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

REPLY BRIEF OF INTERVENOR-APPELLANT OHIO REPUBLICAN PARTY

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Plaintiff-Appellees' brief is noteworthy for what it does not do—namely, provide a viable justification for affirming the trial court's issuance of a preliminary injunction against Directive 2020-16.

The legal flaw at the core of Plaintiffs' case and the trial court's order remains. All parties agree R.C. 3509.05 is silent regarding drop boxes. *See, e.g.,* Ape. Br. 12 ("[T]he 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.") (emphasis original). And all parties in this case agree the Secretary's creation of a state-wide requirement that boards provide a secure drop box for the general election was reasonable in light of the silence in R.C. 3509.05.

But the same deference must be given to the Secretary's corollary judgment regarding the number and location of those drop boxes. Put another way, if statutory silence prohibits the Secretary from imposing limitations on the number and location of drop boxes, so too for his underlying directive compelling boards to provide even a single drop box.

Nor do Plaintiffs explain how the factual context regarding COVID-19, the potential future performance of the United States Postal Service, or the policy preferences of various local officials could be proper evidence in interpreting the text of an Ohio statute. To be sure, none of that "context" bears on the statutory interpretation question before the Court. That is why all parties agreed the trial court did not need to conduct an evidentiary hearing to answer the pure legal question presented. The fact that the trial court, nonetheless, based its declaratory judgment and, by extension, its preliminary injunction on extraneous evidence does nothing to change the rules of statutory interpretation. The meaning of R.C. 3509.05 does not vary depending on whether there is a public health crisis, whether U.S.P.S. is performing optimally or sub-optimally, or whether local officials might act differently if they possessed the Secretary's authority.

Just as they failed to meet their burden of proving the Secretary's interpretation was unreasonable at the trial court, Plaintiffs' challenges to Appellants' arguments fail to justify the relief they seek. But four of their challenges merit a brief response.

1. Standing. Plaintiffs invoke the trial court's description of ORP's position as "disingenuous" because political parties and voters have an interest in knowing the law. Ape. Br. 44–45. Interest in knowing the law, however, is not the basis for ORP's challenge to Plaintiffs' standing. Here, the primary problem confronting Plaintiffs is the relief they seek. Neither their requested declaration nor an injunction of Directive 2020-16 will redress their alleged injuries. *Beadle v. O'Konski-Lewis*, 2016-Ohio-4749, 68 N.E.3d 221, ¶ 11 (6th Dist.).

Goldfarb's claimed harm is the inability to return his absentee ballot to a drop box closer to his home than the board's office. Yet the record shows nothing more than speculation that Franklin County might install more drop boxes and, even then, only a guess that any new drop boxes would be closer to Goldfarb. Opening Br. 11. As for ODP, its harm is that an injunction will force it to spend more resources educating voters. Ape. Br. 50. This is the opposite of what the organizational-standing cases require: relief that allows a plaintiff to stop spending resources on the issue. Plaintiffs' standing problems do not prevent

parties or voters from bringing election suits. They simply confirm that, as in every case, a party has standing only if their claims seek relief that fixes the alleged harm.

2. Factual Error. Plaintiffs observe in a footnote that ORP's recitation of background facts is mistaken to the extent it reports that "no board had approved installing multiple drop locations prior to the issuance of Directive 2020-16." Ape. Br. 6, note 1. Plaintiffs are correct. In summarizing the evidence in the record, ORP's brief neglected to account for ODP Exhibits C and AC. These exhibits reflect that 1 of Ohio's 88 counties, Sandusky, had approved a plan to "purchase two additional drop boxes" upon receipt of the requisite CARES funds for secure installation at unspecified locations in Woodville and Clyde. ODP Ex. AC. Counsel apologizes for that oversight. The statement on page 7 of ORP's opening brief should instead have read:

> "Though Sandusky County was planning to purchase two additional secure drop boxes, there is no evidence that any of Ohio's other 87 county boards had approved multiple drop-box locations before the Secretary issued Directive 2020-16 in

mid-August."

However, Plaintiffs' further suggestion that ORP "hinges much of its argument on this factually wrong statement" misses the mark. *Id.* The underlying point—which is quite modest and hardly debatable—remains unchanged. At this late hour, county boards of elections would still need to resolve substantial practical, procedural, and logistical challenges before they could install any additional drop boxes.

3. ORP's Appeal of the Declaratory Judgment. Plaintiffs' assertion that ORP did not appeal the declaratory judgment is plainly wrong. Ape. Br. 9. ORP appealed both the trial court's entry granting injunctive relief and the underlying declaratory judgment order. ORP Notice of Appeal 1 ("The Ohio Republican Party also appeals this Court's September 15, 2020 Order."); *id.* 9–39 (attaching a copy of the declaratory judgment order pursuant to Ohio Rule of Appellate Procedure 3(D)). And throughout its opening brief, ORP explained why the declaratory judgment order was incorrect. *See, e.g.*, Opening Br. 14–15 (showing that "Ohio law mandates that voters mail or deliver ballots to county boards' offices").

4. Arguments Against Injunctive Relief. Absent from Plaintiffs' brief is any explanation of why, regardless of their declaratory judgment claim, they are entitled to an injunction. *See* Opening Br. 21–25. Plaintiffs did not bring a mandamus action—the means by which plaintiffs can seek to overturn directives that "misdirect[] the members of boards of elections." *State ex rel. Stokes v. Brunner*, 120 Ohio St.3d 250, 2008-Ohio-5392, 898 N.E.2d 23, ¶ 13 (citation omitted). They did not (and could not) bring a challenge under Ohio's Administrative Procedure Act ("APA"). *See* R.C. 119.12. And they disclaimed any constitutional challenge. *See* Stip. ¶ 11.

So what is the basis for the trial court's injunction? Plaintiffs do not say. The trial court seemed to approach this question as if Plaintiffs had brought an APA claim, *see* Op. 7, despite acknowledging that Directive 2020-16 is not subject to notice-and-comment requirements, *see* R.C. 3501.053(A)(2). Plaintiffs endorse that analysis in their argument for *declaratory* relief. Ape. Br. 22–26. But they still fail to connect the dots from a declaration to an injunction. They do not, for example, argue that the Directive violates the APA, nor do they bring

any other legal claims. And without a legal claim that leads to injunctive relief, the trial court had no basis to issue an injunction.

Rather than address this glaring problem, Plaintiffs suggest that Secretary LaRose "plainly consented to the preliminary injunction." Ape. Br. 33. Not the case. The Secretary "request[ed] that [the trial] Court *rule* on the preliminary injunction motion" so that he could appeal any ruling. Show-Cause Resp. 2 (emphasis added). A party asking a court to rule on a motion so that the party may challenge it on appeal is the opposite of *consenting* to it. Regardless, the injunction is before this Court because ORP appealed it.

Plaintiffs' only other response on this issue misunderstands ORP's argument. Plaintiffs say they did not need to bring mandamus or constitutional claims to seek a declaratory judgment. Ape. Br. 29–31. That is beside the point. Plaintiffs needed a constitutional, mandamus, or APA-style claim to obtain *injunctive* relief. They chose not to bring any such claim, and so cannot claim any right to an injunction.

In the absence of a persuasive response, Plaintiffs accuse ORP of advancing a fallacious argument that Plaintiffs simultaneously (1) were

required to bring a mandamus action and (2) could not have brought one. Ape. Br. 30. This is a strawman. ORP's actual argument is that Plaintiffs could have and should have brought a mandamus action, but—because of the concessions they made in the case they chose to bring—a mandamus action would have failed.

Plaintiffs' suggestion that their ability to seek declaratory relief precluded them from seeking a writ of mandamus is also mistaken. Ape. Br. 30–31 (citation omitted). When "declaratory judgment would not be a complete remedy unless coupled with extraordinary relief in the nature of a mandatory injunction, the availability of declaratory judgment does not preclude a writ of mandamus." *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 716 N.E.2d 704 (1999). Mandamus was an available avenue, but a losing one, because the Secretary does not have a "clear legal duty" to authorize additional drop boxes. *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; *see* Stip. ¶ 12 (disclaiming "a legal right to a certain number or location of drop boxes").

At bottom, Plaintiffs made the strategic decision to bring a single claim for declaratory relief. Whatever the merits of that claim, in the absence of any other legal claim it does not entitle them to an injunction.

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In conclusion, the Court should decline Plaintiffs' invitation to assume the role of a legislator. The General Assembly has demonstrated it knows how to account for unprecedented circumstances and pass legislation to govern elections. *See, e.g.*, H.B. 197. The fact the General Assembly made the policy decision not to amend Ohio's election laws to expand the use of drop boxes does not afford the courts the right to impose their policy preferences instead.

For all of these reasons, ORP respectfully submits the Court should vacate the trial court's preliminary injunction.

September 24, 2020

Respectfully submitted,

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