

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, <i>ex rel.</i>)	
TERPSEHORE P. MARAS)	CASE NO. 2022-1270
)	
Relator,)	Original Action in
)	Mandamus Elections Case Under
-vs.-)	S.C.Prac.R. 12.08
)	
OHIO SECRETARY OF STATE)	
FRANK LAROSE)	
)	
Respondent.)	

REPLY BRIEF OF RELATOR

<p>WARNER MENDENHALL (0070165) JOHN PFLEIDERER (0100195) 190 North Union Street, Suite 201 Akron, Ohio 44304 Tel: 330-535-9160 Fax: 330-762-3423 Warner@warnermendenhall.com John@warnermendenhall.com</p>	<p>DAVE YOST (0056290) Ohio Attorney General</p> <p>JULIE M. PFEIFFER (0069762)* *Counsel of Record</p> <p>HEATHER L. BUCHANAN (0083032) ANN YACKSHAW (0090623) ALLISON D. DANIEL (0096186) Assistant Attorneys General Constitutional Offices Section 30 E. Broad Street, 16th Floor Columbus, Ohio 43215 Tel: 614-466-2872 Fax: 614-728-7592 Julie.Pfeiffer@OhioAGO.gov Heather.Buchanan@OhioAGO.gov Ann.Yackshaw@OhioAGO.gov Allison.Daniel@OhioAGO.gov</p>
<p><i>Counsel for Relator Terpsehore P. Maras</i></p>	<p><i>Counsel for Respondent Ohio Secretary of State Frank LaRose</i></p>

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I. INTRODUCTION

Secretary LaRose offers an unreasonable application of Ohio law making it practically and legally impossible for a statewide non-party affiliated candidate to verify whether ballots are fairly and properly counted. First, the Secretary of State's application of the Five Candidate Rule makes it impossible for a statewide non-party affiliated candidate to appoint election observers – it is nothing less than ludicrous to suggest that in each of Ohio's 88 counties, 4 other candidates in each county could have been recruited to appoint elections observers prior to the deadline of October 28, 2022. Second, Secretary LaRose's construction of R.C. 3505.21 confounds the meanings of "observe" and "inspect" to prohibit observers from inspecting ballot counting. Like *State ex rel. Maras v. LaRose*, 2022-Ohio-3295, Relator respectfully petitions this Court for a writ of mandamus ordering Secretary LaRose to properly apply unambiguous Ohio election law.

II. LAW AND ARGUMENT

1. Maras is seeking a writ of mandamus – not declaratory and injunctive relief

Secretary of State administrative directives must be consistent with Ohio election law. *State ex rel. Espen v. Wood Cnty. Bd. of Elections*, 154 Ohio St. 3d 1, 6 (2017). This Court can issue writs of mandamus compelling the Secretary of State to direct boards of elections to allow appointed observers in polling places. *State ex rel. Stokes v. Brunner*, 120 Ohio St. 3d 250, 256 (2008). Declaratory judgment and injunctive relief are appropriate for determining legal relations after the election. *State ex rel. Roseboro v. Franklin Cnty. Bd. of Elections*, 32 Ohio St. 2d 145, 147 (1972) (holding declaratory judgment is appropriate for an equal protection clause violation claim brought after the election).

This Court may compel the Secretary of State to follow its construction of Ohio election law. Maras requests relief within this Court's power to issue a writ of mandamus before the

election – not declaratory and injunctive relief after the election. Like in *Brunner*, Maras requests a writ of mandamus compelling Secretary LaRose direct that Maras’ selected observers be allowed in polling places statewide and that he instruct boards of election to allow such observers in. Further she requests a writ of mandamus compelling the Secretary LaRose to direct that the appointed observers have access to meaningfully observe and inspect the automatic tabulating equipment’s software, hardware, and source codes before the election. If this Court finds Secretary LaRose’s construction of the Five Candidate Rule and R.C. § 3505.21 is unreasonable or illegal (i.e., violates the United States Constitution), then a writ of mandamus compelling Secretary Larose to follow the Court’s construction of Ohio election law is the only viable relief that could be granted. Accordingly, Candidate Maras properly requests relief under writ of mandamus.

2. Party-Affiliated Candidates and Non-Affiliated Candidates Are Classified Differently under the Five Candidate Rule.

If a statutory classification involves a fundamental right or a suspect class, then that classification is subject to the strict scrutiny test; if not, it is subject to the rational basis test. *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 274 (2005). If the classification involves a moderate burden on the right to vote, then the *Anderson-Burdick* test is applicable. *Mays v. LaRose*, 951 F.3d 775, 784 quoting *Burdick v. Takushi*, 112 S.Ct. 2059, 2063 (1992) (internal citations omitted). Regardless, “the preliminary step in conducting an equal protection analysis regarding a particular statute is to examine the classifications created by the statute in question.” *Burnett v. Motorists Mut. Ins. Co.*, 118 Ohio St. 3d 493, 499 (2008). “Where there is no classification, there is no discrimination which would offend the Equal Protection Clauses.” A classification occurs when governmental decisionmakers treat persons who are in all relevant respects alike differently. *McCrone*, 107 Ohio St. 3d 272, at 274. The Five Candidate Rule creates two classes of candidates: (a) party affiliated candidates who are automatically afforded election

observers and (b) non-party affiliated candidates who must satisfy the onerous Five Candidate Rule.

Party affiliated candidates benefit from their classification by their political parties being able to “appoint to the board of elections or to any of the precincts in the county or city one person, a qualified elector, who shall serve as observer for such party.” R.C. § 3505.21(B). Party affiliated candidates need not join with other candidates to appoint election observers and can rely on their political party to do so for them. They may avail themselves of the Five Candidate Rule as an optional secondary mechanism to protect their supporter’s right to vote with election observers present.

Conversely, non-party affiliated candidates can only avail themselves of the Five Candidate Rule to appoint election observers to protect themselves and their supporter’s right to vote. They must assemble “any group of five or more candidates” to appoint election observers. R.C. § 3505.21(B). This classification creates an advantage for party affiliated candidates and a disadvantage for non-party affiliated candidates. The former has an automatic mechanism for political parties to appoint election observers on their behalf, but the latter has an onerous mechanism to appoint election observers on their behalf, despite both sharing the same legal defined term (i.e., candidates) under R.C. § 3505.21(B).

Since R.C. § 3505.21(B) legally defines all candidates to be alike, but functionally treats party affiliated candidates better than non-party affiliated candidates, it creates a classification subject to the Equal Protection Clause.

3. The Five Candidate Rule Should be Reviewed Under Strict Scrutiny Because it Involves the Fundamental Right to Vote.

Respondent recognizes that the right to vote is fundamental. *See* Respondent Br. at 6 (“The right to vote is undoubtedly a fundamental right that is “preservative of all rights”) (citation

omitted). Curiously, Respondent downgrades this right to suit his needs—suggesting elections statutes affecting voting rights do not always merit strict scrutiny. *Id.* (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976)). Respondent’s cited authority, however, is an age discrimination case far removed from our facts. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 313 (“While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereo-typed characteristics not truly indicative of their abilities.”).

Indeed, Respondent’s cited case bolsters Maras’s argument. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 – 442 (1985) (“The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. **In such cases**, the Equal Protection Clause requires only a rational means to serve a legitimate end.”) (emphasis added). Unlike *Murgia* or the other case cited by Respondent – *State ex rel. Keefe v. Eyrich*, 22 Ohio St.3d 164, 165 (1986), there are no real “distinguishing characteristics relevant to the interests [of the] State” between Independent Candidates such as Maras and “party affiliated candidates” such as Respondent LaRose.

By conflating “candidates” with “parties,” the Secretary of State blurs important distinctions—a tactic used repeatedly in the Response Brief. See Respondent Br. at 9 (“Treating political parties differently from candidates makes sense because the two entities are not similarly

situated. Political parties represent broad coalitions of voters throughout the state, typically support multiple candidates every election cycle, and have demonstrated the ability to garner widespread electoral support from Ohioans. Non-party candidates, on the other hand, may represent only themselves.”). Respondent has no justification to treat “Maras” differently from “LaRose” when it comes to the fundamental statutory right afforded both candidates and their supporters--namely the right to observe “the counting of the ballots”. R.C. 3505.21(B). *See also Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (“[T]he rights of voters and the rights of candidates do not lend themselves to neat separation.”).

Creating insurmountable barriers for unaffiliated candidates to appoint election observers denies the candidates, and their electors, participation in an important election process. Respondent would turn observers into some bygone relic of our elections that can be swept away with the inapplicable wide broom of rational basis review.

In so doing, the Secretary of State ignores that “the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud.” *Burson v. Freeman*, 504 U.S. 191, 206 (1992). Election observers prevent both. Contrary to Secretary LaRose’s position and common sense, appointing (or prohibiting the appointment of) election observers affects voting rights by erecting a hurdle to the exercise of the franchise. C.f. Respondent’s Br. at 7.

The Five Candidate Rule as applied to non-party affiliated candidates for statewide elections does not survive strict scrutiny because it is neither narrowly tailored nor serves a compelling governmental interest. Secretary LaRose contends “strict scrutiny” is inapplicable to R.C. § 3505.21 and does not even suggest that it would survive such an inquiry. This is not surprising given that it is difficult to conceive what legitimate compelling state interest could be

served by only allowing political parties to unilaterally appoint observers. And, even if there were such a conceivable compelling state interest – which there is not, the statute would still fail in that the statute broadly applies to all independent candidates who proceeded through the rigor of the certification process and could be more narrowly tailored to apply to a subset of such candidates.¹

Maras has been denied equal protection under Ohio statutory law, including by virtue of the Five Candidate Rule, which is *in violation of* the Ohio Constitution and Constitution of the United States. The fact that Maras has no clear constitutional right to election observers does not change the nature of this petition. Ohio law grants party-affiliated candidates the right to observers and, as applied by the Secretary of State, denies Maras the same. This is no different a violation of equal protection than if Ohio provided office space and supplies to certain political party candidates, of which there is certainly no constitutional right, and denied independent candidates the same.

4. The Five Candidate Rule Cannot Survive *Anderson-Burdick* Analysis.

If this Court finds the functional prohibition of election observers for independent candidates does not substantially burden the right to vote, it should analyze the statute under the *Anderson-Burdick* analysis. *See Mays v. LaRose*, 951 F.3d 775, 783, n.4 (6th Cir.2020). While Maras argues that the Five Candidate Rule imposes a substantial burden, in an intermediate case, where the burden on the right to vote is moderate, the Court must weigh that burden against “the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Mays v. LaRose*, *supra*, 951 F.3d at 784 (*quoting Burdick v. Takushi*, 504 U.S. 428, 434

¹ For an independent candidate to appear on the general election ballot, he or she must obtain the signatures of five thousand valid electors. R.C. § R.C. 3513.257; *C.f.* A party-affiliated candidate must only obtain one thousand signatures to appear on the primary ballot. R.C. § 3513.05.

(1992) (internal citations omitted)). “Only where the State’s interests outweigh the burden on the plaintiff’s right to vote do voting restrictions not offend the Equal Protection Clause.” *Id.* citing *Obama for America v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012).

Secretary LaRose lists the State’s interests in only allowing political parties to unilaterally appoint election observers on page ten of his merit brief. The interests include:

1. The Five Candidate Rule ensures election observers for groups of candidates represent multiple candidates at each observation location and are not “myopically focused on furthering a particular candidacy.”
2. The Five Candidate Rule minimizes the number of people present at any particular election location which reduces the burdens on the boards of election to administer an election.

In listing such interests, the State provides no evidence that an observer focused on a single candidacy produces any negative effects. Indeed, it would be difficult for an observer to only report bad acting to benefit a single independent candidate given that the observer cannot tell who any elector is voting for in the current blind voting system.

Further, the assertion that more observers cause a greater burden on election workers is unsupported. Maras requests that certified independent candidates be allowed to appoint observers like political parties. If this relief is granted, there is little to no possibility that there would be “dozens of people milling about the polling locations.” Respondent Br. at 10. This would not burden to election workers given that they manage hundreds if not thousands of electors at polling places.

5. The Five Candidate Rule Cannot Even Survive a Rational Basis Analysis.

The Five Candidate Rule as applied to non-party affiliated candidates for statewide elections does not survive rational basis analysis. There are only nine statewide elections in the November 8, 2022 general election: U.S. Senate, Governor and Lieutenant Governor, Attorney General, Secretary of State, Treasurer, Auditor, and three Supreme Court Justices. Maras is the

only non-party affiliated statewide candidate running in this election. That means she must gain the consent of four other party-affiliated candidates to appoint observers on a statewide basis. These candidates have party appointed election observers to represent them and are not inclined to help a non-party affiliated candidate which makes five candidate consent practically unobtainable.

“Under [the rational basis] test, a challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded on a reasonable justification, even if the classifications are not precise.” *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 206 (2008). The Five Party Rule for statewide non-party affiliated candidates bears no rational relationship to the state’s interest in preventing too many election observers overburdening county boards of elections because it practically eradicates the possibility of any statewide non-party affiliated candidates appointing election observers. This Court has stated, “[p]oll observers play an important role in assuring the public that election processes are open and transparent, affecting public trust of the process, and thus, the potential for future participation in the democratic process.” *Brunner*, 120 Ohio St. 3d 250, at 256. Preventing the appointment of any additional statewide poll observers beyond the political party observers is not a legitimate government interest or reasonable justification.

6. Secretary LaRose’s construction of R.C. 3505.21 is not in accordance with its plain language or purpose.

The Ohio secretary of state may issue administrative directives construing Ohio election law. *State ex rel. Espen*, 154 Ohio St. 3d 1, at 6. Those directives, however, cannot run counter to the plain language of a statute or be unreasonable. *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 868 (2020). R.C. § 3505.21(C) is plain on its face:

The observer also may inspect the counting of all ballots in the polling place or board of elections from the time of the closing of the polls until the counting is completed and the final returns are certified and signed.

Maras' petition presents this Court with the modern reality of ballots counted by automatic tabulating machines and her associated need for appointed observers to access the tabulating source code, software, and hardware of these automatic tabulating machines. In other words, machines count ballots – not poll workers; therefore, to “inspect the counting of ballots” an observer must inspect the machine counting ballots.

The Respondent again blurs distinctions. This time between the words “observe” and “inspect.” In this context, to observe is to watch.² To inspect is very different. Inspection is not confined to observation but is “ordinarily understood to embrace tests and examination.”³

For an observer to know whether these machines properly count ballots, an observer must be able to inspect the tabulating source code, software and hardware mechanisms that actually count the ballots prior to the election. Once this inspection is complete, the observer – who is knowledgeable in this area, can determine if ballots fed to an automatic tabulating machine are properly counted. Absent this crucial information, observers are not truly “inspect[ing] the counting of all ballots” - they are just observing folks place ballots into a machine. Secretary LaRose's construction of R.C. § 3505.21(C) does not give observers required access under the statute; therefore, his application of the law prevents observers from actually inspecting the counting of all ballots in contravention of unambiguous statutory language.

Moreover, Secretary LaRose's directives construing Ohio election law are not “consistent with the purpose” of the underlying law. *State ex rel. Espen*, 154 Ohio St. 3d 1, 6. The purpose of R.C. § 3505.21 is to allow observers to “assure the public that election processes are open and

² <https://www.merriam-webster.com/dictionary/observe#synonyms>

³ Black's Law Dictionary Sixth Edition.

transparent.” *Brunner*, 120 Ohio St. 3d 250 at 256. Secretary LaRose’s construction of R.C. § 3505.21 prevents observers from openly and transparently inspecting the counting of ballots; therefore, it is not consistent with the purpose of R.C. § 3505.21. All of Secretary LaRose’s policy arguments concerning audits and security implications conflict with any reasonable statutory construction of R.C. § 3505.21(C) and is inconsistent with its purpose. More to the point, these arguments are irrelevant and misleading given the Secretary of State does not even address the fact that the “source code” in question is only for the tabulation of votes in the specific upcoming election and does not relate to any other internal processes. *See* § R.C. 3506.05(H)(1) (“‘source code’ does not include variable codes created for specific elections.”). Again, what matters is the purpose and plain language of the statute, which supports this Court granting Candidate Maras a writ of mandamus compelling Secretary LaRose to instruct board of elections to give her appointed observers access to the automatic tabulating machine source code, software, and hardware for inspection prior to the election.

7. Ohio Does Not Conduct an Actual Audit of Votes – Only Ballots

Rather than address the issues before this Court, Secretary LaRose spends time discussing existing procedures to safeguard our elections. For example, Secretary LaRose references a requirement under R.C. § 3505.331 that boards to conduct a post-election audit. *See* Respondent Br. at 14, 15, 22 (*citing* R.C. § 3505.331).

In practice, this “safeguard” is as about effective as watching the ballots run through the automatic tabulating machine. This is because the so-called audit does not inspect whether the *votes* are actually correct. It simply confirms that the total number of *ballots* equals the total number of ballots counted by the machines. This fact is easily confirmed by the public audit results that Secretary LaRose is required to publish under R.C. § 3505.331. For example, in the November

3, 2020 “audit,” Secretary LaRose directed the boards of elections to conduct the audit on 1) the President and Vice-Presidential race, 2) the race for Justice of the Supreme Court of Ohio, and 3) various local issues and questions.

The published results simply detail the total ballots cast and the total ballots counted.⁴ The result shows near-perfect counting - but only of the total ballots. This defect in the audit process is reflected in R.C. § 3505.331(B)(3)(b)(i) (“election officials [shall] hand count a number of randomly sampled *ballots* equal to a given percentage of the total number of *ballots* cast...”) (emphasis added). The audit set forth by Secretary LaRose is completely inadequate as it does not verify that the votes themselves were correctly counted. It is fictional to assert that election results are accurate simply because the total number of ballots counted may be accurate with no regard to whether the votes reflected on the ballots were counted accurately.

8. Secretary LaRose Asserts that the Unnamed “Independent Escrow Agent” Holds the Keys to Ohio’s Elections.

Secretary LaRose asserts that he, as chief election officer of the State of Ohio, “is statutorily prohibited from accessing *any* source codes for automatic tabulating equipment.” Respondent Br. at 18 (citing R.C. 3506.05(H)(1); OAC 111:3-9-04.”). Secretary LaRose is wrong when he asserts that neither the State of Ohio nor the people within the State have the right to inspect and evaluate the source code of our own vote tabulating machines. He is also wrong when he asserts that because no elector or official in the State of Ohio is allowed to see the source code, voters must turn to the federal government for help.

⁴ The results are published in a Microsoft Excel Workbook with large tables which make it difficult to attach to this brief. A copy can be found at <https://www.ohiosos.gov/globalassets/elections/2020/gen/audit-totals.xlsx>.

As pointed out in the procedurally-defective, argument-laden “affidavit” filed by the Secretary of State, it may be true that the State of Ohio has delegated certification of its voting machines and now relies on the federal Election Assistance Commission to certify the integrity of our election machines. *Aff. Fedek* ¶ 7. This is not, however, what is appropriate under either the Federal Constitution or our own law. More to the point, while we all hope that the federal government can be trusted to protect the liberties of this state, this does not mean that the Secretary of State and our electors are prohibited from inspecting and observing the source code which determines the counting of votes. Indeed, the law cited by Secretary LaRose does not stand for the proposition that Secretary LaRose is “prohibited” from accessing the code within the machines – only that the source code shall be placed with an “independent escrow agent.” There is no cited statutory bar to the access and review of tabulating source code. Moreover, it is more likely that the source code has already been accessed numerous times by Ohio election workers. For example, the Director of the Stark County Board of Elections has publicly said: “[T]esters go over every line of source code of all software and software updates installed on the machines.”⁵

Indeed, existing law suggests the availability of a duty to investigate irregularities in our elections that is central to the role of the Ohio Secretary of State. R.C. § 3501.05(N)(1). Secretary LaRose cannot in good faith maintain that inquiries regarding the functioning of election vote tabulating machines would be beyond the State of Ohio’s reach. Similarly, the purported prohibition now articulated in opposition to this writ is not proscribed by federal or state law, and any such vendor contract that would bar such inspections would improperly restrict the duty of the Secretary of State. *See* O.A.C. 111:3-9-04. This same principle can easily be applied to election

⁵ Stark elections director defends planned purchase of Dominion voting machines, dated February 2, 2021, accessed on October 20, 2022, <https://www.cantonrep.com/story/news/2021/02/02/elections-chief-says-critics-voting-machines-believe-disinformation/4336952001/>

observers who are tasked with observing and inspecting the counting of the votes by the machines – any such prohibition is likewise barred by applicable law. *See* § R.C. 3505.21.

III. CONCLUSION

For the foregoing reasons, Relator is entitled to the relief requested in her petition for writ of mandamus.

Respectfully submitted,

/s/ Warner Mendenhall

Warner Mendenhall (0070165)

John Pfeiderer (0100195)

MENDENHALL LAW GROUP

190 North Union Street, Suite 201

Akron, OH 44304

Phone: (330) 535-9160

Fax: (330) 762-9743

warner@warnermendenhall.com

john@warnermendenhall.com

Counsel for Relator Terpsehore Maras

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 20th day of October 2022, a copy of the foregoing ***Relator's Reply Merit Brief*** was filed electronically. A copy of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. The undersigned further certifies that a copy of the foregoing has been served by e-mail upon:

ANN YACKSHAW (0090623)

JULIE M. PFEIFFER (0069762)

ALLISON D. DANIEL (0096186)

Ann.Yackshaw@OhioAGO.gov

Julie.Pfeiffer@OhioAGO.gov

Allison.Daniel@OhioAGO.gov

/s/ Warner Mendenhall

Warner Mendenhall, 0070165