IN THE SUPREME COURT OF OHIO
CASE NO. 2020-0388

Original Action in Prohibition

Election Matter filed Pursuant to S. Ct. Rule 12.04 and Expedited Under Rule 12.08

STATE OF OHIO EX REL. DEMOCRATIC PARTY,
340 E. Fulton Street
Columbus, Ohio 43215,
STATE EX REL. KIARA DIANE SANDERS,
2100 Commons N Rd.
Reyoldsburg, Ohio 43068,
Relators

STATE EX REL. LIBERTARIAN PARTY OF OHIO
6230 Busch Blvd., Suite 102
P.O. Box 29193
Columbus, Ohio 43229,
Intervener-Relator

V.

FRANK LAROSE, in his official capacity as Secretary of States,
22 North Fourth Street, 16th Floor
Columbus, Ohio 43215,
Respondent

INTERVENER-RELATOR'S BRIEF PURSUANT TO RULE 12.08

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STATEMENT OF FACTS

According to Ohio's General Assembly, the final day of in-person voting in Ohio's presidential, congressional and state-office primary elections is to "be held on the third Tuesday after the first Monday in March." *See* R.C. § 3501.01(E). For Ohio's 2020 congressional, presidential and state-office primary elections, this meant that the election would conclude with in-person voting at the close of the day on March 17, 2020. As far as Ohioans knew in the early morning hours of March 17, 2020, in-person voting would take place across the State that day as planned, and Ohio would by the end of the day conclude voting in its 2020 primaries.[1]

In a press conference on the afternoon of March 16, 2020, Ohio Governor Mike DeWine and Respondent Secretary reinforced people's understanding that in-person voting would be open as planned. The Governor stated at this press conference that he (the executive branch) lacked the legal authority to change the date of Ohio's 2020 presidential primary election. *See* Intervener-Relator's Verified Complaint, ¶ 10 (hereinafter "Complaint"). However, just hours later, on or about 10:11 on that Monday evening, March 16, 2020, Ohio Governor DeWine announced that the Director of the Ohio Department of Health was closing the polling locations in the State of Ohio on Tuesday, March 17, 2020 due to concerns of exposure to COVID-19. *Id.* ¶ 11. Respondent then in the early morning hours of March 17, 2020 issued Directive 2020-16[2] and ordered local elections officials across Ohio to close their polling places. *Id.* ¶ 12.

Directive 2020-16 not only canceled the March 17, 2020 election, *id.* ¶ 13, it also directed local elections officials to "remain open on March 17, 2020 to receive any absentee ballots at the

[1] The counting of votes, obviously, would have continued after this date. Absentee and Overseas Votes, for example, can still be received and counted under Ohio law after the in-person voting day closes the election.

[2] https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-06.pdf.

boards of elections through 7:30 p.m.," "to process any UOCAVA ballots," "to process any-non UOCAVA absentee ballot post-marked by Monday, March 16, 2020 and received by the boards of elections through March 27, 2020," and prohibited them from "tabulating and reporting any results until the close of polls on [the new election day] Tuesday, June 2, 2020." *Id.*

Pursuant to Directive 2020-16's new election schedule, local elections officials were ordered to "process absentee ballot applications received at the board of elections postmarked by Tuesday, May 26, 2020," count absentee ballots "postmarked by June 1, 2020 and … received by the boards of elections no later than Friday, June 12, 2020," and count "UOCAVA absentee ballots … submitted for mailing not later than 12:01 a.m. at the place where the voter completes the ballot, on Tuesday, June 2, 2020." *Id.* On that Tuesday, June 2, 2020 -- the new election date announced by Respondent -- Directive 2020-16 ordered local elections officials to "conduct in-person voting at … polls [which] will open at 6:30 a.m. and close at 7:30 p.m. on Tuesday, June 2, 2020." *Id.*

In direct violation of federal and state voting laws, *see, e.g.*, R.C. § 3503.19(A) ("Voter registration applications, if otherwise valid, that are returned by mail to the office of the secretary of state or to the office of a board of elections must be postmarked no later than the thirtieth day preceding a primary, special, or general election in order for the person to qualify as an elector eligible to vote at that election."), 52 U.S.C. § 20507(a)(1)(B) (application must be accepted "if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election"), Directive 2020-06 also prohibited otherwise eligible voters from continuing to register up until 30 days before the new June 2, 2020 election date: "The 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." *See* Directive 2020-06, *supra*, note 2.

The Directive also purported to reschedule campaign finance reporting requirements under Ohio law, though it made no mention of the reporting requirements for federal candidates under the Federal Election Campaign Act (FECA). The Directive, moreover, said nothing about whether independent congressional and state-office candidates could continue to file their nominating papers up until the day before the primary, as previously authorized by Ohio law. *See* R.C. § 3513.257 (non-presidential independent candidates "shall file no later than four p.m. of the day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters"); *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005) (upholding Ohio law because it created equal qualification deadline for independent and party candidates).

Prior to Respondent's belated announcement of his Directive, his office either coordinated, or was at least complicit in, the filing of a lawsuit in the Franklin County Court of Common Pleas that sought judicial assistance in canceling the election. *See* Exhibit D attached to Relators' Complaint; Rick Rouan, *Misstatements from LaRose's office sparked elections eve chaos in Ohio*, COLUMBUS DISPATCH, March 19, 2020.[3] Judge Frye in the Common Pleas Court, however, refused the invitation and would not cancel the election. Judge Frye's unexpected assertion of judicial independence reportedly caused "chaos" and "confusion" throughout Ohio's executive branch of Ohio's government, a state of chaos and confusion that the executive branch duly transmitted to local elections officials and eligible voters who had expected to vote.

[3] https://www.dispatch.com/news/20200319/misstatements-from-larosersquos-office-sparked-election-eve-chaos-in-ohio.

Even before Judge Frye had announced his decision, Respondent's office had e-mailed local elections officials "to tell them (incorrectly) that Frye had granted the order sought by two elderly voters to stop the election on Tuesday. 'There will be no election tomorrow. We will provide further details regarding the order as soon as humanly possible.'" *Id.* Judge Frye's contrary conclusion reportedly "shocked" Respondent, *id.*, and apparently led him, the Governor, and the Department of Health to pursue an extra-legal path to what they believed was a preordained end.

Respondent's office made this clear when it once again e-mailed local election boards to inform them that "[t]he judge denied the (temporary restraining order)," *id.*, but that "Governor DeWine and Secretary LaRose are working through next steps. We will update you as soon as possible." *Id.* These "next steps" were revealed at approximately10:30 that evening, when Governor DeWine's Department of Health issued its order closing the polls. *Id.* Respondent quickly followed with Directive 2020-06 and began transmitting it to local elections officials later that night and into the early morning hours. *Id.* When voters awakened on the morning of March 17, 2020, they witnessed conflicting news reports about voting in Ohio, leading to anger and confusion. *See Coronavirus upends primary elections in Florida, Illinois and Arizona; vote postponed in Ohio*, L.A. TIMES, March 17, 2020 ("The election-eve maneuvers left many Ohio voters bewildered or angry after they woke up not knowing whether they should go to polling stations to cast ballots").[4] Some even attempted to vote. *See* Marty Schladen, *A few Ohio voters*

[4] https://www.latimes.com/politics/story/2020-03-17/coronavirus-primary-election-confusion-florida-ohio-polling.

still went to closed polls on Tuesday amid coronavirus confusion, COLUMBUS DISPATCH, March 17, 2020.[5]

The chaos and confusion sown by Respondent is sure to continue given the many legal questions that surround Respondent's action. For example, what about Ohio's voter registration deadline, which under state and federal law is necessarily tied to the date of the election? What of campaign finance reporting requirements? How about the deadline for non-presidential independent candidates? And even assuming this deadline for candidates is extended -- and it seems clear it must given Respondent's Directive -- how can candidates be expected to gather signatures given the lockdown that now exists?

At the base of Respondent's chaotic house of cards rest the two premier questions presented to the Court in this case. First, is Respondent's Directive constitutional? Second, if it is not (as Intervener-Relator argues), what can and must be done?

Intervener-Relator respectfully submits that Respondent's actions were legally unwarranted and plainly unconstitutional under Articles I and II of the Constitution of the United States. Given the predicament created for Ohio by Respondent, Intervener-Relator further argues, this Court is now under an affirmative constitutional obligation to either mediate or correct Ohio's constitutional crisis.

Intervener-Relator, for its part, has been placed in a precarious situation by Respondent's action. The Libertarian Party's National Convention, which will select Intervener-Relator's presidential ticket, begins on May 21, 2020. Complaint at ¶ 14. Although Intervener-Relator does not use Ohio's presidential primary to select its delegates to this Convention, the results of Ohio's primaries play a significant part in Intervener-Relator's delegates' participation in the National

[5] https://www.dispatch.com/news/20200317/few-ohio-voters-still-went-to-closed-polls-tuesday-amid-coronavirus-confusion.

Convention. Intervener-Relator's First Amendment rights are jeopardized by Respondent's canceling and postponing the conclusion of Ohio's election to a date beyond the date of the Libertarian National Convention. The results of Ohio's primary for all three political parties provide critical information to Intervener-Relator's and its chosen delegates' and critically facilitate their proper participation in the Libertarian Party's National Convention, that Convention's construction of a national platform, and its selection of Intervener-Relator's presidential ticket.

Whether Respondent and the Democratic Party agrees with Intervener-Relator or not on this point, *see* Relators' Response to Intervener-Relator's Motion to Intervene (questioning the need to conclude voting before the Convention), neither they nor anyone else can "constitutionally substitute [their] own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981). As explained by Judge Watson in *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, *7 (S.D. Ohio 2014) (striking down as violating Due Process Ohio's belated change to it election laws in 2014), moreover, "mov[ing] the proverbial goalpost in the midst of the game ... would be patently unfair." That wisdom is as true here and now as it was there and then.

ARGUMENT

I. Respondent Is Precluded by Articles I and II of the Constitution of the United States from Fixing Deadlines For, or Otherwise Prescribing the Manner of, Federal Elections.

Section 4 of Article I of the United States Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each

State by the Legislature thereof …." U.S. Const., art. I, § 4 cl. 1 (emphasis added). Section 1 of Article II, meanwhile, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to vote for President. U.S. Const., art. II, § 1, cl. 2 (emphasis added). Together, these federal Elections Clauses dictate that Ohio's Legislature must prescribe the time and manner of electing federal Representatives and Senators, as well as the President of the United States. Ohio's Legislature fixes the deadlines; Ohio's Legislature prescribes the manner of voting. Neither Respondent, the Governor,[6] nor Ohio's Department of Health, has any say in this regard unless the Legislature expressly says so.

The United States District Court for the Southern District of Ohio analyzed these provisions in 2008 in response to the Ohio Secretary of State's promulgation of deadlines and rules for ballot access during Ohio's 2008 presidential election. *See Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Ohio 2008). There, Secretary Brunner, by executive Directive, attempted to fix a deadline for political parties seeking to qualify for Ohio's primary and general election ballots. She also included a provision setting the number of signatures needed for political parties to qualify. Both were issued because Ohio's legislatively prescribed deadline and number of signatures had been ruled unconstitutional under the First Amendment in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006).

In *Brunner*, 567 F. Supp. 2d 1006, the Court concluded that Ohio's Secretary of State did not possess statutory under Ohio law, nor constitutional authority under the federal Elections Clauses, to regulate federal elections and ballots. Regulating federal elections transcended the

[6] Of course, the Governor plays an antecedent role through his veto authority when the legislation is passed. This role does not offend either of the Elections Clauses. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court ruled that Art. I, § 4's reference to "Legislature" assumes the basic legislative processes spelled out by a state's fundamental charter. Hence, bicameralism in Ohio is required for the "Legislature" to act, and Ohio's gubernatorial veto can be constitutionally applied to the Legislature's proposed time and manner of conducting federal elections.

Ohio Secretary of State's authority under the federal Election Clauses because delegated power to the "Legislature," and not the executive: "Plaintiffs correctly contend that only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office." *Id.* at 1011.

The Court in *Brunner*, 567 F. Supp. 2d at 1011, observed that "[e]ven if the Ohio General Assembly could delegate its authority to a member of the executive branch, an issue that is not before the Court, there is no evidence that the state legislature has specifically delegated its authority to Defendant to direct the manner in which the state of Ohio votes for Senators and Representatives or selects electors to vote for President." (Emphasis added). The Court further stated that "[a]bsent an express delegation of legislative authority, this Court cannot assume that the Ohio General Assembly intended to vest the Secretary of State with the legislative authority conferred in Article I, Section 4 and Article II, Section 1." *Id.*

In terms of legislative delegation to the Secretary, the Court in *Brunner*, 567 F. Supp. 2d at 1011, recognized that the Secretary had been delegated some authority to act; the Secretary could "[i]ssue instructions by directives and advisories … to election boards as to the proper methods of conducting elections," and to "[p]repare rules and instructions for the conduct of elections …." This did not, however, support "filling a void in Ohio's election law …." *Id.* However, it concluded that a "general, statutory authority to direct the conduct of electors cannot, as to Articles I and II of the Constitution, serve as a substitute for state legislative action regarding the election of federal officials." *Id.* at 1012-13 (emphasis added).

Judge Sargus's conclusion that Ohio's General Assembly had not specifically delegated its Article I and II powers to the Secretary of State was undoubtedly correct. Longstanding practice and authority in Ohio establishes that the Secretary has no power to "amplify" the

state's election laws. In a 1930 response to a question posed by Ohio's Secretary of State, Attorney General Gilbert Bettman stated that while the "Legislature has manifestly left to the discretion of the Secretary of State as chief election officer the determination of certain details which it cannot foresee and determine in the administration of the election laws," this power can only be exercised "so long as the laws were not thereby amplified …." 1930 Ohio A.G. Op. 1423, at 122-23 (emphasis added).[7] Ohio law thus provides two conjunctive conditions for the Secretary to act in the context of elections: (1) he or she must be filling in administrative details the Legislature had not foreseen, and (2) he or she cannot be expanding or amplifying existing laws.

Respondent's cancellation of the March 17, 2020 election, his rescheduling of it, and his establishment of voting procedures, satisfy neither of these conjunctive conditions. First, Ohio's General Assembly expressly provided by statute when and how the primary was to take place. That law remained undisturbed at the time of Respondent's action. Respondent was not filling in any missing details in the existing law. He was not just impermissibly "amplifying" it, he was completely replacing it. Second, the General Assembly was just as aware of the coronavirus's impact in Ohio as everyone else, including Respondent, and yet it chose not to delay the election or change the voting rules. Events were no more unforeseeable late on the evening of March 16, 2020 when the Governor, his Department of Health and Respondent commenced their cancellation of the election than they were in the days and hours before when the Governor admitted he had no power to act. At no time did the General Assembly act to cancel the election.

Even assuming that Respondent had been delegated some kind of general "legislative" authority over elections by the General Assembly, the federal Elections Clauses would still not

[7] https://www.ohioattorneygeneral.gov/getattachment/85a53730-c62e-4de9-a742-1b1e1a68c2d8/1930-1423.aspx.

countenance the Secretary's rejecting and replacing a specific legislative act. This is not a case where the State Legislature knowingly and expressly delegated legislative authority to an executive agent to act on the Legislature's behalf during a crisis or emergency. Louisiana's Governor, for example, postponed Louisiana's presidential primary in 2008 following Hurricane Gustav, *see* Louisiana Ex. Order BJ 08-89,[8] under the authority of just such a specific delegation; it authorized the Governor to extend electoral deadlines during an "emergency or common disaster occurring before or during a regularly scheduled or special election." *See* La. Rev. Stat. § 18:401.1.A. Even then he could not act unilaterally, but was required to act jointly with the Secretary of State following the latter's declaration "that a state of emergency exists." *Id*. § 18:401.1.B. Most recently, the Governor of Louisiana postponed its 2020 primaries under this same authority. *See Louisiana Governor Moves Primary Because of Coronavirus*, N.Y. TIMES, March 13, 2020.[9]

To offer another example, in Kentucky (which has suspended its 2020 primary) the Governor has been specifically delegated the authority by the Legislature to declare a "state of emergency," and then "[u]pon the recommendation of the Secretary of State, to declare by executive order a different time or place for holding elections in an election area for which a state of emergency has been declared for part or all of the election area." Ky. Rev. Stat. § 39A.100(1)(l). That same statute then states that "[t]he election shall be held within thirty-five (35) days from the date of the suspended or delayed election. The State Board of Elections shall establish procedures for election officials to follow." *Id.* Thus, even though the Governor holds

[8] https://www.doa.la.gov/osr/other/bj08-89.htm.

[9] https://www.nytimes.com/aponline/2020/03/13/us/ap-us-virus-outbreak-louisiana-1st-ld-writethru.html.

the trigger to postponing elections, the Legislature itself has supplied the resulting deadline and directed the Board of Elections to supply the procedures.

In Illinois (which has also delayed its primary), the Legislature has similarly delegated emergency powers to the Governor during emergencies: "In the event of a deployment of the United States Armed Forces or the declaration of an emergency by the President of the United States or the Governor of Illinois, the Governor or the executive director of the State Board of Elections may modify the registration and voting procedures established by this Article or by rules adopted pursuant to this Article for the duration of the deployment or emergency in order to facilitate vote by mail voting under this Article." Ill. Code Ann. § 5/20-25.

In contrast to States like Louisiana, Illinois and Kentucky, the Ohio General Assembly has made no such specific delegation of emergency electoral powers to the Governor or any other executive agent. Instead, Ohio's Governor, its Department of Health, and Respondent here unilaterally chose to wrest from the State's General Assembly its constitutional authority to fix the time and manner of elections without any specific legislative direction at all. Naked power-grabs are precisely what the Founding Fathers hoped to prevent.

Plainly put, an executive officer cannot forcibly or unilaterally wrest from a State Legislature the authority delegated to it by Articles I and II of the United States Constitution. No precedent in the Country supports such an autocratic stripping of electoral responsibility and right. This fact is driven home by the Supreme Court's decision in *Arizona State Legislature v. Arizona Department Redistricting Commission*, 135 S. Ct. 2652 (2015), where a five-to-four majority on the Supreme Court barely sustained even the people's right by popular initiative to take from the State Legislature the authority to "legislate" under Article II of the United States Constitution. It was a foregone conclusion to all the Justices in that case that an executive officer,

as opposed to the people, could not unilaterally do the same.

As explained by the Court in *Arizona State Legislature*, 135 S. Ct. at 2672, "[t]he [Elections] Clause was [] intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." Quite contrary to the problem of having a single politician or faction seize the reins of electoral rulemaking, "[t]he Elections Clause … is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands." *Id*. "The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power." *Id*. at 2674 (emphasis added). The same cannot be said for state autocrats and bureaucrats.

Amicus curiae Disability Rights Ohio suggests that Respondent was required by equality principles -- such as those found in the federal Equal Protection Clause and the federal Americans With Disabilities Act (ADA) -- to close the polls on March 17, 2020. The argument seems to be that since some in Ohio had already voted absentee by mail or early in person, conducting in-person voting on March 17, 2020, when many would choose not to venture to the polls, could have violated the voting rights of disabled individuals.

Disability Rights Ohio is incorrect. Disability is not a protected constitutional class, and thus does not as a class receive heightened scrutiny. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Heller v. Doe*, 509 U.S. 312 (1993). Equal protection, meanwhile, does not require absolute equality in terms of the franchise, as made clear in cases like *Bush v. Gore*, 531 U.S. 98 (2000). "All voting requirements inevitably encumber some people more than

others." *Northeast Coalition for the Homeless v. Husted*, 837 F.3d 612, 634 (6th Cir. 2016). The key to Equal Protection is that people be provided equal opportunities to vote and have their votes counted. *See Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012) (holding that disparate treatment between military and overseas voters and domestic early in-person voters in Ohio violated the Equal Protection Clause because the opportunities were not equal). So long as equal opportunities exist, rational distinctions in voting procedures pass constitutional scrutiny.

Whether eligible voters choose to exercise the equal opportunities afforded under State law in light of the circumstances that exist on election day is not something the Equal Protection Clause was designed to address. For example, many eligible voters choose not to go to the polls when it rains or snows. This does not mean in-person voting impermissibly discriminates against people who fear driving on wet roads, nor does it violate the rights of people who are prone to colds. Simply put, in-person voting does not violate the Equal Protection Clause because some would prefer not to use it.

Likewise, Ohio was under no constitutional obligation to cancel the election on March 17, 2020 because of the outbreak of the novel coronavirus. It could have, if done so properly. But it was under no constitutional obligation to do so. Nor would have conducting in-person voting on March 17, 2020 violated the federal Americans With Disabilities Act (ADA). While Intervener-Relator is certainly sympathetic to the health concerns of all Ohioans, amicus curiae's argument that Ohio's compliance with the ADA's standards was threatened by holding in-person voting on March 17, 2020 cannot survive scrutiny.

The ADA, by its terms, was put in place "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," as well as to establish "clear, strong, consistent, enforceable standards" for scrutinizing such discrimination.

42 U.S.C. § 12101(b)(1)-(2). Whether a practice is permissible, or "whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it." *Staron v. McDonald's Corp*., 51 F.3d 353, 356 (2d Cir. 1995). Definitive, absolute conclusions about facial non-compliance with the ADA are rarely possible.

Further, "to prevail on their ADA claim, plaintiffs must propose a reasonable modification to the challenged public program that will allow them the meaningful access they seek." *National Federation of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016) (holding that absentee voting required reasonable accommodate for the blind). No authority has ever held that the only reasonable accommodation for disabled voters is the denial of in-person voting across the board. No court has held that States are precluded from conducting in-person voting because some voters cannot safely do so. No court has ruled that a disproportionate health risk for a segment of the population requires canceling in-person voting.

What States are required to do, rather than deny to all in-person voting, is to reasonably accommodate those who cannot vote in-person. This accommodation can take place in myriad ways, and is routinely satisfied by alternative forms of absentee voting. In terms of the current predicament in Ohio, the General Assembly already offered all voters the option of absentee mail-in voting until the end of the day on March 16, 2020. Even assuming that this was not sufficient under the ADA given the coronavirus outbreak, a reasonable accommodation (to insure equality with in-person voting on the following day) might have been something as simple as extending the post-mark requirement for absentee voting until the end of the day on March 17, 2020. Equal opportunity and reasonable accommodation, after all, are all that are required.

Closing down an election is far from being constitutionally or statutorily required.[10]

II. This Court Possesses Authority Under Articles I and II of the Constitution of the United States to Insure that Federal Elections Timely Take Place in the Absence of Action By the General Assembly.

As made clear above, Respondent's unilateral decision to stop the election can hardly be understood or justified as an attempt to avoid some sort of constitutional crisis. Proceeding as planned on March 17, 2020 would not have violated the Constitution of the United States, the Constitution of Ohio, the Americans With Disabilities Act, or anything else.

Far from averting a legal crisis, Respondent's action created one. As things stand in Ohio, a class of voters has already voted early by mail and in-person, while another class of voters -- those who expected to vote in-person on March 17, 2020 -- have been denied the franchise. Because voting is fundamental, *see Harper v. Virginia State Board of Elections*, 383 U.S.663 (1966); *Kramer v. Union Free School District*, 395 U.S. 621 (1969), patent discrimination like Respondent's violates the Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98 (2000). Ohio has been placed in the unenviable position of having to correct Respondent's wrong in order to avoid not only a federal constitutional violation under Articles I and II, but also a violation of the Equal Protection Clause of the Fourteenth Amendment.

Respondent and Amici curiae Primary Election Candidates question the authority of this Court to entertain the challenge in this case. Their arguments are dubious, but even assuming they were proved correct as a matter of State law, this Court would still be required to exercise jurisdiction to entertain (and redress if warranted) the federal constitutional claims that are presented. "Since at least 1934, the Supreme Court has consistently found that a state may not

[10] Prohibiting in-person voting would not necessarily violate the ADA, either. And it may be that closing polling places during emergencies is sound public policy. The point here is that this kind of decision was not something Ohio, let alone Respondent, was required to make under the Equal Protection Clause or the ADA.

discriminate against federal claims, regardless of whether the discrimination takes a substantive, procedural, or jurisdictional form." Samuel P. Jordan, *Reverse Abstention*, 92 B.U.L. REV. 1771, 1774 (2012). *See also* Vicki C. Jackson, Printz *and* Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. J. 111, 113-14 (1998); Ellen D. Katz, *State Judges, State Officers, and Federal Commands After* Seminole Tribe *and* Printz, 1988 WIS. L. REV. 1465, 1505-06.

A number of Supreme Court precedents prove the point. In *Howlett v. Rose*, 496 U.S. 356 (1990), for example, Florida's courts of general jurisdiction refused to entertain § 1983 claims brought against school board officials. The Court observed that these state courts "of general jurisdiction ... exercise[] jurisdiction over tort claims by private citizens against state entities ... of the size and type of petitioner's claim here, and [] can enter judgment against them." *Id*. at 378 (footnotes omitted). "A state policy that permits actions against state agencies for the failure of their officials" under state law, the Court reasoned, "but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held liable for § 1983 violations in the courts of the State." *Id*. at 380. "That reason, whether presented in terms of direct disagreement with substantive federal law or simple refusal to take cognizance of the federal cause of action, flatly violates the Supremacy Clause." *Id*. at 380-81.

In *Haywood v. Drown*, 556 U.S. 729 (1999), this Court extended this principle to bar even ostensibly neutral jurisdictional rules that shifted both constitutional claims under § 1983 and state-law actions against particular officials from one state court to another. There, New York directed that actions (of any sort) against correctional officers be filed in the state's court of claims rather than in its courts of general jurisdiction. The result was that while § 1983 claims could generally be filed in state courts of general jurisdiction, § 1983 suits against corrections

officers (as well as state-law actions) had to be filed in the state court of claims. The Court ruled that having made the decision to create courts of general jurisdiction, New York could not justify shutting their doors to federal constitutional claims through the expedient of supplying an alternative judicial mechanism. "[A]lthough States retain substantial leeway to establish the contours of their judicial systems," the Court explained, "they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Id*. at 736.

So strong is the presumption in favor of state court jurisdiction over federal claims, the Court in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 207 (1991), ruled that South Carolina's courts were required to entertain federal claims under the Federal Employer's Liability Act (FELA) even if those claims could not be heard in federal court and the state lacked analogous workers' compensation claims: "the Supremacy Clause makes that statute the law in every State, fully enforceable in state court." (Citing *Howlett*, 496 U.S. 356).[11]

Of equal importance, this Court also has the authority under Articles I and II of the United States Constitution -- separate and apart from the authority it possesses under Ohio's Constitution -- to interpret Ohio law and insure that federal elections properly proceed. Articles I and II of the United States Constitution directly delegate authority to States, through their legislative processes, to regulate federal elections. How and whether a State properly exercises

[11] This is not to say that the whole of a state's courts must entertain all federal claims all the time. States are free to enact neutral rules directing the administration of their courts. *See Haywood*, 556 U.S. at 735-36 ("we have emphasized that only a neutral jurisdictional rule will be deemed a 'valid excuse' for departing from the default assumption that 'state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.'") (citations omitted). Rules singling out federal claims for disparate treatment, however, are not neutral. Because this Court is empowered to exercise original jurisdiction over election claims that arise under Ohio law, it is required to also exercise its original jurisdiction over election challenges that arise under the Constitution of the United States.

this "legislative" power presents not only a state-law question,[12] but an overarching federal question about federal power. *See Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76 (2000) (holding that Article II presents a federal delegation of "legislative" power to the States).

The federal question here is how a State must or may properly exercise this federal grant of legislative power. More specifically, can a State Supreme Court do so when the Legislature has failed to act, acted unconstitutionally, or had its lawful action usurped by an executive agent? This problem emerged in the run-up to *Bush v. Gore*, 531 U.S. 98 (2000), where the Court ultimately ruled that Florida's method of counting presidential votes violated the Equal Protection Clause of the federal Constitution. The Supreme Court in an antecedent procedural ruling in *Palm Beach County Canvassing Board*, 531 U.S. 70, addressed the Florida Supreme Court's role under Article II, § 1 of the United States Constitution. The Florida Supreme Court there had interpreted Florida's legislatively-prescribed rules for the presidential election to allow manual recounts. The question was whether this violated Article II. The Court stated:

> As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

Id. at 76. Because it was "unclear as to the extent to which the Florida Supreme Court saw the

[12] Amici curiae Primary Election Candidates are certainly correct about the Secretary's constitutional disability from exercising "legislative" power. His action was not legislative, nor could it be. This fact, however, does not deny this Court of its authority to correct Respondent's ultra vires act. Unlike Respondent, this Court possesses authority under both Ohio law (to interpret legislation) and under Articles I and II of the Constitution of the United States to "legislate" in a properly filed case. Either or both can be used to fulfill Ohio's constitutionally prescribed duty to conduct federal elections. Issuing a Writ of Prohibition blocking Respondent's ultra vires Order and then correcting Ohio's resulting constitutional deficiency are proper remedies available to the Court.

Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2," *id*. at 78, the Supreme Court vacated the Florida Supreme Court's interpretation of the election code and remanded for clarification over whether it was simply interpreting statutory law (which was permissible) or was applying the Florida Constitution (which might not be allowed). *Id*.

On remand, the Florida Supreme Court made clear it was interpreting Florida's legislatively-prescribed election laws. Given this clarification, the Supreme Court on the second round of review in *Bush v. Gore* found no problem under Article II. While the majority invalidated Florida's recount under the Equal Protection Clause, the majority implicitly recognized that the Florida Supreme Court shared with the State Legislature the power delegated to Florida by Article II of the United States Constitution. Its interpretation of state election law and application of that interpretation to a presidential election did not violate Article II.[13]

A similar matter of judicially exercised "legislative" authority was presented under Article I of the United States Constitution in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (2003) (en banc). There, the Colorado Supreme Court, after concluding that the Legislature's mid-census attempt at congressional redistricting was unlawful, substituted its own congressional redistricting plan. In response to the charge that it had usurped the Legislature's authority under Article I, the Court stated: "the word 'legislature,' as used in Article I of the federal Constitution, encompasses court orders. … In such a case, a court cannot be characterized as 'usurping' the legislature's authority; rather, the court order fulfills the state's obligation to provide constitutional districts for congressional elections in the absence of legislative action." *Id*. at 1232. It added, "like the U.S. Constitution, the Colorado Constitution does not grant the General

[13] Only the Chief Justice and Justices Scalia and Thomas disagreed with this implicit conclusion. The Chief Justice concluded that the Florida Supreme Court violated Article II by deviating from the directions of the Florida legislature: "[In] a Presidential election, the clearly expressed intent of the legislature must prevail." *Id*.

Assembly exclusive authority to draw congressional districts. Redistricting can be accomplished by enacting a bill subject to gubernatorial approval, by voter initiative, and through litigation." *Id*. at 1231.[14]

Salazar is remarkably similar to the case at hand. The Colorado Supreme Court entertained the case as an original proceeding in the nature of mandamus to prevent the Secretary of State from implementing a challenged congressional redistricting plan. *Id*. at 1227-28. The Court rejected challenges to its jurisdiction and also ruled it had authority as an original matter to issue the requested writ. The Court concluded that it, like the State Legislature, possessed "legislative" power under Article I of the Constitution to regulate federal elections, and then used judicially drawn district lines to fulfill the State's constitutional duty. The Court, moreover, recognized that it was "constitutionally required" to step in to insure that federal elections in Colorado properly proceeded "when the legislature fails to do so." *Id*. at 1232.

III. Neither the Department of Health Nor the Governor Has "Public Health" Authority to Cancel or Postpone Federal Elections.

Respondent attempts to hide behind decisions made by the Governor and his Department of Health. The fact is, however, that neither the Ohio Department of Health nor the Governor has the power under R.C. § 3701.13, or any other statute, to regulate federal elections under the guise of "public health," "quarantine," or "isolation."

The Department of Health, for its part, claims authority under R.C. § 3701.13 "to make special orders … for preventing the spread of contagious or infectious diseases …." *See* Director of Department of Health Order, March 16, 2020;[15] Exhibit C attached to Relators' Complaint.

[14] In *Lance v. Coffman*, 549 U.S. 437 (2007), the Supreme Court ruled that challengers to the Colorado Supreme Court's redistricting plan lacked standing to proceed in federal district Court.

[15] https://governor.ohio.gov/wps/wcm/connect/gov/81d164da-757d-4818-b898-122325ccf509/Director%27s+Order+Closure+of+the+Polling+Locations.pdf?MOD=AJPERES

That language is contained in the first sentence of the second paragraph of the statute, which without the ellipses states:

> The department may make special or standing orders or rules for preventing the use of fluoroscopes for nonmedical purposes that emit doses of radiation likely to be harmful to any person, for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as are best controlled by a general rule.

The Department of Health would have Ohioans believe that this language -- sandwiched as it is between a delegation of authority to prevent the use of fluoroscopes for nonmedical purposes and one for burying the dead -- grants it not only a veritable blank check to do whatever it feels is necessary to prevent the spread of disease, but also authority to cancel elections.

If this were true, of course, one could only wonder what the first paragraph of § 3701.13 is all about. It states:

> The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority <u>in matters of quarantine and isolation</u>, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established. The department may approve methods of immunization against the diseases specified in section 3313.671 of the Revised Code for the purpose of carrying out the provisions of that section and take such actions as are necessary to encourage vaccination against those diseases.

(Emphasis added). If the Director is correct about the second paragraph, the first paragraph would be rendered wholly superfluous. After all, if the Director can order a super-quarantine under the second paragraph and prevent people from going anywhere, including to the polls, it does not need the specific and literal authority provided in the first paragraph to "quarantine" people and "isolate" places.

Because specific statutory language must control over more general language, *see D.A.B.E., Inc. v. Toledo-Lucas County Board of Health*, 96 Ohio St.3d 250, 773 N.E.2d 536

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(2002), the Director's position cannot be sustained. A specific grant of authority to quarantine sick individuals and isolate infected places necessarily means that the Director does not have the general power to super-quarantine elections and prohibit people from voting.

This was made clear in *D.A.B.E.*, 96 Ohio St.3d 250, 773 N.E.2d 536, where the Court held that local health officials in Ohio have limited powers that do not include prohibiting smoking in public places. The local health officials in that case had banned smoking in "enclosed areas," including bars and restaurants. They claimed that R.C. § 3709.21 authorized their action, since smoking bans were "for the public health." The statute at issue, R.C. § 3709.21, broadly stated that "[t]he board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances." It further stated that "[i]n cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, the board may declare such orders and regulations to be emergency measures …." *Id.*

This Court rejected the local health officials' claim. "At first glance, the language of R.C. 3709.21 seems to grant petitioners the necessary authority to enact the regulation at issue." *Id.* at 255, 773 N.E.2d at 542. However, read in context, the Court observed, it became clear that local health officials did not have "unlimited authority to adopt regulations addressing all public-health concerns." *Id.* "Throughout R.C. Chapter 3709, and elsewhere, the General Assembly has explicitly and in great detail identified specific areas where local boards of health have substantive regulatory power to address public-health issues." *Id.* These many specific qualifications and conditions proved that R.C. § 3709.21 was not a general delegation of authority to regulate for the "public health." "At a minimum, enactment of the provisions cited

above indicates that the General Assembly did not intend through R.C. 3709.21 to vest local boards of health with plenary authority to adopt any regulations that they deem necessary for the public health." *Id*. at 256, 773 N.E.2d at 543.

The same is true of R.C. § 3701.13's delegation of authority to the Department of Health. Contrary to the Department of Health's claim, this grant is not a blank check to regulate anything and everything with an eye toward "public health." The Department of Health's actions are specifically restricted, both by the language of R.C. § 3701.13 and other health statutes.

The question, of course, ultimately becomes what is meant by "quarantine" and "isolation" in R.C. § 3701.13. This Court long ago made clear that the authority of health officials to quarantine and isolate is not boundless. In *Ex parte Company*, 106 Ohio St. 50, 57 (1922), where it sustained a quarantine measure applied to persons reasonably suspected of having several kinds of venereal disease, the Court explained the nature of the quarantine power:

> Quarantine in the sense herein used means detention to the point of preserving the infected person from contact with others. The power to so quarantine in proper case and reasonable way is not open to question. It is exercised by the state and the subdivisions of the state daily. The protection of the health and lives of the public is paramount, and those who by conduct and association contract such disease as makes them a menace to the health and morals of the community must submit to such regulation as will protect the public.

Id. at 57 (emphasis added). *See also Ex parte Kilbane*, 67 N.E.2d 22 (Ohio 1945) (same).

Since that time, it has been understood that health officials' quarantine authority allows them to detain infected people and isolate infected places in order to protect both from coming into "contact with others." Neither was designed to authorize the detention of uninfected individuals and prevent them from visiting or occupying uninfected places. As stated by one authority, quarantine and isolation are designed to allow "local health authorities [] to prevent the spread of communicable and epidemic diseases, … [by] persons afflicted with or exposed to

those diseases …." 53 OHIO JUR. 3D, HEALTH AND SANITATION § 101 (2020). Toward this end, "[a]n isolated or quarantined person may not leave the premises to which he or she has been restricted without the written permission of the board …. " *Id*.

This properly bounded interpretation of the quarantine power, moreover, is made manifest by R.C. § 3703.16, which states:

> No person isolated or quarantined for a communicable disease declared by the board of health of a city or general health district or the department of health to require isolation or quarantine shall attend any public, private, or parochial school or college, Sunday school, church, or any other public gathering, until released from isolation or quarantine by the board.

(Emphasis added).

If this were not enough, Ohio law has long counseled against broad public closures. Section 3707.05 of the Revised Code, for example, states that local health officials "shall not close public highways or prohibit travel thereon, …." (Emphasis added). It would seem quite odd that executive health officials would be authorized by Ohio law to do exactly that by leaving people with no place to lawfully go.

It is far from clear that Ohio's quarantine and isolation powers allow local health officials and the Department of Health by executive fiat to close uninfected public places to access by uninfected persons. Even assuming the Department of Health has this authority, however, it is an unimaginable stretch to think that this power allows health officials to close polling places, prohibit voting and cancel elections.

In the event, this Court need not definitively decide this case in terms of the full reach of the Department of Health's quarantine and isolation powers. For even assuming that these powers permit closing restaurants, bars, day care centers, etcetera, § 3707.05 of the Revised Code expressly prohibits health officials from interfering with the official duties of public

officers; it states that health officials "shall not … interfere with public officers not afflicted with or directly exposed to a contagious or infectious disease, in the discharge of their official duties, …." (Emphasis added). Respondent's official responsibility was and is to timely conduct the election the General Assembly scheduled for March 17, 2020. The Department of Health had no authority under its general quarantine power (found in R.C. § 3701.13) to interfere with the Respondent's official duty in this regard. It could not force him to abdicate his official duty and close the polls. The Department of Health had no more authority to order the Respondent to close the election polls than it has to close this Court.

CONCLUSION

One need not stray too far down a slippery slope to see the danger presented by the facts of this case. If Respondent, the Department of Health and the Governor are correct, wannabe dictators are empowered to cancel elections under guise of public health. "Trust us," the soon-to-be dictator, would claim. "I know better," he most certainly will state. And maybe he does. But thankfully, a government of laws does not countenance dictators nor trust autocrats who claim to know best. A government of laws follows established rules and procedures. In particular, Elections proceed as planned and power to govern is peacefully passed from one generation to the next. A government of laws respects the right of the people -- through their properly elected representatives -- to determine how and when to best to select the next generation of leaders.

That this Country has never canceled or postponed a general election for President or Congress because of pandemic, catastrophe, invasion, civil war, world war, or anything else speaks volumes about the American commitment to this principle.[16] While the British were

[16] Both local and federal primary elections, of course, have been postponed, though rarely. Following the September 11, 2001 terrorist attacks on New York City, for example, state odd-year primary elections were postponed by emergency order two weeks until September 25, 2001. *See* Marisam, *infra*, at 149-50. Louisiana postponed its presidential primary in 2008 following

burning Washington in the late summer of 1814, the Nation geared up for and conducted its mid-term congressional elections. Lincoln was re-elected during this Nation's bloody Civil War in 1864, and Roosevelt was re-elected in the midst of an even bloodier World War in 1944.

Congressional elections proceeded during the all-important mid-term elections of 1918, moreover, notwithstanding the ravaging pandemic of what was then called the Spanish Flu. As explained by Jason Marisam of the Harvard Law School:

> On Election Day, voters and poll workers in some cities donned protective face masks. Meanwhile, hundreds of thousands of potential voters may have stayed home because they were too sick, afraid of catching the flu, or under quarantine. When the voter turnout numbers came in, it appeared that turnout was indeed lower than normal. But surprisingly, in most places the election was held with relatively few complications.

Jason Marisam, *Judging the 1918 Election*, 9 ELECTION L.J. 141, 141 (2010).

How today's pandemic should be solved presents a question that should have been left to the people's elected representatives in the General Assembly. Respondent, however, has rendered that option moot.

For this reason, Intervener-Relator turns to this Court. Intervener-Relator suggests that given the increased availability of remote access to applications and proven track-record in Ohio of absentee voting, the most immediate solution to Ohio's constitutional crisis is to extend absentee voting until a specified date. *See id*. at 151 (suggesting that absentee voting is a credible solution). With or without a closing day of in-person voting, eligible voters must have a

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Hurricane Gustav, *see supra* at page 10, and has done so again in the wake of the coronavirus. *Id*. Additional States, including Louisiana, Kentucky, Illinois and Connecticut have also postponed their primaries, though Louisiana's, Kentucky's and Illinois's Governors acted pursuant to clear delegations. *See supra* at pages 10-11. In Connecticut, meanwhile, state officials reportedly consulted with "local election officials, [and] bipartisan leadership in the General Assembly." Kate Sullivan, *Connecticut governor says primaries moved to June*, CNN, March 19, 2020. Several states, including Arizona, Florida and Illinois proceeded with primaries as planned. *Id*.

reasonable chance to still register, request an absentee ballot, and deliver that ballot to elections officials.

In choosing the new deadlines for Ohio's primary election, it is incumbent upon the Court to balance the First and Fourteenth Amendment rights of voters, candidates (both those sponsored by political parties and independents) and recognized political parties -- including Intervener-Relator, the Ohio Democratic Party, and the Ohio Republican Party -- with the burdens that administering absentee voting will place on elections officials. Let there be no doubt, Intervener-Relator, its candidates, and its voters have all been severely burdened by Respondent's action. Perpetuating Respondent's wrong by further delaying the primary election must be supported by a truly compelling justification.

On balance, Intervener-Relator respectfully suggests that the Court should in addition to prohibiting enforcement of Respondent's unconstitutional Directive, fulfill Ohio's constitutional obligation to conduct its election in a timely fashion by itself setting the needed deadlines and manner of voting. In order to insure that Intervener-Relator, its candidates and members may properly participate in its National Convention (which begins on May 21, 2020), Intervener-Relator respectfully requests that all electoral activities, including the uncertified announcement of winners, be completed no later than May 20, 2020. The precise time frame is something that can be worked out by working backwards from this date and employing the General Assembly's established rules.

Toward this goal, Intervener-Relator further suggests that the great bulk of the upcoming election be conducted by absentee ballot, either delivered by mail or physically delivered to election places. The processing of absentee ballot applications should be re-opened and extended until at least ten days before the conclusion of the election. Local elections officials should

accept and count all valid absentee ballots that are postmarked at least one week before the close of the election, or that are physically received (either directly or by mail) before the close of business on the day voting is concluded.

In order to avoid leveling an unconstitutional poll tax, *see Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); U.S. Const., amend. XXIV, which might be a problem with the great bulk of voting proceeding by mail, Respondent should be directed to arrange for prepaid postage for ballots or provide some other suitable mechanism for voters to cast ballots without cost. Intervener-Relator further respectfully requests that following the close of voting, uncertified results be announced no later than May 20, 2020.

Intervener-Relator remains ready to work with the Court, Respondent, the Ohio Democratic Party, the Ohio Republican Party, and any other interested persons or groups in order to construct a manageable electoral plan for Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that this Brief and supporting Evidence were filed using the Court's electronic filing system and will thereby be served upon Donald J. McTigue, 545 E. Town Street, Columbus, Ohio 43215, dmctigue@electionlawgroup.com, Counsel of Record for Relators, and Bridget C. Coontz, Office of the Attorney General, 30 E. Broad Street, Columbus, Ohio 43215, bridget.coontz@ohioattorneygeneral.gov, Counsel of Record for Respondent. Relator further certifies that he has e-mailed copies of the Brief and supporting Evidence to the aforesaid at their listed e-mail addresses.

/s Mark R. Brown