

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

MICHAEL GONIDAKIS, et al.,

Plaintiffs,

v.

FRANK LAROSE,

Defendant, and

**LEAGUE OF WOMEN VOTERS OF OHIO
and A. PHILIP RANDOLPH INSTITUTE
OF OHIO,**

Intervenor-Defendants.

Chief Judge Algenon L. Marbley

Case No. 2:22-cv-773

**INTERVENOR-DEFENDANTS' OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION TO VACATE STAY AND
FOR IMMEDIATE APPOINTMENT OF A THREE-JUDGE PANEL**

I. INTRODUCTION

Plaintiffs' Emergency Motion to Vacate Stay and For Immediate Appointment of a Three-Judge Panel should be denied. Plaintiffs' dire predictions notwithstanding, the state process is working. The Supreme Court of Ohio's March 16, 2022 Order invalidating the third set of General Assembly district maps ("the Third Plan") sets forth a schedule for the expeditious resolution of that process. It contemplates the enactment of a bipartisan plan by March 28, 2022.

Next week, per the Ohio Court's order, a set of "frequent" public drafting sessions must take place. The Ohio Redistricting Commission ("the Commission") has already scheduled the first such session for tomorrow—Saturday, March 19 at 2:00 pm. These sessions must involve the entire Commission, *i.e.*, Republicans and Democrats. The state process is continuing. Any conclusory assertions—by the Secretary of State or any other party—aside, the process is

capable of generating a legally valid map in time for the May 3 primary. It just needs six business days—the time from the Ohio Court’s ruling until the March 28 deadline—for a new plan.

And in any event, additional time is highly likely to be available. Since the March 16, 2022 decision, numerous Ohio leaders, including Governor DeWine and Senate President Huffman, have suggested it would be possible to move back the May 3 primary date to accommodate the ongoing redistricting process. And Secretary LaRose, in his filing today, has made it abundantly clear that holding a May 3 primary for General Assembly candidate elections—under *any* map—is already impossible. So that ship has sailed. Under these circumstances, there will almost certainly be a later primary scheduled, allowing even *more* time for the state process to be completed.

Accordingly, the stay in this case should remain in place to permit this ongoing state process to unfold. Because Ohio’s legislative and judicial branches are in fact still taking active measures to advance the redistricting process, this Court ought to continue to “stay[] its hand.” *Grove v. Emison*, 507 U.S. 25, 33 (1993) (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)). And because this matter is not yet ripe for federal intervention, the appointment of a three-judge panel continues to be premature.

To be sure, the Ohio Court has provided for a process for further objections and potential litigation of a revised plan. By this Opposition, Intervenor-Defendants do not seek the maintenance of a stay throughout that process. Rather, this Opposition is limited at this time to providing the state process with six more business days—until March 28, 2022—to enact a new plan. It is designed to permit the Ohio state actors to do the work directed by the Ohio Court.

II. RECENT FACTUAL DEVELOPMENTS

At the March 14, 2022 status conference, this Court announced a stay in deference to the ongoing state redistricting process in Ohio. *See* Tr. of Status Conf., ECF No. 69 at PageID # 1004. At that same conference, this Court asked the Ohio Secretary of State to provide information on election deadlines related to the upcoming state primaries. *Id.* at PageID # 981–82.

On March 16, 2022, Secretary LaRose informed this Court that it would be possible to proceed on the Third Plan in light of various state and federal deadlines, subject to certain adjustments that were then in process. *See* Notice by Sec’y of State LaRose, ECF No. 71 at PageID # 1038. Thus, Secretary LaRose stated that a tentative agreement had been reached with the United States Department of Justice to accommodate the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) deadline, which was extended from March 19 to April 5. *Id.* at PageID # 1039–40.

On the same day, Plaintiffs filed a Notice to inform the Court that they wish to change their relief to now seek implementation of the Third Plan as opposed to a prior plan that was no longer under consideration by the Supreme Court of Ohio or the Commission. *See* Pls.’ Additional Notice to Seek Third Plan, ECF No. 72 at PageID # 1042. In that Notice, Plaintiffs amended the relief that they are seeking. They are no longer seeking implementation of the Second Plan but, in light of subsequent developments (which include the revocation of the Commission’s purported “impasse”), they are now seeking implementation of the Third Plan. In the event that this “Notice” was insufficient to effectuate this change of course, Plaintiffs asked this Court “to provide a date by which Plaintiffs may file a First Supplemental Complaint

addressing the most recent post-Complaint events under Fed. R. Civ. P. 15(d) along with a supporting Motion for Preliminary Injunction.” *Id.* at PageID # 1043.¹

But March 16 was not over. That evening the Supreme Court of Ohio issued its Opinion and Order, sustaining Petitioners’ objections to the Third Plan on the basis of violations of Article XI, Sections 6(A) and 6(B) of the Ohio Constitution. *03/16/2022 Case Announcements #2, League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 2022-Ohio-790 (Ohio Mar. 16, 2022). In doing so, the Ohio Court spelled out just how these constitutional defects should be remedied:

- The Supreme Court of Ohio ordered that the Commission be reconstituted and convene in order to draft and adopt a new Ohio General Assembly district plan that conforms with the Ohio Constitution. *Id.*
- “To promote transparency and increase public trust,” the order requires the Commission to conduct its drafting “in public[.]” *Id.*
- To make sure that the work of the Commission is done effectively, the Court ordered the Commission to “convene *frequent* meetings to demonstrate their bipartisan efforts to reach a constitutional plan within the time set by th[e] court.” *Id.* (emphasis added);
- And to make sure that the work is done expeditiously, the new plan must be filed with the Secretary of State no later than March 28, 2022. *Id.*

¹ Mere hours ago, instead of waiting for the requested date from the Court, and although the stay of all proceedings remains pending, Plaintiffs moved to file a First Amended Supplemental Complaint, purportedly to address the deficiencies identified in the Notice. *See* Emergency Mot. for Leave to File First Supp. Am. Compl., ECF No. 75.

- In addition, the Ohio Court set forth an expeditious (72 hour) schedule for the filing of objections, if any, and responses (again, 72 hours), if any, to any revised plan. *Id.*

Contrary to Plaintiffs' claim, this is not a failed process. It is an effective and ongoing process, wherein Ohio's redistricting is being driven to a constitutional conclusion with the guidance of the state court.

Moreover, today, the Secretary of State, in its response to the motion to vacate the stay, stated, in connection with the elections for the state legislature:

At present, the primary election for those districts will have to be held at a later date. The Court ordered the Commission to reconvene and adopt a plan no later than March 28, 2022. *See League of Women Voters, et al. v. Ohio Redistricting Commission*, Entry dated March 16, 2022. The Commission is going to convene and work to comply with the Court's Order. ***And although the May 3, 2022 primary election is no longer looming for the state legislative races***, the need for final state legislative districts to be used in this year's elections remains.

Sec'y of State LaRose Resp. to Pls.' Emergency Mot. to Vacate Stay and Appoint Three-Judge Panel, ECF No. 76 at PageID # 1108 (emphasis added).

III. OPPOSITION TO THE MOTION TO LIFT THE STAY

A. Under the Existing Calendar, Time Remains for the State Process to Conclude.

So long as time remains for the state process to resolve itself, federal intervention is improper and a stay is warranted. *See Growe*, 507 U.S. at 33 (“In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.”). In its ruling from the bench, the Court distinguished this case from the federal intervention in *Branch v. Smith*, 538 U.S. 254 (2003), by accurately noting that in *Branch* there was “no prospect” of resolution before the election. Tr. of Status Conf., ECF No. 69 at PageID # 1003; *Branch*, 538 U.S. at 265 (“we affirm the injunction on the basis . . . that the

state-court plan had not been precleared and had no prospect of being precleared in time for the 2002 election”). Because a very real prospect for resolution remains in this case, deferral continues to be warranted, and the stay ought not be lifted.

1. There are strong reasons to believe that the state process will conclude by the March 28 deadline set by the Supreme Court of Ohio.

The Supreme Court of Ohio has issued a clear, detailed order; a new map is due by March 28, 2022. The Court has not simply punted this issue back to the Commission with open-ended demands. It has instead carefully dictated new procedures to help guide the map-drawing process in order to encourage consistency with the Ohio Constitution. By ordering the Commission to conduct its drafting “in public,” and the Commissioners to “convene frequent meetings to demonstrate their bipartisan efforts to reach a constitutional plan,” the Court has greatly increased the odds of the enactment of a constitutionally-complaint plan. *03/16/2022 Case Announcements #2, 2022-Ohio-790*. Critically, the Supreme Court of Ohio has demonstrated its willingness to enforce its orders with contempt proceedings, if need be. *2/24/2022 Case Announcements #3, League of Women Voters of Ohio v. Ohio Redistricting Comm’n, 2022-Ohio-518* (Ohio Feb. 24, 2022).

No one can doubt the resolve of the Supreme Court of Ohio to see this process through to a constitutional conclusion. The Ohio Court has now provided even more specific instructions for how the Commission is to comply with its constitutional obligations in its most recent iteration of the Ohio redistricting process. Given this ongoing process, there is a very real likelihood that a constitutionally compliant map is just days away.

2. If a new map is enacted by March 28, there is a reasonable prospect that the current election schedule can accommodate that new map.

Once a new map is enacted, there is enough time to move the state and federal deadlines identified by Secretary LaRose in his March 16, 2022 letter.

While ballots subject to UOCAVA would typically need to be sent out no later than 45 days prior to election day, which would result in a March 19 deadline, Secretary LaRose has taken the position that Ohio now has until April 5 to send ballots overseas. Notice by Sec’y of State LaRose, ECF No. 71 at PageID # 1039–40. But regardless of this purported 16-day extension, UOCAVA applies only to federal elections, and so does not apply to the General Assembly election. *See generally* 52 U.S.C. § 20302(a)(1)–(3), (6)(A)–(B), (8)(A)–(B) (applying UOCAVA provisions to elections for “Federal office”). UOCAVA thus poses no threat to the election timeline in any event.

Thus, the only remaining deadlines are those that may be extended at Secretary LaRose’s discretion. Secretary LaRose identified four state deadlines in his March 16 Notice to this Court: (1) the boards of election were required to review all General Assembly candidate petition signatures and certify who qualified for the ballot by March 14; (2) “candidates who wished to take advantage of the 30-day period for moving into a new legislative district set forth in Ohio Const., Art. XI, Sec. 9(C) needed to notify, by March 10, 2022, the county board of elections where they first filed if they intended to run in a different district”; (3) “[c]andidates who need to move into the new legislative district where they wish to run must do so by March 26, 2022; and (4) protests against partisan candidates, including those for Ohio House and Ohio Senate, needed to have been filed by March 17, 2022. *Id.* at PageID # 1039.

None of these deadlines take precedence over the Ohio Constitution.² And they all can be amended by the Secretary of State. According to Secretary LaRose’s own directive, he has

² The only relevant deadline in the Ohio Constitution is a requirement of allowing 30 days for “persons to change residence in order to be eligible for election.” Ohio Const., Art. XI, § 9(C). The March 28 deadline for a new General Assembly map is more than 30 days from the May 3 primary date.

the authority to adjust each of these deadlines in order to facilitate a functional primary schedule. See ~~Exs. A-D~~ Trs. of Meetings and Directive, ECF No. 67-1 at PageID # 956 (directive from Secretary LaRose explaining that the Secretary of State has authority to “adjust deadlines pertaining to the administration of the May 3 primary[.]”). He can and ought to do so here.

In a March 17 letter, Secretary LaRose set forth his position regarding the state of the schedule. The letter was laced with accusations, blaming the present scheduling issues on litigation funded by “out of state special interests” and supposed undue delay by the Supreme Court of Ohio; it even alleged intentional delay by the Biden administration in providing census data. See Ex. A. (3/17/22 Letter from Sec’y of State LaRose to the Ohio General Assembly). In light of these allegations, Secretary LaRose proclaimed to the Ohio General Assembly that the current primary date is no longer feasible. *Id.* He reiterated this position in his filing today. See Sec’y of State LaRose Resp. to Pls.’ Emergency Mot. to Vacate Stay and Appoint Three-Judge Panel, ECF No. 76. The impossibility of holding an election on May 3—under any map—is certainly not a basis to deny the Commission six business days to conduct the work prescribed by the Supreme Court of Ohio. In fact, it is a further reason to allow the work to proceed: a plan can be completed in time to meet the deadlines for a May 3 election, but the election will almost certainly be held sometime later than May 3.

B. There is a Significant Prospect for a Change in the May Primary Date, Making it all the More Likely That the State Process Will Reach a Timely Resolution.

Regardless of whether a May 3 primary is feasible for the Ohio General Assembly candidate contests, it is still possible for the Ohio state government to conduct a primary in accordance with Ohio state law. Secretary LaRose, Governor DeWine, and Senate President Huffman have all indicated that they favor moving the primary date.

Secretary LaRose has made this point twice. First, in state litigation regarding the Ohio Congressional Map, Secretary LaRose made clear that he had no intention of conducting a primary with an invalid map, and that he would move the primary date if need be. *See Resp. of Sec’y of State Frank LaRose to Pet’rs’ Mot. to Enforce Ct. Order*, at 3, *Adams, et al. v. DeWine, et al.*, No. 2021-1428 (Ohio Mar. 8, 2022) (“[T]he Secretary has no intention of proceeding with party primary elections for congressional seats on May 3, 2022 if this Court invalidates the recently adopted congressional district map.”). There is no reason that principle should not extend here, and indeed it appears that Secretary LaRose has already begun informing the legislature that the May 3 primary will not include state House and state Senate contests. *See Ex. A.*

Second, in a filing made just today, Secretary LaRose underscored this point:

At present, the primary election for those districts will have to be held at a later date. . . . ***And although the May 3, 2022 primary election is no longer looming for the state legislative races***, the need for final state legislative districts to be used in this year’s elections remains.

LaRose Opp’n to Pls.’ Mot. for Prelim. Inj., ECF No. 67 at 2 (emphasis added).

The Secretary is not alone. In reaction to the Supreme Court of Ohio’s most recent decision, Ohio Senate President Huffman suggested moving the primary date, at least for state legislative elections.³ According to President Huffman, if all primaries were to be kept on one date, the *earliest* primary date would be in July. *Id.* Governor DeWine has also indicated a primary date move may be imminent, stating that “it’s looking unlikely” that the May 3 date would remain.⁴ These comments, along with the actions and recent filing of Secretary LaRose

³ See Jessie Balmert & Laura A. Bischoff, Ohio Supreme Court rejects statehouse maps, ending hopes of full May primary, *Enquirer*, (Mar. 17, 2022 7:59 AM).

⁴ Jeremy Pelzer, Gov. Mike DeWine’s suggestion to break Ohio’s redistricting impasse: have mapmakers collaborate on bipartisan plan, *msn*, (Mar. 17, 2022).

making clear his decision that a May 3 primary for these offices is no longer possible, all demonstrate the very real possibility of a major change to the primary date. Clearly, if the state legislature is on the precipice of moving back the state primary date by several months, then it can hardly be said that time has run out for letting the state redistricting process run its course.

IV. OPPOSITION TO THE THREE-JUDGE PANEL REQUEST

As discussed in more detail in Intervenor-Defendants' prior Opposition to Plaintiffs' Request For Appointment of Three-Judge Panel (ECF No. 9), Plaintiffs request fails because it does not challenge the constitutionality of an existing "apportionment" under 28 U.S.C. § 2284(a). Plaintiff's request for an immediate appointment of a three-judge panel should be denied.

A. A Three-Judge Panel Should Not Be Appointed Because Plaintiffs Do Not Challenge an *Existing* Apportionment.

Plaintiffs' request for a three-judge panel fails because, by Plaintiffs' own admission, "there is no apportionment." Pls.' Emergency Mot. to Vacate and Appoint Three-Judge Panel, ECF No. 73 at PageID #1046 (emphasis in original). Courts agree that "the challenge [under § 2284(a)] must be to an existing apportionment," *i.e.*, the "final product" of the redistricting process. *City of Philadelphia v. Klutznick*, 503 F. Supp. 657, 658 (E.D. Pa. 1980). As long as Ohio's redistricting process continues, a three-judge panel is inappropriate because a malapportionment challenge does not include "practices or actions that may lead to or affect a future apportionment." *Alabama v. U.S. Dep't of Commerce*, 493 F. Supp. 3d 1123, 1128 (N.D. Ala. 2020); *see also Commonwealth of Mass. v. Mosbacher*, 785 F. Supp. 230, 236 (D. Mass. 1992) (noting that a challenge to "precursors to the ultimate apportionment decision" does not constitute "a direct challenge to apportionment itself"), *overruled on unrelated grounds by Franklin v. Massachusetts*, 505 U.S. 788 (1992).

B. A Request For a Three-Judge Panel Should Be Delayed Until After Ohio's Redistricting Process Has Concluded.

Even if the lack of an apportionment was sufficient basis for a three-judge panel, such a request is not ripe at this time because Ohio has not finished its redistricting process. As discussed in Section III.A *supra*, both the Commission and the Supreme Court of Ohio remain fully engaged in this process to ensure a proper apportionment will occur. As set forth above, just this week, the Supreme Court of Ohio laid out new directives to encourage a bipartisan and constitutional mapmaking process. The Secretary of State has taken measures to extend federal election deadlines, and more sweeping changes to the primary calendar are under discussion at the highest levels of the Ohio government. Until the State of Ohio indicates that it has completed its work, the process has not concluded, and any allegations of an improper apportionment are premature. Once Ohio has completed its redistricting process, the decision on a three-judge panel can be made.

V. CONCLUSION

For the aforementioned reasons, Intervenor-Defendants respectfully request that this Court continue to stay these proceedings and continue to refrain from appointing a three-judge panel.

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* *Pro hac vice* application forthcoming
** *Pro hac vice* application pending

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that on this 18th day of March, 2022, I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Southern District of Ohio, Eastern Division via the ECF system, which will send notification of such filing to all counsel of record.

/s/ Freda J. Levenson
Freda J. Levenson (0045916)
Counsel for Intervenor-Defendants

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Chief Judge Algenon L. Marbley

Case No. 2:22-cv-773

**DECLARATION OF FREDA J. LEVENSON IN SUPPORT OF
INTERVENOR-DEFENDANTS' OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION TO VACATE STAY AND
FOR IMMEDIATE APPOINTMENT OF A THREE-JUDGE PANEL**

I, Freda J. Levenson, having been duly sworn and cautioned according to law, hereby state that I am over the age of eighteen years and am competent to testify as to the facts set forth below based on my personal knowledge and having personally examined all records referenced in this declaration, and further state as follows:

1. I am one of the counsel for Proposed Intervenor-Defendants in the above-captioned case.
2. Exhibit A is a true and correct copy of a letter sent by Secretary of State LaRose to the Ohio General Assembly on March 17, 2022.

I declare the above to be true under penalty of perjury of the laws of the United States of America.

Respectfully submitted,

/s/ Freda J. Levenson

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CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that on this 18th day of March, 2022, I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Southern District of Ohio, Eastern Division via the ECF system which will send notification of such filing to all counsel of record.

/s/ Freda J. Levenson

Freda J. Levenson (0045916)

Counsel for Intervenor-Defendants

EXHIBIT A

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March 17, 2022

Honorable Mike DeWine
Governor, State of Ohio
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Honorable Allison Russo
Minority Leader, Ohio House
77 South High Street, 14th Floor
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Honorable Matt Huffman
President, Ohio Senate
Ohio Statehouse
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Honorable Kenny Yuko
Minority Leader, Ohio Senate
Ohio Statehouse
Columbus, OH 43215

Honorable Robert Cupp
Speaker, Ohio House of Representatives
77 South High Street, 14th Floor
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Members of the General Assembly
Columbus, Ohio

Dear Colleagues:

I regret to inform you that as a result of last night's decision by the Ohio Supreme Court, and barring the immediate action of a federal court, our 88 county boards of elections can no longer include contests for the state House and state Senate in the May 3, 2022 primary election. Let there be no doubt, however, that we will continue to prepare for a May 3 primary election that includes statewide, congressional and local contests, unless directed to do otherwise by the Ohio General Assembly or a court order.

The election effectively begins with the delivery of ballots to military and overseas voters. Due to the Court's order invalidating the third Ohio General Assembly district plan, it's no longer logistically possible to include district-specific legislative races on the ballots without federal court intervention allowing the boards to proceed as scheduled.

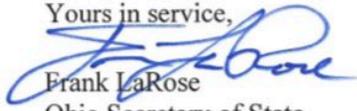
After mounting a monumental effort over the last few weeks, our bipartisan elections officials were ready to conduct this election on time, as I directed. However, those boards are now left once again without clear districts to certify legislative candidates, and they're simply out of time to complete the required work that must be done to reprogram election systems with new district data. **The Court's majority opinion effectively causes the primary election for these contests "to be conducted other than in the time, place, and manner prescribed by the Revised Code."** (ORC Section 3501.40)

I remind the General Assembly that a cascading series of delays beyond our control have brought us to this point. The process of redrawing Ohio's political districts requires the use of U.S. Census data to determine population shifts over the past decade. The Biden administration failed to deliver that data to the Ohio Redistricting Commission by the required April 2021 deadline. I believe this delay was intentional. After Ohio Attorney General Dave Yost sued the federal government to get the data, it finally arrived by mid-August – nearly five months late and just days before the Commission's constitutional deadline for new district maps (September 1). The Redistricting Commission moved quickly to adopt a new state House and Senate district plan, giving final approval on September 16, 2021. Opponents then filed lawsuits against the plan just days later, and the Ohio Supreme Court has so far taken six months in total to consider that litigation, including nearly four months to issue its first ruling and then additional weeks of deliberation each time the Commission has attempted to comply with the Court's ever-changing orders.

Additionally, my office is currently involved in or monitoring no less than *nine* local, state or federal lawsuits seeking in some way to cause chaos and confusion for voters and to postpone the primary election. As I've often stated in recent weeks, I believe the motive is entirely political, and the strategy is being bankrolled by out of state special interests ultimately seeking court-ordered gerrymandering for partisan advantage. Nevertheless, our team at the Secretary of State's Office and our bipartisan colleagues at the boards of elections have been working tirelessly to overcome these unprecedented obstacles, even as some in the General Assembly opposed efforts to accommodate military voters and attempted to block our local elections officials from receiving critical funding needed to get this job done. Regardless, we've never let up in the effort to make a *complete* May 3 primary election a success, and I'm confident we're prepared to do that.

I look forward to working closely with the General Assembly as we chart a course forward to give Ohioans the honest and accessible election they deserve. Please consider me and my office a resource as you make some very important decisions in the days ahead.

Yours in service,


Frank LaRose
Ohio Secretary of State