

IN THE SUPREME COURT OF OHIO

Meryl Neiman, et al.,

Petitioners,

v.

Secretary of State Frank LaRose, et al.,

Respondents.

Case No. _____

Original Action Filed Pursuant to Ohio
Constitution, Article XIX, Section 3(A)
and Article IV Section 2(B)(1)(f)

*Expedited Election Matter Under
S.Ct.Prac.R. 12.08*

PETITIONERS' MOTION FOR A SCHEDULING ORDER

Abha Khanna**
Ben Stafford**
ELIAS LAW GROUP, LLP
1700 Seventh Ave., Suite 2100
Seattle, WA 98101
(206) 656-0176
akhanna@elias.law

Jyoti Jasrasaria**
Spencer W. Klein**
Harleen K. Gambhir**
Raisa Cramer**
ELIAS LAW GROUP, LLP
10 G St. NE, Suite 600
Washington, DC 20002
(202) 968-4490
jjasrasaria@elias.law

Donald J. McTigue (0022849)
Counsel of Record
Derek S. Clinger (0092075)
McTIGUE COLOMBO & CLINGER, LLC
545 East Town Street
Columbus, OH 43215
(614) 263-7000
dmctigue@electionlawgroup.com

**Applications for Admission Pro Hac Vice
Forthcoming

Dave Yost
OHIO ATTORNEY GENERAL
Bridget C. Coontz (0072919)
Julie M. Pfeiffer (0069762)
Michael A. Walton (0092201)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215
(614) 466-2872
bridget.coontz@ohioago.gov

*Counsel for Respondent Ohio Secretary of
State Frank LaRose*

Phillip J. Strach
Thomas A. Farr
John E. Branch, III
Alyssa M. Riggins
NELSON MULLINS RILEY & SCARBOROUGH,
LLP
4140 Parklake Ave., Suite 200
Raleigh, NC 27612
(919) 329-3812
phil.strach@nelsonmullins.com

*Counsel for Respondents House Speaker Bob
Cupp and Senate President Matt Huffman*

Erik J. Clark (0078732)

Counsel for Petitioners

Ashley Merino (0096853)
ORGAN LAW LLP
1330 Dublin Road
Columbus, OH 43215
T: (614) 481-0900
F: (614) 481-0904
ejclark@organlegal.com
amerino@organlegal.com

*Counsel for Respondent Ohio Redistricting
Commission*

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Petitioners have filed this action under Article XIX Section 3(A) and Article IV Section 2(B)(1)(f) of the Ohio Constitution, challenging the remedial congressional redistricting plan adopted by the Ohio Redistricting Commission on March 2 (the “March 2 Plan”). Petitioners have filed this action as an expedited election matter under S.Ct.Prac.R. 12.08 because it was brought, in part, under Art. IV, Sec. 2 of the Ohio Constitution and concerns an election taking place in the next 90 days: the primary elections for congressional offices to be held on May 3, 2022. As such, as a baseline, this matter is subject to the expedited deadlines set out in S.Ct.Prac.R. 12.08.

Petitioners file this separate motion for a scheduling order in the event the Court chooses not to treat this action as one handled under S.Ct.Prac.R. 12.08, or to further expedite the S.Ct.Prac.R. 12.08 schedule. Because the primary date is fast approaching, Petitioners therefore request a scheduling order setting forth a highly expedited schedule for litigation. Under this schedule, the case will be fully briefed exactly nine days after the filing of this complaint and motion. Petitioners’ proposed schedule assumes that filing and service shall be electronic and that all dates are calculated through 11:59 p.m. ET.

Respectfully submitted,

/s Donald J. McTigue

Donald J. McTigue (0022849)
Derek S. Clinger (0092075)
MCTIGUE & COLOMBO LLC
545 East Town Street
Columbus, OH 43215
dmctigue@electionlawgroup.com
dclinger@electionlawgroup.com
T: (614) 263-7000
F: (614) 368-6961

Abha Khanna**
Ben Stafford**
ELIAS LAW GROUP, LLP
1700 Seventh Ave., Suite 2100
Seattle, WA 98101

(206) 656-0176
Jyoti Jasrasaria**
Spencer W. Klein**
Harleen K. Gambhir**
Raisa M. Cramer**
ELIAS LAW GROUP, LLP
10 G St. NE, Suite 600
Washington, DC 20002
(202) 968-4490

**Application for Admission Pro Hac Vice
Forthcoming

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via email on March 21, 2022
upon the following:

Office of the Ohio Attorney General
Bridget Coontz
Section Chief, Constitutional Offices Section
Bridget.Coontz@OhioAttorneyGeneral.gov

Phillip J. Strach
Nelson Mullins Riley & Scarborough, LLP
phil.strach@nelsonmullins.com

Erik J. Clark
Organ Law LLP
ejclark@organlegal.com

/s/ Derek S. Clinger
Derek S. Clinger

Memorandum in Support

This action challenges the congressional redistricting plan (the “March 2 Plan”), passed by the Ohio Redistricting Commission (the “Commission”) in response to this Court’s order declaring the previous congressional plan passed by the General Assembly invalid. This motion is filed simultaneously with a complaint filed by Petitioners pursuant to Article XIX, Section 3(A) and Article IV, Section 2(B)(1)(f) of the Ohio Constitution.

A. Procedural History

In *Adams v. DeWine*, this Court invalidated the congressional redistricting plan passed by the General Assembly (the “November 20 Plan”), finding it violated Article XIX of the Ohio Constitution. 2022-Ohio-89, at ¶ 4 (Jan. 14, 2022). Pursuant to Article XIX, Section 3 of the Ohio Constitution, the General Assembly then had 30 days to pass a new plan remedying the issues addressed in the Court’s order. Because the General Assembly did not pass a new plan, the process moved to the Commission. Two weeks later, the Commission adopted the March 2 Plan, which is the subject of the instant litigation.

B. Candidate Filing Deadlines and Election Dates

The Ohio primary election for United States House of Representative races in the 2022 election is scheduled for May 3, 2022. Pursuant to legislation recently passed by the Ohio General Assembly, county boards of elections must make absentee ballots ready for use to be sent out to uniformed service members and overseas citizens (under the Uniform Overseas Citizens Absentee Voting Act, or “UOCAVA”) by April 5, 2022 [Exhibit 1].

The General Assembly and the Commission delayed the process as long as possible before the General Assembly adopted the November 20 Plan, to manipulate Article XIX processes and facilitate passage of a partisan gerrymander. They took the same tack in delaying adoption of a

remedial plan in response to the Court's January 14 order in *Adams*. The delay by the General Assembly and Commission has shrunk the time available for this Court to rule on the March 2 Plan, but there is still enough time to grant relief prior to the upcoming congressional election.¹ Petitioners recognize that according full relief in this action will require (as Petitioners have requested in their complaint) this Court to issue an order that moves back the primary election. But this is nothing out of the ordinary: courts regularly adjust election deadlines to ensure that elections are run under maps that are fair and legal. *See, e.g., Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022) (modifying congressional and statewide election calendar due to impasse and noting suspension of state legislative election deadlines until resolution of litigation); Order, *In the Matter of 2022 Legislative Districting of the State*, Misc. Nos. 21, 24, 25, 26, 27 (Md. Feb. 11, 2022) (postponing candidate filing and related deadlines before 2022 primaries); Order, *Harper v. Hall*, No. 413P21 (N.C. Dec. 8, 2021) (postponing 2022 primary filing deadlines before primary); *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204, 237, 244 (1992) (revising pre-primary deadlines in similar congressional redistricting impasse case "to provide for an orderly election process").

It is unfortunate that the General Assembly passed an unconstitutional congressional districting plan, and that the General Assembly and Commission thereafter chose to delay the enactment of a remedial plan until just two months before the primary election. But this bad faith conduct cannot shield a congressional plan from review. To find otherwise would render Article XIX toothless, at least as to the first election held under a new plan (which, under a simple-majority

¹ Petitioners in *Adams* sought to present challenges to the March 2 Plan as expeditiously as possible by moving to enforce the Court's January 14 order in the first instance. After the Court clarified that a challenge to the March 2 Plan required a new original action, the same group of petitioners filed the present lawsuit and this motion the next business day.

plan like the March 2 Plan, is half of the elections that will be held under that plan) and would reward efforts to run out the clock on judicial review. The proposed schedule below ensures prompt resolution of this litigation in time for a rescheduled primary election and gives Article XIX meaning by protecting Ohioans' right to vote under congressional maps that are fair.

C. Proposed Litigation Schedule

To facilitate the timely resolution of this case, Petitioners propose the following litigation schedule. For the Court's convenience, Petitioners have also included the UOCAVA deadline and the primary election date, according to the current election calendar, below.

DEADLINE	DESCRIPTION
March 23, 2022	Petitioners file their merits brief and any supporting evidence
March 28, 2022	Respondents file their merits brief and any supporting evidence
March 30, 2022	Petitioners file their reply brief and any supporting evidence
April 5, 2022	Current deadline for absentee ballots to be mailed out under UOCAVA
May 3, 2022	Primary Election Day under current schedule

D. Discovery

Petitioners do not believe discovery is necessary in this case, aside from expert disclosures, which under the proposed schedule Petitioners would submit with their merits brief on March 23, and Respondents would submit with their merits brief on March 28. Petitioners' position on this point is largely identical to the position taken by Respondents Secretary LaRose, President Huffman, and Speaker Cupp in response to Petitioners' motion for a scheduling order filed in *Adams*. See Secretary of State Frank LaRose's Response to Relators' Motion for Scheduling Order, *Adams v. DeWine*, No. 2021-1428 at 4 (Nov. 29, 2021) ("Little time is needed for fact discovery

because it is unnecessary to resolve the legal issues in this case The 2021 Congressional Plan in Sub. S.B. 258 speaks for itself. Whether it complies with Article XIX, Section 1(C)(3)(a) and (b) can be found on its face, aided by expert testimony that the Parties may wish to offer.”); Respondents Huffman and Cupp’s Response to Relators’ Request for a Scheduling Order, *Adams v. DeWine* at 3 (Nov. 29, 2021) (agreeing with the position expressed in Secretary LaRose’s response). While Petitioners believe that fact discovery is ordinarily both necessary and helpful for shedding light on material issues in redistricting disputes such as this one, Petitioners submit that the March 2 plan so plainly violates Article XIX, Section 1(C)(3)(a) and (b) that no fact discovery beyond expert testimony is necessary.

E. Oral Argument

For similar reasons, Petitioners do not believe oral argument is necessary in this matter. The Court issued a lengthy opinion articulating the Article XIX standard in *Adams* and has resolved challenges to multiple remedial General Assembly plans on the papers and without oral argument. *See, e.g., League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-789 (Mar. 16, 2022). Petitioners respectfully submit the Court can and should do the same here.

Exhibit 1

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DIRECTIVE 2022-29

March 11, 2022

To: All County Boards of Elections
Directors, Deputy Directors, and Members

Re: Legislation Regarding Uniformed and Overseas Citizens' Absentee Ballots and Ballot Transmission Instructions

SUMMARY

On March 10, 2022, the Ohio Senate concurred in House amendments to Substitute Senate Bill 11 ("S.B. 11") to modify procedures for uniformed services and overseas citizens' absentee ("UOCAVA") voting in the 2022 primary election. Governor DeWine signed the bill into law today. The temporary provisions related to the 2022 primary election adjust the state deadline to print and send UOCAVA ballots; extend the time for UOCAVA ballots to be returned; require the Secretary of State to take steps to expedite the delivery and return of UOCAVA ballots; and appropriate \$200,000 to implement the bill's requirements. This Directive provides an overview of the temporary law in S.B. 11 and instructions for issuing UOCAVA ballots.

INSTRUCTIONS

Boards of elections must not print ballots until after the March 17, 2022 protest deadline for the offices of U.S. House, Ohio House, Ohio Senate, and State Central Committee. However, boards may begin to program and proof ballots as soon as candidates are certified to appear on the ballot. The most populous board of elections of a district must immediately notify less populous county boards of elections as soon as a protest is resolved against a candidate.

I. TEMPORARY LAW REGARDING BALLOTS FOR UOCAVA VOTERS

S.B. 11 makes the following changes to the administration of the May 3, 2022 Primary Election:

- Requires UOCAVA ballots to be ready for use **no later than Tuesday, April 5, 2022** (the first day after the close of voter registration before the election), instead of March 18, 2022.¹
- Allows UOCAVA ballots to be counted if returned by mail and received at the office of the board of elections by the 20th day after the election, instead of the 10th day, unless the identification envelope is signed after the close of polls on Election Day.²

¹ S.B. 11, Section 5(A).

² S.B. 11, Section 5(B).

- Extends the amount of time a person may mail a UOCAVA ballot for return to their county board of elections from 12:01 a.m. at the place where the voter completes their ballot³ to any time prior to the close of polls on Election Day.⁴
- Requires the Secretary of State to take steps to expedite the delivery and return of uniformed services and overseas absent voter's ballots.⁵
- Permits the Secretary of State to adjust the deadlines for boards of elections to conduct the canvass of the election returns, to accommodate the delayed ballot return deadline.⁶

As stated above, S.B. 11 requires UOCAVA ballots to be ready for use ***no later than Tuesday, April 5, 2022***. A board of elections should transmit UOCAVA ballots as soon as possible to voters who submitted an absentee ballot application if the following condition applies:

- No protest is filed against any candidate for U.S. House, Ohio House, Ohio Senate, and State Central Committee, or the protests have been resolved.

An upcoming directive for the unofficial and official canvasses for the 2022 primary election will include adjusted deadlines for completion of the canvasses.

II. INSTRUCTIONS FOR EXPEDITED MAILING OF UOCAVA BALLOTS

S.B. 11 requires expedited delivery and return of UOCAVA ballots. If the UOCAVA voter did not indicate a preference for delivery or indicated mail as their preferred delivery method, a board of elections must contact the voter, explain the time constraints for return of the ballot, and offer expedited delivery via email or fax. Boards must use the voter's telephone number, even if it is an international number, and email address, if available, to contact them. A board may accept a voter's change in delivery preference by phone or email, rather than requiring the voter to submit a new Federal Post Card Application ("FPCA") or other form of absentee ballot application. If the UOCAVA voter still prefers to receive their ballot by mail, the board must follow the instructions below to expedite delivery.

For expedited shipping through the United States Postal Service ("USPS"), the board must utilize an existing service (e.g., Pitney Bowes, Neopost, etc.) or create and/or utilize a Click-N-Ship account to create a mailing label with the appropriate postage type for that voter's return ballot. For expedited shipping through a private carrier (e.g., FedEx, DHL, UPS, etc.), a board of elections must create an account on the carrier's website, if an account is not already established. Boards of elections must use the account to create prepaid shipping labels for the expedited return of the ballot from the voter. Boards must select the ***quickest and earliest version of shipping possible for ballot return***. Boards must diligently create, proof, and address mailing and return labels to ensure the ballot is promptly delivered to the voter and returned timely to the board of elections.

A. DELIVERY OF THE UOCAVA BALLOT

Boards must use the UOCAVA absentee ballot instructions ([Form 12-K, updated March 11, 2022](#)) and print the instructions on standard letter-sized paper if mailing the absentee ballot to the

³ [R.C. 3511.09](#).

⁴ S.B. 11, Section 5(B).

⁵ S.B. 11, Section 5(C).

⁶ S.B. 11, Section 5(D).

UOCAVA voter. Boards must also use the delivery and return envelopes specifically for UOCAVA voters. Our Office recommends printing the instructions in color to allow the contents to stand out. To reflect the temporary changes in law, the following forms have been updated:

- UOCAVA Absentee Ballot Instructions ([Form 12-K](#));
- Return Envelope for UOCAVA Ballot ([Form 285](#)); and
- Envelope for Delivery of UOCAVA Ballot ([Form 286](#)).

Boards must follow the instructions set forth below when mailing UOCAVA absentee ballots:

- For **uniformed services voters, eligible spouses, and dependents**:
 - For **any APO/FPO/DPO address**, use the United States Postal Service (“USPS”) Priority Mail service to deliver the ballot. For help with addressing APO/FPO/DPO mail, please visit this [USPS article](#).
 - For a **domestic mailing address**, use the United States Postal Service (“USPS”) Priority Express Mail service to deliver the ballot.
 - For a **mailing address outside of the United States**, use the USPS Priority Mail International service to deliver the ballot. Ensure that the voter’s address is correct.
- For **non-military overseas voters**, use a private carrier (*e.g.*, FedEx, UPS, or DHL) or USPS Priority Mail Express International service, whichever provides for the fastest delivery to that overseas voters’ specific location.

B. RETURN OF THE UOCAVA BALLOT

Each board of elections that transmits a UOCAVA ballot to a voter must take the following steps to enable an expedited return of the ballot:

- For **uniformed services voters, eligible spouses, and dependents**:
 - For any voter with an **APO/FPO/DPO address**, prepare and provide a USPS label to the voter. If the voter requests to receive their ballot by email, a .pdf of the label must be one of the attachments to the email. The .pdf can be created and downloaded on the USPS “Click-N-Ship” site. When selecting a method for mailing, utilize the quickest, earliest time for Priority Mail. Boards must include “United States of America” when inserting the board’s address into the label.
 - For a **domestic mailing address**, prepare and provide a USPS label to the voter. If the voter requests to receive their ballot by email, a .pdf of the label must be one of the attachments to the email. The .pdf can be created and downloaded on the USPS “Click-N-Ship” site. When selecting a method for mailing, utilize the quickest, earliest time for Priority Mail Express.
 - For a **mailing address outside of the United States**, prepare and provide a USPS label to the voter. If the voter requests to receive their ballot by email, a .pdf of the label must be one of the attachments to the email. The .pdf can be created and downloaded on the USPS “Click-N-Ship” site. When selecting a method for mailing, utilize the quickest, earliest time for Priority Mail Express International. Boards must include “United States of America” when inserting the board’s address into the label.

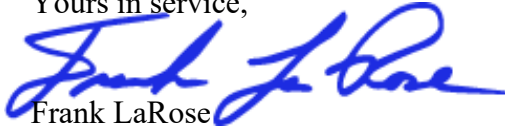
- For **non-military overseas voters**, setup and use an account with a private carrier to prepare a label containing the board's account number. This prepared label must be provided electronically or by mail, if the ballot is delivered by mail. Boards should use information available on websites or contact the delivery service directly to determine the best and fastest shipping service for the delivery of the ballot to the board of elections. Boards must include "United States of America" when inserting the board's address into the label.

C. STATE FUNDING FOR EXPEDITED MAILING OF UOCAVA BALLOTS

Boards of elections may use their grant allocation from S.B. 9 and the new appropriation of funds in S.B. 11 to pay the costs for expedited delivery and return of UOCAVA ballots. Our Office will soon issue additional guidance regarding the S.B. 11 funds.

More information regarding the logistics of expedited mailing for UOCAVA ballots will be provided as soon as possible. If you have any questions concerning this Directive, please contact the Secretary of State's elections counsel at (614) 728-8789.

Yours in service,



Frank LaRose
Ohio Secretary of State

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