IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

OHIO DEMOCRATIC PARTY and LEWIS GOLDFARB, Plaintiff-Appellees, v. FRANK LAROSE, in his official capacity as Ohio Secretary of State, Defendant-Appellant.	Case No. 20AP-432 ACCELERATED CALENDAR On Appeal from the Franklin County Court of Common Pleas, No. 20-CV-5634
OHIO DEMOCRATIC PARTY and LEWIS GOLDFARB, Plaintiff-Appellees, v. FRANK LAROSE, in his official capacity as Ohio Secretary of State, Defendant-Appellee, OHIO REPUBLICAN PARTY, Intervenor-Appellant.	Case No. 20AP-439 ACCELERATED CALENDAR On Appeal from the Franklin County Court of Common Pleas, No. 20-CV-5634

BRIEF OF INTERVENOR-APPELLANT OHIO REPUBLICAN PARTY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

OTHER AUTHORITIES

ASSIGNMENTS OF ERROR

Assignment of Error One (Section I): The trial court erred in holding that Plaintiffs have standing when the possibility that their requested relief will redress their harm is speculative.

Assignment of Error Two (Section II.A): The trial court erred by using anecdotal evidence and its views of sound public policy to reject the Secretary's reasonable interpretation of R.C. 3509.05.

Assignment of Error Three (Section II.B): The trial court erred in using its declaratory-judgment ruling to enjoin Directive 2020-16 in the absence of any legal claim that Directive 2020-16 violates the Ohio Constitution, Ohio law, or any federal law.

Assignment of Error Four (Section III): The court erred in holding that the remaining equitable factors weighed in favor of an injunction.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in holding that Plaintiff Goldfarb has standing even though a favorable ruling might not redress his alleged harm because the county in which he lives might not add more drop-box locations and, even if it does, he may still choose to submit his absentee ballot to the current drop box? (Assignment of Error One.)

2. Did the trial court err in holding that Plaintiff Ohio Democratic Party ("ODP") has standing despite the same redressability problem and ODP's Executive Director's testimony that an injunction would cause ODP to increase, not decrease, the resources it spends on informing voters about drop boxes? (Assignment of Error One.)

3. Did the trial court err by placing the burden on Secretary LaRose to provide *evidence* to support his answer to a legal question about the meaning of Ohio law? (Assignment of Error Two.)

4. Did the trial court err by finding R.C. 3509.05 is ambiguous on drop boxes, yet rejecting and refusing to defer to the Secretary's reasonable interpretation that the statute limits drop boxes to boards of elections' offices? (Assignment of Error Two.)

5. Did the trial court err by using evidence—on COVID-19's impact, the performance of the U.S. Postal Service, and boards' preliminary discussions about multiple drop boxes—to reject the Secretary's reasonable interpretation of R.C. 3509.05? (Assignment of Error Two.)

6. Did the trial court err by using its own views of sound "public policy" to interpret Ohio law? (Assignment of Error Two.)

7. Did the trial court err by finding that Ohio law's silence on drop boxes allows Secretary LaRose to require boards to offer one drop box and to impose security requirements on drop boxes, but at the same

time prohibits him from regulating the number or location of drop boxes? (Assignment of Error Two.)

8. Did the trial court err by placing the burden on Secretary LaRose to justify the process behind Directive 2020-16, when Plaintiffs brought no mandamus or process-based challenge to Directive 2020-16? (Assignment of Error Three.)

9. Did the trial court err by relying on federal cases addressing constitutional claims when Plaintiffs brought no constitutional claim and stipulated they are not challenging the constitutionality of Directive 2020-16? (Assignment of Error Three.)

10. Did the trial court err in granting a preliminary injunction when Plaintiffs brought only a declaratory-judgment claim and chose not to bring any claim that might entitle them to an injunction? (Assignment of Error Three.)

11. Did the trial court err in rejecting and refusing to consider the burdens that last-minute changes to election laws can impose on the State and boards of elections—including evidence about the obstacles boards would need to overcome to install additional drop boxes and equal protection concerns—in favor of a legal conclusion that the public interest always favors more lenient voting laws? (Assignment of Error Four.)

12. Did the trial court err in "presuming" irreparable harm based on "public legal rights," even though Ohio law does not require multiple drop-box locations and Plaintiffs assert no right to drop boxes? (Assignment of Error Four.)

13. Did the trial court err in granting a preliminary injunction, given that Plaintiffs are not likely to succeed on the merits and the other factors weigh against an injunction? (Assignment of Error Four.)

STATEMENT OF THE CASE

This case presents a pure question of law. Yet the trial court relied on anecdotal evidence and "sound public policy" to grant a preliminary injunction against Directive 2020-16—even though Plaintiffs failed to challenge the directive or to identify any law or constitutional provision it violates. This Court should reverse and vacate the injunction.

Ohio law requires a voter to return her absentee ballot "to the director" of her county board of elections either (1) by mail or (2) by "personally deliver[ing] it to the director" (or authorizing a close family member to do so). R.C. 3509.05(A). Everyone agrees that absent from this statute (and Ohio election law) is any mention of "drop boxes."

What does this statutory silence mean? Secretary LaRose interpreted R.C. 3509.05 to permit boards of elections to use drop boxes only at their offices. Exercising his statutory authority, he issued Directive 2020-16, which requires each board to maintain a secure drop box at its office and prohibits installing them at any other location.

This interpretation is reasonable. In the first place, Ohio law requires board directors to provide absentee voters a return envelope

pre-printed with the board's office address. R.C. 3509.04(B). Accordingly, when voters who use the mail return their ballots to "the director," they do so to the board's office. R.C. 3509.05(A). Moreover, one "personally deliver[s]" something, *id.*, by handing it to another at the proper place. For a board director, that place is the board's office. Thus, the best reading of the statute is that voters must return their ballots to their local board's office—whether by mail, to a person (the usual practice for in-person delivery) or to a drop box there (a more recent development). Under longstanding Ohio Supreme Court precedent, courts must defer to the Secretary's reasonable interpretation.

Plaintiffs argue that Ohio law's silence on drop boxes instead means the Secretary may not restrict their number or location. But if silence means the Secretary cannot set any rules for drop boxes, how can the Secretary require boards to offer even one drop box? He cannot. Under Plaintiffs' logic, Directive 2020-16 must fall in its entirety.

The trial court could not reconcile this contradiction at the core of Plaintiffs' claim. So it used other factors. *First*, the parties agreed evidence was unnecessary and irrelevant to the legal question here. Yet

the court relied on evidence—COVID-19's impact, the performance of the U.S. Postal Service, and boards of elections' preliminary discussions about drop boxes, among other things—to decide what R.C. 3509.05 means. *Second*, the court rejected the deference due the Secretary's reasonable interpretation in favor of its view of "sensible public policy." *Third*, it improperly shifted the burden from Plaintiffs onto Secretary LaRose to justify Directive 2020-16, even though Plaintiffs neither challenged the directive nor identified any legal defect with it.

Finally, even if Ohio law is ambiguous on drop boxes, that does not justify an *injunction* against Directive 2020-16. Plaintiffs may bring a mandamus petition if the Secretary incorrectly instructs boards on the meaning of Ohio election law. And courts may enjoin rules that violate the Ohio constitution. But Plaintiffs did not bring those claims or any type of procedural, administrative challenge. The court granted an injunction nonetheless, citing a mixture of federal constitutional and Ohio administrative cases—all of which are inapposite in the absence of a properly pleaded claim attacking Directive 2020-16.

Ultimately, whether Directive 2020-16 is sound public policy has

no bearing on the meaning of Ohio law. These questions are for the General Assembly, which makes the election laws, and the Secretary, who the General Assembly has authorized to interpret and administer them. They are not for the courts. For these reasons, and as explained below, the Court should vacate the injunction.

STATEMENT OF FACTS

A. Ohio is a "national leader" in early voting. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir.2016). One option is no-excuse absentee voting. R.C. 3509.02. Absentee voting is "more convenient but less reliable." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 212 n.4 (2008) (Souter, J., dissenting). So the General Assembly imposed safeguards to minimize fraud and ensure security.

One safeguard is the manner in which absentee voters may return ballots. Ohioans must either (1) mail their ballot or (2) "personally deliver" (or direct a close relative to deliver) their ballot "to the director" of their county board of elections. R.C. 3509.05(A).

Another safeguard is *who* may return absentee ballots. Ohio law allows only the voter herself or a close relative to return the voter's

absentee ballot. *See id.* This protects against the "harm . . . referred to as ballot harvesting[,] which is the coordinated effort to collect absentee voters' ballots . . . and then deliver the ballots to the board of elections." ORP Ex. 10 at 3. The General Assembly enacted R.C. 3509.05 because ballot harvesting can "lead to election fraud." *Id.*

The General Assembly's delegation of authority to the Secretary of State is yet another safeguard. As Ohio's Chief Election Officer, R.C. 3501.04, he is best positioned to understand the burdens of election administration and to make rules accordingly, R.C. 3501.05(B)–(C).

B. Drop boxes implicate these safeguards. In response to COVID-19, the General Assembly passed H.B. 197, which expanded Ohioans' ability to "personally deliver" their absentee ballots "to the director" by requiring boards to "place" a drop box "outside the office of the board for the return of ballots." Am.Sub.H.B. No. 197, Section 32(E)(1).

The Secretary imposed security measures on the drop boxes required by H.B. 197 through Directive 2020-07. It required that they "be monitored 24/7" and that a bipartisan group of officials must retrieve the drop box's contents daily." ORP Opp. Ex. 1 at 3, R.146.

H.B. 197's drop-box provision does not apply for the General Election. Secretary LaRose thus sought the Attorney General's advice on two questions. He asked if county boards could "continue to use" the drop boxes at their offices for the 2020 General Election, and whether Ohio law permits additional drop-box locations. Pls.' Ex. D at 4.

With the General Election fast approaching, and having not received the requested opinion, the Secretary issued Directive 2020-16 on August 12, providing Ohio voters with the first ever state-wide drop-box option for a General Election. Pls.' Ex. A at 1. The directive reasonably interpreted Ohio law to prohibit boards of elections from installing drop boxes "at any other location other than" their offices. *Id.*

This final safeguard—which is entirely derivative of the Secretary's requirement that boards maintain drop boxes—is critical on two fronts. *First*, drop boxes exacerbate the risks of fraud and illegal ballot harvesting. *E.g.*, ORP Ex. 10 at 3 (illegal harvesting of more than 100 ballots during 2020 Primary). Indeed, Plaintiffs recognized the same concerns. Tr. 75:25–76:13, R.194. And the trial court confirmed as much. *See* Opinion ("Op.") 8 n.9, R.176.

Second, county boards of elections face substantial practical, procedural, and logistical challenges in trying to add drop boxes this close to the General Election. No board had approved multiple drop-box locations before the Secretary issued Directive 2020-16 in mid-August. *E.g.*, ORP Ex. 1 ¶ 9; ORP Ex. 2 ¶ 8; ORP Ex. 3 ¶ 7; ORP Ex. 4 ¶ 9. Before new boxes could be installed, boards would need to work through myriad issues to ensure a secure, safe, and fair process, including procurement, cost, picking locations, and implementing the requisite security measures. *E.g.*, ORP Ex. 5 ¶ 10; ORP Ex. 6 ¶ 10; ORP Ex. 7 ¶¶ 11, 13; ORP Ex. 8 ¶ 11. Diverting resources just before the election also would result in fewer resources available to be used to implement social distancing measures for early voting and in-person voting on Election Day. *E.g.*, ORP Ex. 4 ¶ 10; ORP Ex. 5 ¶ 10; ORP Ex. 7 ¶¶ 11, 13; ORP Ex. 8 ¶ 11.

C. Plaintiffs brought this declaratory-judgment action two weeks after the Secretary issued Directive 2020-16. Their complaint contained a single count seeking a declaration that Ohio law "does not limit the number or locations of secure drop boxes that the county boards of

elections may provide . . . and does not limit [the] Secretary from instructing boards of elections that they may have multiple drop boxes at alternate locations." Compl. Prayer for Relief ¶ 1, R.6.

Plaintiffs also sought an injunction against the portion of Directive 2020-16 that limits drop boxes to boards' offices, *id.* ¶ 2, and moved for a preliminary injunction, *see* Pls.' Mem, R.8. The trial court issued an opinion declaring that Ohio law does not prohibit multiple drop-box locations and granted the injunction. *See* Op. 28–30; Entry 3, R.186. The Secretary and the Ohio Republican Party ("ORP") timely appealed.

ARGUMENT

A party seeking a preliminary injunction bears a heavy burden. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 786, 790, 673 N.E.2d 182 (10th Dist.1996). Four factors are relevant: (1) likelihood of success on the merits; (2) whether the movant would suffer irreparable injury; (3) whether the injunction would harm others; and (4) whether it would serve the public interest. *Id.* Appellate courts generally review the trial court's decision for abuse of discretion. *Puruczky v. Corsi*, 2018-Ohio-1335, 110 N.E.3d 73, ¶ 28

(11th Dist.). But legal questions are reviewed de novo. *Id.*

The Court should reverse for four reasons. *First*, Plaintiffs lack standing. *Second*, Plaintiffs are not likely to succeed on the merits. Ohio courts must defer to the Secretary's reasonable interpretation that R.C. 3509.05 permits voters to return absentee ballots only at boards of elections' offices. And even if Ohio law does not *prohibit* multiple drop-box locations, its silence does not *require* drop boxes or deprive the Secretary of his authority to regulate them. *Third*, the court should not have granted an injunction because Plaintiffs brought no legal claim to justify one. *Finally*, the equities cut heavily against an injunction.

I. PLAINTIFFS LACK STANDING

Plaintiffs lack standing. This is a legal question reviewed de novo. *Hamilton v. Ohio Dept. of Health*, 2015-Ohio-4041, 42 N.E.3d 1261, ¶ 15 (10th Dist.). A party has standing if it shows (1) a concrete and particularized injury, (2) caused by the defendant, (3) that the requested relief will redress. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469–70, 715 N.E.2d 1062 (1999).

A party must have standing "for each form of relief" sought.

Preterm-Cleveland, Inc. v. Kasich, 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461, ¶ 30 (citation omitted). To have standing to seek a declaration on the meaning of a statute, the statute must affect a plaintiff's "rights, status, or other legal relations," R.C. 2721.03, and the plaintiff must show that resolving their claim will bring "concrete relief," *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 19. Plaintiffs' claim fails on both prongs.

Start with the legal interest. To the extent Plaintiffs identify one, they advance *boards of elections'* interest in their authority to install drop boxes. Plaintiffs claim no legal right to a certain number or location of drop boxes. Nor could they, because (as Plaintiffs conceded) Ohio law is "silent" regarding drop boxes. Pls.' Mem. 1. If Plaintiffs wanted to pursue any legal interest in drop boxes, they should have joined the county boards of elections. They chose not to do so.

Now turn to whether the declaration will bring Plaintiffs "concrete relief"—or, put differently, whether a declaration will redress the claimed harm. The declaration (and even the injunction) that Plaintiffs seek does not require boards to install more drop boxes. So neither

Plaintiff can establish that relief will remedy their alleged "harms."

Goldfarb. Plaintiff Goldfarb speculated that Franklin County (where he lives) would install additional drop boxes if allowed. But the Franklin County Board of Elections had not committed to multiple drop boxes; had not selected the number or location of any drop boxes; has no current plans to install multiple drop boxes; and would need to resolve "a number of significant concerns" before doing so. ORP Ex. 2 ¶¶ 8–10. And even *if* Franklin County installs additional drop boxes, Goldfarb may still choose to use the drop box at the board's office. Tr. 18:6–11, 21:1–9, R.194. He has no standing because it is "speculative," at best, that his alleged injury will be "redressed by a favorable decision." *Beadle v. O'Konski-Lewis*, 2016-Ohio-4749, 68 N.E.3d 221, ¶ 11 (6th Dist.) (citation omitted).

Rather than address redressability, the trial court cited a case holding that citizens have standing to sue in election-related mandamus and prohibition actions to "enforce public duties." Op. 18 (citing *State ex rel. Barth v. Hamilton Cty. Bd. of Elections*, 65 Ohio St.3d 219, 221, 602 N.E.2d 1130 (1992)). Even if this case supported the notion that

any citizen has a sufficient legal interest in any election case—and it does not—that is separate from whether the requested relief will redress the harm. The court sidestepped this fatal problem, saying only that a declaration "*could* significantly improve the process for many Ohio voters." Op. 19 (emphasis added). This speculation is exactly the reason that Goldfarb lacks standing.

Ohio Democratic Party. ODP has the same redressability problem. The affidavits Plaintiffs submitted show only that counties were "exploring" drop boxes, not that they would install them. *E.g.*, Pls.' Ex. B ¶ 21. The lone affidavit to the contrary contained the opinion of a board director (who cannot vote on board decisions) that Mahoning County would install 10 drop boxes. Pls.' Ex. J ¶ 13. A board member corrected this misstatement, confirming the board had not approved multiple drop boxes nor "agreed on plans" to do so. ORP Ex. 6 ¶ 8.

Again, the trial court did not explain how a favorable decision would redress ODP's alleged harms. It held that ODP has standing because the drop-box limit could require more time explaining the absentee process to voters. Op. 15. However, ODP's Executive

Director testified that ODP provided the exact same instructions to voters and used the same resources before H.B. 197, after H.B. 197, before Directive 2020-16, and after Directive 2020-16. Tr. 42:9–24; 50:5–14; 68:9–12, R.194. Any extra expenditures are related to COVID-19 and the extraordinary circumstances it caused, not to Directive 2020-16. *See id.* 50:22–51:9. And changing the rules just weeks before the election will not allow ODP to divert resources elsewhere—it will cause ODP to spend *more* resources educating voters on the new rules. *Id.* 69:20–70:7; 77:14–24. The court, having elicited testimony from ODP regarding the impact COVID-19 and purported mail delays had on voters, also held that ODP had associational standing. Op. 18–19. But, as with Goldfarb, it made no findings regarding redressability that rise beyond speculation. Plaintiffs lack standing, and the Court should reverse for this reason alone.

II. PLAINTIFFS WILL NOT SUCCEED ON THE MERITS

A. The Court Must Defer To The Secretary's Reasonable Interpretation Of R.C. 3509.05.

This case involves a legal "question of statutory interpretation."

Pls.' Mem. 1. Canons of construction confirm Directive 2020-16's rule that any drop boxes must be located at boards of elections' offices.

1. Ohio law mandates that voters mail or deliver ballots to county boards' offices. A voter must return her ballot "to the director from whom it was received." R.C. 3509.05(A). Ohio election law requires the director to mail ballots to voters and include a return envelope printed with "the official title and address of the director." R.C. 3509.04; *see* https://www.sos.state.oh.us/globalassets/elections/forms/12-f.pdf. It then directs voters who mail ballots to send them "to the director from whom it was received in the return envelope." R.C. 3509.05(A). So when it directs voters to "personally deliver it" or have a close relative "deliver it to the director" in the same paragraph, *id.*, the statute again contemplates the voter returning it to the director's office. "[I]dentical words used in different parts of the same act are intended to have the same meaning." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003); *see also Kimble Clay & Limestone v. McAvoy*, 59 Ohio St.2d 94, 97, 391 N.E.2d 1030 (1979) (same).

The statute's use of "personally deliver," R.C. 3509.05(A),

supports this reading. The common usage of "deliver" is to take something to someone, usually to their "houses or places of work." Cambridge Dictionary, ORP Ex. 14. Given that all ballots must be delivered to the director, common meaning and usage, R.C. 1.42, confirm that ballots must be returned to the address the director provides: the board's office, whether to a person there or to a drop box.

2. At minimum, this Court should follow the longstanding rule that courts defer to the Secretary's reasonable interpretation of election laws when they are "silent," Op. 21, or "ambiguous," *id.* 22. *See State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 57 (silence); *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 586, 651 N.E.2d 995 (1995) (ambiguity); *see also* R.C. 1.49(F).

Take *Colvin*. Ohio law requires citizens to be registered to vote for 30 days to qualify as an "elector." R.C. 3503.01(A). It also requires any person who wants to vote absentee to submit an application stating that she "is a qualified elector." R.C. 3509.03(B)(7). The Supreme Court rejected the argument that this meant Ohioans had to register to vote 30 days before submitting absentee ballot *applications*. Ohio law was

"silent" on the issue. *Colvin*, 2008-Ohio-5041, ¶ 46. So the Court deferred to the Secretary's "administrative construction," which linked the 30-day registration requirement to Election Day. *Id.* ¶ 57.

This Court should do the same. Everyone agrees Ohio law is silent on drop boxes. *See* Pls.' Mem. 1; Op. 21. And everyone agrees that R.C. 3509.05 permits *a* drop box. Given the statutory and contextual points above, the Secretary reasonably concluded that R.C. 3509.05 permits a drop box only at the board of elections' office. This is a prime example of the Secretary exercising his authority, as Ohio's Chief Election Officer, R.C. 3501.04, to issue directives and instruct boards "as to the proper methods of conducting elections," R.C. 3501.05(B).

3. The trial court erred when it failed to defer to the Secretary's reasonable interpretation of R.C. 3509.05(A). It acknowledged that "[d]eference is due the Secretary's interpretation of election law if it is subject to two different, but equally reasonable interpretations." Op. 24–25. To avoid this longstanding rule, the court made three errors.

First, it relied on *factual* evidence to decide a *legal* question. The court found R.C. 3509.05 "ambiguous" because it "does not squarely

answer whether ballot drop boxes are permitted under Ohio law," "how many boxes may be used," or "where they may be located." *Id.* 29. But the court identified no textual infirmity with the Secretary's interpretation. Instead it relied on the "factual record," *id.* 25, the "direct and circumstantial evidence," *id.* 29, and "inferences reasonably drawn from the record about voter behavior in this very unusual pandemic year[,] accompanied by public apprehension over delays in mail delivery," *id.* 28. Even though the meaning of law is a de novo question, and Plaintiffs must show a likelihood of success on the merits, the court shifted the burden to Secretary LaRose to "demonstrate some basis in fact" for his legal determination. *Id.* 23. And it concluded that he "lacked a legitimate basis in evidence" for his interpretation. *Id.* 28.

The factual record has no bearing on the meaning of Ohio law, including whether the Secretary's interpretation is reasonable. *Ralston Steel Car Co. v. Ralson*, 112 Ohio St. 306, 307, 147 N.E. 513 (1925). "Evidence," such as boards' willingness to install new drop boxes, Op. 25, non-record evidence from a federal commission, *id.* 25–27, or non-record reports from other states, *id.* 28, does not dictate the meaning of

Ohio law. *Ralston*, 112 Ohio St. at 307. Otherwise a statute's meaning would change from case to case, depending on the factual record.

Moreover, the three interpretive points the court did make actually support the reasonableness of the Secretary's interpretation. The court cited the "administrative construction of the statute[,]" Op. 22 (quoting R.C. 1.49(F)), and "past practice," *id.*, but those few boards of elections that offered drop boxes did so *only* at their offices. Pls.' Ex. B ¶ 11; Pls.' Ex. H ¶¶ 9–10; Pls.' Ex. K ¶ 8; Pls.' Ex. L ¶ 8; Pls.' Ex. M ¶ 11. The court cited H.B. 197, Op. 23, but the General Assembly's decisions (i) to require only one drop box at boards' offices for the Primary and (ii) not to extend that requirement to the General Election should caution against courts reading a multiple drop-box option into Ohio law. *Cf. Keppel v. Tiffin Sav. Bank*, 197 U.S. 356, 373 (1905). The court also cited constitutional concerns, *id.* 22–24, but Plaintiffs themselves disclaim any constitutional problems with Directive 2020-16, Stip. ¶ 11.

Second, the trial court relied on its public policy views to mandate the option of multiple drop boxes. Op. 23–26. If "[a]llowing additional drop boxes is plainly sensible public policy," *id.* 25, the General

Assembly may adopt a law to that effect. It has already enacted a drop-box law once. On the other hand, the judiciary's role is to "apply[] the law as written" because "societal developments, data-driven or other policy stud[ies], public sentiments," and the like are "well beyond ken of a judicial panel." *State v. C.D.D.*, 10th Dist. No. 19AP-130, 2019-Ohio-4754, ¶ 15. So whether there is "no evidence from which one can reasonably question the wisdom" of allowing multiple drop boxes, Op. 25, does not change whether Ohio law actually allows them.

Finally, the court found that the Secretary's interpretation was unreasonable because R.C. 3509.05 "is silent" on the issue of multiple drop boxes and "[t]he Secretary cannot slip new words into the law." Op. 21. This follows Plaintiffs' argument that courts "should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting the statute." Pls.' Mem. 8 (quoting *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995)). This rule applies to *courts*, which intrude on the legislature's lawmaking authority if they add words to (or delete them from) a statute.

It does not apply to the Secretary's exercise of interpretive or rulemaking authority. The General Assembly has already delegated authority to the Secretary to "[p]repare rules and instructions for the conduct of elections" and to issue directives to boards, R.C. 3501.05(B), (C), (M), so the same separation-of-powers issues do not arise.

On a more practical level, Plaintiffs' and the trial court's argument proves too much. If the Secretary cannot make rules where none exist, then he cannot require every board of elections to offer a drop box for the 2020 General Election. And taken to its logical conclusion, this reasoning would mean that the Secretary cannot impose any requirements on boards that are not found in the Revised Code. After all, a "requirement that does not exist in the statute" is no different than a limit that is not in the statute. Pls.' Mem. 8 (citation omitted).

The trial court held that "the Secretary had legal authority" to require county boards to provide one drop box. Op. 29. And neither the court nor the Plaintiffs objected to the Secretary's security requirements for drop boxes—round-the-clock monitoring, bipartisan collection, and the like. *See id.* 2; Tr. 75:25–76:21, R.194. But neither Plaintiffs nor

the trial court provided a limiting principle or valid way to distinguish between what is permissible and what is not.

At bottom, the court's holding that the Secretary can require drop boxes must mean that he can regulate them. His reasonable interpretation of Ohio law is consistent both with R.C. 3509.05 and with his authority and obligation to ensure safe and secure elections. This Court should defer to it. Because that leaves Plaintiffs unable to succeed on the merits, the Court should vacate the injunction.

B. The Trial Court Erred In Enjoining Directive 2020-16 Because Plaintiffs Identified No Legal Problems With It.

Even were this Court inclined to agree that Ohio law allows multiple drop-box locations, it still should vacate the injunction because Plaintiffs brought no legal claim that warrants one.

1. There is no legal basis to enjoin Directive 2020-16. *First*, Plaintiffs' request for injunctive relief is effectively a request for *mandamus* relief. A plaintiff may bring a mandamus action if the Secretary has "misdirected the members of boards of elections as to their duties." *State ex rel. Stokes v. Brunner*, 120 Ohio St.3d 250, 2008-Ohio-

5392, 898 N.E.2d 23, ¶ 13 (citation omitted). That is this case in a nutshell: the Secretary directed—"misdirected," in Plaintiffs' view—boards to limit drop boxes to their offices.

That leaves Plaintiffs with two problems. One: they did not bring this case in mandamus. Two: presumably they made that strategic choice because a mandamus petition could not succeed. A party is entitled to mandamus only if the respondent (the Secretary) has a "clear legal duty to perform the act prayed for." *State ex rel. Peregrine Health Servs. of Columbus, LLC v. Sears, Dir., Ohio Dep't of Medicaid*, 10th Dist. No. 18AP-16, 2020-Ohio-3426, ¶ 19. Yet Plaintiffs "do not claim a legal right to a certain number or location of drop boxes" or to "require any county board of elections" to provide them. Stip. ¶¶ 12–13.

Second, Plaintiffs brought no other claim that could support an injunction. To be sure, courts may enjoin unconstitutional directives. But only if plaintiffs, as "master" of their complaint, bring constitutional claims. *Carl L. Brown, Inc. v. Lincoln Nat. Life Ins.*, 10th Dist. No. 02AP-225, 2003-Ohio-2577, ¶ 36. "[T]he fact that the wrong asserted could be addressed under either state or federal law" does not change

that the plaintiff must raise those claims. *Bachtel v. Jackson*, 10th Dist. No. 08AP-714, 2009-Ohio-1554, ¶ 21 (citation omitted).

2. The trial court nevertheless analyzed this case as if Plaintiffs had brought a mandamus action challenging the Secretary's administrative reasoning and the process behind Directive 2020-16 *and* a constitutional claim that Directive 2020-16 burdens the right to vote.

For one, the court mistakenly approached this case as if it involved an administrative-procedure-act claim, *cf.* R.C. 119.12. It noted that the Secretary adopted Directive 2020-16 "without any public notice, hearing or comment" and that there was "no administrative record . . . to consider." Op. 7. As the court recognized, however, *id.*, "[t]emporary directives" issued in the 90 days before an election "shall *not* be subject to public review and public comment" requirements, R.C. 3501.053(A)(2) (emphasis added). Ohio law thus provides no basis for the trial court to have placed the burden on Secretary LaRose to justify the process behind Directive 2020-16 or to provide evidence to support it. Indeed, Plaintiffs themselves brought no administrative claim or process challenge. So this reasoning cannot support an injunction.

For another, despite finding that mandamus was unnecessary, Op. 14 n.10, the court erred by relying exclusively on cases *in mandamus* to find that Directive 2020-16 (and the process leading to it) was subject to judicial review for abuse of discretion, *id.* 12 (citing mandamus cases). Again, Plaintiffs chose not to bring a mandamus petition, so mandamus principles cannot lead to an injunction in a declaratory-judgment case.

What is more, the court found that some sort of administrative- or process-based review was appropriate because directives "may well run afoul of constitutional minimums required in dealing with elections." Op. 13; *see id.* 12–13, 22–24. It cited federal cases that applied the *Anderson-Burdick* framework—which compares the burden on the right to vote on the State's interest in existing election rules—and determined that constitutional concerns required it to consider whether Directive 2020-16 is reasonable. *Id.* 23–24.

Not so. From day one Plaintiffs have claimed this is a "simple question of statutory interpretation." Pls.' Mem. 1. They brought no constitutional claims. And while the trial court advised Plaintiffs it would not "hold them to the . . . complaint if implicit in what the case is

about" is a challenge to Directive 2020-16, Tr. 10:24–11:1, R.193, Plaintiffs declined that invitation and stipulated that they "do not assert that Directive 2020-16 is unconstitutional," Stip. ¶ 11. Given Plaintiffs' own choices, constitutional concerns cannot support the trial court's declaratory-judgment ruling or its decision to grant an injunction.

III. THE REMAINING FACTORS FAVOR REVERSAL

The equities weigh heavily against an injunction. *First*, an injunction is contrary to the public interest. The trial court concluded that "[t]he public interest is always served by clarifying and enforcing laws that enhance the opportunity to vote." Entry 2–3. Respectfully, the public interest is not served by the judicial imposition of changes to election rules in the run-up to an election. As the United States Supreme Court has repeatedly indicated, changing election law in the "weeks" before an election can engender widespread "voter confusion" and erode the "[c]onfidence in the integrity of our electoral process" that "is essential to the functioning of participatory democracy." *E.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam); *see also Thompson v. DeWine*, 959 F.3d 804 (6th Cir.2020) (per curiam). The trial court

reasoned that the federal "rule" against last-minute changes does not apply "to a state court." Op. 3. While federal cases are not binding, their rationale holds true whether a state or a federal court makes the last-minute change.

The Court should be especially hesitant to override the Secretary's reasoned judgment on how best to advance the State's compelling interest in safeguarding absentee ballots against ballot harvesting and fraud. "[T]he risk of voter fraud," particularly ballot harvesting, is "real" and "could affect the outcome of a close election." *See Crawford*, 553 U.S. at 196 (Stevens, J., op.). In Cuyahoga County, for example, board of elections staff caught an individual depositing over 100 absentee ballots for the 2020 Primary Election in the drop box in the board parking lot. ORP Ex. 10 at 3–5. And even isolated instances of voter fraud can have a substantial impact on voter confidence in the integrity of an election. *Crawford*, 553 U.S. at 197. The Secretary has the authority and the responsibility to protect against this manner of voter fraud and uphold the integrity of the upcoming election.

While the trial court found that "[a]llowing additional drop boxes

is plainly sensible public policy," Op. 25, Ohio does not charge its courts with determining public policy with respect to elections. *See State ex rel. Schwartz v. Leonard*, 65 Ohio App. 251, 252, 29 N.E.2d 619 (1st Dist.1940) (explaining that the courts' role has never been "to supervise elections or administer the election laws," but to determine whether the executive branch "is performing its duty under the law"). It entrusts those policy decisions to the Secretary of State, who came to the (correct) conclusion that the minimal benefit that additional drop boxes would confer in light of the myriad voting options available to Ohio voters did not outweigh the security concerns and other problems that they would present. This Court should respect that conclusion.

Second, allowing each county board of elections to determine the "number [and] location[] of secure drop boxes" in its sole discretion, Pls.' Mem. 1, would raise equal protection concerns and place a significant burden on boards of elections with fewer resources. The evidence demonstrates that installing drop boxes would take time and resources. Drop boxes cost at least $2,000 each, and boards must make arrangements (and pay) to "install each drop box," "mount remote

cameras for the required surveillance," "assure wifi connectivity," and "have personnel available to empty the box each day." Op. 11; *see also* ORP Exs. 1–8. Under Plaintiffs' proposed regime, each board would have to decide whether the benefits of any additional drop boxes justify the time and expense required, or whether board resources would be better spent fulfilling one of the board's many other responsibilities. Different boards may well make different decisions based on their individual priorities and financial resources. *See* Tr. 62:14–64:1, R.194 (acknowledging boards have varying financial resources).

To the extent any boards would install additional drop boxes, this would raise equal protection concerns because voters in different counties would have different options for delivering absentee ballots. States may not, by "arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam). Rather, "[a] state must impose uniform statewide standards in each county in order to protect the legality of a citizen's vote" and avoid "constitutional problems under the equal protection clause." *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684,

697 (W.D.Pa. 2003). Plaintiffs' proposed regime could create such "constitutional problems" by giving voters in different counties different opportunities. Respectfully, acknowledging as much is not "sophistry." Op. 25. The evidence required a reasoned analysis of how an injunction would impact the public interest.

The trial court dismissed the equal protection problems that would result from a system in which only voters in certain counties had access to multiple drop-box locations, suggesting that the current system results in unequal treatment by not apportioning the number of drop boxes according to county population and "geographic access." *Id.* 24. But allowing boards to install more drop boxes will not ensure that they are equally distributed. Counties with small populations may choose to add drop boxes, while counties with larger populations may decide to spend their resources on other priorities (or vice versa). More importantly for equal protection purposes, the trial court's injunction would replace a statewide rule applicable to all voters with one that allows counties to provide different options to their different voter pools.

Third, Plaintiffs will not be irreparably harmed absent an

injunction. Ohio voters quite simply have more than adequate opportunities to vote without drop boxes located off board premises: they can submit their absentee ballots via the mail, by hand at their board's office, or, pursuant to Directive 2020-16, via a drop box at the board's office. And, of course, Ohioans still may vote in person.

The trial court "presumed" irreparable harm based on a "public legal right[]" to additional drop boxes. Entry 2. However, as discussed above, Ohio law does not require additional drop boxes, and Plaintiffs do not assert any constitutional right to additional drop boxes. As there is no public right to additional drop boxes, the trial court's conclusion that Plaintiffs are irreparably harmed by the current state of affairs was erroneous. On the contrary, because Directive 2020-16 was a proper exercise of the Secretary's authority to "conduct[] this year's election[]," an injunction against its enforcement would itself cause "serious[] and irreparabl[e] harm [to] the State" and its voters. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

CONCLUSION

ORP respectfully asks the Court to vacate the injunction.

September 21, 2020

Respectfully submitted,

/s/ Edward M. Carter

Edward M. Carter (0082673)
M. Ryan Harmanis (0093642)
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673
Phone: (614) 469-3939
Fax: (614) 461-4198
emcarter@jonesday.com
rharmanis@jonesday.com

Counsel for the Ohio Republican Party

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed and a true and accurate copy was served on September 21, 2020, upon the following via electronic mail:

Donald J. McTigue
J. Corey Colombo
Derek Clinger
MCTIGUE & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
dmctigue@electionlawgroup.com
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com

Counsel for Plaintiffs

Benjamin M. Flowers
Stephen P. Carney
Bridget C. Coontz
Halli Brownfield Watson
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Bflowers@OhioAttorneyGeneral.gov
Bridget.Coontz@OhioAttorneyGeneral.gov
Halli.Watson@OhioAttorneyGeneral.gov

Counsel for Defendant Frank LaRose

/s/ Edward M. Carter
Edward M. Carter (0082673)