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July 31, 2023

U.S. Office of Special Counsel
1730 M. Street, NW
Washington, DC 20036

Filed electronically using OSC web page

RE: Ohio Secretary of State Frank LaRose's Violation of Hatch Act

Dear Office of Special Counsel,

I represent the Libertarian Party of Ohio in this matter and write to lodge a formal complaint against Ohio's Secretary of State with you under the federal Hatch Act. Frank LaRose, the target of this administrative complaint, has been Ohio's Secretary of State since winning a state-wide election in 2018. At all relevant times described in this complaint, Secretary LaRose has been Ohio's Secretary of State and has acted as such in his official capacity. As explained below, Secretary LaRose is responsible for administering federal election funds provided to Ohio under the federal Help America Vote Act (HAVA).

In sum, Secretary LaRose, who administers federal funds for elections supplied to his Office under federal law, has used and is using his office and official authority to influence, interfere with and affect an Ohio election scheduled on August 8, 2023 that will decide whether to add what is known as "Issue 1" to Ohio's Constitution. Issue 1 proposes to raise the vote-test from a simple majority to 60% of the vote, as well as imposing additional procedural obstacles for those seeking to amend Ohio's Constitution by placing citizen-initiatives on ballots.

The Hatch Act

The federal Hatch Act, 5 U.S.C. § 1502(a)(1), states that "a State or local officer or employee may not ... use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office." (Emphasis added). According to § 1501(1) of the Hatch Act, "'State' ... means the executive branch of a State." "State ... officer or employee," meanwhile, is defined by the Hatch Act as "an individual employed by a State ... whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—(A) an individual who exercises no functions in connection with that activity." *Id.* § 1501(4). Consequently, an executive branch official whose principal employment includes an activity financed "in whole or in part" by federal money, and who exercises at least some "function" in connection with that federally financed activity, is covered by § 1502(a)(1)'s prohibition.

As the United States Court of Appeals for the Sixth Circuit said in upholding the federal Hatch Act's restrictions on State executive officials as against First and Fourteenth Amendment challenges in *Molina-Crespo v. United States Merit Systems Protection Board*, 547 F. 3d 651, 658 (6th Cir. 2008), "the federal government has a 'legitimate interest in making sure that state programs funded in whole or in part with federal dollars be administered in a non-partisan manner,' and in 'ensuring that the public not perceive that those employees involved in administering the programs are partisan politicians exerting inappropriate partisan influence.'" (Citations omitted).

Issue 1 is clearly partisan. "Republicans seeking to defeat an abortion rights amendment in November's election abandoned those principles by placing Issue 1 before voters in August," Editorial Board, *Republicans seeking to defeat an abortion rights amendment in November's election abandoned those principles by placing Issue 1 before voters in August*, AKRON BEACON JOURNAL, July 19, 2023, <https://www.beaconjournal.com/story/opinion/editorials/2023/07/19/ohio-issue-1-vote-no-august-special-election-constitution-amendment/70406231007/>. As recently reported, Ohio's Issue 1 is all about Ohio Republicans maintaining their political hegemony and prohibiting what they perceive as "liberal" challenges, including those guaranteeing abortion rights. "Millions of dollars are pouring into Ohio for a ballot measure that has become a proxy war for abortion rights." Madison Fernandez, *Ohio's special election has become a proxy war over abortion rights*, POLITICO, July 27, 2023, <https://www.politico.com/news/2023/07/27/ohios-special-election-has-become-a-proxy-war-for-abortion-rights-00108643>. "The push to pass Issue 1 is widely seen as an attempt by Republicans in the state to effectively block a separate initiative for abortion rights that is set to be considered this November." *Id.*

To be sure, a State official retains the First Amendment right "to vote as he chooses and to express his opinions on political subjects and candidates." 5 U.S.C. § 1502(b). But the First Amendment only protects voting rights, speech and political opinions made in a State official's private or personal capacity. Only in their personal capacities do officials enjoy First Amendment protections. *See Garcetti v. Ceballos*, 543 U.S. 1186 (2006). When officials, like La Rose, step outside their personal capacities and use either their office, their "official authority or influence," *see* 5 U.S.C. § 1502(a)(1), to interfere with or affect an election, they no longer enjoy First Amendment protection. Nor do they fall into the safe harbor provided by 5 U.S.C. § 1502(b).

Ohio's Secretary of State Administers Federal Funds

Ohio's Secretary of State is an executive agency that receives and spends federal funds for election administration. *See* Ohio Secretary of State, Media Center, Ohio Secretary of State's Office Receives Perfect Audit from the U.S. Election Assistance Commission in its use of Federal Election Grant Dollars, Aug. 17, 2022, <https://www.ohiosos.gov/media-center/press-releases/2022/2022-08-17/https://www.ohiosos.gov/media-center/press-releases/2022/2022-08-17/> (hereinafter "Media Center") (stating that Ohio received federal funds under the Help America Vote Act (HAVA), 52 U.S.C. §§ 20901-21145, and that "Ohio utilized the HAVA funding it received to improve the state's cybersecurity defenses to implement the Secretary's nationally-recognized security directives and preparedness, as well as fund state efforts to

improve accessibility for voters with disabilities and to assist county boards with COVID preparation and response during the 2020 election cycle.”).

The Secretary of State is Ohio’s Chief Election Administrator

Ohio’s Secretary of State is Ohio’s chief elections officer, *see* Ohio Rev. Code § 3501.05, and according to his official web page “supervises the administration of election laws; reviews statewide initiative and referendum petitions; chairs the Ohio Ballot Board, which approves ballot language for statewide issues; canvasses votes for all elective state offices and issues; investigates election fraud and irregularities; trains election officials, and works with counties to train poll workers. The Elections Division of the Secretary of State’s Office also compiles and maintains election statistics and other election-related records.” Frank LaRose, Ohio Secretary of State, Duties and Responsibilities: Chief Elections Officer, <https://www.ohiosos.gov/secretary-office/duties-responsibilities/>.

As Secretary LaRose’s press release cited above states, *see* Media Center, *supra*, Ohio’s Secretary of State is also responsible for administering and spending the federal election funds Ohio has received under statutes like HAVA. As he must under § 3501.05(W) of the Ohio Revised Code, Secretary LaRose is required to “[e]stablish and maintain a computerized statewide database of all legally registered voters under section [3503.15](#) of the [Ohio] Revised Code that complies with the requirements of the ‘Help America Vote Act of 2002,’ Pub. L. No. 107-252, 116 Stat. 1666, and provide training in the operation of that system.” One of his statutorily mandated functions is thus to comply with HAVA and use the money that HAVA provides.

Secretary LaRose’s official press release of August 17, 2022, *see* Media Center, *supra*, also states that he has complied with this statutory mandate: “Ohio utilized the HAVA funding it received to improve the state's cybersecurity defenses to implement the Secretary's nationally-recognized security directives and preparedness, as well as fund state efforts to improve accessibility for voters with disabilities and to assist county boards with COVID preparation and response during the 2020 election cycle.” *See* Media Center, *supra*. All of these accomplishments with election-administration, moreover, serve and inure to the benefit of both state and federal elections, whether conducted together or separately. It is thus clear that Secretary La Rose officially used federal money provided under HAVA, as is required of him by the Ohio Revised Code, to assist in the administration of Ohio’s elections in 2022 and thereafter, including the special election scheduled for August 8, 2023 to determine the fate of Issue 1.

Secretary LaRose’s Use of Twitter

Secretary LaRose frequently uses a Twitter account to tweet about his and his office’s election-related activities. On October 5, 2022, for example, Secretary LaRose tweeted about his official efforts to enhance election security. Together with a picture of the Ohio Secretary of State Public Integrity Division seal and link to the Ohio Secretary of State’s official web page, LaRose tweeted that “today we launched an innovative new division in my office with a clear mission: boost security, strengthen confidence and inspire increased participation in our elections. Learn

about the big steps we are taking to assure the integrity of our elections at <http://OhioSoS.gov/PublicIntegrity>.” Frank LaRose, Tweet, Oct. 5, 2022, <https://twitter.com/FrankLaRose/status/1577667207391322113>.

LaRose expressly identifies himself on this Twitter account as the “Ohio Secretary of State,” *see* Frank LaRose, Twitter, <https://twitter.com/FrankLaRose>, and as illustrated by the October 5, 2022 tweet commonly uses this account to tweet about his official actions as Ohio’s Secretary of State while using official Secretary of State images and linking to official Secretary of State web pages. *See also* Frank La Rose, Tweet, May 27, 2022, <https://twitter.com/FrankLaRose/status/1530307852073590784> (tweeting official images and announcing that “the State Legislative and Party Central Committee Primary Election will be held on August 2, 2022. We will soon issue a directive to boards of elections so they can prepare to conduct another secure & accessible election for Ohio. Stay tuned for more updates!”)

LaRose’s Campaign in Favor of Issue 1

As stated above, Ohio on August 8, 2023 will hold a special election to determine whether Issue 1 should be passed to amend the Ohio Constitution to make it more difficult for citizens to pass constitutional initiatives. *See* Ohio Secretary of State, State Issue 1, <https://www.ohiosos.gov/globalassets/elections/2023/spec/issuereport.pdf> (last visited July 29, 2023).

LaRose, as Ohio’s Secretary of State and acting as such, has now for several weeks actively campaigned as Ohio’s Secretary of State and in his official capacity to urge voters to vote in favor of this legislative initiative. News reports have repeatedly described La Rose’s many efforts as a “campaign” across Ohio for Issue 1. *See, e.g.*, Natalie Fahmy, *One-one-one interview with Ohio Secretary of State Frank LaRose about August special election*, NBC4I.COM, July 17, 2023, <https://www.nbc4i.com/news/your-local-election-hq/one-one-one-interview-with-ohio-secretary-of-state-frank-larose-about-august-special-election/> (“As far as campaigning goes, LaRose has been on the road encouraging a ‘yes’ vote on issue 1, which would make it more difficult to amend the state’s constitution. He said he believes in the issue and is well within his purview to spread that message.”); Morgan Trau, *Concerns raised over Ohio Sec. of State Frank LaRose’s ethics before contentious August election*, OHIO CAPITAL JOURNAL, July 19, 2023, <https://ohiocapitaljournal.com/2023/07/19/concerns-raised-over-ohio-sec-of-state-frank-laroses-ethics-before-contentious-august-election/> (stating that “LaRose has been out for months campaigning for Issue 1, the proposal he created that would make it more difficult to amend the Ohio Constitution.”).

LaRose’s Debate Participation and Use of Twitter to Broadcast It

On July 25, 2023, as part of his campaign in support of Issue 1, Secretary LaRose participated in a televised debate about the merits of Issue 1 where he was identified as Ohio’s Secretary of State, addressed by the moderators as “Secretary of State LaRose,” and included a

video feed under his image identifying him as “Secretary of State Frank LaRose.”¹ During this debate he repeatedly encouraged voters to vote in favor of Issue 1.

Using his Twitter account, the same one described above that identifies him as the Ohio Secretary of State, LaRose thereafter tweeted video footage of his debate performance and support for Issue 1 with a tag line stating “[v]ote YES on Issue 1!” Frank LaRose, Tweet, July 25 2023, https://twitter.com/FrankLaRose/status/1684002016610365440?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet. In a separate tweet that same day he included additional video of his appearance and support for Issue 1 while including the tag line “Constitutions are not for everyday policy making. Don’t let the radical left California our Ohio. Vote YES on Issue 1!” Frank LaRose, Tweet, July 25 2023, https://twitter.com/FrankLaRose/status/1684001233269321728?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet.

Secretary LaRose’s “Official” Campaign and Tweets Supporting Issue 1

As explained above, LaRose expressly identifies himself on this Twitter account as “Ohio Secretary of State,” *see* Frank LaRose, Twitter, <https://twitter.com/FrankLaRose>, and frequently uses this Twitter account for official election-related business. His using it as Ohio’s Secretary of State to advance his support for Issue 1 thus can only be understood as his using his official authority to support a particular side in the August 8, 2023 election. LaRose’s Twitter account, after all, has frequently been used for official purposes. As the Office of Special Counsel (OSC) has stated, “an employee may violate this prohibition [i.e., the Hatch Act] by misusing either official or personal social media accounts, and, specifically, OSC has advised that an employee may not engage in political activity on a personal social media account if OSC has determined that the account is used for official purposes.” Report of Prohibited Political Activity Under the Hatch Act, OSC Files Nos. HA-19-0631 & HA-19-3395 (Kellyanne Conway), at page 2 (May 30, 2019) (available at <https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity%2c%20Kellyanne%20Conway%20%28HA-19-0631%20%26%20HA-19-3395%29.pdf?csf=1&e=aMNHry>).²

Whether the use of a social media account for electoral purposes alone can violate the Hatch Act is determined using a “multi-factor test,” including “whether it (1) contains little to no personal content; (2) identifies the individual as a federal employee; (3) extensively uses photographs of the employee’s official activities; (4) frequently references, retweets, likes, comments, or otherwise shares material related to official activities; or (5) is linked to an agency website or other official page. No single factor is dispositive.” *Id.* at page 5. LaRose’s use of his

¹ This video can be viewed at Sarah Szilagy, *Lawmakers and policy experts debate Ohio Issue 1*, NBC4I.COM, July 25, 2023, <https://www.nbc4i.com/news/your-local-election-hq/lawmakers-and-policy-experts-to-argue-about-issue-1-in-live-debate/>.

² Although the Conway matter dealt with a federal executive official and 5 U.S.C. § 7323(a)(1), the prohibition mirrors that found in 5 U.S.C. § 1502(a)(1). The calculus for determining whether federal and State officials are engaged in personal or official action should therefore be the same.

Twitter account satisfies most of not all these factors. It appears to contain little to no personal content, identifies LaRose as Secretary of State, uses photographs of official business (such as the Secretary's seal), shares material related to his official duties and activities, and has been used to link to the Secretary of State's official webpage.

Even if the use of his Twitter account for support of Issue 1 (and other political purposes) were not enough by itself to bring LaRose's conduct within the scope of the Hatch Act, its use in conjunction with his weeks-long "campaign" across Ohio to pass Issue 1 does. The OSC has noted that "a well-established pattern of using [] official authority as a platform to engage in blatantly partisan attacks" will support Hatch Act jurisdiction. *Id.* at page 13. As noted above, LaRose has engaged in just such a campaign while identifying himself as the Ohio Secretary of State. His appearance at the July 25, 2023 debate as the Ohio Secretary of State is just one example. His tweeting of video clips from a debate where he tells voters they should pass Issue 1 provides another. His many appearances and meetings to trumpet Issue 1 pile on to demonstrate his "well-established pattern" to get his message in support of Issue 1 across to voters and (hopefully he believes) influence their votes. *See, e.g.,* Nick Evans, *Issue 1 debate brings the fight over how to amend Ohio's constitution statewide*, OHIO CAPITAL JOURNAL, July 26, 2023, <https://ohiocapitaljournal.com/2023/07/26/issue-1-debate-brings-the-fight-over-how-to-amend-ohios-constitution-statewide/> ("Secretary of State Frank LaRose and Ohio Right to Life President Mike Gonidakis spoke in favor of Issue 1."); Sarah Szilagy, *Lawmakers and policy experts debate Ohio Issue 1*, NBC4I.COM, July 25, 2023, <https://www.nbc4i.com/news/your-local-election-hq/lawmakers-and-policy-experts-to-argue-about-issue-1-in-live-debate/> ("Ohio Secretary of State Frank LaRose is one of Issue 1's most prominent supporters, championing the issue as a way to protect Ohio's constitution from out-of-state special interests. He's served as the state's top election official since 2019, and before that was a state senator."); Howard Wilkinson, *Analysis: On Issue 1, Frank LaRose says 'there is no bad time to do a good thing.' Many beg to differ*, IDEASTREAM PUBLIC MEDIA, July 12, 2023, <https://www.ideastream.org/2023-07-12/analysis-ohio-issue-1-frank-larose-good-thing>; Jo Ingles, *LaRose says Issue 1 is '100%' about stopping possible abortion amendment*, STATEHOUSE NEWS BUREAU, June 6, 2023, <https://www.stateneews.org/government-politics/2023-06-06/larose-says-issue-1-is-100-about-stopping-possible-abortion-amendment>, ("Ohio Secretary of State Frank LaRose now says his support of a plan to make it harder to change the state constitution is about fending off an abortion rights amendment.").

Conclusion

All of this makes plain that Secretary LaRose's use of his official position, administration of federal money, and political activities in support of Issue 1 come together to place him in violation of the Hatch Act. His "principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." He exercises a "function[] in connection with that activity." He has put federal money to use in perfecting Ohio's election machinery. His use of federal money is one of his principal activities, as made clear by the Ohio Revised Code. He has frequently and relentlessly campaigned as Ohio's Secretary of State in support of an election on Issue 1 that is scheduled to take place on August 8, 2023.

The federal Hatch Act prohibits LaRose from using his office, “official authority or influence for the purpose of interfering with or affecting the result of an election.” The record reflects that he has done so with the August 8, 2023 special election. He continues to do so. His official action is not protected by the First Amendment. He is in plain violation of the federal Hatch Act.

Should you have questions please feel free to contact me at the above address, or by email at mbrown@law.capital.edu.

Sincerely,

Mark R. Brown

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Cc: Secretary of State Frank LaRose