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

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

OHIO SECRETARY OF STATE FRANK LAROSE'S REPLY BRIEF

DAVE YOST (0056290)
Ohio Attorney General

BENJAMIN M. FLOWERS* (0095284)
Ohio Solicitor General
**Counsel of Record*

(counsel listing continued on next page)

STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
BRIDGET C. COONTZ (0072919)
HALLI BROWNFIELD WATSON (0082466)
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: 614-466-8980
Fax: 614-466-5087
Bflowers@OhioAttorneyGeneral.gov

Counsel for Ohio Secretary of State Frank LaRose

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

The Secretary of State's Directive 2020-016 allows the use of dropboxes located at a county board of elections but prohibits the use of off-site dropboxes. This case asks whether the Directive correctly, or at least reasonably, interprets the Ballot Delivery Law, R.C. 3509.05, and whether the common pleas court erred by enjoining the Directive. The answer to both questions is "yes." Nothing in ODP's response justifies any other conclusion. And if this Court holds otherwise, it will invite a flood of litigation challenging cross-county disparities in dropbox availability, dropbox placement, and whether individual dropboxes comply with other laws (like the Americans with Disabilities Act). Neither the Secretary, the boards, nor the courts have time to deal with the flood of litigation that the Secretary's Directive is, for now, holding back.

I. ODP is not entitled to a declaration or an injunction.

The Directive is valid for three, independent reasons.

A. The Ballot Delivery Law forbids off-site dropboxes.

The easiest way to resolve this case is to hold that the Directive rests on a proper, or at least reasonable (and thus binding), reading of the

Ballot Delivery Law. That law 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 [various specified relatives] 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.

R.C. 3509.05(A). For two reasons, the option to "personally deliver" ballots "to the director" allows delivery to dropboxes *only if* they are installed at a county board of elections.

First, this reading accords with the natural meaning of "personally deliver." To "personally deliver" something to someone is to bring it directly to her. That may include leaving the delivered item at the recipient's property or with the recipient's agent. But it does not include leaving it somewhere else for the recipient to pick up. For example, Amazon offers a delivery service in which it sends packages to a locker for pickup by the buyer. *See* https://tinyurl.com/AMZNlocker. It would abuse the English language, and likely create false-advertising liability, to call this personal delivery. The reason is that "personally deliver[ing]" an item

does not include leaving that item at an agreed-upon place for later pickup by the recipient. Thus, leaving a ballot at an off-site dropbox does not constitute "personally deliver[ing]" it to the director.

Second, this reading gives significance to the requirement that delivery be made "to the director." That phrase, "to the director," appears in the Ballot Delivery Law nine separate times. Each time, it refers to mailing or delivering a ballot. In the mailing context, the phrase unambiguously requires that all mailings be sent *to the director's official address*. And the only official address to which personal delivery is possible is the address of the county board of elections. (Ohio law, at least arguably, allows directors to use a P.O. Box as an official address, too. *See* ODP Br.18–19. But one cannot personally deliver a ballot to the director at that address, which is open only for postmarked mail.) Because "to the director" should not be read to mean different things at different times within the Ballot Delivery Law, it is best read to refer to delivery (by mail or in person) to the director *at his official address*. Thus, delivery to an off-site dropbox is not delivery "to the director."

In sum, the Ballot Delivery Law either bars off-site dropboxes or is reasonably understood to bar them. The Directive is therefore lawful.

B. ODP did not allege or prove necessary elements of the only claim it brought.

ODP brought a single cause of action: it sought a declaratory judgment. To prevail, it had to show that: (1) there is a "real controversy or justiciable issue between the parties"; and (2) "the declaratory judgment will ... terminate the uncertainty or controversy." *McConnell v. Hunt Sports Enters.*, 132 Ohio App.3d 657, 681, 725 N.E.2d 1193 (10th Dist. 1999) (internal citation omitted). ODP proved neither element.

First, it did not establish a "real controversy" because this case does not involve a dispute about *ODP's* rights. ODP agrees that no statute *requires* the installation of additional dropboxes. It sued for a declaration that *county boards of elections* have the right to install as many dropboxes as they like, wherever they like. Because ODP is suing to enforce the rights of non-parties (county boards of elections), rather than its own rights, the case presents no controversy between the parties.

Second, this case will not "terminate the uncertainty or controversy." *Id.* If ODP is injured at all, it is injured by the fact that voters cannot use off-site dropboxes. But this case cannot redress that injury: even if ODP wins, it will be up to the boards to install (or not) additional dropboxes. As such, this dispute will not terminate any uncertainty relating to the plaintiffs' ability to access additional dropboxes.

C. The Directive must be upheld under R.C. 3501.05(B).

Finally, even if ODP is correct that the Ballot Delivery Law permits off-site dropboxes, the Directive must be upheld as a valid exercise of the Secretary's power under R.C. 3501.05(B). That section empowers the Secretary to issue "directives and advisories ... to members of the boards as to the proper methods of conducting elections." *Id.* Under this authority, the Secretary can regulate the administration of Ohio elections by requiring county boards to act in any manner that accords with law.

Here, ODP argues that the Ballot Delivery Law *allows* for the use of off-site dropboxes. But the law indisputably does not *require* such dropboxes. Thus, the Secretary's Directive, by limiting the locations of

dropboxes, requires county boards of elections to "conduct[] elections" in a manner that accords with state law. *Id.* It follows that the Secretary had authority to issue the Directive *even if* ODP is correct about the Ballot Delivery Law's meaning. And if that is true, the trial court erred by enjoining the Directive. *See* SOS Br. 20–24.

II. ODP's arguments for affirmance all fail.

ODP has no good responses to the three fatal flaws just discussed.

A. The statutory text supports the Secretary.

ODP's textual analysis begins on the wrong foot by insisting that "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 or the Secretary may authorize other locations for drop boxes." ODP Br.10–11. That assertion ignores the textual clues, discussed above, that require (or at least justify) interpreting the Ballot Delivery Law to prohibit off-site dropboxes. These clues show that, while the statute is not *explicit* about dropbox locations, neither is it silent.

Regardless, ODP quickly pivots to explaining why the Ballot Deliv-

ery Law, far from being *silent* on dropbox locations, actually permits their installation anywhere. Its arguments fail. It first relies on the principle of consistent usage. It notes that the General Assembly used the phrase "office of the board" elsewhere in the Ballot Delivery Law, and also in a different statute, and from this concludes that "to the director" must not mean "to the board." *See* ODP Br.13 (citing R.C. 3509.06(D)(3)(b)). This is both irrelevant and wrong. It is irrelevant because the Secretary thinks "to the director" and "to the board" *do* have slightly different meanings: the first phrase includes *any* official address, which may include a P.O. Box, and is thus broader than the second phrase. The argument is wrong because the presumption of consistent usage plays no role here. It is true that identical phrases within a statute generally mean the same thing. (That is why "to the director" means the same thing throughout the Ballot Delivery Law. SOS Br.11–12) But there is no "canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540, 133 S. Ct. 1351,

185 L. Ed. 2d 392 (2013); *see also Everly v. Everly*, 958 F.3d 442, 462 (6th Cir. 2020) (Murphy, J., concurring). There are, after all, many ways of expressing the same idea. So it does not follow from the legislature's using "office of the board" and "to the director" in the same statute that the phrases have different meanings. *See State v. Noling*, 153 Ohio St. 3d 108, 2018-Ohio-795, 101 N.E.3d 435, ¶74.

ODP next urges the Court "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." ODP Br.14. This argument fails for three reasons. *First*, this principle would come into play only if the statute were ambiguous, in which case the Secretary's interpretation gets deference.

Second, the principle is not even implicated here, because this case is not about the right to vote or the need to promote free and fair elections. Instead, this case is about where voters may exercise their undoubted right to vote. *Contrast State ex rel. Myles v. Brunner*, 120 Ohio St. 3d 328, 2008-Ohio-5097, 899 N.E.2d 120, ¶21 (applying the liberal-

construction rule to a dispute about whether ballots may be disregarded based on technicalities). However the Court resolves this case, every Ohio voter will have ample opportunity to vote, including by absentee ballot. Even without dropboxes, "[t]here is no dispute that Ohio is generous when it comes to absentee voting—especially when compared to other states." *Mays v. LaRose*, 951 F.3d 775, 779–80 (6th Cir. 2020). Because Ohio law affords ample opportunity to vote—voters can mail or personally delivery an absentee ballot, vote early in-person, or vote in person on Election Day—any ruling in this case will leave unaffected the right of Ohioans to vote. (ODP's discussion about the effects of COVID does not bear on the Ballot Delivery Law's meaning: a law cannot mean different things in pandemic times and non-pandemic times, nor can its meaning shift based on other on-the-ground circumstances.)

Finally, the principle does not help ODP even if it applies. A liberal statutory construction must still be a justifiable construction, and ODP has not established any reading of the Ballot Delivery Law that *permits* the use of off-site dropboxes without permitting numerous other forms of

personal delivery that everyone admits are absurd and ill-advised. If ballots may be returned to somewhere other than the office of a board of elections, why can they not be handed to the director when she is sitting in traffic or at the food store? Why can they not be delivered to her home? *See* SOS Br.14–15. ODP has no good answer. It says that *these* forms of delivery would be impermissible "because the Director has not agreed to take delivery in the manners suggested." ODP Br.16. That avoids the difficulty simply by creating a new question: What in the Ballot Delivery Law would *prohibit* the Director from accepting such forms of delivery? According to the ODP, the answer is "nothing." That absurd conclusion suggests ODP's reading is incorrect.

ODP fares no better in knocking down the Secretary's argument than it does in building up its own. For example, it calls R.C. 3509.04 the "linchpin" of the Secretary's argument. ODP Br.16–17. That is not true. The Secretary cited R.C. 3509.04 to help confirm the agreed-upon fact that mailed ballots must be returned "to the director" at the director's official address. SOS.Br.12. This, the Secretary argued, suggested

that mailing or delivering a ballot "to the director" means mailing or delivering the ballot to her official address. SOS Br.12–13. But since all agree that mailed ballots must be sent "to the director" at her official address, the Secretary's argument does not depend on R.C. 3509.04. Further, other phrases in the Ballot Delivery Law, including "personally deliver," SOS Br.11–12, independently support the Secretary's reading.

ODP next insists that the Secretary's interpretation is not owed any deference. As an initial matter, the Secretary does not need deference to win: the Ballot Delivery Law, as a matter of law, permits personal delivery only to boards of elections, and thus only to dropboxes located at boards of elections. (The Secretary has never conceded the Ballot Delivery Law's ambiguity. *Contra* ODP Br.25. Instead, he has argued that the statute either unambiguously favors his reading or, "[a]t the very least," does not foreclose it. SOS Br.9.)

But if the statute *is* ambiguous, the Secretary is entitled to deference. The first sign that something is wrong with ODP's no-deference argument is its reliance on cases, like *DHS v. Regents of the University of*

California, 140 S. Ct. 1891, 1909–10 (2020), that have nothing to do with the issues here. *DHS* is not about state-law deference principles. Indeed, it is not about deference at all: it asks whether a federal agency violated the federal Administrative Procedure Act in rescinding a policy.

ODP next insists that the Secretary's interpretation is owed no deference because it is based on his statutory construction rather than his policy expertise. ODP again cites only federal law for this argument. ODP Br.22–23 (citing *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 865, 104 S. Ct. 2778 (1984)). But the argument finds no support in *state law*, which requires deference to the Secretary's reasonable statutory interpretations. *See, e.g.*, *State rel. Herman v. Klopfeisch*, 72 Ohio St.3d 581, 586, 651 N.E.2d 995 (1995). The argument does not even find support in federal law, which also requires deference to reasonable statutory constructions regardless of policy considerations. *See, e.g.*, *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003). On top of all this, the interpretation here *is based* on the Secretary's policy expertise: he determined that a significant change to voting methods,

such as the adoption of off-site dropboxes, would be better implemented through the legislative process than by executive fiat; the legislative process allows for greater deliberation and thus avoids problems that on-the-fly implementations cannot. *See* Motion to Quash, Ex. B, R.127.

ODP finally says that the Secretary is not entitled to deference because he "waffled and wavered" as to the Ballot Delivery Law's meaning. ODP Br.23. ODP mistakes the Secretary's thoughtfulness for vacillation. The Secretary long acknowledged that the question in this case required serious thought and was not immediately obvious. Upon giving the question the thought it deserved, the Secretary determined that the law must be read *not* to permit off-site dropboxes. After announcing that interpretation and issuing his Directive, the only action at issue here, he never wavered. That distinguishes this case from *Ohio Manufacturers' Association v. Ohioans for Drug Price Relief Act*, 149 Ohio St.3d 250, 2016-Ohio-5377, 74 N.E.3d 399, ¶¶26–29 (cited at ODP Br.25), in which the Court paid no deference to the Secretary's interpretation after he had *acted* in ways inconsistent with a later-adopted interpretation. (If ODP

means to invoke estoppel principles, its argument fails; those principles do not apply to the Secretary. *Kistler v. Conrad*, Nos. 04-AP-1095 & 1100, 2006-Ohio-3308, ¶ 24 (10th Dist.).)

B. ODP cannot show necessary elements of its claim.

Recall the reason ODP's declaratory-judgment claim fails: it is suing to enforce the rights of non-parties (county boards of election) and a declaratory judgment will not redress the lack of access to off-site dropboxes (that will require independent action by county boards). SOS Br.21–23; *see above* 4–5. ODP ignores these problems, and insists that declaratory relief is appropriate because it will eliminate uncertainty about the meaning of the Ballot Delivery Law. That is true, but irrelevant: eliminating that uncertainty will not, by itself, affect *the plaintiffs'* rights or redress any injury they claim to have suffered.

C. ODP cannot justify the preliminary injunction.

ODP's attempts to justify the preliminary injunction fail. As the foregoing shows, the Ballot Delivery Law either forbids, or is reasonably interpreted to forbid, off-site dropboxes. Regardless, the Secretary's

power to issue directives requiring the boards to act in any manner consistent with law, *see* R.C. 3501.05(B), *independently* justifies Directive 2020-016 and thus bars its being enjoined. *See* SOS Br.23–25; *see above* 5–6. ODP never addresses this alternative basis for reversal; it never even cites R.C. 3501.05(B). If Ohio law really is "silent" on dropbox locations, ODP Br.10–11, this alternative argument is dispositive.

As a fallback, ODP says the Secretary asked for a preliminary injunction and thus cannot appeal. Not so. The Secretary opposed granting ODP *any* relief. But once it became clear that the trial court had rejected the Secretary's legal arguments, the Secretary "request[ed] that" the trial court "rule on the preliminary injunction motion so that he may exercise his right to an immediate appeal." Response to Show-Cause Order, R.181 at 2. The Secretary had already opposed the preliminary-injunction request, and no one understood his urging the trial court to act so that he could appeal as *consent* to the relief being appealed.

*

The Court should vacate the injunction and reverse.

Respectfully submitted,

STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
BRIDGET C. COONTZ (0072919)
HALLI BROWNFIELD WATSON (0082466)
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215

DAVE YOST (0056290)
Ohio Attorney General
/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS* (0095284)
Ohio Solicitor General
**Counsel of Record*
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: 614-466-8980
Fax: 614-466-5087
Bflowers@OhioAttorneyGeneral.gov

Counsel for Defendant-Appellant Frank LaRose, Secretary of State

CERTIFICATE OF SERVICE

I hereby certify that on this September 24, 2020, this brief was filed electronically, and served by email and by mail upon:

DEREK S. CLINGER
McTigue & Colombo LLC
545 E. Town St.
Columbus, Ohio 43215
Tel: 614-263-7000
dclinger@electionlawgroup.com

Counsel for Plaintiffs-Appellees

EDWARD M. CARTER
Jones Day
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
emcarter@jonesday.com

Counsel for Intervenors

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS