

IN THE SUPREME COURT OF OHIO

STATE EX REL. OHIO DEMOCRATIC PARTY
340 E. Fulton Street
Columbus, Ohio 43215

STATE EX REL. KIARA DIANE SANDERS
2100 Commons N Rd.
Reynoldsburg, Ohio 43068

Relators,

-v-

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

Respondent.

CASE NO. 2020-0388

ORIGINAL ACTION IN
PROHIBITION

ALTERNATIVE AND
PEREMPTORY WRITS
REQUESTED

Expedited Election Matter
Under S.Ct.Prac.R. 12.08

BRIEF OF AMICUS CURIAE DISABILITY RIGHTS OHIO

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Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): If You Are at Higher Risk* (Mar. 12, 2020) https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhigh-risk%2Fhigh-risk-complications.html (last accessed Mar. 17, 2020).....4, 5

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Disability Rights Ohio, *VOTING IN OHIO: A Disability Rights Perspective*, 5 (Mar. 2018) https://www.disabilityrightsohio.org/assets/documents/dro_voting_in_ohio_report_march_2018.pdf (last accessed Mar. 17, 2020)7, 8

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<https://www.cincinnati.com/story/news/politics/2020/03/10/ohio-moves-primary-polling-places-amid-coronavirus-concerns/5008955002/> (last accessed Mar. 17, 2020).....8

Ohio Department of Developmental Disabilities, *ICFs: DODD Prepares for COVID-19* (Mar. 12, 2020) <https://dodd.ohio.gov/wps/portal/gov/dodd/about-us/communication/news/news-icf-coronavirus> (last accessed Mar. 17, 2020).....8

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U.S. Department of Justice, *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities* (Oct. 10, 2014) https://www.ada.gov/ada_voting/ada_voting_ta.htm (last accessed Mar. 17, 2020).....2

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Disability Rights Ohio (“DRO”) is a not-for-profit organization designated by the Ohio Governor as the protection and advocacy system under federal law for people with disabilities in Ohio. *See* 42 U.S.C. § 15001, *et seq.*; R.C. § 5123.60. The mission of DRO is to advocate for the human, civil, and legal rights of people with disabilities in Ohio. As the protection and advocacy system for Ohio, DRO investigates abuse, neglect, and rights violations affecting people with disabilities; pursues administrative, legal, and policy remedies to address identified violations; and advocates for individuals in many areas of disability rights, including special education, housing, employment, and government benefits and services.

Voting rights for people with disabilities is an important aspect of DRO’s work, and is reflected in the organization’s priorities. This work includes education and outreach to voters with disabilities and professionals in the disability field, direct and systemic voter advocacy, and operating a voter hotline every Election Day. DRO also engages in voting-related litigation.

II. INTRODUCTION

Holding the Ohio Primary Election during the COVID-19 outbreak forces people with disabilities to choose between exercising their constitutional right to vote and their lives. COVID-19 could be a death sentence for many Ohioans with disabilities. People with disabilities face not only a higher risk of contracting the virus, but also a higher risk for serious complications resulting from the virus. It is the State’s responsibility under the ADA to ensure that reasonable modifications are in place to ensure that individuals with disabilities enjoy a full and equal opportunity to vote.

III. STATEMENT OF FACTS

The State of Ohio’s 2020 presidential primary election was to be held on March 17, 2020. On March 16, 2020, Ohio Governor Mike DeWine announced that the Director of the Ohio

Department of Health was issuing an order closing polling locations in the State of Ohio on March, 17, 2020 due to concerns of the COVID-19 outbreak. Relators Ohio Democratic Party and Kiara Diane Sanders filed a Complaint in Original Action for Writ of Prohibition in the Supreme Court of Ohio on March 17, 2020.

IV. ARGUMENT

THE AMERICANS WITH DISABILITIES ACT REQUIRES STATES TO CONDUCT ELECTIONS IN A MANNER THAT ALLOWS EQUAL ACCESS TO PEOPLE WITH DISABILITIES.

The Americans with Disabilities Act requires states to ensure people with disabilities have equal access to the electoral process. The Americans with Disabilities Act (“ADA”) prohibits discrimination against individuals with disabilities in all areas of public life. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a). Title II of the ADA, 42 U.S.C. § 12141 *et seq.*, not only prohibits discrimination based on an individual’s disability; it also seeks to ensure full participation of people with disabilities in society by removing barriers to access. 28 C.F.R. § 35.130(b)(7).

Participation in the political process is crucial to full participation in society and a central value of the disability movement. To ensure that individuals with disabilities can be full participants in the political process, Title II of the ADA requires that people with disabilities have a full and equal opportunity to vote. These protections extend to every aspect of voting, from registration to casting a ballot, and during all stages of voting, including absentee ballots, early-voting opportunities, and Election Day.¹ *See also* Help America Vote Act of 2002 Pub.L. 107–252. Title III, § 302, 116 Stat. 1706 (codified at 42 U.S.C. § 15301 *et seq.*) (requiring

¹ U.S. Department of Justice, *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities* (Oct. 10, 2014) https://www.ada.gov/ada_voting/ada_voting_ta.htm (last accessed Mar. 17, 2020).

jurisdictions responsible for conducting federal elections to provide at least one accessible voting system for persons with disabilities at each polling place in federal elections).

Voting locations must be basically accessible for voters with disabilities. When a public entity cannot modify barriers--either permanently or temporarily--and are unable to identify an alternative accessible voting location, the public entity must offer an alternative method of voting at the polling place. Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. § 20102 (formerly 42 U.S.C. § 1973ee-1). Accommodations must also be made to ensure full and equal access to early voting opportunities. Without accommodations for individuals with disabilities in the entire electoral process, the risk is that these individuals will be “denied an option available to similarly-situated non-disabled voters,” and thus, excluded from participation in elections. *See Mooneyhan v. Husted*, No. 3:12-CV-379, 2012 WL 5834232, at *5 (S.D. Ohio Nov. 16, 2012) (holding that the Ohio Secretary of State and a county board of elections had to modify its policies, practices, and procedures under the ADA to enable a hospitalized voter with psychiatric disabilities to cast her ballot on Election Day).

When a disconnect between state or local government policies, practices, and procedures and ADA requirements is identified, the courts have consistently ruled that the ADA trumps state regulations. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016). In fact, “requiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does.” *Id.* at 508 (quoting *Jones v. City of Monroe, MI*, 341 F.3d 474, 487 (6th Cir.2003)); *see also Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782–83 (7th Cir.2002). When a condition of voting is violative of the rights of individuals with disabilities, the State must make changes that not only prevent individual disenfranchisement, but also to uphold the integrity of the democratic process at large.

Holding the Ohio Primary Election during the COVID-19 outbreak will disproportionately disenfranchise voters with disabilities in violation of the ADA. Ohioans with disabilities will not have a full and equal opportunity to vote in the Ohio Primary Election due to the current COVID-19 outbreak in the state. Persons with disabilities are not only at a higher risk of serious illness caused by the virus, but also face a higher risk of contracting the virus. Holding the Primary Election in the midst of a deadly virus outbreak forces Ohioans to choose between their hard-fought right to vote and their health, possibly even their lives.

According to the Centers for Disease Control and Prevention (“CDC”), persons with disabilities are at a higher risk for serious illness resulting from COVID-19.² This includes individuals with impaired lung function, immunocompromising disorders, including individuals taking immunocompromising drugs, high blood pressure, diabetes, and heart disease.³

Although not an exhaustive list, the CDC identifies the following chronic conditions as more common in individuals with disabilities: arthritis, asthma, cancer, chronic fatigue syndrome, diabetes, heart disease, limb loss, MRSA, and musculoskeletal disorders.⁴ According to Lindsey Freysinger, MSN, anyone who has an underlying acute health condition is at

² Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): If You Are at Higher Risk* (Mar. 12, 2020) https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhigh-risk%2Fhigh-risk-complications.html (last accessed Mar. 17, 2020).

³ Seth McBride, *New Mobility, Disability-Specific Recommendations for COVID-19* (Mar. 12, 2020) <https://www.newmobility.com/2020/03/disability-specific-recommendations-for-covid-19/> (last accessed Mar. 17, 2020).

⁴ Centers for Disease Control and Prevention, *Disability and Health Promotion: Disability and Health Related Conditions* (Sep. 9, 2019) <https://www.cdc.gov/ncbddd/disabilityandhealth/relatedconditions.html> (last accessed Mar. 17, 2020).

increased risk of severe symptoms for both illnesses because “there would be two separate issues for their immune system to fight.”⁵

Persons with disabilities are not only at higher risk for serious complications from the virus, but also at higher risk for contracting the virus because they are often unable to follow all the suggested precautions to keep themselves healthy. Guidance from the CDC includes “taking everyday precautions,” limiting contact with others, washing hands often, avoiding crowds, and “staying home as much as possible” when there is a COVID outbreak in the community.⁶ Some other precautions include avoiding touching one’s face, coughing into a tissue, and regularly disinfecting surfaces. These suggestions fail to take into account the everyday lives of people with disabilities.

For example, a person without disabilities may arrive at their polling place in their own vehicle and use a disinfecting wipe to open the door to the building, then proceed slowly, avoiding getting too close to others, to the table where they check in. They may sanitize their hands after using the shared pen to sign in. They may then proceed to the polling booth, vote, and again sanitize their hands after finishing. They would then leave the facility, using a disinfecting wipe to touch the door upon their exit.

Assuming they even take the risk of traveling to their polling location on Election Day in the middle of this public health emergency, a person with a disability’s voting experience would likely look much different. A person with physical disabilities may not be able to hold a

⁵ Seth McBride, New Mobility, *Disability-Specific Recommendations for COVID-19* (Mar. 12, 2020) <https://www.newmobility.com/2020/03/disability-specific-recommendations-for-covid-19/> (last accessed Mar. 17, 2020).

⁶ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): If You Are at Higher Risk* (Mar. 12, 2020) https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhigh-risk%2Fhigh-risk-complications.html (last accessed Mar. 17, 2020).

disinfecting wipe in their hand to touch the button to trigger the automatic door. A person with mobility impairments may not have the ability to quickly and safely back away from others that are coming too close to them. A person with cognitive impairments may have to interact with poll workers for a longer period of time than a person without a disability. Additionally, a person with a disability may not be able to sanitize or wash their hands immediately after touching shared surfaces. A person with a disability's time at the polling place will undoubtedly be longer than an individual without a disability, therefore increasing the time they could be potentially exposed to the virus. The experience at the polling place is not equal for persons with disabilities and persons without disabilities. A person with a disability may decide to forgo the entire experience given concerns to their health that are not present for the typical voter. This is the type of unequal access that the ADA prohibits.

Some persons with disabilities rely on the care of others and, therefore, cannot avoid all contact with others. They are forced to trust that their caregivers are taking on these precautions to avoid infecting them. And there is no guarantee that home care workers themselves are healthy enough to continue providing care to people with disabilities, exacerbating the crisis.

Given that many persons with disabilities are already unable to take many of the preventative measures suggested, asking them to further risk exposure by going to the polls during this public health crisis is unreasonable and discriminatory. It forces them to choose between staying at home and forgoing their constitutional right to vote, or adding another exposure risk to an already compromised situation. Moreover, even absentee voting will not totally fix this problem, unless absentee voting is extended in a meaningful way beyond March 17, 2020. The COVID-19 situation has evolved very quickly in Ohio and every day brings new cautions and restrictions on activities. The State's own position only a few days ago was that the

polling locations would be safe, but now that position has changed. This changed position did not occur with sufficient advance warning for individuals to make arrangements to vote by absentee ballot.

The barriers that persons with disabilities already face at the polls are compounded by the current COVID-19 outbreak in Ohio. In March 2016, DRO conducted a survey that identified transportation as the second most prevalent issue for people with disabilities to access in-person voting.⁷ While some voters with disabilities can utilize their own vehicle, the 2017 Self Advocates Becoming Empowered (“SABE”) report found that many voters with disabilities rely on family, friends, or service providers to provide transportation. *Id.* at 4 n.12, 5. Some use public transportation, but service availability to polling places can limit this option.⁸ Given the current local and national guidelines to avoid contact with others, many of the transportation options voters with disabilities were counting on may no longer be available, or pose another risk of exposure.

Persons with disabilities residing in shared living facilities may be prohibited from going to the polling place and returning to their home because of the potential to infect many other at-risk individuals. On March 12, 2020, the Ohio Department of Developmental Disabilities listed “restricting individual community engagement” as a possible precaution for Intermediate Care

⁷ Disability Rights Ohio, *VOTING IN OHIO: A Disability Rights Perspective*, 5 (Mar. 2018) https://www.disabilityrightsohio.org/assets/documents/dro_voting_in_ohio_report_march_2018.pdf (last accessed Mar. 17, 2020).

⁸ Ohio Secretary of State, *Directive 2018-03: Availability of a Remote Ballot Marking System for Use by a Voter with a Disability During Ohio’s By-Mail Absentee Voting Period* (Jan. 19, 2018) <https://www.sos.state.oh.us/globalassets/elections/directives/2018/dir2018-03.pdf> (last accessed Mar. 17, 2020).

Facilities.⁹ Other long-term care facilities are guided to take similar precautions. It is also possible that if an individual did choose to exercise their right to vote, they would be forced into prolonged quarantine upon their return to the facility.

In addition, on March 10, 2020, Governor Mike DeWine announced that 128 polling places will be moved due to COVID-19 concerns.¹⁰ It is possible that some of the new polling locations may not be accessible to individuals with disabilities due to the lack of time to prepare the facilities prior to the Ohio Primary Election date. And again, transportation barriers may be obstacles for those who were planning on voting in person on Election Day.

Finally, DRO's March 2016 survey found the most prevalent issue when it came to voting with a disability was problems experienced while interacting with poll workers.¹¹ These results suggest that additional training for poll workers on topics such as how to set up the polling location to be physically accessible, how to use all available equipment including accessible machines, and how to communicate effectively with voters who may have difficulties speaking, hearing, or writing would be beneficial. Although certain counties in Ohio have trained certain staff on different topics in the hopes of creating more positive and accessible voter experiences, during this time of widespread illness, these trained people may not even be present at the polls to assist voters with disabilities. New poll workers brought on in the days before Election Day will not likely be adequately trained.

⁹ Ohio Department of Developmental Disabilities, *ICFs: DODD Prepares for COVID-19* (Mar. 12, 2020) <https://dodd.ohio.gov/wps/portal/gov/dodd/about-us/communication/news/news-icf-coronavirus> (last accessed Mar. 17, 2020).

¹⁰ Jackie Borchardt, Cincinnati.com, *Ohio moves primary polling places from nursing homes amid coronavirus concerns* (Mar. 10, 2020) <https://www.cincinnati.com/story/news/politics/2020/03/10/ohio-moves-primary-polling-places-amid-coronavirus-concerns/5008955002/> (last accessed Mar. 17, 2020).

¹¹ Disability Rights Ohio, *VOTING IN OHIO: A Disability Rights Perspective*, 4 (Mar. 2018) https://www.disabilityrightsohio.org/assets/documents/dro_voting_in_ohio_report_march_2018.pdf (last accessed Mar. 17, 2020).

V. CONCLUSION

Persons with disabilities are being forced to choose between exercising their constitutional right to vote and their lives. Forcing persons with disabilities to make this choice blatantly violates the ADA's requirement that persons with disabilities enjoy a full and equal opportunity to vote.

A postponement of the Ohio Primary Election until COVID-19 concerns have resolved is a reasonable modification that must be made to ensure the ability of voters with disabilities to exercise their right to vote under the ADA. The postponement or at the least, an extension of absentee voting for a reasonable period of time, would resolve these issues and afford persons with disabilities full and equal access to the polls.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Amicus Curiae Disability Rights Ohio was filed electronically on March 17, 2020. Notice of this filing will be sent by to all parties via electronic mail.

/s/Sarah A. Hill
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