

In the  
**Supreme Court of Ohio**

State ex rel. BRIAN M. AMES,	:
	:
<i>Relator,</i>	: Case No. 2022-0850
	:
v.	: Original Action in Mandamus
	:
FRANK LAROSE, et al.,	: Expedited Election Matter
	: Pursuant to S.Ct.Prac.R. 12.08
<i>Respondents.</i>	:

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**MERIT BRIEF OF RESPONDENT  
OHIO SECRETARY OF STATE FRANK LAROSE**

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BRIAN M. AMES  
2632 Ranfield Road  
Mogadore, Ohio 44260  
330-354-3701  
bmames00@gmail.com

*Relator Pro Se*

DAVE YOST (0056290)  
Ohio Attorney General

ALLISON DANIEL (0096186)\*  
\*Counsel of Record

IRIS JIN (0092561)  
Assistant Attorneys General  
Constitutional Offices Section  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215  
Tel: 614-466-2872; Fax: 614-728-7592  
Allison.Daniel@OhioAGO.gov  
Iris.Jin@OhioAGO.gov

*Counsel for Respondent  
Ohio Secretary of State Frank LaRose*

CHRISTOPHER J. MEDURI (0065072)  
241 South Chestnut St.  
Ravenna, Ohio 44266  
Tel: 330-297-3850  
cmeduri@portageco.com

*Counsel for Respondent  
Portage County Board of Elections*

JAMES R. FLAIZ (0075242)  
Geauga County Prosecutor  
KRISTEN RINE (0083735)  
Assistant Prosecuting Attorney  
Geauga County Prosecutor's Office  
231 Main Street – 3rd Floor  
Chardon, Ohio 44024  
Tel: 440-279-2100  
James.Flaiz@gcpao.com  
Krine@gcpao.com

*Counsel for Respondent  
Geauga County Board of Elections*

SHERRI BEVAN WALSH  
Prosecuting Attorney  
MARRETT HANNA (0065689)  
CARRIE HILL (0099785)  
Assistant Prosecuting Attorney  
53 University Ave., 7th Floor  
Akron, Ohio 44308  
Tel: 330-643-6454  
mhanna@prosecutor.summitoh.net  
chill@prosecutor.summitoh.net

*Counsel for Respondent  
Summit County Board of Elections*

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## INTRODUCTION

Relator Brian M. Ames, a candidate for the Republican State Central Committee for the 28th District, filed this action seeking the extraordinary relief of a writ of mandamus against Respondents Ohio Secretary of State Frank LaRose, the Summit County Board of Elections, the Portage County Board of Elections, and the Geauga County Board of Elections. He claims that he has a right to face the same voters in the August 2 primary election that he would have faced in a May 3 primary election. That is, Ames does not want to face any so-called crossover voters—voters from the May 3 primary who may vote for a different political party in the August 2 primary.

Ames seeks to compel Secretary LaRose “to instruct and direct the county boards of election and their precinct election official to challenge electors who request a ballot for a party other than the party ballot [voted on] in the May 3 [primary].” Ames first filed his Complaint for a Writ of Mandamus with this Court on July 8, 2022.

Ames is not entitled to the relief he seeks in this mandamus action for at least four reasons. First, Ames’s claim is barred by laches because he has not acted with the diligence required in expedited election matters. Ames waited *six weeks* from the date Secretary LaRose issued a directive regarding voters’ primary ballot options to file his complaint for a writ of mandamus. Second, Ames lacks standing to pursue a writ of mandamus based on speculative harm that does not involve the enforcement of a public duty. Third, Ames cannot demonstrate that the Secretary has a clear legal duty to instruct the county boards of election and their precinct election officials to challenge electors on their ballot choice, or, alternatively, to segregate or disqualify ballots cast for a different political party. Ames’s theory that Ohio voters cannot change their party affiliation between May 3, 2022 and August 2, 2022 is wrong as a matter of law. And, finally, Ames has no clear legal right to a writ of mandamus ordering the Secretary provide such an instruction to the

boards of election or their precinct election officials. Therefore, Ames’s requested writ should be denied.

### STATEMENT OF FACTS

This case was set off by the scheduling of a second primary election on August 2, 2022 for Ohio’s General Assembly seats and state party central committee seats during the legislative redistricting litigation. Because this Court is aware of the procedural background of the redistricting litigation, Secretary LaRose will not recite the entire history here. Rather, only the relevant factual and procedural history, as it relates to Relator Ames’s specific claims, is included below.

In several opinions, this Court invalidated General Assembly district maps that had been adopted by the Ohio Redistricting Commission. 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”). On March 28, 2022, the Commission adopted its fourth General Assembly district plan (“Map 4”). But again, various groups and individuals filed objections with this Court. On April 14, 2022, this Court sustained the objections and invalidated Map 4. See *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, \_\_ Ohio St. 3d \_\_, \_\_ N.E.3d \_\_, 2022-Ohio-1235 (“League IV”). The Court ordered the Commission to adopt a new General Assembly district plan by May 6, 2022. *Id.* at ¶ 79.

In the meantime, in February 2022, a group of Ohio Republican voters and activists sued the Commission and Secretary LaRose in federal court, complaining that they had no legislative districts in which to organize, campaign, and vote. *Gonidakis v. LaRose*, \_\_ F.Supp. \_\_, 2022 U.S. Dist. LEXIS 72172 (S.D.Ohio April 20, 2022). On April 20, 2022, the three-judge federal panel



for *Gonidakis v. LaRose* issued an initial Memorandum Opinion and Order. *See id.* In the order, the *Gonidakis* panel found that Ohio could not hold a primary election for its state legislature on May 3. *Id.* at \* 6. However, because the panel found that the legislature still had time to produce a lawful map, it did not order immediate relief for the *Gonidakis* Plaintiffs. Instead, the Court stated that “[i]n the event that Ohio does not reach a resolution before May 28, we will order that the state-legislative primary races be held on the special-election date of August 2, 2022.” *Id.* at \* 9.

Ohio subsequently held a primary election on May 3, 2022. The May 3 primary did not include contests for the General Assembly or State Central Committee. On May 5, the Ohio Redistricting Commission re-adopted Map 3. Various groups and individuals filed objections with this Court. On May 25, 2022, a majority of this Court sustained objections and again invalidated Map 3. *See League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, \_\_ Ohio St. 3d \_\_, \_\_ N.E.3d \_\_, 2022-Ohio-1727 (“League V”).

On May 27, 2022, after this Court invalidated Map 3 for the second time, the *Gonidakis* panel issued an order requiring Secretary LaRose “to push back Ohio state primaries to August 2, 2022, and to implement Map 3 for this year’s elections *only*.” *Gonidakis v. LaRose*, \_\_ F.Supp. \_\_, 2022 U.S. Dist. LEXIS 95341, \*5 (S.D. Ohio May 27, 2022).

On May 28, 2022, Secretary LaRose issued Directive 2022-34 to provide instructions for the August 2, 2022 primary election for all county boards of election. *See* Secretary of State Directive 2022-34, Instructions for the August 2, 2022 Primary Election, available at <https://www.ohiosos.gov/globalassets/elections/directives/2022/dir2022-34.pdf> (accessed July 22, 2022); Relator’s Br., Ex. 14. Within Directive 2022-34, Secretary LaRose instructed that

“[v]oters may request a ballot for either major political party or an issues-only ballot, if applicable, regardless of their participation in the May 3, 2022 Primary Election.” *Id.* at 8.

Directive 2022-34 also instructed the boards that the filing deadlines for candidate declarations and petitions for the August 2 primary were unchanged—the deadlines were the same as those set for the May 3 primary. Unhappy with this instruction, several candidates sued Secretary LaRose and the boards of election to require the boards to accept their candidate declarations and petitions as timely filed. *State ex rel. Demora v. Larose*, \_\_\_ Ohio St.3d \_\_\_, 2022-Ohio-2173, \_\_\_ N.E.2d \_\_\_, ¶ 1-2. This Court held that because “the deadline to file declarations for partisan nomination in a primary election is 90 days before the election, R.C. 3513.05, or 72 days before the election for write-in candidates, R.C. 3513.041,” and “[t]he primary election date is August 2,” the relators who filed their declarations of candidacy and petitions for the August 2 primary within those timeframes filed timely. *Id.* at ¶ 47.

*State ex rel. Demora v. LaRose* and *Gonidakis v. LaRose* made clear that Ohio was indeed conducting two primary elections for the 2022 election cycle.

Relator Ames filed his declaration of candidacy and petitions to be certified to the ballot as a candidate for the Republican State Central Committee for the 28th District on February 1, 2022. Relator’s Br., Ex. 6. Ames is certified as a candidate for the 28th District State Central Committee seat in Summit County, Portage County, and Geauga County. Relator’s Exs. 3-5. On July 8, 2022, forty-two days after Directive 2022-34 was issued, Ames inquired of Secretary LaRose and the Portage County Board of Elections whether an elector may request “a different party ballot for the August election than for May.” Compl. at ¶ 10-11, Exs. 1-2. The Secretary’s Office responded that “[t]here is no requirement for a voter to vote in the same party’s primary election as they did in the May primary.” Relator’s Br., Ex. 1.

Relator filed this action in mandamus on Friday, July 8, 2022.

## LAW AND ARGUMENT

### A. Ames's Claim is Barred by Laches.

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*, \_\_\_ Ohio St.3d \_\_\_, 2022-Ohio-2445, \_\_\_ N.E.2d \_\_\_, ¶ 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. 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. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995). Here, Ames has failed to act with the utmost diligence, and as a result, the doctrine of laches bars his claim before this Court.

Ames unreasonably delayed asserting his alleged right. 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. That is exactly what Directive 2022-34 said. *See Relator's Br., Ex. 14 at 8* (“Voters may request a ballot for either major political party or an issues-only ballot, if applicable, regardless of their participation in the May 3, 2022 Primary Election.”); Relator's Brief at 12 (the Secretary's decision “first appeared on May 28, 2022 in Directive 2022-34”). Yet, Ames waited until 42 days after Directive 2022-34 was issued to file his Complaint. This *six-week* delay in filing his Complaint for an expedited elections matter precludes any consideration of the merits of Ames's claims. *See State ex rel. Valore*, 87 Ohio St.3d 144, 146, 718 N.E.2d 415 (1999). This Court has already found

unreasonable delay by relators who filed their complaints much more promptly than Ames. *See, e.g., Polo* at 145 (17 days); *Syx* at ¶ 11 (22 days); *State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 88 Ohio St.3d 187, 189, 2000-Ohio-295, 724 N.E.2d 775 (22 days).

Ames also provides no excuse for his delay in filing his Complaint. Instead, he unconvincingly alleges that he only discovered that electors were allowed to vote on a different party's ballot in the August primary on July 8, 2022, when the Secretary's Office and the Portage County Board of Elections responded to his email inquiries. *See Relator's Br.* at 11-12. In reality, Ames's inquiry was answered six weeks prior, with the issuance of Directive 2022-34. Other litigants somehow managed to seek relief from the courts during this same time period based on the information within Directive 2022-34, and those litigants did not need email responses in order to file their claims. *See, e.g., State ex rel Demora v. LaRose*, 2022-Ohio-2173 (Complaint filed May 31, 2022). Furthermore, Ames has not presented any evidence that he sought reconsideration from the boards of election or Secretary LaRose to excuse his delay. *See State ex rel. Jones v. LaRose*, 2022-Ohio-2445, ¶ 14 (holding that relator failed to establish a valid excuse for his delay because "other than the bare allegation in his reply brief, Jones has presented no evidence that he sought reconsideration from the board or Secretary LaRose.")

With respect to the third element of laches, it is clear that Ames had actual or constructive knowledge of his alleged injury. Directive 2022-34 was issued on May 28, 2022, and includes the instruction upon which Ames's Complaint is based. *See Relator's Br.* at 12 (the Secretary's decision "first appeared on May 28, 2022 in Directive 2022-34"); Ex. 14.

Finally, Ames's delay in bringing this action is prejudicial. "An unreasonable delay that prevents a court decision before the deadline for distributing absentee ballots is prejudicial." *State ex rel. Jones* at ¶ 16, citing *State ex rel. Valore v. Summit Cty. Bd. of Elections*, 87 Ohio St.3d 144,

146, 1999-Ohio-317, 718 N.E.2d 415. “[C]ases in which laches is dispositive generally involve prejudice to the respondents in their statutory obligation to absentee voters to have absentee ballots printed and ready for use.” *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 14. This Court noted in its recent expedited-elections decision in *State ex rel.*

*Jones*:

Not only has early voting begun, but the election itself is less than three weeks away. Jones’s delay has made it impossible for us to decide the case earlier, despite the imposition of an aggressive expedited-briefing schedule. We hold that Jones’s unreasonable delay has resulted in prejudice to the board in its administration of the election.

*Id.* at ¶ 16.

Here, not only has early voting begun, the election is tomorrow. Ames’s delay is prejudicial to the Secretary because it is turning an already expedited elections case into an emergency. *See Syx* at ¶ 15. What is more, Ames would have this Court change the rules *after* voters have already cast their votes. There is no doubt that disenfranchising voters with a post-hoc change in the rules sows chaos and strikes at the heart of voter trust and confidence. Because Ames’s unreasonable delay has resulted in prejudice to the Secretary in the administration of the election, his claims must be barred by the doctrine of laches.

#### **B. Ames Lacks Standing.**

Even if this Court finds that Ames’s claim is not barred by laches, Ames lacks standing to seek the writ of mandamus that he requests in this action.

“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). And, while “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), this action does not involve the enforcement of a public duty.

Ames requests a writ of mandamus ordering “Secretary of State Frank LaRose \* \* \* to instruct and direct the county boards of election and their precinct election official to challenge electors who request a ballot for a party other than the party ballot [voted on] in the May 3, 2022 [primary].” Compl. at 9, Prayer for Relief. But under the Ohio Revised Code, only precinct election officials may challenge the right of a person to vote in a primary election. *See* R.C. 3513.19. And, pursuant to R.C. 3513.19(A), the right to challenge a voter is up to the discretion of the precinct election official. Further, in cases challenging party affiliation, the challenged voter can cure or overcome a precinct official’s challenge by making a statement “that the person desires to be affiliated with and supports the principles of the political party whose primary ballot the person desires to vote.” R.C. 3513.19(B). Thus, Ames has no rights or public duties arising under R.C. 3513.19. Relator Ames therefore lacks standing to seek a writ of mandamus compelling the statute’s enforcement.

Ames also lacks standing because he cannot demonstrate how he would be directly benefited or injured by a judgment here. Ames suggests that candidates on the August 2 ballot, like himself, are prejudiced because there exists the potential for crossover voters—or “Hybrid

Ballots,” as Ames defines it. *See* Relator’s Br. at 2. He claims that permitting voters to vote in either party’s primary regardless of their participation in the May 3 primary “converted Ohio’s open primary into a doubly open primary as voters may twice select which party’s ballot to vote.” *Id.* These allegations, however, are simply unsupported conclusions and any potential harm is entirely speculative.

For instance, Ames has not shown that he is at any particular risk of losing his race because of crossover voters. In fact, crossover voters could just as easily vote for Ames as they could a competing candidate—that is, crossover voters could benefit Ames’s candidacy. Additionally, Ames has not demonstrated that crossover voters are somehow illegitimate and thus harmful. Ames’s theory that a voter cannot change his or her party affiliation between May 3, 2022 and August 2, 2022 is wrong as a matter of law. After all, there is no statutory prohibition on crossover voting. A voter who affiliated with one party in the May 3, 2022 primary election can have a change of heart and choose to affiliate with a different political party in the August 2, 2022 primary. Indeed, R.C. 3513.19(B) contemplates that exact scenario by giving a voter an opportunity to overcome a challenge to party affiliation with a sincere statement affirming the voter’s desire to affiliate with a different political party.

Finally, much of Ames’s Complaint and Merit Brief is dedicated to implying that harm is caused by the mere fact that the State is holding two primary elections. *See* Compl. at ¶ 14-32 (extensively quoting Justice Kennedy’s dissenting opinion in *State ex rel. DeMora*); Relator’s Br. at 2, 10 (complaining about severing the primary ballot). But these allegations are moot. Ames could have intervened as a party in the redistricting litigation if he intended to assert a claim about harm arising from a second primary election.

Without some articulation of harm or a beneficial interest in the case, Ames's allegations are insufficient to establish standing for a writ of mandamus.

**C. Ames cannot satisfy the elements necessary for a writ of mandamus: Secretary LaRose has no clear legal duty to instruct the county boards of election and their precinct election officials to challenge electors on their ballot choice, and Ames has no corresponding clear legal right to this relief.**

Even if Ames has standing and is not barred by laches, his claim still fails on its merits. Ames requests a writ of mandamus ordering "Secretary of State Frank LaRose \* \* \* to instruct and direct the county boards of election and their precinct election official to challenge electors who request a ballot for a party other than the party ballot [voted on] in the May 3, 2022 [primary]." Compl. at 9, Prayer for Relief. In his Merit Brief, Ames requests the alternative relief of segregating or disqualifying ballots cast for an "opposite party." Relator's Br. at 13. But no statute gives the Secretary the authority to instruct the county boards of election and their precinct election officials to challenge electors on their ballot choice, or, alternatively, to segregate or disqualify ballots cast for a different political party in the August 2 primary election. The Secretary thus has no clear legal duty to instruct the boards or their election officials to challenge electors, or to segregate or disqualify ballots cast, and Ames has no clear legal right to compel the Secretary to do so.

**1. Standard of Review**

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 be entitled to the requested writ of mandamus, Relator must establish by clear and convincing evidence three elements: (1) the relator has a clear legal right to the requested relief; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relator has no plain and adequate remedy at law. *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.

**2. The Secretary has no clear legal duty to provide Ames’s with his requested relief.**

As explained above, no statute gives Secretary LaRose the authority to direct the county boards of election or their precinct election officials to challenge electors on their ballot choice, or, alternatively, to segregate or disqualify ballots cast for a different political party. Therefore, the Secretary has no clear legal duty here and is not the proper party to provide Ames’s requested relief.

Precinct election officials, and not the Secretary or the Boards of Election, have the final authority to challenge a voter’s qualifications in a primary election. *See* R.C. 3513.19; *Maschari v. Tone*, 2004-Ohio-2876, 157 Ohio App.3d 366, 811 N.E.2d 555 (6th Dist.), *aff’d*, 2004-Ohio-5342, 103 Ohio St.3d 411, 816 N.E.2d 579 (2004). Pursuant to R.C. 3513.19:

**(A) It is the duty of any precinct election official, whenever any such official doubts that a person attempting to vote at a primary election is legally entitled to vote at that election, to challenge the right of that person to vote.** The right of a person to vote at a primary election may be challenged upon the following grounds:

- (1) That the person whose right to vote is challenged is not a legally qualified elector;
- (2) That the person has received or has been promised some valuable reward or consideration for the person’s vote;

(3) That the person is not affiliated with or is not a member of the political party whose ballot the person desires to vote. \* \* \*

(B) When the right of a person to vote is challenged upon the ground set forth in division (A)(3) of this section, membership in or political affiliation with a political party shall be determined by the person's statement, made under penalty of election falsification, that the person desires to be affiliated with and supports the principles of the political party whose primary ballot the person desires to vote.

(Emphasis added.) R.C. 3513.19.

Under this statutory language, it is clear that precinct election officials have discretion in deciding which voters should be challenged in a primary election. *See Maschari*, 2004-Ohio-2876, ¶ 22. Moreover, in cases challenging a voter's party affiliation, a voter can overcome a precinct official's challenge by making a sincere statement of party affiliation. R.C. 3513.19(B).

Notwithstanding a precinct election official's role, the relevant statutes place the responsibility on boards of election to appoint precinct election officials, R.C. 3501.22(A), train them, 3501.27(A) and (B), and remove them for cause, 3501.22(A). *See Maschari*, 2004-Ohio-5342, ¶ 29. And, under R.C. 3501.11(E), the boards of elections must "make and issue rules and instructions, not inconsistent with law or the rules, directives, or advisories issued by the secretary of state, as it considers necessary for the guidance of election officers and voters." *See also Maschari*, 2004-Ohio-5342, ¶ 29.

None of these provisions suggest that the Secretary of State has a duty to compel precinct election officials to broadly challenge voters' qualifications, nor do they suggest that the Secretary has a duty to compel boards of elections to instruct precinct election officials to broadly challenge voters' qualifications. Rather, it is the duty of precinct election officials, whenever such officials doubt the legal entitlement of a voter to vote in a primary election, to challenge the right of that person to vote.

Ames has not shown by clear and convincing evidence that the Secretary has a clear legal duty to direct the county boards of election and their precinct election officials to challenge electors on their ballot choice, or, alternatively, to segregate or disqualify ballots cast for a different political party, and Ames has no clear legal right to a writ of mandamus ordering the Secretary to do so. Accordingly, Ames's requested writ against Secretary LaRose should be denied.

### CONCLUSION

For the reasons set forth above, Relator's request for a writ of mandamus, and any alternative relief, should be denied.

Respectfully submitted,

DAVE YOST (0056290)  
Attorney General of Ohio

*/s/ Allison D. Daniel*

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ALLISON DANIEL (0096186)\*

*\*Counsel of Record*

IRIS JIN (0092561)

Assistant Attorneys General  
Constitutional Offices Section  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215  
Tel: 614-466-2872; Fax: 614-728-7592  
Allison.Daniel@OhioAGO.gov  
Iris.Jin@OhioAGO.gov

*Counsel for Respondent*  
*Ohio Secretary of State Frank LaRose*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 1, 2022, the foregoing was filed electronically and that notice of this filing will be sent to the following parties by electronic mail.

BRIAN M. AMES  
bmames00@gmail.com

*Relator Pro Se*

CHRISTOPHER J. MEDURI (0065072)  
cmeduri@portageco.com

*Counsel for Respondent  
Portage County Board of Elections*

JAMES R. FLAIZ (0075242)  
Geauga County Prosecutor  
KRISTEN RINE (0083735)  
Assistant Prosecuting Attorney  
James.Flaiz@gcpao.com  
Krine@gcpao.com

*Counsel for Respondent  
Geauga County Board of Elections*

SHERRI BEVAN WALSH  
Prosecuting Attorney  
MARRETT HANNA (0065689)  
CARRIE HILL (0099785)  
mhanna@prosecutor.summitoh.net  
chill@prosecutor.summitoh.net

*Counsel for Respondent  
Summit County Board of Elections*

*s/ Allison D. Daniel*

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ALLISON DANIEL (0096186)\*

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