

IN THE SUPREME COURT OF OHIO

STATE EX REL. OHIO DEMOCRATIC
PARTY, et al.,

Relators,

-v-

FRANK LAROSE,

Respondent.

CASE NO. 2020-0388

ORIGINAL ACTION IN
PROHIBITION

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

BRIEF OF AMICI CURIAE THE LEAGUE OF WOMEN VOTERS OF OHIO AND THE
OHIO A. PHILIP RANDOLPH INSTITUTE IN SUPPORT OF
NEITHER PARTY

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Ohio Statutes

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Other Authorities

Andrew J. Tobias, *Ohio Secretary of State Frank LaRose Proposes Pre-Paid Statewide Mail for Delayed Primary*, Cleveland.com (Mar. 22, 2020) 13

Andy Chow, *As Coronavirus Spreads, States Scramble to Reassure Public that Voting Is Safe*, KPBS (Mar. 16, 2020) 5

Center for Election Innovation & Research, *California Voter’s Choice Act November 6, 2018 General Election Report* 11

Dr. Daniel Smith, *Vote by Mail Ballots Cast in Florida*, (October 19, 2018)..... 15

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Julie Carr Smythe, *AP Exclusive: Thousands of Ohio Absentee Ballots Rejected*, Associated Press (Dec.16, 2019)..... 14

National Conf. of State Legislatures, *Returning Absentee Ballots* (Feb, 27, 2019) 18

Ohio Governor Mike DeWine, *Statement from Ohio Governor Mike DeWine on the March 17, 2020 Election* (Mar. 16, 2020)..... 6

Ohio Secretary of State, *Directive 2020-06* (Mar. 16, 2020)..... 1, 6, 7

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I. INTRODUCTION

Ohio's government and citizens are engaged with responding to the serious public health implications of COVID-19 and must act accordingly to ensure the protection of public safety. Yet even in this extraordinary moment, it remains true that the right to vote is a fundamental right, "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Any emergency state action in the realm of voting must be crafted with the utmost care to preserve both the State's interest in public safety and this most critical of rights—including, and perhaps especially, in the midst of this crisis. Amici, League of Women Voters of Ohio and Ohio A. Philip Randolph Institute, respectfully submit this Brief in support of no party in this case to alert the Court and the parties to two fundamental principles that must guide any remedies fashioned in this case.

First, the Ohio Secretary of State's Directive 2020-06 purports to set June 2 as the new primary date, but prohibits anyone who was not registered to vote by February 18, 2020, from voting in the rescheduled election. This Directive violates Section 8 of the National Voter Registration Act of 1993 (52 U.S.C. § 20507(a)) ("NVRA"), which unambiguously mandates that voters be permitted to register to vote up to 30 days prior to any election. Whether the election is to be held on April 28, May 16, June 2, or some other day, Ohioans must be permitted to continue to register to vote in accordance with the requirements of federal law.

Second, the Relators' and Intervenor's requested remedies appear to rely only on voting by mail. Although Amici acknowledge, and indeed describe below, the need for the most expansive mail absentee ballot procedures possible, voting by mail should not be the only option. While full access to voting by mail is an essential option for many people, including elderly individuals, persons with disabilities, and, under the current crisis, individuals who are ill or fearful of being exposed to the COVID-19, voting by mail is not a full solution. This is true

particularly in communities of color—where mail service is often not as robust as elsewhere—and among those who are distrustful of the use of the mail system as the vehicle to exercise this important right. For many such Ohioans, in-person voting—including early in-person voting—remains the most viable option.¹ In addition, Ohio’s current procedures for voting by mail are so burdensome and restrictive as to make that option inadequate for conducting the entire election. Any new election date must, to the extent possible, make accommodation for all voters, and not rely exclusively on means that could have a discriminatory impact on specific populations.

Amici suggest that any remedy or relief ordered in this case require Ohio officials to develop a concrete plan to address problems that may arise up to or on the rescheduled primary election date in order to prevent the chaos and confusion that prevailed on March 16–17, 2020. This should include a communications plan so that local elections officials and the public are not misinformed about critical information such as whether polls will be open or closed, as occurred in the hours prior to the scheduled 2020 primary.

II. STATEMENT OF INTEREST OF AMICI CURIAE

A. THE LEAGUE OF WOMEN VOTERS OF OHIO

The League of Women Voters of Ohio (“LWVO”) is a not-for-profit, membership organization affiliated with the League of Women Voters of the United States. LWVO has approximately 3,000 members in the State and provides support to approximately thirty local leagues. LWVO was founded in 1920, after the enactment of the Nineteenth Amendment of the U.S. Constitution which granted women the right to vote. LWVO’s mission is to help Ohioans

¹ In recent primary elections, millions of voters cast ballots in person on Election Day in Ohio. In the 2004 primary election, 2,365,969 voters cast in-person ballots. In the 2008 primary election, 3,603,523 voters cast in-person ballots; in 2012, 1,970,753 cast in-person ballots; and in 2016, 3,302,832 cast in-person ballots on Election Day. Ohio Sec’y of State, *Election Results and Data*, <https://www.sos.state.oh.us/elections/election-results-and-data/> (accessed Mar. 23, 2020).

exercise the right to vote, improve American democracy, and engage Ohioans in the decisions that most impact their lives. For decades, LWVO has fulfilled this mission by registering new voters, publishing non-partisan voter guides, helping educate citizens about Ohio’s voting process, and advocating in favor of positive voting reforms. Since the spread of COVID-19 in Ohio, LWVO has conducted education and advocacy, helping prospective voters understand what led the State to close the polls on March 17. LWVO also registered voters in advance of the 2020 primary election.

LWVO is committed to protecting the voting rights of all Ohioans, particularly during this unprecedented time when voters face innumerable challenges around requesting and casting their ballots and uncertainty on whether their ballots will count. As a leading voice in enforcing the National Voter Registration Act across the country through its national and other state-based affiliates, LWVO has a strong interest in ensuring that the voter registration deadline is extended to a date that is no earlier than 30 days prior to the date of the election. LWVO believes that this would allow many individuals, including students currently displaced due to university closures, to re-register at their new address so that they can participate in the primary election. In addition, LWVO has an equally strong interest in ensuring that voting is inclusive, safe, and accessible for all eligible Ohioans.

B. THE OHIO A. PHILIP RANDOLPH INSTITUTE

The Ohio A. Philip Randolph Institute (“Ohio APRI”) is a state chapter of the A. Philip Randolph Institute, a national organization for African-American trade unionists and community activists that was established in 1965 to forge an alliance between the civil rights and labor movements. Ohio APRI has ten chapters across Ohio, including in Columbus, Cleveland, and Cincinnati, and has members throughout the State. Ohio APRI’s mission includes supporting charitable ventures such as feeding the hungry and providing clothing to those in need and

conducting voter engagement. The organization dedicates a majority of its resources to voter engagement work, including voter outreach, voter education, and voter registration. Ohio APRI conducts voter registration activities in low-registration neighborhoods, as well as get-out-the-vote activity in neighborhoods that have low voter turnout, targeting predominantly low-income and African American voters. These same communities typically exhibit lower usage rates for vote-by-mail. Leading up to the March 17 primary election, Ohio APRI spent several weeks registering Ohio voters in low-turnout, low-registration, and low-income neighborhoods. Because state officials closed polling places on March 17, Ohio APRI members and voters who planned to vote on Election Day were unable to cast a ballot.

Ohio APRI is committed to protecting the voting rights of all Ohioans, particularly during such an unprecedented time when voters face innumerable challenges around casting their ballots and uncertainty on whether their ballots will count. Ohio APRI has a strong interest in ensuring that the opportunity for voter registration continue to a date that is no earlier than 30 days prior to the date of the election. In addition, Ohio APRI has an equally strong interest in ensuring that voting by mail and in-person is inclusive, safe, and accessible for Ohioans.

III. FACTUAL BACKGROUND

The spread of COVID-19 has forced state and local county officials, poll workers, and voters to grapple with novel issues, especially how to hold safe, inclusive, and timely elections in this new reality. Several key events in the chaotic days leading up to March 17's aborted primary election warrant particular emphasis here.

On March 9, 2020, Ohio Governor Mike DeWine declared a state of emergency “to protect the well-being of the citizens of Ohio from the dangerous effects of COVID-19.”² Following the declaration, state officials began taking a series of emergency actions that would impact the election. On March 9, Secretary of State Frank LaRose ordered county boards of elections to relocate all polling places out of residential senior citizen facility facilities to protect that demographic, which, according to the Centers for Disease Control and Prevention, is at a particularly high risk of contracting coronavirus.³ This resulted in a scramble by boards of elections to move more than 150 polling locations, in piecemeal fashion.⁴ Shortly thereafter, local officials began reporting shortages of poll workers—about half of whom are over sixty in Ohio—and severe difficulty recruiting replacements.⁵

In any event, the election ultimately did not take place. Around 3 p.m. on March 16, Governor DeWine announced at a press conference that state officials had determined it was unsafe to hold the election on Tuesday, and that he anticipated, and would not contest, a private

² The Office of Governor Mike DeWine, *Executive Order 2020 01D*, (Mar. 9, 2020), https://content.govdelivery.com/attachments/OHOOD/2020/03/09/file_attachments/1396418/Executive%202020-01D.pdf (accessed Mar. 23, 2020).

³ Ohio Sec’y of State, *Directive 2020-03*, (Mar. 9, 2020), <https://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-03.pdf> (accessed Mar. 23, 2020). COVID-19 presents a particularly serious risk to people who are over the age of 60, have underlying health conditions, have weakened immune systems, or who are pregnant.

⁴ Andy Chow, *As Coronavirus Spreads, States Scramble to Reassure Public that Voting Is Safe*, KPBS (Mar. 16, 2020), <https://www.kpbs.org/news/2020/mar/16/as-coronavirus-spreads-states-scramble-to/>.

⁵ Rick Rouan, *Ohio Elections Boards Frantically Seeking Poll Workers Due to Coronavirus Outbreak*, Columbus Dispatch (Mar. 12, 2020), <https://www.dispatch.com/news/20200312/ohio-elections-boards-frantically-seeking-poll-workers-due-to-coronavirus-outbreak/1> (accessed Mar. 23, 2020).

lawsuit to postpone the election.⁶ Though the Franklin County Court of Common Pleas denied that relief at an emergency hearing shortly after 7:00 p.m., a series of conflicting and erroneous messages and media reports led boards to misinform poll workers throughout the afternoon and evening that the election had been postponed.

At 10:26 p.m., Ohio Department of Health Director Dr. Amy Acton ordered all polls closed.⁷ Shortly thereafter, Secretary LaRose issued Directive 2020-06, which postponed the March 17, 2020 presidential primary election to June 2, 2020, and further stated that “[t]he boards of elections are prohibited from processing any new voter registrations for the June 2, 2020 presidential primary election. The February 18, 2020 voter registration deadline remains the voter registration deadline.”⁸

Relators filed the instant lawsuit against Secretary LaRose seeking, in part, an order requiring the Secretary to: (1) rescind Directive 2020-06, (2) direct county boards of elections to accept and process absentee ballots applications until noon on April 25, and (3) direct county boards of elections to accept and count all valid absentee ballots postmarked on or before April 28 and received at the boards on or before May 8, or received by personal delivery by the voter or a family member on or before April 28. Relators’ Compl. at 5. The Ohio Libertarian Party intervened as a Relator in the case, agreeing that the Court should rescind the Directive, but

⁶ The Ohio Channel, *DeWine and LaRose Press Conference*, (Mar. 16, 2020, 2 P.M.), 28:35-29:14, <https://www.ideastream.org/news/dewine-and-larose-press-conference-march-16-2020> (accessed Mar. 23, 2020).

⁷ Ohio Governor Mike DeWine, *Statement from Ohio Governor Mike DeWine on the March 17, 2020 Election*, (Mar. 16, 2020), <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/dewine-statement-on-march-17-2020-election> (accessed Mar. 23, 2020).

⁸ Ohio Sec’y of State, *Directive 2020-06*, (Mar. 16, 2020), <https://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-06am.pdf> (accessed Mar. 23, 2020).

arguing in favor of a primary date that would allow election results to be determined closer to the Libertarian Party's National Convention, set for May 21, 2020. To this end, the Ohio Libertarian Party requested, among other things that boards (1) process mail absentee ballot applications received until noon on May 8, and (2) count mail ballots postmarked on or before May 12 or delivered to the boards by May 20. Intervenor's Compl. at 7–8.

On March 18, Amici LWVO and Ohio APRI sent a Notice Letter pursuant to the National Voter Registration Act ("NVRA"), informing Respondent that Directive 2020-06's voter registration deadline violates Section 8 of the NVRA and Ohio state law.⁹ Amici urged Respondent, as they do in this Brief, either to bring Directive 2020-06 into compliance immediately, or to commit to extending the voter registration deadline in the event that another election date was set.¹⁰

IV. ARGUMENT

Amici do not take a stance on what date this Court should order the primary to be held; but ask only that first, Ohio modify its voter registration deadline to comply with the National Voter Registration Act; and second, that, whatever day is selected, the State provide for the necessary voting accommodations to allow all registered Ohio voters to exercise their fundamental right to vote.

A. FEDERAL LAW REQUIRES THAT OHIO'S VOTER REGISTRATION DEADLINE MUST BE NO EARLIER THAN 30 DAYS PRIOR TO THE PRIMARY ELECTION.

Secretary LaRose's Directive 2020-06 postpones the primary until June 2, but states: "[t]he boards of elections are prohibited from processing any new voter registrations for the June

⁹ For a June 2 election, the voter registration deadline cannot be earlier than May 3, 2020.

¹⁰ See Jen Miller, *Ohio Voting Rights Groups Demand Voter Registration Deadline Be Extended*, League of Women Voters of Ohio Press Statement (Mar. 19, 2020), <https://www.lwvohio.org/press-release-3-19-2020> (accessed Mar. 23, 2020).

2, 2020 presidential primary election. The February 18, 2020 voter registration deadline remains the voter registration deadline.” Ohio Sec’y of State, *Directive 2020-06* (Mar. 16, 2020), at 1. This sets the voter registration deadline for the primary election approximately *three and a half months* prior to the election date—a clear violation of Section 8 of the NVRA, which requires that voters who register at least 30 days prior to any date set for the presidential primary must be permitted to vote.

When elections move, for whatever reason, the strong protections of the NVRA move with them. Section 8(a)(1) of the NVRA requires that “each State shall ensure that any eligible applicant is registered to vote in an election” if the applicant has registered to vote “not later than the lesser of 30 days, or the period provided by State law, before the date of the election.” 52 U.S.C. § 20507(a)(1). Under the NVRA, an “election” is “a general, special, primary, or runoff election” as defined under the Federal Election Campaign Act of 1971. *Id.* § 20502 (citing 52 U.S.C. § 30101(1)).¹¹ This means for a June 2 primary, federal law requires states to accept voter registration applications through May 3.

On its face, the voter registration deadline in Directive 2020-06 is preempted by the NVRA (52 U.S.C. § 20507(a)) because the Directive makes clear that the February 18, 2020 voter registration deadline “remains the voter registration deadline” for the June 2, 2020 election and prohibits county boards of elections from processing any new voter registrations beyond this prior deadline. This restriction on voter registration is a patent violation of Section 8(a)(1) of the

¹¹ In *Fish v. Kobach*, the Tenth Circuit noted that because the NVRA relies on the Federal Election Campaign Act to define the terms, “election” and “Federal office,” the NVRA “applies expressly to all federal general and primary elections, including presidential elections.” 840 F.3d 710, 719 n. 7 (10th Cir. 2016).

NVRA. Therefore, the Secretary must amend Directive 2020-06 such that it extends the voter registration deadline for a contemplated June 2 presidential primary election to May 3, 2020.

In similar circumstances, other states have taken similar actions. In Georgia, a federal court held that because the date of a special runoff election was more than 30 days from the voter registration deadline set for the general election, this original voter registration deadline violated Section 8 of the NVRA and had to be extended. Thus, the court granted the plaintiffs' preliminary injunction to extend the voter registration deadline for a June 20, 2017 special runoff election to no earlier than May 21, 2017. *See Ga. State Conf. of the NAACP v. Kemp*, N.D.Ga. No. 1:17-cv-1397, 2018 WL 2271244, Consent Decree at *3 (Apr. 11, 2017); *see also Ga. State Conf. of the NAACP v. Kemp*, N.D.Ga. No. 1:17-cv-1397 (Oct. 17, 2017), ECF No. 42 (extending preliminary injunction to all future federal elections including runoffs). Similarly, in response to an NVRA notice letter pointing out that the registration deadline for a runoff election violated Section 8 of the NVRA, the Secretary of State of Mississippi extended the voter registration deadline to 30 days before the runoff election.¹²

Thus, whatever date becomes the final and lawful date of the Ohio presidential primary election, whether by court order or by legislative action, the Secretary's office must allow Ohio citizens to register to vote up to 30 days prior to Election Day to remain in compliance with Section 8 of the NVRA.

¹² Response Letter from Miss. Sec'y of State Jim Hood to NVRA Notice of Non-Compliance Letter from the Lawyers' Comm. for Civil Rights Under Rule of Law (July 12, 2018), <https://lawyerscommittee.org/wp-content/uploads/2018/07/MS-SOS-letter-re-NVRA-compliance.pdf> (accessed Mar. 23, 2020).

B. OHIO MUST ENSURE THAT THE MECHANISMS FOR VOTING USED IN THE 2020 PRESIDENTIAL PRIMARY DO NOT RESULT IN VOTERS BEING DISENFRANCHISED OR DENIED ACCESS TO THE BALLOT.

Secretary LaRose’s Directive 2020-06 set the presidential primary election for June 2, 2020, and is requiring polling sites be open and operational on that day. Directive 2020-06, at 1–2. Relators request, however, that the election be conducted by mail absentee ballot, with a postmark deadline of April 28, 2020. Relators’ Compl. at 5. Intervenors propose a similar process, with a postmark deadline of May 12, 2020. Intervenor’s Compl. at 7–8.

But switching exclusively to Ohio’s present mail voting system for the upcoming election would disenfranchise many voters who do not have reliable access to mail, who may have difficulty with the process of applying for and returning a mail ballot, or who distrust the mail process. As this Court considers the case before it and what relief may be appropriate, Amici urge the Court to consider the full implications of both eliminating in-person voting and relying on Ohio’s current vote-by-mail system.

1. Many Ohio Voters—Particularly Voters of Color and Young Voters—Rely on In-Person Voting.

While the option of voting by mail is an important safeguard for many, it is not a cure-all that would, on its own, make voting accessible for all Ohio voters. The vast majority of voters in the United States, including millions of Ohioans, cast ballots in person, whether on Election Day itself or during early in-person voting. In the 2016 primary election, over 3.3 million Ohioans cast in-person ballots on Election Day, and over 163,000 voters cast in-person absentee ballots.¹³ The numbers are even greater, of course, in general elections.

¹³ Ohio Sec’y of State, *Election Results and Data*, <https://www.sos.state.oh.us/elections/election-results-and-data/> (accessed Mar. 23, 2020).

In-person voting options and extended early voting are especially important for voters of color, as well as for young voters. Data from California, which is experimenting with vote-by-mail, show that older, white voters more frequently vote by mail. In comparison, Black and Hispanic voters and young people are more likely to vote in-person.¹⁴

A study looking at data on early in-person voting in Ohio found:

[I]n the 2012 General Election, 19.55% of blacks reported voting EIP [Early In Person] absentee ballots in Ohio, whereas 8.91% of whites in the state reported they voted EIP absentee ballots. The statistically significant results indicate that black voters were more likely to cast EIP absentee ballots in the 2012 General Election than white voters. Similarly, according to the 2008 CPS November Supplement, 19.88% of blacks reported casting EIP absentee ballots in Ohio, whereas 6.18% of whites reported doing so. Again, the results are statistically significant, indicating that blacks were more likely than whites to cast EIP absentee ballots in the 2008 General Election.¹⁵

Many of these voters may find Ohio's vote-by-mail system to be inaccessible, meaning Ohioans must be provided mechanisms outside of the current vote-by-mail system to safely participate in the upcoming election. Safe options could include expanded access to curbside voting at polling places, so that at-risk voters may remain out-of-doors, or in their cars, to vote. Adding additional days of early in-person voting, and additional locations, would also help reduce crowding.

Increasing early in-person voting opportunities is critical in this moment, so that voters do not all have to show up on one day, which would undermine their opportunity to distance

¹⁴ Center for Election Innovation & Research, *California Voter's Choice Act November 6, 2018 General Election Report*, <https://electioninnovation.org/wp-content/uploads/2020/03/VCA-November-2018-General-Election-Report.pdf> (accessed Mar. 23, 2020).

¹⁵ Analysis of Effects of Senate Bill 238 and Directive 2014-06 on Early In-Person (EIP) Absentee Voting by Blacks and Whites in Ohio in *Ohio State Conf. of the NAACP v. Husted*, S.D. Ohio No. 2:14-CV-404, ECF No. 18-1, at *31 (Mar. 30, 2014), <https://moritzlaw.osu.edu/electionlaw/litigation/documents/Ohio192.pdf> (accessed Mar. 23, 2020).

themselves safely from others. Additionally, this measure is especially critical for communities of color and low-income persons who are more likely to be working in jobs without flexibility or paid sick leave, and who may have an even harder time voting on Election Day, on top of concerns about their health and the health of their loved ones.

In urging this Court not to order mail balloting as the sole means to vote in Ohio's 2020 primary election at this time, Amici do not in any way discount the gravity of the public health issues the state is facing. Amici's point is that in-person voting is critically important to many Ohio voters, and that the State must plan now for measures that would allow for safe administration of in-person voting

2. Ohio Must Take Steps to Eliminate Obstacles to Mail-in Absentee Voting in the Upcoming Election.

While preserving the opportunity for in-person voting, Ohio must also address the challenges voters will face when voting absentee by mail, and make vote-by-mail accessible and inclusive in the upcoming election. Under existing Ohio law, a voter must: obtain an absentee ballot application, find and apply postage to it, mail it in, receive the absentee ballot itself by return mail, complete it, and then either find and apply postage to that as well, or deliver it in person to their county board of election. As explained below, given the gravity and scale of the coronavirus pandemic and the fact that many more Ohioans may need to use mail absentee ballots, this process presents potentially insurmountable obstacles to Ohioans' effective exercise of their fundamental right to vote. Amici urge that any remedy ordered by the Court include procedures to alleviate these issues, including that the State:

- Ease absentee ballot request procedures;
- Provide enhanced uniform trainings to boards of elections regarding elector identity verification, including signature match and date of birth;

- Allow voters to cure their ballots without requiring that they travel to their boards of elections within seven days of Election Day to do so;
- Expand the designees (currently, limited to close family members) who can drop off an absentee voter’s ballot in person;
- Prepay postage for absentee ballot applications and mail absentee ballots; and
- Allow absentee ballot drop-off at any polling location in the county where the voter is registered, not just at the county boards of elections.

a) Difficulties Requesting Absentee Applications

The multi-step process of voting by mail begins with a written request for an absentee ballot. While the Secretary’s website has online absentee ballot applications, the request cannot be submitted online. Any voter without a printer in their home—which includes many low-income households—may need their elections board to mail them the application or visit the board, local library, or a print shop to obtain an application.

After a voter obtains an application for an absentee ballot, it must be submitted to the elections board. Because absentee ballot applications currently are not postage prepaid, voters must also place the application in an envelope, address the envelope to their county boards of elections, obtain postage, and mail the application. The request process, itself, presents challenges to many voters, particularly low-income voters. The Secretary has proposed that the legislature provide for prepaid postage for absentee ballot applications as well as absentee ballots,¹⁶ but the Court should order that as part of any remedy fashioned if the legislature does not act, along with an order directing that absentee ballot applications may be submitted online.

¹⁶ Andrew J. Tobias, *Ohio Secretary of State Frank LaRose Proposes Pre-Paid Statewide Mail for Delayed Primary*, Cleveland.com (Mar. 22, 2020), <https://www.cleveland.com/open/2020/03/ohio-secretary-of-state-frank-larose-proposes-pre->

b) Overbroad Rejection of Absentee Applications and Absentee Ballots

Once local boards receive absentee applications, they typically use their discretion to determine the voter's identity. They may reject an application due to a mistaken conclusion that the signature on the application does not sufficiently match the signature on file, or other immaterial errors. In the 2018 general election, an Associated Press investigation revealed that 21 Ohio counties rejected thousands of absentee ballot applications because a signature was either missing, or deemed not to match the signature on file.¹⁷ Although the boards of elections send notice letters to voters allowing them to cure such deficiencies, the practical impact of application rejection is that the voters must once again begin the process of sending a new application or correcting the problems in their original application. This prolonged process operates as an obstacle to voting.

The same rejection process applies to absentee ballots. Election officials are required to compare the voter's signature on the outside of the identification envelope with the one on the voter's registration form, to verify it. R.C. 3509.06(D)(3). Any precinct official may challenge the signature match, R.C. 3509.06(D)(2)(a), and challenges to absentee vote validity use the same procedures as with other votes, R.C. 3509.07(F). Statewide data does not break down the reasons for absentee ballot rejections, but the Secretary's office reported that county boards

paid-statewide-mail-vote-for-delayed-primary.html (accessed March 23, 2020); Ohio Sec'y of State Press Release, *LaRose Encourages General Assembly to Support Ohio Voters First Act*, (Mar. 21, 2020), <https://www.sos.state.oh.us/media-center/press-releases/2020/2020-03-21/> accessed Mar. 23, 2020).

¹⁷ Julie Carr Smythe, *AP Exclusive: Thousands of Ohio Absentee Ballots Rejected*, Associated Press (Dec. 16, 2019), <https://apnews.com/ddfed70e98d79cf0bee49eb1d9fd85b9> (accessed Mar. 23, 2020). The vast majority of Ohio's 88 counties did not keep track of rejections, so the 21 counties with data likely reflect only a fraction of the problem.

rejected a total of 11,792 absentee ballots in 2018.¹⁸ Signatures deemed to mismatch, often erroneously so, are among the reasons why these rejections may have occurred. And, the individuals who are disenfranchised because of a signature problem are likely disproportionately voters of color and young voters.¹⁹

In addition to signature verification, Ohio law also requires that election officials match the voter's date of birth provided on their identification envelope with the date of birth on their registration file. The dates must match precisely, unless at least three members of the board determine that the voter has otherwise met the identification and signature verification requirements. *See* R.C. 3509.06(D)(3)(a)(iii). This requirement creates the possibility that a ballot could be rejected for a non-conforming or lack of technical precision in date of birth.

If a board rejects a ballot, the board must send a written notice to the voter informing them of the rejection and the nature of the perceived defect, and asking them to cure. R.C. 3509.06(D)(3)(b). It is the voter's burden to take steps to cure, possibly including appearing in person to the board of elections. R.C. 3509.06(D)(3).

If the primary election is set for a date upon which it later turns out that state public health officials are instructing or recommend that individuals avoid traveling outside of their homes due to risks presented by COVID-19, state officials must adopt reforms to allow voters to cure their ballots without requiring that they travel to their boards of elections. Indeed, the state has been ordered to provide such accommodations to certain voters with disabilities. *Ray v.*

¹⁸ Ohio Sec'y of State, *2018 Official Elections Results: Absentee Supplemental Report as Amended by Miami County* (Feb. 13, 2019), <https://www.ohiosos.gov/elections/election-results-and-data/2018-official-elections-results/> (accessed Mar. 23, 2020).

¹⁹ *See* Dr. Daniel Smith, *Vote by Mail Ballots Cast in Florida*, (October 19, 2018), at *3 https://www.acluf.org/sites/default/files/acluf_-_vote_by_mail_-_report.pdf (accessed March 22, 2020).

Franklin Cty. Bd. of Elections, S.D.Ohio 2008 WL 4966759, at *19–20 (Nov. 17, 2008) (requiring “reasonable accommodations” for persons who “are confined to their homes and cannot travel to their respective County Board of Elections” to correct deficient absentee ballots).²⁰ All of these difficulties with mail-balloting confirm the importance of maintaining in-person voting options.

c) Challenges Associated with Late-Mailed Absentee Ballots

Submitting a timely absentee ballot application does not guarantee that a voter will receive their ballot in time to be able to cast it and have it count. Ohioans consistently experience difficulties and delays in receiving their ballots. In some instances, they do not receive their ballot at all.

For example, prior to the March 17 primary election, as a result of last-minute polling location changes and fears around contracting the coronavirus, an increased number of voters were in need of absentee ballots on very short notice. However, short staffing at county boards of elections, slow postal delivery times, and the number of steps needed for a voter to request an absentee ballot made it all but impossible for these voters to receive and return their ballots in a timely way.

To reduce the recurrence of these issues in a rescheduled primary, Amici urge that any mail ballot submission date must (1) be set and communicated in time to alert voters of the deadline, and (2) provide voters with sufficient time to request, receive, and cast absentee ballots before the deadline.

²⁰ The reasonable accommodations noted by the court included having members of the boards of elections provide the absentee ballot at the home of the individual or allowing a designee to pick up the deficient absentee ballot from their board, deliver it to the voter, and then return the corrected ballot to their board.

d) Challenges Voters Face in Returning Absentee Ballots to Boards of Elections

Ohio law requires that voters submit their mail absentee ballots either by mail or in person. Ballots submitted in person must be delivered by the voter or their family member by the close of polls on Election Day. Absentee ballots are not postage prepaid; as the Secretary’s website instructs, “[i]t is your responsibility to make sure the ballot has enough postage” and voters “should not use a postage meter or an online service (such as stamps.com) to affix postage.”²¹ This creates additional, potentially insurmountable burdens to voting by mail for voters who may not be able to leave their home at the time of a set election date if concerns about COVID-19 have not lessened, as well as for low-income voters.

Additionally, for voters who wish to have their mail ballot personally delivered but cannot do so themselves, Ohio law provides that only that certain specified immediate family members may deliver the ballot. R.C. 3509.05(A). Not all Ohioans live with or have access to or assistance from a person who meets those particular criteria, especially when family members remain in their separate households—such as adult children avoiding visits with their parents—to comport with current social distancing recommendations. Likewise, this rule is especially burdensome for persons living in nursing homes, senior centers, or facilities serving disabled people, which currently are strictly restricting visitor access.²²

Amici urge the Court to require simple reforms for the presidential primary to allow voters who need to submit mail absentee ballots to do so more easily. For example, allowing voters to select a designee is neither unheard of nor uncommon in the United States. In fact, only

²¹ Ohio Sec’y of State, *Absentee Voting*, <https://www.ohiosos.gov/elections/voters/absentee-voting/#byMail> (accessed Mar. 23, 2020).

²² Vince Coll, *Area Nursing Homes Taking Ohio Governor’s Limited Visitor Policy Seriously*, WKBN 27 (Mar. 12, 2020, 5:55 P.M.), <https://www.wkbn.com/news/coronavirus/area-nursing-homes-taking-ohio-governors-limited-visitor-policy-seriously/> (accessed Mar. 23, 2020).

ten states require that the voter or a family member return a ballot; twenty-seven states and Washington, D.C. permit a voter to designate an agent.²³ Allowing Ohio voters who have requested a mail absentee ballot after Ohio declared a state of emergency to designate a friend, or an employee at a nursing home or other group residential facility, is necessary to prevent the disenfranchisement of Ohio voters in the 2020 primary election.

Currently, under Ohio law, mail absentee ballots submitted in person must be delivered to the county board of elections. R.C. 3508.05(A) (noting ballots must be delivered to “the director”). The office of the county board may, particularly in rural counties, involve an hour or more of travel by car. In this emergency situation, allowing voters or designees additional drop-off options for absentee ballots—such as individual polling locations and drop boxes—will assist voters in better exercising their right to vote by reducing the distance voters must travel and, in the case of drop boxes, allow voters a no-contact option to submit their absentee ballots.

V. CONCLUSION

It is incumbent on this Court to ensure that Ohioans are able to exercise their fundamental right to vote. Amici have presented information about how registration restrictions and hurdles in casting a ballot could deny qualified Ohio voters of this fundamental right, in violation of federal law. Any relief this Court orders must effectively address these barriers to the ballot.

²³ Nat’l Conf. of State Legislatures, *Returning Absentee Ballots* (Feb, 27, 2019), <https://www.ncsl.org/research/elections-and-campaigns/returning-absentee-ballots.aspx> (accessed Mar. 15, 2020).

Respectfully submitted, this 24th day of March, 2020,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Brief of Amici Curiae the League of Women Voters of Ohio and the Ohio A. Philip Randolph Institute in Support of Neither Party are being served by email upon counsel of record for all parties on March 24, 2020 as follows:

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