In The
Ohio Supreme Court

REGINA C. ADAMS, et al.,	:	
	:	
Relators,	:	**Case No. 2021-1428**
	:	
v.	:	**Original Action Pursuant to**
	:	**Ohio Const., Art. XIX, § 3(A)**
GOVERNOR MIKE DEWINE, et al.,	:	
	:	**Redistricting Case**
Respondents.	:	

RESPONSE OF SECRETARY OF STATE FRANK LAROSE TO PETITIONERS' MOTION TO ENFORCE COURT ORDER

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Respectfully submitted,

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I. INTRODUCTION

Secretary of State LaRose is a party in this case in a very limited capacity: as Ohio's chief elections officer responsible for conducting party primary elections for the new, fifteen seat congressional district plan. *See Adams, et al. v. DeWine, et al.*, No. 2021-1428, December 3, 2021 Entry. In that capacity, he has been taking the necessary actions to implement the congressional district plan that has been adopted because the party primary elections for these races are still scheduled for May 3, 2022. For the reasons set forth in Ohio House Speaker Bob Cupp's and Ohio Senate President Matt Huffman's response to Petitioners' *Motion to Enforce*, he believes that the March 2, 2022, congressional district plan complies with the Ohio Constitution and should be implemented.

But Petitioners' other requests for relief are problematic. Because, ultimately, they are asking this Court to "enforce" Orders that it never made. True, on January 14, 2022, this Court invalidated the Ohio General Assembly's November 20, 2021 congressional plan and ordered it to pass a new one within thirty days that "complies in full with Article XIX of the Ohio Constitution and is not dictated by partisan considerations." *See Adams, et al. v. DeWine, et al*., 2022-Ohio-89, ¶ 102. But, that's it. To "enforce" *that* order with respect to the March 2 congressional district plan ("Plan") adopted pursuant to it would be to either: 1) declare that the new Plan "complies in full with Article XIX of the Ohio Constitution and is not dictated by partisan considerations[,]" or 2) declare that it does not, invalidate it, and require the General Assembly to enact a new one. Enforcing the January 14, 2022 Order would not—and does not—involve this Court staying election deadlines or adopting a new plan on its own. Especially, when Ohio law prevents this Court from doing either.

A. Only the General Assembly can alter election deadlines.

This Court did not issue any orders regarding the May 3, 2022 primary election deadlines. So, there are no such deadlines to "enforce" or move. Nonetheless, Petitioners ask this Court to "postpone relevant election deadlines" in light of the upcoming primary. *Motion to Enforce*, p. 35. They couch this request in injunction-like language, claiming that harm would occur "if elections were to proceed under an unconstitutional map." *Id.* For starters, the Secretary has no intention of proceeding with party primary elections for congressional seats on May 3, 2022 if this Court invalidates the recently adopted congressional district map. But until and unless the Petitioners prove beyond a reasonable doubt that the March 2 Plan is unconstitutional, there is no presumption that the alleged harm will occur. *Adams*, 2022-Ohio-89 at ¶ 27, citing *Ohio Renal Assn. v. Kidney Dialysis Patient Protection Amendment Commt.*, 154 Ohio St.3d 86, 2018-Ohio-3220, 111 N.E.3d 1139, ¶ 26; *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 20. This Court's decision regarding the March 2 Plan will be dispositive of that issue. If it declares the Plan constitutional, then an election will proceed on a constitutional map. On the other hand, if it invalidates the Plan and prohibits its use, the congressional party primaries will not be able to be held in conjunction with the May 3, 2022 primary election. Problem solved.

Finally, the cases Petitioners cite for the notion that federal courts may move election deadlines are simply inapplicable here. *See Mot. to Enforce* at 36, citing *Upham v. Seamon*, 456 U.S. 37, 44 (1982); *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201, n.11 (1972); *Larios v. Cos,* 305 F.Supp.2d 1335, 1343 (N.D. Ga. 2004). This is not a federal case. The out-of-state cases that Petitioners cite are equally unhelpful as they fail to recognize one important aspect of *Ohio* law: Ohio Revised Code Section 3501.40. It provides "notwithstanding any other contrary provision of the Revised Code, no public official shall

cause an election to be conducted other than in the time, place, and manner prescribed by the Revised Code." R.C. 3501.40. In relevant portion, "'public official' means any elected or appointed officer, employee, or agent of the state[.]" *Id.* But even if that statute did not exist, here, the Petitioners have not raised any declaratory judgment claims related to R.C. 3501.40 or existing election dates for which they would be entitled to injunctive relief. *See generally Complaint.* Nor could they, because this Court lacks subject-matter jurisdiction over a claim for a prohibitory injunction which seeks to prevent future harm. *See State ex rel. Gaddell-Newton v. Husted*, 153 Ohio St.3d 225, 2018-Ohio-1854, 103 N.E.3d 809, ¶ 13.

Simply put, in Ohio, only the General Assembly can alter election dates. Until and unless it does, the Secretary, Ohio's Boards of Elections, and this Court must proceed under the current election schedule. In order to prepare for the likely possibility that the May 3, 2022 primary election date will not move, the Secretary has been in contact with both the United States Department of Defense and the United States Department of Justice seeking a federally-approved solution to the March 19, 2022 federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") deadline by which ballots must begin to be mailed to overseas and military voters. *See* R.C. 3511.04; *see also* Ex. A, March 7, 2022 letter from Secretary LaRose to the Ohio General Assembly. He has also asked the General Assembly to alter statutory election deadlines to permit the timely return of the UOCAVA ballots. *Id.* Interfering with that process now is unwarranted and likely unconstitutional.

B. Petitioners' request that this Court implement a plan should be denied.

The Petitioners correctly note that "[t]he Constitution…is the supreme law of this state." *Mot. to Enforce* at 26, *citing State ex rel. Ohio Gen. Assembly v. Brunner,* 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, ¶ 30. Our supreme law is clear as to who draws congressional district plans. It says, "the general assembly shall be responsible for the

redistricting of this state for congress." Ohio Const. Art. XIX., Sec. 1. If that plan is invalidated by this Court, the Ohio Constitution first vests the General Assembly with the authority to remedy the defects in the plan and if it fails to do so, that responsibility then falls to the Ohio Redistricting Commission. Ohio Const. Art. XIX, Sec. 3(B)(2). So, while Petitioners' request that the parties continue to do what they have done—submit supplemental maps and briefs—is constitutional, its request that this Court implement its own plan is not. *Compare Mot. to Enforce* at 39 *with id.* at 38. Still, four U.S. Supreme Court Justices—enough to grant *certiorari*—recently signaled their willingness to decide next Term whether the federal Constitution's Elections Clause, *see* U.S. Const., Art. I, Sec. 4, cl.1, limits the power of state courts to review or redraw state congressional maps. *See Moore v. Harper*, 595 U.S. __, No. 21A455, 2022 U.S. LEXIS 1442 at *1-2 (Mar. 7, 2022) (Kavanaugh, J., concurring in denial of application for stay); *id*. at *2-7 (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting from the denial of application for stay).

The Secretary of State, Ohio's 88 boards of elections, candidates, and voters need a congressional district map. But, that need does not trump the Ohio Constitution, which provides that the congressional district plan must, in the first instance, be drawn by the Ohio General Assembly. Petitioners' request for this Court to implement its own plan must be denied.

II. CONCLUSION

Secretary LaRose will administer the 2022 congressional primary and general elections in accordance with a constitutional congressional district plan. But, he cannot agree to the relief requested by the Petitioners which violates Ohio law, as Petitioners' requests to enjoin election deadlines and for a Court-ordered map do. For the reasons set forth in Senator Huffman's and Speaker Cupp's response to Petitioners' *Motion to Enforce*, the March 2 congressional district plan should be upheld and the inclusion of party primary elections for the fifteen congressional

districts in conjunction with the scheduled May 3, 2022, primary election should proceed accordingly.

Respectfully submitted,

OHIO ATTORNEY GENERAL

/s/ Bridget C. Coontz

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Response Of Secretary Of State Frank Larose To Petitioners' Motion To Enforce Court Order* was sent via email this 7th day of March, 2022 to the following:

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Exhbit A

Letter from Secretary of State LaRose dated March 7, 2022

Frank LaRose
Ohio Secretary of State

March 7, 2022

Honorable Mike DeWine
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Honorable Matt Huffman
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Honorable Kenny Yuko
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Dear Colleagues:

As you know, the lengthy litigation over a new district plan for the General Assembly has made it impossible for our county boards of elections to be able to mail ballots to overseas military voters beginning on March 19, 2022, (45 days before the May 3, 2022, primary election) as required by federal law under the Uniformed and Overseas Citizens Absentee Act (UOCAVA). For that reason, we applied to the U.S. Department of Defense, as is permitted under federal law, for a waiver of the 45-day requirement. The Department of Defense denied our request last week to extend that deadline for the delivery of ballots.

Their decision, dated March 4, 2022, recognizes that Ohio faces an "undue hardship on the grounds that the State has suffered a delay in generating ballots due to a legal contest, prohibiting compliance with UOCAVA's requirement to transmit ballots at least 45 days prior to the May 3, 2022 primary election" but added that "Ohio's comprehensive plan [as outlined in the waiver application] does not provide UOCAVA voters sufficient time to receive and submit absentee ballots in time to be counted in the May 3, 2022 primary election."

In subsequent conversations over the weekend with the Department of Defense and the Department of Justice after their denial of our waiver application, I offered two new alternatives that would help us accommodate these voters, including measures expediting the delivery and the return receipt of military ballots and granting UOCAVA voters an additional 10-day extension of the Ohio statutory deadline by which UOCAVA ballots can be returned. Both actions require legislative approval, but the Department of Justice has agreed in principle that immediate favorable consideration by the General Assembly of these two items would avoid efforts by the federal government to seek a remedy for the State's failure to begin mailing

Exhibit A

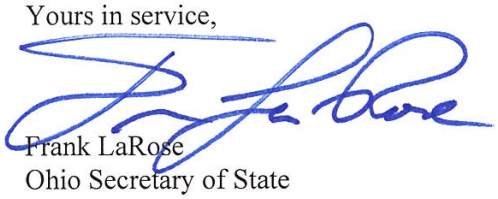
UOCAVA ballots on March 19. Therefore, I am formally appealing to the members of the General Assembly to enact emergency legislation granting my office the authority to:

1. Facilitate the expedited delivery and receipt of military ballots for the May 3, 2022 primary election, and
2. Extend by an additional 10 days (for a total of 20 days) the deadline by which UOCAVA ballots can be returned to a county board of elections.

Regardless of where we stand individually or collectively on litigation over Ohio's political districts, we should do everything in our power to ensure that our brave men and women serving overseas are not caught up in those disagreements and disenfranchised from having their voices heard in this upcoming election.

I am grateful for your partnership as we continue to navigate these unprecedented circumstances. As always, please consider me and my office a resource as we work together to give Ohio voters the secure, accurate, and accessible elections they expect and deserve.

Yours in service,



Frank LaRose
Ohio Secretary of State

Exhibit A