

**IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT**

OHIO DEMOCRATIC PARTY,
et al.,
Plaintiffs-Appellees

CASE NO. 20-AP-432
ACCELERATED
CALENDAR

v.

FRANK LAROSE,

Defendant-Appellant.

On appeal from the
Court of Common Pleas
Franklin County
Case No. 20-cv-5634

OHIO DEMOCRATIC PARTY,
et al.,

CASE NO. 20-AP-432
ACCELERATED
CALENDAR

v.

FRANK LAROSE,

OHIO REPUBLICAN PARTY,
Intervenor-Appellant.

On appeal from the
Court of Common Pleas
Franklin County
Case No. 20-cv-5634

**AMICUS BRIEF OF THE CITY OF COLUMBUS, CITY OF
CINCINNATI, CITY OF AKRON, CITY OF TOLEDO, BOARD
OF LUCAS COUNTY COMMISSIONERS, CUYAHOGA
COUNTY, JUDY DODGE, CAROLYN RICE, AND DEBORAH A.
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ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

Appellant’s Assignment of Error No. 1: The trial court erred by issuing the declaratory judgment in this case, as the court wrongly declared that the Ballot Delivery Law, R.C. 3509.05, allows county boards of elections to install as many drop boxes as they like in as many places as they like.

(Declaratory Judgment Opinion R. 176 at 29)

AMICI COUNTERPROPOSAL: The trial court correctly recognized that the Secretary of State violated Ohio law by prohibiting county boards of elections from placing drop box locations in different areas of their counties where it would be convenient for voters to be able to use.

Appellant’s Assignment of Error No. 2: The trial court erred in enjoining the Secretary of State’s Directive 2020-16.

(Preliminary Injunction Opinion, R. 186 at 3)

AMICI COUNTERPROPOSAL: The trial court properly enjoined Directive 2020-16 as that Directive is counter to Ohio law.

ISSUES PRESENTED FOR REVIEW

Does Ohio law allow the use of multiple drop box locations?

INTRODUCTION

Amici City of Columbus, City of Cincinnati, City of Akron, City of Toledo, Board of Lucas County Commissioners, Cuyahoga County, as well as Judy Dodge, Carolyn Rice, and Deborah A. Lieberman, Montgomery County Commissioners (collectively, “Amici”) file this amicus curiae brief in support of the trial court’s determination that Directive 2020-16 be enjoined. That Directive prohibits county boards of elections from “installing a drop box at any location other than the board of elections.” Ohio Sec’y of State, Directive 2020-16, (Aug. 12, 2020). As the trial court found, there is simply nothing in the Ohio Revised Code that limits any county board of elections from establishing multiple drop box locations throughout the county. Furthermore, prior to Directive 2020-16, some boards of elections were examining where and how to add additional drop box locations in their counties for the 2020 general election.

Amici, like all Ohioans, have an interest in making sure that the 2020 general election, held during a pandemic, runs as smoothly as possible. Amici want all of their residents who wish to cast a ballot to

be able to do so in a safe environment. One of those ways is for boards of elections across the State to add additional drop box locations so that individuals who requested mail-in absentee ballots can be certain that their ballots have been timely returned to the boards of elections.

Prior elections have taught us that early vote centers—which are typically at boards of elections where the drop boxes will be located—experience long lines, especially the weekend before the election. Additionally, the United States Postal Service (“USPS”) warned Secretary of State LaRose that it may not be able to timely process absentee ballots in accordance with the deadline requirements of the Ohio Revised Code. During the 2020 primary election, 1% of all absentee ballots returned were rejected by the boards of elections, and 2/3 of those rejected absentee ballots were not counted because they were not timely returned to the boards. Recent USPS changes, including the removal of high speed sorters, the closing of branch offices, and other delays, may further impact absentee voting.

Multiple drop box locations are a plain and obvious solution to these problems. That solution is made even better because, as the trial

court found, there is simply nothing in the Ohio Revised Code that prohibits their use.

INTEREST OF AMICI CURIAE

Amici have a direct stake in this dispute. As local governments, the Amici have been on the front line responding to COVID-19 and have an interest in ensuring that their residents can vote safely. Local health departments conduct critical contact tracing of the COVID-19 virus. Contact tracing involves identifying individuals who came into contact with an individual who has tested positive for the virus. Just like they do for other diseases, local departments of health will contact an individual who tests positive for the coronavirus and determine other individuals with whom that person had close contact. Contact Tracing, Ohio Dep't of Health (Apr. 28, 2020).

<https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio/Contact-Tracing/>.

Similarly, our local health departments have been at the forefront of approving business opening plans, school opening plans, and investigating allegations that individuals or businesses may be violating

various health orders. These local health departments are essential in Ohio's COVID-19 mitigation plans.

Amici also have an interest in making sure that their residents are given free and fair access to cast their votes in the 2020 general election. Their residents already face challenges from COVID-19 and USPS changes. In an election that may break all records for absentee balloting in Ohio, Amici have an interest in seeing that their residents have a way to vote that is both safe and efficient.

Finally, many Amici have important local issues on the 2020 general election ballot. Whether it is a Charter Amendment to add a Civilian Review Board, local tax levies, zoning changes, or local liquor options, Amici have a direct stake in guaranteeing that the results of these elections accurately reflect the will of the electorate.

ARGUMENT

A. The State has already recognized that COVID-19 presents at least some risk to in-person voting.

The State has acknowledged the risks associated with in-person voting in light of the COVID-19 pandemic. Indeed, on March 16, 2020, Dr. Acton issued an Order providing as follows:

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

Ohio Dep't Public Health, Director's Order, p. 2 (March 16, 2020). As a result of Dr. Acton's Order, Ohio had no in-person voting for the March 17, 2020 primary. The Ohio General Assembly subsequently passed House Bill 197, which allowed Ohioans to continue to vote by mail only (with exceptions for individuals with disabilities and those unable to receive mail) until April 28, 2020. *See* Ohio House Bill 197, § 32.

The State defended House Bill 197’s provision for all absentee/ mail-in voting in *League of Women Voters*, noting that “coronavirus posed obvious risks to in-person voting, where asymptomatic virus carriers could nonetheless spread the virus to voters and often elderly poll workers.” (R. 104, Def. State of Ohio’s Opp. to Pl.’s Mot. for TRO, at p. 3.) The State argued that its “interest in conducting the March 17 primary, to the greatest extent possible, through absentee voting is simple: it seeks to save Ohioans’ lives,” and stated, “No one disputes Dr. Acton’s conclusion that in-person voting carries ‘a high probability of widespread exposure to COVID-19.’” (*Id.*, at p. 17.) In that case, the Court concluded that “the State has an interest in curbing the global COVID-19 pandemic,” and “in limiting in-person voting during this period of crisis.” *League of Women Voters v. LaRose*, No. 2:20-cv-1638, 2020 U.S. Dist. LEXIS 91631, at *22 (S.D. Ohio Apr. 3, 2020).¹

¹ Studies have tied in-person voting to an increase in the spread of COVID-19. *See* Nicholas Reimann, Coronavirus Infections Spiked In Wisconsin After In-person Election, Study Says, Forbes (May 19, 2020, 1:23 PM), <https://www.forbes.com/sites/nicholasreimann/2020/05/19/coronavirus-infections-spiked-in-wisconsin-after-in-person-election-study-says/#648e3b4614b3> (quoting Chad D. Cotti, et al., The Relationship between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary, NBER (Rev. Aug. 2020), <https://www.nber.org/papers/w27187.pdf>).

Although Ohioans are no longer subject to State-mandated stay-at-home orders, the COVID-19 pandemic is by no means “curbed.” On July 29, 2020, the Ohio Department of Health issued a press release stating that “Ohio’s hospitals saw their highest number of patients with COVID-19 this week since the pandemic began on March 9, 2020.”

Ohio COVID-19 Hospitalizations Hit New High During Pandemic, Ohio Dep’t of Health, (July 29, 2020),

<https://odh.ohio.gov/wps/portal/gov/odh/media-center/odh-news-releases/ohio-covid-19-hospitalizations-hit-new-high-during-pandemic>.

As of August 31, 2020, Columbus recorded 16,788 COVID-19 cases and 451 deaths. (R. 105, Exhibit B to Amicus Brief).

B. Certain communities are at a higher risk for both contracting COVID-19 and for more adverse reactions to the disease.

Individuals accessing how they want to cast their ballot this November do so against a backdrop of the realities of COVID-19, including its disproportionate impact on certain communities. For example, even though the population of Columbus is 54% non-Hispanic White, non-Hispanic White individuals make up only 29% of the

reported COVID-19 cases and 32% of the reported hospitalizations.

Similarly, the population of Columbus is 29% non-Hispanic Black, yet non-Hispanic Black individuals make up 31% of all reported COVID-19 cases and 41% of all COVID-19 hospitalizations. *Id.*

Income level has greatly affected how COVID-19 has impacted communities. CelebrateOne zip codes² report infections at 2,177.0/100,000 residents while non-CelebrateOne zip codes report an infections at a rate of 1,487.6/100,000 residents. *Id.* at p. 3. Likewise, CelebrateOne zip codes report a hospitalization rate of 224.1/100,000 residents while non-Celebrate One zip codes have a hospitalization rate of 108.1/100,000 residents. *Id.* Finally, the death rate per 100,000 residents is 52.6 in CelebrateOne zip codes and 42.7 in the other areas of the City of Columbus. *Id.*

² CelebrateOne is a program of the Columbus Department of Public Health to lower infant mortality. It focuses on the zip codes where infant mortality is the highest. The CelebrateOne zip codes are 43203, 43204, 43205, 43206, 43207, 43211, 43219, 43222, 43223, 43224, 43227, 43229, and 43232. This is made up of Franklinton, the Hilltop, Linden, the Southside, the near Eastside, the Northeast Side, and Northland. These are “neighborhoods in Columbus where higher unemployment, lower graduation rates, homelessness, lack of access to nutritious food, higher instances of crime and lower access to health coverage and timely access to pre-natal care contribute to babies being born too small or too soon, and not thriving during their first year of life.” CelebrateOne, City of Columbus, <https://www.columbus.gov/celebrate-one/Neighborhoods/> (last visited Aug. 31, 2020).

C. COVID-19 has impacted the way in which Ohioans will vote in the 2020 general election.

Secretary LaRose understands that “[b]oards of elections will see high voter turnout this November.” Ohio Sec’y of State, Directive 2020-11, at p. 6 (July 6, 2020). In Directive 2020-11, LaRose stated that the boards “must prepare to hire additional staff to account for *significant increases in absentee voting, voter turnout, questions from voters, early in-person voting, social distancing and cleaning protocols, and voter registration.*” *Id.* (emphasis added). In fact, “[b]oards must take into consideration the amount of staff the board requires to successfully administer an election under normal circumstances and account for higher voter turnout, higher percentage of absentee ballots, and additional social distancing and cleaning protocols that will require more staffing for compliance.” *Id.* Thus, it is clear that more people will vote absentee during the 2020 general election.

As the trial court found, Secretary LaRose has mailed approximately 7.8 million absentee ballot applications to registered voters. R. 176, Opinion at 4. Further, as of September 4, 2020,

approximately 1 million voters have already requested a mail-in absentee ballot. *Id.* In fact, LaRose has stipulated that “election officials expect a major increase in mail-in voting this year due to the coronavirus.” *Id.* And, while in a normal election year around 20% of Ohioans vote by mail, LaRose predicted that could be as high as 50% this year. *Id.*

While more electors will choose to cast an absentee ballot, USPS recently informed Secretary LaRose that “under [USPS’s] reading of Ohio’s election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Services’ delivery standards.” (R. 106, Attached as Exh. C to Amicus Brief below). As the trial court pointed out, the USPS informed LaRose that “[t]o allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state’s due date.” R. 176, Opinion at 6. Accordingly, many Ohio voters will likely—unknowingly—miss the deadline due to postal service delays and delivery standards beyond their control.

Additionally, in an August 16, 2020 letter to President Trump, Attorney General Dave Yost recognized reported changes to the USPS, including “removal of sorting equipment and mail boxes,” and noted the effect that those changes may have on the election³. (R. 107, Attorney General Yost’s Letter.) Attorney General Yost recognized that the COVID-19 pandemic means that “many of our senior citizens and other people who are medically vulnerable will vote absentee this year.” *Id.* He asked President Trump to postpone any changes to the postal service until after the election “to avoid slowing the mail or creating uneven levels of service across the country,” emphasizing “the people of this country, for the good of the country, *need* to know that all lawfully cast votes will be timely delivered so that they can be counted.” *Id.* (emphasis in original).

³ The United States Postal Service has removed high capacity mail sorters from use. The Columbus Dispatch reported, “The Columbus area was among the hardest hit in the country, with a reduction of 327,000 pieces of mail per hour, according to the Post. The only cities with bigger reductions were Los Angeles (577,000 pieces per hour), Houston (470,000) and Pontiac, Michigan (394,000). Pontiac is near Detroit.” Rick Rouan, [Postal Service reduces mail sorting capacity, warns Ohio some absentee ballots may not be delivered in time to count](https://www.dispatch.com/news/20200814/postal-service-reduces-mail-sorting-capacity-warns-ohio-some-absentee-ballots-may-not-be-delivered-in-time-to-count), Columbus Dispatch (Aug. 14, 2020, 6:26 PM), <https://www.dispatch.com/news/20200814/postal-service-reduces-mail-sorting-capacity-warns-ohio-some-absentee-ballots-may-not-be-delivered-in-time-to-count>.

The trial court properly concluded that “voter apprehension [about delivery of absentee ballots in the mail] has been proven, and is not irrational. Voter concern about mail service is, therefore, another factor weighed by boards of elections if they have the legal authority to implement additional drop boxes or other methods to receive absentee ballots.” R. 176 at 6.

D. Disparities between Ohio’s 88 counties.

The trial court also correctly recognized the great disparities that exist between Ohio’s 88 counties. Both Franklin and Cuyahoga counties have over 1.2 million residents and approximately 900,000 registered voters. R. 176 at 7. Meanwhile, the State’s three least populous counties – Vinton, Monroe, and Morgan counties – have less than 15,000 residents and 10,000 voters each. Similarly, Ashtabula county covers over 700 square miles while Ottawa, Erie, and Lake counties each cover 255 square miles or less. *Id.* at 7-8.

Likewise, different counties have different transportation issues. The trial court correctly recognized that voters who rely on public

transportation could save substantial time if public libraries had ballot drop boxes. *Id.* at 8. As the Amici showed below, a voter in the Hilltop area of Columbus must take two buses and spend an hour and fifteen minutes each way in order to reach the Franklin County Board of Elections and use their drop box. (Exh. 112, showing COTA trip from 1970 West Broad Street to 1700 Morse Road).

The trial court also correctly detailed other problems with having a single drop box in many counties. Specifically, despite having a drop box inside the board of elections and a second drop box for drive through traffic, Hamilton County experienced substantial traffic safety problems during the 2020 primary election. R. 176 at 8. “[O]n the last day of primary voting lines of vehicles waiting to get to the drop box extended onto a nearby four-lane state highway, and were estimated to be as long as a mile in both directions.” *Id.*

After Montgomery County realized that their drop box led to traffic congestion on Dayton’s main thoroughfare, their board of elections moved the drop box to the loading dock of the county building. *Id.* at 9. That change, however, will not alleviate traffic problems.

“[O]nly a small number of vehicles can wait in line *** to use the exterior drop box before traffic backs up on to Third Street.” *Id.*

The Franklin County Board of Elections is located in the northern portion of the county. Its board had been exploring adding another 4 or 5 locations in the west, south, and east sides of the county including at libraries, other county buildings, or at branch offices for the sheriff’s department. *Id.* at 9-10. This is especially important since as of September 4, 2020, the Franklin County Board of Elections had received over 145,000 mail-in absentee ballot requests, nearly equal to the total number of absentee ballots cast in the county in the 2016 general election. *Id.* at 10.

Mahoning County, a county that has to deal with lag time in mail because local mail gets sent from the county to Cleveland to be sorted and then sent back to Mahoning county, had been looking at adding 10 drop box locations. *Id.* Mahoning recognizes that the way its mail is delivered means that it generally takes five to seven days to go from one local address to another. Since ballots must be returned to the boards of

elections no later than 10 days after the election, voters in Mahoning County run the real risk of being disenfranchised.

Likewise, Huron County, having experienced problems with the mail service during the 2020 primary election, was also interested in adding a second drop box location so that voters in both the northern and southern parts of the county could conveniently use that option. *Id.* at 10-11.

Given the varying circumstances in Ohio's 88 counties, the local boards of elections should be permitted to decide whether to place additional drop boxes throughout their counties. These additional drop boxes are not onerous to install. The trial court recognized that each new box costs about \$2,000 and requires only two weeks to deliver. *Id.* at 11. This is a simple and cost effective solution allowing more voters to safely cast their ballots while ensuring that such ballots are timely received by the boards of elections.

E. This Court should reject LaRose’s egregious interpretation of Ohio law.

“If the secretary’s advice to the boards of elections is an erroneous interpretation of the election laws there must be some remedy to correct the error and to require proper instructions in lieu of those erroneously given.” *State ex rel. Colvin v. Brunner*, 120 Ohio St. 3d 110, 2008-Ohio-5041 ¶ 20. In our case, Secretary LaRose has erroneously interpreted Ohio’s election law to prohibit multiple drop box locations. The common pleas court corrected that egregious error.

It is unfortunate that litigation was necessary in order to guarantee the right of *all* Ohioans to cast a ballot in a safe and effective manner. It is even worse when the State’s Chief Elections Officer claimed to be in support of additional drop box locations if Ohio law allowed them. Ohio law clearly does.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Franklin County Common Pleas Court.

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I hereby certify that the foregoing was filed electronically on September 23, 2020. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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