

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

LEAGUE OF WOMEN VOTERS OF OHIO,  
OHIO A. PHILIP RANDOLPH INSTITUTE,  
LASHUNDA LEE, MUNIA MOSTAFA,  
AUDRIANNA VICTORIAN RODRIGUEZ, and  
HANNAH TUVELL,

*Plaintiffs,*

v.

FRANK LAROSE, in his official capacity as  
Secretary of State of Ohio,

*Defendant.*

CASE NO. 2:20-cv-1638

JUDGE MICHAEL H. WATSON

Magistrate Judge Elizabeth Preston Deavers

**DEFENDANT OHIO SECRETARY OF STATE FRANK LAROSE'S  
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY  
RESTRAINING ORDER (DOC. 4)**

Respectfully submitted,

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**DEFENDANT OHIO SECRETARY OF STATE FRANK LAROSE’S**  
**MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION FOR TEMPORARY**  
**RESTRAINING ORDER (DOC. 4)**

Defendant Ohio Secretary of State Frank LaRose (“Secretary LaRose”), through counsel, respectfully submits for his response to Plaintiffs’ Motion for a Temporary Restraining Order (Doc. 4), the following:

**I. INTRODUCTION**

The unprecedented fight to stop the spread of COVID-19 has upended much of our lives. Ohioans have been ordered to stay at home except when conducting essential activities. We must maintain social distancing of at least six feet from any other person, and we must not gather together in groups larger than ten people. Other businesses that are very important to people such as restaurants, bars, fitness gyms, and other places of public amusement where people gather together are shuttered. All K-12 schools are closed. Ohioans have had to postpone cherished events like high school proms, baby showers, and family reunions. It is no wonder that our presidential primary election has been impacted in ways few people ever expected.

Ohio’s presidential primary elections are set by statute. Revised Code 3501.01 defines a presidential primary election as a primary election “at which an election is held for the purpose of choosing delegates and alternates to the national conventions of the major political parties pursuant to section 3513.12 of the Revised Code.” R.C. 3501.01(E)(2). The Revised Code further specifies that when “a presidential primary election is held, all primary elections shall be held on the third Tuesday after the first Monday in March except as otherwise authorized by a municipal or county charter.” *Id.* In 2020, the third Tuesday after the first Monday in March fell on March 17, 2020.

As March 17 approached, so too did the novel coronavirus named COVID-19. COVID-19, a new strain of coronavirus that had not been previously identified in humans, is a respiratory

disease that can result in serious illness or death. *See* Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio, available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limit-and-or-prohibit-mass-gatherings-in-the-state-of-ohio>. The Director of the Ohio Department of Health, Dr. Amy Acton, announced the first cases of COVID-19 on March 9, 2020, just over a week before the scheduled primary. *Id.* Every day as the primary drew nearer, Dr. Acton announced more and more cases of COVID-19 throughout Ohio.

As the Director of the Department of Health, Dr. Acton has extremely broad authority to regulate the spread of infectious diseases like COVID-19. The Revised Code gives the Director of the Ohio Department of Health “supervision of all matters relating to the preservation of the life and health of the people,” including “ultimate authority in matters of quarantine and isolation.” R.C. 3701.13. The Director may also “make special or standing orders or rules . . . for preventing the spread of contagious or infectious diseases.” *Id.* And “[t]he director of health shall investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it.” R.C. 3701.14(A) (emphasis added).

Since March 12, 2020, Ohio Department of Health Director Dr. Acton has made necessary use of her authority to curb the spread of COVID-19 in Ohio. First, she issued an order prohibiting mass gathering in the State of Ohio pursuant to her authority under R.C. 3701.13. *See* Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio, available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limit-and-or-prohibit-mass-gatherings-in-the-state-of-ohio>. The order seeks to “prevent the spread of COVID-19 into the State of Ohio” by prohibiting mass gatherings. It defines a mass gathering as

“any event or convening that brings together one hundred (100) or more persons in a single room or single space at the same time, such as an auditorium, stadium, arena, large conference room, meeting hall, theater, or any confined indoor or outdoor.”<sup>1</sup> The order urged all persons to “maintain social distancing (approximately six feet away from other people) whenever possible.” *Id.*

As the threat mounted, the Director took more aggressive steps, including closing K-12 schools in Ohio (many of which serve as polling places) until April, and eliminating visitor access to nursing homes. *See* Order the Closure of all K-12 Schools in Ohio, *available at* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-the-closure-of-all-k-12-school-in-the-state-of-ohio>; Order to Limit Access to Ohio’s Nursing Homes and Similar Facilities, *available at* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limit-access-to-ohios-nursing-homes-and-similar-facilities>. Within days, these orders proved insufficient to slow the spread of COVID-19 in Ohio. So, on Sunday March 15, the Director closed restaurants for dine-in customers and shuttered Ohio’s pubs and bars. Order Limiting the Sale of Food and Beverages, Liquor, Wine, and Beer to Carry-Out and Delivery Only, *available at* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/health-director-order-limit-food-alcohol-sales-to-carry-out-delivery-only>.

Each one of the Director’s Orders reiterated the need to maintain social distancing of six feet from other persons. The Orders also noted that while the coronavirus is most contagious when carriers are symptomatic, spread can occur before a carrier shows symptoms. As the March 17,

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<sup>1</sup> As the virus spread, Dr. Acton later revised the definition of mass gatherings down to fifty or more people. *See* Amended Order, *available at* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limit-prohibit-mass-gatherings-ohio-amended>. The Centers for Disease Control and Prevention recommends that gatherings and events of any size in communities with substantial spread be canceled. *See* CDC, “Resources for Large Community Events & Mass Gatherings,” *available at* <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html>.

2020, presidential primary election approached, it became apparent that these coronavirus characteristics posed obvious risks to in-person voting, where asymptomatic virus carriers entering the polling places across the state to vote or work the polls could spread the virus to voters and poll workers. Secretary LaRose instructed the boards of election to mitigate these risks by sanitizing the voting machines and pledged to reimburse the boards for any supplies purchased for this purpose. *See* Press Release, available at <https://www.sos.state.oh.us/media-center/press-releases/2020/2020-03-132/>.

Even prior to that, Secretary LaRose had taken an extraordinary step to try to mitigate the risk of COVID-19 spread to a particularly vulnerable population – our senior citizens. On March 9, just eight days prior to the primary election, he instructed the county boards of elections to relocate any polling locations that were to be housed within senior residential living facilities. *See* Directive 2020-03 available at [www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-03.pdf](http://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-03.pdf). Secretary LaRose took this proactive step because individuals over the age of 65 are at an especially high risk of suffering more severe illness or even death due to COVID-19. Secretary LaRose also instructed the county boards of election to make greater use of so-called “curbside voting” and pledged to reimburse the boards for any expenses they incurred in procuring hand sanitizer, sanitizing wipes, and other disinfecting products. *See Secretary of State Directive 2020-05* attached as **Exhibit 1**.

On the afternoon of March 16, 2020 – the day before the primary election – Governor DeWine, Dr. Acton, and Lieutenant Governor Jon Husted held what has since become a daily 2:00 P.M. press conference. Despite hearing from the public health professionals as late as Sunday, March 15 that it was still safe to have in-person voting on March 17, on the morning of Monday, March 16 that changed. *See* Doc. 4-4. Secretary LaRose participated in this press conference



because of what the Governor and Dr. Acton were going to announce at that press conference. For the first time since the COVID-19 outbreak began, Dr. Acton and Governor DeWine recommended that Ohioans over the age of 65 *not* appear in person at the polls for Ohio’s March 17, 2020 primary. See 3-16-20 COVID-19 Update, available at <http://ohiochannel.org/collections/governor-mike-dewine>. A press release from Secretary LaRose’s Office followed, noting that while pre-March 16 guidance “indicated it would be safe to vote on election day . . . , new information has led ODH to recommend Ohioans who are 65 and older to self-quarantine in their homes.” Press Release, available at <https://www.sos.state.oh.us/media-center/press-releases/2020/2020-03-16/>. This virus is fifteen times more likely to be fatal for vulnerable populations, which includes those over the age of 65.

Without some state intervention, the election would have proceeded in a matter of hours, bringing hundreds of voters together in small polling places across the State. Many of these voters might have already had COVID-19 without showing symptoms and thus had the potential to widely spread COVID-19 among the voting population, and beyond. Proceeding with the primary had one clear result: exposing millions of Ohio voters and their families to COVID-19. Finding the increased risk of transmission of COVID-19 medically untenable, the Director issued the following order late Monday evening:

Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions, I hereby **ORDER** all polling locations in the State of Ohio **closed** on March 17, 2020. This Order shall take effect immediately and remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

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

When Director Acton issued her order on the evening of March 16, the time for requesting an absentee ballot had passed. For most voters, Saturday, March 14, 2020, was the deadline to request an absentee ballot by mail. R.C. 3509.03(D).<sup>2</sup> Likewise, early in-person voting at the county boards of elections had concluded at 2:00 P.M. earlier that day. R.C. 3509.051; Directive 2019-28 § 1.04. Due to the Director's Order, Ohio's polling places could not open at 6:30 A.M. on March 17, 2020, as contemplated by R.C. 3501.01(E)(2) and R.C. 3501.32(A). While Ohio provides multiple options for voting, including liberal periods for early in-person and absentee voting, in the last three presidential primary elections, nearly 85% of Ohio voters still chose to vote in person at their assigned polling location on election day. *Declaration of Grandjean* attached as **Exhibit 2**, ¶ 41.

Thus, registered Ohio voters who had not cast absentee ballots – either by mail or in person – and who planned to vote at their polling place on election day had no remaining alternative method to vote. As of March 16, just 523,522 of the 7,776,063 Ohioans who were registered to vote in the 2020 presidential primary had voted. *Id.* at ¶¶ 16, 31. This left up to 7.2 million registered Ohio voters, through no fault of their own, without a way to vote.

Faced with the very real prospect of disenfranchising up to 7.2 million voters due to the COVID-19 virus, Secretary LaRose acted. Unfortunately Ohio, unlike several other states, has no procedure or mechanism in the Revised Code for an election to be extended, postponed, or rescheduled by an executive officer of the state in the event of an unforeseen public health crisis,

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<sup>2</sup> Unexpectedly hospitalized voters can request absentee ballots until 3:00 P.M. on election day. R.C. 3509.08.

natural disaster, or emergency declared on or just before a scheduled election day.<sup>3</sup> *See, e.g.*, Ky. Rev. Stat. § 39A.100(1)(l); La. Rev. Stat. § 18:401.1.A. Secretary LaRose is the Chief Election Officer for the State of Ohio. 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 may issue directives to the boards of elections “as to the proper methods of conducting elections” and to “prepare rules and instructions for the conduct of elections.” R.C. 3501.05(B)-(C). Further, the Secretary, like every elected official, took an oath of office in which he swore to “support the constitution of the United States and the constitution of [Ohio,] and faithfully to discharge the duties of the office.” R.C. 3.23. He also must instruct the boards of elections on the applicable requirements of federal law. *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 2011-Ohio-35, 941 N.E.2d 782, ¶ 37. In the absence of emergency authority to change an election date from the General Assembly, these statutory duties obligated Secretary LaRose to issue a directive to prevent widespread, and unprecedented, disenfranchisement.

After Dr. Acton issued her Order at approximately 10:00 P.M. on March 16 closing all the polling locations the next day, Secretary LaRose used these powers a few minutes later on the evening of March 16 to issue Secretary of State Directive 2020-06, which suspended in-person voting in the primary election until June 2, 2020. *See* Directive 2020-06, available at <https://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-06am.pdf>. *Directive 2020-06* attached as **Exhibit 3**. The Secretary ordered the boards of election to “post notice on their websites, social media, at the board of elections, and at polling places that in-person voting for the March 17, 2020 Presidential Primary Election is suspended.” *Id.* Secretary LaRose ordered

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<sup>3</sup> Governor DeWine may change the date of an election under R.C. 161.09, which applies only in the event of an “attack” by a foreign power. The General Assembly has created no other emergency exceptions.

boards of elections to accept absentee ballot applications until Tuesday, May 26, 2020, and to count any absentee ballot postmarked by June 1, 2020, and received by the boards no later than June 12, 2020. The Directive included special instructions for UOCAVA absentee ballots and voters experiencing unforeseen hospitalizations. The Directive ordered the boards to “conduct in-person voting at polling locations in their county. The polls will open at 6:30 A.M. and close at 7:30 P.M. on Tuesday, June 2, 2020.” The Directive specifically prohibited boards “from tabulating and reporting any results until the close of polls on Tuesday, June 2, 2020,” and set forth a timeline for official canvassing “[c]onsistent with current law” and based upon the conclusion of in-person voting on June 2. Nothing in the Directive altered the March 17 primary election date, canceled it, or re-scheduled it. It is clear from the Directive that the actions Secretary LaRose directed the county boards of election to take were aimed at extending the time for voters to vote, much like when a judge orders Ohio polling locations to be kept open after the statutory closing time of 7:30 P.M. because an emergency or disaster disrupted voting in a county.

In the days that followed March 17, the Ohio General Assembly announced its intention to meet the week of March 23, 2020, to consider legislation to deal with a number of issues that have affected Ohioans during the current COVID-19 pandemic, including how to conclude the March 17 primary election. Secretary LaRose vigorously lobbied the General Assembly to adopt a plan to conclude the March 17 primary election that was based on his Directive 2020-06 and the knowledge of the logistical issues that the handful of states who conduct “vote by mail” elections have faced. *See* Secretary of State Frank LaRose March 21, 2020, Letter to All Members of the Ohio General Assembly. (Doc. 4-4). His plan was to have his office mail to every one of the approximately 7.2 million registered voters who were registered by February 18, 2020, (and thus, eligible to vote in the March 17 primary elections) and who had not already voted in the March 17

primary election an application to request an absentee ballot with a postage-paid return envelope included addressed to the particular voter's county board of elections. The Secretary's plan included reimbursing each of the 88 county boards of election for the postage costs they would incur by then sending an absentee ballot back to those registered voters who returned a completed application AND including with their ballot a postage-paid return envelope addressed to the voter's county board of elections. And finally, the Secretary's plan contemplated some form of limited in-person voting to accommodate those voters who need assistance in voting or those voters who have difficulty in receiving mail. The in-person voting opportunity would be had on June 2, 2020, provided that the Director of the Ohio Department of Health deemed it safe to have in-person voting. That date would also be the date the extended absentee voting period would end. June 2, 2020, was originally the last date that any state's primary election would be held in advance of the Democratic National Convention then scheduled to begin on July 13, 2020, and rescheduled for August 17, 2020.<sup>4</sup>

In the hope that the General Assembly would consider and pass a bill that contained his plan to conclude the March 17 primary election, Secretary LaRose had a bill draft prepared for the General Assembly's consideration, calling it the "Ohio Voters First Act." See draft of the "Ohio Voters First Act," Legislative Services Commission Bill Draft 1\_133\_2644-1 attached as **Exhibit 4**; Doc. 4-4. Ultimately, the General Assembly decided not to adopt the Secretary plan to conclude the March 17 election. The bill passed by the General Assembly on March 25, 2020, which was *unanimously* passed in both the House and the Senate, instead directs Secretary LaRose to mail an

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<sup>4</sup> Some states in which voting has not yet begun for their primary election have since rescheduled their elections to dates after June 2, 2020. For example, West Virginia rescheduled its primary election date from May 12 to June 9, 2020. See <https://abcnews.go.com/Health/wireStory/west-virginia-governor-reschedules-states-12-primary-election-69918754>

informational postcard to all of Ohio's registered voters informing them of the ways in which they can request an absentee ballot. *See* Sections 32-33 of Amended Substitute House Bill 197 ("H.B. 197"). The bill also provides for limited, in-person voting on April 28, 2020, and that the extended voting period for the March 17 primary election ends on the same day. *Id.* The bill includes an emergency clause, making it immediately effective upon the Governor's signature. Governor DeWine signed the bill on Friday, March 27, 2020.

Upon the General Assembly's passage of H.B. 197 on March 25, 2020 – and even before Governor DeWine signed the bill into law – Secretary LaRose rescinded his Directive 2020-06 as it was inconsistent with the elections-related provisions of H.B. 197. While the legislature had not adopted Secretary LaRose's preferred plan to conclude the March 17 primary election, the legislature had spoken. Secretary LaRose respects the role of the Legislature and recognizes H.B. 197 as the law of land. He is ready, willing, and able to fulfill his duties in compliance with H.B. 197, and indeed he and his team have been doing so ever since the bill was passed on March 25. They have already devoted countless, almost around-the-clock, hours to carrying out the provisions of H.B. 197 so that Ohioans may have an expeditious and orderly primary election.

Unfortunately, in this case the Plaintiffs seek to upend Ohio's primary once again. They disguise their own election policy preferences as federal constitutional mandates. They have failed as a threshold matter to show that H.B. 197 violates the state or federal constitution. They have failed to establish that this Court, or the judicial branch itself, is properly vested with the authority to usurp the legislature's power to enact election laws. As a practical matter, Plaintiffs' proposed package of remedies are unworkable from an administrative and logistical point of view – at odds with longstanding Ohio law and practice. The relief they seek would result in massive confusion

among voters and elections officials alike. A classic case of the cure being worse than the perceived disease.

## II. POSTURE OF THIS ACTION AND RESPONSE TO THIS COURT’S ORDER

On March 30, 2020, Plaintiffs filed this action naming Secretary LaRose as the only Defendant. (Doc. 1). The next day, Plaintiffs filed an Amended Complaint (“Am. Compl.”) and their Motion for a Temporary Restraining Order (“Motion”). (Doc. 4, 5). On March 31, 2020, this Court issued an Order recognizing Secretary LaRose “has already attempted to alleviate some of the alleged burdens associated with H.B. 197 by, *inter alia*, not requiring voters to submit the official ballot request form” and “is currently reviewing other ways to address Plaintiffs’ concerns.” (Doc. 14). This Court ordered Secretary LaRose to promptly respond to Plaintiffs’ Motion and address:

- a. ... [T]he State’s interests that justify the burden on voting rights imposed by the establishment of an April 28, 2020 deadline for absentee voting (as opposed to [Secretary LaRose’s] original suggestion of a June 2, 2020 deadline for absentee voting).
- b. ... [I]ts position regarding whether the writ of prohibition currently pending in the Supreme Court of Ohio has any impact on this litigation.

*Id.*

Secretary LaRose defers to the intervener, the State of Ohio, for an express response to this Court’s order to describe the State’s interests in implementing the aspects of H.B. 197 pertaining to the election. Secretary LaRose did not draft or enact the law, though he will dutifully abide by and carry the law into action. In response to this Court’s second directive: On March 31, 2020, the Supreme Court of Ohio dismissed that action before it as moot. Accordingly, the former action before the Supreme Court does not impact this matter.

### **III. PLAINTIFFS' PURPORTED CAUSES OF ACTION AND MOTION**

Plaintiffs' Amended Complaint sets forth two causes of action that are the subject of its Motion alleging the State's enactment of H.B. 197 pertaining to the current primary election violates: (1) Section 8 of the National Voter Registration Act ("NVRA" or "Act") (Count I), and (2) the First and Fourteenth Amendments of the U.S. Constitution (Count II). *Am. Compl.*, pp. 20-23. Plaintiffs seek substantially the same relief in their Amended Complaint as they do in their Motion.<sup>5</sup> Plaintiffs' Motion should be denied because (a) they have not met their burden as established herein and in the State of Ohio's response brief, and (b) the extraordinary relief they seek is not warranted or appropriate as discussed below.

### **IV. PLAINTIFFS' MOTION FAILS**

#### **A. Plaintiffs' Request for a Temporary Restraining Order fails**

##### **1. Likelihood of Success on the Merits**

"The party seeking a preliminary injunction bears the burden of justifying such relief." *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002); *see Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015) ("preliminary injunctions are extraordinary and drastic remedies... never awarded as of right").

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<sup>5</sup> Plaintiffs' Amended Complaint and Motion contain factual and legal inaccuracies beyond what is expressly addressed in this Memorandum. It is Secretary LaRose's intention to be brief and only address Plaintiffs' allegations to the extent necessary to inform this Court's decision on their Motion. Secretary LaRose does not accept or agree with Plaintiffs' allegations and arguments that are not specifically addressed herein and silence should not be construed as approval.



This Court considers four factors when deciding whether to issue a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). When plaintiffs mount a constitutional challenge, “the likelihood of success on the merits often will be the determinative factor” *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). Furthermore, “[a]s a general rule, last-minute injunctions changing election procedures are strongly disfavored.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5; 127 S.Ct. 5; 166 L.Ed.2d 1 (2006) (“Court orders affecting elections... can themselves result in voter confusion.... As an election draws closer, that risk will increase.”). Given the extraordinary, unforeseen circumstances that brought us to this time and place, the admonitions contained in *Purcell* are controlling in this action.

Plaintiffs are unable to demonstrate a likelihood of success on the merits in this action. To establish a likelihood of success on the merits, “a plaintiff must show more than a mere possibility of success.” *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997). A plaintiff must “establish a *substantial likelihood* or probability of success on the merits.” *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 635 (6th Cir. 2010) (emphasis added). Additionally, “all statutes are presumed constitutional, and the party challenging a statute bears the burden of proving otherwise.” *Doe v. Ronan*, 2009 WL 10679456, at \*2 (S.D. Ohio, 2009) (quoting *State v. Boczar*, 113 Ohio St. 3d 148, 150 (Ohio 2007)). A statute will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt. *Id.* As such, “courts have a duty to liberally construe statutes in order to save them from constitutional infirmities.”

*Eppley v. Tri-Valley Local School Dist. Bd. Of Educ.*, 122 Ohio St.3d 56, 59 (Ohio 2009). Here, H.B. 197 passed in the General Assembly unanimously with full bipartisan support and the bill was promptly signed into law by Governor DeWine to help address the COVID-19 crisis. As a duly enacted statute, H.B. 197 is “entitled to the benefit of every presumption in favor of its constitutionality.” *Wetland Preservation LTD. v. Corlett*, 975 N.E.2d 1033, 1038 (11<sup>th</sup> Dist 2012).

Furthermore, “[t]he Supreme Court’s approach to constitutional challenges to election regulations requires balancing a state’s ‘broad power’ to regulate elections against the fundamental rights of candidates and voters.” *Jolivette v. Husted*, 694 F.3d 760, 767 (6th Cir. 2012). The level of scrutiny applied to a state election regulation depends on the burden imposed by the regulation on the constitutional rights of voters and candidates. *See Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). In evaluating an election regulation against a constitutional challenge, the court “weigh[s] the character and magnitude of the burden the State’s rule imposes on citizens’ constitutional rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997).

**a. Plaintiffs have not demonstrated likelihood of success on Count I alleging an NVRA violation**

Count I of Plaintiffs’ Amended Complaint alleges that H.B. 197’s provision directing Secretary LaRose not to process voter registrations received after February 18, 2020 violates the NVRA. *Am. Compl.*, PAGEID #153. Plaintiffs are not likely to succeed on the merits of Count I because they cannot establish a violation of the Act.

R.C. 3501.01 defines a presidential primary election as a primary election “at which an election is held for the purpose of choosing delegates and alternates to the national conventions of

the major political parties pursuant to section 3513.12 of the Revised Code.” R.C. 3501.01(E)(2). The Revised Code further specifies that when “a presidential primary election is held, all primary elections **shall** be held on the third Tuesday after the first Monday in March except as otherwise authorized by a municipal or county charter.” *Id.* (emphasis added). Pursuant to Ohio law, primary election day is the third Tuesday after the first Monday in March. In this case, that is March 17, 2020 (“Election Day”). The enactment of H.B. 197 did not change Election Day. The date is fixed by law and can only be moved in the event of an attack by a foreign power (R.C. 161.09), with no exception for a pandemic. Secretary LaRose has been clear that the date of the election has not changed: “March 17 was primary election day, but a public health emergency necessitated the polls not open on Tuesday, effectively *extending* the March 17 election through June 2.” *Secretary of State Letter to Ohio General Assembly*; Doc. 4-4, PAGEID #90 (emphasis added).

Similarly, H.B. 197 does not fix a new date for Election Day. It specifically provides:

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

- (1) Count any ballots cast in the March 17, 2020, primary election, or in any special election held on the day of the primary election;
- (2) Release the count or any portion of the count of any ballots cast in the March 17, 2020, primary election, or in any special election held on the day of the primary election;
- (3) Process any voter registration application submitted after February 18, 2020.

H.B. 197, § 32. By its express terms, H.B. 197 does not fix a new date for the primary election; rather, because the polls were unavailable on March 17, 2020, the legislature held the polls open until April 28, 2020.

As such, Plaintiffs’ contention that H.B. 197 violates the NVRA by prohibiting the processing of voter registrations after February 18, 2020 is without merit. The NVRA provides:

(a) **IN GENERAL** In the administration of voter registration for elections for Federal office, each State shall—

(1) ensure that any eligible applicant is registered to vote in an election—

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, 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;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

52 U.S.C. § 20507. As noted above, Election Day did not change. H.B. 197’s prohibition against processing voter registrations received after February 18, 2020 is consistent with the NVRA.

Plaintiffs argue the February 18, 2020 date “sets the voter registration deadline *70 days* prior to the close of polls for Ohio’s 2020 Federal Primary Election.” *Motion*, PAGEID ## 48-49. Plaintiffs’ words are chosen carefully in an attempt to avoid the actual language of the NVRA. Plaintiffs wish to distract this Court and have it focus on when polls will close—this in and of itself is a tacit acknowledgement that H.B. 197 extends the date for polls to remain open and does not change Election Day, and the NVRA does not speak to the date polls close. The NVRA mandates processing of voter registrations received 30 days before the date of election. Plaintiffs are not reasonably likely to succeed on Count I of the Amended Complaint because they cannot establish that H.B. 197’s prohibition against processing registrations received after February 18, 2020 violates the NVRA.

Further, the authority cited by Plaintiffs does not support their claims or argument. Plaintiffs direct this Court to *NAACP v. Kemp*, No. 1:17-cv-1397, 2018 WL 2271244 (N.D. Ga. Apr. 11, 2018) and contend that the district court found a violation of the NVRA because the date of a special runoff election was more than 30 days after the original voter registration deadline set for the general election. *Motion*, PAGEID #49. The decision Plaintiffs cite, however, involved the plaintiff's request for attorneys' fees. *Id.* at \*1. The court previously granted the plaintiff's motion for preliminary injunction, but that was based on NVRA's definition of "runoff election" and the case settled shortly thereafter. *Kemp* simply does not stand for the proposition for which Plaintiffs cite.

Plaintiffs also cite *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427 (D. Ariz. Nov. 3, 2016), but it is of little import to this case. In *Reagan*, the Arizona Secretary of State set the voter registration deadline for October 10, 2016, the twenty-ninth day before the November 8, 2016 general election. *Id.* at \*13. On its face, that date complies with the 30-day requirement of the NVRA. However, that was a Monday, and post offices were closed on the Sunday before (October 9). October 10 also was Columbus Day. The Arizona Motor Vehicle Department ("MVD") was closed October 8 through October 10 for the weekend and the holiday and the court determined:

[I]n effect, the deadline to register by postmarked mail was Saturday, October 8, 2016 – 31 days before the election. The deadline to register in-person at the MVD was Friday, October 7, 2016 – 32 days before the election. The voter registration deadline therefore did not ensure that any applicant who registered to vote 'not later' than 30 days before November 8, 2016 was eligible to vote in the general election.

*Id.* In contrast to Ohio voters, certain Arizona voters were not provided 30 days prior to the election date to register. In Ohio, all voters were provided the opportunity to register on or before February 18, 2020.

Although discussed in the context of First and Fourteenth Amendment claims, the *Reagan* decision is instructive regarding the impact on voters who did not register by February 18, 2020.

The court stated:

Assuming that there was demonstrable number of individuals who did not register to vote on October 10, 2016 because it fell on a holiday, those voters cannot be said to have been disenfranchised by the Secretary's deadline... The deadline did not prevent individuals from registering to vote in-person at the MVD or by postmarked mail; it merely required those wishing to do so during open operating business hours at some date and time prior to October 10, 2016. The voters at issue here could have registered in time for the general election, but unfortunately did not do so.

*Id.* at \*9. Accordingly, relevant in this case: Any Ohio voter wishing to vote in the 2020 primary election could have registered by February 18, 2020. Any failure to do so was not caused by or the result of H.B. 197.

**b. Plaintiffs have not demonstrated likelihood of success on Count II alleging violation of the First and Fourteenth Amendments**

Intervener the State of Ohio is the more appropriate party to address Plaintiffs' assertions under Count II. Accordingly, Secretary LaRose defers to the State of Ohio response to Plaintiffs' Motion in substantial part.

Secretary LaRose will only briefly address Plaintiffs' reliance upon *Obama for Am. v. Husted*, 697 F.3d 423 ("*OFA*") in support of their claim that H.B. 197 is unconstitutional. *OFA* does not support Plaintiffs' position. The election law at issue in that case restricted the rights of all non-military members from in-person early voting in the three days leading to Election Day. *Id.* at 432. Plaintiffs state that the court upheld the preliminary injunction because of a "particularly high burden upon the estimated 100,000 voters" effected by the legislation. *Motion*, PAGEID ## 50-51. That does not accurately describe the court's holding. The court in *OFA* upheld the

injunction only because of the regulation's discriminatory application against non-military members:

If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters, its "important regulatory interests" would likely be sufficient to justify the restriction. *See Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. However, Ohio's statutory scheme is not generally applicable to all voters, nor is the State's justification sufficiently "important" to excuse the discriminatory burden it has placed on some but not all Ohio voters.

*OFA* at 433-434. Unlike the law at issue in that case, H.B. 197 applies to all Ohio voters equally. If anything, *OFA* supports the validity of H.B. 197 because Ohio has critical regulatory interests in planning through the immense logistical uncertainty caused by COVID-19. H.B. 197 is applied in a nondiscriminatory manner. Contrary to Plaintiffs' assertions that H.B. 197 may result in unintended discrimination, "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v State of Maryland*, 366 U.S. 425,426; 81 S. Ct. 1101; 6 L.Ed.2d 393 (1961).

In accordance with the foregoing and the State of Ohio's opposition, Plaintiffs fail to meet their burden to establish likelihood of success on the merits of their claim. Therefore, their Motion fails, should be denied, and the other elements of Plaintiffs' request for a temporary restraining order are moot. To the extent this Court continues its analysis, Secretary LaRose defers to the position of the State of Ohio regarding Plaintiffs claims that (a) they will suffer irreparable harm without the injunction, (b) issuance of an injunction will not cause substantial harm to others, and (c) the public interest is served by the issuance of an injunction.

**B. Plaintiffs' Requested Relief is Unwarranted, Unworkable, and Should be Denied**

Plaintiffs' Motion should also be denied because the nine aspects of Plaintiffs' requested relief are unwarranted, unworkable, and should not be implemented by extraordinary judicial action. Plaintiff's requests and reasons why they fail are as follows:

Request: (1) An order mandating that any qualified Ohio elector who submitted a voter registration application or updated their registration information between February 19, 2020, and 30 days prior to the day on which the 2020 primary election is set to conclude shall have their registration information processed and be permitted to vote in the 2020 primary election.

Response: This request is inconsistent with the law *before and after* H.B. 197. Even if COVID-19 did not create a public health crisis and H.B. 197 was not enacted, only those who were registered to vote by February 18, 2020 are eligible to vote in the 2020 primary election. Today's circumstances do not change that and there is no valid justification to disregard *prior and current Ohio law* and grant Plaintiffs' request that persons who submit voter registration applications or update their registration information after February 18, 2020 be deemed properly registered and permitted to vote in the 2020 primary election.

The Ohio Constitution, Article V, Section 1 requires a person to register to vote no later than 30 days before the election. Election Day for the 2020 primary in Ohio was and remains March 17, 2020. The voting opportunities that come after March 17 are a mere extension of the election. In other words, because this election is ongoing and currently held open, there is no basis to change or extend registration deadlines. Everyone registered and eligible to vote in the 2020 primary before COVID-19 created a state of emergency and H.B. 197 was enacted is still registered and eligible to vote in this election, which H.B. 197 recognizes. The extension of voting opportunities beyond Election Day under H.B. 197 is akin to circumstance extending voting hours



or permitting voting in successive days after an election day because of an emergency or natural disaster; in this case, COVID-19.

The law *before and after* H.B. 197 dictates that persons who submit a voter registration application or updated their registration information after February 18, 2020 are not eligible to register and vote in the 2020 primary election. Approximately half a million people already voted in this election and their votes will be processed and counted. Ohio is not starting the election over from scratch, which might warrant additional registration deadlines in advance of a “new” election day under Ohio law and possibly the NVRA. *See, e.g.*, 52 U.S.C. § 20507(a). Under H.B. 197, Ohio will allow the millions of people already registered to vote in this election to do just that—vote in the 2020 primary election. Plaintiffs’ requested relief is not warranted and should be denied.

Request: (2) An order mandating, at least 21 days prior to the close of polls for the 2020 primary election, county boards of elections shall mail all registered electors who have not already voted in the election a primary ballot for each party with candidates on the ballot, return postage pre-paid, with instructions to cast only one ballot and return the ballot in the official pre-paid postage envelope.

Response: This request is both logistically and administratively unworkable and will create confusion for voters. Before COVID-19 and H.B. 197, a voter could request one of four different ballots for the 2020 primary election: Republican, Democrat, Libertarian, or Issues Only. If Plaintiffs’ request is granted, the State will have to print and mail up to 7.7 million Republican, 7.7 million Democrat, 7.7 million Libertarian, and 7.7 million Issues Only ballots. Because many Ohio counties use direct recording or hybrid voting systems (that print a completed ballot) for in-person voting, they do not have anywhere near the number of paper ballots or paper absentee ballots and envelopes to accommodate a mandate for mailing ballots numbering four-times the

amount of registered voters in those counties. For example, county boards of elections do not generally have on hand enough Issues Only ballots for 100% of the registered voters in the county, and millions of new envelopes would need to be designed and acquired to accommodate mailing four different ballots to each voter. The logistical challenges are immense.

Also, in Ohio, voters designate themselves a Republican, Democrat, or Libertarian by requesting that party's ballot either in the absentee ballot application or when the voter goes to the polls. *See* R.C. 3513.19; 3513.05 (paragraph 7). Even with explicit instruction, mailing four different ballots to each voter is bound to cause confusion and mistakes, such as a voter returning two, three, all four ballots. In that event, what is the voter's county board of elections to make of that voter's political party designation?

In sum, implementing Plaintiffs' proposal is contrary to Ohio law and procedure both *before and after* H.B. 197, is a recipe for mass confusion and potential voter errors, and will cause logistical nightmares for county boards of elections and state-level administrators. Accordingly, Plaintiffs' requested relief should be denied.

Request: (3) An order mandating that any elector who has not received a mail absentee ballot at least 14 days prior to the close of polls for the 2020 primary election may submit a request for such a ballot to their local board of election by phone.

Response: Again, Plaintiffs' request is contrary to election laws *before and after* H.B. 197. The law requires proper identification and a person's signature to vote whether absentee by mail, early in-person, or at the polls on an election day. Allowing a person to request an absentee ballot over the phone eliminates this important voter verification safeguard, which is not prudent or warranted, even in an emergency. *See* R.C. 3505.18; R.C. 3509.03(B)(5). Accordingly, Plaintiffs' requested relief should be denied.

Request: (4) An order mandating that any elector who qualifies for in-person voting pursuant to H.B. 197, § 32(D)(1), and who received a mail absentee ballot, can vote a regular ballot in-person ballot [*sic.*] if they bring their absentee ballots to their local board of election.

Response: Plaintiffs' request pertains to voters with recognized ADA disabilities who need assistance casting a ballot and those who have issues receiving mail. These situations are expressly accounted for and appropriately addressed in the law pursuant to H.B. 197, and there is no reason to issue an order modifying Ohio law in accordance with Plaintiffs' request. H.B. 197, § 32.

Request: (5) An order mandating any elector who does not receive their mail absentee ballot prior to the postmark date for mail absentee ballots shall be permitted to vote a provisional ballot in person at their local board of election.

Response: The absentee ballot deadlines in H.B. 197 correspond with the absentee ballot deadlines in current, permanent law by requiring all applications for absentee ballots to be received by noon on April 25, 2020, postmarked no later than April 27, or returned in person to the board of elections by 7:30 P.M. on April 28. *See* H.B. 197, § 32(E); R.C. 3509.03(D); R.C. 3509.05. H.B. 197 does not allow for this contemplated group of individuals to arrive at the designated polling places on April 28 to cast provisional ballots in person. Presumably to limit the spread of COVID-19 and to minimize the risk to voters and persons working the polls that day, H.B. 197 limited the persons who can vote in-person on April 28 to those who have a disability requiring them to have assistance in marking their ballot and those who do not receive mail at a regular location. H.B. 197 already allows for a provisional ballot by mail solution and a period of time for a voter to cure any deficiencies in their provisional ballot. Thus, for public health reasons and because the absentee ballot deadlines in H.B. 197 mirror the deadlines in permanent law, there is

no reason or justification for extraordinary relief beyond what the law currently provides, and Plaintiff's request should be denied.

Request: (6) An order mandating any elector will be permitted to cure any deficiencies in their provisional ballots or absentee ballot identification envelopes by mail, phone, or email up through the day prior to the day the official canvass is required to begin.

Response: Plaintiffs' request should be denied because H.B. 197 adequately addresses these issues in a manner comparable to current, permanent law. Under the Revised Code, if a voter casts a provisional ballot, and after examining it, the board of elections finds there is a problem with the ballot, the board must notify the voter and give the voter an opportunity to address and cure the problem. The current, permanent law provides a seven-day period for that process. *See* R.C. 3505.181(B)(7). Plaintiffs request an extension of that period for three to eight additional days beyond the time that is provided for in H.B. 197 and provided in permanent law. An order from this Court modifying an Ohio law unanimously enacted by the entire General Assembly to provide *three to eight additional days* in a process already accounted for is not warranted under the circumstances brought upon us by COVID-19 or otherwise. Plaintiffs' request should be denied.

Request: (7) An order mandating the conclusion of the 2020 primary election be set at such a time as will allow election officials to provide orderly notice to electors and administer the election in the manner provided for herein.

Response: Mere disagreements with the deadlines set by statute do not render them unconstitutional nor does it establish a right to extraordinary relief as discussed herein and in the State of Ohio's response to Plaintiffs' TRO Motion. As Secretary LaRose emphasized throughout this brief, H.B. 197 was passed unanimously by the General Assembly and signed by the Governor.

While the timeline to complete the March 17 primary election in H.B. 197 is ambitious, Secretary LaRose and his team are working tirelessly to implement the portions of the law pertaining to Ohio's primary election. Secretary LaRose does not support usurping the authority of the duly elected members of the General Assembly and the Governor. The deadlines established with respect to the closing of the polls are consistent with current law. As such, Plaintiffs have not met their burden to establish a right to the requested relief. Accordingly, their request and TRO Motion should be denied.

Requests: (8) An order mandating Secretary LaRose to issue a directive notifying Ohio's eighty-eight county boards of elections of the aforementioned requirements; and (9) to educate and inform electors about: the timeline and process for voting in the upcoming election; and that if they did not receive an absentee ballot in the mail they may contact their boards of elections and (a) confirm whether they have been sent a ballot, and (2) if they have not received a ballot, request a ballot by phone.

Response: Plaintiffs' request fails in accordance with the discussion above. H.B. 197 was unanimously passed by the General Assembly with full bipartisan support and signed into law by the Governor and "[p]roper deference to state legislative authority requires that Ohio's election process be allowed to proceed unhindered by the federal courts." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir.2016); *see also* 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"). Without question, on his own Secretary LaRose will do his utmost to keep Ohio's voters informed of the process by which the March 17 primary election will be completed.

**V. THE OHIO DEMOCRATIC PARTY’S REQUESTED RELIEF IS LOGISTICALLY IMPOSSIBLE**

While not waiving any arguments related to other portions of the Ohio Democratic Party’s (“ODP”) Memorandum, nor conceding any points or issues contained therein, Secretary LaRose briefly addresses a portion of the relief requested by ODP.<sup>6</sup>

ODP opposes Plaintiffs’ request that this Court change the date of Ohio’s primary election. (Doc. 25-2, PAGEID #234). While opposing any extension of the time to complete the primary election, ODP also requests this Court order Secretary LaRose to mail to an absentee ballot, with postage pre-paid, to every voter in Ohio. These two positions are irreconcilable – it is simply not feasible to accomplish all of the tasks required of election officials and voters to mail absentee ballot requests and then absentee ballots to every responsive voter in Ohio **and** conclude voting on April 28, 2020.

To comply with such an order, the Secretary of State’s Office would need to: (a) draft and create the mail piece that is the *application* for an absent voter’s ballot; (b) make certain the data for the 7.2 million registered voters who have not yet voted is correct to be given to the vendor by requesting all data from boards of elections and verifying and analyzing that data; (c) have a vendor print the 7.2 million mail pieces, making certain that each mail piece contains a reply envelope with each voter’s correct board of elections; (d) rely on the vendor to mail all 7.2 million pieces; (e) rely on the U.S. Postal Service to deliver all 7.2 million mail pieces with the applications; (f) allow time for each voter to open the mailing, complete the application, and mail it back to their board of elections; (g) give each board of elections time to process each absent voter’s application;

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<sup>6</sup> ODP requests this Court require Secretary LaRose undertake action that cannot be completed by April 28th, while at the same time is unyielding in its insistence that it must certify its delegates by June 20<sup>th</sup>, despite the postponement of Democratic National Convention until August 17<sup>th</sup>. Doc. 39. These are unprecedented times in which all have been forced to make adjustments; ODP should as well.

(h) ensure that each board mails the correct ballot style (Republican, Democrat, Libertarian, or Issues Only ballot) to every voter who requested the absent voter's ballot; and (i) allow voters sufficient time to receive the ballot, vote it, and return it via mail to the board of elections – and all of this must be done by April 28, 2020. *Exhibit 2*, ¶ 35.

For all of the reasons provided herein, it would be logistically impossible for the Secretary of State's Office and Ohio's boards of elections to send unsolicited absentee ballot *applications* to all 7.7 million registered voters, or to all 7.2 million registered voters who have not previously voted in the March 17, 2020 primary election, process the applications, send the correct ballots, allow time for the ballots to be received by the voter, voted, and returned to the boards of election by April 28, 2020. *Id.* at ¶ 36.

Regardless of the impossibility of effecting ODP's requested relief, this is yet another request to change current law and extend dates not affected by the closure of the polls. Absentee-ballot deadlines are set by statute and are tied to the date of an election. Absentee-ballot applications must be received by the boards of elections no later than noon on Saturday before election day. R.C. 3509.03(D). Voters must postmark absentee ballots no later than the day before election day, and the boards must receive the ballots ten days after the election. R.C. 3509.05(B)(1). For the March 17, 2020 primary election, these dates fell on March 14, March 16, and March 27, respectively. These dates were not affected by the closure polls. Accordingly, ODP seeks an unnecessary remedy tailored only to advance its own special interests, not to remedy an actual harm.

**VI. CONCLUSION**

In accordance with the foregoing, and the State of Ohio's response to Plaintiffs' Motion, the Motion should be denied.

Respectfully submitted,

*/s/ Jonathan R. Secrest*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of April, 2020, the foregoing was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

/s/ Jonathan R. Secrest  
Jonathan R. Secrest (0075445)

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