IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO DEMOCRATIC PARTY, ET AL., **Plaintiffs,** -v- **FRANK LAROSE, in his official capacity as Ohio Secretary of State.** **Defendant.**	**CASE NO. 20 CV 4997** **JUDGE STEPHEN L MCINTOSH**

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Law

Ohio Revised Code Provisions

Case Law

Ohio Secretary of State Directives

INTRODUCTION

In a case involving a straightforward question of statutory interpretation, Defendant LaRose has raised a dizzying slew of hyperbolic arguments in opposition to Plaintiffs' Motion for a Preliminary Injunction.[1] But none of his arguments are well taken. And while Defendant goes to great lengths to argue that the sky would fall if Ohio's voters are allowed to electronically submit their absentee ballot requests—a policy that Defendant himself has repeatedly endorsed and called for—he spends little time addressing the primary question presented by this case, which is whether R.C. 3509.03 prohibits qualified electors from submitting their completed absentee ballot applications to their county boards of elections in this manner.

ARGUMENTS IN RESPONSE

I. Plaintiffs' Claims Are Not Barred By Laches.

Defendant LaRose haphazardly contends that Plaintiffs' claims are barred by the doctrine of laches, which may bar relief in an election-related matter if the person seeking relief fails to act with the "utmost diligence." *See State ex rel. Stevens v. Fairfield Cty. Bd. of Elections*, 152 Ohio St.3d 584, 2018-Ohio-1151, ¶ 8 (explaining that "[a] laches defense rarely prevails in election cases.") (emphasis added). But, as a matter of law, laches does not bar claims for prospective relief, like Plaintiffs'. Moreover, even if laches could apply here, Defendant LaRose failed to establish all the necessary elements for laches to apply.

A. Laches does not bar claims for prospective relief.

Laches does not bar Plaintiffs' claims because, as a matter of law, laches does not apply to claims for prospective relief. It is well-settled that "[l]aches only bars damages that occurred before

[1] Defendant's brief was not timely filed by 5 p.m. on August 11, 2020 as required by the Court's Order. Despite the untimeliness, Plaintiffs are not objecting and want the Court to have the benefit of both side's arguments in makings its decision on the merits.

the filing date of the lawsuit," and it "does not prevent plaintiff[s] from obtaining injunctive relief or post-filing damages." *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002); *see also Ohio A. Philip Randolph Institute v. Smith*, 335 F.Supp.3d 988 (S.D. Ohio 2018) (quoting same); *United States Playing Card Co. v. Bicycle Club*, 119 Ohio App.3d 597, 604, 695 N.E.2d 1197 (1st Dist. 1997) ("where the remedy desired is prospective relief, a finding of laches alone is not sufficient [to defeat a suit for injunctive relief]."). Here, Plaintiffs are seeking declaratory and injunctive relief, and they are not seeking a remedy for any harm that occurred prior to the filing of lawsuit. Consequently, laches does not bar Plaintiffs' action.

B. Even if laches could apply here, Defendant LaRose failed to establish all the necessary elements for laches to bar the Court's consideration of Plaintiffs' claims.

Even if laches could apply here, Defendant LaRose failed to demonstrate all the elements needed for the doctrine to bar Plaintiffs' claims. The elements of laches, which Defendant bears the burden of proving, are "(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *State ex rel. Beard v. Hardin*, 153 Ohio St.3d 571, 2018-Ohio-1286, ¶ 14. Establishing all these elements is essential as the Ohio Supreme Court has instructed that courts should try to follow "the fundamental tenet of judicial review in Ohio," which is "that courts should decide cases on their merits." *State ex. rel. Yeager v. Richland County Bd. Of Elections,* 136 Ohio St.3d 327, 2013-Ohio-3862, ¶ 14 (internal quotations and citations omitted).

1. There has been no unreasonable delay or lapse of time in asserting a right.

As an initial matter, there has been no unreasonable delay in asserting a right. Defendant LaRose issued Directive 2020-13 on July 17, 2020 and Plaintiffs filed their lawsuit two weeks later on July 31, 2020, which was 95 days before the election. All cases cited by Defendant LaRose concerned involved greater delays and/or were filed much closer to the election than this.

2. Any supposed "delay" is well-excused because Plaintiffs were waiting to see if litigation would be necessary in light of Defendant LaRose's repeated public statements that he wanted to allow online absentee ballot requests.

Defendant LaRose contends that Plaintiffs could have brought this action even before he issued Directive 2020-13 on July 17, 2020 as his interpretation of R.C. 3509.03 has been the same throughout his administration. But this is an incredibly disingenuous argument as Defendant LaRose has repeatedly stated that he wanted to allow online absentee ballot requests. For instance, in June 2020, Defendant LaRose's spokesperson confirmed that Defendant LaRose "has been thinking about the potential for an online absentee ballot request since he took office in January 2019" and that Defendant LaRose "actually wanted to make the change when he was a state senator."[2] Additionally, ever since Ohio's 2020 Presidential Primary Election in which in-person voting was ultimately cancelled, forcing many voters to vote by mail, Defendant LaRose has publicly urged the General Assembly to create a new online absentee ballot request system.[3] And while Defendant LaRose tried to no avail to get the General Assembly to do so, two Democratic legislators wrote a letter to him on July 14, 2020 stating, in part, that under the current language of R.C. 3509.03 and R.C. 3509.04, "[t]here is absolutely nothing preventing the ballot request from being electronic."[4] Three days after this letter, however, Defendant LaRose issued Directive 2020-13 in which he effectively instructed boards to reject completed absentee ballot requests that are submitted via email or fax.

---

[2] Rick Rouan, *Could Ohio develop online absentee ballot requests in time for November election?*, Columbus Dispatch, June 10, 2020 available at https://www.dispatch.com/news/20200610/could-ohio-develop-online-absentee-ballot-requests-in-time-for-november-election (last accessed Aug. 13, 2020).

[3] *See* Rouan, *supra*; Laura Bischoff, *Ohio's primary election draws turnout below 23 percent*, Dayton Daily News, Apr. 30, 2020 available at https://www.daytondailynews.com/news/state--regional-govt--politics/ohio-primary-election-draws-turnout-below-percent/FGzUxU2iDoc9Nhg7VVZefL/ (last accessed Aug. 13, 2020); Karen Kasler, *Ohio Secretary of State: Voters Should Be Able To Request Absentee Ballots Online*, WOSU, May 6, 2020 (available at https://radio.wosu.org/post/ohio-secretary-state-voters-should-be-able-request-absentee-ballots-online#stream/0 (last accessed Aug. 13, 2020).

[4] A copy of this letter is available at https://mcusercontent.com/bcb33ac455647b715653e0c09/files/d4788075-3de0-4214-a210-dcc83046fbfa/Sens_Williams_Antonio_Letter_to_SoS.pdf (last accessed Aug. 13, 2020).

Given Defendant LaRose's long-held position in favor of online absentee ballot requests, and the fact that Democratic lawmakers pointed out that the law currently allows for a form of online absentee ballot requests, Plaintiffs were justified in waiting to see if he would follow through on his words. If he had, Plaintiffs would not have needed to bring this lawsuit. Thus, any delays prior to the issuance of Directive 2020-13 are attributable to Plaintiffs waiting to see if litigation would even be necessary, and this is a valid excuse for any delays in bringing a lawsuit. *See Stevens, supra,* ¶ 10 (explaining that delays attributable to efforts to "obviate the need for litigation" are not unreasonable).

3. Plaintiffs only recently learned that Defendant LaRose would prohibit boards of elections from accepting electronically transmitted absentee ballot applications for the November 3, 2020 General Election.

For the same reasons above, Plaintiffs did not have knowledge of Defendant LaRose's intent to prohibit completed absentee ballot requests from being submitted via email or fax for the November 3, 2020 General Election until July 17, 2020 when Directive 2020-13 was issued. Prior to this, there was a very real possibility that the General Assembly would change the law or that Defendant LaRose himself would implement an online absentee ballot request system. Again, Plaintiffs should not be faulted for waiting to see if Defendant LaRose would follow through on his public support for the policy and allow some form of online absentee ballot requests.

4. Defendant LaRose has not been prejudiced.

Finally, Plaintiffs' July 31, 2020 filing did not prejudice Defendant LaRose. Any error in interpreting R.C. 3509.03 prior to the filing of this action and any actions taken pursuant to this erroneous interpretation are not Plaintiffs' fault. *See* Def. Br. at 26-28. Defendant LaRose has only himself to blame.

Defendant LaRose also confusedly faults Plaintiffs both *for* seeking expedited briefing in

this matter and for *not* bringing this case as an expedited matter in the Ohio Supreme Court. Def. Br. 28-29. But the Ohio Supreme Court does not have original jurisdiction over declaratory judgment actions, and Plaintiffs' action would have been promptly dismissed. *See, e.g., State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2974, ¶ 13-14. As to the briefing schedule, the Court has been generous in accommodating Defendant LaRose. This has included extending the initial briefing schedule to give him a total of eleven (11) days to respond to Plaintiffs' motion, which is far more than the three (3) days he would have had to respond to a merit brief in an expedited election action in the Supreme Court (*see* S.Ct.Prac.R. 12.08(A)(2)(b)). And this has also included the Court's presumptive acceptance of Defendant's untimely filed Brief. Thus, Defendant LaRose has not been prejudiced by the filing of this action on July 31, 2020.

In sum, even if laches could apply to claims for prospective relief, Defendant LaRose failed to prove all the necessary elements for the doctrine to apply here.

II. Plaintiffs Have Shown A Likelihood Of Success On The Merits.

A. Plaintiffs have shown a likelihood of success on their statutory interpretation claims.

As set forth more fully in Plaintiffs' Memo in Support, Plaintiffs are likely to succeed on the merits of their statutory interpretation claims that (1) R.C. 3509.03 does not prohibit qualified electors from submitting their completed absentee ballot requests via email or fax, and that (2) qualified electors have a right under R.C. 3509.03 to request absentee ballots in this manner. In response, Defendant LaRose ignores the plain language of R.C. 3509.03 and instead relies heavily upon cherry-picked canons of statutory interpretation to create ambiguity where none exists. *See City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, ¶ 17 ("We may not use canons of interpretation to create ambiguity that does not exist in the plain language itself" as "[d]oing so would be inconsistent with the well-established rule that the plain language of the enacted text is

the best indicate of intent") (internal quotations and citations omitted).

1. Defendant LaRose entirely ignores the plain language of R.C. 3509.03.

Despite this case primarily being a question of statutory interpretation, Defendant LaRose tellingly did not even attempt to argue that his interpretation of R.C. 3509.03 is supported by the plain language of the statute. But any question of statutory interpretation must begin by addressing the plain language of the statute. *See, e.g., State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, ¶ 17 (analyzing the plain language of R.C. 3509.03).

R.C. 3509.03(A) provides:

> Except as provided in division (B) of section 3509.08 of the Revised Code, any qualified elector desiring to vote absent voter's ballots at an election shall make written application for those ballots to the director of elections of the county in which the elector's voting residence is located.

As is apparent, nothing in the plain language of the statute requires completed absentee ballot applications to be returned only by mail or in person. Nothing in the plain language prohibits completed absentee ballot applications from being submitted via email or fax.[5] And nothing prohibits qualified electors who submit their completed absentee applications via email or fax from having their applications processed in the same manner as an application submitted by mail or in person. Defendant LaRose did not—and cannot—identify any language in R.C. 3509.03 or elsewhere stating otherwise.

Based on the plain language alone, the Court should find that R.C. 3509.03 does not prohibit qualified electors from submitting their absentee ballot requests to their county boards of

[5] For comparison, Plaintiffs, in their Memo in Support, provided several examples of election-related statutes in which the General Assembly *explicitly* stated how documents must be returned to or filed with elections officials. *See* Pl. Memo at 7 citing R.C. 3509.05 (concerning the return of absentee ballots) 3509.06(D)(3)(b) (concerning how voters must provide information missing from their absentee ballot identification envelopes), R.C. 3509.06(E)(2) (same), R.C. 3503.19(A) (concerning the return of completed voter registration forms) R.C. 3503.20 (concerning online voter registration), and R.C. 3519.051 (requiring original copies of signed petitions to be filed).

elections via email or fax.

2. None of the statutes cited by Defendant Secretary prohibit qualified electors from submitting their absentee ballot requests via email or fax.

Rather than addressing the plain language of R.C. 3509.03, Defendant LaRose cites two other statutes, R.C. 3511.02 and R.C. 3511.021(A), which concern the return of completed absentee ballot applications *for UOCAVA voters*. But neither of these statues prohibit non-UOCAVA voters from submitting their absentee ballot requests to their county boards of elections via email or fax either.

As explained in more detail in Plaintiffs' Memo in Support, federal law requires states to allow UOCAVA voters to submit their completed absentee ballot requests electronically. *See* Pl. Memo in Support at 11. *See* 52 U.S.C. § 20302(a)(6)(A). Pursuant to this federal mandate, the General Assembly enacted R.C. 3511.02 and R.C. 3511.021(A), which, again, expressly allow UOCAVA voters to submit their completed absentee ballot applications through electronic means.

Defendant LaRose cites these two statutes to argue that they demonstrate a legislative intent to prohibit non-UOCAVA electors from submitting their completed absentee ballot requests via email or fax. But, importantly, nothing in R.C. 3511.02 or R.C. 3511.021—or in the federal law, for that matter—addresses how non-UOCAVA electors must return their completed absentee ballot applications. These statutes do not require completed absentee ballot applications for non-UOCAVA electors to be returned only by mail or in person. They do not prohibit non-UOCAVA electors from submitting their completed absentee ballot applications through electronic means. And they do not prohibit qualified non-UOCAVA electors who submit their completed absentee ballot applications through electronic means from having their applications processed in the same manner as an application submitted by mail or in person. Defendant LaRose's assertion otherwise further highlights his inability to justify his interpretation of R.C. 3509.03 as prohibiting qualified

electors from submitting their completed absentee ballot requests via email or fax.

3. Adopting Defendant LaRose's interpretation of R.C. 3509.03 would require the Court to re-write the plain language of the statute.

Ironically, Defendant LaRose argues that Plaintiff's interpretation of R.C. 3509.03 would require the Court to re-write the plain language of the statute. Def. Br. at 32. But it is Defendant LaRose's interpretation that would require the Court to re-write the statute. This, again, is because nothing in R.C. 3509.03 prohibits qualified electors from submitting their completed absentee ballot requests to their county boards of elections via email or fax, and nothing prohibits such electors who submit their absentee ballot requests in this manner from having their applications processed in the same manner as an elector who submits their application by mail or in person.

In *State ex rel. Myers v. Brunner*, the Ohio Supreme Court made simple work of rejecting a similar attempt by the then-Secretary of State who inserted a prohibition into R.C. 3509.03 where one did not exist. In *Myles*, a political campaign distributed absentee ballot applications that included a check box next to a statement that the voters were qualified electors. *See Myles*, *supra*, ¶ 2. Although this check box was not required by R.C. 3509.03, the Secretary interpreted R.C. 3509.03 as requiring boards of elections to reject any applications that did not check the box. *Id.* at ¶ 4-5, 20. The Supreme Court held that [b]ecause the statute does not strictly require that the box next to the qualified-elector statement be marked, we cannot require it." *Id.* at ¶ 21. The Court also reiterated its longstanding direction that courts have a "duty to liberally construe elections laws in favor of the right to vote," and that courts "must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections." *Id.* at ¶ 22, 26.

Consistent with *Myles*, the Court must reject Defendant LaRose's interpretation of R.C. 3509.03 as it inserts a prohibition into the statute that does not exist.

4. Defendant LaRose's interpretation of R.C. 3509.03 is not entitled to any deference because it is unreasonable and fails to apply the plain language of the statute.

Defendant LaRose also asserts that, as Ohio's chief elections officer, his interpretation of the election statutes is entitled to deference. Def. Br. at 32. But the Ohio Supreme Court has been clear that the Secretary of State's interpretation of election laws is not entitled to any deference when it is "unreasonable and fails to apply the plain language" of the statute. *Myles*, ¶ 26; *see also Stokes v. Brunner*, 120 Ohio St.3d 250, 2008-Ohio-5392, ¶ 29 (quoting same). This is especially so when adopting the Secretary's interpretation of R.C. 3509.03 "would result not in a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted…may be included within its scope." *Myles*, ¶ 26 quoting *Lamie v. United States Trustee*, 540 U.S. 526, 528 (2004) (internal quotations and brackets omitted). Thus, because Defendant LaRose's interpretation is not supported by the plain language of R.C. 3509.03, and because adopting his interpretation would require the Court to enlarge the statute by inserting words not actually used therein, his interpretation is unreasonable and not entitled to any deference.

5. In the absence of a prohibition, qualified electors must be permitted to submit completed their absentee ballot requests to their county boards of elections via email or fax.

Defendant LaRose also seems to argue that in the absence of language expressly *authorizing* qualified electors to submit their completed absentee ballot applications via email or fax, they are prohibited from doing so. Def. Br. at 32-33. But as explained more fully in Plaintiffs' Memo in Support, the Ohio Supreme Court has held just the opposite: in the absence of language *prohibiting* voters from filing electronically, they must be permitted to do so. *See* Pl. Memo in Support at 9-10 citing *State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36, ¶ 26-27. Indeed, accepting Defendant LaRose's argument otherwise would be inconsistent with the Court's duties 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." *Myles*, ¶ 22, 26.

Plaintiffs have, therefore, shown that they are likely to succeed on the merits of their two statutory interpretation claims.

B. Plaintiffs have shown a likelihood of success on their constitutional claims.

Plaintiffs' Memo in Support also establishes that Plaintiffs are likely to succeed on the merits of their two related constitutional claims that the refusal to accept to qualified electors' applications for absentee ballots that are timely emailed or transmitted by other viable electronic forms of transmission constitutes a denial of the electors' due process and equal protection rights guaranteed by the Ohio Constitution. Pl. Memo in Support at 10-12.

1. Plaintiffs are broadly authorized to bring declaratory judgment actions to protect their state constitutional rights to due process and equal protection.

Defendant LaRose first argues that the Ohio Constitution's due process and equal protection clauses are not self-executing and, therefore, do not create private causes of action. Def. Br. at 33-35. But this argument, which the State has unsuccessfully made to other courts, *see City of Riverside v. State*, 2nd Dist. Montgomery No. 26024, 2014-Ohio-1974, ¶ 39-40, is irrelevant as Plaintiffs are not bringing a private suit for damages. Instead, Plaintiffs seek declaratory relief, and it is well-settled that citizens may bring declaratory judgment actions to enforce the rights afforded to them in the Ohio Constitution. *See Hagedorn v. Cattani*, 715 Fed. Appx. 499, 508 n5 (6th Cir. 2017) citing *City of Riverside, supra* (distinguishing a private suit for damages from a case challenging the constitutionality of a statute). Otherwise, Ohio's Bill of Rights would be dead letter, and the State would have unbridled power to restrict these rights.

Ohio's Declaratory Judgment Act "broadly authorizes plaintiffs to bring actions for a declaration of 'rights, status, and 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[6] (emphasis added). Moreover, it is "well settled that 'actions for declaratory judgment may be predicated on constitutional or nonconstitutional grounds.'" *Id* 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).

Pursuant to Ohio's Declaratory Judgment Act, numerous actions challenging legislation on state constitutional grounds have been permitted, including challenges brought under Ohio's rights to association and free speech. *See, e.g., Christensen v. Bd. of Comm'rs on Grievs. & Discipline of the Supreme Court of Ohio*, 61 Ohio St. 3d 534, 537 (1991) (explaining that a candidate could have brought a declaratory judgment action to challenge a Judicial Conduct Cannon under the Ohio Constitution's right to free speech); *Magda v. Ohio Elections Comm'n*, 2016-Ohio-5043 (10th Dist.) (involving, in part, a declaratory judgment action challenging Ohio's prohibition on political candidates using the title of an office not currently held as violative of the Ohio Constitution's right to free speech); *Couchout v. Ohio State Lottery Comm.*, 71 Ohio App. 3d 371, 373 (10th Dist. 1991) (holding that the common pleas court had jurisdiction over a case requesting declaratory and injunctive relief based on claims that a statute was an unconstitutional impairment of contract, constituted a retroactive law, and denied the non-resident due process).

Here, Plaintiffs seek a declaratory judgment that Defendant LaRose, in instructing boards of elections to reject qualified electors' applications for absentee ballots that are emailed or faxed, has violated their Ohio constitutional rights to due process and equal protection. Such an action is plainly authorized under the Declaratory Judgment Act.

[6] R.C. 2721.03 also provides that "any person whose rights, status, or other legal relations are affected by a constitutional provision [or] statute…may have determined any question of construction or validity arising under…the constitutional provision [or] statute…and obtain a declaration of rights, status, or other legal relations under it."

2. Plaintiffs established that Defendant LaRose's interpretation of R.C. 3509.03 burdens the right to vote.

Defendant LaRose also argues that the State's absentee ballot request regime does not burden the right to vote. Def. Br. at 35-39. But Defendant is dead wrong. The fundamental right to vote encompasses the manner in which it is exercised. *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012). Therefore, any burdens on the manner in which the right to vote is exercised, including arbitrarily prohibiting one group of voters from submitting their absentee ballot requests online while allowing another group to do so, constitute burdens on the right to vote itself. *See id.*

In bringing their constitutional claims, Plaintiffs have alleged that the State has burdened voting rights through the disparate treatment of similarly situated voters. Specifically, Plaintiffs alleged that the State is arbitrarily and disparately valuing the votes of UOCAVA voters who can electronically request absentee ballots and voters who request absentee ballots by mail or in person over the votes of non-UOCAVA voters who, like Plaintiff Houlahan and many of Plaintiff ODP's members, desire to submit their completed absentee ballot requests through electronic means.

Defendant incorrectly urges the Court to assess this claim under rational basis review. Instead, when a plaintiff alleges that a state has burdened voting through the disparate treatment of voters, courts review the claims using the "flexible standard" outlined in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Obama for Am.*, 697 F.3d at 429. Under this standard, the Court must weigh the "character and magnitude of the asserted injury to the rights" against "the precise interests put forward by the State as justification for the burden imposed by its rule," while also taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights." *Id.* quoting *Burdick,* 504 U.S. at 434.

As to the character and magnitude of the burden, Plaintiffs do "not need to show that they

were legally prohibited form voting, but only that burdened voters have few alternate means of access to the ballot." *Id.* at 431. Defendant LaRose contends that voters have a "litany of options" (Def. Br. at 42), but that is not the case. If voters cannot submit their completed requests for absentee ballot applications via email or fax, then there are options are limited to (1) risking their health by voting in person amidst the ongoing pandemic, (2) risking their health and incurring travel expenses by submitting their absentee request in person at their county board of elections, or (3) incurring the expense of mailing their absentee ballot application while also risking that it does not get timely delivered by the postal service.

As to the State's precise interests for the prohibition and the extent to which those interests are necessary to burden Plaintiffs' rights, Defendant LaRose "must propose an interest sufficiently weighty to justify the limitation." *Obama for Am.*, 697 F.3d at 433. He failed to do so here. Defendant LaRose asserts only that the State has a vague interest in "maintaining an orderly election." Def. Br. at 42. But he does not explain how this interest justifies treating completed absentee ballot requests submitted via email or fax any differently than absentee ballot requests submitted in person or by mail, nor does he explain how this interest justifies permitting UOCAVA voters from submitting their absentee ballot requests via email while also prohibiting non-UOCAVA voters from doing the same. Further, Defendant LaRose does not explain how allowing non-UOCAVA voters to submit their completed applications via email or fax would be any more burdensome for the boards of elections than the current process that allows voters to submit their absentee applications in person or by mail and also allows UOCAVA voters to submit their completed applications via email or fax.

Instead, Defendant LaRose simply indicates that non-UOCAVA voters have never been allowed to electronically submit their completed absentee ballot applications in the past, and that

allowing something new might pose challenges for the boards. But given the lack of evidence from Defendant LaRose to support his claims, he has not shown that the State's regulatory interest in an "orderly election" is important and sufficiently weight to justify the burden he has placed on non-UOCAVA voters nor has he shown that it would be burdensome to allow all voters—not just UOCAVA voters—to submit their completed absentee ballot requests online.

Plaintiffs have, therefore, established that they are likely to succeed on their constitutional claims.

III. Plaintiffs Have Shown That Issuing A Preliminary Injunction Would Not Harm Third Parties.

Defendant LaRose's primary argument in opposition to Plaintiffs' motion for preliminary injunction is essentially that the sky will fall if voters are allowed to submit their completed absentee ballot requests via email or fax. *See* Def. Br. at 4 (arguing that the "confusion, chaos, and potentially catastrophic consequences…cannot be overstated"); at 4-5 (alleging that "[i]s no exaggeration to say" that issuing the requested relief would "jeopardize…the nation"); at 23 ("all will not be fine"). But despite his protestations to the contrary, Defendant LaRose has immensely overstated and exaggerated his position.

A. It is not too late to get it right.

Defendant LaRose argues that it is too late for the Court to do anything about his (erroneous) interpretation of R.C. 3509.03. But this simply not true.

1. Courts have routinely awarded injunctive relief in cases far closer in proximity to an election than this action.

Defendant LaRose relies heavily upon the "Purcell principle" from the U.S. Supreme Court's decision in *Purcell v. Gonzalez* 549 U.S. 1, 4-5 (2006) in support of his position that it is too late for the Court to do anything about his interpretation of R.C. 3509.03. Def Br. at 12-14.

Although it is true that the U.S. Supreme Court stated in *Purcell* that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain from the polls," (*Purcell*, 549 U.S. at 4-5), the Supreme Court has "never outlined a categorically higher burden for Plaintiffs who move for relief soon before an election." *A. Philip Randolph Inst. v. Husted,* 907 F.3d 913, 918 (6th Cir. 2018) citing *Ohio Republican Party v. Brunner*, 544 F.3d 711, 718 (6th Cir. 2008) (en banc) ("This generalization [that courts should deny relief sought soon before an election] surely does not control many election-related disputes—keeping polls open past their established times on election day or altering the rules for casting ballots or provisional ballots during election week."), *vacated on other grounds by* 555 U.S. 5 (2008) (per curiam). As a result, courts have routinely awarded injunctive relief in cases far closer in proximity to an election than this action.[7]

2. Defendant LaRose himself has ordered sweeping election changes far closer in proximity to elections than this action.

Defendant LaRose's purported concerns about this Court making election changes too close to an election are belied by own his history of ordering sweeping election changes far closer in proximity to elections than this action. In the two weeks since Plaintiffs filed this action, Defendant LaRose has issued three new directives to the county boards of elections (Directives 2020-14, -15, -16) as well as releasing a mammoth "48-Point Guidance Requirements and

[7] *See, e.g., A. Philip Randolph Inst., supra* (6th Cir. Oct. 31, 2018) (granting an emergency motion to require the Secretary of State to issue a directive to the boards of elections instructing them to comply with certain procedures in conducting a purge of voter rolls); *Obama for Am. v. Husted*, 888 F.Supp.2d 897 (S.D. Ohio Aug. 31, 2012) (awarding injunctive relief requiring the Secretary of State to restore in-person early voting for all eligible Ohio voters during the three days before the election); *Ohio Republican Party, supra,* (6th Cir. Oct. 14, 2008) (en banc) (awarding injunctive relief requiring Defendant Secretary to address mismatches in the voter registration database less than a month before the November 2008 Election); *Project Vote v. Madison Cty. Bd. of Elections*, Case No. 1:08-cv-2266-JG, 2008 U.S. Dist. LEXIS 74016, 2008 WL 4445176 (N.D. Ohio Sept. 29, 2008) (granting motion for preliminary injunction requiring the Madison County Board to accept same-day voter registrations and absentee votes); *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio Oct. 26, 2006) (granting motion for preliminary injunction enjoining enforcement of naturalized citizen portion of the Voter ID laws).

Recommendations to County Boards" addressing a range of issues for the November 3, 2020 General Election.[8] Moreover, Defendant LaRose, along with Ohio Governor Mike DeWine, notably *cancelled* in-person voting for Ohio's 2020 Primary Election just hours before polls were scheduled to open on March 17, 2020, sending the election into chaos and creating massive confusion among voters and poll workers.[9] Given his own track record of making dramatic changes with little notice, Defendant LaRose cannot reasonably argue that it is too late for the Court to award Plaintiffs' requested relief.

3. Defendant LaRose fails to explain how there would be "voter confusion" if the Court granted the requested relief.

Moreover, and while ignoring his own role in creating the voter confusion by issuing an erroneous interpretation of R.C. 3509.03, Defendant also fails to explain how voters would be "confused" by granting the injunction. The worst-case scenario is that not all voters would be aware that they can submit their completed absentee ballot requests via email or fax. But no rights would be taken away from voters by granting the injunction, and, therefore, there is no scenario in which a voter is denied the right to vote out of "confusion" as to whether they could submit their absentee ballot request via email or fax. Moreover, the potential knowledge gap among voters about their rights is something that can be mitigated by any number of actors, including Defendant's office, the 88 county boards of elections, the media, political campaigns, businesses, labor organizations, and nonprofit organizations.

---

[8] *See* Frank LaRose, *LaRose Sends 48-Point Guidance Requirements and Recommendations to County Boards*, Aug. 12, 2020 available at https://www.sos.state.oh.us/media-center/press-releases/2020/2020-08-12/ (last accessed Aug. 14, 2020).

[9] *See, e.g.,* Alexa Corse, *Ohio's Primary Postponement Sows Confusion Among Voters*, Wall Street Journal, Mar. 17, 2020, available at https://www.wsj.com/articles/ohios-postponement-of-primary-leaves-many-voters-confused-11584464786 (last accessed Aug. 14, 2020).

4. Defendant LaRose's repeated assertion that his instruction to Ohio 7.8 million voters "cannot be changed" is directly contradicted by his Deputy Assistant Secretary of State's sworn testimony.

Defendant LaRose repeatedly states that the instruction in his mailing to all of Ohio's 7.8 million voters "cannot be changed." Def. Br. at 5, 20, 21. But the evidence he cites—a sworn affidavit from his own Deputy Assistant Secretary of State—states that the instruction can be changed. *See* Def. Exh. A, Grandjean Aff. ¶ 24, 26. It would just cost his office some unspecified amount of money to change it and potentially delay the still-unsent and still-unscheduled mailing while it is fixed. *Id.* Moreover, even if the instruction could not be changed, this would affect only one aspect of Plaintiffs' requested relief. Defendant LaRose could still be instructed to correct his direction to the county boards of elections.

B. Plaintiffs' requested relief would simply require the boards of elections to expand their existing process for accepting UOCAVA absentee ballot requests to all voters.

1. Boards of elections have had a process in place to accept emailed absentee ballot requests for UOCAVA voters for 10 years.

Defendant LaRose's contends that allowing voters to email or fax their completed absentee ballot requests would amount to a "never-before-used election process that pushes the State and its 88 boards of elections into uncharted—and potentially dangerous—waters." Def. Br. at 14 (emphasis). But this argument is disingenuous, at best. Dating back to 2009, when Congress amended the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) with the Military Overseas Voter Empowerment (MOVE) Act, Ohio's elections officials have been required by federal law to accept emailed absentee ballot requests from UOCAVA voters and to have a process in place to do so. Plaintiffs seek simply to extend this existing system to all Ohio's voters.

Not only does the evidence submitted by Defendant LaRose plainly demonstrate that the

boards of elections already have a process in place to accept emailed absentee ballot applications, but it shows that the boards' process for accepting absentee ballot requests via email is essentially the same as the process for accepting applications in person or by mail. The only difference is the manner of delivery. Indeed, this is spelled out in the affidavits of the Directors of the Delaware County Board of Elections (Def. Exh. D, Harron Aff.) and the Hamilton County Boards of Elections (Def. Exh. C, Poland Aff.):

Process For
Non-UOCAVA Absentee Requests

1. A voter submits their request in person or by mail.
2. A Board employee must "open the application, review it, scan it, and attach it to the voter's record in the voter registration database."
3. A second Board employee "matches the application information to the data in the Boards' voter-registration system."
4. "Once it is confirmed that the information in the application matches that in the voter-registration database, an absentee ballot packet, including the ballot, instructions for it [*sic*] return, identification envelopes, and a return envelope are all created and mailed to the voter."

Def. Exh. D, Harron Aff. ¶ 8;
see also Def. Exh. C, Poland Aff. ¶ 11
(outlining the same process).

Process For
Emailed UOCAVA Absentee Requests

1. A voter submits their request by email.
2. A Board employee "opens the email, and prints, and review the [request]."
   a. If the voter used a particular form, and is not registered to vote, the Board processes their registration.
3. A second Board employee "matches the application information to the data in the Board's voter registration system."
4. "Once confirmed, the Board will email the absentee ballot to the email address listed on the UOCAVA's voter's [application]."

Def. Exh. D, Harron Aff. ¶ 12;
see also Def. Exh. C, Poland Aff. ¶ 8
(outlining the same process)

Except for the manner of delivery—and email or fax would unquestionably be faster than relying upon the postal service—the process for reviewing emailed and non-emailed applications is the same, and Defendant's repeated assertion that the boards would have to develop an entirely new procedure to accept emailed absentee ballot requests is simply not true. Instead, they would

just continue using the processes they already have in place.

2. There would be no added burdens on the boards of elections.

Defendant LaRose also complains that the boards of elections have no plan in place to accept a large volume of emailed or faxed absentee ballot requests. Def. Br. at 18-19. But, again, Defendant's own evidence shows that the process for receiving an emailed UOCAVA absentee ballot is essentially the same as the process for receiving an application in person or by mail. *See* Def. Exhs. C-D. Moreover, Defendant LaRose and the county boards of elections have been preparing for a surge in absentee ballot requests due to the ongoing coronavirus pandemic. Indeed, as previously stated, Defendant LaRose projects that as many as 50% of Ohio voters will cast a ballot by mail in the November 3, 2020 General Election, and the Director of the Hamilton County Board of Elections stated in her affidavit that, as of August 5, 2020, her county has seen a 4,994% increase in the number of absentee ballot applications received by the Board during the same time period for the 2016 General Election. Def. Exhs. C, Poland Aff. ¶ 14. Thus, if anything, the ongoing pandemic is burdening elections officials. But expanding the existing online absentee request process for UOCAVA voters to non-UOCAVA voters would not require the boards of elections to do much differently than they are already required to do.

Furthermore, receiving non-UOCAVA applications via email or fax would be less time-consuming and more efficient for the boards. Board staff would not have to sift through mail and open envelopes. Additionally, by sending the requests via email, it would create a digital record for the boards.

3. Defendant LaRose's cybersecurity concerns are wildly overstated.

Defendant LaRose is trying to have it both ways on cybersecurity.

To the Court, Defendant LaRose goes to great lengths to argue that nothing can be done to

make this (already existing) process secure from cybersecurity threats. Def. Br. at 14-18. He argues that no precautions can be taken, and no training can prepare officials for the supposedly unknown dangers that lie ahead with the use of email or fax machines. *Id.* He also argues that boards of elections would not know how to securely open an email. *Id.*

To the public, however, Defendant LaRose has gone to great lengths to say just the opposite. He claims that his office is "the national leader in election security."[10] He states that new, artificial intelligence software he installed in all 88 county boards of election "looks at known bad behavior and characteristics of malicious actors versus looking only for bad files like traditional anti-virus software."[11] He has made available to all boards with "an assigned Cybersecurity expert that will assist boards and local IT support with tools, software or hardware integration, software and patch management support, network analysis review, incident response planning and exercising; tier one incident management forensic collection support, and general engineering technical assistance."[12] He has "required county boards of elections to install Albert Intrusion Detection Monitoring hardware, designed to detect any suspicious cyber-activity."[13] His office "is providing county boards of elections with a malicious domain blocking service" that "will block access to malicious websites, help stop malware from connecting to known command-and-control infrastructure, and compliment the intrusion detection services currently provided."[14] He has partnered with the Election Infrastructure Information Sharing and Analysis Center to provide boards "with timely and actionable information regarding threats to the county's election

[10] Frank LaRose, *LaRose Issues First in the Nation Secretary of State Vulnerability Disclosure Policy*, Aug. 11, 2020, available at https://www.sos.state.oh.us/media-center/press-releases/2020/2020-08-11/ (last accessed Aug. 14, 2020).
[11] Frank LaRose, *LaRose Setting New Standard for Election Security,* July 14, 2020, available at https://www.sos.state.oh.us/media-center/press-releases/2020/2020-07-14/ (last accessed Aug. 14, 2020).
[12] *Id.*
[13] *Id.*
[14] *Id.*

information systems."[15] And he requires all permanent board employees, vendors, and contractors to "have an Ohio Attorney General's Bureau of Criminal Investigation ("BCI") statewide criminal background check conducted, at a minimum, every ten years."[16]

Defendant LaRose has also required each county board of elections to "receive cyber security training from his office as well as training their own staff annually on cybersecurity." Def. Exh. B, Wood Aff. ¶ 5.e. citing Directive 2019-08. These training programs "cover topics such as knowing how to detect a phishing email, the importance of using strong passwords, and general cybersecurity awareness," and it has "three to five phishing-related training awareness videos." *Id.* at ¶ 5.f. Additionally training materials regarding "Top Security Threats" were "presented by Secretary of State employees at the Ohio Association of Election Officials Winter Conference held in January of 2020." *Id.* at ¶ 5.g.

The affidavit of the Director of the Hamilton County Board of Elections even confirms that the boards have indeed received this training. Her affidavit states that the Board "currently has in place important safeguards to prevent and recover from technological attacks against the Board's election systems." Def. Exh. C, Poland Aff. ¶ 15. This includes receiving "extensive training from the Secretary of State's Office on how to identify and combat cybersecurity threats," as well as training that is "specific to identifying 'phishing' emails that contain viruses that can cause extensive damage to data or allow bad actors to gain unauthorized access to networks." *Id.*

Given Defendant LaRose's contradictory tales of cybersecurity preparedness, his arguments to the Court are entitled to little weight. Cybersecurity is absolutely important, but when looking outside the four corners of Defendant LaRose's response in opposition, it is apparent that he and the boards of elections have taken great precautions and measures to significantly reduce

[15] *Id.*
[16] *Id.*

the risk of cybersecurity threats.

IV. Plaintiffs Have Shown That They Will Suffer Irreparable Harm Absent Injunctive Relief.

As an initial matter, if there is a right under R.C. 3509.03 to submit an absentee ballot application request via email or fax, then the denial of this right constitutes irreparable harm as the denial of this right cannot be compensated by money damages.

Additionally, and contrary to Defendant LaRose's assertion otherwise, it is well-settled that irreparable harm is presumed when constitutional rights are threatened or impaired. *See Obama for Am.,* 697 F.3d at 436 citing *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."). It is further well-settled that constitutional protections concerning the fundamental right to vote extend to the "manner of its exercise." *Id.* at 428 quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Thus, a restriction on the right to vote or on the manner in which that right is exercised constitutes irreparable injury.

Moreover, the irreparable harm faced by Plaintiffs is not "speculative" as Defendant LaRose contends. Defendant LaRose already instructed boards of elections in Directive 2020-13 to not accept otherwise valid absentee ballot requests that are submitted to the boards via email or fax. Thus, Plaintiff Houlahan and Plaintiff ODP's members know with certainty that, absent injunctive relief, they will not be able to exercise their right under R.C. 3509.03 to request an absentee ballot for the November 3, 2020 General Election by submitting their completed applications to their county boards of elections via email or fax. Accordingly, Plaintiffs have demonstrated that they will suffer irreparable harm absent injunctive relief.

V. Plaintiffs Have Shown That The Public Interest Would Be Served By The Injunction.

A. Any purported burden on the county boards of elections is irrelevant to this prong.

Defendant LaRose argues that the "public interest is not served by imposing new burdens on boards of elections." Def. Br. at 18. First, and as previously explained, no new burdens would be imposed on boards of elections by granting the requested relief. Second, and more to the point, whether any burdens *are* imposed on the boards of elections, which are arms of the State, is an entirely separate issue from the *public interest* prong of the preliminary injunction standard. Thus, his argument is irrelevant to this prong.

B. Defendant LaRose ignores the chaos and confusion created by the current system that would be reduced by Plaintiffs' requested relief.

In speculating that allowing voters to submit their absentee ballot requests via email or fax would create "confusion, chaos, and potentially catastrophic consequences," (Def. Br. at 4) Defendant LaRose ignores the actual confusion, chaos, and catastrophic consequences of the current system that operates under his erroneous interpretation of R.C. 3509.03.

There is a real risk of absentee ballot applications getting lost or delayed in the mail. For instance, it was widely reported during this year's Primary Election that in Butler County alone, more than 300 absentee ballots were not counted because the postal service failed to deliver them on time.[17] This mirrors a national trend in which tens of thousands of absentee ballots have been not counted because they arrived too late.[18]

Moreover, this risk will increase in the 2020 General Election when there will be even

---

[17] *See* Jessie Balmert, *More than 300 Butler County ballots delivered late won't count in Ohio primary*, Cincinnati Enquirer, May 12, 2020 available at https://www.cincinnati.com/story/news/2020/05/12/more-than-300-butler-county-ballots-delivered-late-wont-count-ohio-primary/3119026001/.

[18] *See* Elise Viebeck and Michelle Ye Hee Lee, *Tens of thousands of mail ballots have been tossed out in this year's primaries. What will happen in November?,* Washington Post, July 16, 2020 available at https://www.washingtonpost.com/politics/tens-of-thousands-of-mail-ballots-have-been-tossed-out-in-this-years-primaries-what-will-happen-in-november/2020/07/16/fa5d7e96-c527-11ea-b037-f9711f89ee46_story.html (last accessed Aug. 13, 2020).

more absentee ballot requests and absentee ballots for the postal service to handle. For instance, Defendant LaRose projects that as many as 50% of voters could cast ballots by mail in November.[19] Even the postal service recently acknowledged the likelihood of delays in mail during the 2020 General Election due to a combination of increased demand and new policies recently implemented by the postal service.[20] As a result, the postal service recommends that voters request their absentee ballots at least 15 days before the election.[21] For comparison, Ohio law allows voters to submit their request for an absentee ballot up until noon three days before the election. R.C. 3509.03(D).

Denying the requested relief would preserve the confusion, chaos, and actual catastrophic consequences that exist in the current system that operates under Defendant LaRose's erroneous interpretation of R.C. 3509.03. This does not serve the public interest. But granting the requested relief would serve the public interest as it would dramatically reduce voters' reliance upon the postal service, which, in turn, would reduce the demand upon the already strained postal service.

C. The public has a strong interest in exercising the fundamental political right to vote.

In arguing that granting the requested relief would not serve the public interest, Defendant Secretary also ignores 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 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). Thus, because the

---

[19] *See* Rouan, *supra*.

[20] *See* Michelle Ye Hee Lee and Jacob Bogage, *Postal Service backlog sparks worries that ballot delivery could be delayed in November*, Washington Post, July 30, 2020, available at https://www.washingtonpost.com/politics/postal-service-backlog-sparks-worries-that-ballot-delivery-could-be-delayed-in-november/2020/07/30/cb19f1f4-d1d0-11ea-8d32-1ebf4e9d8e0d_story.html (last accessed Aug. 13, 2020).

[21] *See* Michelle Ye Hee Lee, *Scattered problems with mail-in ballots this year signal potential November challenges for Postal Service*, Washington Post, July 15, 2020, available at https://www.washingtonpost.com/politics/scattered-problems-with-mail-in-ballots-this-year-signal-potential-november-challenges-for-postal-service/2020/07/15/0dfb8b42-c216-11ea-b178-bb7b05b94af1_story.html (last accessed Aug. 13, 2020).

public interest "favors permitting as many qualified voters to vote as possible," the public interest favors granting Plaintiffs' requested injunctive relief.

Accordingly, Plaintiffs have met their burden for the issuance of a preliminary injunction.

VI. The Court Should Deny Defendant's Motion to Dismiss

In addition to opposing Plaintiffs' Motion for Preliminary Injunction, Defendant LaRose also argues in a "combined" motion to dismiss that Plaintiffs lack standing to challenge Directive 2020-13 and Defendant LaRose's interpretation of R.C. 3509.03. Def. Br. at 1, 47-56.

By contending that Plaintiffs ODP and Houlahan lack standing to challenge his action, Defendant LaRose effectively asks the Court to hold that his directives and implementation of election laws are immune from legal challenge. After all, if a major political party or an aggrieved voter cannot seek legal relief on matters involving the fundamental right to vote than it would be difficult to imagine any party that would have standing to challenge unjust interpretations of election laws and related administrative actions. However, there is simply no support for Defendant LaRose's argument, and as set forth below, Plaintiffs ODP and Houlahan both quite plainly have standing to bring this action.[22]

A. Standard of review.

The familiar standard for reviewing a Civ.R. 12(B)(6) motion is that it "must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. The court must presume all factual allegations contained in the complaint are true and draw all reasonable inferences in favor of the non-moving party. *Jones v. Greyhound Lines, Inc.*, 10th Dist. No. 11AP-518, 2012-Ohio-4409, ¶ 31, 981 N.E.2d 294, citing *Mitchell v. Lawson*

[22] It is hornbook law that only party need establish standing. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999); *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)

Milk Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

B. Plaintiff Houlahan has standing.

The factual allegations in the Amended Complaint establish that Plaintiff Houlahan has standing under both common law principles and the Declaratory Judgment Act. And because Defendant LaRose challenged Plaintiff Houlahan's standing, Plaintiffs have filed an affidavit from Plaintiff Houlahan in rebuttal that affirms, under oath, the relevant allegations in the Complaint. *See* Plaintiffs' Exhibit C, Houlahan Aff.

Plaintiff Houlahan is an 81-year-old qualified elector of Franklin County, Ohio. Amended Compl. ¶ 7, 48; Houlahan Aff, ¶ 3, 4. He is eligible to request and cast an absentee ballot at the November 3, 2020 General Election. Amended Compl. ¶ 7; Houlahan Aff, ¶ 5. He voted by absentee ballot for at the 2020 Primary Election and intends to vote by absentee ballot at the November 3, 2020 General Election. Houlahan Aff, ¶ 6.

Plaintiff Houlahan desires to submit his completed application for an absentee ballot to the Franklin County Board of Elections via email and to have his application for an absentee ballot processed by the Board in the same manner as if he had submitted the application in person or by mail. Amended Compl. ¶ 7, 48; Houlahan Aff, ¶ 7.

Due to the ongoing COVID-19 pandemic, Plaintiff Houlahan does not want to risk his health or the health of any elections officials that he would come into contact with by submitting his application for an absentee ballot to the Board in person. Amended Compl. ¶ 39, 41, 48; Houlahan Aff, ¶ 9. Additionally, submitting his absentee ballot application in person at the Board would require him to spend time and financial resources to travel to the Board that he otherwise would not have to spend if he could submit his application to the Board via email. Amended Compl. ¶ 41, 48; Houlahan Aff, ¶ 9.

Plaintiff Houlahan also does not want to submit his completed absentee ballot application in the mail. Amended Compl. ¶ 48; Houlahan Aff, ¶ 11. Submitting his absentee ballot application in the mail would require him to spend financial resources on postage and an envelope that he otherwise would not have to spend if he could submit his application to the Board via email. Amended Compl. ¶ 48; Houlahan Aff, ¶ 12. Plaintiff Houlahan has read numerous news reports and statements from elections officials, including Ohio Secretary of State Frank LaRose, about delays in mail delivery that could result in his absentee ballot application not being delivered to the Board in time. Amended Compl. ¶ 39-40, 48; Houlahan Aff, ¶ 13-16. Based on these reports and others, he is deeply concerned that if he submits an absentee ballot application in the mail that it will not be delivered to the Board in time for him to receive and return his absentee ballot, and he does not want to be disenfranchised due to delays in mail delivery. Amended Compl. ¶ 48; Houlahan Aff, ¶ 17-18.

1. Standing under common law.

Common law standing requires "litigants to show, at a minimum, that they have suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *Moore, supra.*

Based on the facts alleged in the Amended Complaint and affidavit offered in rebuttal, Plaintiff Houlahan has established that Defendant LaRose's Directive 2020-13 and interpretation of R.C. 3509.03 prevents him from requesting an absentee ballot in his preferred manner for the November 3, 2020 General Election, and that it would cause him to incur additional expenses and risk his health and the health of elections officials if he had to vote in person or submit a request for an absentee ballot in person or by mail. This is a concrete injury that is not applicable to the public at large given that not everyone is a qualified Ohio elector, like Plaintiff Houlahan, let alone

a qualified elector who desires to submit his request for an absentee ballot by mail. Moreover, this injury would be redressed by the requested relief. Thus, Plaintiff Houlahan has sufficiently established common law standing.

2. Standing under the Declaratory Judgment Act.

Pursuant to the Declaratory Judgment Act, in addition to standing, "a plaintiff must plead 'three prerequisites to declaratory relief': (1) a real controversy between the parties, (2) justiciability, and (3) the necessity of speedy relief to preserve the parties' rights." *Hamilton v. Ohio Dept. of Health*, 2015-Ohio-4041, 42 N.E.3d 1261, ¶ 23 (10th Dist.).

All three of these elements are easily satisfied as there is: (1) a real controversy between Plaintiff Houlahan and Defendant LaRose in that Defendant LaRose's interpretation of R.C. 3509.03 is preventing Plaintiff Houlahan from requesting an absentee ballot in his preferred manner; (2) the claim is plainly justiciable; and (3) immediate relief is needed as the November 3, 2020 General Election is imminent.

C. Plaintiff ODP has standing.

The factual allegations in the Amended Complaint also establish that Plaintiff ODP has organizational and associational standing under common law principles and the Declaratory Judgment Act. And because Defendant LaRose challenged Plaintiff ODP's standing, Plaintiffs have filed an affidavit from Plaintiff ODP's Executive Director in rebuttal that affirms, under oath, the relevant allegations in the Complaint. *See* Plaintiffs' Exhibit D, Beswick Aff.

Plaintiff ODP is one of Ohio's two legally recognized major political parties whose candidates for local, state, and federal offices will stand for election at the November 3, 2020 general election. Amended Compl. ¶ 6; Beswick Aff, ¶ 3. ODP has hundreds of thousands of members from across the state, including many qualified Ohio electors who regularly support and

vote for candidates affiliated with ODP. Amended Compl. ¶ 6. More than 800,000 ODP members participated in Ohio's 2020 Primary Election. Amended Compl. ¶ 6; Beswick Aff, ¶ 4.

ODP devotes substantial resources to voting activities, and this is especially so in a presidential election year, like 2020, when voter turnout is at its highest. Amended Compl. ¶ 6, 42; Beswick Aff, ¶ 5. Each election cycle, ODP's staff and volunteers make calls and send mailings to inform registered Democrat and unaffiliated voters about the voting process, including providing voters with information about requesting absentee ballots. Amended Compl. ¶ 42. Additionally, ODP runs a voter protection program each election cycle to help voters with issues related to their efforts to vote, including issues related to voters' attempts to request absentee ballots. *Id.* Throughout the early voting period and on election day, paid and volunteer attorneys staff a hotline that voters can call to ask questions or report problems. *Id.* ODP intends to spend its resources to continue these voter education and voter protection efforts for the November 3, 2020 General Election. Amended Compl. ¶ 42; Beswick Aff, ¶ 5.

Like Defendant LaRose, Plaintiff ODP projects a marked increase in the number of Ohio electors who will choose to request an absentee ballot for the November 3, 2020 General Election compared to prior elections due to the ongoing COVID-19 pandemic. Amended Compl. ¶ 38; Beswick Aff, ¶ 7.

Plaintiff ODP has an interest in knowing whether, under R.C. 3509.03, qualified electors have a right to submit their completed absentee ballot applications via email or by other viable forms of electronic transmission, such as facsimile, so that ODP can properly inform voters of their rights. Amended Compl. ¶ 43; Beswick Aff, ¶ 10. If it is later determined that voters do, indeed, have a right to submit their completed absentee ballot applications via email or other viable form of electronic transmission, then Plaintiff ODP will spend resources to inform voters about

their right to request an absentee ballot in this manner. Amended Compl. ¶ 43.

Moreover, Plaintiff ODP has members who have suffered and will suffer injury as a result of Defendant Secretary's interpretation of R.C. 3509.03. Amended Compl. ¶ 44. Plaintiff ODP has more than 800,000 members who voted in the 2020 presidential primary election and who intend to vote in the November 3, 2020 general election. *Id.* Many of Plaintiff ODP's members choose to vote by absentee ballot and will choose to vote in this manner for the November 3, 2020 general elections. *Id.* These members will thus be subject to Defendant Secretary's interpretation of R.C. 3509.03, and as a result, these members' right to request an absentee ballot via email or through other viable forms of electronic transmission, such as facsimile, will be impeded. *Id.* Further, Defendant Secretary's interpretation of R.C. 3509.03 will require Plaintiff ODP's members to choose between submitting their absentee ballot request in-person, which would require them to spend the time and resources necessary to travel to their county boards of elections and requiring them risk their health and elections officials' health in light of the ongoing COVID-19 pandemic, or submitting their requests by mail, which would require them to spend the resources necessary to mail their request and to risk disenfranchisement due to delays in mail delivery. *Id.*

In short, Plaintiff ODP's members, voters and candidates rely on ODP to represent its interests when it comes to voting rights and assuring that their best interests and legal rights in the election process are protected. Amended Compl. ¶ 47.

1. Standing under common law.

Plaintiff ODP has organizational and association standing under common law principles.

As an organization, Plaintiff ODP has an interest in knowing whether, under R.C. 3509.03, qualified electors have a right to submit their completed absentee ballot applications via email or by other viable forms of electronic transmission, such as facsimile, so that Plaintiff ODP can

properly inform voters of their rights. If it is later determined that voters do, indeed, have a right to submit their completed absentee ballot applications via email or other viable form of electronic transmission, then Plaintiff ODP will spend resources to inform voters about their right to request an absentee ballot in this manner. Defendant LaRose's interpretation of R.C. 3509.03 directly impacts this interest.

As an association, Plaintiff ODP's members, all of whom are qualified Ohio electors and would have standing in their own right, are subject to Defendant LaRose's interpretation of R.C. 3509.03 as prohibiting them from submitting their absentee ballot request to their county boards of elections via email or fax. Therefore, and as a direct consequence of Defendant LaRose's erroneous interpretation, Plaintiff ODP's members will be forced to incur additional expenses and risk their health and the health of elections officials if they have to vote in person or submit a request for an absentee ballot in person or by mail. But this concrete injury would be redressed by the requested relief. Moreover, the interests Plaintiff ODP seeks to protects in this lawsuit are germane to Plaintiff ODP's interests in that voting activities are inherently the reason political parties, like Plaintiff ODP, exist, and that Plaintiff ODP has an interest in knowing what rights voters have under the law with respect to how to request an absentee ballot.

2. Standing under the Declaratory Judgment Act.

Plaintiff ODP has also established organizational and associational standing under the Declaratory Judgment Act. As with Plaintiff Houlahan, there is: (1) a real controversy between Plaintiff ODP and Defendant LaRose in that Defendant LaRose's interpretation of R.C. 3509.03 directly impacts ODP's organizational strategies and ODP's members' rights to request an absentee ballot in their preferred manner; (2) the claim is plainly justiciable; and (3) immediate relief is needed as the November 3, 2020 General Election is imminent.

3. Courts have routinely determined that Plaintiff ODP has standing to challenge the Secretary of State's actions.

Furthermore, courts have routinely found Plaintiff ODP to have standing to challenge the actions of the Ohio Secretary of State. In *Ohio Org. Collaborative v. Husted*, 189 F. Supp.3d 708, 725-26 (S.D. Ohio 2016), for instance, the court determined that the Ohio Democratic Party had standing to bring action against the Ohio Secretary of State's enforcement of a law that reduced the early in-person voting period and eliminated same day registration. The court held that ODP established representational standing to bring suit on behalf of its members as its members would have standing to sue in their own right. The court further determined that ODP established organizational standing as ODP established an injury in fact, as the challenged provisions made it more difficult for its members and constituents to vote, which hindered ODP's mission of electing its candidates, and (2) the challenged provisions would have forced ODP to divert resources from ensuring their members and constituents vote to counteracting the negative effects of the challenged provisions.

Similarly, in *NEOCH v. Husted*, Case No. 2:06-cv-896, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251 (S.D. Ohio June 7, 2016) *aff'ed in part, rev'ed in part by* 837 F.3d 612 (6th Cir. 2016), the district court determined that ODP had both organizational and associational standing to challenge legislative changes to Ohio's absentee-and provisional-voting regimes, and it had constitutional and prudential standing because enactment of the challenged laws caused a significant burden on their members. As to organizational standing, the court determined that a showing that a political party would be compelled to devote resources to getting to the polls those of its supporters who would otherwise be discouraged from bothering to vote is sufficient to confer standing. And the fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury. As to associational standing, the court

determined that plaintiffs including ODP had standing to bring suit on behalf of their members. The court held that an association has standing to bring suit on its members' behalf "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." The court noted that "ODP registers its members, educates them about voting procedures and requirements, and encourages them to vote for Democratic candidates. In this case the court found two of the other parties involved had third party standing because "(1) the party asserting the right has a 'close' relationship with the person who possesses the right; and (2) the possessor of the right is hindered in her ability to protect her own interests. On appeal, however, the Sixth Circuit addressed the standing of only one of the other organizational plaintiffs, finding that because it has organizational standing, it need not reach the State's other arguments regarding the plaintiffs' standing to bring suit. *NEOCH*, 837 F.3d at 623-624.

The pending case is similar to the ones cited herein as a political party representing the interests of hundreds of thousands of members, voters, and candidates as well as an aggrieved voter have in fact suffered an injury that is traceable to the Defendant's allegedly unlawful conduct, and likely to be redressed by the requested relief.

Again, only one of the Plaintiffs needs to establish standing. *See Dep't of Commerce, supra; Rumsfeld, supra*. And here, *both* Plaintiffs Houlahan and ODP have established that they have standing to challenge Defendant LaRose's actions. Accordingly, the Court must deny Defendant LaRose's motion to dismiss.

VII. Defendant LaRose's Attorneys' Fees Argument is Premature.

Defendant LaRose also argues that Plaintiffs are not entitled to attorneys' fees under R.C.

2335.39 because Plaintiffs have not yet prevailed in the action. Def. Br. at 47. This argument is premature, though, as Plaintiffs did not seek attorneys' fees in their Motion for Preliminary Injunction. Pursuant to R.C. 2335.39(B)(1), if Plaintiffs prevail in this action, they will file a motion requesting the award with the Court within thirty (30) days after the court enters final judgment in the action. At that time, Defendant LaRose can make any arguments in opposition to Plaintiffs' request.

CONCLUSION

For the reasons stated, Plaintiffs request that their Motion for Preliminary Injunction be granted and that Defendant's Motion to Dismiss for Lack of Jurisdiction be denied.

Respectfully submitted,

/s/ Derek S. Clinger
J. Corey Colombo* (0072398)
*Trial Attorney
Derek Clinger (0092075)
MCTIGUE & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
Phone: (614) 263-7000
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com

N. Zachary West (0087805)
O'Connor, Haseley, & Wilhelm
35 North Fourth Street, Suite 340
Columbus, Ohio 43215
Phone: (614) 208-4375
west@goconnorlaw.com

Counsel for Plaintiffs

CERTIFICATE 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 August 14, 2020 upon the following via electronic mail:

Renata Y. Staff, Renata.Staff@OhioAttorneyGeneral.gov
Heather L. Buchanan, Heather.Buchana@OhioAttorneyGeneral.gov

Counsel for Defendant

/s/ Derek S. Clinger
Derek S. Clinger