

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Brian M. AMES :
Relator : CASE NO. 2022-0850
vs. : Original Action in Mandamus
: Expedited Election Matter Under
Ohio Secretary Secretary of State Frank :
LaRose et al. : S.C.Prac.R. 12.08
Respondents : Peremptory Writ Requested
:

BRIEF OF BRIAN M. AMES, RELATOR

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INTRODUCTION

For the second time in as many election cycles, Ohio's primary election is in disarray. The first instance was when in-person voting for the 2020 Presidential Primary Election was delayed as a result of the Coronavirus/COVID-19. In response to that pandemic, the 133rd Ohio General Assembly ("133rd G.A.") passed H.B. 197 on March 25, 2020 and Governor DeWine signed H.B. 197 into law on March 27, 2020. Exhibit 18, Directive 2020-07, (REL_EVID_44). The legislation included many provisions concerning Ohio's response to Coronavirus/COVID-19, including changes to the 2020 Primary Election. *Id.* The bill contained an emergency clause, which meant that the bill went into effect immediately upon the Governor's signature. *Id.* Also on March 27, 2020, Ohio Secretary of State Frank LaRose ("Secretary LaRose") issued Directive 2020-07 which provided additional information regarding H.B. 197, its implementation, and the conclusion of the 2020 Presidential Primary Election. *Id.* In-person voting, originally set for March 17, 2020, was limited to April 28, 2020 and made available only for individuals with a qualifying disability or who could not receive mail. Exhibit 18, Directive 2020-07 ¶8, (REL_EVID_45).

The second instance of an Ohio primary array falling into disarray is the 2022 Gubernatorial Primary Election. Unlike the response in 2020 which was initiated by the General Assembly, Secretary LaRose directed that the primary contests for the Ohio House, Ohio Senate, and State Central Committee ("Severed Contests") would not be included on the May 3, 2022 Primary Election ballot ("May 3 Ballot"). Exhibit 11, Directive 2022-31, (REL_EVID_24). This directive did not result from any legislation enacted by the General Assembly, nor did it result from the order of any court to remove the Severed Contests from the May 3 Ballot, retaining the others ("Retained Contests"). It resulted from an unwarranted, unprecedented, and *ultra vires* action taken by Secretary LaRose.

The decision to sever the May 3 Ballot has had numerous consequences. The primary contests were all set for a single stage, the May 3 Ballot, where all contests would be attended by the same members of the electorate. As a direct result of Secretary LaRose's action, the Retained Contests became the main event with greater participation by the electorate than can reasonably be expected for the Severed Contests on the ballot for August 2, 2022 ("August 2 Ballot"). Those candidates appearing on the August 2 Ballot ("Severed Candidates"), including Relator Brian M. Ames ("Mr. Ames"), have been prejudiced as a direct result.

Additional prejudice to the Severed Candidates resulted from Secretary LaRose's directive that "[v]oters may request a ballot for either major political party or an issues-only ballot, if applicable, regardless of their participation in the May 3, 2022 Primary Election." (Exhibit 14, Directive 2022-34, REL_EVID_38 at III). This directive converted Ohio's open primary into a doubly open primary as voters may twice select which party's ballot to vote. This action effectively created ("Hybrid Ballots") consisting of contests from opposite parties. There can be no reasonable belief that the outcome of the 2022 election will be the same as it would have been if all contests had been on the ballot on May 3, 2022 eliminating the possibility of Hybrid Ballots being cast. Furthermore, much of R.C. Title 35 depends on the determination of party affiliation based on ballot selection in a primary. There is no statute that prescribes how the party affiliation of a voter who selects different ballots for different parties must be determined.

There is no benefit accruing from Secretary LaRose's decision to sever the primary ballot. Due to the May 27, 2022 order of a federal court, the general assembly districts for the August 2 Ballot are the same as they would have been for the May 3 Ballot if it had not been severed. *Gonidakis v. LaRose*, S.D. Ohio No. 2:22-cv-0773, 2022 U.S. Dist. LEXIS 95341 (May 27, 2022).

STATEMENT OF FACTS

A. Relator is certified as a candidate .

Relator Brian M. Ames (“Mr. Ames”) is a qualified elector who affiliates with the Republican Party and resides at 2632 Ranfield Road, Mogadore, OH 44260, which is in the 28th Ohio Senate District (the “28th District”) under the General Assembly district plan in place for the August 2, 2022 primary election. Compl. ¶ 4. On February 1, 2022, Mr. Ames submitted his Form No. 2-J Declaration of Candidacy and Petition for Candidate for Brian M. Ames dated January 12, 2022 to the Trumbull County Board of Elections. Exhibit 6 (REL_EVID_11-12). Mr. Ames has been certified to the ballot as a candidate for the Republican State Central Committee for the 28th District. Compl. ¶ 4; (REL_EVID_6-10). Relator Ames is certified as a candidate for 28th District State Central Committeeman, Republican as shown on the Summit County Board of Elections candidate list. Compl. ¶ 12; Exhibit 3 (REL_EVID_6). Relator Ames is certified as a candidate for Republican State Central Committeeman, 28th District as shown on the Portage County Board of Elections candidate list. Compl. ¶ 13; Exhibit 4 (REL_EVID_8). Relator Ames is certified as a candidate for Republican State Central Committeeman, 28th District as shown on the Geauga County Board of Elections candidate list. Exhibit 5 (REL_EVID_10).

On July 8, 2022, Relator Ames inquired of Ohio Attorney General Frank LaRose “[m]ay an elector request a different party ballot for the August election than for May?” Compl. ¶ 10. The response was “There is no requirement for a voter to vote in the same party’s primary election as they did in the May primary.” Exhibit 2 (REL_EVID_05).

On July 8, 2022, Relator Ames inquired of the Director of the Portage County Board of Elections “[m]ay an elector request a different party ballot for the August election than for May?” Compl. ¶ 11. The response was “Yes, per the Ohio Secretary of State, voters may request a ballot for either major political party regardless of their participation in the May 3, 2022

Primary Election.” Exhibit 2 (REL_EVID_05).

B. 2022 Directives and Ballots.

On March 9, 2022, Secretary LaRose issued Directive 2022-28 to all county boards of elections directors, deputy directors, and members regarding “Ballots and Candidates for May 3, 2022 Primary Election for All Offices”. Exhibit 7 (REL_EVID_13-17). Directive 2022-28 was accompanied by official ballot forms including the “Official Democratic Primary Ballot” (“Democrat A”) and the Official Republican Primary Ballot (“Republican A”). Exhibits 7-9 (REL_EVID_13-21). Both ballots Democrat A and Republican A included the Severed Contests. Exhibits 8 and 9 (REL_EVID_18-21).

On March 17, 2022, Secretary LaRose issued Directive 2022-30 to all county boards of elections board members directors, and deputy directors regarding “*League of Women Voters of Ohio, et al. v. Ohio Redistricting Commission, et al.* Decision and Additional Instructions”¹. Exhibit 10 (REL_EVID_22-23). In Directive 2022-30, Secretary LaRose informed the county boards of elections that “federal litigation is still pending regarding the February 24, 2022 General Assembly district maps.”² Exhibit 10 (REL_EVID_22).

Also on March 17, 2022, Secretary LaRose sent a letter (the “March 17 Letter”) to Governor DeWine and the members of the General Assembly which begins with following paragraph:

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.

Exhibit 17 (REL_EVID_42-43). Nowhere in the March 17 Letter does Secretary LaRose request specific direction of the General Assembly. *Id.* Nowhere in the March 17 Letter does Secretary

1 See *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-789.

2 See *Gonidakis, et al. v. LaRose, et al.*, Case No. 2:22-CV-773 (S.D. Ohio 2022).

LaRose inform the General Assembly of any intent on his part to remove the Severed Contests from the May 3 Ballot. *Id.*

On March 23, 2022, Secretary LaRose issued Directive 2022-31 to all county boards of elections board members directors, and deputy directors regarding “Revised Form of Ballot for the May 3, 2022 Primary Election”. Exhibit 11 (REL_EVID_24-27). In Directive 2022-31, Secretary LaRose informed the county boards of elections that “[t]he Plaintiffs in the federal court case *Gonidakis v. LaRose*³ filed a motion on Monday asking the court to order the use of the February 24, 2022 district plan for the primary.” Exhibit 11 (REL_EVID_25). Directive 2022-31 was accompanied by official ballot forms including the “Official Democratic Primary Ballot” (“Democrat B”) and the Official Republican Primary Ballot (“Republican B”). Exhibits 11-13 (REL_EVID_25, 28-30). Neither ballot Democrat B or Republican B included the Severed Contests. Exhibits 12-13 (REL_EVID_28-30). Secretary LaRose cited no enactment by the General Assembly or order by this Court as mandating the removal of the Severed Contests from the ballot but stated only that this Court “ordered the Ohio Redistricting Commission to adopt a new General Assembly district plan by March 28, 2022.” Exhibit 11 (REL_EVID_24 at I).

On May 28, 2022, Secretary LaRose issued Directive 2022-34 to all county boards of elections board members directors, and deputy directors regarding “Instructions for the August 2, 2022 Primary Election”. Exhibit 14 (REL_EVID_31-39). In Directive 2022-34, Secretary LaRose informed the county boards of elections that “[o]n May 27, 2022, a three-judge federal panel for the Southern District of Ohio (2-1) ordered, ‘[a]ssuming no map is approved by midnight on Saturday, May 28, we order Secretary of State Frank LaRose to push back Ohio’s state primaries to August 2, 2022, and to implement Map 3 for this year’s elections only.’”⁴ Exhibit 14 (REL_EVID_31-39). Directive 2022-28 was accompanied by official ballot forms

³ Case No. 2:22-CV-773 (S.D. Ohio 2022).

⁴ *Gonidakis, et al., v. LaRose, et al.*, Case No. 2:22-cv-0773 (S.D. Ohio May 27, 2022).

including the “Official Democratic Primary Ballot” (“Democrat C”) and the Official Republican Primary Ballot (“Republican C”). Exhibits 14-16 (REL_EVID_36, 40-41). Each of ballots Democrat C and Republican C included only the Severed Contests. Exhibits 15-16 (REL_EVID_40-41). In Directive 2022-34, Secretary LaRose instructed the county boards of elections that “[v]oters may request a ballot for either major political party or an issues-only ballot, if applicable, regardless of their participation in the May 3, 2022 Primary Election” without citing any enactment by the General Assembly or order by a court to support that instruction. Exhibit 14 (REL_EVID_31-39). Secretary LaRose did not, in Directive 2022-34, instruct the county boards of elections to provide notice to the public that voters would be permitted to vote a different party’s ballot in August than voted in May. *Id.*

C. The 2020 Presidential Primary.

On March 25, 2020, the 133rd G.A. passed H.B. 197 which enacted provisions governing the conclusion of the 2020 Presidential Primary in Section 32 thereof. Exhibit 19 (REL_EVID_53-57). On March 27, 2020, Secretary LaRose issued Directive 2020-07 to all county boards of elections directors, deputy directors, and members regarding “House Bill (‘H.B.’) 197 and Additional Instructions”. Exhibit 18 (REL_EVID_44-52). Secretary LaRose summarized Directive 2022-34 for the county boards of elections as follows:

On March 25, 2020, the Ohio General Assembly passed H.B. 197. Governor DeWine signed H.B. 197 into law on March 27, 2020. The legislation includes many provisions concerning Ohio’s response to Coronavirus/COVID-19, including changes to the 2020 Primary Election. The bill contains an emergency clause, which means that the bill goes into effect immediately upon the Governor’s signature. This Directive provides additional information regarding H.B. 197, its implementation, and the conclusion of the 2020 Presidential Primary Election. (Footnote omitted.)

Exhibit 18 (REL_EVID_44-52). In-person voting, originally set for March 17, 2020, was limited to April 28, 2020 and made available only for individuals with a qualifying disability or who could not receive mail. Exhibit 18, Directive 2020-07 ¶8, (REL_EVID_45).

D. Primary election for members of the U.S. House of Representatives.

On March 21, 2022, Meryl Neiman and others filed a complaint in this Court initiating case 2022-0298: *Meryl Neiman, et al. v. Secretary of State Frank LaRose, et al.* Exhibit 20, (REL_EVID_58-65) In said complaint, Petitioners sought relief from this Court including the issuance of a permanent injunction and judgment barring Respondents from calling, holding, supervising, administering, or certifying any elections under the congressional district plan adopted by the Ohio Redistricting Commission on March 2, 2022. Exhibit 20, (REL_EVID_64 at B).

E. Failure of Respondent Summit County Board of Elections to serve its filings.

As an original action relating to a pending election, this case proceeds under S.Ct.Prac.R. 12.08. Division (C) of that rule of practice requires that “[a]ll documents in expedited election cases, except those filed to initiate a case under this rule, shall be served on the date submitted for filing by personal service, facsimile transmission, or e-mail.” That requirement is clearly stated in the summons:

The response, evidence, and merit briefs must be served by personal service, facsimile transmission, or by email on the date of the filing. See S.Ct.Prac.R. 12.08.

Notwithstanding the rule and the summons, Respondent Summit County Board of Elections has failed to properly serve its filings.

LAW AND ARGUMENT

A. Permitting an elector to vote in two parties’ primary elections conflicts with the statutory scheme enacted in Title 35 of the Ohio Revised Code.

The seventh paragraph of section 3513.05 of the Revised Code establishes the standards of affiliation to be used for the determination of a person’s party affiliation. R.C. 3513.19(A) and (A)(3). The seventh paragraph of R.C. 3513.05 reads in its entirety:

For purposes of signing or circulating a petition of candidacy for party nomination or election, an elector is considered to be a member of a political party if the

elector voted in that party's primary election within the preceding two calendar years, or if the elector did not vote in any other party's primary election within the preceding two calendar years.

If an elector has been permitted to vote in two different parties' primary the determination of affiliation with a given party becomes indeterminate. The subject voter has, within the preceding two calendar years, voted in that party's primary election qualify for affiliation but has also voted in another party's primary election disqualify from affiliation.

Statutes that depend on an unambiguous determination of party affiliation go to the core of elections. R.C. 3501.06(B)(2) which provides for the appointment of members of a county board of elections is one such statute. R.C. 3501.06(B)(2) reads in its entirety:

Beginning in 2017, on the first day of March in odd-numbered years, the secretary of state shall appoint two of such board members for a term of four years. One of those board members shall be from the political party which cast the highest number of votes for the office of governor at the most recent regular state election, and the other shall be from the political party which cast the next highest number of votes for the office of governor at such election. Thereafter, all appointments shall be made on the first day of March in odd-numbered years for a term of four years.

Appointments are generally made based on the recommendation of a county executive committee pursuant to R.C. 3501.07 which reads in pertinent parts:

At a meeting held not more than sixty nor less than fifteen days before the expiration date of the term of office of a member of the board of elections, or within fifteen days after a vacancy occurs in the board, the county executive committee of the major political party entitled to the appointment may make and file a recommendation with the secretary of state for the appointment of a qualified elector. The secretary of state shall appoint such elector, unless the secretary of state has reason to believe that the elector would not be a competent member of such board. In such cases the secretary of state shall so state in writing to the chairperson of such county executive committee, with the reasons therefor, and such committee may either recommend another elector or may apply for a writ of mandamus to the supreme court to compel the secretary of state to appoint the elector so recommended. In such action the burden of proof to show the qualifications of the person so recommended shall be on the committee making the recommendation.

At least one county executive committee has successfully obtained a writ of mandamus from

this Court to compel the secretary of state to appoint the elector so recommended. *See State ex rel. Summit Cty. Republican Party Executive Comm. v. Brunner*, 118 Ohio St.3d 515, 2008-Ohio-2824.

Assuming, *arguendo*, that both persons recommended to the secretary of state for appointment to a county board of elections would be competent members of such board but have voted in both major parties' primaries in 2022. How would the secretary of state determine their party affiliations without adding words to the statute? Which party would each person represent?

Other statutes that depend on an unambiguous determination of party affiliation include R.C. 3501.09, "The director and deputy director shall be of opposite political parties"; R.C. 3501.091, "The director and deputy director shall be of opposite political parties"; R.C. 3501.14, "The board may, when necessary, appoint a deputy director, who shall not be a member of the same political party of which the director is a member"; R.C. 3501.16, "from persons belonging to the same political party as that to which the outgoing officer belonged"; R.C. 3501.161, "The director and deputy director shall be of opposite political parties, and the chairman shall be selected from the members of the board of opposite politics from those of the director"; R.C. 3501.22, "Not more than one-half of the total number of precinct election officials shall be members of the same political party"; R.C. 3501.23, "provided that such officials shall be equally divided between the two major political parties"; R.C. 3501.31, "shall appoint a qualified elector who is a member of the same political party as the political party of which such absent precinct election official is a member"; and R.C. 3517.03, "All the members of such committees shall be members of the party". Article XIX, Section 1(C)(3)(a) of the Ohio Constitution, which states that if the General Assembly passes a congressional-district plan by a simple majority in each house, it "shall not pass a plan that unduly favors or disfavors a political party or its incumbents", may also be implicated.

B. The primary date was set by statute and that date was May 3, 2022.

The date of the 2022 primary election was set by the General Assembly through the enactment of R.C. 3501.01: “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.” R.C. 3501.01(E)(1). Since the General Assembly determined the date of the primary and chose not to change it when it enacted H.B. 93, the date of the 2022 primary election remains May 3, 2022. The August 2, 2022 is not a primary election but rather a special election during which the conclusion of the voting the 2022 primary election is being conducted. The *Gonidakis* court did not create a new primary. In granting the relief sought, the federal panel did nothing more than declare the commission’s third map (“Map 3”) valid for purposes of the primary and liberate the candidates who were legally qualified to appear on the May 3 primary ballot by setting a date for them to finish the May 3 primary. *State ex rel. DeMora v. LaRose*, Slip Opinion No. 2022-Ohio-2173 at ¶53

C. Secretary LaRose has violated R.C. 3501.40 by severing the primary ballot.

Secretary LaRose’ decision to remove the Severed Contests from the May 3, 2022 ballot caused the 2022 primary election to be conducted other than in the time, place, and manner prescribed by the Revised Code in contravention of R.C. 3501.40, which reads in pertinent parts:

Except as permitted under section 161.09 of the Revised Code, and notwithstanding any other contrary provision of the Revised Code, no public official shall cause an election to be conducted other than in the time, place, and manner prescribed by the Revised Code.

D. Ballots B and C do not equate to Ballots A.

Currently, an elector who chose a Republican B ballot on May 3 is permitted to choose a Democrat C ballot on August 2. Exhibit 14, Directive 2022-34, (REL_EVID_38). The contests on the combination of a Republican B ballot and a Democrat C ballot do not equate to either a Republic A or a Democrat A ballot. Likewise, an elector who chose a Republican B ballot on

May 3 is permitted to choose a Democrat C ballot on August 2. Exhibit 14, Directive 2022-34, (REL_EVID_38). The contests on the combination of a Democrat B ballot and a Republican C ballot do not equate to either a Democrat A or a Republic A ballot. The law provides that “[s]eparate primary election ballots shall be provided by the board of elections for each political party having candidates for nomination or election in a primary election.” R.C. 3513.13. Secretary LaRose has exceeded his legal authority by permitting electors to vote Hybrid Ballots consisting of combinations of contests of candidates affiliated with different parties. The use of Hybrid Ballots has not been authorized by the General Assembly. Secretary LaRose lacks standing to argue that “Relator’s requested relief will unconstitutionally deprive Ohio voters of their constitutional right to vote.” LaRose Answer Defense 4. Furthermore, LaRose Defense 4 is without merit as the State has a compelling interest in the conduct of elections in compliance with the statutes.

E. The conduct of an election under a district plan or map found to be unconstitutional does not necessarily render that election invalid.

The Ohio Redistricting Commission a congressional-district plan on March 2, 2022 that this court decided July 19, 2022 does not comply with Ohio Constitution, Article XIX, Section 1(C) (3)(a) and is invalid. *Neiman v. LaRose*, Slip Opinion No. 2022-Ohio-2471 syllabus. This Court had neither enjoined the *Neiman* respondents barring them from calling, holding, supervising, administering, or certifying any elections under the March 2, 2022 congressional district plan nor has it held that the results of the May 3, 2022 election are invalid with respect to congressional districts. *Neiman passim*. Given the outcome of *Neiman*, it does not follow that the conduct of an election under a district plan or map found to be unconstitutional necessarily renders that election invalid.

F. Regarding Respondents’ defenses of laches.

The period of time between the discovery that electors were being allowed to vote a different

party's ballot in August than in May is measured in hours rather than days. The reply from the Portage County was sent on Friday, July 8, 2022 at 11:22am. Exhibit 2, (REL_EVID_05). The reply from Secretary LaRose's office was sent on Friday, July 8, 2022 at 12:24pm. Exhibit 1, (REL_EVID_04). Mr. Ames' complaint was filed that same day, July 8, 2022. Compl. page 1. The defense of laches clearly does not apply.

The failure of Secretary LaRose to provide for public notice of his unprecedented decision to permit electors to vote a different party's ballot in August than in May, which first appeared on May 28, 2022 in Directive 2022-34, concealed the issue from the public until Mr. Ames made his inquiry. Since there was only a de minimis delay, the doctrine of laches is inapplicable.

G. Mr. Ames has a clear legal right and Respondents have a clear legal duty.

To be entitled to a writ of mandamus, a relator must establish by clear and convincing evidence that (1) they have a clear legal right to the requested relief, (2) the boards of elections and/or the secretary of state have a clear legal duty to provide it, and (3) the relator does not have an adequate remedy in the ordinary course of the law. *See State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014- Ohio-1417, 8 N.E.3d 940, ¶ 13. A failure to establish any of these elements will result in a denial of the petition for a writ of mandamus. *See Creasy v. Waller*, 1 Ohio St.3d 93, 93-94, 438 N.E.2d 414 (1982).

Mr. Ames has established that he has been certified to the ballot as a candidate for the Republican State Central Committee for the 28th Senate District. As Ohio's chief elections officer, Secretary to conduct all elections in the time, place, and manner prescribed by the Revised Code and direct the county boards of elections to that purpose. The county boards of elections have a clear legal duty to comply with the statutes and directives of the secretary of state. Due to the proximity of the August 2 election, Mr. Ames has no adequate remedy in the ordinary course of the law. Therefore, issuance of the requested writ of mandamus is proper.

H. Additional relief requested.

Relator Brian M. Ames requests the following additional relief to minimize the harm of permitting electors to vote Hybrid Ballots:

- (1) That ballots contained in envelopes bearing the name of the elector be segregated according to the party for which the elector voted in May as reflected in the current voter rolls.
- (2) That the ballots cast for an opposite party be disqualified as to the Severed Contests and the votes in those contests not be counted.
- (3) That all envelopes bearing the name of the elector not be opened until they have been segregated as to (1).

CONCLUSION

It was the unwarranted and unprecedented decisions of Secretary LaRose to 1) sever the 2022 primary ballots and 2) permit electors to vote Hybrid Ballots consisting of contests from opposite parties that has introduced chaos into the 2022 primary election. All candidates standing for nomination or election in that primary have been and continue to be prejudiced by those decisions. It is proper for this Court to grant to Relator Brian M. Ames all the relief which he has requested.

Respectfully Submitted,



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PROOF OF SERVICE

I hereby certify that on the 28th day of July, 2022 a true copy of the foregoing was, in accordance with Civ.R. 5(B)(2)(f), sent by electronic mail to:

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