# The Supreme Court of Ohio

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| State ex. rel. Ohio Democratic Party, et. al., | ) | |
| | ) | |
| Relators, | ) | |
| | ) | |
| v. | ) | **EXPEDITED ELECTION ACTION** |
| | ) | |
| Frank LaRose, | ) | |
| | ) | |
| Respondent. | ) | |

**REPLY BRIEF OF *AMICI CURIAE* PRIMARY ELECTION CANDIDATES IN SUPPORT OF NEITHER SIDE**

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The complaint of the intervening relator was filed before enactment of Am.Sub.H.B. 197. The genesis of the complaint is the separation-of-powers doctrine—i.e., the complaint is that the executive branch undermined the coordinate branches of government by arrogating legislative power respecting the 2020 Ohio Primary by fiat under Directive 2020-006. This is a legitimate worry, but not one rectifiable in "prohibition," because the extraordinary remedy of prohibition exists to stop the unauthorized exercise of *judicial* or quasi-*judicial* power. What happened before now has nothing to do with judicial power.

Besides, the General Assembly has since statutorily repealed the directive, which respondent also rescinded himself. Therefore, this case is moot.[1]

So, it would be an especially bad means for this court to expand judicial power by effectively rejecting the legislative remedy afforded by the General Assembly yesterday, to be signed into law by the governor today. To reject the new statutory

[1] *Cf., State ex. rel. Roof v. Bd. of Com'rs of Harding County*, 39 Ohio St.2d 130 (1974), ("When this case was instituted, R.C. 3507.07 mandated precinct-by-precinct rotation of candidates' names in those localities using voting machines. The subsequent repeal of that statute renders its effect on this case moot. A new rotational statute has not been enacted by the General Assembly. Additionally, there is nothing in the record to indicate that the Secretary of State, pursuant to R.C. 3507.15, has promulgated a rotational regulation that will apply in future general elections.")

scheme, this court would be doing what relators rightfully claimed the executive branch could not, i.e., usurp legislative power. Two constitutional wrongs don't make a right.

Worse, this court would be doing so in a case that *predates* the new law.

Doubtless, if this court does this in this one case now, then there is no outer-limit: this court will be asked to wade into the political thicket in all manner of future original actions styled as "prohibition" cases. And on the matter of this court's limited original jurisdiction, the Libertarian briefs cites *People ex. rel. Salazar v. Davidson*, 79 P.3d. 1221 (Colorado, 2003). But pages 1227-1228 of *Salazar* show that the Colorado constitution materially differs from the Ohio constitution because Coloradoans have conferred their state supreme court with discretionary, original jurisdiction over injunction actions. *See*, Colo. Const. art. VI, §3, ("The supreme court shall have power to issue writs of... mandamus, ...injunction, and such other ... writs as may be provided by rule of court....") In contrast, the people of Ohio have not. *See*, Ohio Const. Art. IV, Sec. 2(B)(1).

Intervenor and various *amici* have raised many sincere policy concerns about the lack of in-person voting, how long voting should last, special considerations of disabled persons, and the unreliability of the postal service in urban areas, *etc*. But "all arguments going to the soundness of legislative policy choices, however, are directed to their proper place, which is outside the door to this courthouse. This court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. The only judicial inquiry into the constitutionality

of a statute involves the question of legislative power, not legislative wisdom." *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 455-456, 1999-Ohio-123. As to concerns about a 30-day voter-registration window, that is a legitimate point, but is separate case or controversy, which is not reviewable in "prohibition" because it has nothing to do with the unauthorized exercise of judicial or quasi-judicial power. If the new law enacted this week—before this case was filed—is *ultra vires* as applied to federal elections because of a federal statutory right to register, then any elector who is denied a right to register may bring a claim in mandamus to compel compliance with the statutory duty.

However, this court has no original jurisdiction to effectively declare the new law invalid and "enjoin" it: prohibition is not the opposite of mandamus. *State ex. rel. Triplett v. Ross*, 111 Ohio St.3d 231, 2006-Ohio-4705, ¶70 (Moyer, C.J., dissenting).

## CONCLUSION

If voters are displeased by how the 2020 Ohio Primary was handled, then their remedy is to make their voices heard at the ballot box in the primary and future elections.

As tempting as it may be for this court to opine, pro or con, on this dispute, many doctrines—judicial restraint, separation of powers, standing, justiciability, subject-matter jurisdiction—all point to the exact same outcome: for this court to dismiss the remainder of this case without a determination on the merits.

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