IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

OHIO DEMOCRATIC PARTY and JAY MICHAEL HOULAHAN, Plaintiff-Appellees, v. FRANK LAROSE, in his official capacity as Secretary of State of Ohio, Defendant-Appellant, DONALD J. TRUMP FOR PRESIDENT, INC., THE OHIO REPUBLICAN PARTY, THE REPUBLICAN NATIONAL COMMITTEE, and THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, Intervenor-Appellants.	Case No. 20-AP-421 Case No. 20-AP-428 ACCELERATED CALENDAR On Appeal from the Franklin County Court of Common Pleas, No. 20-CV-4997

REPLY OF INTERVENOR-APPELLANTS DONALD J. TRUMP FOR PRESIDENT, INC., THE OHIO REPUBLICAN PARTY, THE REPUBLICAN NATIONAL COMMITTEE, AND THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE

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INTRODUCTION

Because courts must defer to the Secretary's reasonable interpretations of election statutes, and because his interpretation here is reasonable—indeed, consistent with more than a decade of bipartisan precedent—Plaintiffs lose. Nothing else is needed to decide this case. But what remains also weighs heavily against a last-minute injunction. The record reflects substantial security and administrative problems with making a massive change this close to the election. And it lacks evidence that Directive 2020-13 burdens the right to vote.

To prevail, *Plaintiffs* needed to show R.C. 3509.03 unambiguously allows voters to return absentee ballot applications in the novel ways they propose. Yet Plaintiffs admitted the opposite. They advanced the position that R.C. 3509.03 is *ambiguous* (through silence) on how voters may return applications. Put another way, Plaintiffs' position forecloses them from showing R.C. 3509.03 unambiguously allows applications, for the first time ever, by text, Facebook, Instagram, and the like.

Unable to meet their burden, Plaintiffs attempt to shift it to the Secretary. They argue that the Secretary failed to provide evidence

showing that the equities *do not* warrant an injunction. That is not the way it works. Plaintiffs' failure to submit evidence on this point is dispositive; their attempted reliance on the trial court's findings and assumptions outside of the record does not suffice as a substitute.

ARGUMENT

The Republican Committees explained that this Court should vacate the injunction for four reasons: (1) lack of standing; (2) laches; (3) Plaintiffs' claims fail on the merits; and (4) the equities cut strongly against an injunction. Plaintiffs' responses to each are unpersuasive.

I. THE REPUBLICAN COMMITTEES PRESERVED THEIR ARGUMENTS BELOW

Plaintiffs first try to avoid these arguments. They argue that the Republican Committees, having been allowed to intervene, cannot participate in this appeal because they "waived" all arguments by "not mak[ing]" them below. Appellees' Br. ("Ape. Br.") 6.

Wrong on both the facts and the law. As for the facts, although the Republican Committees timely intervened, Int. Or. 5, the late hour of Plaintiffs' suit forced this case onto an expedited schedule and the

Secretary already had submitted his opposition. In the interest of fairness, the Republican Committees offered to adopt the Secretary's arguments rather than file a separate brief. Mot. to Int. 9. The trial court allowed the Republican Committees to intervene and join the Secretary's brief. Int. Or. 5. They did so shortly thereafter. The trial court's issuance of its order in the interim makes no difference, as it had already permitted the Republican Committees to join the Secretary's brief.

As for the law, Plaintiffs recite the rule that a party cannot raise an argument for the first time on appeal. Ape. Br. 6. This protects a party (and the trial court) from being ambushed with new arguments on appeal. *Foy v. Ohio Dep't of Rehab. & Correction*, 10th Dist. Franklin No. 16AP-723, 2017-Ohio-1065, ¶ 32. That is not a problem here. The Republican Committees raise only the issues the Secretary raised, which they timely joined below. These issues are properly before the Court.

II. PLAINTIFFS LACK STANDING

The Republican Committees explained why both Plaintiffs lack standing. Opening Br. 8–12. Plaintiffs' responses raise little new.

One point bears mentioning: Plaintiffs assert that the Republican

Committees cannot argue standing because they claimed an interest in this case for intervention. Ape. Br. 51–52. They are mistaken. The test for standing is different from the test for intervention. For standing, a plaintiff must have suffered harm, caused by the defendant, that a favorable decision will redress. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469–70, 715 N.E.2d 1062 (1999). An intervenor, by contrast, may intervene if "the *disposition* of the action may as a practical matter impair or impede" its interest implicated by the action. Civ.R. 24(A)(2) (emphasis added).

The Republican Committees had a sufficient interest for intervention because Plaintiffs' suit could impair their interest in the current election rules and force them to spend resources. But the Republican Committees would, like Plaintiffs, lack standing to challenge Directive 2020-13 because it does not harm them. While the Ohio Democratic Party ("ODP") insists that Directive 2020-13 causes it to divert resources, Ape. Br. 58–59, ODP admitted that it would spend *more* resources if given an injunction, Op. 15. This proves the Republican Committees' interest and disproves ODP's standing.

III. LACHES BARS PLAINTIFFS' CLAIMS

Plaintiffs' brief warrants three points in reply on laches. *First*, their "waiver" argument, Ape. Br. 45, fails for the same reason their overall forfeiture argument fails. Plaintiffs also suggest the Republican Committees waived laches because it is an affirmative defense. *Id.* But Plaintiffs cite no case requiring a party to assert laches in an answer before raising it in response to a motion for a preliminary injunction. Indeed, the Secretary raised a laches argument, which the Republican Committees joined, without filing an answer. Sec.'s Opp. 23–29.

Second, Plaintiffs argue laches does not apply because they seek prospective relief. Ape. Br. 46–47. But courts regularly apply laches in election suits seeking prospective relief—being placed on the ballot, for example. *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, 836 N.E.2d 536, ¶¶ 17–18.

Finally, Plaintiffs prejudiced the Defendants by forcing them to litigate on an expedited schedule; prejudiced the Secretary and Ohio's boards by leaving them inadequate time to develop a process for securely accepting absentee applications; and prejudiced the Republican

Committees by seeking a last-minute change that would insert security risks into an election in which Republicans will vote and run for office.

IV. PLAINTIFFS WILL NOT SUCCEED ON THE MERITS

Plaintiffs cannot succeed on the merits because R.C. 3509.03 is best read to require voters to return absentee ballot applications by mail or in person. The Secretary's longstanding interpretation confirms this reading, R.C. 1.49(F), as does the General Assembly's decision to allow UOCAVA voters (but not others) to submit applications by fax or email, R.C. 3511.02(A), 3511.021(A)(1). At a minimum, the Secretary's interpretation is reasonable, so the Court must defer to it. *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 586, 651 N.E.2d 995 (1995).

Given the Secretary's longstanding, reasonable interpretation, Plaintiffs must show that R.C. 3509.03 *unambiguously* authorizes voters to return applications however they want. Plaintiffs sought (and the trial court granted) an order directing boards to accept applications sent by any "viable electronic form[] of transmission," Compl. Prayer for Relief ¶ 8, including email, fax, "text," Ape. Br. 17, and presumably Facebook, Twitter, or Instagram. Their arguments do not show that R.C. 3509.03

unambiguously authorizes applications through those methods.

Canons of Construction. Plaintiffs argue that, because the statute is *silent* on how voters may return applications, it unambiguously authorizes them to submit applications however they want. Ape. Br. 11. But the rule that *courts* should not add words to statutes does not dictate how the *Secretary* may address statutory silence in election matters. The General Assembly gave the Secretary the authority to "instruct[] . . . boards as to the proper method of conducting elections." R.C. 3501.05(B). So when a statute is "silent"—particularly on a procedural issue regarding the "proper method of conducting elections," *id.*—courts defer to the Secretary's reasonable "administrative construction" of the statute. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶¶ 46, 57. Taken to its logical conclusion, Plaintiffs' proposed rule of construction would bar all administrative rulemaking.

The other canons of construction Plaintiffs rely upon are similarly unavailing. Plaintiffs cite rules against unduly technical interpretations and in favor of the right to vote. *See* Ape. Br. 12. But, as explained on the equities, Plaintiffs have not shown that Directive 2020-13 burdens the

right to vote. And in any event, these rules do not authorize courts to override the reasonable interpretation of Ohio's Chief Election Officer to upend a longstanding process on the eve of an election.

Plaintiffs' Cases. Plaintiffs ignore the Ohio Supreme Court's approach to statutory silence altogether. They do not even mention *Colvin*, instead directing the Court to two inapposite cases.

The first involved the contents of an absentee ballot application, not its manner of delivery. *State ex rel. Myles v. Brunner*, 120 Ohio St. 3d 328, 2008-Ohio-5097, 899 N.E.2d 120, ¶¶ 4–5. This makes all the difference because R.C. 3509.03 is *not* silent on the contents of an application. It explicitly says applications "need not be in any particular form." R.C. 3509.03(B). Despite this language, in *Myles* the Secretary issued a directive stating that voters who submitted applications provided by the Republican campaign for president that stated "I am a qualified elector"—but did not check a box next to that statement—did not meet the requirement that voters' applications certify they are qualified electors. *Myles* ¶¶ 4–5.

The Ohio Supreme Court rejected this interpretation. *Id.* ¶ 18. The

Secretary had adopted an overly technical interpretation, applicable only to a small subset of voters, in direct conflict with R.C. 3509.03's language authorizing voters to submit applications in "any" form. Here, by contrast, the Secretary followed a longstanding interpretation, applicable to all absentee voters, that reasonably interprets statutory *silence*. *Colvin* controls when it comes to silence, not *Myles*.

Plaintiffs' second case is even less on point. *See State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36, 985 N.E.2d 441. There, a board of elections found that documents submitted via email were not "certified" to the board as required by statute. *Id.* ¶¶ 7, 11. The Ohio Supreme Court disagreed because the board had not created rules on "the manner in which documents may be 'filed with' or 'certified to' the board." *Id.* ¶ 27. Here, of course, Secretary LaRose *did* impose a rule—the same one his predecessors stretching back to 2007 imposed.

The Secretary's Actions. Plaintiffs next claim the Secretary's actions on other issues related to absentee ballots show his interpretation is unreasonable. Ape. Br. 15–16. Just the opposite. To be sure, the

Secretary required boards to email voters about rejected applications and to install an office drop box for the return of ballots (and applications). *Id.* Plaintiffs do not challenge the Secretary's authority to impose those rules. Indeed, ODP has agreed in another lawsuit that Secretary LaRose *does* have the authority to require boards to install drop boxes at their offices—even though Ohio law is silent on drop boxes. Plaintiffs' position seems to be that when Ohio law is silent, the Secretary may impose only those requirements Plaintiffs like. This Court should reject this arbitrary, policy-based approach to interpreting Ohio law.

Constitutional Claims. Plaintiffs assert that the trial court held Directive 2020-13 unconstitutionally burdens the right to vote and violates the equal protection clause. Ape. Br. 22–30. Not so. The trial court addressed the constitutional issues only *after* it found Plaintiffs showed a likelihood of success on their statutory argument, in the equities section on "irreparable injury." Op. 11–12. It made no finding about the likelihood of success on the merits of the constitutional claims.

V. THE REMAINING FACTORS FAVOR REVERSAL

As with the merits, Plaintiffs attempt to shift the burden of showing

that the remaining factors support an injunction onto Defendants. They retain the burden, and fail to carry it.

Public Interest. Plaintiffs double down on the trial court's conclusion that Ohio already has a process for securely accepting electronic UOCAVA applications that could be applied to non-UOCAVA applications with "minimal" difficulty. Ape. Br. 33–34. That conclusion, however, has no basis in the record.

The record shows that: (1) emails can be vessels for cybersecurity threats, including ransomware; (2) board members manually review emailed UOCAVA applications for cybersecurity threats; (3) boards do not have the resources to manually review a large influx of emailed applications; (4) an influx of emailed applications could overload boards' networks (as in New Jersey); and (5) the consequences of a ransomware attack, network overload, or other cybersecurity issues could be catastrophic. *See* Opening Br. 25–26.

Plaintiffs did not submit any contrary evidence. They contend that the process for receiving paper absentee ballot applications is the same as for UOCAVA applications "[e]xcept for the manner of delivery." Ape.

Br. 35. The issue here *is* the manner of delivery, as only electronic applications involve cybersecurity threats.

Plaintiffs acknowledge as much by referring to the training boards receive. Ape. Br. 38–39. But they fail to acknowledge the time it takes board members to review emailed applications, and they cite no evidence suggesting boards have the resources to handle an exponential increase in electronic applications. And while they allude to boards' "cyber-attack detection and tracking hardware," *id.* 39, there is no evidence that this eliminates the burdens on or risks to boards.

This is doubly true because Plaintiffs seek an injunction that would require boards to do *more* than they do for UOCAVA voters. UOCAVA voters may submit applications by fax or email, but not by other electronic means. R.C. 3511.02(A), 3511.021(A)(1); Sec.'s Ex. C ¶ 6; Sec.'s Ex. D ¶ 11. Yet Plaintiffs claim a right to *any* method of electronic delivery, including text and presumably sending applications to boards' Twitter accounts or a director's Facebook account. There is no evidence any board has ever accepted these methods of delivery or that the UOCAVA process would work for them.

Plaintiffs' arguments only show that the harm from an injunction outweighs any hypothetical harm from the current system. Their primary "evidence" of harm is an outside-the-record news article about absentee ballots (not applications) that were not counted because of mail delays. Ape. Br. 43. But voters have been able to apply for absentee ballots since January 1 and still may submit applications to drop boxes or in person at their board's office. Any "confusion and chaos," *id.*, is pure speculation without evidence. And while Plaintiffs raise health concerns, *id.* 43–44, they again offer no evidence that mailing an application is any riskier to one's health than emailing it.

Plaintiffs' final contention is that an injunction would promote the right to vote. *Id.* 43. Yet this assumes a right to submit electronic applications. Neither the Ohio Constitution nor the Revised Code provides this right. So Plaintiffs assert constitutional violations under *Anderson-Burdick* cases and *Bush v. Gore*. Ape. Br. 25–30.

Their *Anderson-Burdick* claim fails because any minimal burden that Directive 2020-13 imposes on the right to vote is easily outweighed by Ohio's interests. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837

F.3d 612, 635 (6th Cir.2016) ("*NEOCH*"). If Plaintiffs wanted to establish a constitutional violation, they were required to present actual evidence of the burden on voters. *See id.* They instead presented none.

To the extent Plaintiffs contend Directive 2020-13 violates their equal protection rights because they have fewer options than UOCAVA voters, they must overcome rational-basis review because they have failed to show a burden on the right to vote and they are not a suspect class. *See Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir.2012). They cannot do so because courts have recognized the "highly relevant distinctions between service members and the civilian population." *Id.*

Harm to Third Parties. Plaintiffs contend that because Ohio law allows voters to submit electronic applications, "the work associated with processing [those] applications does not constitute harm or at least is justified." Ape. Br. 32–33; *see also* Op. 12. Again, Plaintiffs start with the assumption that they are right on the merits. They are not. And regardless, the heavy burden that an injunction would create is a "harm" that this Court must consider. *See NEOCH*, 837 F.3d at 635. That harm would extend beyond boards to all Ohioans. Plaintiffs' proposed system

presents significant cybersecurity risks that could have devastating consequences on the upcoming election. Opening Br. 25–26.

Proximity to the Election. Plaintiffs finally argue that the well-established principle that courts should not change the rules in the run-up to an election does not apply. Ape. Br. 39–40. Simply because United States Supreme Court precedent is not binding on this issue does not mean it is wrong. That precedent is persuasive because it is correct: boards do not have the resources necessary to shift gears and accept potentially millions of electronic applications this late in the game.

Plaintiffs last cite other instances in which the Secretary has changed election procedures. *Id.* 41–42. This confirms that the Secretary, not the judiciary, is best positioned to make these decisions. Given that his interpretation of Ohio law is reasonable, and the burdens an injunction would impose, this Court should defer to the Secretary.

CONCLUSION

For these reasons, the Court should vacate the injunction.

September 23, 2020

Respectfully submitted,

/s/ M. Ryan Harmanis

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

John M. Gore (pro hac vice)
E. Stewart Crosland (pro hac vice)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 879-3939
Fax: (202) 626-1700
jmgore@jonesday.com
scrosland@jonesday.com

Counsel for Intervenor-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed and a true and accurate copy was served on September 23, 2020, upon the following via electronic mail:

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

N. Zachary West
O'Connor, Haseley, & Wilhelm
35 North Fourth Street, Suite 340
Columbus, Ohio 43215
west@goconnorlaw.com

Counsel for Plaintiffs

Renata Y. Staff
Heather L. Buchanan
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Renata.Staff@ohioattorneygeneral.gov
Heather.Buchanan@ohioattorneygeneral.gov

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

/s/ M. Ryan Harmanis
M. Ryan Harmanis (0093642)