

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

LEAGUE OF WOMEN VOTERS OF OHIO, et al,	:	
	:	
Plaintiffs,	:	Case No. 2:20-cv-1638
	:	
v.	:	JUDGE WATSON
	:	
FRANK LAROSE, et al,	:	
	:	
Defendants.	:	

**DEFENDANT STATE OF OHIO’S OPPOSITION TO PLAINTIFFS’ MOTION FOR
TEMPORARY RESTRAINING ORDER**

Defendant State of Ohio hereby responds to Plaintiffs’ Motion for a Temporary Restraining Order. The State respectfully requests that the Court deny Plaintiffs’ motion. A memorandum in support is attached.

Respectfully submitted,

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I. INTRODUCTION

Elections in Ohio are conducted by statute, not by litigation. Elections conducted by litigation invite special interest groups to intervene to plead for special benefits and pet causes. *See, e.g.*, ODP Motion to Intervene, Doc. 25; LPO Motion to Intervene, Doc. 29; ORP Motion to Intervene, Doc. 32.¹ But when elections are conducted by statute, one decision-making body makes one set of rules. And that is precisely what happened here: the Ohio General Assembly responded to a once-in-a-generation pandemic that shut down in-person voting for the 2020 presidential primary election. Changing Ohio’s existing election mechanics as little as possible, the General Assembly enacted House Bill 197, which provides a way for every voter who could have voted in person on March 17, 2020, to vote by absentee ballot.

But now, special interest groups and political parties knock on this Court’s door and ask for *this* new change and *that* new deadline. The General Assembly could have enshrined these groups’ policy preferences into statute in House Bill 197. It did not, and its enactment cannot be disturbed simply because these groups failed to get the policies they wanted. House Bill 197 must stand even if there are other alternatives that could have been enacted; even if there are *better* alternatives that could have been enacted.

There are only two questions in this case: (1) whether House Bill 197 violates federal law and (2) whether it violates the United States Constitution. The answer to both questions is an easy “no.” House Bill 197 does not violate the National Voter Registration Act’s requirement that states permit voter registration until 30 days before a federal election. Nothing about H.B. 197 changed

¹ The Ohio Democratic Party and the Libertarian Party of Ohio also sought writs of prohibition against Secretary LaRose in the Supreme Court of Ohio. *Ohio Democratic Party v. LaRose*, No. 2020-0388 (Ohio Mar. 17, 2020). Each party asked the Supreme Court to implement detailed election schedules and accompanying election procedures of its choosing. Five additional parties, including some of the plaintiffs here, filed amicus briefs, setting forth still other proposed election schedules and mechanics. *See id.*

the date of the election from March 17, and Ohio indisputably allowed voter registration to occur until 30 days before that date. And as for Plaintiffs' claim that House Bill 197 burden their right to vote, Plaintiffs cannot show any non-speculative burden on voting, much less a severe one. And any burden is more than justified by the State of Ohio's interests in preventing the spread of an infectious disease, ensuring orderly elections, lessening the burdens on boards, and bringing the election to a close.

The merits of this case aside, it's hard to imagine a temporary restraining order that would more drastically alter the status quo than the one sought here. Ohio's boards of elections are diligently working to implement House Bill 197, and voters are complying. Plaintiffs here ask this Court to upend this system completely *for just fourteen days*. Fed. R. Civ. P. 65(b)(2).

II. STATEMENT OF FACTS

Ohio's presidential primary elections are set by statute. Ohio Revised Code 3501.01 defines a presidential primary election as a primary election "held for the purpose of choosing delegates and alternates to the national conventions of the major political parties pursuant to section 3513.12 of the Revised Code." Ohio Rev. Code § 3501.01(E)(2). When "a presidential primary election is held, all primary elections shall be held on the third Tuesday after the first Monday in March." *Id.* In 2020, the third Tuesday after the first Monday in March fell on March 17.

As March 17 approached, so too did the novel coronavirus named COVID-19. COVID-19, a new strain of coronavirus that had not been previously identified in humans, is a respiratory disease that can result in serious illness or death. As the Director of the Department of Health, Dr. Acton has extremely broad authority to regulate the spread of infectious diseases like COVID-19, including making "special or standing orders or rules . . . for preventing the spread of contagious or infectious diseases." Ohio Rev. Code § 3701.13. Since the first cases of COVID-19 were announced on March 9, Dr. Acton has made necessary use of her authority to curb the spread of

COVID-19 in Ohio, including banning mass gatherings, closing K-12 schools, prohibiting visitors at nursing homes, shuttering bars and restaurants, and ordering most Ohioans to stay at home. *See* Public Health Orders, *available at* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/public-health-orders>. Dr. Acton's orders noted that, while the coronavirus is most contagious when carriers are symptomatic, spread can occur before a carrier shows symptoms. *See id.*

The coronavirus posed obvious risks to in-person voting, where asymptomatic virus carriers could nonetheless spread the virus to voters and often elderly poll workers. Older adults are at a higher risk of infection, serious complications, ICU admission, and death from COVID-19. Dr. Acton recommended that elderly Ohioans remain at home on March 17 and not report to the polls. Secretary LaRose Press Release, *available at* <https://www.ohiosos.gov/media-center/press-releases/2020/2020-03-16/>.

Two elderly Ohioans, citing Dr. Acton's recommendation to remain at home, sued Secretary LaRose to halt the election but failed to obtain emergency relief. *See Reardon v. LaRose*, No. 20 CV 002105 (F.C.C.P. Mar. 16, 2020). The court ruled that postponing or extending voting was the statutory duty of the General Assembly, not a state trial court. Thus, late on March 16, without some state intervention, the election would have proceeded in a matter of hours, bringing hundreds of voters together in small polling places across the State. Finding the increased risk of transmission of COVID-19 medically untenable, Dr. Acton issued the following order late Monday evening approximately two hours after the denial of the TRO:

Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions, I hereby **ORDER** all polling locations in the State of Ohio **closed** on March 17, 2020. This Order shall take effect immediately and remain in full force and effect until the State of Emergency

declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

Closure of the Polling Locations in the State of Ohio on Tuesday March 17, 2020, *available at* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-close-polling-locations-3-16-2020>.

When Dr. Acton issued her order on the evening of March 16, the time for requesting an absentee ballot had passed. For most voters, Saturday, March 14, 2020, was the deadline to request an absentee ballot by mail. Ohio Rev. Code § 3509.03(D).² Likewise, early in-person voting at the county boards of elections had concluded at 2:00 p.m. earlier that day. Ohio Rev. Code § 3509.051; Directive 2019-28 § 1.04. Due to the Director's order, Ohio's polling places could not open at 6:30 a.m. on March 17, 2020, as contemplated by Ohio Rev. Code §§ 3501.01(E)(2) and 3501.32(A). Thus, registered Ohio voters who had not cast absentee ballots either by mail or in person and planned to vote at their polling place on election day had no remaining alternative method to vote.³ And without some state action, the boards could have begun tabulating votes after 7:30 p.m. on March 17—even though no in-person could occur.

In response, Secretary LaRose issued Directive 2020-06 on March 16. This directive prevented the boards from tabulating votes and suspended in-person voting in the primary election until June 2, 2020. Secretary LaRose ordered boards of elections to accept absentee ballot applications until Tuesday, May 26, 2020, and to count any absentee ballot postmarked by June 1, 2020, and received by the boards no later than June 12, 2020.

² Unexpectedly hospitalized voters can request absentee ballots until 3:00 p.m. on election day. Ohio Rev. Code § 3509.08.

³ Approximately 7.2 million registered voters fall into this category. *Ohio Democratic Party v. LaRose*, No. 2020-0388, LaRose Merit Brief Grandjean Aff. (Ohio Mar. 25, 2020).

March 17, 2020, proceeded with the Director’s order in effect. The polls were closed and there was no in-person voting that day.⁴ Due to Directive 2020-06, the boards did not tabulate election results that evening but proceeded under the schedule set forth in that directive.

Litigation immediately followed. The Ohio Democratic Party sought a writ of prohibition preventing Secretary LaRose from implementing Directive 2020-06 and proposed an election schedule nearly identical to the schedule adopted by the General Assembly in House Bill 197.⁵ *Ohio Democratic Party v. LaRose*, No. 2020-0388 (Ohio Mar. 17, 2020). The Libertarian Party of Ohio intervened in the prohibition action, proposing yet another election schedule.⁶ *See id.*

Meanwhile, the only entity in the State of Ohio with the authority to set election dates—the General Assembly—had not yet spoken. The General Assembly went into session and *unanimously* passed House Bill 197 on March 25, 2020. The bill provides as follows:

- Secretary of State Directive 2020-06 is void.
- Boards of elections may not count any ballots cast in the March 17, 2020, primary election until April 28, 2020.
- Boards may not count any absentee ballots submitted by voters who were not registered before February 18, 2020.
- Secretary of State Frank LaRose must “send a postcard to each registered elector in this state, notifying the elector of the methods by which the elector may obtain an application for absent voter’s ballots, the procedures and deadlines to apply for absent voter’s ballots under this section, and the procedures and deadline to return voted ballots to the office of the board of elections under this section.”

⁴ A judicial candidate filed a writ of mandamus in the Ohio Supreme Court seeking to force the Secretary to proceed with in-person voting. The Supreme Court denied the writ. *Speweik v. LaRose*, No. 2020-0832, 2020-Ohio-997 (Ohio Mar. 17, 2020).

⁵ The Ohio Democratic Party requested an absentee-ballot cutoff of April 28, 2020, but also wanted Secretary LaRose to mail absentee ballot applications to all registered voters who had not yet voted. *See* Compl. Ex. A Proposed Order, *Ohio Democratic Party v. LaRose*, No. 2020-0388 (Ohio Mar. 17, 2020).

⁶ The Libertarian Party of Ohio preferred an absentee-ballot cutoff of May 8, 2020. It agreed that Secretary LaRose should be ordered to mail absentee ballot applications to voters. *See* Compl. Prayer for Relief, *Ohio Democratic Party v. LaRose*, No. 2020-0388 (Ohio Mar. 19, 2020).

- Voters registered by February 18, 2020, and who had not already voted in the March 17 primary election, are permitted to request absentee ballots until April 25.
- Boards of elections must count absentee ballots from voters registered by February 18, 2020, and who had not already voted in the March 17 primary election if the voter return the absentee ballot to the boards of elections by 7:30 p.m. on April 28, 2020, or by May 8, 2020, if submitted by mail and postmarked by April 27, 2020.
- Disabled voters and voters unable to receive mail may vote in person at the county boards of elections on April 28, 2020 until 7:30 p.m.

See generally H.B. 197 § 32. Again, every Republican and Democratic legislator in both houses of the General Assembly voted for House Bill 197. *See* House Bill 197 Votes, *available at* <https://www.legislature.ohio.gov/legislation/legislation-votes?id=GA133-HB-197>. Secretary LaRose rescinded Directive 2020-06, Governor DeWine signed House Bill 197 on March 27, and it went into effect immediately.

The passage of House Bill 197 ultimately resolved the prohibition case pending against the Secretary of State in the Ohio Supreme Court. *See Ohio Democratic Party v. LaRose*, No. 2020-0388, 2020-Ohio-1253 (Ohio Mar. 31, 2020). With House Bill 197 adopting its preferred election schedule, the Ohio Democratic Party moved to dismiss its complaint in prohibition. The Libertarian Party of Ohio, which preferred a more extended election schedule, did not. But the Ohio Supreme Court found that the Libertarian Party’s prohibition claim was mooted when Secretary LaRose rescinded Directive 2020-06. *See id.*⁷

On March 30, Plaintiffs brought a two-count complaint against Secretary LaRose, alleging that House Bill 197 (1) violates the National Voter Registration Act and (2) violates the First and Fourteenth Amendments of the United States Constitution. Plaintiffs seek emergency relief, including an order setting a new, but unspecified, primary date. Plaintiffs also seek an order

⁷ This Court instructed the parties to address “whether the writ of prohibition currently pending in the Supreme Court of Ohio has any impact on this litigation.” Doc. 14 at PageID 190. That case has been dismissed and no longer poses any risk of an inconsistent judgment.

forcing Secretary LaRose to, among other things, mail all registered voters who have not yet voted in the March 17 primary “a primary ballot for each party” (i.e., Republican, Democrat, Libertarian, and presumably issues-only) with a return envelope, postage pre-paid, and to permit anyone who registers to vote 30 days before the new primary date to receive and complete an absentee ballot.

III. LAW AND ARGUMENT

A. Legal Standard.

To obtain a temporary restraining order, Plaintiffs must show: (1) it has a strong likelihood of success on the merits; (2) it would suffer irreparable injury absent the TRO; (3) issuance of a TRO would not cause substantial harm to others; and (4) the public interest would be served by issuance of a TRO. *See Project Vote v. Madison Cnty. Bd. of Elections*, 2008 U.S. Dist. LEXIS 74016, at *18-19 (N.D. Ohio Sept. 29, 2008); *see also Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000). The standard for granting a TRO matches the standard for a preliminary injunction “with emphasis, however, on irreparable harm given that the purpose of a TRO is to maintain the status quo.” *Doe v. Univ. of Cincinnati*, 2015 U.S. Dist. LEXIS 132864, at *3 (S.D. Ohio Sept. 30, 2015). The movants bear the burden of establishing their claim to a TRO, which “should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.” *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) (citations omitted).

Here, the request for TRO must be considered in the elections context, where courts understand that “States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Accordingly, the State’s power to regulate its own elections—a power specifically reserved to it in the Constitution—is “substantial.” *Storer v. Brown*, 415 U.S. 724, 730 (1974).

B. Plaintiffs Cannot Show Likelihood of Success on The Merits.

1. Plaintiffs' claim under the National Voter Registration Act is likely to fail.⁸

Plaintiffs' NVRA claim stands on a faulty premise – that the 2020 presidential primary election was moved to April 28, 2020. Doc. 4 at 3. Using this faulty premise, Plaintiffs claim that more than two thousand individuals who submitted voter registration applications between February 18 and March 13 should now be registered and permitted to cast a vote, even though they missed the statutory February 18, 2020 deadline for voter registration in the 2020 presidential primary election. *Id.* at 3, Exhs. A and B. Plaintiffs offer no legal support for their novel claim.

The National Voter Registration Act provides that “each State shall insure that any eligible applicant is registered to vote in a[federal] election ... 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. § 20501(a)(1)(A)-(D). The NVRA defines “election” in relevant part as “a general, special, primary, or runoff election.” 52 U.S.C. § 30101(1)(A).

Ohio provides statutorily defined times for all of these types of elections. For example, under Ohio Rev. Code § 3501.01(A), a “general election” is “the election held on the first Tuesday after the first Monday in each November.” A “special election” is “any election other than those elections defined in other divisions of this section. A special election may be held only on the first Tuesday after the first Monday in May, August, or November...”. Ohio Rev. Code § 3501.01(D). A primary election, and in particular, a presidential primary election, “shall be held on the third

⁸ To the extent Plaintiffs' reading of the NVRA “displace[s Ohio's] voter qualifications or dictate[s] what evidence [Ohio] may consider in deciding whether those qualifications have been met,” their interpretation raises “serious constitutional problems.” *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1850 (Thomas, J., concurring). The State of Ohio preserves its argument that Plaintiffs' reading of the NVRA is unconstitutional, or at the very least, should be avoided because of serious constitutional concerns. See *id.*

Tuesday after the first Monday in March except as otherwise authorized by a municipal or county charter.” Ohio Rev. Code § 3501.01(E)(2).

In Ohio, the 2020 presidential primary election is March 17, 2020, which is the “third Tuesday after the first Monday in March” as provided for by Ohio Rev. Code § 3501.01(E)(2). In accordance with the NVRA, voter registration closed on February 18, 2020, thirty days before the March 17 Presidential Primary Election. Plaintiffs’ claim that H.B. 197 moved or reset the 2020 presidential primary election to April 28, 2020, and therefore, voter registration must be retroactively opened from February 18 through March 29, 2020 is wrong. None of the events that occurred either immediately before or after March 17 changed the date of the 2020 presidential primary election. First, on March 16, 2020, Dr. Acton closed all polling locations in order to slow the spread of COVID 19. She did not cancel the election. The Director’s authority under Ohio Rev. Code § 3701.13 extended to the closure of polling places to contain the spread of an uncured, highly contagious disease. She exercised that authority on the evening of March 16, 2020 when she closed all polling locations.

Secretary LaRose did not cancel or move Ohio’s 2020 presidential primary election either. Secretary LaRose issued Directive 2020-06 to allow voting beyond the scheduled election date of March 17, 2020, to prevent the disenfranchisement of millions of Ohioans. The directive instructed the county boards of elections how to continue to conduct a constitutional primary election by ordering them not to tabulate votes and to continue to accept absentee-ballot applications and completed ballots. Further, the Directive instructed the boards how to address the closure of the polls on March 17, which would have resulted in widespread disenfranchisement. The directive did not cancel the election. It provided additional opportunities for voting when the polls had to be closed on March 17.

Finally, on March 25, 2020, the Ohio General Assembly unanimously passed, and Governor DeWine signed into law H.B. 197. H.B. 197 extends absentee voting in the March 17, 2020 primary election through April 28, 2020. H.B. 197 § 32(C)(3), (D). Electors who have not already cast a ballot in the election, and who were registered to vote in Ohio as of the February 18 deadline, may cast absentee ballots through April 28. *Id.* §32(C)(3). Importantly, H.B. 197 did not cancel or reset the 2020 presidential primary election to April 28, 2020, as wrongly argued by the Plaintiffs. All votes already cast in the 2020 presidential primary election are being held and will be counted at the conclusion of the election. *Id.* § 32(B). The statute itself shows that the election’s date did not change, repeatedly referring to the March 17 primary:

(B) During the period beginning on the effective date of this section and ending at 7:30 p.m. on April 28, 2020, no board of elections, and no election official, shall do any of the following:

(1) Count any ballots cast in the **March 17, 2020, primary election**, or in any special election held on the day of the primary election;

(C)(1)(a) An elector who has not already cast a ballot in the **March 17, 2020, primary election**, or in any special election held on the day of the primary election, and who was registered to vote in this state as of February 18, 2020, may vote in that election in accordance with this section.

(G) The boards of elections and the Secretary of State shall complete the unofficial count, the canvass of the election returns, and all other post-election procedures with respect to the **March 17, 2020, primary election**, and any special election held on the day of the primary election, on the dates provided in the Revised Code, except that each deadline shall be calculated by adding 42 days.

See H.B. 197 § 32. H.B. 197 simply extended absentee voting through April 28, 2020.

In compliance with the NVRA, Ohioans were able to register to vote until February 18, which was 30 days prior to an election. Ohio Rev. Code § 3503.06(A). Because H.B. 197 only extended absentee voting through April 28, and did not legislate a “re-do” of the primary election, it did not re-open voter registration. H.B. 197 § 32(B), (C)(3). Accordingly, the NVRA does not entitle Plaintiffs to a retroactive reopening of the voter resignation deadline.

Unfortunately, Ohio's need to modify its election due to a statewide emergency is not unique. Over the years, states natural disasters and other public emergencies such as Hurricane Katrina in 2006, Hurricane Sandy in 2012, and the terrorist attacks of September 11, 2001, have interfered with election schedules. *See* Morley, Michael T., Symposium: Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks, 67 Emory L.J. 545 (2018). States that faced these disasters have fallen into three paradigms: election modifications, election postponements, and election cancellations. *Id.* at 548. In an "election modification," a state "accepts as valid everything that transpired before an election emergency arose and simply authorizes additional methods of, or time for, voting." *Id.* (emphasis added). Similarly, in an "election postponement," "an election scheduled for a particular date is held on a different day while holding constant as much as possible, including the identities of the candidates running, *the people entitled to vote*, and potentially even the candidates' spending." *Id.* (emphasis added). On the other hand, an "election cancellation" entirely nullifies the originally scheduled election with the expectation that a new election will be held at some point in the future. *Id.* at 550. When a state cancels an election, as opposed to modifying or postponing an election, "critical components of the election are determined *entirely anew* rather than attempting to hold them constant from the originally scheduled election." *Id.* (emphasis added).

Ohio's extension of absentee voting until April 28 falls into the election-modification paradigm. Plaintiffs have offered no legal support for their theory that a modification amounts to an entirely new "election," which triggers the voter registration provision of the NVRA. To the contrary, New York employed a similar election modification in response to the terrorist attacks on September 11, 2001, where it also statutorily defined voter eligibility in the modified scheme without offending the NVRA. New York passed a statute which "attempted to minimize the consequences of the disruption by providing that only people who were eligible to vote in the

original primaries would be permitted to vote in the rescheduled elections.” *Id.* at 554. New York also, “permitted people to request absentee ballots, however, even if they had not submitted such requests for the original September 11 election.” *Id.* Like New York’s election modification in the wake of the terrorist attacks of September 11, 2001, H.B. 197 simply modifies the already scheduled March 17, 2020 presidential primary to extend absentee ballot voting through April 28, 2020. In such situations, the NVRA does not mandate the retroactive re-opening of voter registration.⁹

Further, Plaintiffs’ reliance on *Ga. State Conf. of the NAACP v. Kemp*, No. 1:17-cv-1397, 2018 WL 2271244 and *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427 (D.C. Ariz. Nov. 3, 2016) to argue that Ohio’s modification of the 2020 presidential primary election must also come with an extension of the voter registration deadline under the NVRA falls flat. Doc. 4 at 14. In *Georgia State Conference*, the NAACP challenged a Georgia statute setting a voter registration deadline that for a subsequent runoff election in its primary. The parties ultimately agreed to a Consent Decree recognizing the obvious, that “runoffs” are specifically included in the definition of “election” in the NVRA. *Ga. State Conf.*, at ECF Doc. 42. See 52 U.S.C. § 30101(1)(A).

Arizona Democratic Party is equally inapposite. There, Arizona miscalculated its voter registration deadline due to an intervening holiday, causing the state to close its registration one day early. 2016 WL 6523427 at 6. The Court ruled that, while the one-day discrepancy did not severely burden voting from a constitutional perspective, it technically violated the NVRA. *Id.* at 43. Here, Ohio closed voter registration thirty days before the March 17 primary election. Nothing

⁹ In fact, if Plaintiffs’ theory were correct, every time elections officials or a court holds open a polling place for an hour, it would also have to retroactively extend voter-registration by an hour as well. Boards of elections would need to review their files to determine if someone registered to vote just after the voter-registration deadline had closed.

in *NAACP* or *Arizona Democratic Party* remotely relates to the circumstances found here, and they provide absolutely no legal support for Plaintiffs' NVRA claim.

Finally, H.B. 197 and the events leading up to its enactment posed no barriers to voter registration. While Ohio's ramp up to prevent the spread of COVID-19 started in early January, the Ohio Department of Health did not issue its first order limiting Ohioans' daily activities until March 12, 2020, when it prohibited mass gatherings in the State of Ohio. This was nearly one month after the February 18 deadline to register to vote in the upcoming primary. As such, Plaintiffs cannot legitimately claim that the fight against COVID-19 actually caused barriers to an individual's ability to timely register to vote. Accordingly, for all of the reasons set forth above, Plaintiffs' NVRA claim fails, and their request for a temporary restraining order must be denied.

2. Plaintiffs' First and Fourteenth Amendment claims are likely to fail.

Anderson-Burdick standard. When considering challenges to state election laws under the First and Fourteenth Amendments, the Court must first weigh the "character and magnitude" of the asserted injury to the rights protected by those amendments, *i.e.*, the right to vote. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The *Anderson-Burdick* test weighs the burden on voting from the perspective of the affected electors, taking into account the whole range of voting opportunities the state provides. *See Mays v. LaRose*, No. 19-4112, 2020 U.S. App. 6673 (6th Cir. Mar. 3, 2020). Thus, if the affected voters have or had alternative voting opportunities, the burden will not be severe. *See id.* Once it has established the burden on voting, the Court weighs the precise interests put forward by the State as justifications for the burden, taking into consideration the extent to which those interests make it necessary to burden the Plaintiff's rights. *Id.*

As the burden on voting increases, so too must the regulation's importance in promoting the State's interests. For severe burdens, the regulation must advance a compelling State interest

in a narrowly-drawn manner. This test resembles that of strict scrutiny. *See Ohio Council 8 Am. Fed'n of State, Cty. & Mun. Emps. v. Husted (AFSCME)*, 814 F.3d 329, 335 (6th Cir. 2016). When the burden on voting is only “moderate,” the State’s interest in orderly election administration is sufficient to justify that burden. *See Mays*, 2020 U.S. App. LEXIS 6673, at *18-21. And finally, “the State’s important regulatory interests are generally sufficient to justify” reasonable and generally-applicable restrictions. *Anderson*, 460 U.S. at 788.

Last month, the Sixth Circuit addressed an *Anderson-Burdick* claim strikingly similar to this one. *See Mays v. LaRose*, No. 19-4112, 2020 U.S. App. LEXIS 6673 (6th Cir. Mar. 3, 2020). Like Plaintiffs, the plaintiffs in *Mays* failed to take advantage of Ohio’s early voting opportunities and later found themselves unable to vote on election day when circumstances unexpectedly changed. In *Mays*, the plaintiffs were arrested after the deadline to request absentee ballots and were held in detention through election day. Because plaintiffs had *no* avenue to vote on election day, they challenged the constitutionality of Ohio’s absentee-ballot deadline. Although it agreed that unexpected circumstances prevented the plaintiffs from voting in person on election day, the Sixth Circuit found that the burden on voting was “moderate.” *Id.* at *15. In assessing the burden on voting, the court took into account “the alternative voting opportunities Ohio provides,” including “all voting opportunities Plaintiffs *could have* taken advantage of, even if they were no longer a possibility at the time of the election.” *Id.* The Sixth Circuit found that the State’s interest in orderly election administration justified any burden imposed by the challenged law.

Burden on voting. Here, Plaintiffs cannot even articulate the “moderate” burden on voting found in *Mays*. Plaintiffs do not account for *Mays* in their motion and do not explain why the burden here exceeds, or even equals, the “moderate” burden in that case. True, like the plaintiffs in *Mays*, Plaintiffs here were not able to vote in person on March 17 under Dr. Acton’s order closing polling locations. But unlike the plaintiffs in *Mays*, the General Assembly specifically

extending voting opportunities for the Plaintiffs: it extended the absentee-ballot deadline until April 28 and allowed disabled voters and other voters who cannot vote by mail to vote in person at the boards of elections. These additional opportunities, when combined with all the early voting opportunities available to Plaintiffs before March 17, result in an even lower burden than the “moderate” burden in *Mays*.

Plaintiffs “fear” that voting might prove difficult, but they can only speculate that they will be burdened or harmed by House Bill 197. *See* Lee Aff., Doc. 4-6; Mostafa Aff., Doc. 4-8; Rodriguez Aff., Doc. 4-9; Jeter Aff., Doc. 4-12; Riley Aff., Doc. 4-13. First, Plaintiffs’ complaint that House Bill 197 unduly compresses the voting period is exaggerated. Plaintiffs list eight steps that must proceed in sequence, beginning with the Secretary’s postcard mailing. Doc. 4 at PageID 39. But no voter needs to wait to receive the Secretary’s postcard to begin the absentee-ballot process, and widespread publicity already alerted many voters to House Bill 197. Declaration of Gov. Taft at ¶ 15. That leaves ample time—more than four weeks—to (1) apply for the appropriate absentee ballot,¹⁰ (2) process the application, (3) receive the ballot in the mail, and (4) complete

¹⁰ Plaintiffs note that the states that have developed mail-only elections automatically mail absentee ballots to registered voters without requiring voters to apply and demand that Secretary LaRose do likewise. Doc. 4 at PageID 44-45. But these states also developed certain party-affiliation requirements—absent from Ohio—to fit that process. In Hawaii, for example, the Democratic Party of Hawai’i mails presidential primary ballots *only* to voters who have already enrolled in the party. *See* Democratic Party of Hawai’i <https://hawaiidemocrats.org/join/> (the party runs the state’s presidential primary election). And in Oregon, “the county clerk shall mail the official ballot of a major political party to each elector *who is registered as being affiliated* with the major political party as of the 21st day before the date of the election.” Or. Rev. Stat. § 254.470(3)(a) (Oregon provides unaffiliated voters opportunities to *request* parties’ primary ballots as well). Washington has an open primary, where all candidates for office, regardless of party affiliation, appear on *all* voters’ primary ballots. Wash. Rev. Code § 29A.52.112. Only Colorado allows the mailing of multiple ballots to voters, but Colorado, unlike Plaintiffs here, specifically legislated for the possibility that voters would return multiple ballots. Colo. Rev. Stat. § 1-4-101(2). These states’ election mechanics complement their vote-by-mail systems. Boards of elections do not have to guess which primary ballots to send voters; nor do they send *four* ballots

and return the ballot. *Id.* Voters and boards have a week to complete each step, with time left over to account for mailing delays and to correct mistakes. And this does not count the time between March 17 and the passage of House Bill 197, during which voters could have submitted absentee-ballot requests. With time built into each step in the process, plaintiffs' fears that they will run out of time to vote are simply unsubstantiated. *See, e.g., Regan v. Vinick & Young*, 862 F.2d 896, 902 (1st Cir. 1988) ("Speculation or unsubstantiated fears about what may happen in the future cannot provide the basis for a preliminary injunction."); *NACCO Material Users, Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 943 (6th Cir. 2007) (same).

Plaintiffs also claim they will not be able to mail their absentee-ballot applications because they cannot access a printer. Lee Aff., Doc. 4-6; Mostafa Aff., Doc. 4-8; Rodriguez Aff., Doc. 4-9. Access to a printer is immaterial; no voter needs to print an application to vote. Ohio Rev. Code § 3509.03(B) (noting that an application for an absentee ballot "need not be in any particular form"). Voters can call their boards of election to request an application. *See* 2020 Primary FAQs, available at <https://www.sos.state.oh.us/elections/voters/2020-primary-frequently-asked-questions/>. The only plaintiff who chose this option was able to request an absentee ballot application by telephone. Flanagan Moore Aff., Doc. 4-7. Alternatively, voters can simply write down all the information that must be included in an absentee-ballot application, *see* Ohio Revised Code § 3509.03(B), on any available piece of paper and mail it to the boards. No one will be prevented from voting due to lack of printer access. Plaintiffs are correct that a stamp is required,

to every voter. Ohio's party-affiliation system is simply different. Ohio allows primary voters to select a party or issues-only ballot at the time of voting, and it allows voters to switch freely between the parties from election-to-election. Ohio Rev. Code § 3509.03(B)(8); Ohio Election Official Manual, Directive 2016-06 Ch. 13 § 1.01. Ohio's laws, therefore, require different *mechanics* than the other states. Ohio's absentee-ballot application alerts the boards of elections which ballot style should be mailed to the voter.

but stamps are widely available for purchase online and at post offices, shipping centers, supply stores, grocery stores, and ATMs. Plaintiffs do not say they don't know how to or cannot acquire stamps before the end of April.

State's interests. The State's interest in conducting the March 17 primary, to the greatest extent possible, through absentee voting is simple: it seeks to save Ohioans' lives. No one disputes Dr. Acton's conclusion that in-person voting carries "a high probability of widespread exposure to COVID-19."¹¹ Further, Ohioans have been instructed to remain at home. So, the General Assembly curtailed in-person voting as much as possible, including only disabled voters and voters unable to receive mail. For these voters, voting by mail is difficult, perhaps impossible, and a requirement that they vote by mail could amount to a ban on voting. For everyone else, the need to stop the spread of COVID-19 more than justifies the elimination of in-person voting for the March 17 primary.

The State also has an interest in minimizing disorder and easing the burdens on the boards of elections. House Bill 197 allows the boards to continue to use an absentee-balloting system that the boards already have in place and use for every single election: processing absentee ballot applications, sending absentee ballots, and counting ballots as they come in. *See Mays*, 2020 U.S. App. LEXIS 6673, at *19-20. True, the volume will greatly exceed past numbers, but the boards already have processes in place and plans to handle the influx of requests. *See, e.g.*, Directive 2020-07 (giving the boards instructions on complying with H.B. 197).

¹¹ It will take months, if not years, to calculate the effect of in-person primaries on the spread of COVID-19. But it bears mentioning that Michigan reported a strong uptick in COVID-19 infections—far exceeding Ohio's—beginning 9 days after its March 10 in-person primary election. Laura Johnston, "Ohio has 351 coronavirus cases, compared to 1,035 in Michigan: Compare timeline of restrictions," *Cleveland.com*, available at <https://www.cleveland.com/news/2020/03/compare-coronavirus-cases-in-ohio-michigan.html>.

Plaintiffs' proposal, on the other hand, would force boards to create entirely new processes on the fly, including at least (1) compiling a list of voters who have not yet voted in the primary, (2) mailing, for the first time in Ohio history, four different ballot styles (Republican, Democrat, Libertarian, and issues-only) to every voter identified above, (3) creating a new set of instructions to mail with the four ballot styles to inform voters to complete only *one* of the four ballots, and (4) creating an in-person provisional voting process for voters who have received absentee ballots but still need to vote in person. With four ballots per voter in circulation, boards will have to implement additional processes to prevent fraud (*e.g.*, someone else filling out a voter's unused ballots), to determine which ballot to count when some voters inevitably complete multiple, and to protect the integrity of the election. Taft Decl. ¶¶ 10-12.

Finally, the State has an interest in concluding the March 17 primary as expeditiously as possible, while ensuring that everyone who was eligible to vote on March 17 can vote. As more time elapses between the March 17 primary and its conclusion, more Ohio voters might change addresses, names, or even pass away, leading to additional logistical complications for the boards. *See, e.g.*, Rodriguez Aff., Doc. 4-9.

Under the *Anderson-Burdick* test, Plaintiffs here cannot even articulate a moderate burden on the right to vote. And on the other side of the ledger, the State's interests include stopping the spread of COVID-19 and saving lives, minimizing the burden on the boards of elections by keeping an already developed process, and preserving the integrity of the election by bringing it to an expeditious end. These interests more than justify any speculative burden on voting.

3. The April 28, 2020 conclusion to the election does not impose an undue burden on voting as opposed to Secretary LaRose's plan in Directive 2020-06.¹²

¹² "Defendant's response shall specifically include the State's interests that justify the burden on voting rights imposed by the establishment of an April 28, 2020 deadline for absentee voting (as

House Bill 197’s absentee voting plan to conclude the 2020 presidential primary election by April 28, 2020 imposes no higher burden on voting than the plan suggested by Secretary LaRose that would have concluded the election on June 2, 2020. *See* Letter of Secretary of State Frank LaRose to All Members of the Ohio General Assembly dated March 21, 2020 *available at* https://www.ohiosos.gov/globalassets/media-center/news/2020/2020-0321_lettertolegislators.pdf To be clear, the absentee voting plan set forth in Secretary LaRose’s now rescinded Directive 2020-06, which he advocated before the Ohio General Assembly in his March 21, 2020 letter, is not the same absentee voting plan that the General Assembly passed into law through H.B. 197. Because they are fundamentally different plans, they contain fundamentally different conclusion dates. The Directive 2020-06 plan for absentee voting required Secretary LaRose “to produce and mail a postage paid absentee ballot request form to every eligible Ohio voter who did not cast a ballot during Ohio’s early voting period from February 18 through March 16 and to pay the postage for the voter to return their ballot.” *Id.* The following steps would have been required: Secretary LaRose would have needed to develop a mailing piece, hire a vendor to print it, create a list of voters who had not yet voted, and create individualized postage-paid return envelopes for each of the 7.2 million voters that corresponded to the voter’s particular board of elections. *See Ohio Democratic Party v. LaRose*, No. 2020-0388, LaRose Merit Brief Grandjean Aff. (Ohio Mar. 25, 2020). It was this rejected plan coupled with a day of in person voting that Secretary LaRose asserted he could not complete before June 2, 2020. *Id.*

The Ohio General Assembly took a different approach in H.B. 197, utilizing postcards instead of mailing pre-printed ballot requests and envelopes to all of the nearly 7.2 million eligible Ohio voters who did not cast a ballot during the early voting period. H.B. 197 is arguably more

opposed to Defendant’s original suggestion of a June 2, 2020 deadline for absentee voting.” Doc. 14 at PageID 189.

efficient, more streamlined, and less time consuming than the plan articulated in Directive 2020-06 and LaRose's letter, thus lending itself to a quicker conclusion to the 2020 presidential primary election. Moreover, by avoiding an in person vote on June 2, 2020, H.B. 197 provides a safer and swifter end to the election.

C. Plaintiffs Have Not Shown That, Absent A TRO, They Will Be Irreparably Harmed.

Plaintiffs correctly note that “a restriction on the fundamental right to vote . . . constitutes irreparable injury.” *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). And they claim that House Bill 197 will irreparably harm them because they are “at a serious risk” of not being able to vote. But as set forth above, Plaintiffs' claim of potential disenfranchisement depends upon key misinterpretations of House Bill 197, as well as several layers of speculation unsupported by any evidence. *See, e.g., Regan v. Vinick & Young*, 862 F.2d 896, 902 (1st Cir. 1988) (“Speculation or unsubstantiated fears about what may happen in the future cannot provide the basis for a preliminary injunction.”); *NACCO Material Users, Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 943 (6th Cir. 2007) (same).

D. The Balance of Equities Weighs Heavily in The State's Favor.

Plaintiffs incorrectly assert that the only potential harm in their requested TRO is the cost and administrative burden of compliance. Doc. 4 at PageID 54. Additionally, Ohio's interests “will suffer if the Court takes away the Ohio General Assembly's prerogative” to set the State's election schedule. *Libertarian Party of Ohio v. Husted*, No. 2:13-cv-953, 2014 U.S. Dist. LEXIS 49841, at *34. This Court has already said that it “does not intrude upon the Ohio legislature's prerogative lightly,” and that this factor weighs in favor of denying the TRO. *Id.* at *35.

E. The Public Interest Does Not Favor the Entry of a TRO Adopting Yet Another Election Schedule.

It is well-settled that the public interest does not favor the alteration of election processes in the weeks leading up to an election. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the Supreme Court vacated an injunction preventing Arizona’s voter identification laws from taking effect just before a general election. The Court concluded that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Id.* at 4-5; *see also SEIU Local 1 v. Husted*, 698 F.3d 341, 345-46 (6th Cir. 2012) (noting that the public interest strongly disfavors last-minute changes to election procedures). Thus, where relief cannot be granted without seriously disrupting the State’s election process, it must be denied. *See Williams v. Rhodes*, 393 U.S. 23, 24 (1968). In *Williams*, the Supreme Court upheld the district court’s determination that a political candidate should remain off of the ballot and rejected his party’s request to issue a separate set of ballots. *Id.* at 24. Notably, the Court held that “the confusion that would attend to such a last-minute change poses a risk poses a risk with the rights of other Ohio citizens, for example, absentee voters.” *Id.*

Relying on this precedent, in *Veasey v. Perry*, the Fifth Circuit Court of Appeals stayed a district court’s order enjoining Texas’ voter ID law on the eve of the election. *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014). The Court noted that it was not “a run-of-the-mill case; instead, it is a voting case decided on the eve of an election.” *Id.* at 893. Because the judgment below “substantially disturb[ed] the election process of the State [] just nine days before early voting [was to begin]”, the court held that “the value of preserving the status quo” was much higher there than in other contexts and stayed the lower court’s injunction. *Id.*; *see also Spirit Lake Tribe v. Jaeger*, 2018 U.S. Dist. LEXIS 186993 (N.D.N.D. Nov. 1, 2018) (“The federal courts are unanimous that

is highly important to preserve the status quo when elections are fast approaching.” (citing *Purcell*, 549 U.S. 1; *Williams*, 393 U.S. 23)).

In so holding the Fifth Circuit recognized that “[t]he Supreme Court has continued to look askance at changing election laws on the eve of an election.” *Veasey*, 769 F.3d at 894. For support, the Court noted three cases in which the Supreme Court halted decisions “that would have altered the rules of the [election] just before it [began].” *Id.* (citing *Frank v. Walker*, 135 S. Ct. 7 (2014); *North Carolina v. League of Women Voters of North Carolina*, 135 S. Ct. 6 (2014); *Husted v. Ohio State Conference of N.A.A.C.P.*, 135 S. Ct. 42 (2014)). It noted that, although the Supreme Court did not explain its reasoning for the stays, “the common thread is clearly that the decision of the Court of Appeals would change the rules of the election too soon before the election date.” *Id.* Critically, “the timing of the decisions, rather than their merits seems to be the key.” *Id.* Thus, *even where the challenged law is found to be invalid*, when an election is imminent, and the “State’s election machinery is already in progress, equitable considerations might justify a court withholding the granting of immediate relief.” *Id.* (quotation omitted).

Ohio’s election laws provide certainty to Ohio voters, candidates, and boards of elections. Every year, the Secretary of State posts an election calendar on his website so that deadlines and legal requirements are widely publicized. *See*¹³ 2020 Ohio Election Calendar, *available at*: https://www.sos.state.oh.us/globalassets/publications/election/2020electioncalendar_12x18.pdf. Further, he uses his authority to issue Directives to instruct Boards as to how to implement elections and comply with Ohio law. *See, e.g., id., available at*: <https://www.sos.state.oh.us/elections/elections-officials/rules/>. Boards rely on the Secretary’s direction and are required to follow it. Ohio Rev. Code § 3501.11; *see also* Taft Decl. at ¶ 14.

¹³ All websites cited herein, last visited April 2, 2020.

Changes to that direction via a court order can only exacerbate the confusion that has thus far run rampant.¹⁴

It is truly unavoidable that Ohio is now on its third schedule for completing the primary election. First, Ohio voters and boards of elections were operating under the election schedules set forth in Ohio law and published on the Secretary's elections calendar. Next, Ohio voters and boards were operating under the schedule set forth in Directive 2020-06 due to the closure of the polls. Now, the General Assembly has exercised its legislative prerogative and enacted H.B. 197, ending the confusion. The Bill is effective. The Secretary of State has instructed all of Ohio's 88 county boards how to comply with it. *See* Directive 2020-07. Even the Plaintiffs are publicizing its requirements. *See* "Covid-19 & the 2020 Elections," League of Women Voters, *available at* <https://www.lwvohio.org/covid-19-elections>. H.B. 197 ends the chaos and offers Ohio voters and boards a certain path forward for completing Ohio's 2020 primary.

But, a new source of confusion has cropped up: this lawsuit. *See, e.g.*, Craig Shoup, "Candidates in primary election deal with stress, confusion," *available at* <https://www.thenewsmessenger.com/story/news/politics/elections/2020/03/31/candidates-sandusky-county-primary-election-ohio-handle-confusion/5093408002/>, published March 31, 2020. This report states as follows:

¹⁴ *See, e.g.*, Rick Rouan "Coronavirus: Ohio Supreme Court allows delay to primary election," *available at* <https://www.dispatch.com/news/20200316/coronavirus-ohio-supreme-court-allows-delay-to-primary-election> ("The [Franklin County] legal action capped a chaotic 12 hours in which it appeared that the election was off, back on, and then off again."); Alexa Course, "Ohio's Primary Postponement Sows Confusion Among Voters," *available at* <https://www.wsj.com/articles/ohios-postponement-of-primary-leaves-many-voters-confused-11584464786>; Tyler Olson, "Confusion over how and when Ohio's primary will take place after coronavirus postponement," <https://www.foxnews.com/politics/after-election-day-postponement-still-not-clear-how-ohioans-will-vote-in-primary>, published March 18, 2020; Tyler Olson, "Confusion over how and when Ohio's primary will take place after coronavirus postponement," <https://www.foxnews.com/politics/after-election-day-postponement-still-not-clear-how-ohioans-will-vote-in-primary>, published March 18, 2020.

“On March 25 the state legislature passed a bill that required all voting in Ohio’s Primary be done by April 28. But uncertainty remains after a federal lawsuit filed by the League of Women Voters seeks to push the election to a later date[.]”

Id. Notably, this statement was made *after* two separate intervenors, the Ohio Democratic Party and the Libertarian Party of Ohio, moved to intervene and advocate for each’s own preferred relief. *See* Doc. 29-1 (setting forth the LPO’s preferred schedule); Doc. 25-2 (setting forth ODP’s preferred relief).

Given that the existence of this lawsuit has already been widely publicized, boards of elections, who are often wary veterans of last-minute election litigation, and voters are now likely aware that the laws governing the 2020 primary might change – for a fourth time. And unlike the changes at issue in *Purcell*, *White*, or *Veasey*, this change would not occur at the eve of the election, it would occur midstream *after* implementation of the newly enacted Ohio law is underway. And any such change would require Secretary LaRose to issue yet another directive as to how to conclude the 2020 Primary. Courts must act in the public interest and must refrain from issuing orders that cause further confusion and disruption. The Sixth Circuit has ruled that “ there is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of the submission of absentee ballots.” *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) citing *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) “There is also a strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote.” *Id.* Finally, “[a]s the Supreme Court recently recognized, court orders affecting elections can themselves result in voter confusion and cause the very chilling effect that plaintiffs claim they seek to avoid.” *Id.* citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006). This Court should permit H.B. 197 to proceed without interference in the public interest.

We now have clarity and certainty as to how Ohio is going to complete voting in the 2020 Primary Election. And though the purpose of a TRO is to maintain the status quo, Plaintiffs ask this Court to reverse the well-plotted course that the General Assembly set for Ohio through H.B. 197. Existing Supreme Court precedent instructs this Court to avoid such disruptions. Accordingly, Plaintiffs' motion for a temporary restraining order should be denied.

IV. CONCLUSION

For these reasons, the State of Ohio respectfully requests that this Court deny Plaintiffs' motion for temporary restraining order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2020, the foregoing *Defendant State of Ohio's Opposition to Plaintiffs' Motion for Temporary Restraining Order* was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

/s/ Julie M. Pfeiffer

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