

IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* One Person One Vote,
et al.,

Relators,

v.

Ohio Secretary of State
Frank LaRose,

Respondent.

Case No. 2023-0630

Original Action in Mandamus
Expedited Elections Case

BRIEF OF AMICUS CURIAE LEAGUE OF WOMEN VOTERS OF OHIO IN
SUPPORT OF RELATORS

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Table of Contents

Table of Authorities.....	iv
INTRODUCTION	1
STATEMENT OF INTEREST OF AMICUS CURIAE	2
BACKGROUND	3
ARGUMENT	6
I. August Special Elections Have Notoriously Dismal Voter Turnout and Fail to Represent the Will of the People	6
II. The Havoc an August Election Will Wreak on Election Officials Also Threatens the Integrity of Both the August and November Elections	10
CONCLUSION.....	13

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Table of Authorities

Cases

<i>Adams v. DeWine</i> , 167 Ohio St.3d 499, 2022-Ohio-89, 195 N.E. 3d 74.....	6, 9
<i>Democratic Nat’l Comm. v. Wisconsin State Legislature</i> , 208 L. Ed. 2d 247, 141 S. Ct. 28 (2020)	13
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm’n</i> , 167 Ohio St. 3d 255, 2022-Ohio-65, 192 N.E.3d 379.....	9
<i>Ne. Ohio Coal. for Homeless & Serv. Emps. Int’l Union, Loc. 1199 v. Blackwell</i> , 467 F.3d 999 (6th Cir. 2006)	13
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	6
<i>State ex rel. Twitchell v. Saferin</i> , 155 Ohio St.3d 52, 2018-Ohio-3829, 119 N.E.3d 365.....	7
<i>State ex rel. Weinberger v. Miller</i> , 87 Ohio St. 12, 99 N.E. 1078 (1912)	6
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	6

Statutes

R.C. 3501.38	12
R.C. 3519.16(E)	12

Other Authorities

Aimee Hancock, <i>Ohio August Election: Some Voting Locations will Change; Poll Workers Needed</i> , Dayton Daily News (May 17, 2023), https://www.daytondailynews.com/local/ohio-august-election-some-voting-locations-will-change-poll-workers-needed/JSVQAA6DNZAIVGJOZHKAPA5HRM/	11
Cuyahoga Cnty. Bd. of Elections, November 2, 2021 Election Results, https://boe.cuyahogacounty.gov/elections/GetDocumentById/4eefab46-4501-4737-a370-325be3a05915/	12
Cuyahoga Cnty. Bd. of Elections, November 2, 2021 General Election Issues List, https://boe.cuyahogacounty.gov/elections/GetDocumentById/3838369f-5438-49f2-8a25-fa0ddd4f2805/	12
Franklin Cnty. Bd. of Elections, November 2, 2021 General Election Candidates List, https://vote.franklincountyohio.gov/BOEL-website/media/Election-Info/2021/(3)%20General%20Election%20-%20November%20,%202021/(2)%20Candidates%20and%20Issues/2021-General-Combined-Candidate-List-with-overlaps-20.pdf	12
Franklin Cnty. Bd. of Elections, November 2, 2021 General Election Issues List, https://vote.franklincountyohio.gov/BOEL-website/media/Election-	

Info/2021/(3)%20General%20Election%20-%20November%202,%202021/(2)%20Candidates%20and%20Issues/2021-General-Certified-Issues-List-3.pdf.....	12
John Kosich, <i>Local Boards of Election Scramble to Prepare for New August Election</i> , News 5 Cleveland (May 16, 2023), https://www.news5cleveland.com/news/local-news/local-boards-of-election-scramble-to-prepare-for-new-august-election	11
Morgan Trau, <i>Sec. of State blames rushed preparation period for rocky start to May 3 primary</i> , News5 Cleveland (May 3, 2022) https://www.news5cleveland.com/news/politics/ohio-politics/sec-of-state-blames-rushed-preparation-period-for-rocky-start-to-may-3-primary	13
Ohio Sec’y of State, 2023 Elections Calendar, https://www.ohiosos.gov/publications/2023-elections-calendar	11
Ohio Sec’y of State, Directive 2022-17, Chapter 13: Petitions (2022) https://www.ohiosos.gov/globalassets/elections/directives/2022/eom/dir2022-17-ch13.pdf	11
Ohio Sec’y of State, Directive 2023-03, Substitute House Bill 458 (134th General Assembly) (2023) https://www.ohiosos.gov/globalassets/elections/directives/2023/dir2023-03.pdf	5
Ohio Sec’y of State, Directive 2023-07, August 8, 2023 Special Election for Statewide Ballot Issue (2023), https://www.ohiosos.gov/globalassets/elections/directives/2023/dir2023-07.pdf 6	
<i>Ohio’s August Primary Breaks Modern State Record for Low Voter Participation</i> , Cleveland.com (Aug. 3, 2022) https://www.cleveland.com/news/2022/08/ohios-august-primary-breaks-modern-record-for-low-voter-participation.html	7
S.J.R. 2, 135th Gen. Assemb. (2023) (as enrolled) https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/resolutions/sjr2/EN/06/sjr2_06_EN?format=pdf	5
S.J.R. 2, 135th Gen. Assemb. (2023) (as introduced) https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/resolutions/sjr2/IN/00/sjr2_00_IN?format=pdf	5
S.J.R. 2, amending Article II, Sections 1b, 1e, and 1g of the Ohio Constitution.....	5
The Federalist No. 22 (Alexander Hamilton)	9
The Federalist No. 53 (Alexander Hamilton or James Madison)	1

Constitutional Provisions

Ohio Const. Art. II, Sec. 1a.....	11
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Legislative Testimony

<i>Allow Special Election to be Held in August for Certain Purposes: Hearing on S.B. 92 before the H. Gov’t Oversight Comm.</i> , 2023 Leg., 135th Sess. (statement of Frankie DiCarlantonio, Ohio Assoc. of Elected Officials)	10, 12, 13
<i>Allow Special Election to be Held in August for Certain Purposes: Hearing on S.B. 92 before the H. Gov’t Oversight Comm.</i> , 2023 Leg., 135th Sess. (statement of Michelle Wilcox, Luke Scott, Rodney Metz, Francia Engle, Diana Dulebohn, and Joe Kuhn, Auglaize County Board of Elections).....	11

<i>Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the H. Ways and Means Comm., 2021 Leg., 134th Sess. (statement of Cory Noonan, Cnty Comm’rs Assoc. of Ohio)</i>	4
<i>Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the H. Ways and Means Comm., 2021 Leg., 134th Sess. (statement of Frank LaRose, Secretary of State)</i>	passim
<i>Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the H. Ways and Means Comm., 2021 Leg., 134th Sess. (statement of Terry Burton, Ohio Assoc. Of Elected Officials)</i>	10, 12
<i>Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the S. Local Gov’t and Elections Comm., 2021 Leg., 134th Sess. (statement of Rep. Thomas Hall, R-Madison Twp.)</i>	4, 12
<i>Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the S. Local Gov’t and Elections Comm., 2022 Leg., 134th Sess. (statement of Greg Lawson, Buckeye Institute)</i>	2, 4, 8
<i>Regards Timing and Content of Tax Ballot Issues: Hearing on H.B. 342 before H. Gov’t Accountability and Oversight Comm., 2017 Leg., 132nd Sess. (statement of Rep. Derek Merrin, R-Monclova)</i>	7

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INTRODUCTION

Election manipulation by a legislature is not an unknown problem, or a new one. Federalist No. 53 decries the British Parliament’s having “actually changed, by legislative acts, some of the most fundamental articles of the government. They have in particular, on several occasions, changed the period of election. ... An attention to these dangerous practices has produced a very natural alarm in the votaries of free government[.]” Just recently, the chief elections officer of Ohio warned that scheduling special elections in August—leading to what he described as embarrassingly low voter turnout—was an undemocratic practice that skewed results in favor of special interests. This case presents this Court with the question of whether Article XVI, Section 1, of the Ohio Constitution should be construed to allow such manipulation at the unilateral whim of the General Assembly by joint resolution alone, contrary to its own statutes.

On March 22, 2023, the Ohio Senate introduced Senate Joint Resolution 2. S.J.R. 2 proposed an amendment to the Ohio Constitution requiring, for any future amendments, approval by at least 60% of the voters rather than a simple majority and called for the matter to be put to the voters in a special election on August 8, 2023. S.J.R. 2 was quickly passed through the legislative process and adopted by the General Assembly on May 10, 2023, the last day to file local questions and issues for the August 8th special election. This is even though almost five months prior, the General Assembly passed House Bill 458, eliminating special elections altogether except in the most extreme cases of financial crisis within a specific municipality.

In passing H.B. 458, proponents of the bill acknowledged the abysmally low voter turnout of August special elections and their threat to democracy. Public officials, notably including Secretary of State Frank LaRose, recognized how undemocratic—and unfair—it was to put important matters on the ballot during a special election at a time when the vast majority of voters

are unaware an election is even taking place. As Greg Lawson of the Buckeye Institute testified in support of H.B. 458, “Such tactics strike at the very heart of our American self-government and allow the few to unfairly rule the many.” *Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the S. Local Gov’t and Elections Comm.*, 2022 Leg., 134th Sess., 2 (statement of Greg Lawson, Buckeye Institute) (hereinafter “*H.B. 458*, Lawson Interested Party Testimony”).

The issue proposed by S.J.R. 2 is a shameless attempt to silence the voice of Ohioans by allowing a minority of voters to defeat the will of the majority who wish to amend the Ohio Constitution. Compounding the shame, this attempt is mounted on a brazenly undemocratic vehicle—in a special election that had just been eliminated by statute nearly five months prior due to chronically low voter participation. An August special election will likely produce distorted election results, rather than an accurate representation of public opinion.

For these reasons, it is not unsurprising that prior to this past year, Ohio had not held a statewide election in August for 80 years. Affidavit of David Niven, attached as Exhibit 1. And in 1942, when it did, “it was the quietest primary on record.” *Id* at ¶ 4.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae League of Women Voters of Ohio (“LWVO”) is the Ohio chapter of the League of Women Voters of the United States—a nonpartisan, statewide non-profit founded in May 1920, shortly before the ratification of the Nineteenth Amendment in August 1920 granting women’s suffrage. LWVO currently has 3,438 members across the state, the vast majority of whom are registered Ohio voters, who live and vote in all of Ohio’s Senate districts and 94 of Ohio’s 99 House districts. LWVO’s members make up 30 local Leagues and at-large units that are dedicated to empowering citizens and ensuring an effective democracy.

LWVO's mission is to help Ohioans exercise the right to vote, improve American democracy, and engage Ohioans in the decisions that most impact their lives. As part of its mission, LWVO aims to shape public policy, to educate the public about policy issues and the functioning of our democracy, and to protect and expand Ohioans' access to elections and their government. As such, LWVO and its members invest substantial volunteer time in voter education, civic engagement, and voter registration efforts.

LWVO is committed to protecting the voting rights of all Ohioans. LWVO has filed state and federal cases and appeared as amicus curiae in seeking to hold Ohio's elected officials accountable to the Ohio Constitution in planning and conducting elections. *See, e.g., Ohio A. Philip Randolph Institute v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019), *LWVO v. Ohio Redistricting Comm.*, 168 Ohio St.3d 309, 2022-Ohio-789, *LWVO v. Ohio Redistricting Comm.*, 168 Ohio St.3d 374, 2022-Ohio-1235, *LWVO et al. v. Ohio Redistricting Comm.*, 168 Ohio St.3d 522, 2022-Ohio-1727, *State ex rel. Ohio Democratic Party v. LaRose*, 159 Ohio St.3d 277, 2020-Ohio-1253 (as amicus). An August special election impairs LWVO's mission by making it more difficult to engage voters through its education, registration, and outreach efforts, and diminishing Ohio's long tradition of democracy of "one person, one vote."

BACKGROUND

On October 19, 2021, House Bill 458 was introduced in the Ohio House of Representatives with the express purpose of abolishing nearly all August special elections in Ohio. The bill's sponsor, Representative Thomas Hall, noted the reasoning behind it: that "special elections are not an accurate representation of public opinion," and that H.B. 458 would "prevent those elections to increase transparency and election integrity, while also decreasing the financial burden on taxpayers." *Eliminate August Special Elections Except for U.S. House Nomination: Hearing on*

H.B. 458 before the S. Local Gov't and Elections Comm., 2021 Leg., 134th Sess., 1 (statement of Rep. Thomas Hall, R-Madison Twp.) (hereinafter “*H.B. 458*, Hall Sponsor Testimony”).

Secretary of State Frank LaRose testified in support of the bill, arguing that while the general election in November of 2020 had a record 74% turnout, the special election in August of the same year saw only 11.8% of electors voting in Hamilton County and 6.8% in Cuyahoga County. *Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the H. Ways and Means Comm.*, 2021 Leg., 134th Sess., 1 (statement of Frank LaRose, Secretary of State) (hereinafter “*H.B. 458*, LaRose Proponent Testimony”). Such “embarrassingly low voter turnout rates,” Secretary LaRose testified, are “normal” in August special elections. He argued that the results of such elections were skewed as a result, disproportionately favoring a minority share of voters: “[J]ust a handful of voters end up making big decisions. The side that wins is often the one that has a vested interest in the passage of the issue up for consideration. This isn’t how democracy is supposed to work.” *Id.* Other proponents and experts agreed, noting that “fewer voters are paying attention to such issues during a non-November election” and many voters “remain understandably more concerned with summer’s family vacations or getting the kids ready for the new school year[.]” *H.B. 458*, Lawson Interested Party Testimony; *see also Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the H. Ways and Means Comm.*, 2021 Leg., 134th Sess., 1 (statement of Cory Noonan, Cnty. Comm’rs Assoc. of Ohio) (“Voters are often unaccustomed to going to the polls in August, which leads to lower voter turnout.”).

Eliminating August special elections, in Secretary LaRose’s view, offered a cure to these ills: “Voters are just as capable of voting on these important issues during the standard primary and general elections and there is no reason why these contests can’t happen at the regularly scheduled

primary and general elections which occur twice a year.” *H.B. 458, LaRose Proponent Testimony*. The General Assembly passed H.B. 458 in late 2022, and Governor DeWine signed it into law on January 6, 2023. On February 7, 2023, Secretary LaRose issued Directive 2023-03, instructing county boards of elections that “[s]pecial elections held in August are eliminated except when a political subdivision or school district is in a state of fiscal emergency[.]”¹

On March 22, 2023, the Ohio Senate introduced Senate Joint Resolution 2. S.J.R. 2 proposed an amendment to the Ohio Constitution requiring, for any future amendments, approval by at least 60% of the voters rather than a simple majority—and called for the matter to be put to the voters in a special election on August 8, 2023.² S.J.R. 2 passed the Ohio Senate on April 19, 2023, and was introduced to the House the following day. An amended version of S.J.R. 2 passed the House on May 10, 2023; the Senate concurred with the House amendments later the same day.

In its final form, S.J.R. 2 proposes several major changes to the process for amending the Ohio Constitution, all making it more difficult for Ohioans to do so.³ In addition to raising the threshold for Ohio voters to approve an amendment, S.J.R. 2 introduced a new requirement that for a citizen-led initiative to be placed on the ballot, proponents would be required to submit petitions bearing the signatures of at least 5% of the electors of each of Ohio’s 88 counties. S.J.R. 2, amending Article II, Sections 1b, 1e, and 1g of the Ohio Constitution. It would also eliminate the existing ten-day “cure” period, during which additional signatures may be submitted if defects

¹ Ohio Sec’y of State, Directive 2023-03, Substitute House Bill 458 (134th General Assembly) at 9 (2023) <https://www.ohiosos.gov/globalassets/elections/directives/2023/dir2023-03.pdf>.

² S.J.R. 2, 135th Gen. Assemb. (2023) (as introduced) https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/resolutions/sjr2/IN/00/sjr2_00_IN?format=pdf.

³ S.J.R. 2, 135th Gen. Assemb. (2023) (as enrolled) https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/resolutions/sjr2/EN/06/sjr2_06_EN?format=pdf.

are found in the initial set. S.J.R. 2, amending Article II, Section 1g of the Ohio Constitution. It purports to place these matters before the voters in an August 8, 2023, special election, despite H.B. 458 and other statutes having forbidden just such an election from occurring. On May 10, the same day that S.J.R. 2 was passed by the General Assembly, Secretary LaRose issued Directive 2023-07, which instructed county boards of elections to begin preparing for an August 8 special election on the constitutional amendment process proposed in S.J.R. 2.⁴

ARGUMENT

I. August Special Elections Have Notoriously Dismal Voter Turnout and Fail to Represent the Will of the People

There is little of more fundamental importance in a representative democracy than the right to vote, a “right ... preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (“the right to exercise the franchise ... is preservative of other basic civil and political rights”). Though the people grant “transitory authority” to their elected representatives to govern, “the true power is expressed by the people when they exercise their right to vote[.]” *Adams v. DeWine*, 167 Ohio St.3d 499, 2022-Ohio-89, 195 N.E. 3d 74, ¶ 1. Elections exist not merely to coordinate or schedule the exercise of that democratic power, but to facilitate it. As this Court has put it, the “intention and purpose of all elections is to register the will of the people honestly expressed through the ballot[.]” *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 37, 99 N.E. 1078 (1912). To that end, reviewing courts—including this one—are to apply faithful constructions of election laws and rights with an eye towards “foster[ing] the goal of providing citizens with access to the ballot, a foundation of our

⁴ Ohio Sec’y of State, Directive 2023-07, August 8, 2023 Special Election for Statewide Ballot Issue (2023), <https://www.ohiosos.gov/globalassets/elections/directives/2023/dir2023-07.pdf>.

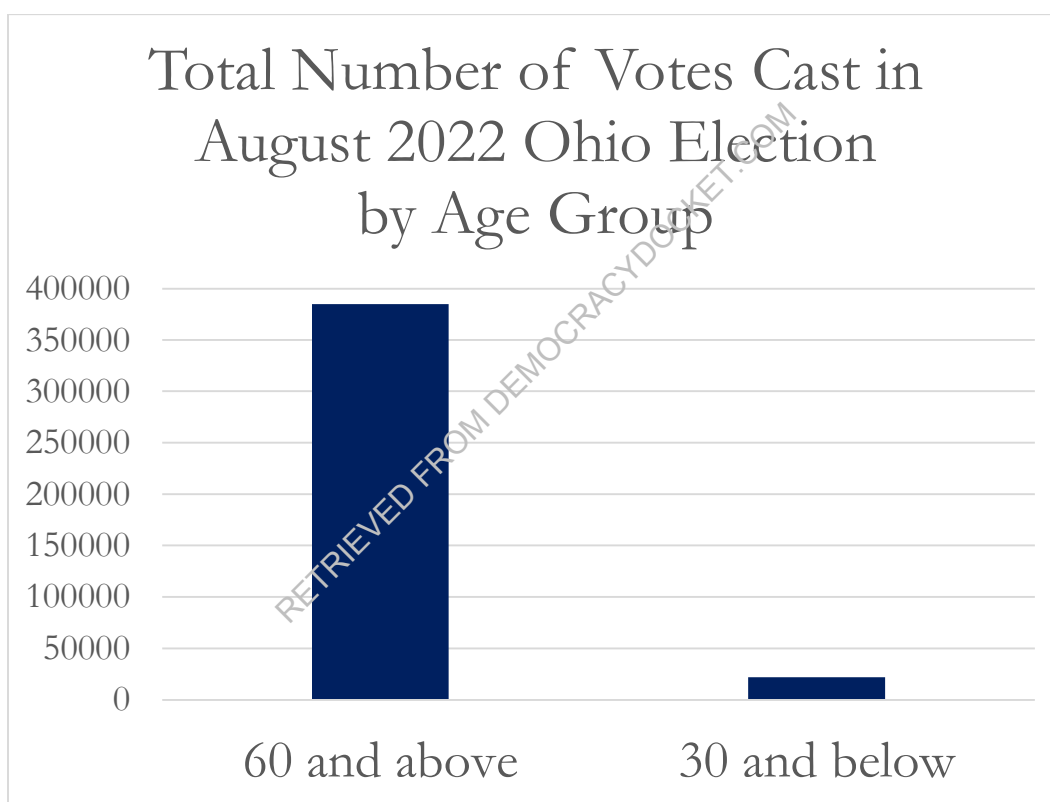
democracy.” *State ex rel. Twitchell v. Saferin*, 155 Ohio St.3d 52, 2018-Ohio-3829, 119 N.E.3d 365, ¶ 35 (Kennedy, J., concurring in judgment only) (internal citation omitted).

There can be no dispute that an August special election undercuts that critical purpose, by presenting a decision of immense import to what is—by the Secretary of State’s own account—a vastly diminished and profoundly unrepresentative portion of the electorate. Testifying in support of H.B. 458, Secretary LaRose joined a chorus of public officials in pointing out that August special elections are not an accurate representation of public opinion, as they have “embarrassingly low voter turnout rates [which] means just a handful of voters end up making big decisions.”⁵ *H.B. 458, LaRose Proponent Testimony*. That assessment was, if anything, understated. As University of Cincinnati political scientist David Niven notes, “[t]urnout in the August 2022 statewide election was 8.01 percent. Ohio’s turnout rate in November 2022 was 6.53 times higher.” Niven Aff., ¶ 6. That was hardly a novel development, as the last time that Ohio held a statewide August special election—80 years earlier—the turnout was similarly abysmal. *Id.* at ¶ 4–5.

Even worse, the likely voters in an August special election are not merely a *small* subset of Ohio electors, they are a deeply *skewed* one. *See* Niven Aff. at ¶¶ 7–11. As Secretary LaRose observed about August special elections specifically, “[t]he side that wins is often the one that has a vested interest in the passage of the issue up for consideration. That isn’t how democracy is

⁵ Secretary LaRose explained that in August of 2020, special elections held in Hamilton and Cuyahoga Counties pulled voter turnout of 11.8 percent and 6.8 percent respectively, compared with 74 percent for the November 2020 general election. *H.B. 458, LaRose Proponent Testimony*. Ohio’s August 2022 special election saw a 7.9 percent voter turnout. Andrew J. Tobias and Zachary Smith, *Ohio’s August Primary Breaks Modern State Record for Low Voter Participation*, Cleveland.com (Aug. 3, 2022) <https://www.cleveland.com/news/2022/08/ohios-august-primary-breaks-modern-record-for-low-voter-participation.html>. And in 2016, some of the August special elections triggered single digit voter turnouts, which “occurred in highly populated, urban areas of the state.” *Regards Timing and Content of Tax Ballot Issues: Hearing on H.B. 342 before H. Gov’t Accountability and Oversight Comm.*, 2017 Leg., 132nd Sess., 1 (statement of Rep. Derek Merrin, R-Monclova).

supposed to work.” *H.B. 458, LaRose Proponent Testimony*; *see also H.B. 458, Lawson Interested Party Testimony* (“Off-cycle elections empower a small but motivated fraction of voters to hold sway over the vast majority of voters who are likely unaware that a question has even been asked, let alone put on a ballot.”). As Dr. Niven notes, the August 2022 electorate was marked by a striking age disparity, with those who voted an average age of 16 years older than registered voters who did not participate. *See Niven Aff. at ¶ 10*. Indeed, the share of voters aged 60 and older in August special elections vastly outweighs 30 and younger:



Id. at ¶ 10. The ratio of 60-and-over voters to 30-and-under voters was 17.45 to 1. In the November 2022 election, by contrast, that ratio was a mere 6.5 to 1. In November 2020 it was even less: 3.7 to 1. *Id.* ¶¶ 10–11.

Depressed voter turnout in any election breeds “doubt and lack of confidence in the democratic process—that is, whether the outcome of an election by so few voters as compared to

electors is truly the will of the people.” *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 167 Ohio St. 3d 255, 2022-Ohio-65, 192 N.E.3d 379, at ¶ 155 (Brunner, J., concurring). That can only be more so where a small minority of Ohio electors might enact S.J.R. 2, a measure that itself would establish an ongoing minority power to negate the will of the majority. *See* The Federalist No. 22 (Alexander Hamilton) (“To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser.”).

The content and context of S.J.R. 2’s hastily imposed August special election compel the conclusion that these distorting effects are a feature, not a bug. Even setting aside that S.J.R. 2 itself represents a frontal assault on majority rule and the citizenry’s power to check their representatives, the August special election is S.J.R. 2’s proponents’ best effort to rig the result by enhancing supporters’ voting power. As Dr. Niven observes, this is the “political equivalent of venue shopping,” allowing special interests to “capitalize on low turnout elections to advance their agenda.” Niven Aff. at ¶ 14; *see also id.* at ¶ 12 (noting warnings regarding strategic election manipulation in the Federalist Papers). Secretary LaRose agrees—or did, quite recently. *See H.B. 458*, LaRose Proponent Testimony (“[t]he side that wins is often the one that has a vested interest in the passage of the issue up for consideration. That isn’t how democracy is supposed to work.”).

This Court has observed of partisan gerrymandering that it “is an abuse of power ... that strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party[.]” *Adams*, 2022-Ohio-89, at ¶ 1. An August special election on S.J.R. 2 would do the same. Article XVI, Section 1 of the Ohio Constitution should not be construed to authorize this manner of undemocratic gamesmanship.

II. The Havoc an August Election Will Wreak on Election Officials Also Threatens the Integrity of Both the August and November Elections

Further concerns arise from the abrupt creation of a statewide August special election that will put tremendous new administrative burdens on the 88 county boards of elections. A statewide August special election still requires “boards of elections to undergo the FULL planning process for an election; no different than a primary or general election.” *Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the H. Ways and Means Comm.*, 2021 Leg., 134th Sess., 1 (statement of Terry Burton, Ohio Assoc. Of Elected Officials) (hereinafter “*H.B. 458, Burton Proponent Testimony*”). This process includes “recruitment of poll workers, procurement of voting locations, hiring of additional staff to support early voting hours, testing of voting equipment, and all the other myriad of tasks that go into the planning and execution of an election.” *Id.*; see *H.B. 458, LaRose Proponent Testimony*; *Allow Special Election to be Held in August for Certain Purposes: Hearing on S.B. 92 before the H. Gov’t Oversight Comm.*, 2023 Leg., 135th Sess. (statement of Frankie DiCarlantonio, Ohio Assoc. of Elected Officials) (hereinafter “*S.B. 92, DiCarlantonio Opponent Testimony*”). S.J.R. 2 mandates that this work be done in a compressed timeframe, placing the election’s integrity—and the public’s confidence in it—at risk. County boards of election did not anticipate or budget for an August special election, especially given that H.B. 458 eliminated them in nearly all circumstances. Indeed, it appears, *none* of Ohio’s 88 counties had planned to conduct a special election in August of 2023. S.J.R. 2 now abruptly requires that *all* of them do so.

Many counties, including Auglaize, prepared their 2023 election cycle “without an August special election in mind because the General Assembly eliminated them[.]” *Allow Special Election to be Held in August for Certain Purposes: Hearing on S.B. 92 before the H. Gov’t Oversight Comm.*, 2023 Leg., 135th Sess., 2 (statement of Michelle Wilcox, Luke Scott, Rodney Metz,

Francia Engle, Diana Dulebohn, and Joe Kuhn, Auglaize County Board of Elections) (hereinafter “S.B. 92, Wilcox Opponent Testimony”). This means that boards of elections “didn’t include that election date to regular polling locations, didn’t list it as a possibility to poll workers, didn’t budget for the cost, planned personal time off, etc.” *Id.* With such short notice of an August special election, some voting sites have declined to serve as polling locations, and there is a shortage of poll workers.⁶

The timeline for the overlapping preparations of two elections, one statewide special election in August and the general election in November, is also fraught with logistical hurdles and administrative burdens. Nominating petitions of candidates as well as local questions and issues for the November election are due to be filed the day after the August special election.⁷ Even while boards of elections are still counting ballots, receiving and processing absentee ballots, working on curing provisional ballots, and certifying election results for August, they must “review, examine, and certify the sufficiency and validity of a local question and issue petitions,” verify *each* signature collected on these petitions, and verify the signatures on any petition of a statewide initiative seeking to amend the Ohio constitution. *See* Ohio Const. Art. II, Sec. 1a; R.C. 3501.38 and 3519.16(E).⁸ In 2021, Cuyahoga County alone had 68 issues and hundreds of candidate

⁶ Aimee Hancock, *Ohio August Election: Some Voting Locations will Change; Poll Workers Needed*, Dayton Daily News (May 17, 2023), <https://www.daytondailynews.com/local/ohio-august-election-some-voting-locations-will-change-poll-workers-needed/JSVQAA6DNZAIVGJOZHKAPA5HRM/> (explaining that in Montgomery County alone, a total of 1,500 to 1,600 poll workers will be needed); *see also* John Kosich, *Local Boards of Election Scramble to Prepare for New August Election*, News 5 Cleveland (May 16, 2023), <https://www.news5cleveland.com/news/local-news/local-boards-of-election-scramble-to-prepare-for-new-august-election> (noting Cuyahoga County Board of Elections is “about a month behind where we would want to be in election preparation”).

⁷ Ohio Sec’y of State, 2023 Elections Calendar, <https://www.ohiosos.gov/publications/2023-elections-calendar>.

⁸ *See also* Ohio Sec’y of State, Directive 2022-17, Chapter 13: Petitions (2022) at 363 and 368, <https://www.ohiosos.gov/globalassets/elections/directives/2022/eom/dir2022-17-ch13.pdf>

petitions to certify and review prior to the November election.⁹ Franklin County also had dozens of issues and hundreds of candidate petitions.¹⁰ Rushing to prepare for and implement an August special election will require election officials to scramble to simultaneously prepare for a statewide special election and the November 7, 2023, general election, and undermine the integrity of both. *S.B. 92, Wilcox Opponent Testimony.*

As the sponsor of H.B. 458 observed, an August special election would cost the Huron County Board of Elections' Director and Deputy Director over 1,000 hours of preparation time—time that otherwise could be used “to clean up the voter rolls, enter voter registrations into the database, or conduct voter outreach and education.” *H.B. 458, Hall Sponsor Testimony; see also H.B. 458, Burton Proponent Testimony* (testifying that special elections consume time in between primary and general elections that would otherwise be used to maintain and update voter information and systems). Running an August special election exacerbates a growing problem, as “the demands being placed on [election officials] have become unreasonable and untenable.” *S.B. 92, DiCarlantonio Opponent Testimony.*

⁹ Cuyahoga Cnty. Bd. of Elections, November 2, 2021 General Election Issues List, <https://boe.cuyahogacounty.gov/elections/GetDocumentById/3838369f-5438-49f2-8a25-fa0ddd4f2805/>; Cuyahoga Cnty. Bd. of Elections, November 2, 2021 Election Results, <https://boe.cuyahogacounty.gov/elections/GetDocumentById/4eefab46-4501-4737-a370-325be3a05915/>.

¹⁰ Franklin Cnty. Bd. of Elections, November 2, 2021 General Election Candidates List, [https://vote.franklincountyohio.gov/BOEL-website/media/Election-Info/2021/\(3\)%20General%20Election%20-%20November%202,%202021/\(2\)%20Candidates%20and%20Issues/2021-General-Combined-Candidate-List-with-overlaps-20.pdf](https://vote.franklincountyohio.gov/BOEL-website/media/Election-Info/2021/(3)%20General%20Election%20-%20November%202,%202021/(2)%20Candidates%20and%20Issues/2021-General-Combined-Candidate-List-with-overlaps-20.pdf); Franklin Cnty. Bd. of Elections, November 2, 2021 General Election Issues List, [https://vote.franklincountyohio.gov/BOEL-website/media/Election-Info/2021/\(3\)%20General%20Election%20-%20November%202,%202021/\(2\)%20Candidates%20and%20Issues/2021-General-Certified-Issues-List-3.pdf](https://vote.franklincountyohio.gov/BOEL-website/media/Election-Info/2021/(3)%20General%20Election%20-%20November%202,%202021/(2)%20Candidates%20and%20Issues/2021-General-Certified-Issues-List-3.pdf).

The multiple conflicting demands on Ohio election officials will present a serious threat to election integrity. In the short term, as Secretary LaRose has noted in the past, “[n]obody does their best work in a hurry.” Forcing election administrators to prepare on a compressed timeline—as is the case with any special election, but particularly one that is abruptly imposed as in S.J.R. 2—increases the likelihood that “things ... can happen.”¹¹ In the long term, as noted by a trustee of the Ohio Association of Election Officials in public testimony, Ohio will lose qualified election officials: “I would suggest to you that if this is ‘just doing our job,’ Ohioans will soon face a very real situation where no one qualified to do that job is willing to do so anymore.” *S.B. 92, DiCarlantonio Opponent Testimony*.

This impact on the conduct of elections, like other late changes to the election process, will “invit[e] confusion and chaos and erod[e] public confidence in electoral outcomes.” *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 208 L. Ed. 2d 247, 141 S. Ct. 28, 30 (2020) (J. Gorsuch, concurring); see also *Ne. Ohio Coal. for Homeless & Serv. Emps. Int’l Union, Loc. 1199 v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) (noting the “strong public interest in smooth and effective administration of the voting laws”).

CONCLUSION

For the foregoing reasons, Amicus Curiae League of Women Voters of Ohio respectfully requests that this Court issue Plaintiffs’ a Writ of Mandamus directing Respondent Ohio Secretary of State Frank LaRose to remove the constitutional amendment proposed in S.J.R. 2 from the August 8, 2023, special election and instruct election officials not to proceed with the special election.

¹¹ Morgan Trau, *Sec. of State blames rushed preparation period for rocky start to May 3 primary*, News5 Cleveland (May 3, 2022) <https://www.news5cleveland.com/news/politics/ohio-politics/sec-of-state-blames-rushed-preparation-period-for-rocky-start-to-may-3-primary>.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2023, the foregoing Amicus Brief of the League of Women Voters of Ohio in Support of Relators was filed electronically using the Court's e-filing system. I further certify that the foregoing was served by electronic mail upon the following:

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Exhibit 1

Affidavit of David Niven, PhD

RETRIEVED FROM DEMOCRACYDOCKET.COM

**Affidavit of David Niven 5.18.23.pdf**

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I, Theresa M Sabo, did witness the participants named above electronically sign this document.



IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* One Person One Vote,
et al.,

Relators,

v.

Ohio Secretary of State
Frank LaRose,

Respondent.

Case No. 2023-0630

Original Action in Mandamus
Expedited Elections Case

AFFIDAVIT OF DAVID NIVEN, PH.D. IN SUPPORT OF
BRIEF OF *AMICUS CURIAE* LEAGUE OF WOMEN VOTERS OF OHIO

I, David Niven, 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 affidavit, and further state as follows:

1. I am a professor of political science and researcher at the University of Cincinnati, where I conduct research relating to democracy, elections, and representation, particularly in the State of Ohio. I have published numerous peer-reviewed papers on voting, public opinion, and related matters. In addition to my research and academic publications, I testified as an expert witness for the plaintiffs in *Ohio A. Philip Randolph Institute v. Larry Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019), and submitted an *amicus* brief to this Court in support of the relators in *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 167 Ohio St.3d 255, 2022-Ohio-65, 192 N.E.3d 379. Both cases pertained to alleged partisan gerrymandering in Ohio.



2. John Tyler, the 10th president of the United States, could have known – with certainty – the date of the 2024 presidential election.¹ An Ohioan could *not* have known when they would next be asked to vote as recently as last Tuesday (May 9, 2023).

3. The effect of an improvised summer election is entirely predictable: few people will vote, and those that do will not be remotely representative of the larger electorate.

4. “Tuesday was the quietest primary on record,” declared the McConnellsville newspaper’s front page story when Ohio held an August election in 1942.² The *Columbus Dispatch* suggested low turnout in August 1942 was “evidence of the apathy Central Ohio voters showed towards the Tuesday primary.”³

5. Ohio would not hold another statewide August election until 80 years had passed.⁴ Once again, voting in August resulted in notably light participation. As one 2022 headline put it, “Ohio’s August primary breaks modern state record for low voter participation.”⁵

6. Turnout in the August 2022 statewide election was 8.01 percent. Ohio’s turnout rate in November 2022 was 6.53 times higher.

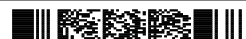
¹ President Tyler signed the Presidential Election Day Act of 1845 creating a national election day standard that remains in effect.

² *The Primary*, Morgan County Democrat, (Aug. 13, 1942) 1.

³ *Only 1881 Out of 10,000 Cast Their Votes In Madison County*, Columbus Dispatch (Aug. 12, 1942) A-3.

⁴ Individual communities would sporadically hold their own August elections when ballot issues arose. A random sample of local August election results from the last 10 years showed turnout rates typically below 15 percent and ranging to less than 7 percent.

⁵ Andrew J. Tobias and Zachary Smith, *Ohio’s August Primary Breaks Modern Record for Low Voter Participation*, Cleveland.com (Aug. 3, 2022) <https://www.cleveland.com/news/2022/08/ohios-august-primary-breaks-modern-record-for-low-voter-participation.html>



7. While anemic turnout is a well-known consequence of staging elections in August, what is perhaps less well understood is the degree to which small turnout electorates are radically unrepresentative.

8. The average (mean) age of Ohioans who voted in the August 2022 election was 16 years older than the average age of Ohio registered voters who did not participate.

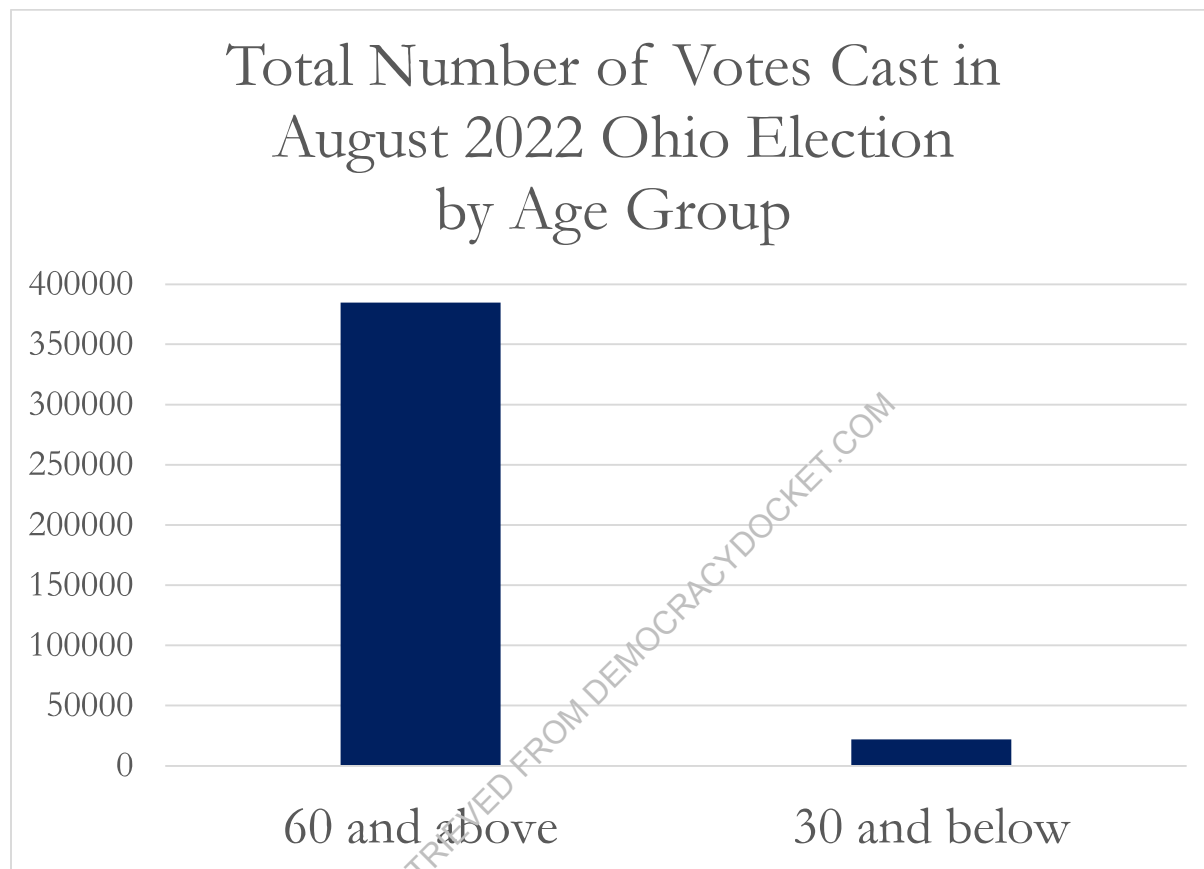
[illegible]

10. Perhaps a better illustration of the age disparity is a simple count of voters by age. Among Ohio voters 60 and above, 384,899 cast a vote in the August 2022 election. Among Ohio

⁶ Powerball, *Powerball Odds*, <https://www.powerball.com/powerball-prize-chart> (accessed May 16, 2023).



voters 30 and below, 22,057 cast a vote in the August 2022 election. Which is to say, there were 17.45 times as many August voters 60 and over as there were 30 and under. Notable in the present context is the fact that reproductive rates peak in the age bracket that encompasses the late 20s.⁷



11. In contrast, the ratio of 60 and above voters to 30 and under voters was approximately 6.5 to 1 in the November 2022 election, and about 3.7 to 1 in the November 2020 election.

12. In *The Federalist Papers*, we were warned that one quite alarming aspect of the British parliament's thirst for power was that it had "actually changed, by legislative acts, some of the most fundamental articles of government. They have in particular, on several occasions,

⁷ Hamilton, Brady E., and Stephanie J. Ventura. "Fertility and abortion rates in the United States, 1960–2002." *International Journal of Andrology* 29, no. 1 (2006): 34–45.



changed the period of election.” Instead, Federalist 53 calls for predictable and recurring election schedules, asking “what better security would the case admit, than that of selecting and appealing to some simple and familiar portion of time, as a standard ... for fixing the national sentiment, and for united patriotic exertions.”

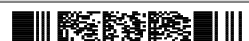
13. Later, in Federalist 60, Alexander Hamilton warns that the capacity to alter election schedules is the capacity to tip the scales of election outcomes. Politicians who can schedule elections at their whim will “amuse themselves in the ridiculous task of fabricating election laws for securing a preference to a favorite class of men,” Hamilton wrote.

14. Scholars have indeed found evidence to back Hamilton’s assertion that election timing is subject to strategic manipulation. In *Timing and Turnout: How off-cycle elections favor organized groups*, Sarah Anzia demonstrates how special interests capitalize on low turnout elections to advance their agenda. In a paper in the journal *Economics and Politics*, Marc Meredith extends the point, showing the political equivalent of venue shopping in which self-interested political actors strategically time the arrival of ballot questions to coincide with the most favorable election date and turnout rate forecast.

15. Ohio Secretary of State Frank LaRose recognizes the dangerous implications of voting in August. As he said, holding elections in August “means just a handful of voters end up making big decisions,”⁸ and “produce[s] skewed election results that often do not reflect the will of the people.”⁹ As Secretary LaRose put it, “August special elections generate chronically low

⁸ *LaRose Provides Testimony in Support of Bill to Provide Relief to Ohio’s Local Governments and County Boards of Elections*, <https://www.ohiosos.gov/media-center/week-in-review-archive/2022-11-18/> (accessed May 16, 2023).

⁹ *LaRose Statement of Passage of House Legislation Eliminating August Special Elections*, <https://www.ohiosos.gov/media-center/press-releases/2021/2021-12-09/> (accessed May 16, 2023).



turnout because voters aren't expecting an election to occur. This is bad news for the civic health of our state.”¹⁰

16. Indeed, as Secretary of State LaRose noted, “This isn’t how democracy is supposed to work.”¹¹


17. There was a compelling reason for President Tyler and the congress to set a uniform, predictable election schedule. There was a compelling reason for the authors of *The Federalist Papers* to warn us of the dangers of election schedule manipulation. There was a compelling reason that motivated Secretary of State Frank LaRose to declare that August elections were “chronically low turnout,” “skewed,” and “bad news.”

18. Elections are meant to reflect the will of the people, not to thwart it. One cannot hold an election meant to draw a tiny and unrepresentative electorate and consider it fair or free. “This isn’t how democracy is support to work,” we have been told. Because it isn’t.

David Niven
Signed on 2023/05/18 07:51:34 -8:00

David Niven

Signed at Columbus, Franklin, Ohio.
City County State


Signed on 2023/05/18 07:51:34 -8:00

Notary Public

before me this 18th day of May, 2023



Notarial act performed by audio-visual communication

¹⁰ *LaRose Statement of Passage of House Legislation Eliminating August Special Elections*, <https://www.ohiosos.gov/media-center/press-releases/2021/2021-12-09/> (accessed May 16, 2023).

¹¹ *Eliminate August Special Elections Except for US House Nomination: Hearing on H.B. 458 before the H. Ways and Means Comm.*, 2021 Leg., 134th Sess. (statement of Frank LaRose, Secretary of State).

