IN THE FRANKLIN COUNTY
COURT OF COMMON PLEAS

OHIO DEMOCRATIC PARTY, et al.,	:	
	:	
Plaintiff,	:	Case No. 20-CV-5634
	:	
v.	:	Judge Richard Frye
	:	
FRANK LAROSE, in his official capacity as Ohio Secretary of State,	:	
	:	
Defendants.	:	

SECRETARY OF STATE FRANK LaROSE'S COMBINED MOTION TO DISMISS AND MEMORANDUM IN OPPOSITION TO PRELIMINARY INJUNCTIVE RELIEF

Defendant Ohio Secretary of State Frank LaRose hereby submits his attached Combined Motion to Dismiss pursuant to Civ. R. 12(B)(1) and (6) and Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction

Respectfully Submitted,

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I. INTRODUCTION

> *"As is apparent from the plain text of R.C. 3509.05(A), the General Assembly said nothing about boards of elections providing one or more secure drop boxes to facilitate the return of marked absentee ballots."*

Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("*Motion*"), p. 7. So, why are we here? It is not because a single board of election claims it has, or is even asking for, discretion to install multiple drop boxes wherever it wants. Rather, Plaintiffs the Ohio Democratic Party ("ODP") and Lewis Goldfarb want this Court to read such limitless discretion into R.C. 3509.05. Their request completely overlooks a very key fact. Under Ohio law, when the director of the board of elections receives a completed absentee ballot application, he or she is required to send to the voter an absentee ballot, complete with a pre-printed return envelope on which *shall be printed* "the official title and post-office address of the director." R.C. 3509.04. R.C. 3509.05(A) requires an elector to mail or personally deliver the completed absentee ballot "to the director" in that pre-printed return envelope. So, to the extent that Plaintiffs are confused about where to return an absentee ballot "to the Director," the answer is clear: to the address on the envelope. R.C. 3509.05 is not ambiguous simply because Plaintiffs are ignoring R.C. 3509.04. And, if there is no ambiguity, there is no need to engage in a statutory construction analysis. But even if there were ambiguity, it is well-settled that the Secretary's reasonable to interpretation of Ohio election laws, including those which require an absentee ballot to be personally delivered "to the Director" at the board of elections, is entitled to deference.

This case suffers many other fatal flaws. Broadly speaking, Ohio's Declaratory Judgment Act allows any person whose rights are affected by a statute to have its construction determined and obtain a declaration regarding those rights. R.C. 2721.03. Plaintiffs do not claim that R.C. 3509.05 gives them a statutory right to submit their absentee ballot via a drop box, much less that such a right has been violated. They also do not raise a constitutional claim. Simply put, they are

not asking this Court for a declaration regarding their own rights under R.C. 3509.05, because they do not have any. Instead, Plaintiffs want a declaration regarding *options* (not rights) of third parties. They want an opinion as to whether R.C. 3509.05 permits (but does not require) third parties—namely boards of elections—to install multiple drop boxes for absentee ballots. At bottom, Plaintiffs are simply asking this Court to tell them what the law is as applied to others. They are not doing so because they claim to be harmed, rather they are "interested" in the topic. No matter how they package it, this entire case is a request for an advisory opinion. It is not a proper claim under Ohio's Declaratory Judgment Act and it must be dismissed.

But, Plaintiffs' failure to state a declaratory judgment claim is not their only problem. Their lack of harm dooms their standing. Plaintiffs do not claim that they have been harmed by R.C. 3509.05. Instead, they base their claim on Directive 2020-016, which was issued by Secretary of State LaRose directing boards that they are required to have one drop box at the board of elections for the November 2020 election. Motion, pgs. 1, 7. But, they are not challenging the Directive on any grounds. Nor do they claim that if boards have discretion to install drop boxes, that the Secretary is required to rescind or amend it. That would be a different claim, one that Plaintiffs would also lack standing to bring.

Plaintiffs want to make this case about policy. It is not. But, in the absence of a claim, standing, a harm, or jurisdiction, policy arguments are all that they have. Plaintiffs have failed to meet any of their burdens in this matter. This case should be dismissed and their request for preliminary injunctive relief should be denied.

II. BACKGROUND AND FACTS

Ohio's expansive no-fault absentee voting process is well-known and well-recognized. *See Mays v. LaRose,* 951 F.3d 775, 779 (6th Cir. 2020) ("There is no dispute that Ohio is generous when it comes to absentee voting – especially when compared to other states."). Since January 1st

of this year Ohio voters have been able to mail or hand-deliver their written application for an absentee ballot to the relevant county board of elections ("board"). R.C. 3509.03. Once the board determines that the absentee ballot application contains all of the information required by R.C. 3509.03, it either delivers in person or mails the absentee ballot to the voter. R.C. 3509.04(B). Starting on October 6, 2020—a full 28 days before Election Day—voters may return the completed absentee ballot to the board in one of two ways: (1) by mailing it to the board of elections, or (2) by personally delivering it to the director of the board. R.C. 3509.05. In relevant portion, R.C. 3509.05 provides:

> The elector shall mail the identification envelope to the director from whom it was received in the return envelope, postage prepaid, or the elector may personally deliver it to the director, or the spouse of the elector, the father, mother, father-in-law, mother-in-law, grandfather, grandmother, brother, or sister of the whole or half blood, or the son, daughter, adopting parent, adopted child, stepparent, stepchild, uncle, aunt, nephew, or niece of the elector may deliver it to the director. The return envelope shall be transmitted to the director in no other manner, except as provided in section 3509.08 of the Revised Code.

As Plaintiffs concede, R.C. 3509.05 unambiguously makes no mention of absentee ballot drop boxes *at all. Motion,* p. 7. Nor did it ever until the passage of Ohio House Bill 197. H.B. 197, § 32, 133rd GA.

Known as the COVID-19 relief bill, H.B. 197 enacted several temporary laws to address the many disruptions caused by the unprecedented global pandemic. This included provisions designed to address closing the polls to in-person voting the day before the 2020 Primary Election. In relevant portion, H.B. 197 extended the deadline by which voters could cast a ballot in the Primary Election and required each board of election to install a secure receptacle at the board of elections in which absentee ballots could be deposited. H.B. 197 § 32(C); (E)(1). Up until H.B. 197 Ohio law did not expressly require or allow board to have a secure receptacle, or "drop box" for absentee ballots. Given that H.B. 197 was only temporary law, it still does not.

Nonetheless, on August 12, 2020 Secretary of State Frank LaRose issued Directive 2020-016 ("Directive") instructing all of Ohio's boards to continue using the secure receptacle that was installed outside of the board office pursuant to H.B. 197. Though unchallenged, that Directive is the genesis of this lawsuit.

Plaintiff the Ohio Democratic Party ("ODP") is one of Ohio's two recognized major political parties and asserts that its members "are likely to request an absentee ballot for the November 3, 2020 general election." Compl., ¶¶ 5, 8. It "intends to spend its resources to [] voter education and voter protection efforts in 2020" and "has an *interest* in knowing whether Ohio law limits boards of elections to a single drop box for the return of absentee ballots and whether Defendant LaRose may authorize the boards to have more than one secure drop box" so that it "can properly inform its members" how to return an absentee ballot. *Id.*, ¶¶ 9-10 (emphasis added). Further, it alleges that "many Democratic Party members" of boards of elections favor multiple drop boxes. *Id.*, ¶ 12.

Plaintiff Lewis Goldfarb is a qualified elector of Franklin County who has already requested an absentee ballot for the 2020 General Election. *Id.*, ¶ 6. He too "has an *interest*" in knowing whether Ohio law limits boards of election to a single drop box and "intends to personally deliver his absentee ballot…to the drop box closest to his residence." *Id.*, ¶¶ 6, 13 (emphasis added). He also wants to know if boards can have more than one drop box so that he will "know how and where" to deliver his marked ballot. *Id.*, ¶ 13.

He and the ODP bring this suit under Ohio's Declaratory Judgment Act, *id.*, ¶ 15, which "allows 'any person…whose rights, status, or other legal relations are affected by a…statute [or] rule…[to] have determined any question of construction…arising under such…statute [or] rule…and obtain a declaration of rights, status, or other legal relations thereunder." *Freedom Rd.*

Found. v. Ohio Dep't of Liquor Control, 80 Ohio St.3d 202, 204, 1997-Ohio-346, 685 N.E.2d 522, citing R.C. 2721.03. They ask this Court to:

> Declare that Ohio law, including R.C. 3509.05, does not limit the number or locations of secure drop boxes that county boards of elections may provide to the voters of their respective counties, and does not limit Defendant Secretary from instructing boards of elections that they may have multiple drop boxes at alternate locations in their respective counties.

Compl., *Prayer for Relief,* ¶ 1. Notably, this case does not raise federal or Ohio Constitutional questions. Plaintiffs do not claim that R.C. 3509.05 grants them any statutory right to a drop box for absentee ballots. *See generally* Compl. Rather, they frame their case as a strict question of statutory construction as to whether the statute prohibits multiple drop boxes at multiple locations. *Id.* Plaintiffs are *not* challenging Directive 2020-016 or seeking a declaration regarding it. And though they are not challenging the Directive or the Secretary's authority to issue it, Plaintiffs ask for a temporary restraining order and preliminary injunction enjoining it. *Id., Prayer for Relief,* ¶ 2.

At bottom, Plaintiff Golfdarb and the ODP, want this Court to tell them what the law is as it applies to Ohio's boards of elections. They stake their claim for such a declaration on their generalized interest in knowing how Ohio law applies to third parties, and their desire to inform members how to return their absentee ballots (in the case of ODP) and where to return it (in the case of Mr. Goldfarb). But, there is not a single board of election—the only entities capable of implementing the relief Plaintiffs seek—before this Court. Plaintiffs request for a declaration regarding what someone *else* may do is a request for an advisory opinion, not a claim for declaratory relief.

Plaintiffs have failed to state a declaratory judgment claim upon which relief can be granted and this entire case must be dismissed pursuant to Civ. R. 12(b)(6). They similarly lack standing to bring this action and it must be dismissed pursuant to Civ. R. 12(b)(1). Thus, Plaintiffs cannot

succeed on the merits of their claim, or any of the other preliminary injunction factors and it must be dismissed in its entirety.

III. LAW AND ARGUMENT

A. Plaintiffs failed to state a claim for declaratory relief.

A Civ. R. 12(b)(6) motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt, Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. When considering such a motion, the court "must presume that all factual allegations in the complaint are true and must make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "Unsupported conclusions of a complaint are not considered admitted, and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots*, 45 Ohio St. 3d 324, 544 N.E.2d 639 (1989) (citation omitted). Here, the Complaint fails to state a declaratory judgment claim and it must be dismissed.

1. Plaintiffs failed to state a claim under Ohio's Declaratory Judgment Act.

Plaintiffs failed to state a claim for declaratory relief upon which relief can be granted and their Complaint must be dismissed. Ohio's Declaratory Judgment Act "is remedial in nature; its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and it is to be liberally construed and administered." *Ohio Ass'n of Pub. Sch. Emples. (OAPSE) v. Sch. Emples. Ret. Sys.*, 10th Dist. Franklin App. No. 19AP-288, 2020-Ohio-3005, ¶ 24, citing *Swander Ditch Landowners' Assn. v. Joint Bd. of Huron and Seneca Cty. Commrs.*, 51 Ohio St.3d 131, 134, 554 N.E.2d 1324 (1990), citing *Radaszewski v. Keating*, 141 Ohio St. 489, 496, 49 N.E.2d 167 (1943). "The essential elements for declaratory relief are: (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3)

speedy relief is necessary to preserve the rights of the parties. *Id.* at ¶ 25, citing *Aust v. Ohio St. Dental Bd.*, 136 Ohio App.3d 677, 681, N.E.2d 605 (10th Dist. 2000). A controversy is justiciable "when it presents 'issues that are ripe for judicial resolution and which will have a direct and immediate impact on the parties.'" *Id.* at ¶ 25, quoting *Cristino v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin App. No. 13AP-772, 2014-Ohio-1383, ¶ 22 (additional citation omitted).

Not every case is appropriate for declaratory relief, and "'in keeping with the longstanding tradition that a court does not render advisory opinions, [the declaratory judgment statutes] allow the filing of a declaratory judgment only to decide 'an actual controversy, the resolution of which will confer certain rights or status upon the litigants.'" *Id.* at ¶ 26, quoting *Mid-Am. Fire & Cas. Co. v. Heasley,* 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9 (additional citation omitted). There are two reasons for dismissing a declaratory judgment action under Civ. R. 12(b)(6): "(1) where there is no real controversy or justiciable issue between the parties, or (2) when the declaratory judgment will not terminate the uncertainty or controversy." *McConnell v. Hunt Sports Enters.*, 132 Ohio App.3d 657, 681, 725 N.E.2d 1193 (10th Dist. 1999), citing *AEI Group Inc. v. Ohio Dept. of Commerce,* 67 Ohio App.3d 546, 550, 587 N.E.2d 889 (10th Dist. 1990). *See also OAPSE,* at ¶ 26 ("[I]n the absence of an actual controversy, a trial court may not render a declaratory judgment."), citing *Mid-Am Fire & Cas. Co.,* at ¶ 9. Plaintiffs' declaratory judgment claim fails on both fronts.

2. There is no real controversy between Plaintiffs and Secretary LaRose.

Plaintiffs' "interest in knowing what the law is" regarding boards' ability to use absentee ballot drop boxes is not a real controversy for purpose of the Declaratory Judgment Act. "For a real controversy to exist 'there must be a 'genuine dispute between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *OAPSE,* at ¶ 25, quoting *Town Ctrs. Ltd. Pshp. v. Ohio State AG,* 10th Dist. Franklin App. No.

99AP-689, 2000 Ohio App. LEXIS 1457, ¶ 12, quoting *Wagner v. Cleveland,* 62 Ohio App.3d 8, 13, 574 N.E.2d 533 (8th Dist. 1988).

In *OAPSE,* the Ohio Association of Public School Employees ('OAPSE") challenged two bills which impacted OAPSE members' cost of living allowance ("COLA"). OAPSE sought a declaration that both bills were passed by the General Assembly in violation of Ohio's single subject rule and that one bill amounted to an unconstitutional delegation of legislative authority from the General Assembly to the School Employee Retirement System ("SERS"). But, OAPSE did not sue the State of Ohio or the General Assembly. Instead, it sued SERS, the entity responsible for implementing the changes made by the challenged bills.

The trial court dismissed OAPSE's request for declaratory relief, holding that if that there was a controversy at all, it was between OAPSE and the General Assembly, not the named defendants. *Id.* at ¶ 28. On appeal, the Tenth District upheld the dismissal, holding that "there simply is no actual controversy between OAPSE and SERS as pertaining to the constitutional claims." *Id.* It further held that "[w]ere the trial court to have determined the merits of the constitutional claims as the case was presented, such a determination would amount to an advisory opinion which is impermissible." *Id.,* citing *Mid-Am. Fire & Cas. Co.,* at ¶ 9

Here too, there is no real controversy between Secretary LaRose and the Plaintiffs. Plaintiffs do not allege anywhere in the Complaint that they have a legal interest that is adverse to the Secretary. They do not claim that they have the statutory or constitutional right to use or install drop boxes, or that the Secretary has taken a legal position adverse to them. Instead, their entire case is premised upon their "interest" in knowing how R.C. 3509.05 applies to third parties. Compl., ¶¶ 10, 13. But, they do not claim to have any rights under it that must be preserved such

that speedy relief is necessary. *See OAPSE,* at ¶ 24. Wanting to know what the law says, without having an actual legal stake in the answer is not an "actual legal controversy."

Plaintiffs' multiple allegations regarding *why* they want multiple drop boxes do not alter that conclusion, because these policy arguments do not rise to the level of a legal dispute between the Secretary and the Plaintiffs. Simply put, Plaintiffs' policy preferences are irrelevant to the narrow question that Plaintiffs have asked this Court to answer: does R.C. 3509.05 prohibit a board of election from having more than one drop box for absentee ballots? *See*, Compl., *Prayer for Relief,* ¶ 1. If this Court even gets to that question—and it should not—answering it will require considering legislative intent, statutory language, and the words and phrases used in the statute. *OAPSE,* at ¶¶ 17. Plaintiffs' preference for the *possibility* of multiple drop boxes that they *might* use if it is a shorter drive has no bearing on that analysis.

Further, even if this Court were to answer Plaintiffs' question in the way that they would like, there is no guarantee that either Plaintiff will actually get what they want: more, closer drop boxes. Thus, the requested declaration will not "have a direct and immediate impact" on either Plaintiff. *See OAPSE,* at ¶ 25, quoting *Cristino v. Ohio Bur. of Workers' Comp.,* 10th Dist. Franklin App. No. 13AP-772, 2014-Ohio-1383, ¶ 22. Said differently, they could get the declaration, but not the drop boxes. This reality takes us to the second basis for dismissing this case: the requested declaration will not terminate the uncertainty that Plaintiffs claim exists.

3. Plaintiffs' requested declaration will not terminate the uncertainty or controversy.

Undoubtedly, Plaintiffs want more drop boxes for absentee ballots. But, giving the Plaintiffs a declaration that a board may install them will not terminate the alleged controversy they raise. Because, Plaintiffs are not seeking a declaration that the statute *requires* multiple drop boxes, nor could they when they concede that it does not even mention drop boxes. See Motion, p. 7. And,

whether drop boxes are actually installed is entirely out of the Plaintiffs' hands. Plaintiffs are asking for a declaration with which they can do nothing.

Ohio's county boards of elections have four members: two from the Republican Party and two from Democrat Party. Compl., ¶ 12. Plaintiffs allege (but do not support with evidence) that in many (but not all) counties the Democrat board members want multiple drop boxes. *Id.* But, *if* a board decides to consider the issue (and there is no guarantee that it will), it will still require approval by a vote of the majority of its members to move forward with installing them. R.C. 3501.11. In some counties, the majority of the members might vote 'no,' and in others the board could end up in a tie vote that the Secretary must break. R.C. 3501.11(X). A board that approves multiple drop boxes might also tie on the issue of how many to install, and where to put them. Ultimately the declaration that Plaintiffs want will not terminate the controversy as to whether the Secretary is required to permit multiple drop boxes, and if so, whether they will actually be installed, and where.

In reality, even if Plaintiffs were asking for a declaration that R.C. 3509.05 *requires* the Secretary to permit multiple drop boxes (and they are not), they have no control over, or even a say in, whether a board considers or approves them. So, even if Plaintiffs get the declaration that they seek they cannot do anything with it. Given that they do not claim to have a statutory or constitutional right to a drop box, they also cannot claim that such a result is unlawful. To the extent that Plaintiffs argue that they are not actually seeking drop boxes, but the option of drop boxes, they reveal their actual aim of this case: to get an advisory opinion regarding R.C. 3509.05.

At bottom, Plaintiffs cannot claim that the declaration they seek will terminate their perceived "controversy" when they do not seek a companion declaration that the Secretary's Directive actually *violates* R.C. 3509.05. Even if this Court were to declare that R.C. 3509.05

permits multiple drop boxes, which is all that Plaintiffs ask it to do, absent a declaration that Directive 2020-016 violates any statute or is unconstitutional (and they have not asked for one) the "controversy" as framed will not terminate. It does not automatically follow that if boards have the discretion to install multiple drop boxes, the Secretary is required to permit them before statewide, uniform security and constitutional standards for installing them can be adopted. There is simply no time before the November election to do so.

Plaintiffs chose to bring this case seeking a declaration regarding R.C. 3509.05 *only.* Whether that declaration automatically requires a related declaration that Directive 2020-016 violates R.C. 3509.05 is a different question, and one that they are not asking this Court to answer. Similarly, though Plaintiffs attempt to bootstrap public policy and constitutional concepts into their *Motion,* they have not raised a constitutional challenge. They are not asking this Court to determine the constitutionality of R.C. 3509.05 or Directive 2020-016. Those questions are being raised elsewhere and are entirely irrelevant here. See, *A. Phillip Randolph Institute of Ohio, et al. v. LaRose,* 1:20-cv-1908 (N.D. Ohio, Polster, J.).

Plaintiffs' case falls several steps short of terminating the "controversy" they perceive. A declaration that R.C. 3509.05 permits multiple drop boxes does not automatically mean that multiple drop boxes will be installed *or* that Directive 2020-016 is unlawful. And, Plaintiffs have not asked this Court to declare that it does. They have failed to state a Declaratory Judgment claim upon which relief can be granted and the Complaint must be dismissed.

B. Even if Plaintiffs stated a claim under the Declaratory Judgment Act, they lack standing and this Court therefore lacks jurisdiction.

Even if they had stated a claim under Ohio's Declaratory Judgment Act, neither Plaintiff has standing to bring this action. Standing is a threshold jurisdictional issue and a requirement to file suit in Ohio's common pleas courts. "The Ohio Constitution expressly requires standing for

cases filed in common pleas courts." *Preterm-Cleveland, Inc. v. Kasich,* 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461, ¶ 20, quoting *ProgressOhio.org, Inc. v. JobsOhio,* 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 20. "Article IV, Section 4(B) provides that the courts of common pleas 'shall have such original jurisdiction over all justiciable matters.'" *ProgressOhio,* at ¶ 11. "Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue.'" *Id.* at ¶ 7, quoting *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27. A Plaintiff bears the burden to demonstrate standing at the time suit is filed, *Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 27. A matter is not justiciable if a party cannot do so. *ProgressOhio,* at ¶ 11.

"Standing does not depend on the merits of the plaintiff's claim[;]" instead it "depends on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case." *Id.* at ¶ 7, citing *Clifton v. Blanchester,* 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 15; *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515 (1973). "Traditional standing principles require litigants to show, at a minimum, that they have suffered '(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.'" *ProgressOhio,* at ¶ 7, citing *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. To do so, a plaintiff must show "a concrete injury in fact, rather than an abstract or suspected injury." *State ex rel. Consumers League of Ohio v. Ratchford*, 8 Ohio App.3d 420, 424, 457 N.E.2d 878, 883 (10th Dist. 1982).

Here, Plaintiffs must show that they have suffered an "invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not hypothetical or

conjectural." *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, 840 N.E.2d 1101, ¶ 10 (10th Dist.), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Their particularized injury must be "different in character from that sustained by the public generally." *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 19 (quotation omitted). An imminent injury must be "certainly impending." *Clapper v. Amnesty Internatl. USA*, 568 U.S. 398, 409 (2013) (quotation and emphasis omitted). "Standing depends on whether the claimant has a sufficient personal stake in the litigation to obtain a judicial resolution of the controversy." *Deutsche Bank Nat'l Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 20. "The issue of standing hinges upon whether [a party] is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." *Murr v. Ebin,* 10th Dist. Franklin App. No. 96APE 10-1406, 1997 Ohio App. LEXIS 1973, *3-4, citing *Rakas v. Illinois,* 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978).

Applying this standard in *ProgressOhio*, the Ohio Supreme Court rejected the appellants' standing to challenge to the constitutionality of the Jobs Ohio Act. *ProgressOhio*, 139 Ohio St.3d 520. Rather than show that they had any rights at stake or that speedy resolution would bring them concrete relief, the appellants "simply argue[d] that they [had] an idealistic opposition" to the program implemented via the challenged statutes. *Id.* at ¶ 19. The Supreme Court held that this was insufficient to confer standing under the Declaratory Judgment Act and upheld the dismissal of their claims on this, and other, bases. *Id.* Plaintiffs obviously have an idealistic opposition to Ohio's boards having one drop box at the board of elections. But, in accordance with *ProgressOhio,* that opposition does not amount to a concrete injury sufficient to confer standing.

The Franklin County Court of Common Pleas has been down this road before. In *Union County v. Brunner,* 146 Ohio Misc.2d 40, 2008-Ohio-2833, 889 N.E.2d 589. In that case, the

Union County Commissioners challenged former-Secretary of State Jennifer Brunner's Directive requiring the board of elections to use certain voting equipment. *Id.* They claimed that the Directive violated their rights under R.C. 3506.02, which allows county commissioners to adopt certain voting equipment for use in elections on the recommendation of the local board of elections. *Id.* at ¶ 38. But the court recognized that R.C. 3506.02 gave the county commissioner's the limited role of adopting voting equipment, and did not give them any additional authority to dictate how the equipment would be used. *Id.* at ¶ 42. It noted that "[b]oards of county commissioners do not have the authority to determine how elections will be conducted[,] those decisions are left exclusively to boards of elections and the secretary of state." *Id.* at ¶ 42. Their lack of authority over how voting machines will be used on Election Day "renders them without an injury based upon the secretary's issuance of a directive that merely dictates how Union County's existing voting equipment will be used." *Id.* Thus, the court concluded that the commissioners had not proven that the directive had in anyway diminished their rights under R.C. 3506.062. *Id.* at ¶ 43.

Like the commissioners in *Union County*, the Plaintiffs do not have any rights under R.C. 3509.05, nor is Directive 2020-016 directed at them. This "renders them without an injury" based on anyone's interpretation of R.C. 3509.05.

That the right at issue in a declaratory judgment case must belong to the named plaintiff is only underscored by the Tenth's District's decision in *Murr v. Ebin,* 10th Dist. Franklin App. No. 96APE 10-1406, 1997 Ohio App. LEXIS 1973. In *Murr* the Court considered whether an inmate had standing to challenge an institutional rule that prohibited him from assisting other inmates with legal work in the prison library. *Id.* at *2. Though the trial court dismissed the case pursuant to the unauthorized practice of law, on appeal the Tenth District held that the case should have been dismissed based on the plaintiff's lack of standing. *Id.* The Court recognized that in Ohio

only an attorney at law has the authority to act as a lawyer for others. Though federal courts have recognized an exception to this rule and allowed inmates to serve as jailhouse lawyers under certain circumstances, the "right" to have a jailhouse lawyer belongs to the inmate on whose behalf it is exercised, not the individual acting as a jailhouse lawyer. *Id.*, citing *Gibbs v. Hopkins,* (C.A.6), 10 F.3d 373 (6th Cir. 1993). As the "lawyer," the *Murr* plaintiff "'neither owned nor possessed a 'right' to act as an attorney for another," *id.* at *7, yet he brought the action only on his own behalf, not on behalf of an inmate who arguably possessed the right to his services. *Id.* at *4. Because Murr was not the aggrieved party whose right had been adversely affected by the rule "he lacked standing to bring [the] action." *Id. See also Freedom Rd. Found.,* 80 Ohio St.3d 202 (Holding that an organizational plaintiff had standing to challenge to a gambling statute as it applied to its sales of "tip tickets," but recognizing that because it was not a liquor permit holder, it lacked standing to challenge the application of an administrative code provision under which such permit holders could be cited for sale of the tip tickets.).

Plaintiffs do not claim to *have* any constitutional or statutory rights under R.C. 3509.05, much less, any that are being injured. They do not claim to have a right to install drop boxes, or a role in the decision as to whether and where drop boxes will (or won't) be installed. They also do not claim that they have any right to require the Secretary to permit or require additional drop boxes, or to require boards to install more drop boxes, if they are permitted. As in *Murr,* Plaintiffs are seeking a declaration regarding rights that they do not possess. The analogy is clear: just like the jailhouse lawyer who lacked standing to assert a right belonging inmates, Plaintiffs here lack standing to assert a right (if one exists) that belongs to Ohio's boards of election. They cannot be the aggrieved party for purposes of standing.

Because they are seeking a declaration regarding the boards' rights, Plaintiffs cannot claim to have suffered an injury that is fairly traceable to the Secretary's conduct. The Secretary did not take any action with regard to the *Plaintiffs*. The relief that they seek—a declaration that boards *may* install more than one drop box—will not redress any injury they might claim to have. At bottom, they are seeking to enjoin a directive that does not harm them. Because, even if the Court grants the declaration, Plaintiffs are not challenging Directive 2020-016 and it will still be in effect. In order for it *not* to be in effect, Plaintiffs would need an additional declaration that *it* somehow violates R.C. 3509.05. But, they did not ask for it.

But, even if this Court were to grant Plaintiffs' declaration *and* enjoin the un-challenged Directive, Plaintiffs would still be a long way from their alleged "injury" being redressed. Some boards might decide not to even consider additional drop boxes, and others may tie as to whether to have them, where to have them, and how many to have. In the case of Mr. Goldfarb, his alleged injury will only be redressed *if* the drop box is closer to his house than the one at the Franklin County Board of Elections. Many of ODP's members are undoubtedly in the same boat. If boards install drop boxes, they might not be any closer to ODP members than the one required by Directive 2020-016. In that case, Plaintiffs are seeking relief that they might not actually use.

The ODP's claims are not salvaged by their attempt to assert standing on behalf of their members. Associational standing only exists when an association's "members have suffered actual injury" and thus "have standing to sue in their own right." *Ohio Contrs. Ass'n v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994) (quotation omitted). The Supreme Court has "emphasized that 'to have standing, the association must establish that its members have suffered actual injury.'" *State ex rel. Am. Subcontrs. Assn. v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011-Ohio-2881, 950 N.E.2d 535, ¶ 12, quoting *Bicking,* 71 Ohio St.3d at 320. Thus, "[a]t least one of the members of

the association must be actually injured," and the injury "must be concrete and not simply abstract or suspected." *Id.* (internal quotation and citation omitted).

Plaintiff Goldfarb does not claim to be a member of the ODP and it is not relying on him to establish standing. Compl., ¶ 6. Instead, without naming *any* member who it claims has rights under R.C. 3509.05, ODP seems to premise its associational standing on four things: (1) its "interest" in knowing whether Ohio law limits boards to having one drop box, *id.*, ¶ 10, (2) its intention to spend money on voter education efforts, *id.*, ¶ 9, (3) its Democratic Party members of boards who favor multiple drop boxes (but who are not actually named Plaintiffs in this case), *id.*, ¶ 12, and (4) that some members of their party who opt to use drop boxes will have to travel different distances to do so. *Id.* at ¶ 11.

But, these allegations are entirely irrelevant to question that they are asking this Court to answer. The only question that Plaintiffs are asking this Court to answer is one of statutory construction: whether R.C. 3509.05 prohibits boards from having more than one drop box. Compl., *Prayer for Relief*, ¶ 1; *Motion*, p. 1, 7. Their question is not whether it should, or whether it would be easier for its members if it did, it is: what did the General Assembly mean when it phrased R.C. 3509.05 the way it did? As further discussed, a complete reading of Ohio law—specifically R.C. 3509.04—provides a very logical answer to that question.

ODP's attempt to establish standing based on policy considerations and personal preferences fail. But, even if they are considered, ODP's allegations fall far short of the "concrete particularized injury" required for standing. First, ODP's "interest" in knowing what Ohio law says about drop boxes is not an injury, it a desire for an advisory opinion. Second, ODP's intention to spend money on voter education efforts is not an "injury," it is a choice. Third, ODP has no authority to sue on behalf of members of the boards of election who, in their official capacity as

board members, may favor additional drop boxes beyond the one permitted by Directive 2020-16. If a board member favors additional drop boxes, there is a process set forth in Ohio law whereby members can vote in accordance with their preferences. R.C. 3501.11. ODP cannot sue to circumvent that statutory process based on its own preference. Finally, Plaintiffs' allegation that some members will have to travel farther than the board of elections to use drop boxes is entirely irrelevant to their question of statutory construction. Overall, the allegations on which Plaintiffs premise their standing are a thinly-veiled attempt to introduce policy and constitutional considerations into a straight question of statutory interpretation. Plaintiffs chose how to frame this case. Their attempt to shift the focus away from that choice is insufficient to confer standing and their claims must be dismissed.

C. Mandamus, not declaratory relief, is the appropriate action to "correct" the Secretary's instructions to the board of elections.

"[I]f the secretary of state 'has, under the law, misdirected the members of boards of elections as to their duties, the matter may be corrected through the remedy of mandamus.'" *State ex rel. Stokes v. Brunner,* 120 Ohio St.3d 250, 2008-Ohio-5392, 898 N.E.2d 23, ¶ 13, quoting *State ex rel. Colvin v. Brunner,* 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 20, quoting *State ex rel. Melvin v. Sweeney*, 154 Ohio St.223, 226, 94 N.E.2d 785 (1950). The entire crux of Plaintiffs' case is that the Secretary misdirected the boards with respect to drop boxes when he issued Directive 2020-016 and that he had "no legal basis" to do so. *Motion,* p. 9. That is a claim for mandamus, not a claim for declaratory relief. *See Stokes,* at ¶ 13. But, Plaintiffs also lack standing in mandamus. They cannot claim that the Secretary has a "clear legal duty" to allow boards to install multiple drop boxes when they admit that R.C. 3509.05 is completely silent in that regard. Their obvious attempt to avoid these problems and re-package their case as declaratory

judgment action fails on its face. The dispositive threshold issue here is that these Plaintiffs lack standing and their case must be dismissed.

D. This court lacks jurisdiction over Plaintiffs' claims for their failure to join a necessary party.

Similarly, to the extent that Plaintiffs seek a declaration that third parties, namely Ohio's boards, have certain rights under Ohio law, their failure to name any such third parties is a jurisdictional defect that requires dismissal. Ohio's Declaratory Judgment Act provides that "when declaratory relief is sought, 'all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding.'" *Union Cty. Commrs.*, 146 Ohio Misc.2d 40 at ¶ 61, quoting R.C. 2721.12. "The absence of an interested and necessary party to a declaratory judgment action constitutes a jurisdictional defect that precludes a court from rendering a declaratory judgment [and] renders all other issues moot, including the merits." *Id.* at ¶ 62.

Though the court rejected the commissioner's standing in *Union County,* it held that the board of elections would have standing to challenge the Secretary's directive. *Id.* at ¶ 59. It recognized that the Union County Board of Elections was the specific entity charged with implementation of the directive and "had a legal interest that would be affected by a declaration regarding the secretary's authority to issue [it]." *Id.* at ¶ 56. Consequently, the board had "an undisputable legal interest in a declaration regarding whether the directive is lawful because such a declaration directly affects whether the [Board] will implement the directive." *Id.* at ¶ 65. The court therefore found "that the [Board was] an interested and necessary party to the declaratory judgment action." *Id.* It concluded that in the absence of the Board, it lacked jurisdiction to decide the plaintiff's declaratory judgment claim and dismissed it. *Id.* at ¶ 68.

Ohio boards have an indisputable legal interest in the declaration and injunction that Plaintiffs seek. Only the boards can choose to consider whether to install one or more additional

drop boxes beyond the one required by Directive 2020-16, and if a board were to so decide, only the boards can decide where to install the additional drop boxes. This Court offered to allow the Plaintiffs to amend their Complaint and name a board of election as an additional Plaintiff. Plaintiffs declined the invitation and that decision is fatal to their claims. Boards are a necessary and interested party in whose absence this Court lacks jurisdiction to decide Plaintiffs' declaratory judgment claim and this case must be dismissed.

Any attempt by the Plaintiffs to distinguish *Union County* from the instant matter on the basis that they are not seeking a declaration regarding Directive 2020-016 only hurts their case. If Plaintiffs are not challenging Directive 2020-016, there is no basis to enjoin it. It will remain in effect, even with the declaration Plaintiffs seek (as it should). Their alleged injury will not be redressed, and they therefore lack standing.

E. Even if Plaintiffs can overcome their failure to state a claim, lack of standing, and jurisdictional defects, the preliminary injunction should be denied.

1. Plaintiffs will not succeed on the merits.

Revised Code 3509.05 is unambiguous, or at a minimum can be reasonably interpreted to require an absentee ballot to be delivered "to the Director" at the official address pre-printed on the return envelope, the board of elections. Plaintiffs cannot succeed on the merits of an alternate interpretation. "The construction and interpretation of statutes is a recognized function of a declaratory action." *OAPSE,* at ¶ 16, citing *Town Ctrs. Ltd.*, 2000 Ohio App. LEXIS 1457. But, "when the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation." *State ex rel. Gesleh v. State Med. Bd.*, 172 Ohio App.3d 365, 2007-Ohio-3328, 874 N.E.2d 1256, ¶ 9, citing *State ex rel. Jones v. Conrad,* 92 Ohio St.3d 389, 392, 2001-Ohio-207, 750 N.E.2d 583. "'In such a case, we do not resort to rules of interpretation in an attempt to discern what the General Assembly could

have conclusively meant or intended…we rely on what the General Assembly has actually said." *Id.*, quoting *Jones,* 92 Ohio St.3d at 392. "A court may interpret a statute only where the words of the statute are ambiguous." *Id.,* quoting *State v. Jordan,* 89 Ohio St.3d 488, 492, 2000-Ohio-225, 733 N.E.2d 601.

"'Statutory interpretation is a question of law.'" *State ex rel. Peregrine Health Servs. of Columbus, LLC v. Sears,* 10th Dist. Franklin App. No. 18AP-16, 2020-Ohio-3426, ¶ 23, quoting *Silver Lining Group,* 2017-Ohio-7834, ¶ 33, 85 N.E.3d 789 (10th Dist.). The "paramount concern in construing a statute is legislative intent." *State ex rel. Linnabary v. Husted,* 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 22 (quotation omitted). "To determine legislative intent, the court looks to and gives effect to the statutory language without deleting or inserting words." *OAPSE,* at ¶ 17, citing *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 2001-Ohio-236, 741 N.E.2d 121. Further "[t]he statutory language must be considered in context, and the court must construe words and phrases 'according to the rules of grammar and common usage.'" *Id.,* quoting *Silver Lining Group,* at ¶ 34. "A court's duty is to give effect to the words used in a statute, not to delete or insert words." *Elec. Classroom of Tomorrow v. Ohio Dept. of Educ.,* 92 N.E.3d 1269, 2017-Ohio-5607, ¶ 20 (10th Dist.), citing *State v. Maxwell,* 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, ¶ 10.

As Ohio's chief election officer Secretary LaRose may issue directives to the boards of elections "as to the proper methods of conducting elections" and to "[p]repare rules and instructions for the conduct of elections." R.C. 3501.04; R.C. 3501.05(B)-(C). To do so, he retains broad power to interpret election laws. Ohio courts have repeatedly held that the Secretary's determination of such matters is entitled to deference by the courts: "when an election statute is subject to two different, but equally reasonable, interpretations, the interpretation of the Secretary

of State, the state's chief election officer, is entitled to more weight." *State ex rel. Herman v. Klopfeisch*, 72 Ohio St.3d 581, 586, 651 N.E.2d 995 (1995). Courts have a duty to defer to the Secretary's reasonable interpretation. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 57; *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 2005-Ohio-5795, 841 N.E.2d 766, ¶ 13.

R.C. 3509.05 is not ambiguous simply because it does not specify where an absentee ballot must be returned "to the Director." Reading that statute, one can logically conclude that it is not designed to answer the question of "where." Rather, R.C. 3509.05 provides the manner in which an absentee ballot must be completed and dictates *to whom* it must be returned. It must be returned "to the Director" in the return envelope. R.C. 3509.05. Plaintiffs cannot credibly that those words are unclear. They can only do so by ignoring R.C. 3509.04, which requires the director pre-print his official address on the return envelope.

Specifically, upon the receipt of an absentee ballot application that contains all of the required information, the director of a board of elections "shall mail with the ballots and the unsealed identification envelope an unsealed return envelope upon the face of which shall be printed the official title and post office address of the director." R.C. 3509.04 (emphasis added). When an elector receives the ballot, he or she must mark it, fold it, and place it in the identification envelope provided by the director. R.C. 3509.05(A). The elector must then "mail the identification envelope to the director from whom it was received in the return envelope [which, pursuant to R.C. 3509.04 has the director's pre-printed post office address] or personally deliver it [the pre-addressed return envelope] to the director." R.C. 3509.05(A). Thus, the "where" an absentee ballot must be returned "to the director" *is* set out in the statute, just not the one that Plaintiffs ask this Court to construe. Regardless as to whether it is mailed or personally delivered,

an absentee ballot may only be returned "to the director" at the address on the pre-printed return envelope. R.C. 3509.05; R.C. 3509.04. It may not be returned "to the director" in any other manner, or at any other location. *Id.* Notably, there is no evidence before the court that any Ohio director sent out return envelopes with an address *other* than the board of elections. Nor is there any evidence that any director of a board of elections maintains his or her office anywhere other than the board of elections. But, even if there were, the Secretary's reasonable interpretation that in every Ohio county electors must still uniformly deliver an absentee ballot "to the Director" at the board of elections, is entitled to deference.

R.C. 3509.05 does not somehow become ambiguous and subject to interpretation simply because the Plaintiffs choose to read it in a vacuum. The General Assembly said what it intended: absentee ballots must be personally delivered or mailed "to the director" at the address he or she provides. This Court can only interpret the words "to the Director" if they are ambiguous, they are not, and this inquiry must end. *State ex rel. Gesleh*, at ¶ 9.

What's worse, is that Plaintiffs are asking this Court to read more than just words into R.C. 3509.05. In the name of "statutory construction," the Plaintiffs are asking this Court to opine that a Director has limitless discretion. But, there is not a single director of a board of elections before this Court asking for it. Nonetheless, Plaintiffs contend that in the absence of a limit in R.C. 3509.05 as to the location of the Director, the Secretary cannot read one in. See, *Motion,* p. 8. Their position is internally inconsistent. They claim that the Secretary cannot read a limitation into R.C. 3509.05, yet they want this Court to order one. They ask for a declaration that limits R.C. 3509.05 to allowing boards to have as many drop boxes at alternate locations as they choose. In other words, they want a limitation—multiple drop boxes—but only the one that they prefer. But how could it logically stop there? Would it not follow that if "drop boxes" were read in into

R.C. 3509.05, so too would the ability of a Director to start accepting absentee ballots handed to him or her at the grocery store? At church? At a stop light? Why would he not have the discretion to go door-to-door and ask voters to hand him their executed absentee ballots? And, if there is truly no limiting principal in R.C. 3509.05, how would the Secretary ensure that the Director's discretion is consistently applied in every Ohio county?

Though courts are bound to liberally construe election laws in favor of the right to vote, this rule does not allow them to simply "ignore facts and make unreasonable assumptions if doing so favors the right to vote.'" *State ex rel. Skaggs v. Brunner,* 120 Ohio St.3d 506, 2008-Ohio-6333, 900 N.E.2d 982, ¶ 50, quoting *State ex rel. Colvin v. Brunner,* 120 Ohio St.3d 110, 2008-Ohio-5041, 862 N.E.2d 979, ¶ 62. In the case of R.C. 3509.05, this rule does not mean assuming that the General Assembly intended to give a Director or a board unbridled discretion to determine where to accept ballots, even if doing so might favor the right to vote, for some (but not all) voters. Nor does it require the Court to ignore the fact that the question of "where" to deliver a ballot "to the director" is provided for in R.C. 3509.04.

The key question here is still: what did the General Assembly intend when it required an elector to return a completed ballot via U.S. mail or by personally delivering it "to the director"? That language is straightforward: the ballot has to be returned to the Director in the return envelope he or she provides. So too is the question of "where" to return the ballot "to the Director": to the address pre-printed on the return envelope. R.C. 3509.04. To the extent that there is any ambiguity (and there is not), the Secretary's interpretation that a voter must deliver a ballot to the address on the return envelope is reasonable and entitled to deference. See, *State ex rel. Colvin*, at ¶ 57 There is no one before this Court arguing that location is anywhere other than the board of elections.

But, even if they were, it would not matter. Generally speaking, Ohio law evidences an intent by the General Assembly to completely occupy the field and provide uniformity when it comes to determining the number of locations at which absentee voting may occur. The statutory right to vote absentee is set out in R.C. 3509.02, which contemplates that a voter may vote absentee at the board of elections or at an alternate location (commonly known as an early vote center) created pursuant to R.C. 3501.10(C). But, there can only be *one* early location per county at which early in-person voting may occur. R.C. 3501.10(C) ("The board of elections may maintain permanent or temporary branch offices at any place within the county, provided that, if the board of elections permits electors to vote at a branch office, electors shall not be permitted to vote at any other branch office or any other office of the board of elections."). That the General Assembly passed H.B. 197 and dictated that a single drop box was required at the board of elections further supports the conclusion that it did not intend to give boards broad, much less any, discretion regarding the return of absentee ballots. Ohio law leaves no room for boards to exercise the discretion that Plaintiffs seek. They are not entitled to an injunction ordering it, especially on a complaint that is supposed to *only* be about statutory construction.

Only the General Assembly has the authority to require or authorize boards to allow early voting or to accept absentee ballots at multiple locations. It has not done so and R.C. 3509.05 cannot be interpreted to grant boards or directors such broad discretion. This Court does not have the authority to legislate a duty that the General Assembly has not yet recognized. *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757, ¶ 40, quoting *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 14 ("'The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.'"). That is exactly what Plaintiffs are asking this Court to do, give boards discretion

that that the General Assembly has not. Their invitation should be rejected, and their requested declaration denied.

2. There is no evidence that Plaintiffs will be harmed in the absence of a preliminary injunction.

Plaintiffs have not provided any evidence that they will be irreparably harmed absent an injunction. There is not a single affidavit or any other evidence from Plaintiff Goldfarb. There is also not a single affidavit or any other evidence from a representative or member of the ODP. When, at the status conference, Counsel for the Secretary outlined the Plaintiffs' lack of harm and lack of standing, this Court invited Plaintiffs to call additional witnesses to support their claimed harm. They confirmed that they are not doing so. Exhibit A, Sept. 4, 2020 email from D. McTigue to B. Coontz. Plaintiffs are not entitled to a preliminary injunction if they are not harmed.

The affidavits that Plaintiffs attached to their *Motion* do not alter that conclusion, as none of them address, much less mention, irreparable harm to the Plaintiffs. Notably, none of the affidavits are from individuals claiming to be members of ODP. The affidavits from a member of the Hamilton County Board of Elections and the Sandusky County Board of Elections do not carry Plaintiffs' burden of proving irreparable harm to the Plaintiffs. Once again, if either board wanted to bring suit, it could have. And, if the Plaintiffs wanted to bring the boards into this suit, they could have. Given the boards' workload leading up to the November election, it is fortunate that Plaintiffs did not. But, they cannot now claim to be before this Court on any board or board member's behalf. Plaintiffs' burden is to show that *Plaintiffs* will be irreparably harmed without an injunction. The record is completely devoid of any evidence to that effect.

When this Court considers *what* the Plaintiffs are seeking to enjoin, Directive 2020-016, their lack of evidence makes sense. The Directive does not apply to the Plaintiffs, and they do not claim that it does. And though they speculate that a single drop box "threatens to disenfranchise

voters, including Plaintiff ODP's members," they have not offered *any* evidence to support that statement. *Motion,* p. 9. Bottom line, Plaintiffs have no evidence that they are being irreparably harmed by Directive 2020-016 because it does not actually apply to them.

But even if they tried to offer evidence, it would be completely irrelevant to the actual question that they admit is one of *law*: what was the General Assembly's intent when it provided that an absentee ballot must be "personally delivered to the director"? Once again, that question need only be answered if R.C. 3509.04 is ignored and the required deference is not afforded to the Secretary. *See, e.g., State ex rel. Colvin,* 120 Ohio St.3d 110 at ¶ 57. Furthermore, constitutional and policy considerations have no bearing on the answer, as only the General Assembly's legislative intent in phrasing R.C. 3509.05 the way that it did is "of paramount concern." *State ex rel. Linnabary*, 138 Ohio St.3d 535 at ¶ 22.

When it drafted R.C. 3509.05 the General Assembly could not have considered COVID-19, any perceived problems with the United States Postal Service, or how long it takes to get to a board of elections on a bus. Plaintiffs can cite no authority for the proposition that evidence of later-occurring events and factors are relevant to and should be considered for purposes of determining legislative intent. Even if they could, they have not presented any evidence connecting those events and factors to R.C. 3509.05 and the interpretation that they seek or to their *own* harm. Plaintiffs are not entitled to enjoin a Directive that does not apply to them, that they are not challenging and that they have not proven harms them, irreparably, much less at all.

3. Changing election procedures on the eve of an election will harm Ohio voters, and the State.

Plaintiffs ask this Court to do what courts have been resoundingly unwilling to do and have cautioned against: change an election procedure when the election is imminent. *See e.g.* Ex. B, April 28, 2020 Decision and Judgement Entry, *Ohioans for Raising the Wage, et al. v.*

LaRose, Franklin County CP Case No. 20 CV 2381 at 9 (Young, J.), citing *Purcell v. Gonzalez,* 549 U.S. 1, 4-5 (2006) (*per curiam*) (denying preliminary injunction because, although plaintiffs had established third parties would not be unjustifiably harmed by an injunction, "court orders affecting elections. . , can themselves result in voter confusion[,] [a]s an election draws closer, that risk increase"); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020) (citing *Purcell* in staying district court's preliminary injunction); *Estill v. Cool,* 295 F. App'x 25, 27 (6th Cir. 2008) (upholding denial of preliminary injunction where ballot printing and distribution was scheduled to begin the day after the Sixth Circuit issued its opinion, 19 days after the preliminary injunction motion was denied); *SEIU Local 1 v. Husted,* 698 F.3d 341, 345 (6th Cir. 2012), citing *Purcell,* 549 U.S. at 4-5 ("As a general rule, last-minute injunctions changing election procedures are strongly disfavored."). "Court orders affecting elections especially conflicting court orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell,* 549 U.S. at 4-5; *see also Thompson*, 959 F.3d at 813.

Citing that risk, in *League of Women Voters v. LaRose*, the Court rejected the plaintiffs' request to preliminarily enjoin H.B. 197, the bill passed in response to the disruption to Ohio's March 2020 primary caused by COVID-19. No. 2:20-cv-1638, 2020 U.S. Dist. LEXIS 91631, *31 (S.D. Ohio Apr. 3, 2020). The court noted that the "public has an interest in a free and fair election [and in] avoiding further voter confusion." *Id.* Even amidst the COVID-19 outbreak, the court concluded "because further changes to the election procedure could cause significant additional voter confusion, the court finds that the public interest factor weighs against granting Plaintiffs their requested relief." *Id.*

Plaintiffs are not seeking to preserve the status quo, they want to disrupt it. That is not the purpose of a preliminary injunction. Ex. B, *Ohioans for Raising the Wage, et al. v. LaRose*, 20 cv 2381 at 11, quoting *Obringer v. Wheeling, & Lake Erie Ry.*, 3d Dist. Crawford No. 3-09-08, 2010-Ohio-601, ¶ 19. If it is disrupted, this Court must also consider the voter confusion and election administration problems that it will create. Assuming for argument's sake that the preliminary injunction is granted, not all boards will choose to consider drop boxes, and those that do might tie on that decision. Given that there are also no standards regarding where and how many drop boxes a county may install, a board might also tie on those details. If Plaintiffs are truly concerned about ensuring that voters do not have to travel long distances to drop off a ballot, what standards do they propose to ensure that all voters have similar travel times? Regardless, any ties will come to the Secretary of State to be broken, litigation could ensue, and the status of drop boxes will remain in the air for the foreseeable future.

Under Plaintiffs' plan, a board would also have to consider the security implications of drop boxes. Would the drop box(es) be monitored 24/7? What security measures will be required to ensure that they are not tampered with? How often will they be emptied, and by whom? How will the ballots be securely transported to the board of elections? How will the board ensure that bad actors do not install their own drop boxes, providing the ability to steal ballots? How will boards combat the voter confusion created by having a pre-printed return envelope with an address to which a ballot musts be returned and conflicting instructions regarding the availability of a drop box at an alternate location?

And, under Plaintiffs' plan, how does the Secretary ensure that all Ohio voters are being treated equally? If a board opts not to consider or install drop boxes, voters in that county will not have the same opportunity to deliver an absentee ballot as voters in others. Plaintiffs cannot in

one breath claim that having a single drop box at the board disenfranchises voters, *Motion*, p. 9, (a notion that the Secretary disputes), and in the next ask for relief that invites Ohio voters to be treated differently, depending on where they live (a concern that Judge Polster has already raised in the Northern District Case). Plaintiffs have no answers to any of these questions, and offer no plan for providing them. If Directive 2020-016 is enjoined the inevitable result will be voter confusion, disparate treatment of voters, election disruption, and more lawsuits. Accord, *Thompson,* 959 F.3d at 813 ("[R]ewriting a state's election procedure or moving deadlines rarely ends with one court order[, m]oving one piece on the game board invariably leads to additional moves.")

Finally, if enjoined from implementing its properly issued Directive, the State would be irreparably harmed. "Unless [a] statute is unconstitutional, enjoining a 'State from conducting [its] elections pursuant to a statute enacted by the Legislature...would seriously and irreparably harm the State." *Thompson,* 959 F.3d at 812, quoting *Abbott v. Perez,* 138 S.Ct. 2305, 2324, 201 L.Ed. 2d 714 (2018). The General Assembly has determined that *it* will determine where and how absentee voting will occur in Ohio, and the result is uniformity. If Plaintiffs wanted to challenge that uniformity, whether provided for in Directive 2020-016, R.C. 3509.05, or R.C. 3509.04 as being unconstitutional, they could have. They did not. The State will be irreparably harmed if it is enjoined from carrying out its uniform and constitutional election laws, and Plaintiffs offer no evidence to the contrary.

IV. CONCLUSION

For the foregoing reasons, the Motion to Dismiss of Defendant Ohio Secretary of State Frank LaRose should be granted, and Plaintiffs' Motion for Preliminary Injunction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing with the Clerk of the Court by using the e-Filing system which will send a notice of electronic filing to the following:

EDWARD M CARTER for Donald J Trump For President Inc, The Republican National Committee, The Ohio Republican Party, National Republican Congressional Committee

M RYAN HARMANIS for Donald J Trump For President Inc, The Republican National Committee, The Ohio Republican Party, National Republican Congressional Committee

ALANA TANOURY for Jane Doe, Summit County, City Of Akron, City Of Dayton, City Of Columbus, City Of Cincinnati, Joan Doe, Commissioners, John Doe

RICHARD N COGLIANESE for Jane Doe, Summit County, City Of Akron, City Of Dayton, City Of Columbus, City Of Cincinnati, Joan Doe, Commissioners, John Doe

EVE V BELFANCE for Jane Doe, Summit County, City Of Akron, City Of Dayton, City Of Columbus, City Of Cincinnati, Joan Doe, Commissioners, John Doe

DEREK CLINGER for Ohio Democratic Party, Lewis Goldfarb

DONALD J MCTIGUE for Ohio Democratic Party, Lewis Goldfarb

JOHN C COLOMBO for Ohio Democratic Party, Lewis Goldfarb

I further certify that the following parties were served by electronic mail on this 8th day of September, 2020:

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