Supreme Court of Ohio Clerk of Court - Filed March 20, 2020 - Case No. 2020-0388

The Supreme Court of Ohio

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

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

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INTRODUCTION: THIS CRISIS CALLS FOR A LEGISLATIVE REMEDY

Relevant here, Ohio Const. Art. V. Sec. 7 provides that candidates are nominated "at direct primary elections…as provided by law." The two most basics questions respecting any election are: (1) when is the election and (2) how are the votes cast?

The *amici curiae* listed below fully endorse the relators' stance that fixing election dates and procedures is purely a legislative function. But this is also where we part ways—because this case involves respondent's unauthorized exercise of *legislative* power, the relators' invited "remedy" of "prohibition" doesn't follow. Here's why.

The extraordinary remedy of prohibition bars the unauthorized exercise of *judicial* or quasi-*judicial* power. It is thus not germane to enjoining the exercise of *legislative* power. *State ex. rel. Save Your Courthouse Committee v. City of Medina*, 157 Ohio St.3d 423, 2019-Ohio-3737, ¶¶23-31. Thus, this court should "simply dismiss the prohibition claim for failure to state a claim." *Id*. at ¶32. Under the separation of powers, the remedy here is emphatically within the province of the General Assembly—no matter how enticing it may be for this court to opine upon the unfolding of events leading to this unprecedented point in the rich tapestry of Ohio electoral history.

* * *

It is a bedrock axiom that the General Assembly has plenary power to enact election laws. Fundamentally, the right to vote is exercised in the manner as prescribed

by the legislature. *State ex. rel. Painter v. Brunner*, 128 Ohio St.3d 17, 2011-Ohio-35, ¶41, quoting *Bush v. Gore* (2000), 531 U.S. 98, 104, ("the right to vote as the legislature prescribes is fundamental…"). The other branches of government cannot intrude upon this; just as the executive and legislative branches may not encroach upon judicial power.[1] Thus, the doctrine of judicial restraint obliges this court to let the legislature perform its constitutionally allocated powers when it reconvenes soon.

Yet relators seek an unprecedented remedy: for a majority of this court to pronounce judge-made election systems and deadlines. This is unconstitutional.

The judicial branch—like respondent secretary of state—lacks power to preemptively legislate voting deadlines and procedures. So, if this court grants relators' wishes, it will create federal challenges to any judicially-crafted edicts.

This very uncertainty unfairly favors moneyed candidates and those without primary opposition. Therefore, prudence suggests a legislative remedy.

A legislative solution affords certainty and is extra preferable because the bicameral Ohio legislature is designed to be the most politically-accountable branch because members are from widespread geographic areas and the representatives are elected every even-numbered year. Legislators are best fit to craft a practical remedy—

[1] *Cf.*, *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶46, ("We therefore must jealously guard the judicial power against encroachment from the other two branches of government and * * * conscientiously perform our constitutional duties and continue our most precious legacy.")

signed into law by the governor—reflecting the general will of voters after hearing an earful of varying opinions from them this past week.

STATEMENT OF INTEREST OF THE *AMICI*

The *amici* listed below have personal stakes in the outcome of this case because they are on the primary ballot or managing contested campaigns. They seek certainty on (a) when primary voting is done and (b) how votes will be cast. The following *amici* campaigned on finite resources this cycle anticipating that it would be done by now:

- Corey Speweik is a candidate for Wood county common pleas court in a contested primary. He was the relator in *Speweik v. Wood Cty. Bd. of Elections, et al*., Supreme Court of Ohio Case No. 2020-0382, decided on March 17, 2020.

- Liamer Media, LLC is an Ohio limited liability company that has advised candidates in elections to the Ohio Court of Appeals, the Ohio House and Senate, Lucas county common pleas court, Sandusky county common pleas court, Ottawa county municipal court, Ottawa county commissioner, Sandusky county commissioner, mayors of Fremont and Findlay, Sandusky county county court, Sandusky county prosecutor, Wood county common pleas court, and Hancock county sheriff. Liamer has also advised all manner of issue and levy committees in Ohio. Liamer is advising campaigns in 11 separate counties this primary and also advising on one school levy. Liamer has a keen interest in firmly securing the right to vote in compliance with Ohio law.

- Tracy Overmyer is the Sandusky county clerk of courts running for reelection in a contested primary.

- Gary Click is a Republican State Central Committeeman for Ohio's 26th Senate District and is currently running for the Ohio House of Representatives 88th House District in a contested primary.

- Cynthia Welty is a candidate for Sandusky county common pleas court in a contested primary.

- Tim Saltzman is a candidate for Hancock county sheriff in a contested primary.

FACTS

In 1993, the General Assembly amended R.C. 3501.01(E) to move Ohio's primary season in presidential election years forward from May to March. It now reads:

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

Until recently, Ohio presidential primaries were on the *second* Tuesday after the first Monday of March. But this was changed by H.B. 166, eff. October 17, 2019, which moved presidential primaries to the *third* Tuesday. The apparent intent was to schedule Ohio's presidential primary on the national calendar strategically by requiring that Ohio's primary "*shall* be held on the third Tuesday after the first Monday in March" in presidential-election years. Regardless of intent, the usage of "shall" signals mandatory

compliance.[2] Thus, the 2020 primary shall be held on March 17, 2020. Leading up to this date, the statutory law enabled robust no-fault absentee and in-person early voting starting on February 19, 2020 (the day after registration closed). *See* R.C. Chapter 3509.

Voting proceeded normally until March 16, 2020—when state officials first implied that the election would be suspended due to Coronavirus concerns.[3] The governor tweeted that, "I don't have the authority to push the date back, so a lawsuit will be filed soon in Franklin county." In that lawsuit, two citizens sought to enjoin the March 17th election. In the interim, Corey Speweik sought in this court a writ of a mandamus to enforce R.C. 3501.01(E)(2) as written. The Franklin county common pleas court refused to enjoin the primary election. But this court denied a writ in *Speweik* early on March 17th. The state then afforded electors no means to vote on "the third Tuesday after the first Monday in March" as specifically required by R.C. 3501.01(E)(2).

Next, relators filed this case against Secretary of State Larose, demanding that this court pronounce all-absentee voting until April 25th after issuing a "writ of prohibition" enjoining respondent's unauthorized *legislative* conduct. This court should reject this invitation because the judiciary, like respondent, lacks power to legislate.

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[2] *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 476 (2002), ("the settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is.")

[3] These same concerns were also known to members of the General Assembly who, aware of absentee and in-person early voting, did *not* extend the March 17th deadline.

Plus, altering the statutory law affects multiple provisions tethered to the primary deadline. For example, independent candidates are required to file a statement of candidacy "no later than four p.m. of the day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters…" *See* R.C. 3513.257. This was March 16th. Is the deadline now April 24th if this court pronounces a new primary of April 25th? Further, candidates who withdraw or die so many days before a primary may be replaced on the ballot. Are the replacement windows re-opened if the primary is moved? Similarly, does moving the primary move the deadline to register to vote by "the thirtieth day preceding a primary" under R.C. 3503.19? Similarly, campaign-finance disclosure laws would be different if primary deadlines were extendable by the executive or judicial branches.

And here's another concrete example: relators' proposed remedy would have this court rewrite Ohio law by requiring all-absentee voting until April 25th. But the absentee-ballot statute, R.C. 3509.01, says that, "The board of elections of each county shall provide absent voter's ballots for use at every primary…election to be held on ***the day*** specified by division (E) of section 3501.01 of the Revised Code for the holding of a primary election, designated by the general assembly…" This renders all-absentee voting past March 17, 2020 troublesome given that the definite article "the" precedes the singular term "day" in the absentee-voting statue. In sum, relators' proposal is invalid and incomplete because the General Assembly has enacted an intricate statutory

scheme such that fiddling with one feature triggers numerous problems. Thus, the circumstances presented necessarily require a legislative—not judicial—remedy that takes a multiplicity of cascading statutory factors into account.

ARGUMENT

I. Relators correctly detect that respondent lacks legislative power.

The separation-of-powers doctrine is "implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159 (1986). The doctrine "is designed to prevent a primary and intrinsic threat: the concentration of power in a single branch of government." *State ex. rel. v. Mahoning County Board of Elections*, 153 Ohio St.3d 581, 2018-Ohio-1602, ¶27.

Under Article II, Section 1 of the Ohio constitution, "The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives…"[4] Because respondent secretary of state is *not* a member of either chamber of the General Assembly, relators accurately observe that he lacks legislative power. By extension, he lacks power to legislate election deadlines and procedures: only the legislature has such power.

[4] "The judicial power of the state is vested exclusively in the courts." *Bodyke*, *supra*, at ¶58, citing Ohio Const. Art. IV, Sec. 1.

II. The remedy offered by relators is unworkable because (a) prohibition is inapplicable to the unauthorized exercise of *legislative* power and (b) the affirmative relief relators seek would frustrate the separation of powers amongst the co-equal branches of government.

Where relators go awry is the relief requested. Perhaps they could obtain an injunction in common pleas or federal court. But as this court explained last year in *State ex. rel. Save Your Courthouse Committee v. City of Medina*, supra, three elements are necessary for this court to issue a writ of prohibition:

- 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.

As to the first element, this court held that prohibition does *not* lie to prevent the unauthorized exercise of *legislative* power—even if the exercise of legislative power was unauthorized. Here is what this court said at paragraphs 26-28 of *Save Your Courthouse*:

> The allegations do not state a claim for a writ of prohibition because the committee cannot satisfy the first and fundamental element of a prohibition claim: the exercise of judicial or quasi-judicial power. "Quasi-judicial authority" refers to "the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial.
>
> When a public entity takes official action but does not conduct proceedings akin to a judicial trial, prohibition will not issue. For example, a board of elections did not exercise quasi-judicial authority when it denied an election protest, because it did not consider sworn testimony, receive documents into evidence, or in any other fashion "conduct a hearing sufficiently resembling a judicial trial." Likewise, in *Wright* at 186, 718 N.E.2d 908, we affirmed the denial of a writ of prohibition against the registrar of the Bureau of Motor Vehicles because the issuance of an administrative license suspension, without a formal hearing, was not quasi-judicial.

> Here, the committee targets the exercise of *legislative*—not *judicial*—power by city council. ***

This court then dismissed the prohibition action for failure to state a claim.

This same analysis applies here. Because relators' objection is to LaRose's unauthorized exercise of *legislative* power, they fail to state a claim for extraordinary relief in prohibition because they cannot satisfy the very first element of the claim.

Cognizant of this, relators' complaint at ¶17 tries to trigger the extraordinary remedy of prohibition by blithely asserting that respondent exercised quasi-judicial power. But this conclusory allegation contradicts the gravamen of their true objection: that legislating new election deadlines is a *legislative* power that the secretary of state doesn't wield. While we wholly agree that the secretary of state lacks legislative power, the fact remains that he didn't exercise quasi-judicial power—because he conducted no quasi-judicial hearing under the law. The absence of any law requiring such a hearing automatically defeats relators' prohibition claim. *State ex. rel. Save Your Courthouse Committee* at ¶29, ("The *requirement* of conducting a quasi-judicial hearing is the key point of exercising that authority."), (italics in original). Hence, because LaRose wasn't required to hold a hearing with competing evidence before selecting a date of June 2, 2020—the complaint states no prohibition claim.

Indeed, relators' topmost objection is that Ohio law required LaRose *not* to mandate a June 2, 2020 primary date for in-person voting. That is, he usurped *legislative*

power in doing so. Thus, the first element of any prohibition claim—the exercise of *judicial* or quasi-*judicial* jurisdiction—is not present here; requiring dismissal. And the affirmative relief relators request—a series of orders on how to conduct a primary—is unsupported by prohibition jurisprudence.

CONCLUSION

This court should (a) hold that setting election dates is a *legislative* function and therefore (b) dismiss relators' prohibition complaint for failure to state a claim. This would enable the codification of a holistic, legislative response to this unparalleled situation; thusly according due respect for the co-equal branches of government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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