
using a postage evidencing system, including a postage meter, as 137  
defined in 39 C.F.R. 501.1. 138

(3) Uniformed services and overseas absent voter's ballots 139  
received by mail at the office of the board after 7:30 p.m. on 140  
April 28, 2020, and not later than May 8, 2020, are eligible to 141  
be counted if they were submitted for mailing not later than 142  
12:01 a.m. at the place where the voter completed the ballot on 143  
April 28, 2020, regardless of whether the ballots are 144  
postmarked. 145

(G) (1) If the election officials find that the 146  
identification envelope statement of voter containing absent 147  
voter's ballots for the March 17, 2020, primary election, or for 148  
any special election held on the day of the primary election, is 149  
incomplete or that the information contained in that statement 150  
does not conform to the information contained in the Statewide 151  
Voter Registration Database concerning the voter, as described 152  
in section 3509.06 of the Revised Code, the voter shall provide 153  
the necessary information to the board of elections in 154  
accordance with that section not later than May 5, 2020. 155

(2) An individual who casts a provisional ballot under 156  
division (E) of this section and who is required under sections 157  
3505.181 to 3505.183 of the Revised Code to provide 158  
identification or additional information to the board of 159  
elections shall provide the necessary identification or 160  
information to the board in accordance with those sections not 161  
later than May 5, 2020. 162

(H) The boards of elections and the Secretary of State 163  
shall complete the unofficial count, the canvass of the election 164

returns, and all other post-election procedures with respect to 165  
the March 17, 2020, primary election, and any special election 166  
held on the day of the primary election, on the dates provided 167  
in the Revised Code, except that each deadline shall be 168  
calculated by adding 42 days. 169

(I) (1) For the purpose of the contribution limits 170  
described in section 3517.102 of the Revised Code, the date of 171  
the 2020 primary election is March 17, 2020. However, the 172  
statements of contributions and expenditures required to be 173  
filed under division (A) (2) of section 3517.10 of the Revised 174  
Code after the primary election shall be filed not later than 175  
4:00 p.m. on June 5, 2020. 176

(2) As used in this division, "interim election period" 177  
means the period beginning on March 18, 2020, and ending on 178  
April 28, 2020. For purposes of the contribution limits 179  
described in section 3517.102 of the Revised Code, any 180  
contribution received during the interim election period is not 181  
considered to have been received during a primary election 182  
period or a general election period. The contribution limits 183  
that apply during a primary election period under that section 184  
apply during the interim election period. A person who receives 185  
contributions or makes expenditures during the interim election 186  
period shall file a separate report of those contributions and 187  
expenditures in accordance with section 3517.10 of the Revised 188  
Code not later than 4:00 p.m. on June 5, 2020. 189

(J) In implementing this act, the Secretary of State shall 190  
proceed as though the Department of Administrative Services has 191  
suspended, under section 125.061 of the Revised Code, the 192  
purchasing and contracting requirements contained in Chapter 193  
125. of the Revised Code that otherwise would apply to the 194



Secretary of State. The Secretary of State shall comply with 195  
division (E) of that section. 196

**Section 2.** All items in this section are hereby 197  
appropriated as designated out of any moneys in the state 198  
treasury to the credit of the designated fund. For all 199  
appropriations made in this act, those in the first column are 200  
for fiscal year 2020 and those in the second column are for 201  
fiscal year 2021. The appropriations made in this act are in 202  
addition to any other appropriations made for the FY 2020-FY 203  
2021 biennium. 204

205

	1	2	3	4	5
A	SOS SECRETARY OF STATE				
B	Dedicated Purpose Fund Group				
C	5RG0	050627	Absent Voter's Ballot Application Mailings	\$ 5,000,000	\$ 0
D	TOTAL Dedicated Purpose Fund Group			\$ 5,000,000	\$ 0
E	TOTAL ALL BUDGET FUND GROUPS			\$ 5,000,000	\$ 0

ABSENT VOTER'S BALLOT APPLICATION MAILINGS 206

The foregoing appropriation item 050627, Absent Voter's 207  
Ballot Application Mailings, shall be used by the Secretary of 208  
State to pay for expenses incurred for the purpose of 209

implementing this act. 210

An amount equal to the unexpended, unencumbered portion 211  
of the foregoing appropriation item 050627, Absent Voter's 212  
Ballot Application Mailings, at the end of fiscal year 2020 is 213  
hereby reappropriated to the Secretary of State for the same 214  
purpose in fiscal year 2021. 215

On the effective date of this section, or as soon as 216  
possible thereafter, the Director of Budget and Management shall 217  
transfer \$5,000,000 cash from the Controlling Board Emergency 218  
Purposes/Contingencies Fund (Fund 5KM0) to the Absent Voter's 219  
Ballot Application Mailing Fund (Fund 5RG0). 220

Within the limits set forth in this act, the Director of 221  
Budget and Management shall establish accounts indicating the 222  
source and amount of funds for each appropriation made in this 223  
act, and shall determine the form and manner in which 224  
appropriation accounts shall be maintained. Expenditures from 225  
appropriations contained in this act shall be accounted for as 226  
though made in the main operating appropriations act of the 227  
133rd General Assembly. 228

The appropriations made in this act are subject to all 229  
provisions of H.B. 166 of the 133rd General Assembly that are 230  
generally applicable to such appropriations. 231

**Section 3.** This act is hereby declared to be an emergency 232  
measure necessary for the immediate preservation of the public 233  
peace, health, and safety. The reason for such necessity is that 234  
the COVID-19 pandemic and resulting emergency public health 235  
orders precluded in-person voting at polling places in this 236  
state on March 17, 2020. Therefore, this act shall go into 237  
immediate effect. 238