

**IN THE SUPREME COURT OF OHIO**

|   |   |                                 |
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| State of Ohio ex rel. Brian M. AMES                   | : |                                 |
| Relator   | : | CASE NO. 2022-0850              |
| vs.   | : | Original Action in Mandamus     |
|   | : | Expedited Election Matter Under |
| Ohio Secretary Secretary of State Frank LaRose et al. | : | S.C.Prac.R. 12.08               |
| Respondents   | : | Peremptory Writ Requested       |
|   | : |                                 |

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**REPLY BRIEF OF BRIAN M. AMES, RELATOR**

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## INTRODUCTION

Respondent Ohio Secretary of State Frank LaRose (“Secretary LaRose”) has filed a merit brief (“SOS Brief”) but no evidence. Secretary LaRose has instead referenced the evidence Mr. Ames filed with his brief. Respondent Summit County Board of Elections (“Summit County”) has filed a merit brief (“Summit Brief”) with evidence consisting of two exhibits: A. The May 27, 2022, Order from Federal Case *Gonidakis v. Larose*, No. 2:22-cv-0773, (S.D. Ohio May 27, 2022); and B. Ohio Secretary of State Directive 2022-32. Respondent Portage County Board of Elections (“Portage County”) has filed a merit brief (“Portage Brief”) but no evidence. Portage County concurs with and defers to the statement of facts in the SOS Brief. Portage Brief p. 1. Respondent Geauga County Board of Elections (“Gauga County”) has filed a merit brief (“Gauga Brief”) with evidence consisting of eight exhibits: A. Ohio Secretary of State Directive 2022-31; B. Ohio Secretary of State Directive 2022-32; C. The May 27, 2022 Order from Federal Case *Gonidakis v. Larose*, No. 2:22-cv-0773, (S.D. Ohio May 27, 2022); D. Ohio Secretary of State Directive 2022-34; E. Affidavit of Geauga County Board of Elections Director Michelle Lane; F. Ohio Secretary of State Directive 2022-33; G. Ohio Secretary of State Directive 2022-13, Pages 288-289; and H. A copy of the Portage County Board of Elections Official Canvass from the May 3, 2022 primary election.

Among all of Respondents Briefs but three arguments are made: 1) Mr. Ames’ claims are barred by laches, 2) Mr. Ames lacks standing, 3) Mr. Ames cannot satisfy the elements necessary for a writ of mandamus. 1) SOS Brief p. 5, Summit Brief p. 2, Portage Brief p. 2 Gauga Brief p. 3; 2) SOS Brief p. 7; and 3) SOS Brief p. 10, Summit Brief p. 2, Gauga Brief p.3; respectively.

All briefing for this expedited election case will be completed with the filing of this brief.

## STATEMENT OF FACTS

### **A. The Redistricting Impasse is not the cause of the unprecedented removal of the Severed Contests from the May 3 ballot.**

In his statement of facts, Secretary LaRose recites the history of the redistricting controversy as if it were relevant to the specific claims Mr. Ames. It is not. Secretary LaRose has not pointed to any court that ordered him to sever the primary ballots for a very simple reason: there is none. See *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, \_\_ Ohio St.3d \_\_, 2022-Ohio-65, \_\_ N.E.3d \_\_, (“League I”); *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, \_\_ Ohio St.3d \_\_, 2022-Ohio-342, \_\_ N.E.3d \_\_ (“League II”); *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, \_\_ Ohio St.3d \_\_, 2022-Ohio-789, \_\_ N.E.3d \_\_, (“League III”); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, \_\_ Ohio St. 3d \_\_, 2022-Ohio-1235, \_\_ N.E.3d \_\_ (“League IV”) *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, \_\_ Ohio St. 3d \_\_, 2022-Ohio-1727, \_\_ N.E.3d \_\_ (“League V”). If there were any evidence that court ordered Secretary LaRose to sever the primary ballots, he most assuredly would have produced it for this Court’s consideration. However, Secretary LaRose has produced no such evidence.

All four respondents seek to implicate a federal panel as the origin of the “second primary”. *Gonidakis v. LaRose*, \_\_ F.Supp. \_\_, 2022 U.S. Dist. LEXIS 72172 (S.D.Ohio April 20, 2022) (“*Gonidakis I*”); *Gonidakis v. LaRose*, \_\_ F.Supp. \_\_, 2022 U.S. Dist. LEXIS 95341, (S.D.Ohio May 27, 2022) (“*Gonidakis II*”). Secretary LaRose asserts in his brief that “[i]n the [*Gonidakis I*] order, the *Gonidakis* panel found that Ohio could not hold a primary election for its state legislature on May 3.” SOS Brief p. 3. That assertion is factually incorrect. What the *Gonidakis* panel did was observe that “[b]y now everyone agrees that legal and practical requirements preclude Ohio from holding a primary election for its state legislature on May 3, the date provided by statute.” *Gonidakis I* p. 2. It did not conclude that the ballot should be severed and



did not order such. Rather, it stayed its hand to give Ohio's elected leaders still another chance to approve a lawful map or change Ohio election laws and deadlines:

The Ohio Supreme Court's latest opinion also asked us to wait a bit longer. It surmised that either the Ohio legislature or this court could change Ohio's election laws to allow for a primary even later than August 2. That is only half right: Ohio's elected leaders might still approve a lawful map or change Ohio election laws and deadlines, and our choice of remedy is designed to give them still another chance to do so. But the record evidence makes clear that this court cannot wait any later than May 28 without jeopardizing the right to vote, overriding a host of state election laws and deadlines, and inviting the electoral chaos and confusion that the U.S. Supreme Court has repeatedly instructed lower courts to avoid. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). As of today, no map exists, uncertainty persists, and nothing ensures that a state-legislative election will happen at all. This court's intervention, however, can restore a lawful and orderly election by ensuring Ohio voters, candidates, and officials know the districts that will apply—at least as a last resort.

*Gonidakis I* p. 3.

Since the ballot was severed on March 23, 2022 by Directive 2022-31, *Gonidakis II* issued on May 27, 2022, more two months later, could not possibly have ordered the removal of the Severed Contests from the May 3 ballot.

**B. Facts not in evidence.**

No respondent has introduced into evidence any notice to the public that voters would be permitted to request a ballot for either major political party regardless of their participation in the May 3, 2022 election (the “Double Open”). No respondent has introduced into evidence any affidavit of a person who swears that they notified the public in general or Mr. Ames specifically that the Double Open would be in effect. No respondent has introduced into evidence the existence of any subscription service, such as that provided by this Court on its website, whereby the public could subscribe for notification of the issuance of directives by Secretary LaRose. No respondent has introduced into evidence the existence of any other method whereby the public may be reasonably informed of the conditions and consequences of voting in an election prior to

arriving at the poll.<sup>1</sup>

## **LAW AND ARGUMENT**

### **A. The Doctrine of Laches does not apply.**

Each respondent argues that Mr. Ames’ claims are barred by laches. (SOS Brief p. 5, Summit Brief p. 2, Portage Brief p. 2, and Geauga Brief p. 3.) Mr. Ames will respond to all four with a single argument.

In election cases, a relator must act with the utmost diligence, and laches may bar relief in an election matter if the person seeking relief fails to act with such diligence. *State ex rel. Jones v. LaRose*, Slip Opinion No. 2022-Ohio-2445, ¶ 11, citing *State ex rel. Syx v. Stow City Council*, 161 Ohio St.3d 201, 2020-Ohio-4393, 161 N.E.3d 639, ¶ 11, and *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 137 Ohio St.3d 62, 2013-Ohio-4490, 997 N.E.2d 524, ¶ 30. “Extreme diligence and promptness are required in election-related matters,” and if a party “seeking extraordinary relief in an election-related matter fails to exercise the requisite diligence, laches may bar the action.” *State ex rel. Comm. for the Charter Amendment, City Trash Collection v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, 776 N.E.2d 1041, ¶ 16 (quotations omitted); see also *State ex rel. Carberry v. Ashtabula*, 93 Ohio St.3d 522, 523, 757 N.E.2d 307 (2001); *State ex rel. Hills Communities, Inc. v. Clermont Cty. Bd. of Elections*, 91 Ohio St.3d 465, 467, 746 N.E.2d 1115 (2001). Thus, a delay in filing expedited election claims may constitute laches, thereby “precluding a consideration of the merits of the claims.” *State ex rel. Valore v. Summit Cty. Bd. of Elections*, 87 Ohio St.3d 144, 146, 718 N.E.2d 415.

Laches may apply where four elements are met: (1) an unreasonable delay or lapse of time in asserting a right; (2) the absence of an excuse for the delay; (3) the knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. See *State ex rel. Polo v.*

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<sup>1</sup> This court has before it *State ex rel. Cunnane v. LaRose*, case no. 2022-0918, concerning two relators who were not informed that there were no issues to be voted on and hence no issues-only ballot could be offered to them.

*Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995).

Secretary LaRose asserts that “[Mr.] Ames knew or should have known by May 28, 2022, when Secretary LaRose issued Directive 2022-34, that voters could request a ballot for either major political party regardless of their participation in the May 3 primary.” SOS Brief p. 5. As discussed above, no respondent has introduced evidence to support Secretary LaRose’s assertion. The Respondents laches arguments in there entireties ask this Court to consider facts not in evidence.

Any delay in bringing this case results solely from the failure of Secretary LaRose to provide for public notice of his unprecedented decision to permit electors to vote a different party’s ballot in August than in May, which first appeared on May 28, 2022 in Directive 2022-34 . That lack of notice effectively concealed the Double Open from the public until Mr. Ames made his inquiry. Since there was only a de minimis delay on the part of Mr. Ames, the doctrine of laches is inapplicable.

There is no unreasonable delay or lapse of time in Mr. Ames asserting his rights. The period of time between Mr. Ames’ discovery that electors were being allowed to vote a different party’s ballot in August than in May is measured in hours rather than days. The reply from the Portage County was sent on Friday, July 8, 2022 at 11:22am. Exhibit 2, (REL\_EVID\_05). The reply from Secretary LaRose’s office was sent on Friday, July 8, 2022 at 12:24pm. Exhibit 1, (REL\_EVID\_04). Mr. Ames’ complaint was filed that same day, July 8, 2022. Compl. page 1. The doctrine of laches clearly does not apply here.

## **B. Standing.**

“Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim.” *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 9. “A party lacks standing to invoke the jurisdiction of the court unless [it] has, in an

individual or representative capacity, some real interest in the subject matter of the action.” *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 298 N.E.2d 515 (1973), syllabus. To have standing in a mandamus case, a relator must be “beneficially interested” in the case. *State ex rel. Spencer v. E. Liverpool Planning Comm.*, 80 Ohio St.3d 297, 299, 685 N.E.2d 1251 (1997). “[T]he applicable test is whether [the] relators would be directly benefitted or injured by a judgment in the case.” *State ex rel. Sinay v. Soddors*, 80 Ohio St.3d 224, 226, 685 N.E.2d 754 (1997). “as a general principle, resident electors and taxpayers have standing to bring mandamus actions to enforce public duties in election matters,” *State ex rel. Barth v. Hamilton Cty. Bd. Of Elections*, 65 Ohio St.3d 219, 221-222, 602 N.E.2d 1130 (1992).

Secretary LaRose is the chief elections officer for Ohio, as set forth in R.C. 3501.04:

The secretary of state is the chief election officer of the state, with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV of the Revised Code. He shall perform these duties, in addition to other duties imposed upon him by law, without additional compensation.

R.C. 3501.05 imposes specific duties on Secretary LaRose as follows:

The secretary of state shall do all of the following:

(A) Appoint all members of boards of elections;

(B) Issue instructions by directives and advisories in accordance with section 3501.053 of the Revised Code to members of the boards as to the proper methods of conducting elections.

(C) Prepare rules and instructions for the conduct of elections;

(D) Publish and furnish to the boards from time to time a sufficient number of indexed copies of all election laws then in force;

\* \* \*

(G) Determine and prescribe the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and forms and blanks required by law for use by candidates, committees, and boards;

\* \* \*

(M) Compel the observance by election officers in the several counties of the requirements of the election laws;

(N)(1) Except as otherwise provided in division (N)(2) of this section, investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of election laws to the attorney general or prosecuting attorney, or both, for prosecution;

(2) On and after August 24, 1995, report a failure to comply with or a violation of a provision in sections 3517.08 to 3517.13, 3517.20 to 3517.22, 3599.03, or 3599.031 of the Revised Code, whenever the secretary of state has or should have knowledge of a failure to comply with or a violation of a provision in one of those sections, by filing a complaint with the Ohio elections commission under section 3517.153 of the Revised Code.

\* \* \*

(P) Prescribe and distribute to boards of elections a list of instructions indicating all legal steps necessary to petition successfully for local option elections under sections 4301.32 to 4301.41, 4303.29, 4305.14, and 4305.15 of the Revised Code;

\* \* \*

(U) Adopt rules pursuant to section 111.15 of the Revised Code for the purpose of implementing the program for registering voters through boards of elections, designated agencies, and the offices of the registrar and deputy registrars of motor vehicles consistent with this chapter;

\* \* \*

(W) Establish and maintain a computerized statewide database of all legally registered voters under section 3503.15 of the Revised Code that complies with the requirements of the "Help America Vote Act of 2002," Pub. L. No. 107-252, 116 Stat. 1666, and provide training in the operation of that system;

\* \* \*

(Z) Conduct voter education outlining voter identification, absent voters ballot, provisional ballot, and other voting requirements;

\* \* \*

(BB) Disseminate information, which may include all or part of the official explanations and arguments, by means of direct mail or other written publication, broadcast, or other means or combination of means, as directed by the Ohio ballot board under division (F) of section 3505.062 of the Revised Code, in order to inform the voters as fully as possible concerning each proposed constitutional amendment, proposed law, or referendum;

(CC) Be the single state office responsible for the implementation of the "Uniformed and Overseas Citizens Absentee Voting Act," Pub. L. No. 99-410, 100 Stat. 924, 42 U.S.C. 1973ff, et seq., as amended, in this state. The secretary of state may delegate to the boards of elections responsibilities for the implementation of that act, including responsibilities arising from amendments to that act made by the "Military and Overseas Voter Empowerment Act," Subtitle H of the "National Defense Authorization Act for Fiscal Year 2010," Pub. L. No. 111-84, 123 Stat. 3190.

(DD) Adopt rules, under Chapter 119. of the Revised Code, to establish procedures and standards for determining when a board of elections shall be placed under the official oversight of the secretary of state, placing a board of elections under the official oversight of the secretary of state, a board that is under official oversight to transition out of official oversight, and the secretary of state to supervise a board of elections that is under official oversight of the secretary of state.

(EE) Perform other duties required by law.

Whenever a primary election is held under section 3513.32 of the Revised Code or a special election is held under section 3521.03 of the Revised Code to fill a vacancy in the office of representative to congress, the secretary of state shall establish a deadline, notwithstanding any other deadline required under the Revised Code, by which any or all of the following shall occur: the filing of a declaration of candidacy and petitions or a statement of candidacy and nominating petition together with the applicable filing fee; the filing of protests against the candidacy of any person filing a declaration of candidacy or nominating petition; the filing of a declaration of intent to be a write-in candidate; the filing of campaign finance reports; the preparation of, and the making of corrections or challenges to, precinct voter registration lists; the receipt of applications for absent voter's ballots or uniformed services or overseas absent voter's ballots; the supplying of election materials to precincts by boards of elections; the holding of hearings by boards of elections to consider challenges to the right of a person to appear on a voter registration list; and the scheduling of programs to instruct or reinstruct election officers.

\* \* \*

Secretary asserts that "this action does not involve the enforcement of a public duty." SOS Brief p. 8. Clearly Secretary LaRose has a duty to ensure the proper conduct of an election according to the law. R.C. 3501.05(B)(C)(M)(N)(P) and others.

It is not reasonable to hold that Mr. Ames, all other electors and candidates, and the public in general would not directly benefit from Secretary LaRose being compelled to perform his duties

in compliance with the law. Therefore, this Court must hold the Mr. Ames has standing.

**C. Mr. Ames can satisfy the elements necessary for a writ of mandamus.**

It is well established that relief in the form of mandamus is extraordinary relief. See, e.g., *State ex rel. Rashada v. Pianka*, 112 Ohio St.3d 44, 2006-Ohio-6366, 857 N.E.2d 1220, ¶ 2.

To prevail in this mandamus case, [a relator] must establish a clear legal right to the requested relief, a clear legal duty on the part of Secretary [LaRose] to provide it, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6. [A relator] must prove that he is entitled to the writ by clear and convincing evidence. *Id.* at ¶ 13. *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 13. “[A]ll three of these requirements must be met in order for mandamus to lie.” *State ex rel. Kirtz v. Corrigan*, 61 Ohio St.3d 435, 438, 575 N.E.2d 186 (1991). “Clear and convincing evidence is that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases.” (Quotations omitted.) *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 54. Stated differently, the burden of proof is on the relator to “demonstrate that there is plain, clear, and convincing evidence which would require the granting of the writ.” (Quotations omitted.) *Id.* at ¶ 55.

It is undisputed that Mr. Ames has been certified to the ballot as a candidate for the Republican State Central Committee for the 28th District. It is undisputed that, had Secretary LaRose not severed the 2022 primary ballot, a valid primary would have concluded soon after the issuance of *Gonidakis II* by the federal panel on May 27, 2022. It is undisputed that there is no adequate remedy in the ordinary course of the law. The evidence is overwhelming. The issuance of a peremptory writ of mandamus is both necessary and proper.

**D. The question of party affiliation.**

Both Respondents Portage County and Geauga County argue that “[p]arty affiliation in Ohio is purely a matter of self-identification, and that self-identification is subject to change.” *State ex rel. Stevens v. Fairfield Cty. Bd. of Elections*, 152 Ohio St.3d 584, 2018-Ohio-1151, 99 N.E.3d 376, ¶ 20. The question here is how often may it change?

**State ex rel. Stevens v. Fairfield Cty. Bd. of Elections**

Stevens filed a petition to appear on the May 8, 2018 primary ballot as a candidate for the Ohio Democratic Party State Central Committee, as Member for the 20th Senate District. On February 15, 2018, the board voted three to zero, with one abstention, to deny Stevens access to the ballot because, according to the meeting minutes, “his voting history did not show he was a member of the Democratic Party.” *Stevens* ¶ 2. Stevens had not voted in the in a primary election in 2016 or 2017. *Stevens* ¶ 14. The board agreed that R.C. 3513.05 sets out the correct standard for determining party membership under R.C. 3517.03, but rejected Stevens’s argument that the two clauses in the statute should be read disjunctively. *Stevens* ¶ 15. R.C. 3513.05, paragraph 7 states:

For purposes of signing or circulating a petition of candidacy for party nomination or election, an elector is considered to be a member of a political party if the elector voted in that party’s primary election within the preceding two calendar years, or if the elector did not vote in any other party’s primary election within the preceding two calendar years.

The *Stevens* court considered only elections in different calendar years. *Stevens* ¶¶ 19, 21. There is nothing to support a determination of party affiliation more often than once each calendar year. Secretary LaRose has not proposed a method for doing so and the General Assembly has not enacted one.

**E. Respondents have not directly opposed Mr. Ames’ arguments made in his brief.**

Most notable is the absence any argument contra Mr. Ames’ argument that Secretary LaRose



has violated R.C. 3501.40 by severing the primary ballot. Nor has any respondent discussed the statutes that depend on an unambiguous determination of party affiliation.

### **CONCLUSIONS**

The current state of the conduct of Ohio's primary elections is desperate. The public may reasonably question the ability of Ohio to conduct a free and fair primary election, a hallmark of a robust representative government, given the lawless conduct of the 2022 primary. The lack of confidence in primary elections encourages the return to Tammany Hall politics where Boss Tweed predetermines who appears on the primary ballot. That is contrary to the purpose of primary elections and inconsistent with the principles of good government. Only this Court stands to prevent the chaos that would ensue from a precedent that Ohio's chief election officer need not adhere to the law. It is proper for this Court to grant to Relator Brian M. Ames all the relief which he has requested.

Respectfully Submitted,



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### **PROOF OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of August, 2022 a true copy of the foregoing was, in accordance with Civ.R. 5(B)(2)(f), sent by electronic mail to:

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