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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY

OHIO DEMOCRATIC PARTY, ET AL.,	**CASE NOS. 20 AP 432/429**
Plaintiffs-Appellees,	**ACCELERATED CALENDAR**
-v-	
FRANK LAROSE, in his official capacity as Ohio Secretary of State.	**On appeal from the Court of Common Pleas Franklin County**
Defendant- Appellant,	**Case No. 20-CV-5634**
OHIO REPUBLICAN PARTY.	
Intervenor-Appellant.	

BRIEF OF PLAINTIFFS-APPELEES

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STATEMENT OF THE CASE

Ohio Secretary of State Frank LaRose (the "Secretary") defines his appeal in terms of whether his conclusion that the intent of the General Assembly in R.C 3509.05 was to limit the personal delivery of absentee ballots to only the offices of the boards of elections, and hence there can be only a single drop box per county, is correct or at least not unreasonable. Appellees Ohio Democratic Party (ODP) and Lewis Goldfarb agree that this is the primary issue though disagree with the Secretary as to the answer. This is because Ohio law is entirely silent about where delivery may occur. And this silence, together with the well-settled rules of statutory construction, leads to the unescapable conclusion that, as a matter of law, the Franklin County Court of Common Pleas' (the "Trial Court") declaratory judgment ("D.J. Op.") that R.C. 3509.05 does not limit the number of locations that the county boards of elections may authorize for voters to personally return their ballots, and hence the number of authorized drop boxes, is correct.

The relevant statute simply states that the voter or a close family member may "personally deliver" the ballot to the Director of their board

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of elections. "Personally" modifies the voter (or close family member), not the recipient—personal delivery does not mean that the Director must personally receive it. The question then is what are the options for personal delivery to and receipt by the Director? The answer, in the absence of a statutory limitation, is that ballots may be returned to the Director at any locations authorized by the Board.

Having established that the Trial Court's declaratory judgment is correct, the secondary issue is whether the Trial Court was correct to issue a preliminary injunction enjoining the Secretary's instruction in Directive 2020-16 that limits the installation of drop boxes to the boards of elections' offices ("P.I. Op."). As to this issue, Appellees agree with the Secretary that he generally has the authority under Ohio law to issue instructions to the boards of elections. These instructions, however, must be reasonable and consistent with Ohio law, and the Secretary's instruction in Directive 2020-16 is neither. This is because the sole justification the Secretary has provided for his instruction is his flawed statutory construction. He provided no other rationale. Indeed, the Secretary even repeatedly stated that he *supports* boards being able to

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install additional drop boxes but that his hands have been tied by the General Assembly. But once this sole footing for the Directive crumbles, there is nothing left upon which to defend it. Accordingly, the Secretary failed to provide a "reasonable" justification for the limitation in Directive 2020-16. For this reason, and because the remaining factors all favor Appellees, the Trial Court correctly issued a preliminary injunction.

STATEMENT OF THE FACTS

Ohio law authorizes a system of no-fault absentee voting in which any qualified elector may vote by absentee ballot at an election. *See* R.C. 3509.02. Once a voter has requested, received, and marked their absentee ballot, Ohio law provides that the voter shall return their absentee ballot by placing it into an identification envelope and either (1) "mail the identification envelope to the director from whom it was received in the return envelope, postage prepaid," (2) or "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

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deliver it to the director." R.C. 3509.05(A), third paragraph. The ballot "shall be transmitted to the director in no other manner, except as provided in section 3509.08 of the Revised Code," (*id.*) which concerns disabled, hospitalized, and confined absent voter's ballots. All marked absentee ballots that are delivered to the director either personally by the voter or by an authorized close relative "shall be delivered to the director not later than the close of the polls on the day of an election." R.C. 3509.05(A), fifth paragraph.

Importantly, nothing in R.C. 3509.05 or elsewhere in the Revised Code prescribes either the manner in which voters or their close relatives may "deliver" their absentee ballot or the manner in which the directors of the boards of elections are to receive "delivered" ballots.

In the absence of any language in the Ohio Elections Code limiting the manner in which voters may "deliver" their marked absentee ballots to the board of elections, boards have, for many years, provided a drop boxes to facilitate the return of absentee ballots. The Hamilton County Board of Elections, for instance, has had a drop box at their office since 2012. *See* Pl. Ex. B, ¶ 10.

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Due to the COVID-19 pandemic, Ohio elections officials are projecting—and experiencing—a surge in the use of absentee voting compared to the past. The Secretary stipulated that while typically about 20% of voters cast absentee ballots, he estimates that as many as 50% of voters will cast absentee ballots for the 2020 General Election. *See* D.J. Op. at 4. This estimate is bearing out, too. As of September 4, 2020, already more than one million of Ohio's 7.8 million had already requested absentee ballots. *Id.*

At the same time that elections officials are seeing an increase in absentee ballot requests, policy changes within the United States Postal Service (USPS) have led to widely reported delays in mail delivery that may result in absentee ballots not being timely received or returned by voters. *See* D.J. Op. at 5-6. The USPS has already warned Ohio's elections officials that "there is a significant risk that, at least in certain circumstances, ballot may be requested in a manner that is consistent with [Ohio's] election rules and returned promptly, and yet not be returned in time to be counted." Pl. Ex. C-1 p.2.

Amidst the backdrop of increased demand for absentee ballots and

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increased delays in mail delivery, many of the bipartisan county boards of elections around the state were, as of July, moving forward with plans to install additional secure drop boxes in different parts of their respective counties for voters to use in returning their absentee ballots. On July 13, 2020, the Sandusky County Board of Elections, for example, unanimously approved the installation of two additional drop boxes in different parts of the county—one in Woodville and one in Clyde (in addition to the board's office in Fremont).[1] *See* Pl. Exs. C & AC. Similarly, on July 14, 2020, the Hamilton County Board of Elections approved a motion to explore adding four more secure drop boxes throughout Hamilton County, in addition to the two drop boxes already located at their office. Pl. Ex. B, ¶ 21. The Hamilton County Board's staff subsequently received bids for installing the new drop boxes. *Id.* ¶ 22. The Director and Deputy Director of the Franklin County Board of Elections were similary exploring "adding 4-5 drop boxes in the west, south, and east sides of Franklin County, including

[1] Throughout its brief, ORP repeats the plainly incorrect assertion that no board had approved installing multiple drop locations prior to the issuance of Directive 2020-16, and, in turn, hinges much of its argument on this factually wrong statement. *See* ORP Br. at 7, 12.

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libraries, other county agency buildings or branch offices of the Franklin County Sheriff." D.J. Op. at 9-10. Around the state, and in counties large and small, boards of elections were taking similar steps. *See* D.J. Op. at 9-10 (summarizing efforts in Athens, Huron, Mahoning, and Montgomery Counties).

But as many boards of elections were preparing to install additional drop boxes in their counties, the Secretary blocked them. Initially, the Secretary expressed uncertainty as to whether boards of elections were allowed to have even one secure drop box located at their respective offices; on July 20, 2020, he sent a Request for a Formal Opinion to the Ohio Attorney General to address his uncertainty. *See* Pl. Ex. D. At this time, his office instructed all boards of elections to not take any further actions toward installing additional drop boxes pending the request. *See* Pl. Ex. P. But before the Attorney General could issue his legal opinion, the Secretary abruptly withdrew the request and, on August 12, 2020, he issued Directive 2020-16 in which he instructed that boards of elections (1) must have one drop box installed outside their offices and (2) are "prohibited from installing a drop box at any other location other than the

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board of elections." *See* Pl. Ex. A.

Even *after* the Secretary issued Directive 2020-16, he continued to express uncertainty as to whether the law supports his instruction. On August 19, 2020, the Secretary stated in a phone call that included the President of the A. Philip Randolph Institute of Ohio, Andre Washington, and State Representative Paula Hicks Hudson that if a judicial order made it clear that he has the authority to allow county boards of elections to install secure drop boxes at locations other than the boards' offices, then he would allow the boards to do so. *See* Pl. Ex. E, ¶ 5-6; Pl. Ex. E, ¶ 3-4. The Secretary's counsel made a similar remark to Judge Dan Polster of the U.S. District Court for the Northern District of Ohio in an August 31, 2020 status conference in a separate federal lawsuit concerning drop boxes.[2] *See* Pl. Ex. N, pp. 11, 14, 18, 20, 22; D.J. Op. at 3.

Regardless of what the Secretary told others, he acted to prohibit the boards from installing drop boxes at other locations in their counties. As

[2] Despite his prior statements, it seems that the Secretary now believes that he needs not just one, but two, courts, and maybe even three, to tell him that boards may have more than one drop box, a policy he favors.

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a result, the boards of elections that had made plans to install additional drop boxes in their counties had to stop, and this will harm Appellees and other Ohio voters.

Appellees filed their Verified Complaint on August 25, 2020 seeking a declaratory judgment and potentially injunctive relief as to Directive 2020-16's legally flawed conclusion limiting boards to a single drop box located outside their office location. Shortly after the case began, Appellant Ohio Republican Party ("ORP") intervened. An evidentiary hearing was held on September 11, 2020. Affidavits from twenty witnesses were presented, and Mr. Goldfarb and ODP's Executive Director, Greg Beswick, both testified in person. The Secretary refused to testify or to send anyone else to testify. *See* D.J. Op. at 2-3 n.2. On September 15, 2020, the Trial Court granted Appellees' requested declaratory relief. Then, on September 16, 2020, after the Secretary refused to rescind Directive 2020-16 and oddly *requested* the Court to issue the preliminary injunction initially sought by Appellees, the Court issued the injunction. *See* P.I. Op. at 2. The Secretary appeals both decisions and ORP appeals the injunction.

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LAW & ARGUMENT

I. The Trial Court Correctly Issued A Declaratory Judgment. (Secretary's First Assignment of Error)

A. Standard of Review.

An appellate court reviewing a declaratory judgment matter should apply an abuse-of-discretion standard in regard to the trial court's holding concerning appropriateness of the case for declaratory relief, i.e., the matter's justiciability, and should apply a de novo standard of review in regard to the trial court's determination of legal issues in the case. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, ¶ 1, 972 N.E.2d 586. The Trial Court's declaratory relief is appropriate under both standards.

B. R.C. 3509.05 does not limit the personal delivery of absentee ballots to the office of the board of elections.

The primary issue in this declaratory judgment action is whether Ohio law limits the personal delivery of absentee ballots to a single location that, according to the Secretary's legislative construction, is the office of the board of elections (including a drop box located outside the board's office). Ohio law is entirely silent with respect to the location(s) for return of absentee ballots, and is, thus, also silent as to whether a board

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or the Secretary may authorize other locations for drop boxes. The Trial Court, therefore, correctly concluded that nothing in the Ohio Revised Code supports the Secretary's ban on boards of elections authorizing drop boxes at locations other than their offices.

1. Ohio law is silent with respect to locations for the personal delivery of absentee ballots, and therefore does not limit their return to county boards of elections' offices.

The key statute is R.C. 3509.05(A), the third paragraph of which 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.

In construing R.C. 3509.05(A), the Court's "paramount concern is the legislative intent in enacting the statute." *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, ¶ 17 quoting *State ex rel.*

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Steele v. Morrissey, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 21. To discern the legislative intent of a statute, the Court must "first consider the statutory language, reading words and phrases in context and construing them in accordance with the rules of grammar and common usage." *Id.* (internal quotation and citation omitted). Courts are further bound by the duties to (1) not insert language not used in the statute, (2) avoid unduly technical interpretations that impede the public policy favoring free, competitive elections, and (3) liberally construe election laws in favor of the right to vote. *Id.* at ¶ 21, 22, 26. The Secretary's construction of R.C. 3509.05 violates all three principles by construing delivery to the Director as meaning one thing, delivery "to the board of elections office."

Beginning with the text of R.C. 3509.05(A), the parties agree that the General Assembly said nothing at all about boards of elections installing or using secure drop boxes to facilitate the return of absentee ballots.

Appellants place much emphasis on the term "deliver" to support their conclusion that boards of elections are limited to installing drop boxes only at their offices. But the statute says nothing at all with respect to the location(s) where voters or their close family members may

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"deliver" their absentee ballot or the location(s) that boards of elections may authorize as points to receive the delivered ballots. Moreover, and prior to Directive 2020-16, no Secretary of State had ever interpreted this provision or anything else in Ohio law as limiting the number or locations of drop boxes for voters to use to return their absentee ballots, despite the growing ubiquity of drop boxes prior to 2020.

In contrast, when the General Assembly has intended to restrict other voting activities to one location, it has made such restrictions clear. For instance, the General Assembly specified that county boards of elections may allow early, in-person voting to occur at only one location in the county. *See* R.C. 3501.10(C). But nothing like that exists with respect to drop boxes.

Similarly, the General Assembly has been equally clear when it intends an activity to take place at the "office of the board" of elections. In the fourth paragraph of 3509.05(A), for example, the statute explicitly refers to voting activity that takes place "*at the office of the board....*" (emphasis added). And in R.C. 3509.06(D)(3)(b), the statute makes clear that if an absentee ballot features incomplete or non-conforming

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identification information, the voter must complete a correction form and "*deliver the form to the office of the board in person* or by mail." (emphasis added). The fact that "the office of the board" is used in these instances, but not used in the third paragraph's references of delivering a ballot "to the director," makes clear that a single geographic limitation was not intended by the open-ended terminology of that paragraph.

Due to the silence in the Ohio Revised Code concerning the location(s) for personal delivery of absentee ballots, it is evident that Ohio law does not limit the locations or number of drop boxes that a county board of elections may provide to their voters. This conclusion is entirely consistent with the duties of courts to not insert language not used in the statute, to avoid unduly technical interpretations that impede the public policy favoring free, competitive elections, and to liberally construe election laws in favor of the right to vote. *See Myles*, *supra*, ¶ 21, 22, 26. Indeed, given the non-specificity or ambiguity in the law, the Secretary and the Trial Court had an obligation to liberally construe the law as not limiting return only to the board of elections office and a drop box located outside it.

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The Trial Court agreed with Appellees, explaining:

> It is readily apparent that the words "deliver" and "transmitted to" were used interchangeably by the General Assembly. It is also plain that delivery or transmission of an absentee ballot can be accomplished using a drop box that puts the ballot securely into the custody of the director of a board of election, or by actually handing the ballot over to the director face-to-face, or delivering it to his or her staff. No statute says that delivery must occur with only box per county. No statute says that delivery would be improper to a drop box controlled by a board and placed at a safe location separate and apart from the main board office. The statute is silent on such matters. The Secretary cannot slip new words into the law….
>
> A voter is personally delivering their absentee ballot to the director of their board of elections whether they drop it in the only available box, or potentially deposit the ballot in one of multiple boxes under the control of their elections board. Either way, the ballots are delivered. This is true regardless of the location at which a box is placed in the county.
>
> D.J. Op. at 21-22.

In response to this segment of the Trial Court's decision, the Secretary poses a set of hypotheticals. For instance, the Secretary asks whether a voter could hand their absentee ballot to the board's director at the grocery store or while stopped at a red light, or if a voter could leave

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their ballot on the director's lawn. Sec. Br. at 14. Appellees agree with the Secretary that the answer is, of course, no. But it is not because these "deliveries" occur away from the board of elections office. Rather, it is because the Director has not agreed to take delivery in the manners suggested. *See Kniebbe v. Wade*, 161 Ohio St. 294, 118 N.E.2d 833 (1954) ("It is essential to delivery that there not only be a voluntary delivery, but there must also be an acceptance thereof on the part of the grantee."). The spurious hypotheticals offered up are red herrings. But, if one drop box is permissible, as the Secretary and ORP concede, then multiple drop box locations are permissible so long as they are authorized by the board.

Given the silence in Ohio law and the well-established rules of statutory construction, the Trial Court correctly concluded that R.C. 3509.05 does not limit county boards of elections to installing drop boxes only at their offices.

2. The Secretary's reliance upon R.C. 3509.04 is misplaced.

Despite unequivocally stating that "[t]his case begins and ends with the text of…R.C. 3509.05," the linchpin of the Secretary's entire statutory construction argument to both the Trial Court and this Court actually rests

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upon another statute, R.C. 3509.04. Sec. Br. at 12-13. This other statute, however, primarily concerns how the boards of elections deliver absentee ballots to voters and has no bearing on drop boxes. Thus, it is readily apparent that the Secretary is grasping at straws.

The Secretary's argument, in short, is that because R.C. 3509.04 requires boards of elections to mail absentee ballots to voters with an unsealed return envelope that contains the "post-office address of the director"—which the Secretary (incorrectly) equates with each board's office address—voters must also use this address when personally delivering their absentee ballots to this address, not just for mailing ballots back. Sec. Br. at 12-13; ORP Br. at 15-16. This reasoning has several obvious flaws.

First, neither R.C. 3509.04, nor R.C. 3509.05, state that a voter who chooses to personally return their ballot must return it either to the board of elections office or to the pre-printed address on the return envelope. R.C. 3509.04 concerns the delivery of an absentee ballot from the board of elections to the voter, and it says nothing about the return process except to provide a pre-printed address for returning by mail. The third

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paragraph of R.C. 3509.05(A) states that "[t]he elector shall mail the identification envelope to the director from whom who it was received in the return envelope, postage prepaid, or the elector may personally deliver it to the director…" Thus, the envelope with the pre-printed address clearly is for when the voter chooses to mail the ballot. Nothing in this language requires the voter to use the return envelope when personally delivering their absentee ballot to the director.

Under Ohio law, all absentee ballots, regardless of whether they are returned by mail or personal delivery, must be placed inside the completed *identification* envelope; otherwise, the ballot must be rejected. *See* R.C. 3509.07(F). But not all absentee ballots must be placed in the return envelope with the pre-printed address for mailing. R.C. 3509.05(A) sets forth no such requirement for voters who personally deliver their absentee ballots to the director.

Finally, a board's "post-office address" is not necessarily the same address as the board's office. According to the Secretary's own directory of county boards of elections, at least ten boards of elections, including the Franklin County Board of Elections, direct mail to a P.O. Box rather

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than to their office address. *See* Pl. Ex. Q. Moreover, many boards of elections have a dedicated P.O. Box specifically for receiving absentee ballots; for instance, the Franklin County Board of Elections has a P.O. Box for general mail, including absentee ballot *requests* (P.O. Box 182111, Columbus, OH 43218), and a separate P.O. Box specifically for returned absentee *ballots* (P.O. Box 182200, Columbus, OH 43218).[3] Note further that the Franklin County Board of Elections' P.O. Boxes are not even in the same zip code as its office, which is in the 43229 zip code. Pl. Ex. Q. Under the logic of the Secretary's statutory construction, a voter personally delivering their ballot would have to take it to the post office

[3] The Secretary refused to stipulate to this fact (Tr. 108:4), perhaps because it defeats his entire statutory construction argument. Nevertheless, the P.O. Box used by the Franklin County Board of Elections for the return of absentee ballots is an easily located matter of public record. *See* Franklin County Board of Elections, *Election Notice for Use with the Federal Write-In Absentee Ballot - November 3, 2020 General Election*, at *12, available at https://vote.franklincountyohio.gov/BOEL-website/media/Election-Info/2020/(3)%20General%20Election%20-%20November%203,%202020/(1)%20Notices%20of%20Election/2020-General-Form-No-120-FWAB-Notice-46-Day.pdf ("After you have completed the FWAB, you must PRINT the ballot and MAIL it to your county board of elections this address: Franklin County Board of Elections, PO Box 182200, Columbus, OH 43218-2200").

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where their board has its P.O. Box and ask the Postmaster to place it in the box. Further, the voter would have to affix a stamp to comply with federal postal regulations. But this is not what the law requires, and it is entirely permissible under Ohio law for absentee ballots to be returned to these P.O. Boxes because the board's directors have designated them as the points of delivery—just as the directors would authorize absentee ballots to be returned to designated drop boxes.

3. The Secretary is not entitled to any deference.

Appellants argue that the Secretary's interpretation of R.C. 3509.05 is entitled to deference, but, for three separate reasons, it is not: (1) it is unreasonable; (2) it is not based upon the Secretary's own policy expertise; and (3) the Secretary has so vacillated on his interpretation that it can be said he has even announced a definitive interpretation.

a. The Secretary's interpretation is unreasonable.

The Secretary's interpretation is not entitled to deference for the additional reason that it is unreasonable. *Myles*, ¶ 26 (explaining that the Secretary's interpretation of election law is not entitled to any deference when it is "unreasonable and fails to apply the plain language"); *Stokes v.*

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Brunner, 120 Ohio St.3d 250, 2008-Ohio-5392, ¶ 29 (quoting same); *State ex rel. Brinda v. Lorain Cty. Bd. of Elections*, 115 Ohio St.3d 299, 2007-Ohio-5229, ¶ 30, 874 N.E.2d 1205 (quoting same). The Trial Court correctly noted this standard, explaining that the "mere fact that the Secretary's judgment is entitled to some deference in election matters does not mean he has carte blanche." D.J. Op. at 13.

The Secretary must defend Directive 2020-16 based on the reason he gave at the time it was issued. *See Dept. of Homeland Security v. Regents of the Univ. of California*, 591 U.S. __, 140 S.Ct. 1891, 1909-10 (2020) ("The basic rule is clear: An agency must defend its actions based on the reasons it gave when it acted."). The only reason given by the Secretary for the instruction in Directive 2020-16 is his previously addressed statutory construction. Indeed, as the Trial Court found, the Secretary issued Directive 2020-16 (1) without public notice, hearing, or comment, (2) without a formal opinion from the Ohio Attorney General despite having requested one a few weeks earlier, (3) without input from boards of elections, major political parties, or ordinary citizens, and (4) without an administrative record. D.J. Op. at 7. To be sure, the Secretary

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was not *required* to produce a record, but without a such a record, the Secretary cannot claim to have based his instruction in the Directive upon anything other than what he said at the time he issued it; this was the Trial Court's point in bringing up the lack of a record—the Trial Court was not, as ORP contends, shifting the burden to the Secretary or basing its decision upon its own policy judgment. And with only a flawed statutory construction argument serving as the basis for the instruction in Directive 2020-16, the Secretary's instruction in the Directive is unreasonable and not entitled to any deference.

b. The Secretary's interpretation is not based upon his own policy expertise.

Similarly, the lack of any record indicates that the Secretary's interpretation was not based upon his own policy expertise. Deference to the Secretary's interpretation of Ohio's election laws is appropriate only when he is bringing his own policy expertise as the chief elections officer to bear to resolve statutory ambiguity. Indeed, reliance upon such administrative expertise is the foundation of the judicial practice of deferring to an administrative agency's statutory interpretation. *See*

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Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 865 (1984). Here, however, the Secretary—who has repeatedly stated that he favors multiple drop boxes—has not relied upon his own policy expertise in announcing his interpretation. Instead, he argues that his hands are tied by the language of R.C. 3509.04 and R.C. 3509.05. This is not an interpretation entitled to deference.

c. The Secretary has not announced a definitive interpretation.

Furthermore, the Secretary has so waffled and wavered on his interpretation of R.C. 3509.05 that it cannot be said that he has even announced a definitive statutory interpretation that warrants any deference. The Ohio Supreme Court has explained that when the Secretary of State "vacillates" or changes his interpretation of an election law in a relatively short period of time, then such interpretation is not entitled to any deference. *See Ohio Manufacturers' Assn. v. Ohioans for Drug Price Relief Act*, 149 Ohio St.3d 250, 2016-Ohio-5377, ¶ 26-29 ("It is generally our obligation to defer to the secretary of state's reasonable interpretation of an election statute. However, [the Secretary] has vacillated on his interpretation of this statute....Given this history, we

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hold that the secretary of state has not announced a definitive statutory interpretation that warrants our deference.")

Over the course of two months, the Secretary has gone full circle on whether Ohio law clearly or unclearly answers the question of whether boards can install drop boxes at locations other than their offices.

In his July 20, 2020 Request for a Formal Legal Opinion (Pl. Ex. D), the Secretary stated:

> "Recently, I have been asked whether under Ohio law there may be more than one secure ballot 'drop box' in a county in which voters who requested and voted their absentee ballots may deposit their voted ballots to return them to their county board of elections. The answer to that question is not clear....
>
> I have been asked whether there may be additional secure receptacles installed in a county for absentee voters to drop off their voted absentee ballots...R.C. 3509.05 does not speak to the issue at all."

To the Trial Court, the Secretary stated: "The answer is clear" (Sec. Mot. to Dism. at 1); "R.C. 3509.05 is not ambiguous" (*id*); "R.C. 3509.05 is unambiguous" (*id.* at 20, 22); "Plaintiffs cannot credibly that [*sic*] that those words are unclear" (*id.* at 22); "This Court can only interpret the words 'to the Director' if they are ambiguous, they are not, and this

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inquiry must end" (*id.* at 23); and "That language is straightforward" (*id.* at 24).

And to this Court, the Secretary now concedes that R.C. 3509.05 is "[a]t the very least…ambiguous on this score." Sec. Br. at 9.

As is evident, the Secretary has so vacillated on his interpretation of R.C. 3509.05 that, like the Secretary in *Ohio Manufacturers'. Assn.,* it cannot be said that he has even announced a definitive interpretation of the law that warrants any deference.

For all these reasons, the Trial Court correctly determined in its declaratory judgment that the Secretary's restriction on the locations and number of drop boxes, as announced in Directive 2020-16, is "not required by law," that "every board of elections is legally permitted to consider enhancing safe and convenient delivery of absentee ballots, and may tailor ballot drop box locations or conceivably other secure options to the needs of their individual county," and that "[n]either R.C. 3509.05(A) nor any other statute supports the Secretary's ban on local boards of elections employing multiple absentee ballot drop boxes at locations in their county, as they deem proper." D.J. Op. 29. This Court

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should affirm.

C. This is a "classic case" for issuance of a declaratory judgment.

Although the Secretary repeatedly expressed great uncertainty as to what Ohio law says with respect to drop boxes—and even indicated that he would follow a court ruling that said multiple drop box locations are permissible—the Secretary argues on appeal that this matter was inappropriate for declaratory judgment. Sec. Br. at 19-23. But as the Trial Court put it, this matter presents a "classic case" for issuance of a declaratory judgment. D.J. Op. 13.

Again, a trial court's decision concerning the appropriateness of a case for declaratory judgment is reviewed for abuse of discretion. This standard "connotes more than an error of law or judgment; it implies that the court's action was unreasonable, arbitrary or unconscionable." *Ohio Assn. of Pub. School Emples. (OAPSE) v. School Emples. Retirement Sys.*, 10th Dist. Franklin No. 19AP-288, 2020-Ohio-3005, ¶ 13 citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Under Ohio's Declaratory Judgment Act, plaintiffs are "broadly authorize[d]" to "bring actions for a declaration of 'rights, status, and

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other legal relations whether or not further relief is or could be claimed." *Moore v. City of Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897, ¶ 45 quoting R.C. 2721.02(A). Indeed, "any person whose rights, status, or other legal relations are affected by a…statute…may have determined any question of construction or validity arising under the…statute…and obtain a declaration of rights, status, or other legal relations under it." R.C. 2721.03. These provisions are remedial in nature and are required to be "liberally construed and administered." R.C. 2721.13.

The three prerequisites for a declaratory judgment claim are: (1) a real controversy between the parties, (2) the controversy is justiciable, and (3) speedy relief is necessary to preserve the rights of the parties. *OAPSE*, ¶ 25.

The Secretary contends that there is no real controversy between the parties. Sec. Br. at 19-21. ORP makes a similar argument, albeit in the context of a challenge to Appellees standing, which is addressed *infra*. ORP Br. at 10-13. But there is a real controversy, and that controversy is the legal dispute between Appellees and the Secretary as to whether Ohio law limits the number or locations of drop boxes that the county boards

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of elections may provide to their respective voters. The Secretary, in his arguments to the Trial Court, contended that R.C. 3509.04 and R.C. 3509.05 "unambiguously" require voters to personally deliver their absentee ballots to the board of elections office. Appellees disagree as these statutes are entirely silent on the issue. The "controversy," therefore, is the dispute as to the construction of the statutes, and as the Trial Court correctly found, the Secretary's erroneous interpretation directly affects the legal right of every voter in Ohio, including Appellee Goldfarb and Appellee ODP's members, to return their absentee ballots. The erroneous instruction also affects ODP's members who, by law, make up half the members of the county boards of elections by prohibiting them from installing additional drop boxes in their counties. Moreover, the Secretary's contemporaneous pronouncements that, as a matter of policy, he favors, or at least is not opposed, to counties being able to offer more than one drop box location, escalated the controversy to an "open invitation to a court." This is all more than sufficient to satisfy the real controversy prong.

The Secretary also contends the requested declaration "will not

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terminate the uncertainty or controversy." Sec. Br. at 22-23. But this, too, is plainly wrong, and much of his argument is premised upon a mischaracterization of Appellees' Verified Complaint. Contrary to the Secretary's repeated assertions otherwise, Appellees do not seek to compel boards of elections to install any number of drop boxes at any number of locations. Instead, the relief sought in the Verified Complaint would (1) declare that Ohio law does not limit the number or locations of drop boxes, and it would (2) enjoin enforcement of the Secretary's instruction in Directive 2020-16 that states otherwise. *See* Verif. Compl., Prayer for Relief, ¶ 1-2. If such relief is awarded, then it will terminate the legal uncertainty about whether the Secretary's actions are lawful and remove the Secretary's unlawful restriction in Directive 2020-16.

ORP improperly makes several related but confused arguments for the first time on appeal:

First, ORP asserts (for the first time on appeal) that Appellees were required to have bought a constitutional challenge to Directive 2020-16 to seek declaratory relief. ORP Br. at 22-23. But, again, the Declaratory Judgment Act plainly authorizes plaintiffs to seek declaratory relief

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"whether or not further relief is or could be claimed." R.C. 2721.02(A). Further, it is "well-settled that 'actions for declaratory judgment may be predicated on constitutional or nonconstitutional grounds.'" *Moore*, *supra*, ¶ 45 quoting *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶ 13 (emphasis added).

Second, ORP asserts (again, for the first time on appeal) both that (1) Appellees were *required* to have brought this action as a mandamus action rather than as a declaratory judgment action, and also that (2) Appellees *could not* have brought this action as a mandamus action. ORP Br. at 21-22. But with their second point, they debunked their first. Appellees could not have brought this action as a mandamus action because of the availability of declaratory relief. One of the necessary elements for entitlement to a writ of mandamus is that the party seeking the writ must "lack an adequate remedy in the ordinary course of the law." *See, e.g., State ex rel. Fleming v. Fox*, 158 Ohio St.3d 244, 2019-Ohio-3555, ¶ 2, 8 (denying a requested writ of mandamus in an expedited election action because the relators had an adequate remedy in the

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ordinary course of law). If a party seeking a writ of mandamus could have sought declaratory relief in the ordinary course of law, then they are precluded from seeking a writ of mandamus. *See State ex rel. Gadell-Newton v. Husted*, 153 Ohio St.3d 225, 2018-Ohio-1854, ¶ 9 ("If the allegations of a complaint indicate that the real objects sought are a declaratory judgment and a *prohibitory* injunction, then the complaint does not state a claim in mandamus and must be dismissed for lack of jurisdiction."). Thus, because Appellees were able to seek declaratory relief, they were precluded from seeking a writ of mandamus.

Moreover, even if Appellees could have brought this action as a mandamus action, the availability of such a remedy does not preclude Appellees from seeking declaratory relief instead. This is because nothing in Ohio law provides that the availability of a writ of mandamus precludes a declaratory judgment action. Just the opposite, Civ.R. 57 plainly states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

The Trial Court saw through Appellants' haphazard procedural objections, and this Court should, too. And for all the above reasons. the

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Trial Court correctly determined that this action presents a "classic case" for issuance of declaratory relief.

II. The Trial Court Correctly Issued The Preliminary Injunction. (Secretary's Second Assignment of Error; ORP's Second, Third, and Fourth Assignments of Error)

A. The preliminary injunction was issued at the Secretary's urging.

Oddly, the Secretary *urged* the Trial Court to issue the preliminary injunction that he now appeals. As explained in the Trial Court's September 16, 2020 Entry Granting Preliminary Injunction, the Trial Court did not issue a preliminary injunction along with the declaratory relief issued the day before. Entry at 1. At that point, however, the Secretary "urge[d] the court to grant an injunction so that he may appeal." *Id.* at 2. An injunction was not necessary to appeal as the Declaratory Judgment Act plainly authorizes appeals of declaratory judgments. R.C. 2721.08 ("All judgments and decrees under this chapter may be reviewed on appeal as are other judgments and decrees of the court of record involved.") But rather than just appeal the Trial Court's declaratory judgment, the Secretary *urged* the Court to issue a preliminary injunction. Subsequently, the Trial Court issued the preliminary injunction pursuant

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to R.C. 2721.09, which authorizes courts to "grant further relief based on a declaratory judgment or decree previously granted under [the Act]." Whatever his rationale, the Secretary plainly consented to the preliminary injunction. He, therefore, cannot turn around and, in good faith, appeal the preliminary injunction that was issued at his urging.

B. Standard of Review

Assuming arguendo that the Secretary can appeal the preliminary injunction, the standard of review for issuance of a preliminary review is no doubt a familiar one. A court must consider: (1) whether there is a substantial likelihood that the plaintiff will prevail on the merits; (2) whether the plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether third parties will be unjustifiably harmed if the injunction is granted; and (4) whether the public interest will be served by the injunction. *Vanguard Transp. Sys. V. Edwards Transfer & Storage Co. Gen. Commodities Div.*, 109 Ohio App. 3d 786, 790, 673 N.E.2d 182 (10th Dist. 1996).

The decision whether to grant or deny a preliminary injunction is "solely within the trial court's discretion." *Franks v. Rankin*, 10th Dist.

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No. 11AP-962, 2012-Ohio-1920, ¶ 28 citing *Garono v. State*, 37 Ohio St.3d 171, 172, 524 N.E.2d 496 (1988). As a result, "'unless there is a plain abuse of discretion on the part of [the] trial court[],' a reviewing court will not disturb a judgment granting or denying an injunction." *Id.* quoting *Perkins v. Quaker City*, 165 Ohio St. 120, 125, 133 N.E.2d 595 (1956). "In other words, absent a showing that the judgment is unreasonable, arbitrary, or unconscionable, a reviewing court will not reverse." *Id.*

With respect to a trial court's factual findings, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Williams v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. No. 18AP-720, 2019-Ohio-2194 quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1979). And in determining whether a civil judgment is against the manifest weight of the evidence, "an appellate court is guided by the presumption that the findings of the trial court are correct." *Id.* citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d

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1273 (1984).

C. Appellees have a substantial likelihood of success on the merits.

Appellees demonstrated a substantial likelihood of success on the merits. As previously explained, Appellees established that they are entitled to the declaratory relief sought in their Verified Complaint and issued by the Trial Court that the Secretary's restriction on the number and location of drop boxes, as announced in Directive 2020-16, is not required by law and that nothing in Ohio law otherwise supports the Secretary's ban.

Although the Secretary is limited to defending Directive 2020-16 based on the reason he gave at the time it was issued, Appellants have sought to provide post hac justifications for it. For instance, at the Trial Court's evidentiary hearing, the Secretary's counsel argued that having one drop box per county somehow assures "equal treatment." *See* D.J. Op. 24. The Trial Court appropriately rejected this view of equal treatment as "nonsense," explaining that "[u]nless Ohio rearranges it government structure so that every county has roughly the same population and comparable geographic access to a drop box and places for voting, there

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will inevitably be serious inconvenience caused many voters by such an arbitrary rule." *Id.*

The evidentiary record further supports the Trial Court's rejection of the Secretary's post hac "equal treatment" argument—the Secretary's official canvass of Ohio's 2020 Primary Election, in the record as Pl. Ex. W, shows that nearly 40% of Ohio's voters live in just five of the eighty-eight counties (Cuyahoga, Franklin, Hamilton, Summit, and Lucas). Limiting counties to one drop box location, regardless of demand upon the drop box, is, as the Trial Court stated, the equivalent to arguing that "every county needs only 100 (or some other arbitrary number) of voting machines, regardless of the population." D.J. Op. at 24. For this very reason—and as Appellees pointed out to the Trial Court[4]—the federal U.S. Elections Assistance Commission strongly recommends that absentee ballot drop box allocation be based on population size rather than arbitrary county or municipal lines.

[4] The Secretary mischaracterizes the Trial Court's acceptance of Appellees' argument as the Trial Court having conducted "its own independent research into recommendations by the U.S. Election Assistance Commission." Sec. Br. at 16.

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ORP, too, seeks to provide a post hac justification for the Secretary's decision. ORP contends that the Secretary issued Directive 2020-16 to prevent "voter fraud." ORP Br. at 26-27. But the Secretary *never* provided this as a rationale for Directive 2020-16, and, further, nothing in the record supports ORP's allusions to widespread voter fraud occurring in Ohio.

For all these reasons, Appellees demonstrated a substantial likelihood of success on the merits of their declaratory judgment claim.

D. Appellees will suffer irreparable injury absent injunctive relief.

Appellees also established that they will suffer irreparable harm absent injunctive relief. The Trial Court correctly concluded that this case presents circumstances in which irreparable harm is presumed, and, independently, that Appellees established by clear and convincing evidence that they will be irreparably harmed without injunctive relief. P.I. Op. at 2.

An irreparable injury is "one for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete." *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d

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1, 14, 684 N.E.2d 343 (8th Dist. 1996).

Limiting boards of elections to providing a drop box only at the boards' offices threatens to disenfranchise voters, including ODP's members, and it is well-settled that irreparable harm is presumed when constitutional rights, such as the right to vote, are threatened or impaired. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

The Secretary attempts to counter this harm by deafly asserting that a voter can avoid this threatened injury "by voting early." Sec. Br. at 27. But the Trial Court's robust factual findings, which were based on submitted evidence and live witness testimony and are entitled to great deference, establish the numerous barriers to "voting early."[5] These

[5] The Trial Court also correctly noted the limited options for a voter to exercise their right to personally deliver an absentee ballot. *See* D.J. Op. at 8 n.9. First, and pursuant to R.C. 3509.05, only the voter or a close relative of the voter can deliver the voter's completed absentee ballot to a designated location. Second, voters are prohibited from returning their completed absentee ballots their precinct's polling location on Election Day. Thus, unless boards are allowed to install drop boxes at additional locations in their counties, a voter (or their close relative) wishing to personally deliver their absentee ballot will have to travel to their board of elections office.

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findings include the following: the Secretary estimates that as many as 50% of Ohio voters will vote by absentee ballot for the 2020 General Election—a staggering increase from the usual 20% of Ohio voters who vote by absentee ballot (D.J. Op. at 4); widespread public concern about delays in mail delivery that is likely to impact voter behavior and increase their desire to deliver their absentee ballots in person (*id.* at 5-6); difficulties accessing boards of elections' offices (*id.* at 8); the Hamilton County Board of Elections' experience with having one drop box for the 2020 Primary Election and having traffic backed up a mile in each direction on a nearby highway on the last day for returning absentee ballots to the Board (*id.* at 8); a related issue that boards may not be able to tell which cars are "in line" to drop off their absentee ballots when polls close at 7:30 p.m. (*id.* at 8-9); traffic congestion at the Montgomery County Board of Elections' drop box (*id.* at 9); delays of 5-7 days for mail delivery in Mahoning County due to local mail having to be processed in Cleveland (*id.* at 10); and problems and delays with mail delivery in Huron County during the 2020 Primary Election, including ballots mailed by the Board being returned to the Board rather than delivered to the

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voters (*id.*).

The Secretary's drop box limitation, combined with the ongoing COVID-19 pandemic, the surge in demand for absentee ballots, delays in mail delivery, traffic problems, and the lack of access to the county boards of elections' offices via public transportation acts and threatens to prevent Appellee Goldfarb and ODP's members from being able to return their absentee ballots in time to be voted. That is why many boards were in the process of installing additional drop boxes in locations other than their offices prior to the Secretary prohibiting them doing so in Directive 2020-16—the Trial Court found, for instance, that the bipartisan Director and Deputy Director of the Franklin County Board of Elections were exploring installing 4-5 drop boxes throughout Franklin County but stopped when ordered by the Secretary. D.J. Op. at 9-10. And with time running short for boards to install additional drop boxes prior to the election, the threat of irreparable harm continues to grow without injunctive relief in place.[6]

[6] Appellees note that with the stay of the Trial Court's injunction, it may be too late for boards that want additional drop boxes to have them in

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E. No third parties will be unjustifiably harmed by an injunction.

Appellees also demonstrated that no third parties will be unjustifiably harmed by issuance of an injunction.

With respect to the Secretary, the Trial Court aptly noted that his "foremost obligation is to follow Ohio law." P.I. Op. at 2. If his instruction in Directive 2020-16 is unlawful, then he will not be unjustifiably harmed if his instruction is enjoined.

With respect to ORP, the Trial Court correctly concluded that ORP failed to provide credible evidence that they will be harmed by issuance of a preliminary injunction. P.I. Op. at 2. The evidence stipulated to by all parties demonstrates that this is not a partisan issue: the Secretary indicated that, historically, "there is no significant difference between Republican and Democratic voters when it comes to voting by mail in Ohio." D.J. Op. at 4 n.3. Additionally, "both major parties heavily organize around encouraging supporters to vote by mail." *Id.* The Trial

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place for the beginning of absentee voting on October 6, 2020, but that there is still time for the boards to install drop boxes for the final weeks of absentee voting when demand will logically be at its peak.

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Court also found that "the added convenience and safety of additional drop boxes should enhance voting for members of both major parties." *Id.* at 11. Moreover, the Trial Court noted that with every board of elections consisting of two ORP members and two ODP members, any board decisions to install additional drop boxes will require bipartisan support. P.I. Op. at 2.

The Secretary also expresses a concern about harm to the boards of elections. Sec. Br. at 28. But this argument overlooks the fact that injunctive relief would not compel the boards to do anything but instead would give them discretion to decide for themselves what is best for their counties. This does not harm them.

Accordingly, Appellees demonstrated that third parties will not be unjustifiably harmed by issuance of an injunction.

F. The public interest will benefit from injunctive relief.

Finally, the public interest will undoubtedly benefit from injunctive relief. In arguing otherwise, Appellants overlook the longstanding principle that the public has a "strong interest in exercising the fundamental political right to vote" and that this interest is "best served

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by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Obama for Am.*, 697 F.3d at 436-437 (internal quotations and citations omitted). Further, the Trial Court's detailed findings demonstrate how injunctive relief would serve the public interest by helping to mitigate the negative effects of the ongoing COVID-19 pandemic, the surge in demand for absentee ballots, delays in mail delivery, traffic problems, and the lack of access to the county boards of elections' offices. Accordingly, the public interest will benefit from injunctive relief.

For the foregoing reasons, the Trial Court correctly issued a preliminary injunction, and this Court should affirm such holding.

G. Even if this Court reverses the preliminary injunction, it can and should affirm the declaratory relief.

Appellees' action sought both a declaratory judgement on the question of whether Ohio law prohibits boards of elections from installing drop boxes at locations other than their offices and a preliminary injunction enjoining the Secretary's instruction to boards that they are prohibited from installing a drop box at any location other than their

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offices. Although the preliminary injunction is, in part, dependent upon a declaration that Ohio law does not prohibit boards from installing drop boxes at locations other than their offices, the reverse is not the case—the declaration of Ohio law stands on its own and is not dependent upon whether a preliminary injunction is issued given that a number of other factors go into deciding whether to issue a preliminary injunction. Accordingly, even if this Court reverses the Trial Court's decision to grant a preliminary injunction, the Court can and should still leave in place the Trial Court's declaration.

III. Appellees Have Standing (ORP's First Assignment of Error)

A. ORP's standing challenge is "particularly disingenuous."

ORP challenges ODP's standing, and the Trial Court rightfully described this as "particularly disingenuous" of ORP. D.J. Op. at 14. This is because the "law protects the rights of both major parties equally," that "[n]o doubt ORP itself has sued its own share of cases seeking to clarify election law," and that a "decision here that ODP lacked standing would invariably threaten ORP's own access to the courts." *Id.* Indeed, if, as ORP urges, neither a major political party nor an aggrieved voter have

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standing to challenge the Secretary's directives—which are always directed only to boards of elections—then it is hard to imagine that anyone could ever have standing to challenge the Secretary. Nevertheless, this is the dangerous position ORP asks the Court to take on appeal.

B. The extensive factual record establishes Appellees' standing.

Appellees developed an extensive factual record that included a Verified Complaint, documentary evidence, sworn affidavits, and live testimony from Mr. Goldfarb and ODP's Executive Director. And based on this record, the Trial Court correctly determined that Mr. Goldfarb has standing to sue, and that ODP has standing to sue in its own right and as an association. Importantly, only one party need establish standing to proceed. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999).

A party has standing if it shows (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) is likely to be redressed by the requested relief. *Moore, supra*, ¶ 22. And as previously stated, declaratory relief, which is to be liberally construed, is available to a plaintiff that can show a real controversy exists between the

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parties, the controversy is justiciable, and speedy relief is necessary to preserve the rights of the parties. *Id.* at ¶ 49. Additionally, courts are to be "generous" in considering whether a party has standing. *Id.* at ¶ 48.

Furthermore, and as the Trial Court explained, "legal standing is not defeated because the potential for future harm cannot be shown with precision." D.J. Op. at 19. Standing can rest "on the predictable effect of Government action on the decisions of third parties." *Dept. of Commerce v. New York*, 139 S. Ct. 2566 (2019). Courts have excused definitive proof where the injury was impossible to prove with absolute certainty. *See Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) ("by their nature, mistakes cannot be specifically identified in advance…It is inevitable, however, that there will be such mistakes.") The standard, then, is whether the harm or threatened harm is real or imminent.

1. Mr. Goldfarb has standing to sue.

Mr. Goldfarb is a qualified voter in Franklin County who intends to cast an absentee ballot at the 2020 General Election. *See* D.J. Op. at 18. He requested his absentee ballot in August, and once he receives his ballot, he hopes to vote using the drop box closest to his residence. *Id.* Mr.

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Goldfarb testified that because of COVID-19 and his own health history, he does not feel comfortable voting in person. *Id.* He also testified that although he did not believe his mail delivery has been delayed, he has been reading news reports about issues with mail delivery and does not trust that if he mails his ballot it will be timely delivered to the board of elections. *Id.* Mr. Goldfarb testified further that as a resident of Hilliard in western Franklin County, a drive to the Franklin County Board of Elections office on Morse Road in northern Franklin County would take about an hour round trip with light traffic. *Id.* Due to Directive 2020-16, he will be obligated to make this hour-long trip to cast his ballot, unless additional drop boxes are permitted and located closer to his home. *Id.*

The legal right at stake for Mr. Goldfarb (and all Ohio voters) is his right to personally deliver his absentee ballot. By law, only he or a close relative of his can personally deliver his absentee ballot to the director of his board of elections. The board of elections will not pick up Mr. Goldfarb's ballot from him, and he, therefore, has the burden to personally deliver his absentee ballot. Directive 2020-16 directly impacts Mr. Goldfarb's ability to do so for the 2020 General Election by limiting his

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options to mail delivery, which he, like many others, does not trust, or personal delivery to his board of elections office, which, as he testified, requires an hour-long drive. Directive 2020-16 deprives him (and other voters) of a choice of locations.

Directive 2020-16's deprivation of Mr. Goldfarb's choices is not merely speculative either. The Trial Court found, based on sworn evidence, that the Franklin County Board of Elections was in the midst of exploring adding more drop boxes when the Secretary's officed ordered all boards to stop. D.J. Op. at 9-10. Clearly, the Secretary did not find it merely "speculative" that boards would install additional drop boxes given that it warranted a directive banning them from doing so.

ORP also distorts Mr. Goldfarb's testimony as saying that even if his board installs additional drop boxes that he may still choose to use the drop box at the board's office. ORP Br. at 11. But, as the transcript shows, this statement came in response to a hypothetical presented by the Secretary's counsel in which all the additional drop boxes installed in Franklin County were located even farther away from Mr. Goldfarb's home than the boards' office—a scenario Mr. Goldfarb found "hard to

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believe" given the distance already. Tr. 17:10-11. Moreover, Mr. Goldfarb testified that voting is deeply important to him and that he is the kind of person who would do whatever it takes to cast his ballot, even if it meant driving two hours in one direction to do so. Tr. 23:2-12; 26:11-19. His sense of civic duty does not deprive him of legal standing.

Finally, given that the Secretary's instruction in Directive 2020-16 requires Mr. Goldfarb to travel to his board of elections office to exercise his right to personally deliver his absentee ballot, the harm is unquestionably traceable to the Secretary and enjoining the instruction would remove the restriction. This constitutes a real controversy between Mr. Goldfarb and the Secretary, it is plainly justiciable in that it is ripe for review and resolving it in Mr. Goldfarb's favor will remove the restriction, and immediate relief is needed given the imminence of the 2020 General Election. Accordingly, Mr. Goldfarb has standing to sue.

2. ODP has independent standing of a political party to sue.

The Trial Court correctly determined that ODP has standing to sue in its own right as an organization independent of its standing to sue on behalf of its members. Courts have routinely found organizations

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involved in the voting process, including ODP *and* ORP, to have standing to bring lawsuits challenging election laws and rules. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) ("we also agree with the unanimous view of those judges that the Democrats have standing to challenge the validity of the law.").

As the Trial Court accurately explained the standard, a "voting law can injure an organization enough to give it standing by 'compelling it to devote resources' to combatting the effects of that law that are harmful to the organization's mission....[A law that] likely discouraged some of the party's supporters from voting...thus struck directly at the organization's mission and forced it to spend resources to get discouraged voters to the polls." D.J. Op. at 16 quoting *Common Cause Indiana v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019) citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 1982).

Similarly, an organization can have standing when a voting law "has created a culture of voter confusion" requiring the organization to "expect further concrete and specific adverse consequences: they will be required to increase the time or funds (or both) spent on certain activities to

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alleviate potentially harmful effects" of the challenged provision. *Id.* quoting *Common Cause Indiana*, *supra*, 937 F.3d at 952. Based on this legal standard and the facts in the Verified Complaint and extensive live testimony from Greg Beswick, ODP's Executive Director of 6 years, the Trial Court determined that ODP has standing to seek declaratory relief and to challenge Directive 2020-16.

Mr. Beswick testified that approximately 800,000 people from all 88 counties voted in Ohio's 2020 Democratic Primary Election and are, therefore, considered "members" of ODP. *See* D.J. Op. at 15. Tens of thousands of people make financial contributions to ODP each year. *Id.* ODP also has around 300 candidates on the 2020 General Election ballot around the state. *Id.* at 16. Additionally, ODP, by law, has two members on each of the eighty-eight county boards of elections. *Id.* at 15.

Mr. Beswick testified that the greatly changed nature of the recent primary election resulted in about 1.5 million people who had voted with ODP in the 2016 and 2018 primaries not voting this year. *Id.* He believes the drop-off is attributable, in part, due to the COVID-19 pandemic and the confusion about the mechanics of voting absentee in the changed 2020

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Primary Election voting process. *Id.* As a result, ODP has had to spend its organizational resources to provide substantial voter education efforts, including explaining how to mail absentee ballots back and how to deliver them to a drop box. *Id.* If the limitation in Directive 2020-16 is lifted, then ODP will give county-specific instructions to voters on the locations of all drop boxes. *Id.*

Mr. Beswick testified further that if Directive 2020-16 remains in effect, the limit on the location of drop boxes set forth therein will cause ODP to spend more time and resources explaining the absentee voting process to voters. *See* D.J. Op. at 15. Mr. Beswick explained the confusion he has heard from voters throughout the year, as well as the apprehension and expressed distrust of the postal service in light of news reports. *Id.* Mr. Beswick explained that, in his experience, such events will prompt some voters to personally deliver their ballots rather than use the mail, but that for others, it may be discouraging enough to stop them from voting entirely. *Id.* He said that long lines can do this and that distrust in the system can do this, but that when voters are given more options, they are more likely to be at ease and get their ballot submitted. *Id.*

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Mr. Beswick also testified that many of ODP's members rely upon public transportation. *See* D.J. Op. at 16. The Trial Court appropriately found that this gives "another legitimate basis for concern that travel to a single drop box will adversely impact its voters." The Trial Court explained that "[t]hose who must travel by public transportation across large counties to a single box, assuming there is public transportation and the box is on or near a bus line, must still be given information about making this trip." *Id.* ODP spends resources to do this, and Mr. Beswick testified that it is especially important to do so because boards of elections are often not located in the easiest locations to get to and because, unlike other places like a local library or post office, voters may lack familiarity with their board of elections office.

Mr. Beswick also testified that ODP regularly spends resources to support its candidates. *See* D.J. Op. at 16. ODP distributes slate cards and assists candidates in explaining the voting process to voters, including how to return absentee ballots. *Id.*

Finally, the parties to the litigation all stipulated that both ODP and ORP heavily organize around encouraging their supporters to vote

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absentee. *See* D.J. Op. at 17.

Given all this evidence, the Trial Court was right to conclude that "[e]xplaining to Ohio voters how important it is to overcome any confusion or distrust in the system, to return ballots in a timely manner, to deal with anxiety that the United States Mail may be delayed, and to vote absentee using no more than one ballot drop box in each county will occupy the time of both parties if Directive 2020-16 remains unchanged." D.J. Op. at 17. Accordingly, ODP established that it has standing to sue in its own right as an organization.

3. ODP has associational standing.

Separately, ODP has standing to sue on behalf of its members. *See Sandusky Co. Democratic Party*, 387 F.3d at 574 (holding that ODP, among others, had standing to sue on behalf of its members who would vote in the general election). An association has standing to bring a lawsuit on behalf of its members when "'(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual

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members in the lawsuit." *LULAC v. Kasich*, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 19 (internal quotations and citations omitted). ODP easily satisfies these requirements.

a. ODP's members would have standing to sue on their own.

ODP has three classes of members, each of whom would have standing to sue in their own right: (1) its approximately 800,000 members who are registered Ohio voters; (2) its approximately 300 members who are candidates at the November 3, 2020 General Election, and (3) its members who serve on the county boards of elections.

The Secretary's restriction on the location of drop boxes directly affects (1) the plans for how and where ODP's 800,000 voter-members will cast their ballots in the November 3, 2020 General Election, (2) the plans for how ODP's members who are candidates will communicate to voters about how to cast their ballots, and (3) the ability of ODP's members who are board of elections members to install additional drop boxes in their respective counties. Thus, each class faces a unique harm from the Secretary's restriction, and the requested declaratory and injunctive relief would redress each. Accordingly, ODP has several

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classes of members, each of whom would have standing to challenge Directive 2020-16 in their own right.

b. The interests ODP seeks to protect are germane to its purpose.

As previously explained, the interests ODP seeks to protect in this lawsuit are germane to its purpose to elect Democrats. Voting activities are inherently the reason that political parties like ODP exist, and ODP has an interest in knowing what rights voters have under the law with respect to how to cast their ballots.

c. Individual participation of ODP's members is not required.

Finally, the individual participation of an organization's members is not necessary when an association seeks prospective relief for its members. *Sandusky Co. Democratic Party,* 387 F.3d at 574. Thus, ODP's claim and relief sought do not require its members to individually participate in the action.

For these reasons, ODP established that it has associational standing to pursue the declaratory judgment claim in this action.

Based on the extensive factual record before it, the Trial Court

correctly determined that Mr. Goldfarb has standing to sue, and that ODP has standing to sue in its own right and as an association. This Court should affirm.

CONCLUSION

For the foregoing reasons, Appellees respectfully ask the Court to affirm the Trial Court's decisions granting declaratory and injunctive relief.

Respectfully submitted,

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CERTIFCATE OF SERVICE

I hereby certify that the foregoing was electronically filed using the Court's e-Filing system, which will send a copy of the foregoing to all counsel of record. Additionally, a true and accurate copy of the foregoing was served on September 23, 2020 upon the following via electronic mail:

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