IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF OHIO,
OHIO A. PHILIP RANDOLPH INSTITUTE,
LASHUNDA LEE, MUNIA MOSTAFA,
AUDRIANNA VICTORIAN RODRIGUEZ,
and HANNAH TUVELL,
Plaintiffs,

and

LIBERTARIAN PARTY OF OHIO,
Proposed Intervenor-Plaintiff,

v. **Case No. 20-1638**

Judge Watson

FRANK LAROSE, in his official capacity as
Secretary of State of Ohio,
Defendant,

and

STATE OF OHIO,
Intervenor-Defendant.

INTERVENOR-PLAINTTIFF LIBERTARIAN PARTY OF OHIO'S
REPLY TO DEFENDANTS' RESPONSE TO
MOTION FOR EMERGENCY RELIEF

I. Defendant-LaRose's Cancellation of the March 17, 2020 Primary Violated the Federal Elections Clauses.

Defendant-LaRose concedes that neither he nor the Governor possessed lawful authority to cancel or postpone the March 17, 2020 election. Still, he goes to great lengths to claim that his cancellation of the March 17, 2020 primary was pursuant to a lawful directive issued by Ohio's Department of Health. To the extent that issue remains relevant to these proceedings, he

is wrong. Neither he, the Governor, nor the Department of Health, had lawful authority to cancel or postpone the March 17, 2020.

Section 4 of Article I of the United States Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof …." U.S. Const., art. I, § 4 cl. 1 (emphasis added). Section 1 of Article II, meanwhile, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to vote for President. U.S. Const., art. II, § 1, cl. 2 (emphasis added). Together, these federal Elections Clauses dictate that Ohio's Legislature must prescribe the time and manner of electing federal Representatives and Senators, as well as the President of the United States. Ohio's Legislature fixes the deadlines; Ohio's Legislature prescribes the manner of voting. Neither Respondent, the Governor,[1] nor Ohio's Department of Health, has any say in this regard unless the Legislature expressly says so.

This Court analyzed these provisions in 2008 in response to the Ohio Secretary of State's promulgation of deadlines and rules for ballot access during Ohio's 2008 presidential election. *See Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Ohio 2008). There, Secretary Brunner, by executive Directive, attempted to fix a deadline for political parties seeking to qualify for Ohio's primary and general election ballots. She also included a provision setting the number of signatures needed for political parties to qualify. Both were issued because Ohio's legislatively prescribed deadline and number of signatures had been ruled unconstitutional

[1] Of course, the Governor plays an antecedent role through his veto authority when the legislation is passed. This role does not offend either of the Elections Clauses. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court ruled that Art. I, § 4's reference to "Legislature" assumes the basic legislative processes spelled out by a state's fundamental charter. Hence, bicameralism in Ohio is required for the "Legislature" to act, and Ohio's gubernatorial veto can be constitutionally applied to the Legislature's proposed time and manner of conducting federal elections.

under the First Amendment in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006).

In *Brunner*, 567 F. Supp. 2d 1006, the Court concluded that Ohio's Secretary of State did not possess statutory under Ohio law, nor constitutional authority under the federal Elections Clauses, to regulate federal elections and ballots. Regulating federal elections transcended the Ohio Secretary of State's authority under the federal Election Clauses because delegated power to the "Legislature," and not the executive: "Plaintiffs correctly contend that only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office." *Id.* at 1011.

The Court in *Brunner*, 567 F. Supp. 2d at 1011, observed that "[e]ven if the Ohio General Assembly could delegate its authority to a member of the executive branch, an issue that is not before the Court, there is no evidence that the state legislature has specifically delegated its authority to Defendant to direct the manner in which the state of Ohio votes for Senators and Representatives or selects electors to vote for President." (Emphasis added). The Court further stated that "[a]bsent an express delegation of legislative authority, this Court cannot assume that the Ohio General Assembly intended to vest the Secretary of State with the legislative authority conferred in Article I, Section 4 and Article II, Section 1." *Id.*

In terms of legislative delegation to the Secretary, the Court in *Brunner*, 567 F. Supp. 2d at 1011, recognized that the Secretary had been delegated some authority to act; the Secretary could and can "[i]ssue instructions by directives and advisories … to election boards as to the proper methods of conducting elections," and to "[p]repare rules and instructions for the conduct of elections …." This did not, however, support "filling a void in Ohio's election law …." *Id.* However, it concluded that a "general, statutory authority to direct the conduct of electors

cannot, as to Articles I and II of the Constitution, serve as a substitute for state legislative action regarding the election of federal officials." *Id*. at 1012-13 (emphasis added).

Judge Sargus's conclusion that Ohio's General Assembly had not specifically delegated its Article I and II powers to the Secretary of State was undoubtedly correct. Longstanding practice and authority in Ohio establishes that the Secretary has no power to "amplify" the state's election laws. In a 1930 response to a question posed by Ohio's Secretary of State, Attorney General Gilbert Bettman stated that while the "Legislature has manifestly left to the discretion of the Secretary of State as chief election officer the determination of certain details which it cannot foresee and determine in the administration of the election laws," this power can only be exercised "so long as the laws were not thereby amplified …." 1930 Ohio A.G. Op. 1423, at 122-23 (emphasis added).[2] Ohio law thus provides two conjunctive conditions for the Secretary to act in the context of elections: (1) he or she must be filling in administrative details the Legislature had not foreseen, and (2) he or she cannot be expanding or amplifying existing laws.

Defendant-LaRose now concedes that he was given no such express delegation. He admits that he could not unilaterally cancel or postpone the election. Still, he asserts that the Department of Health could. Because he did what the Department of Health ordered, his actions were somehow made lawful.

He is wrong. The Department of Health is constrained by Articles I and II in the exact same way as is Defendant-LaRose. So is the Governor. None of them can forcibly or unilaterally wrest from the State Legislature the authority delegated to it by Articles I and II of the United States Constitution. No precedent supports such an autocratic stripping of electoral responsibility and right. This fact is driven home by the Supreme Court's decision in *Arizona State Legislature*

[2] https://www.ohioattorneygeneral.gov/getattachment/85a53730-c62e-4de9-a742-1b1e1a68c2d8/1930-1423.aspx.

v. Arizona Department Redistricting Commission, 135 S. Ct. 2652 (2015), where a five-to-four majority on the Supreme Court barely sustained even the people's right by popular initiative to take from the State Legislature the authority to "legislate" under Article II of the United States Constitution. It was a foregone conclusion to all the Justices in that case that an executive officer, as opposed to the people, could not unilaterally do the same.

As explained by the Court in *Arizona State Legislature*, 135 S. Ct. at 2672, "[t]he [Elections] Clause was [] intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." Quite contrary to the problem of having a single politician or faction seize the reins of electoral rulemaking, "[t]he Elections Clause … is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands." *Id*. "The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power." *Id*. at 2674 (emphasis added). The same cannot be said for state autocrats and bureaucrats.

II. The Department of Health Was Precluded by the Elections Clauses and Ohio Law From Cancelling the March 17, 2020 Election.

Just as Defendant-LaRose is limited by Articles I and II, so is the Department of Health. It has no power under Articles I and II to cancel or postpone federal elections. Even assuming that a State Legislature could delegate such authority to health officials -- no State has done so -- no such delegation has occurred here.

Defendant-LaRose cites the Department's authority under O.R.C. § 3701.13 to "to make special orders … for preventing the spread of contagious or infectious diseases …." The

Department, for its part, singularly relied on this same statute. *See* Director of Department of Health Order, March 16, 2020.[3] That statute, however, says absolutely nothing about voting and elections -- let alone voting in federal elections.

Section 3701.13 states:

> The department may make special or standing orders or rules for preventing the use of fluoroscopes for nonmedical purposes that emit doses of radiation likely to be harmful to any person, for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as are best controlled by a general rule.

Contrary to Defendant-LaRose's claim, this is not a blank check. It does not override all of Ohio law.

The Ohio Supreme Court made this clear in *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health*, 96 Ohio St.3d 250, 773 N.E.2d 536 (2002). There, the Court held that notwithstanding a general grant of power to protect "public health," local health officials in Ohio have limited powers that do not include the authority to prohibit smoking in public places. General health powers are no substitute for specific grants, and cannot override specific limitations.

The local health officials in that case claimed that O.R.C. § 3709.21's grant of power to pass rules "for the public health" supported their action.[4] The Ohio Supreme Court disagreed:

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[3] https://governor.ohio.gov/wps/wcm/connect/gov/81d164da-757d-4818-b898-122325ccf509/Director%27s+Order+Closure+of+the+Polling+Locations.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-81d164da-757d-4818-b898-122325ccf509-n3EOF8I.

[4] The statute at issue, R.C. § 3709.21, broadly stated that "[t]he board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances." It further stated that "[i]n cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, the board may declare such orders and regulations to be emergency measures …." *Id*.

"At first glance, the language of R.C. 3709.21 seems to grant petitioners the necessary authority to enact the regulation at issue." *Id*. at 255, 773 N.E.2d at 542. Read in context, however, it became clear that local health officials did not have "unlimited authority to adopt regulations addressing all public-health concerns." *Id*. "Throughout R.C. Chapter 3709, and elsewhere, the General Assembly has explicitly and in great detail identified specific areas where local boards of health have substantive regulatory power to address public-health issues." *Id*. These many specific qualifications and conditions proved that R.C. § 3709.21 was not a general delegation of authority to regulate for the "public health." "At a minimum, enactment of the provisions cited above indicates that the General Assembly did not intend through R.C. 3709.21 to vest local boards of health with plenary authority to adopt any regulations that they deem necessary for the public health." *Id*. at 256, 773 N.E.2d at 543.

The same is true of O.R.C. § 3701.13's delegation of authority to the Department of Health. Contrary to Defendant-LaRose's claim, this grant is not even a blank check to regulate the public health. It is a far cry from being a grant of power to cancel elections and close polls.

Nor does the Department's power to "quarantine" and "isolate" under O.R.C. § 3701.13 support cancelling elections. In *Ex parte Company*, 106 Ohio St. 50, 57 (1922), where it sustained a quarantine measure applied to persons reasonably suspected of having several kinds of venereal disease, the Court explained the nature of the quarantine power:

> Quarantine in the sense herein used means detention to the point of preserving the infected person from contact with others. The power to so quarantine in proper case and reasonable way is not open to question. It is exercised by the state and the subdivisions of the state daily. The protection of the health and lives of the public is paramount, and those who by conduct and association contract such disease as makes them a menace to the health and morals of the community must submit to such regulation as will protect the public.

Id. at 57 (emphasis added). *See also Ex parte Kilbane*, 67 N.E.2d 22 (Ohio 1945) (same).

It has long been understood that health officials' quarantine and isolation authority allows them to detain infected people and isolate infected places in order to protect both from coming into "contact with others." It has never been understood to authorize the detention of uninfected individuals and prevent them from visiting or occupying uninfected places. As stated by one authority, quarantine and isolation are designed to allow "local health authorities [] to prevent the spread of communicable and epidemic diseases, … [by] persons afflicted with or exposed to those diseases …." 53 OHIO JUR. 3D, HEALTH AND SANITATION § 101 (2020). Toward this end, "[a]n isolated or quarantined person may not leave the premises to which he or she has been restricted without the written permission of the board …. " *Id.*

Whether the Department should have broad quarantine authority is not the question here. The point is the Department's power has never been understood that way. It is beyond debate that the General Assembly never intended to delegate to the Department of Health sweeping powers to regulate, cancel, and postpone federal elections. Its action in this very case makes that clear. Indeed, the General Assembly makes this very point in O.R.C. § 3707.05 of the Revised Code, which states that health officials "shall not … interfere with public officers not afflicted with or directly exposed to a contagious or infectious disease, in the discharge of their official duties, …." (Emphasis added). The General Assembly fully envisioned that health officials might attempt to interfere with government and made plain that they could not.

* * *

The Constitution guarantees "a Republican Form of Government." U.S. Const., art. IV, § 4. Further, as Chief Justice Marshall said so poignantly in *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819), this Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." (Emphasis original). It was not meant to be

jettisoned, as Defendant-LaRose seems to argue, during emergencies. Justice Robert Jackson made this same point in his renowned concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, concurring), where he observed that the Constitution's only "express provision for exercise of extraordinary authority because of a crisis," is found in the Suspension Clause of Article I, § 9, cl. 2 (which allows Congress to suspend the Writ of Habeas Corpus). Nothing in the Constitution allows local health officials to cancel federal elections.

III. No Precedent Supports Postponing and/or Extending a Federal Election While Maintaining a Pre-existing Registration Deadline.

Defendant-LaRose cites no authority nor historical precedent for his and Ohio's refusing to extend the voter registration deadline in lockstep with the election date. He cites only New York City's odd-year local election as an example. That election, however, was purely local and had nothing to do with federal office. It is irrelevant here.

The fact is that no court has ever authorized what Ohio and Defendant-LaRose propose to do, even under catastrophic conditions that have completely destroyed local infrastructure. Louisiana has a world of experience with this sort of thing, having experienced Hurricanes Katrina and Gustav, and in both instances having been forced to delay the State's September elections. Louisiana's Governor in September 2008 following Gustav, and acting under an explicit delegation of emergency power, *see* La. Rev. Stat. § 18:401.1.A., postponed Louisiana's presidential primary. *See* Louisiana Ex. Order BJ 08-89.[5] Most recently, the Governor of Louisiana postponed its 2020 primaries under this same authority. *See Louisiana Governor*

[5] https://www.doa.la.gov/osr/other/bj08-89.htm.

Moves Primary Because of Coronavirus, N.Y. TIMES, March 13, 2020.[6] In both instances, voter registration deadlines were automatically extended (consistent with Louisiana law) in lockstep with the new election dates. There was no special law -- like that here -- stating that registration was frozen on the earlier-prescribed dates.

The Court in *Florida Democratic Party v. Scott*, 215 F. Supp.3d 1250, 1257 (N.D. Fla. 2016), made much of these facts in ruling that Florida's excuse for not doing the same was "incomprehensible." It stated: Many other states, for example, either extended their voting registration deadlines in the wake of Hurricane Matthew or already allow voter registration on Election Day. There is no reason Florida could not do the same." *Id*. It elaborated: "Other states ravished by Hurricane Matthew extended their registration deadline to protect voters. In fact, fifteen other states, including, for example, Iowa, even allow registration on Election Day. It is incomprehensible that Florida could not follow suit." *Id*. at 1258 (emphasis added).

IV. Imposing Costs on Voters Violates the Fourteenth and Twenty Fourth Amendments.

Defendant-LaRose fails to explain why it can constitutionally impose costs on voters in this particular election when in other elections it cannot. In scheduled elections across Ohio, for example, voters have the right to vote free of charge. This is accomplished through in-person voting. While voters can be expected to purchase stamps for their absentee ballots, they always have the option of voting in person (no excuse needed) for free. This choice avoids violations of the Fourteenth and Twenty Fourth Amendments. In contrast, in Ohio's newly scheduled election, voters must cast absentee ballots, must pay to acquire the ballots, and must pay to insure that

[6] https://www.nytimes.com/aponline/2020/03/13/us/ap-us-virus-outbreak-louisiana-1st-ld-writethru.html.

their ballots are cast. They have no option to vote in person -- for free -- without excuse. This combination means they must pay, and it is this combination that constitutes a quintessential poll tax.

The Twenty Fourth Amendment, ratified in 1964, bars the use of poll taxes by the States (or the Congress) in federal elections. In *Harman v. Forsesenius*, 380 U.S. 528, 541 (1965), the Supreme Court interpreted this Amendment to reach beyond technical and literal taxes; according to the Court, the Twenty Fourth Amendment "'hits onerous procedural requirements which effectively handicap exercise of the franchise …." "Significantly," the Court stated, "the Twenty-fourth Amendment does not merely insure that the franchise shall not be 'denied' by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied or abridged' for that reason." *Id*. at 540. "Thus," the Court concluded, "like the Fifteenth Amendment, the Twenty-fourth 'nullifies sophisticated as well as simple-minded modes' of impairing the right guaranteed." *Id*. at 540-41. In short, "the Twenty–Fourth Amendment exists to combat the 'disenfranchisement of the poor...."' *Johnson v. Bredesen*, 624 F.3d 742, 750 (6th Cir. 2010) (quoting *Harman*, 380 U.S. at 539) (emphasis added).

In *Harman*, the Court used this analysis to invalidate a Virginia law that imposed no tax at all on federal voters. Instead, it required that federal voters "either pay the customary poll taxes as required for state elections [which had not yet been invalidated by the Supreme Court's decision in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966)] or file a certificate of residence." *Harman*, 380 U.S. at 532. The Court ruled that "it need only be shown that [the law] imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id*. at 541. Applying this standard, the Court ruled that Virginia's certificate of residence requirement "constitutes an

abridgment of the right to vote in federal elections in contravention of the Twenty-fourth Amendment." *Id*.

It is irrelevant that some, or most voters, moreover, can readily satisfy whatever financial obstacles a State to chooses to impose. "The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (holding that individual challenges to State photo ID law could proceed under theory that they constituted unconstitutional poll tax).

"In *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of $1.50," *Crawford v. Marion County Election Board*, 553 U.S. 181, 189 (2008), thus effectively extending as a matter of Fourteenth Amendment Equal Protection the reach of the Twenty Fourth Amendment to state and local elections. Consequently, whether federal, state or local elections are involved, a State may not constitutionally "impose[] a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Harman*, 380 U.S. at 541.

Here, Ohio does just that. According to Defendant-LaRose, "Voters who want to cast a ballot must [after receiving a post card] then either print out an absentee ballot request form themselves or call their county board and ask for one to be sent to them. Voters must then affix their own postage and send the request to their county board of elections." *LaRose Issues Statement on Legislation Finalizing Ohio's Primary Election*, March 25, 2020 (emphasis added). Voters must first supply their own ballot request forms, then must supply their own postage to send those forms to their county boards of elections. Only then will they receive a ballot and be able to vote.

Many voters, of course, can satisfy the first step using their own computers, printers and paper at home. Unfortunately, many voters cannot. Many voters can easily afford the cost of postage to return their ballot requests to their elections boards. Unfortunately, many poor voters cannot. And as stated by the Sixth Circuit, "the Twenty–Fourth Amendment exists to combat the 'disenfranchisement of the poor...'" *Bredesen*, 624 F.3d at 750 (emphasis added). That is exactly what Ohio is doing.

CONCLUSION

Intervenor-Plaintiff respectfully requests that the Court issue emergency relief directing Defendant-LaRose to comply with federal law while conducting Ohio's federal primary election. Intervenor-Plaintiff further respectfully requests that the election be concluded no later than May 12, 2020.

Respectfully submitted,

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