0A415 - T2

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

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

OHIO DEMOCRATIC PARTY, et al.,	:	Case No. 20 AP 421 ACCELERATED CALENDAR
Plaintiffs-Appellees,	:	
v.	:	On appeal from the Court of Common Pleas Franklin County
FRANK LAROSE, in his official capacity as Ohio Secretary of State,	:	Case No. 20-CV-4997
Defendant-Appellant.		

BRIEF OF APPELLANT-DEFENDANT OHIO SECRETARY OF STATE FRANK LAROSE

DAVE YOST (0056290)
Ohio Attorney General

HEATHER L. BUCHANAN (0083032)
RENATA Y. STAFF (0086922)
Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872 | Fax: 614-728-7592
Renata.Staff@OhioAttorneyGeneral.gov
Heather.Buchanan@OhioAttorneyGeneral.gov

0A415 - T3

Counsel for Defendant-Appellant Frank LaRose, in his official capacity of Ohio Secretary of State

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

0A415 - T4

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Table of Contents

Table of Contents iii

Statement of Assignments of Error Presented for Review ix

Statement of Issues Presented for Review ix

Introduction 1

Statement of the Case and the Facts 2

Law and Argument 7

A. Standard of Review. 7

B. The Secretary's reasonable interpretation of R.C. 3509.03 is entitled to deference. 7

1. The trial court erred in failing to defer to the Secretary's reasonable interpretation of R.C. 3509.03. 7

2. The trial court erred in inserting a requirement into the law that does not exist. 12

C. Appellees' claims raised solely under Article I, Sections 2 and 16 of the Ohio Constitution are not cognizable causes of action. 14

D. As a matter of law, where there is no authority or evidence of a burden on the right to vote, Ohio's ballot application return process easily passes the applicable rational-basis test and *Obama for America* does not apply. 15

1. Rational basis is the applicable standard. 15

2. Any burden articulated by appellees is not severe and easily outweighed by the State's compelling interests under *Anderson-Burdick*. 18

E. The trial court abused its discretion when it failed to consider the relevant, dispositive, and undisputed evidence of harm to the State, the public, and third parties from changing election procedures when an election is imminent. 24

F. As a matter of law, appellees lack standing to challenge Directive 2020-13 or the Secretary's implementation of R.C. 3509.03. 29

Conclusion 30

Certificate of Service 31

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

0A415 - T6

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Celebrezze,
460 U.S. 780 (1983)....................18, 19

State ex rel. Brown v. Ashtabula Cty. Bd. of Elections,
142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596....................18

Burdick v. Takushi,
504 U.S. 428 (1992)....................18, 19

State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections,
108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757....................13

Columbia Gas Transm. Corp. v. Levin,
117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400....................18

State ex rel. Colvin v. Brunner,
120 Ohio St. 3d 110, 2008-Ohio-5041, 896 N.E.2d 979....................10, 11

Dudum v. Arntz,
640 F.3d 1098 (9th Cir. 2011)....................24

Garono v. State,
37 Ohio St.3d 171, 524 N.E.2d 496 (1988)....................7

State ex rel. Herman v. Klopfleisch,
72 Ohio St.3d 581, 651 N.E.2d 995 (1995)....................9

JPMorgan Chase Bank, N.A. v. Liggins,
10th Dist. No. 15AP-242, 2016-Ohio-3528....................7

LaRouche v. Fowler,
152 F.3d 974 (D.C. Cir.1998)....................24

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

League of Women Voters v. LaRose,
S.D.Ohio No. 2:20-cv-1638, 2020 U.S. Dist. LEXIS 91631 (Apr. 3, 2020)........3, 22

Libertarian Party of Ohio v. Husted,
2017-Ohio-7737, 97 N.E.3d 1083 (10th Dist.)........19

State ex rel. Linnabary v. Husted,
138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940........9, 11

Mays v. LaRose,
951 F.3d 775 (6th Cir. 2020)........20, 21, 23

McDonald v. Bd. of Election Comm'rs,
394 U.S. 802 (1969)........15, 16

Obama for Am. v. Husted,
697 F.3d 423 (6th Cir.2012)........1, 16, 17, 21

Ohio Contrs Assn. v. Bicking,
71 Ohio St.3d 318, 643 N.E.2d 1088 (1994)........30

PDU, Inc. v. City of Cleveland,
8th Dist. Cuyahoga No. 81944, 2003-Ohio-3671........14, 15

Purcell v. Gonzalez,
549 U.S. 1 (2006)........24

State ex rel. Purdy v. Clermont Cty. Bd. of Elections,
77 Ohio St.3d 338, 1997-Ohio-278, 673 N.E.2d 1351........23

Simpkins v. Grace Brethren Church of Delaware,
149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122........17

State ex rel. Steele v. Morrissey,
103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107........25

State ex rel. Stokes v. Brunner,
120 Ohio St. 3d 250, 2008-Ohio-5392, 898 N.E.2d 23........9

0A415 - T8

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Storer v. Brown,
415 U.S. 724 (1974) 18

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 19

Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.,
109 Ohio App.3d 786, 673 N.E.2d 182 (10th Dist. 1996) 25

Youngstown City School Dist. Bd. of Edn. v. State,
10th Dist. Franklin No. 15AP-941, 2017-Ohio-555 7

Statutes

42 U.S.C. §1983 14

R.C. 1.49(D) 10

R.C. 1.49(F) 11

R.C. 3501.05 3

R.C. 3509.01(B) 2

R.C. 3509.02 2

R.C. 3509.03 .... *passim*

R.C. 3509.03(A) 2

R.C. 3509.03(B) 3, 4

R.C. 3509.03(D) 2, 30

R.C. 3509.051 2

R.C. 3511 5

R.C. 3511.02 10

0A415 - T9

R.C. 3511.02(A) 5

R.C. 3511.02(A)(1) 5, 10, 11

R.C. 3511.02(A)(3) 5

R.C. 3511.021 .... 5, 10

R.C. 3511.021(A) 10, 11

R.C. 3511.021(A)(1) 5

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Statement of Assignments of Error Presented for Review

Assignment of Error No. 1: The trial court erred by granting a preliminary injunction requiring Ohio's 88 county boards of elections to accept non-UOCAVA absentee ballots via email or fax. (R. 104, "Op.")

Statement of Issues Presented for Review

1. Did the trial court err as a matter of law by disregarding the Secretary's reasonable interpretation of R.C. 3509.03, under which the statute does not authorize a board of elections to accept non-UOCAVA absentee ballots applications via email or fax when the statute is silent on the matter and the Secretary's interpretation is entitled to deference?

2. Did the trial court err as a matter of law by concluding that appellees stated cognizable causes of action under the Equal Protection and Due Process clauses of the Ohio Constitution?

3. Did the trial court err as a matter of law in applying *Obama for America* where appellees showed no disparate impact on the right to vote?

4. Did the trial court abuse its discretion in failing to consider the relevant, dispositive, and undisputed evidence of harm to the State, the public, and third parties?

5. Did the trial court err as a matter of law in holding that appellees established standing?

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Introduction

Among Ohio's many policies for protecting the integrity and security of the 2020 General Election is the requirement that most voters submit requests for absentee ballots by mail or in person. The General Assembly has determined that only a narrow subset of voters—Uniformed and Overseas Citizens Absentee ("UOCAVA") voters—may submit their requests by email or fax. Of course, the special accommodations in state and federal law that allow UOCAVA voters to make email or fax requests are based on "highly relevant distinctions between service members and the civilian population" that address communication difficulties from being outside the country. *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir.2012).

Nevertheless, the trial court issued a preliminary injunction requiring Ohio officials to disregard the Secretary's long-settled interpretation of the General Assembly's policy choices mere weeks before the election and weeks after absentee ballot applications began to be distributed to eligible voters. To the trial court, that a small number of UOCAVA voters have the statutory right to submit applications electronically is sufficient

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

justification to override the Secretary's reasonable statutory interpretation and the General Assembly's policy choice and grant every voter the right to return applications by email, fax, or any other electronic method.

The trial court's order both ignores and misapplies precedent about statutory construction, deference to the Secretary's reasonable statutory interpretation, and the constitutional parameters of the right to vote. The trial court also erroneously disregarded uncontested evidence of critical security harm of implementing an untested process mere weeks before an election. This Court should vacate the trial court's injunction.

Statement of the Case and the Facts

All registered voters in Ohio may vote by absentee ballot without excuse. R.C. 3509.02. Ohioans have the option to vote absentee either by mail or in-person, and can do so for almost a month prior to the election. R.C. 3509.01(B), 3509.051.

To vote by mail, voters must apply for an absentee ballot in writing. R.C. 3509.03(A). For the 2020 General Election, voters could begin requesting absentee ballot applications on January 1, 2020, and can continue to do so until noon on Saturday, October 31, 2020. R.C. 3509.03(D).

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

An absentee ballot application does not need to be "in any particular form." R.C. 3509.03(B). However, there are numerous ways to obtain an absentee ballot application. Voters may download the application on the Secretary of State's website, or request one by calling the board of elections, and the board will mail an application to that voter. *League of Women Voters v. LaRose*, S.D.Ohio No. 2:20-cv-1638, 2020 U.S. Dist. LEXIS 91631, at *20-21 (Apr. 3, 2020).

But Ohio voters need not even take these steps to obtain an absentee ballot application because all registered voters will receive an absentee ballot application in the mail from the Secretary, if they have not already received one. (R.40, Grandjean Aff., ¶¶ 7, 16); R.C. 3501.05. Each application includes instructions to return the application by mail or in-person, and a pre-printed return envelope. *Id.* ¶¶ 13, 18.

An absentee ballot application must include certain information, such as the voter's name, date of birth, address, and driver's license number, social security number, or a copy of a valid form of identification. R.C. 3509.03(B)(1)-(9). Before returning the application to the board, the

voter must sign and include an affirmation declaring that the voter is eligible to vote. R.C. 3509.03(B)(2), (7).

On July 17, 2020, Secretary LaRose issued Directive 2020-13 to the 88 county boards of elections. (R.12, Directive 2020-13.) This Directive generally provides instructions for how boards should prepare for the statewide mailing of absentee ballot applications. *Id*. Citing R.C. 3509.03, Secretary LaRose also provides the following instructions to board for processing absentee ballot applications: "The voter must complete the absentee ballot application by providing the voter's date of birth, identification, and signature before sealing the application in the reply envelope and submitting it to the voter's county board of elections in person or by mail, with the voter affixing a first-class stamp." *Id*. Directive 2020-13 did not change existing law, nor did it impose a new interpretation of R.C. 3509.03. Rather, this Directive reiterates the same instruction regarding the method of return of absentee ballot applications that has been given to boards since 2007. (R.40, Grandjean Aff., ¶ 30.)

Both Ohio and federal law provide for a different process for voters who are overseas or in the military (UOCAVA voters) to request their

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

ballots. Under Chapter 3511 of the Ohio Revised Code and the federal Uniformed and Overseas Citizens Absentee Voting Act, military or overseas voters are permitted to apply for absentee ballots in a different way than most absentee voters. Under Ohio law, UOCAVA voters may "apply[] electronically to the secretary of state or to the board of elections of the county in which the person's voting residence is located in accordance with section 3511.021 of the Revised Code." R.C. 3511.02(A). R.C. 3511.021 specifically requires the Secretary to establish procedures to allow UOCAVA voters to apply for an absentee ballot electronically. R.C. 3511.021(A)(1). Also, UOCAVA voters "may make written application" containing certain categories of information specified by statute to the board of elections. R.C. 3511.02(A)(1). The voter "may personally deliver the application to the director or may mail it, send it by facsimile machine, send it by electronic mail, send it through internet delivery if such delivery is offered by the board of elections or the secretary of state, or otherwise send it" to the board. *Id.* UOCAVA voters may also request an absentee ballot application through specified family members. R.C. 3511.02(A)(3).

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Appellees, the Ohio Democratic Party and voter Jay Michael Houlahan filed this lawsuit on July 31, 2020, asserting violations of the Equal Protection and Due Process clauses of Ohio's Constitution. (R.9.) Concurrently, appellees sought preliminary injunctive relief. (R.11.) On August 4, the trial court ordered the Secretary to file a response to appellees' request for preliminary relief. (R.29.) Also on August 4, appellees filed their First Amended Complaint for Declaratory and Injunctive Relief and the trial court issued an amended briefing schedule on August 5. (R.28; R.30.) On August 11, the Secretary filed a Combined Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and Motion to Dismiss Plaintiffs' Amended Complaint, and appellees filed a reply brief on August 14. (R.38; R.45.) On September 8, the trial court granted the motion to intervene of numerous Republican political committees. (R.103.) On September 11, the trial court granted appellees' motion for preliminary injunction. (R.104; R.105.) On the same day, the Secretary filed a notice of appeal, a motion to stay the trial court's judgment, and an emergency motion for a stay in this Court. (R.114; R.115.) This Court granted a stay of the trial court's judgment and issued a briefing schedule.

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Law and Argument

A. Standard of Review.

Generally, "[t]he grant or denial of an injunction is solely within the trial court's discretion[.]" *Garono v. State*, 37 Ohio St.3d 171, 173, 524 N.E.2d 496 (1988) (citation omitted). However, "no court has the authority, within its discretion, to commit an error of law." *JPMorgan Chase Bank, N.A. v. Liggins*, 10th Dist. No. 15AP-242, 2016-Ohio-3528, ¶ 18 (quotation marks and citation omitted). Therefore, "[t]o the extent that the trial court made legal determinations in reaching its decision on the motion for preliminary injunction, this Court's review of the trial court's decision is plenary, and it undertakes a de novo review of its judgment to that extent." *Youngstown City School Dist. Bd. of Edn. v. State*, 10th Dist. Franklin No. 15AP-941, 2017-Ohio-555, ¶ 45.

B. The Secretary's reasonable interpretation of R.C. 3509.03 is entitled to deference.

1. The trial court erred in failing to defer to the Secretary's reasonable interpretation of R.C. 3509.03.

Appellees want the court to interpret R.C. 3509.03 in a way that allows voters to return absentee ballot applications electronically via email

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

or fax. This is an interpretation of R.C. 3509.03 that no secretary of state or court has ever recognized.

In its opinion, the trial court posed two questions on the issue: (1) "whether R.C. 3509.03 *allows* for absentee ballot applications to be submitted to board[s] of elections via email or fax (Op. at 9), and (2) "whether R.C. 3509.03 *prohibits* voters from submitting absentee ballot applications via email or fax" (Op. at 10). (Emphasis added.) The answer to both questions is a clear "no": R.C. 3509.03 neither allows nor prohibits electronic return of absentee ballot applications. Yet, the trial court chose to answer only the second question. The trial court did not explain why the answer to one question and not the other is dispositive or carries more weight than the other. With no supporting authority or analysis, the trial court summarily concluded that because the statute does not *prohibit* electronic return of absentee ballot applications, the Secretary's interpretation of the statute is wrong. (Op. at 10).

The trial court erred in this conclusion. Well-settled precedent dictates that when, as here, an election statute is silent on a particular point, or is otherwise open to two reasonable interpretations, courts must defer

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

to the Secretary of State's interpretation of the law. *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 23. Indeed, "when an election statute is subject to two different, but equally reasonable interpretations, the interpretation of the Secretary of State, the state's chief election officer, is entitled to *more* weight." (Emphasis added.) *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 586, 651 N.E.2d 995 (1995). The only time a court should depart from this obligation is if the secretary of state's interpretation is *unreasonable*. (Emphasis added.) *State ex rel. Stokes v. Brunner*, 120 Ohio St. 3d 250, 2008-Ohio-5392, 898 N.E.2d 23, ¶ 29.

But the trial court here did not find that the Secretary's interpretation of R.C. 3509.03 is unreasonable. Nor did it explain why it was departing from the well-settled authority that dictates it must defer to the Secretary's reasonable interpretation of the statute. For the below reasons, the Secretary's interpretation of R.C. 3509.03 is reasonable, and, as a matter of law, the Court must defer to that interpretation.

First, correlative provisions to R.C. 3509.03. When, as here, a statute is silent concerning a requirement or prohibition, courts consider

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

correlative provisions in the Revised Code, or statutes that relate to the same subject matter. *State ex rel. Colvin v. Brunner*, 120 Ohio St. 3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 46 ("[S]tatutes that relate to the same subject matter must be construed in pari materia so as to give full effect to the provisions."); R.C. 1.49(D). Three statutes in the Revised Code address absentee ballot applications: R.C. 3509.03, R.C. 3511.02, and R.C. 3511.021(A). Under R.C. 3511.021, UOCAVA voters may apply electronically for an absentee ballot application. R.C. 3511.02(A)(1) has a return catchall that allows UOCAVA voters to "otherwise send" absentee ballot applications. But the statute goes further and specifies that UOCAVA voters can send absentee ballot applications "by facsimile machine," "electronic mail," or "send it through internet delivery if such delivery is offered by the board of elections or the secretary of state." *Id.*

R.C. 3509.03 contains no such language. When R.C. 3509.03 is examined together with R.C. 3511.02 and R.C. 3511.021(A), there is no question that the General Assembly has intended to allow electronic return of absentee ballot applications for UOCAVA voters only.

Second, administrative construction. The Secretary's interpretation of R.C. 3509.03 as not allowing electronic return of absentee ballot applications follows the interpretation and administrative practice of every other secretary of state since 2007. (R.40, Grandjean Aff., ¶ 30.) Thus, the longstanding administrative practice supports the Secretary's reasonable interpretation of the statute. *Colvin* at ¶ 57; R.C. 1.49(F).

Third, legislative intent. It is axiomatic that in discerning elections statutes, the "paramount concern" is legislative intent. *Linnabary* at ¶ 22 (quotation marks and citation omitted). The legislative intent of R.C. 3509.03 supports Secretary LaRose's interpretation. The General Assembly has provided for electronic return of absentee ballot applications in one specific context: for UOCAVA voters. R.C. 3511.021(A) and R.C. 3511.02(A)(1) are unequivocal in allowing UOCAVA voters to return absentee ballot applications electronically.

The statutory evolution of R.C. 3509.03 reinforces these points. When the General Assembly enacted HB 224 to implement the current process for UOCAVA voters (by implementing the federal Military and Overseas Voter Empowerment Act), it amended R.C. 3509.03 in the same

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

legislation. (R.44, HB 224). Thus, when the General Assembly codified electronic return of absentee ballot applications for UOCAVA voters, it declined to do so for non-UOCAVA voters. The General Assembly has amended R.C. 3509.03 eight times since 2005, when the current "the application need not be in any particular form" language was added. (R.38, P.I.Opp. at 31.) Certainly, technology such as email has evolved since then, but the language in the statute has not. It is clear that when the General Assembly has intended to allow voters to return absentee ballot applications by electronic means, it has done so with unequivocal and unambiguous language.

Based on the foregoing, the Secretary's interpretation of R.C. 3509.03 is reasonable as a matter of law. There is nothing in the trial court's opinion or in the record of this case that says otherwise. The Court, therefore, must to defer to this reasonable interpretation.

2. The trial court erred in inserting a requirement into the law that does not exist.

When a statute is silent on a limitation or requirement, as R.C. 3509.03 clearly is here, it is not the role of the court to judicially-legislate

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

one. Construing R.C. 3509.03 as providing for the electronic return of absentee ballot applications is tantamount to adding a requirement that does not exist in the statute. Neither the trial court nor appellees cite any authority for the position that a statute's silence gives courts free reign to insert any requirement or prohibition it "assumes" will work. (Op. at 10.) For this reason, the trial court's approach conflicts with established separation of powers parameters and case authority.

There are innumerable ways to return an absentee ballot application that are not prohibited under R.C. 3509.03. Can a voter bring an absentee ballot application to the home of a board director and require that it be accepted? Can a voter hand their application to a board director when they cross paths at the grocery store? Luckily, precedent does not allow courts to slide down this dangerous road. This is why the Supreme Court is unequivocal in deferring to the Secretary of State, as the state's chief election officer, when it comes to *reasonable* interpretations of elections law. And why courts routinely caution against judicially-legislating by adding requirements where none exist in the statute. *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, 841

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

N.E.2d 757, ¶ 35 ("We will not infer what the General Assembly did not provide [which 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.'"), citing *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004). The General Assembly has declined to amend R.C. 3509.03 to allow electronic return of absentee ballot applications; this mandate should not come from a court.

C. Appellees' claims raised solely under Article I, Sections 2 and 16 of the Ohio Constitution are not cognizable causes of action.

Appellees' claim that Ohio's process governing the return of absentee ballot applications violates the Equal Protection and Due Process clauses of Ohio Constitution Article I, Sections 2 and 16 must fail, as neither is a self-executing source of protection. Unlike the federal provisions in 42 U.S.C. §1983, there is not a state statute that creates a cause of action for violations of Sections 2 and 16. "'A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation.'" *PDU, Inc. v. City of Cleveland,* 8th Dist. Cuyahoga No. 81944, 2003-Ohio-3671, ¶ 20, quoting *State*

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

v. Williams, 88 Ohio St.3d 513, 521, 728 N.E.2d 342 (2000). If the language of a constitutional provision "cannot provide for adequate and meaningful enforcement of its terms without other legislative enactment," then it is not self-executing. *Id.* Constitutional provisions that are not self-executing cannot serve as the basis for a claim. *Id.* at ¶ 27.

D. As a matter of law, where there is no authority or evidence of a burden on the right to vote, Ohio's ballot application return process easily passes the applicable rational-basis test and *Obama for America* does not apply.

1. Rational basis is the applicable standard.

Where, as here, there is no evidence of an infringement on the fundamental right to vote, rational basis is the applicable standard. *See, e.g.*, *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969) (applying rational basis review to Illinois statute denying inmates mail-in ballots; with no evidence that Illinois deprived inmates of other voting opportunities, no burden on the right to vote). Rational basis applies here because Ohio's process for returning absentee ballot applications does not infringe on the right to vote. Simply put, there is no constitutionally-protected right to submit absentee ballot applications by any means

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

preferable. And appellees did not offer any evidence to suggest they are or will be precluded from voting. Nor could they. Ohio offers a litany of options for voting, including early voting, Election Day voting, and voting by mail—none of which appellees challenge here.

In Ohio, UOCAVA voters may return absentee ballot applications electronically. These statutes, "designed to make voting more available to some groups who cannot easily get to the polls," does not itself "deny" non-UOCAVA voters "the exercise of the franchise." *McDonald*, 394 U.S. at 807-08.

The trial court's opinion confuses appellees' desired way to return absentee ballot applications with an actual infringement on voting rights. *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir.2012) ("*OFA*"), confirms this error. That case reaffirms the principle that, "[i]f a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used." *OFA* at 429. Appellees' failure to produce evidence "that 'burdened voters

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

have few alternate means of access to the ballot'" subjects their claims to rational basis review. *Id.* at 430-31 (citation omitted).

In *OFA*, plaintiffs introduced "extensive evidence" showing "that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." *Id.* at 431. This included "statistical studies that estimated approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day, and that these voters are disproportionately 'women, older, and of lower income and education attainment.'" *Id.*, citing *Obama for Am. v. Husted*, S.D. Ohio, 2012 U.S. Dist. LEXIS 124567, at *3. No such evidence was presented here. Rather, the evidence before the Court confirms that appellees have and continue to have ample opportunities to vote.

In the absence of any cognizable evidence of a burden on the right to vote, R.C. 3509.03 passes constitutional muster under rational basis review. Under this deferential standard, the state regulation is sound when the classification "is rationally related to a legitimate government purpose" or when "reasonable grounds" exist for the distinction. *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

8118, 75 N.E.3d 122, ¶ 47-48 (Citations omitted). Indeed, "[u]nder the rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 91. (Citation omitted).

2. Any burden articulated by appellees is not severe and easily outweighed by the State's compelling interests under *Anderson-Burdick.*

Even if the Court were to conclude that the stricter *Anderson-Burdick* standard applies, appellees cannot prevail. The US Supreme Court has emphasized the importance of state regulation of elections, stating that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 729-730 (1974). Accordingly, if the Court finds that appellees' voting rights are burdened, this constitutional challenge must be analyzed under the "flexible framework" developed in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 432-34 (1992). *See State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Ohio St.3d 370, 378, 2014-Ohio-4022, 31 N.E.3d 596 (O'Connor, C.J., concurring in judgment only) ("[W]here a plaintiff alleges that the state has burdened voting rights through disparate treatment, the *Anderson/Burdick* balancing test is applicable."); *Libertarian Party of Ohio v. Husted*, 2017-Ohio-7737, 97 N.E.3d 1083, ¶ 51 (10th Dist.).

Under this standard, courts first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson,* 460 U.S. at 789; *Burdick*, 504 U.S. at 432-34. The court "then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* State actions that impose a "severe" burden on the right to vote are closely scrutinized. *Burdick*, 504 U.S. at 434. "Lesser burdens, however, trigger less exacting review." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

As to the burden on appellees, the trial court erred by failing to consider the numerous voting options available to appellees. Under *Anderson-Burdick*, when evaluating disparate treatment claims like those raised by appellees, courts evaluate the "burden from the perspective of only

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

affected electors and within the landscape of all opportunities that Ohio provides to vote." *Mays v. LaRose*, 951 F.3d 775, 784-785 (6th Cir. 2020). That is, any burden is evaluated "from the perspective of only affected electors—not the perspective of the electorate as a whole." *Id.* at 785. There are a multitude of voting options available to appellees, which they do not dispute. With the Secretary's mailing to all registered voters, which includes an absentee ballot application and preprinted return envelope, voters need only supply stamps. Postage stamps are widely available in stores, ATMs, post offices, or online. Appellees have not claimed that they are unable to purchase postage stamps or place their application in a mailbox in time to return their absentee ballot applications.

Rather than properly evaluating the burden on appellees within the context of all available voting options, the trial court instead concluded that the process for returning absentee ballot applications "places an additional burden on eligible voters' access to voting." (Op. at 11.) By adopting this approach, the trial court erred.

First, appellees introduced no evidence of any burden, much less a severe one. While returning absentee ballot applications by mail or in

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

person may create an inconvenience, appellees "are not totally denied a chance to vote" as a result of having to do so. *Mays* at 787. There is no evidence that appellees will "be *precluded from voting* without the additional three days of in-person early voting." (Emphasis added.) 697 F.3d at 431; *see Mays* at 783, fn. 4 (questioning *OFA's* application of *Anderson-Burdick* framework to assess burden imposed on plaintiffs under the Equal Protection Clause).

Recently, the Sixth Circuit concluded that even voters who had no avenue to vote were subject to a "moderate" burden when considering the ample voting opportunities in Ohio. In *Mays*, the plaintiffs were arrested after the deadline to request absentee ballots and were held in detention through Election Day. In assessing the burden on voting, the court considered "the alternative voting opportunities that Ohio provides," including "all voting opportunities that the Plaintiffs *could have* taken advantage of, even if they were no longer a possibility at the time of litigation." *Id.* at 786-87. Here, of course, no such moderate burden exists—appellees have and continue to have many options for requesting and completing both their absentee ballot applications and absentee ballots.

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Even during pandemic conditions, courts have concluded that the requirements for returning absentee applications by mail are not a severe burden. The plaintiffs in *League of Women Voters v. LaRose*, 2020 U.S. Dist. LEXIS 91631, argued that the absentee ballot application process for the conclusion of the primary election could result in "delays at the post office or restrictions in place because of the COVID-19 pandemic, resulting in some voters being unable to postmark their ballots in time to be counted." *Id.* at *19. The court found no unconstitutional burden. *Id.* at *20. Rather, plaintiffs had many "opportunities to vote, both by mail and in person, prior to late March 16, 2020, when the polls were closed." *Id.* The requirement that voters affix a postage stamp to return their ballot application, the court held, was "no more than a minimal burden" because of the wide availability of stamps in stores and online. *Id.* at *21. Even this combination of factors, the court held, including "a tight deadline to accomplish the proper [absentee ballot] request" and "a tight deadline to accomplish…submission of a ballot" imposed "*at most*, a modest burden on the right to vote[.]"(Emphasis in original.) *Id.* at *20-21

Rather than evaluating any burden on appellees in the context of "the landscape of all opportunities that Ohio provides to vote," *Mays*, 951 F.3d at 784-785, the trial court simply assumed a burden existed because, if given the opportunity, "[a] significant number of eligible voters would request their absentee ballot by facsimile or email." (Op. at 11.) This analysis altogether ignores the governing standard. Appellees are not unconstitutionally burdened when weighed against the State's compelling interests in preserving the existing absentee application return process.

The trial court also erred by failing to give due weight to the State's compelling interest in the integrity of the election. The Ohio Supreme Court has found that "there is a *compelling* state interest for the state, the Secretary of State and county boards of elections, to see that elections are conducted in an orderly manner." (Emphasis added.) *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 346, 1997-Ohio-278, 673 N.E.2d 1351, fn. 1. The trial court received extensive evidence that permitting the return of absentee ballot applications electronically would create a significant impediment to preserving the integrity and security of the upcoming election. Nevertheless, the trial court disregarded

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

these interests due to what *it* deemed to be a burden on appellees' voting rights. This decision was wrong on the merits and on the remedy.

Finally, appellees' Due Process claim does not raise a distinct cause of action and fails for the same reasons as their Equal Protection challenge. *Dudum v. Arntz*, 640 F.3d 1098, 1106, fn.15 (9th Cir. 2011), citing *Anderson*, 460 U.S. at 787 n.7; *LaRouche v. Fowler*, 152 F.3d 974, 987–88 (D.C. Cir.1998) ("In the election context, due process claims are "addressed . . . collectively using a single analytic framework."). Ohio's compelling regulatory interests justify any burden on appellees' voting rights and satisfy both rational basis and *Anderson-Burdick* review.

E. The trial court abused its discretion when it failed to consider the relevant, dispositive, and undisputed evidence of harm to the State, the public, and third parties from changing election procedures when an election is imminent.

The trial court's disregard of an essential element of the preliminary injunction analysis is not supported by the law or the evidence. The US Supreme Court has expressly cautioned against last-minute changes to election procedures, a principle the trial court disregarded and this Court should reaffirm. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.") Any such changes are especially egregious here because appellees challenge a statutory interpretation in place since at least 2007. *See State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 13 ("[A] delay as short as nine days can bar an election action based on laches").

Not only did the trial court disregard this principle, it also disregarded the requirement to balance the potential harm at issue when it concluded that "its role is to determine whether R.C. 3509.03 prohibits voters from submitting absentee ballot applications via email or fax, *not to anticipate the difficulties and complexities of complying with the language of the statute*." (Emphasis added.) (Op. at 10.) But at the preliminary injunction stage, the court *must* balance the potential harm to third parties and to the public that will result from granting an injunction. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

786, 790, 673 N.E.2d 182 (10th Dist. 1996). It is Ohio's 88 boards of elections that will bear the brunt of the "difficulties and complexities" in implementing this change in procedure now, this close to the General Election. It is also Ohio's electors who will be faced with the real potential that bad actors could undermine the integrity of a pivotal election. The trial court erred in holding that it did not need to consider this harm.

The trial court had before it substantial evidence that granting appellees' requested relief—to order, now, less than two months before the General Election, that the boards of elections change procedure on accepting absentee ballot requests—will severely impact the security, administration, and integrity of the General Election. This evidence included affidavits from boards of elections directors, and Spencer Wood, the Secretary's Chief Information Officer. These witnesses testified about the disastrous potential consequences to appellees' relief, including phishing and ransomware attacks, network overloads, and the availability of board resources to manage this new process. This evidence was not disputed.

Despite the weight of this evidence and the court's obligation to balance the equities and harm to third parties and the public, the trial court

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

addressed these considerations in only a cursory fashion, simply concluding: "county boards of election may need to work harder." (Op. at 12.) In finding that no harm will come to third parties (the State, Ohio's 88 county boards of elections, and the public) the court stated that because the boards of elections accept absentee ballot applications electronically from UOCAVA voters, the court "can assume that a policy or protocol is already in place" to accept all applications this way. (Op. at 10.)

This conclusion disregards the uncontradicted evidence here. The Secretary stated clearly "there is *no plan* for how boards will process large volumes of absentee ballot applications that are returned by email or fax, and boards have not dedicated staff to doing so." (Emphasis added.) (R.38, P.I.Opp. at 19.) This is based on the testimony from the Secretary's supporting affidavits, which reiterate that there is *no plan*—nor is there time to develop such a plan—for processing and addressing the cybersecurity risks that will come with large volumes of electronically-received absentee ballot applications. *Id.* Appellees did not introduce contrary evidence or rebut this evidence. Other than stating that the boards of

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

elections have email addresses and fax numbers, appellees put no evidence in the record to explain how to implement their proposed remedy.

The Secretary also introduced a report compiled by several nonpartisan voting rights organizations, "Expecting the Unexpected – Election Planning for Emergencies." (R.43.) In the chapter "What Did Not Work" is a detailed discussion of New Jersey's efforts to allow, for the first time, electronic return of ballot applications after the devastation caused by Hurricane Sandy. *Id*. at 13. The result of this experiment was chaos. Voters did not get ballots. The report concluded that "the state lacked the resources and infrastructure necessary for this option to function smoothly." *Id*. at 14. Because the ability of UOCAVA voters to return absentee ballot applications electronically is mandated by federal law, New Jersey also had such "a policy or protocol [] already in place". Yet when the state opened electronic return to *all* voters without the proper resources and infrastructure, the UOCAVA "policy and protocol" did not save them. Instead, the worst happened: voters did not get ballots.

The statements in this report are not contradicted by anything else in the record. And the trial court did not explain why Ohio would not

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

follow New Jersey's fate. Nor did the trial court explain why it was simply disregarded, or perhaps disbelieved the Secretary's evidence that there is *no plan* to process non-UOCAVA absentee ballot applications electronically. In so doing, the trial court abused its discretion.

A grant of a preliminary injunction is an "extraordinary remedy." Such remedy should be based on the evidence, not the court's assumption, and certainly not on an "assumption" that is directly contradicted by the uncontested evidence in the record. The trial court did not need to make assumptions here and it did not need to "anticipate" the potential harm that will result: the Secretary put this evidence directly before the court. The trial court erred in ignoring and summarily rejecting this evidence, and abused its discretion in granting the preliminary injunction.

F. As a matter of law, appellees lack standing to challenge Directive 2020-13 or the Secretary's implementation of R.C. 3509.03.

None of the appellees establish that the current process for submitting absentee ballot applications has caused them any harm, or that the harm flows to any of ODP's members. As appellees acknowledge, voters have had, and still have, months to submit their absentee ballot

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

applications. (R.9, Am. Compl. ¶19); R.C. 3509.03(D). Accordingly, appellees fail to allege any facts regarding a concrete harm sufficient to confer standing. *Ohio Contrs Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994) ("[T]he injury must be concrete and not simply abstract or suspected.").

Conclusion

For the foregoing reasons, the trial court's decision granting appellee's motion for preliminary injunction was erroneous. The Secretary respectfully requests that the Court reverse and vacate the injunction.

Respectfully Submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ Heather L. Buchanan
HEATHER L. BUCHANAN (0083032)
RENATA Y. STAFF (0086922)
Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872 | Fax: 614-728-7592
Renata.Staff@OhioAttorneyGeneral.gov
Heather.Buchanan@OhioAttorneyGeneral.gov

Counsel for Defendant-Appellant Frank LaRose, in his official capacity of Ohio Secretary of State

Franklin County Ohio Court of Appeals Clerk of Courts- 2020 Sep 16 3:24 PM-20AP000421

Certificate of Service

I hereby certify that the foregoing was electronically filed and a true and accurate copy was served on September 16, 2020, upon the following via electronic mail:

J. Corey Colombo
Derek Clinger
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com

N. Zachary West (0087805)
west@goconnorlaw.com

Counsel for Plaintiffs-Appellees

Edward M. Carter
M. Ryan Harmanis
emcarter@jonesday.com
rharmanis@jonesday.com

John M. Gore
E. Stewart Crosland
jmgore@jonesday.com
scrosland@jonesday.com

Counsel for Intervenor-Defendants Donald J. Trump for President, Inc., the Ohio Republican Party, The Republican National Committee, and the National Republican Congressional Committee

/s/ Heather L. Buchanan
HEATHER L. BUCHANAN
(0083032)
Assistant Attorney General