IN THE FRANKLIN COUNTY
COURT OF COMMON PLEAS

OHIO DEMOCRATIC PARTY,	:	
Plaintiff,	:	Case No. 20-CV-4997
v.	:	Judge Stephen L. McIntosh
FRANK LAROSE, in his official capacity as Ohio Secretary of State,	:	
Defendants.	:	

DEFENDANT OHIO SECRETARY OF STATE FRANK LAROSE'S COMBINED MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendant Ohio Secretary of State Frank LaRose hereby responds to Plaintiffs' Motion for Preliminary Injunction and for the reasons set forth herein, respectfully requests that it be denied. Moreover, Defendant Ohio Secretary of State Frank LaRose moves to dismiss Plaintiffs' Amended Complaint for lack of jurisdiction pursuant to Civ.R. 12(B)(1) and 12(B)(6). The reasons for the motion are set forth in the attached Memorandum.

Respectfully Submitted,

DAVE YOST
Ohio Attorney General

/s/ Renata Y. Staff
RENATA Y. STAFF (0086922)
HEATHER L. BUCHANAN (0083032)
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 Frank LaRose, in his official capacity of Ohio Secretary of State

TABLE OF CONTENTS

MEMORANDUM IN SUPPORT

I. INTRODUCTION

At a time when Ohio is, and should be, working to increase election security and voter confidence, the Plaintiffs are seeking relief that would significantly undermine both. That is, they ask this Court to interpret R.C. 3509.03 in a way that would require boards of elections—for the first time ever—to accept *all* absentee ballot applications by email or fax. While, in a vacuum, that declaration might appear to be rather simple legal determination, their related demand that the process be implemented *immediately* is anything but simple. The confusion, chaos, and potentially catastrophic consequences that will inevitably flow from implementing this untested internet-based procedure, *this close* to an historic Presidential Election, cannot be overstated.

Simply put, Plaintiffs seek immediate injunctive relief that will seriously jeopardize the cybersecurity of every one of Ohio's 88 county boards of elections, and therefore the 2020 Presidential Election. They seek an injunction that would require boards to click on every email received in order to determine if it contains an absentee ballot application. And, they want this Court to order this relief *before* determining whether boards have the network capacity to actually receive large volume of applications, and *before* security protocols or training can be rolled out to guard against cyber-attack. The consequences associated with doing so could be disastrous. Voter registration systems could easily be compromised.

It is no exaggeration to say that, by giving Plaintiffs what they want, this Court would jeopardize the security and integrity of the Presidential Election in Ohio—and therefore, the nation. Ohio's boards of elections should not have to cross their fingers and hope for the best

every time they click on an email attachment. That is no way to run any election, much less a Presidential one.

So, how can all of this be prevented if the Court orders Plaintiffs' requested relief? Plaintiffs don't appear to have answers, and there is simply not enough time for Secretary LaRose and the boards of elections to figure it out. To be clear: the wheels are in motion for absentee voting in the 2020 General Election in Ohio. Ohio voters have been allowed to request absentee ballot applications since January 1, 2020. To date, tens of thousands of voters have taken advantage of this opportunity. On July 17, 2020, Secretary LaRose instructed the 88 county boards of elections that pursuant to R.C. 3509.03, absentee ballot applications can be returned to the boards only by mail or in-person. This same instruction has been given to boards of elections since 2007.

7.8 million absentee ballot application packets are currently being printed. In a few weeks, the Secretary of State will mail a packet to all Ohio registered voters. Each packet contains the absentee ballot application with explicit instructions to return the application by mail or in-person. Those instructions *cannot be changed*. Nonetheless, Plaintiffs seek to create mixed-messaging via an Order that would direct the boards to do something other than what they—and every Ohio voter—have been instructed to do thus far. No one benefits from creating such voter confusion when an election is imminent. And, the only reason there would be so much confusion this close to a Presidential Election is because Plaintiffs waited entirely too long to ask for "emergency" relief. They are challenging a legal interpretation that has been in effect for at least 13 years. They have no excuse for waiting to bring their claims and have no right to upend existing processes and implement new ones that could threaten the Presidential Election in Ohio.

The Secretary of State believes in modernizing election processes, but not on the fly, and at the expense of the integrity of the entire 2020 Presidential Election. An email absentee ballot application process might someday be developed, but it would be irresponsible to try to implement it in the manner that Plaintiffs propose: immediately, and without any regard to election security. Plaintiffs' request for a preliminary injunction should be denied. In contrast to the lack of harm that will result from denying Plaintiffs' requested relief, the remedy sought by Plaintiffs could result in chaos. The purpose of a preliminary injunction is to preserve the status quo. Instead, Plaintiffs' want to throw the 13-year status quo into a tailspin.

Plaintiffs have otherwise failed to carry their burden as to any of the factors required to grant a preliminary injunction. First, their requested relief is barred by the doctrine of laches because Plaintiffs unreasonably delayed in bringing this suit. Plaintiffs challenge an interpretation and implementation of R.C. 3509.03 that has existed for 13 years. Thus, *even if* the plaintiffs were correct that the statute permitted voters to request absentee ballots by email, they are not entitled to an injunction requiring the State to accept such requests for the upcoming election. Second, and regardless of this inexcusable delay, Plaintiffs fail to prove any likelihood of success on the merits of their constitutional claims.

Finally, Plaintiffs' Amended Complaint merits dismissal pursuant to Civ.R. 12(B)(1) and 12(B)(6). Plaintiffs' Amended Complaint fails to allege sufficient facts to establish that they have standing to pursue their claims or that their Amended Complaint presents a justiciable controversy. Therefore, this Court lacks jurisdiction to hear and decide their claims.

II. FACTUAL BACKGROUND

A. Applying for an absentee ballot.

"Ohio is a national leader when it comes to early voting opportunities." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir.2016). And, as the Sixth Circuit recently recognized, "Ohio is generous when it comes to absentee voting." *Mays v. LaRose*, 951 F.3d 775, 779 (6th Cir.2020). Since 2006, all registered voters have had the option to vote by absentee ballot, for any reason or for no reason at all. R.C. 3509.02. Further, Ohioans may vote absentee by mail or in person. R.C. 3509.01(B), R.C. 3509.051.[1] This case implicates the former method only.

To vote by mail, voters must apply for an absentee ballot in writing. R.C. 3509.03(A) states that "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." The absentee window is long. For the upcoming 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). With limited exceptions not relevant here (*e.g.*, R.C. 3509.08), an absentee ballot application must be received by the board of elections by noon on the third day before the election. R.C. 3509.03(D).

Absentee ballot applications are widely available and easy to complete. Voters may download the application on the Secretary of State's website, print it, and mail it to the board of elections. *See* Form No. 11-A Absentee Ballot Application, available at https://www.sos.state.oh.us/globalassets/elections/forms/11-a_english.pdf (accessed Aug. 11,

[1] Ohio voters can vote early and in-person at their county board of elections during designated days and hours. R.C. 3509.01(B)(3), 3501.10(C). This year, in-person "early absentee" voting begins on October 6. The requirement to complete the absentee ballot application is the same for in-person absentee voting as mail-in absentee voting. R.C. 3509.03, 3509.051(A)(2).

2020). But voters need not have access to a printer to submit an application. Libraries and other places of business offer absentee ballot applications for free. Additionally, a voter may request an absentee ballot application 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). And, as described in more detail below, all registered voters will receive an absentee ballot application in the mail.

In the unlikely event that all the above methods fail, a voter can still mail an absentee ballot request to the board on any available piece of paper. *League of Women Voters*, 2020 U.S. Dist. LEXIS 91631, at *20. Indeed, the absentee ballot application submitted need not even be the Secretary of State's website. It does not need to be "in any particular form," but it 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).

Boards of elections review absentee ballot applications to ensure that the applications contain all the information required by statute. R.C. 3509.04(A). If a piece of information is missing, the board must notify the voter so that the voter may attempt to cure the application during the ballot-application window. *Id.* If all the statutory information is present, the board "shall deliver to the applicant . . . proper absent voter's ballots." R.C. 3509.04(B).

B. UOCAVA voters.

Both Ohio and federal law provide for a different process for those electors who are overseas or in the military. Under Chapter 3511 of the Ohio Revised Code and the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), military or overseas

voters are permitted to apply for absentee ballots in a different way than most absentee voters. Under federal law, UOCAVA voters may use a federally-prescribed form called the Federal Post Card Application ("FPCA") to both register to vote and apply for an absentee ballot. 52 U.S.C. § 20302(a)(4) ("Each State shall . . . use the official post card form . . . for simultaneous voter registration application and absentee ballot application."); 52 U.S.C. § 20301(b)(3); R.C. 3511.02(A).

Under Ohio law, UOCAVA voters have several other options. First, they 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). Second, they "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 use the FPCA. R.C. 3511.02(A)(2). And third, UOACAVA voters may request an absentee ballot application through specified family members. R.C. 3511.02(A)(3).

Just as with non-UOCAVA voters, boards of elections review UOCAVA ballot applications for the required information and notify UOCAVA voters of any deficiencies that might exist. R.C. 3511.04(A). If the application suffices, the board shall "mail, send by facsimile machine, send by electronic mail, send through internet delivery if such delivery is

offered by the board of elections or the secretary of state, or otherwise send" UOCAVA absentee ballots. R.C. 3511.04(B).

C. The absentee-ballot application process for the 2020 General Election is underway.

On July 17, 2020, Secretary LaRose issued Directive 2020-13 to the 88 county boards of elections. Pls' Exh. A, 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. Affidavit of Amanda Grandjean, ¶ 30, attached as Def. Exh. A.

As previous secretaries of state have done, Secretary LaRose will soon send an absentee ballot application packets to all 7.8 million of Ohio's registered voters. Grandjean Aff. ¶¶ 7, 16; *see also* R.C. 3501.05. These packets contain an absentee ballot application with instructions to return the application by mail or in-person. *Id.* ¶ 13, and Def. Exh. A-2. The packet also contains a pre-printed return envelope. Grandjean Aff. ¶ 18. These packets were sent to print the week of July 31. *Id.* ¶ 13. Secretary LaRose intends to mail the absentee application packets the last week of August with the goal of getting the applications in the hands of Ohio's 7.8 million registered voters around Labor Day. *Id.* ¶ 16.

D. Plaintiffs' Amended Complaint and Motion for Preliminary Injunction.

On July 31, 2020, Plaintiffs filed a Complaint and Motion for Preliminary Injunction. In their Motion for Preliminary Injunction Plaintiffs ask the Court to issue the following relief: (1) enjoin Secretary LaRose from enforcing an interpretation of R.C. 3509.03 that prohibits returning absentee ballot applications in electronic form; (2) order Secretary LaRose to include in the statewide mailing of absentee ballot applications instructions that voters can return their applications in electronic form; (3) order Secretary LaRose to direct the boards of elections that they must accept and process applications submitted electronically; and (4) order Secretary LaRose to communicate the Court's judgment to the county boards of elections. Mot. for PI, 14.

On August 4, 2020, Plaintiffs' filed an Amended Complaint that seeks declaratory relief and injunctive relief. Plaintiffs seek a declaration that R.C. 3509.03 allows voters to return absentee voter applications in electronic form, such as email or facsimile. Am. Compl. ¶¶56-60. Plaintiffs also claim that the Secretary's interpretation of R.C. 3509.03 violates Ohio Constitution Article I, Sections 2 and 16. *Id.* ¶¶62-73.

III. PLAINTIFFS HAVE NOT DEMOSTRATED ENTITLEMENT TO A PRELIMINARY INJUNCTION.

To prove entitlement to a preliminary injunction, Plaintiffs bear the burden of showing (1) a substantial likelihood of success on the merits; (2) irreparable harm if the injunction is not granted; (3) third parties will not be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App. 3d 786, 790, 673 N.E.2d 182 (10th Dist. 1996). And, Plaintiffs must make this showing by clear and convincing evidence for each factor. *Id.*

"[N]o one of the four preliminary injunction factors is dispositive" when considering whether to grant injunctive relief. *Intralot, Inc. v. Blair*, 10th Dist. Franklin No. 17AP-444, 2018-Ohio-3873, ¶ 31, citing *Escape Enters., Ltd., v. Gosh Enters., Inc.*, 10th Dist. No. 04AP-834, 2005-Ohio-2637, ¶ 48. Instead, a court "must focus primarily on weighing and balancing the equities between the parties." *Franks v. Rankin*, 10th Dist. Franklin No. 11AP-962, 2012-Ohio-1920, ¶ 28, citing *Franklin Cty. Dist. Bd. of Health v. Paxson*, 152 Ohio App. 3d 193, 2003 Ohio 1331, ¶ 25, 787 N.E.2d 59 (10th Dist.).

Though Plaintiffs fall short of satisfying *any* of the four prongs, this Court should give considerable weight to the harm that will be caused it if the injunction is granted. Plaintiffs offer no plan for how to implement the relief that they seek. They either fail to recognize, or ignore, the fact that they are effectively seeking to open up 88 portals to each county's voter registration systems. And, if the floodgates open, they offer no evidence that counties will be equipped, either from a network capacity, staffing, or cyber-security perspective, to handle them. Simply put, their request is incredibly short-sighted. It fails to account for the significant harm that it can, and inevitably will, cause.

A. The balance of harms weighs heavily against granting the requested injunctive relief, and the requested injunctive relief would harm the public interest.

Plaintiffs ask this Court to do what courts have been resoundingly unwilling to do and have cautioned against: change an election procedure when the election is imminent. *See, e.g., Ohioans for Raising the Wage, et al. v. LaRose,* Franklin County CP Case No. 20 CV 2381 at 9 (Young, J.), citing *Purcell,* 549 U.S. 1, 4-5 (2006) (*per curiam*) (denying preliminary injunction because, although plaintiffs had established third parties would not be unjustifiably harmed by an injunction, "the Court must be mindful that court orders impacting

elections may result in voter confusion [,] and the closer an election draws, the more that risk will increase"); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020) (citing *Purcell* in staying district court's preliminary injunction); *Estill v. Cool,* 295 F. App'x 25, 27 (6th Cir. 2008) (upholding denial of preliminary injunction where ballot printing and distribution was scheduled to begin the day after the Sixth Circuit issued its opinion, 19 days after the preliminary injunction motion was denied); *SEIU Local 1 v. Husted,* 698 F.3d, 341, 345 (6th Cir. 2012), citing *Purcell,* 549 U.S. at 4-5 ("As a general rule, last-minute injunctions changing election procedures are strongly disfavored."). "Court orders affecting elections especially conflicting court 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." *Purcell,* 549 U.S. at 4-5; *see also Thompson*, 959 F.3d at 813.

Citing that risk, in *League of Women Voters v. LaRose*, the Court rejected the plaintiffs' request to preliminarily enjoin H.B. 197, the bill passed in response to the disruption to Ohio's March 2020 primary caused by COVID-19. 2020 U.S. Dist. LEXIS 91631 at *31. The court noted that the "public has an interest in a free and fair election [and in] avoiding further voter confusion." *Id.* Even amidst the COVID-19 outbreak, the court concluded "because further changes to the election procedure could cause significant additional voter confusion, the court finds that the public interest factor weighs against granting Plaintiffs their requested relief." *Id.*

Here, Plaintiffs are not seeking to preserve the status quo, they want to disrupt it. The is not the purpose of a preliminary injunction. *Ohioans for Raising the Wave, et al. v. LaRose,* 20 CV 2381 at 11 (Young, J.), quoting, *Obringer v. Wheeling, & Lake Erie Ry.,* 3d Dist. Crawford No. 3-09-08, 2010-Ohio-601, ¶ 19. And when, as here, the undisputed evidence is

that disrupting the status quo can, and will, severely impact the security, administration, and integrity of the 2020 General Election, the preliminary injunction should be denied.

1. Plaintiffs' relief creates significant cybersecurity risks that will jeopardize the 2020 General Election.

Plaintiffs seek to immediately implement a never-before-used election process that pushes the State and its 88 boards of elections into uncharted—and potentially dangerous—waters. Plaintiffs want to rush an electronic system for returning absentee ballot applications before any protection can be built. Worse yet, this rush is caused by Plaintiffs' own delay. But they offer no evidence as to whether and how these waters can be safely navigated, immediately or ever. And, while it might theoretically be possible to eventually implement an electronic process for returning absentee ballot applications, the undisputed evidence is that it cannot be done safely in time for the 2020 General Election.[2]

The Sixth Circuit recently rejected a similar request to re-write Ohio law and implement a new, un-tested court-ordered, election procedure for collecting electronic signatures on initiative petitions. *Thompson*, 959 F.3d 804. In *Thompson,* the court refused to "'usurp[] a State's legislative authority by rewriting it statutes' to create new law." *Id.* at 812, citing *Esshaki v. Whitmer,* 6th Cir. No. 20-1336, 2020 U.S. App. LEXIS 14376, *2 (May 5, 2020). The court further stated that "the decision to drastically alter Ohio's election procedures must rest with the Secretary of State and other elected officials, not the court." *Id.*

[2] Representatives for Plaintiff ODP have even cautioned against the rush to implement new, untested, elections procedures: "There was a rush to modernize after Bush v. Gore, but in that rush to modernize there clearly wasn't enough protection built up, and all of a sudden you have machines that are tied to the Internet and you don't have paper ballots to back everything up or you don't have people voting originally on paper ballots, it's clear what experts have been saying for years: 'This is not secure.'" Jack McCordick, *An Interview with David Pepper, Ohio Democratic Party Chairman*, (Apr. 19, 2018), available at https://thepolitic.org/an-interview-with-david-pepper-ohio-democratic-party-chairman/ (accessed Aug. 6, 2020).

In so holding the court stated:

> These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into uncharted waters. It may well be that the new methods for gathering signatures and verifying them proposed by Plaintiffs (using electronic signatures gathered online by third parties and identified by social security number) will prove workable. But they may also pose serious security concerns and other, as yet, unrealized problems.

Id. This is equally true here: the security concerns are great, and the problems cannot possibly be realized on Plaintiffs' timeframe, nor should they have to be.

Developing a safe procedure for returning absentee ballot applications by email or fax that ensures that applications can actually be received by the boards (and do not end up in a spam filter or blocked), depends on the security measures implemented by each of Ohio's 88 boards of election. Plaintiffs offer no evidence to what those measures might be, nor do they acknowledge the potentially disastrous consequences of failing to implement them in advance. Here are just a few of the potential consequences to Plaintiffs' requested relief:

Ransomware attack: Ransomware is a virus that is sent (often via email or in an attachment to an email) for the purpose of infecting a computer or a network. Affidavit of Spencer Wood, ¶ 3-h, attached as Def. Exh. B. To avoid a Ransomware attack, boards of elections are trained not to click on emails or attachments they do not recognize. *Id.* ¶ 5-e, f; Affidavit of Sherry L. Poland, ¶ 15, attached as Def. Exh. C; Affidavit of Karla Herron, ¶ 15, attached as Def. Exh. D. Even with that training, devastating attacks have occurred. For example, on October 31, 2016—just days before the last Presidential election—the Henry County Board of Elections fell victim to a Ransomware attack that was likely the result of a Board employee clicking on a phishing email. Wood Aff. ¶ 4-b. Its entire county voter registration system was compromised. *Id.*

In another example, on June 23, 2019, the Fayette County Board of Elections was also hit with a Ransomware cyber-attack. *Id.* ¶ 4-c. As a result, its entire voter registration system was completely unusable and ultimately had to be re-built. *Id.*

If a board's voter registration system is unusable, the board cannot process any absentee ballot applications *or* ballots. If this were to happen again through an infected absentee ballot application that is emailed to any (or multiple? or all?) board on October 31, 2020, Election Day voting might not be possible *at all* at that board. Herron Aff. ¶ 22.

What's worse is that at this point there is no way to adequately train board staff regarding how to discern what email purporting to be an absentee ballot they should or should not open in the event it contains Ransomware. Wood Aff. ¶ 6-f. And even if there were time for such training, some boards would not have sufficient staff or time to check the security of each email received. Poland Aff. ¶¶ 16-17; Herron Aff. ¶¶ 18-25. Regardless, boards would likely be constitutionally required to indiscriminately click on every email and attachment received to ensure all applications are processed. Every day would be a new opportunity for bad actors to compromise the 2020 General Election in Ohio.

Undeterred, Plaintiffs claim that just because UOCAVA voters can email ballot applications (which is true), *all* voters should be able to do the same. This contention is absurd. Essentially, Plaintiffs contend that one recognized vulnerability (UOCAVA by email), for which boards have implemented precautions (Poland Aff. ¶ 8; Herron Aff. ¶ 20), justifies creating an entirely new vulnerability for which there are *no* precautions in place. Said differently: it could be bad. So, let's make it worse. Regardless, the number of UOCAVA versus non-UOCAVA absentee ballot applications that a board receives is an apples-to-orange comparison. Herron Aff. ¶ 15. Boards have the capacity to implement precautions for emailed

UOCAVA absentee applications and ballots, but could easily become overwhelmed and unable to do so with other applications.

Network Overload, intentional or otherwise: There is no shortage of evidence of what happens when a state attempts to quickly allow emailed absentee ballot applications. In November 2012, after the State was battered by Hurricane Sandy, the New Jersey Lt. Governor directed county election officials to allow electronic voting by email or fax, and they tried to do so. *See* https://www.nj.com/politics/2012/11/election_2012_chaos_at_county.html , last accessed August 10, 2020. Voters were permitted to email ballot application requests to the county and once it was approved, receive and cast the ballot by email or fax. *Id.* The process was described as "anything but efficient." *Id.* Fax machines jammed, election officials received more requests than they could process, and email in-boxes became clogged. *Id.* The counties became "swamped with requests". *Id.* In a report discussing emergency preparedness in elections, even Election Protection, an election-protection group, listed this well-intentioned effort under the label "What Did Not Work." *See* "Excepting the Unexpected – Election Planning for Emergencies," pp. 14-15, attached as Def. Exh. E. In bestowing that label, the report detailed email and fax networks that were so overloaded that absentee ballot requests were either rejected or never delivered. *Id.* Simply put, voters did not get ballots. Thus, the report concluded that "the state lacked the resources and infrastructure necessary for this option to function smoothly." *Id.* at 8.

Ohio's boards of election similarly lack the resources and infrastructure necessary to run smoothly an untested process for emailing absentee ballot requests applications. Wood Aff. ¶¶ 6-g, 6-k: Poland Aff. ¶¶ 17-18; Herron Aff. ¶¶ 18, 21. Overloaded networks could

crash, either as the result of a legitimate volume of requests, or as a result of a flood designed to overload (and crash) a board's network. Wood Aff. ¶ 6-h. Applications might not be received, and voters will not get ballots.

Again, no one, particularly Secretary LaRose, is saying that election processes cannot and should not be modernized. But that modernization cannot be rushed at the expense of election security and integrity. New Jersey's experience should serve as a cautionary tale. Right now, Plaintiffs' requested relief would be a gift to anyone who wished to interfere with the 2020 General Election in Ohio. It should be denied.

2. The public interest is not served by imposing new burdens on boards of elections.

Plaintiffs similarly ignore the burden that they seek to place on Ohio's boards of elections, at the last-possible minute. Administering a General Election—much less this year—is no small task, and it is indisputable that "the list of responsibilities of the board of elections is long, and the staff and volunteers who prepare for and administer elections undoubtedly have much to accomplish during the final few days before the election." *Mays*, 951 F.3d at 787, (listing duties of the board of elections leading up to the elections) quoting, *Obama for America,* 297 F.3d 423, 432-33 (6th Cir. 2012). Ohio's 88 boards have planned to staff and administer an election with known responsibilities. Adding an entirely new absentee application process for which there is no plan or dedicated resources imposes a significant administrative burden on boards. Poland Aff. ¶¶ 13-18; Herron Aff. ¶¶ 17-21. The State's interest in avoiding that burden, especially at this crucial point in the election cycle, is well-settled. *See, e.g., League of Women Voters*, 2020 U.S. Dist. LEXIS 91631. at *27 ("[T]he State has a strong interest in minimizing disorder and easing the burdens on the county boards of elections.").

Currently, 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. Wood Aff. ¶ 6-g, 6-k; Poland Aff. ¶ 13; Herron Aff. ¶ 17. With COVID-19, boards are already struggling to find much-needed poll workers to staff Election Day voting. Herron Aff. ¶ 18. Requiring boards to divert attention away from hiring poll workers in order to implement and staff an entirely new process could frustrate those efforts. *Id.* But even if there was a large supply of potential board staff available (and there is not), there is no time—or curriculum—to train them to distinguish between a phishing email that could bring down a board's network, versus one that contains an absentee ballot application. Wood Aff. ¶ 6-g, 6-k. There is no plan for how a board would process a large "dropbox" of hundreds, or even thousands, of absentee ballot applications received at the last minute on October 31, 2020—all while boards must still complete the countless other tasks required of them the weekend before the election. Poland Aff. ¶ 12; Herron Aff. ¶¶ 16, 20. It is questionable whether it could.

Yet Plaintiffs are demanding that Ohio's boards be required to develop and implement these plans immediately, and on the fly. And, they are demanding that it be done at the most disruptive time—while boards are in the middle of administering a General Election. Boards should not be forced to shoulder that burden. Ohio law has *always* been interpreted to only allow absentee ballot applications by mail or in-person. The public interest is not served by permitting Plaintiffs to wait until the last minute to challenge that interpretation and upend the Boards' processes and planning. Plaintiffs can cite no authority to support the notion that that the status quo must be changed so close to an election, and their request to do so should be denied.

3. Plaintiffs' requested relief risks voter confusion.

Implementing a process for returning absentee ballot applications by email or fax at this late stage in the election cycle will also inevitably result in voter confusion. Ohio's absentee ballot request process is well-underway. Voters have been able to submit requests since January 1, 2020. R.C. 3509.03(D). At this very moment, Secretary LaRose is preparing to mail absentee ballot application packets to all of Ohio's 7.8 million registered voters. Grandjean Aff. ¶¶ 13-16. The mailing contains specific instructions directing voters to return the application by mail, or by in-person to the board of elections. *Id.* ¶ 13, and Def. Exh. A-2. The application makes no mention of a process for email or fax return, and it cannot be changed. *Id.*

Plaintiffs' request that Secretary LaRose be ordered to include "viable electronic forms of transmission" (an un-defined term) instructions in his absentee mailing completely fails to appreciate this fact. Mot. for PI, 14. So too does their assertion that there is time to update the mailing because they have not yet been "sent". *Id.* at 12. The issue is not that they have not yet been sent; the issue is that they have gone to print.[3] Creating a separate insert for the mailing would not fix the situation, as the insert would conflict with the instructions on the application mailing. The public interest is never served by mixed-messaging in elections. Regardless, there is likely insufficient time—or money—to print 7.8 million additional inserts. Grandjean Aff. ¶¶ 18, 22, 24-27.

But the Secretary's mailing is not the only issue. Countless other resources and websites instruct voters to return absentee ballot applications only in-person or by mail. This includes, but is not limited to, the Secretary of State's website

[3] Notably, Plaintiffs have not asked for a temporary restraining order to halt the printing of this mailing so that it can be changed.

(https://www.ohiosos.gov/elections/voters/absentee-voting/); the ACLU's website (https://www.acluohio.org/vote-center/how-to-vote-in-ohio); the League of Women Voter's website (https://www.lwvohio.org/register-to-vote); WOSU's website (https://radio.wosu.org/post/ohio-voting-guide-what-know-about-2020-election); the Columbus Navigator website (https://www.columbusnavigator.com/absentee-voting-ohio/); and Vote.org's website (https://www.vote.org/absentee-ballot/ohio/) (each last visited August 8, 2020). If absentee ballot applications instructions were to change and just one of those websites (or any of the countless others not mentioned here) did not update accordingly, voters will get conflicting instructions on how to return absentee ballot applications. The public interest is not served by creating voter confusion this close to the election.

Mass email notification of a change in instructions would not solve, and would likely compound, the problem. First, the boards do not have every registered voters' email address. Herron Aff. ¶ 10. If boards try to email only those for whom they have email addresses, to the exclusion of the rest of the registered voters, it would create an equal protection problem. Second, what about bad actors? Consider what would happen if this Court orders Secretary LaRose to publicize retuning absentee ballot applications by email or fax. On the heels of such publicity, what would stop a bad actor from sending a mass email to registered voters (including ODP's own members) directing them to send absentee ballot applications to a phony—but legitimate-looking—website and email address? Simply put, Plaintiffs' requested relief opens a very easy way to steal applications.

Few government interests, if any, are more important than a State's compelling interest in protecting the integrity of the election. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *cf. also Crawford v. Marion Cnty. Election Bd.*, 553 U.S.

181, 194-97 (2008). "[C]aution" in granting injunctions is "especially" warranted "in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important public works or to control the action of another department or government." *Country Club v. Jefferson Metropolitan*, 5 Ohio App.3d 77, 80, 449 N.E.2d 460, 464 (7th Dist. 1981) (quotation omitted). This is especially true here, where the requested relief would inevitably lead to additional problems, and litigation.

> [R]ewriting a state's election procedures or moving deadlines rarely ends with one court order. Moving one piece on the game board invariably leads to additional moves. This is exactly why federal courts are not supposed to change state election rules as elections approach. [citations omitted]. Here, the November election itself may be months away but important, interim deadlines that affect Plaintiffs, other ballot initiative proponents, and the State are imminent. And moving or changing a deadline or procedure now will have inevitable, other consequences.

Thompson, 959 F.3d at 813. Simply put, implementing Plaintiffs' relief is not as easy as they would make it seem, and an order doing so would not be the end of it.

One could easily imagine one, or many, applications bouncing back to a sender, being blocked by a firewall, getting stuck in a spam filter, or being stolen. Similarly-situated requestors—those who email applications—would be treated differently in the worst possible way: not all of them would get an absentee ballot. These problems might not be realized until after the absentee ballot application deadline has passed and voters could be completely disenfranchised. Litigation would inevitably ensue. The public interest is never served by creating even the potential for such chaos this close to an election. Plaintiffs' attempt to do so must be denied.

Notably, Plaintiffs cite to no case law or evidence to support their position that third parties will not be harmed and the public interest would be served, if Ohio's election

processes were to be upended at this late stage. Mot. for PI, 12-13. They similarly fail to recognize, much less distinguish, the weight of authority to the contrary. Rather than carry their burden of establishing that neither third parties or the public interest will be harmed by a preliminary injunction, Plaintiffs simply ask this Court to conclude that 'all will be fine.' The undisputed evidence leads to one conclusion: all will not be fine, and Plaintiffs have failed to prove otherwise.

B. Plaintiffs will not suffer any irreparable harm.

Plaintiffs cannot show that, without the injunction, they will suffer actual and imminent irreparable injury. Contrary to Plaintiffs' contention, irreparable harm is not presumed. Unlike in *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012), and *Elrod v. Burns*, 427 U.S. 347 (1976), where the court found that a constitutional right was being threatened or impaired, no such threat or impairment is present here. Irreparable harm is not presumed and must be proved. *Levine v. Beckman*, 48 Ohio App.3d 24, 27, 548 N.E.2d 267 (10th Dist. 1988). And Plaintiffs' "[s]peculation or unsubstantiated fears about what may happen in the future cannot provide the basis for a preliminary injunction." *In re Rare Coin Galleries, Inc*, 862 F.2d 896, 902 (1st Cir. 1988); *see also Aero Fulfillment Servs., Inc. v. Tartar*, 1st Dist. Hamilton No. C-060071, 2007-Ohio-174, ¶26. Here, Plaintiffs' claimed harm requires this Court to layer speculation on top of speculation. Separate and apart from any concrete harm or injury, Plaintiffs are unable to succeed on the merits of their claims under the equal protection or due process clauses of Ohio's Constitution. Accordingly, Plaintiffs fail to show *any* harm that would justify the issuance of preliminary injunctive relief.

C. Plaintiffs' requested relief is barred by the equitable doctrine of laches, *without regard* to their success on the merits.

In elections cases such as this, plaintiffs are required to act with "utmost diligence."

Blankenship v. Blackwell, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 19. And, the burden is on the plaintiff to show that when seeking extraordinary relief by way of preliminary injunction, they acted with the requisite diligence and promptness. *Smith v. Scioto Cty. Bd. of Elections*, 123 Ohio St.3d 467, 2009-Ohio-5866, 918 N.E.2d 131, ¶ 11. Courts regularly apply laches, the equitable doctrine requiring parties not to delay and sit on their rights, with particular force in election cases. *State ex rel. Fuller v. Medina Cty. Bd. of Elections*, 97 Ohio St.3d 221, 2002-Ohio-5922, 778 N.E.2d 37, ¶ 7 (laches may bar relief in an election matter if the party seeking relief has failed to act with the "utmost diligence").

The elements of a laches defense 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. Carrier v. Hilliard City Council*, 144 Ohio St.3d 592, 2016-Ohio-155, 45 N.E.3d 1006, ¶ 8. All four elements of laches are present here. Because Plaintiffs failed to act with any diligence and promptness in bringing their action, their motion for preliminary injunction is untimely and should be denied.

1. Plaintiffs' delay is unreasonable.

Plaintiffs' delay in seeking an "emergency" preliminary injunction is wholly unreasonable. They are challenging a statutory interpretation that informs an integral part of the absentee voting process that has existed since at least 2007. Grandjean Aff. ¶ 30. Plaintiffs attach to their Motion for Preliminary Injunction Directive 2020-13, which was issued on July 17, 2020. Pls' Exh. A, Directive 2020-13. This Directive instructs boards of elections that pursuant to R.C. 3509.03, voters must submit absentee ballot applications in-person to the board, or by mail after affixing a stamp. *Id.* But a directive with these same instructions has

been issued since 2007, by the last three secretaries of state. Grandjean Aff. ¶ 30. Thus, Secretary LaRose's "interpretation" of R.C. 3509.03 as requiring return of absentee applications by mail or in-person is not new. Rather, this same interpretation has been conveyed to boards of elections—and implemented in practice—for *13 years*.

Plaintiffs also attach Directive 2019-28. Pls' Exh. B. This Directive reiterates that pursuant to R.C. 3509.03, absentee ballot applications are to be returned by mail or in-person. *Id.* This Directive was issued on December 18, 2019. Grandjean Aff. ¶ 31. And, before the Elections Manual was made public, Secretary LaRose allowed for a period of public comment, from November 18, 2020, to December 2, 2020. *Id.* Thus, Plaintiffs' own evidence establishes that Secretary LaRose's interpretation of R.C. 3509.03 has been public for at least *seven months*. A delay that ranges from 13 years to seven months constitutes a complete failure to act with "utmost diligence."

Yet, even if this Court concludes that Directive 2020-13 is somehow the first time the current interpretation of R.C. 3509.03 has been implemented or made public, this Directive was issued on July 17, 2020. Pls' Exh. A. Plaintiffs waited *two full weeks* to seek injunctive relief after the Directive was issued. Ohio courts have found that similar—and even shorter—delays are unreasonable and warrant dismissal based on laches. *See, e.g., State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 88 Ohio St.3d 187, 189, 2000-Ohio-295, 724 N.E.2d 775 ("a delay as brief as nine days can preclude our consideration of the merits of an expedited election case"); *Paschal v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St. 3d 141, 142, 656 N.E.2d 1276 (1995) (nine-day delay in bringing elections action justified denying a writ); *see also Lyons v. City of Columbus*, S.D.Ohio 2:20-cv-3070, 2020 U.S. Dist. LEXIS 108230 (June 19, 2020) (denying last-minute injunction changing election procedure where the

plaintiff failed to act with the utmost diligence). Plaintiffs' delay here—at worst 13 years, at best two weeks—is unreasonable.

2. Plaintiffs give no excuse for their delay, nor can they claim lack of knowledge of the alleged wrong.

Plaintiffs provide no excuse justifying their failure to act diligently. Plaintiffs have been on constructive notice of the interpretation and implementation of R.C. 3509.03 for over a decade. Even if this issue was not "ripe" until Secretary LaRose issued Directive 2020-13 on July 17, Plaintiffs continued to sit on their claims for two weeks. And again, Plaintiffs give no excuse for this delay.

Contrary to Plaintiffs' inference, at least six directives, from three secretaries of state (of both political parties), have provided the same instructions to boards: absentee-ballot applications are to be returned by mail or in-person. Grandjean Aff. ¶ 30. Plaintiff ODP, one of Ohio's two legally recognized major political parties, which devotes "significant financial resources to its 'get out the vote' efforts" and "a concentrated effort to encourage Ohio voters to vote by absentee ballot," (Mot. for PI, 2, fn. 1) cannot, with any credibility, claim to be in the dark on an integral step of the absentee-voting process that has existed since 2007.[4] Plaintiffs cannot claim lack of knowledge, and provide no excuse for their delay in bringing this request for injunctive relief.

3. Plaintiffs' delay will result in substantial prejudice to Secretary LaRose, Ohio's boards of elections, and to Ohio voters.

The prejudice that will result from Plaintiffs' delay in bringing this suit is significant. Plaintiffs could have sought injunctive relief any time since as early as 2007. Plaintiffs' own

[4] Prior to the spring primary, Plaintiff ODP instructed voters that return of absentee ballot applications was not permitted electronically. *See* https://ohiodems.org/vote/ (accessed Aug. 9, 2020).

evidence establishes that Plaintiff could have sought such relief seven months ago, or over two weeks ago. Instead, Plaintiffs waited until the wheels of the 2020 General Election are already moving. To put the brakes on now will result in severe prejudice to Secretary LaRose, the 88 county boards of elections, and to Ohio voters.

As previously explained, 7.8 million absentee ballot application packets are being printed. Grandjean Aff. ¶ 30. The applications' instructions state that they must be returned by mail, or in-delivered to the county board of elections. *Id.* ¶ 13, and Def. Exh. A-2. To reverse course on those instructions will cause extreme prejudice to Secretary LaRose and the 88 boards of elections, as well as to voters. As many courts have recognized, court interference in an election—particularly this close to an election—risks voter confusion and board error. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Adding to this risk of board error is imposing an entirely new absentee application process upon the boards, a process for which there is no plan or dedicated resources. Poland Aff. ¶¶ 13-18; Herron Aff. ¶¶ 17-21.

Plaintiffs' delay is even more inexcusable when the risks associated with blindly implementing a fax or email absentee ballot application process are considered. Because of Plaintiffs' delay in seeking their relief, the boards will have no choice but to cross their fingers and hope for the best every time they click on an email. The result could be catastrophic: perhaps even more than most years, as the election this year is likely to be bitterly contested and some number voters on both sides are likely to question to accuracy of the results. Throwing an untried and unsecure process into the mix will further undermine confidence in the results of the election—an election *for the United States President*. The last thing this country needs right now, after four years spent investigating possible election

interference, is an unsecure process in a battleground state that causes significant percentages of the population to doubt the legitimacy of the election. But that is exactly what Plaintiffs are asking for.

Finally, courts have routinely found prejudice when the filing party's delay *causes* a case to become expedited. *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, 836 N.E.2d 536, ¶18 ("prejudice in expedited election cases occurs because [the] relators' delay prejudices [the] respondents by making the case an expedited election case . . ., which restricts [the] respondents' time to prepare and defend against [the] relator's claims"); *Blankenship*, 103 Ohio St.3d 567, ¶ 27 ("[i]f relators had acted more diligently, the Secretary of State would have had more time to defend against relators' claims . . .[i]nstead, the Secretary of State was forced to defend" under an accelerated briefing schedule). Here, Plaintiffs' "emergency" is clearly one of their own making. They are challenging a statutory interpretation that has existed since at least 2007 and could have filed this action on any day since that time. Plaintiffs' unreasonable delay has unnecessarily forced Secretary LaRose to defend a 13-year-old process in an expedited time-frame, prejudice that could have been avoided had they acted with the requisite diligence and promptness.

Plaintiffs' decision not to bring this matter as an expedited elections case under S.Ct.Prac.R. 12.08 will prolong the delay here. In elections cases brought within 90 days of an election, plaintiffs can file directly into the Supreme Court of Ohio, obtain an automatic expedited briefing schedule, and are guaranteed expedited finality. S.Ct.Prac.R. 12.08. Had Plaintiffs filed this suit on August 3 instead of July 31, they could have availed themselves of this expedited procedure. Instead, Plaintiffs strategically chose to file in the Franklin County Court of Common Pleas. Any finality to this litigation is far in the future. Bringing this matter

directly to the Supreme Court, the final arbiter, as Plaintiffs could have done, would have been judicially efficient and preserved the enormous resources expended to litigate this matter before three forums as a result of almost-certain appeals, instead of one.

There can be no doubt that Plaintiffs slept on their presumed rights. Plaintiffs waited *13 years* since the first directive instructing boards on return of absentee ballot applications to file their lawsuit. During those 13 years, three different secretaries of states from both political parties have advanced the same interpretation of R.C. 3509.03 and implemented the same process by which voters can return absentee ballot applications. Plaintiffs offer no reason for their delay. (COVID-19 is no excuse; by March at the latest, everyone was or should have been aware that the pandemic might increase the desire to vote absentee.) Yet, the prejudice that will result from Plaintiffs' delay is substantial.

Plaintiffs inexcusably waited too long to seek relief from this Court. Laches bars their motion for a preliminary injunction and their request for such extraordinary injunctive relief should be denied.

D. Even assuming due diligence, Plaintiffs have no likelihood of success on the merits of their constitutional claims.

Even if this Court assumes that Plaintiffs acted with the extreme due diligence and promptness required in elections matters (and they did not), Plaintiffs' untimely attack on R.C. 3509.03 lacks merit.

1. Plaintiffs' interpretation of R.C. 3509.03 must be rejected.

Plaintiffs ask this Court to interpret R.C. 3509.03 in a way that allows voters—for the first time ever—to return absentee ballot applications by email or fax. This is an interpretation

of R.C. 3509.03 that no court has ever recognized.[5] Because elections are governed by statute, not common law, courts discerning elections statutes should give particular weight to legislative intent. Indeed, the "paramount concern in construing a statute is legislative intent." *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 22.

When the "meaning of a statute is unambiguous and definite, then it must be applied as written and no further interpretation is appropriate." *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 584, 651 N.E.2d 995 (1995). But if plain meaning does not suffice, Ohio courts regularly consider correlative provisions in the Revised Code, together with any administrative construction to arrive at a sensible meaning. R.C. 1.49(D), (F).

Here, the only reasonable comparable to R.C. 3509.03 are R.C. 3511.02 and R.C. 3511.021(A), the only other statutes that address return of absentee ballot applications. UOCAVA voters are permitted to "apply electronically" for an absentee ballot application, and can so apply "to the secretary of state or to the board of elections of the county in which the person's voting residence is located." R.C. 35011.021(A). R.C. 3511.02(A)(1) further provides that UOCAVA voters can "personally deliver" their absentee ballot application, or "may mail it, send it by facsimile machine, send it by electronic mail," or "send it through internet delivery if such delivery is offered by the board of elections or the secretary of state." These statutory provisions are *unequivocal* in offering UOCAVA voters the option to return

---

[5] Numerous state and federal courts have addressed various aspects of R.C. 3509.03 and no court has ever found that anything other than mail and in-person delivery of applications is permitted. *See, e.g., League of Women Voters*, 2020 U.S. Dist. LEXIS 91631, fn. 8 (rejecting plaintiffs' argument that R.C. 3509.03 disproportionately burdens voters who do not have access to printers, envelopes or stamps, but noting "that the voter is responsible for postage required to mail-in the absentee ballot application"); *NEOCH v. Husted*, S.D.Ohio No. 2:06-CV-896, 2016 U.S. Dist. LEXIS 74121, *32-33 (June 7, 2016) ("Before mailing the form [absentee-ballot application] back to the Board, the voter must sign and include in the envelope an affirmation declaring that the voter is eligible to vote. . .").

absentee ballot applications by email or fax.

Notably, when the General Assembly implemented the current process for UOCAVA voters (by implementing the federal Military and Overseas Voter Empowerment Act ("MOVE Act") in HB 224, it also amended R.C. 3509.03. *See* Def. Exh. F. In HB 224, the General Assembly specified methods of delivery of the written absentee application to include electronic means of delivery for UOCAVA voters only. *Id.* But at the same time, the General Assembly did *not* amend the analogous section of R.C. 3509.03 to specify that electronic methods of delivery are permitted for non-overseas voters. Indeed, the General Assembly has amended R.C. 3509.03 eight times since 2005.[6] In 2013, it added current subsection (E), which provides, "A board of elections that mails an absent voter's ballot application to an elector under this section shall not prepay the return postage for that application." 2013 Am.Sub.S.B. 205. Thus, the General Assembly amended the statute to provide specific instructions on the *mailing* of absentee ballot applications.

From this statutory history it is clear that when the General Assembly has intended to permit email or fax of absentee ballot applications, it has done so with specific, unambiguous language. Had the General Assembly intended that voters could email or fax absentee ballot applications, it could have easily done so, as it did in R.C. 3511.02(A) and R.C. 3511.021(A). But the General Assembly did not, and the Court cannot judicially legislate to add this nonexistent requirement. *State ex rel. Columbia Res. Ltd. v. Lorain Cty. Bd. of Elections*, 111 Ohio St.3d 167, 2006-Ohio-5019, 855 N.E.2d 815, ¶ 32 (court cannot "add a requirement that does not exist in the statute").

---

[6] 2015 Am.Sub.H.B. No. 359; 2013 Am.Sub.S.B. No. 205; 2013 Am.Sub.S.B. No. 47; 2011 Am.Sub.H.B. No. 224; 2009 Am.Sub.H.B. No. 48; 2008 Am.Sub.H.B. No. 562, 2005 Am.Sub.H.B. No. 3; 2005 Am.Sub.H.B. 234.

The administrative construction of the statute also weighs against allowing return of absentee ballot applications by email or fax. R.C. 1.49(F) (noting that courts may look to "[t]he administrative construction of the statute" in statutory construction). The longstanding administrative practice here is clearly to permit return of absentee ballot applications by mail or in-person, as this has been the practice since 2007. Grandjean Aff. ¶ 30.

Moreover, the interpretation of Secretary LaRose as the State's chief election officer (R.C. 3501.04) is entitled to deference. Secretary LaRose may issue directives to the boards of elections "as to the proper methods of conducting elections" and to "[p]repare rules and instructions for the conduct of elections." R.C. 3501.05(B)-(C). In this capacity, Secretary LaRose retains broad power to interpret election laws, including R.C. 3509.03. Ohio courts have repeatedly held that the Secretary of State's determination of such matters is entitled to deference by the courts: "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." *Herman*, 72 Ohio St.3d at 586. Here, at a minimum, the foregoing establishes that Secretary LaRose has adopted a reasonable interpretation of R.C. 3509.03. Consequently, courts, including this one, have a duty to defer to the Secretary's reasonable interpretation. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 57; *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 2005-Ohio-5795, 841 N.E.2d 766, ¶ 13.

Ultimately, it is the sole province of the General Assembly to weigh the various interests and policies involved to determine whether permitting voters to return absentee ballot applications by email or fax is appropriate and can be done safely. Until the General Assembly so acts, courts have no authority to legislate a duty that the General Assembly has

not yet recognized. *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757, ¶ 40, quoting *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 14 ("'The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.'").

2. Plaintiffs fail to state any cognizable claims under Article I, Sections 2 and 16 of the Ohio Constitution.

Plaintiffs' claim that Ohio's process governing the return of absentee ballot applications violates the equal protection and due processes clauses of Ohio Constitution Article I, Sections 2 and 16 must fail, as neither is a self-executing source of protection. And, 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. Here, Plaintiffs seek relief pursuant to Ohio's Declaratory Judgment Act, which allows Ohio courts to declare the rights of parties in various contexts. *See, e.g.*, R.C. 2721.02(A) ("[C]ourts of record may declare rights, status, and other legal relations…"); R.C. 2721.03. But, unlike 42 U.S.C. §1983 the Act itself does not actually create any substantive rights and Plaintiffs must identify a source of substantive rights that is allegedly being violated. *See Scott v. Houk*, 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E. 835, ¶ 20 (O'Connor, J., concurring) ("In the absence of demonstrating an established right, a declaratory judgment does not lie under R.C. 2721.02(A)."); *cf also Sessions v. Skelton*, 163 Ohio St. 409, 415, 127 N.E.2d 378 (1955) ("A declaratory judgment action creates no new or substantive rights, it is purely a procedural remedy…"). Plaintiffs failed to do so here.

As a matter of law, Plaintiffs have failed to state a claim under either Ohio Constitution Article I, Sections 2 or 16, because neither is a source of substantive rights. "'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 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.

This interpretation makes sense. The very purpose of a self-executing provision is that "it is complete in itself and becomes operative without the aid of supplemental or enabling legislation." *Williams* at 521. A constitutional provision must be "sufficiently precise in order to provide clear guidance to courts with respect to their application" in order to be self-executing. *Id.* Following this logic, in *PDU,* the Eighth District Court of Appeals also held that Article I, Sections 2 and 16 were not self-executing. *PDU* at ¶ 24.

Following this precedent, the Fifth District Court of Appeals similarly held that a motion to dismiss for failure to state a claim upon which relief was proper because Ohio's equal protection and due process clauses were not self-executing. *Autumn Care Center, Inc. v. Todd*, 22 N.E.3d 1105, 1107–11 (5th Dist. 2014). The plaintiffs in that case, like the Plaintiffs here, unsuccessfully sought declaratory judgment against the State. *Id.* at ¶ 11 (seeking declaratory judgment that employees of the Ohio Department of Health denied appellant "due course of law and equal protection of the law"). The court held that dismissal was proper, because these constitutional provisions were not self-executing.

Plaintiffs' claims likewise fail here as a matter of law. Indeed, neither Article I, Section 2 nor Article I, Section 16 provides for "meaningful enforcement" absent "other legislative enactment." *PDU* at ¶20. Neither "is [] an independent source of self-executing

protections;" rather, the language in Article I, Sections 2 and 16 "are statements of fundamental ideals upon which our government is based." *Id.* at ¶24. Sections 2 (equal protection) and 16 (due process) of Article 1 likewise fail to provide self-executing protections. *Id.* at ¶27. Both Section 2 and 16 lack the completeness necessary to provide meaningful guidance for judicial review. Because Article I, Sections 2 and 16 are not self-executing Plaintiffs fail to state any claim premised upon them. Accordingly, Plaintiffs' claims fail as a matter of law.

3. Even assuming Plaintiffs state an equal protection claim, this claim likewise fails.

Neither Plaintiffs' equal protection nor due process claims rely on self-executing sources of protection and must fail as a matter of law. But even assuming Plaintiffs stated claims under these provisions, their claims fail. As an initial matter, Plaintiffs' equal protection claims fail because, as a matter of law, Ohio's process for returning absentee ballot applications does not burden Plaintiffs' fundamental right to vote—let alone that it does so unequally. There is no question that the longstanding process for returning absentee ballot applications furthers the State's significant regulatory interests in ensuring an orderly 2020 General Election and minimizes the burden on the county boards of elections. In light of these weighty State interests, the absentee ballot application process must stand. And even if Plaintiffs could articulate some impairment of their equal protection rights (which they have not done), the challenged process is still constitutional under the *Anderson-Burdick* framework.

a. Because Plaintiffs fail to establish any burden on their fundamental right to vote, the State's absentee ballot application return process passes rational basis review.

At bottom, Plaintiffs cannot establish that Ohio's requirements governing the return of

absentee ballot applications burden their fundamental right to vote. Indeed, they identify no authority to support their contention that voters have a fundamental right to return applications for absentee ballots "by emailing an image of their application to their county boards of elections or by other viable electronic form of transmission, such as facsimile machine." Mot. for PI, at 10. Accordingly, Ohio's rational reasons for treating UOCAVA voters differently from non-UOCAVA voters do not offend Ohio's Equal Protection Clause and Plaintiffs' request for a preliminary injunction should be denied.

Rational basis review is certainly satisfied under these circumstances. The Ohio Supreme Court has "held that the equal protection provisions of the Ohio and federal Constitutions are functionally equivalent and require the same analysis." *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 59, 2009-Ohio-1970, ¶ 11. "The Equal Protection Clause applies when a state either classifies voters in disparate ways or places restrictions on the right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (internal citations omitted.).

The precise character of the state's action and the nature of the burden on voters will determine the appropriate equal protection standard. *Id.* at 429 (citing *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004) ("The scrutiny test depends on the [regulation's] effect on [the plaintiff's] rights.")). And where, as here, Plaintiffs allege that the State has treated them differently without any corresponding burden on the fundamental right to vote, the rational basis standard of review applies. *Id.* Under this well-trod standard, a state regulation is constitutionally sound when the classification "is rationally related to a legitimate government interest" or when "reasonable grounds" exist for the distinction. *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 47-48. 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).

To be sure, Plaintiffs' failure to articulate any burden on their fundamental right to vote triggers rational basis review. Here, Plaintiffs cannot show, as they must, that "'burdened voters have few alternate means of access to the ballot.'" *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir.2012) (citing *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998)). Nor can they. The United States Supreme Court has already held that rational basis is the appropriate standard where plaintiffs fail to put forth evidence of any burden on voters' fundamental rights.

For example, the plaintiffs in *McDonald v. Bd. of Election Comm'rs*, a group of unsentenced Illinois inmates, were denied absentee ballots because they were not specifically listed as a group of Illinois voters that were entitled to ballots and claimed violations of their fundamental right to vote under the equal protection clause. 394 U.S. 802 (1969). The Supreme Court held no fundamental right was implicated because of the absence of any evidence "in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." *McDonald*, at 807. Indeed, the Court held: "[W]e cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting." *Id.* at 808. Accordingly, the Court, concluded that Illinois' exclusion of plaintiffs from the ballot was sound. *Id.* This case is no different. Like *McDonald*, Plaintiffs offer absolutely no evidence of any burden on their right to vote aside from speculation as to possible delays in mail service.

This dearth of evidence dooms Plaintiffs' equal protection claim. The claim is further

undermined by their reliance on *OFA*. *OFA* reaffirms the requirement that it is *Plaintiffs' burden* to show infringement on the right to vote. The plaintiffs in *OFA* challenged the statutory scheme that allowed UOCAVA voters the opportunity to cast an absentee ballot in person at the board of elections during the last weekend before Election Day while not extending that same deadline to others. *OFA*, 697 F.3d at 427. Rejecting the defendant's claim that rational basis standard of review governed the constitutionality of these statutes, the Court singled out the "extensive evidence" introduced by the *OFA* plaintiffs 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. And, notably, "[t]he State did not dispute the evidence presented by Plaintiffs[.]" *Id.*; *see also Mays v. LaRose*, 951 F.3d 775, 783 (6th Cir.2020), fn. 4 (questioning *OFA's* application of *Anderson-Burdick* framework to assess burden imposed on plaintiffs under the Equal Protection Clause).

Plaintiffs offer no such evidence here. As Plaintiffs acknowledge, beginning on January 1, 2020, voters were, and continue to be, permitted to request absentee ballots for the 2020 General Election. Am. Compl., ¶ 19; R.C. 3509.03(D). The window for requesting an absentee ballot does not close until noon on Saturday, October 31, 2020 for mailed requests and 6:00pm on Friday, October 30 if the request is submitted to a board of elections in person. R.C. 3509.03(D). Voters have had, and still have, months to submit their absentee-ballot applications.

The Secretary will be mailing each voter an unsolicited absentee-ballot application. Am. Compl., ¶¶30, 31; Pls' Exh. A, Directive 2020-13. This application will be prefilled with the voter's name, address, and local voter identification number and mailed to the voter's address. Pls' Exh. A, Directive 2020-13. The Secretary's mailing also contains a reply

envelope that voters can use to return their completed application by mail. *Id.* Using this method, voters only supply stamps. Alternatively, voters can simply write down all the information that must be included in an absentee-ballot application, *see* R.C. 3509.03(B), on any available piece of paper and mail it to the boards. Am. Compl., ¶16. Postage stamps are widely available in stores, ATMs, post offices, or online. Plaintiffs 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.

Given the State's compelling interest in ensuring an orderly and secure election and the vast opportunities that Plaintiffs had and continue to have under Ohio law to request and cast an absentee ballot, Plaintiffs' equal protection claims fail.

b. Even assuming Plaintiffs have alleged a burden on their fundamental right to vote, the challenged statute passes constitutional muster under the *Anderson-Burdick* framework.

The Court need not engage in any balancing analysis because Plaintiffs' Equal Protection claims fail as a matter of law. Here, Plaintiffs have not articulated any infringement or burdens on Plaintiffs' fundamental right to vote under the Equal Protection Clause of Ohio's Constitution. Because Plaintiffs' fundamental rights are not burdened, the constitutionality of the State's regulation depends on whether it "bear[s] a rational relationship to a legitimate government interest or that reasonable grounds [ ] exist for drawing the distinction." *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 27-28. There is no question that the challenged process furthers the state's compelling interests in ensuring an orderly and secure presidential election. In light of these compelling state interests, the injunctive relief is inappropriate.

But even if Plaintiffs could articulate some burden on their fundamental right to vote

(which they have not done), the challenged regulations are still constitutional. As explained, the regulations are sound under the Equal Protection Clause. Accordingly, this Court's inquiry should end there. In fact, courts have questioned the applicability of the *Anderson-Burdick* balancing to claims under the Equal Protection Clause. *See Mays*, 951 F.3d at 783, fn. 4 (questioning application of *Anderson-Burdick* framework to assess burden imposed on plaintiffs under the Equal Protection Clause). The Ohio Supreme Court has suggested using the federal *Anderson-Burdick* balancing test to evaluate cases where plaintiffs' fundamental rights have been burdened. *State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 35 (O'Connor, C.J., concurring in judgment only) ("where a plaintiff alleges that the state has burdened voting rights through disparate treatment, the *Anderson/Burdick* balancing test is applicable."). And, the Tenth District Court of Appeals has applied the *Anderson-Burdick* balancing test in examining a constitutional challenge to Ohio's regulation of ballot access for independent candidates and minor parties. *Libertarian Party of Ohio v. Husted*, 2017-Ohio-7737, 97 N.E.3d 1083, ¶ 51 (10th Dist.).

Applying this test, the Supreme Court has recognized that election regulations "will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Subjecting every regulation to strict scrutiny "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* Rather, "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." *Id.*, quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus, a "more flexible standard" applies to state election laws. *Burdick*, 504 U.S. at 434. This standard requires that the court "weigh 'the character and magnitude of the asserted injury to the rights protected by

the First and the Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule[.]'" *Id.*, quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983).

And, "when s state election law provision imposes only 'reasonable nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* Under this framework, when evaluating disparate treatment claims, like those raised by Plaintiffs, courts evaluate the "burden from the perspective of only affected electors and within the landscape of all opportunities that Ohio provides to vote." *Mays*, 951 F.3d at 784-785. 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.

Ohio's absentee ballot application process easily satisfies the *Anderson-Burdick* balancing test. Plaintiffs have offered no evidence of a burden to support their preliminary injunction motion. Nonetheless, Plaintiffs' bare conclusion that they are subject to disparate treatment as a result of Ohio's absentee ballot return process does not suffice to meet their burden here. Mot. for PI, at 11-12. The Sixth Circuit Court of Appeals recently rejected a disparate treatment claim on similar grounds, where evidence in support of the preliminary injunction was actually offered. *See Mays*, 951 F.3d 775. In *Mays*, the plaintiffs were arrested after the deadline to request absentee ballots and were held in detention through Election Day. Because they had *no* avenue to vote on election day, they challenged the constitutionality of Ohio's absentee-ballot deadline. While the Court agreed that unexpected circumstances prevented the plaintiffs from voting in person on election day, the Sixth Circuit found that the burden on voting was "moderate." *Id.* at 786. In assessing the burden on voting, the Court

considered "the alternative voting opportunities the 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.* Here, of course, no such moderate burden exists—Plaintiffs have and continue to have a litany of options for requesting and completing both their absentee ballot applications and absentee ballots.

Regardless, any burden that Plaintiffs articulate is easily outweighed by the State's interests in maintaining an orderly election. A recent decision from the Southern District of Ohio disposes of any argument to the contrary. In *League of Women Voters v. LaRose*, the plaintiffs argued that the absentee-ballot application process established by legislation in H.B. 197 to complete voting in Ohio's primary election amidst the COVID pandemic and resulting health orders caused voter disenfranchisement. 2020 U.S. Dist. LEXIS 91631. H.B. 197 was signed into law on March 27, 2020, and required absentee ballots to be postmarked April 27, 2020, and set April 28, 2020, as the last day for voting. plaintiffs argued that this legislation resulted in a severe burden on the right to vote.

The absentee ballot application process for the conclusion of the primary election, plaintiffs argued, could result in voter disenfranchisement by not leaving enough time for voters to return absentee ballot applications that needed to be corrected and additional "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 *19-20. Plaintiffs also argued that the mail-in only option burdened voters, particularly economically disadvantaged voters, "by requiring voters to access a printer to print off the official ballot request form and to obtain postage for the absentee ballot request." *Id.* Despite the compressed timeline for requesting and returning absentee applications and ballots and the

mailing requirements to do so, the Court held that voters' right to vote was not unduly burdened. *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 as stamps are available at multiple locations that remain open during the Governor's stay-at-home order, including grocery stores. Those who do not wish to leave their homes to purchase stamps can purchase them 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[.]" *Id.* at *20-21 (emphasis in original).

Here, Plaintiffs' narrow-sighted fixation on the method by which absentee-ballot applications are returned thoroughly ignores the many opportunities Plaintiffs had and continue to have to request absentee ballot applications. But Plaintiffs cannot show any non-speculative burden on this right, much less one so severe that it requires the interjection of an unknown, untested, and possibly unworkable and dangerous process into Ohio's elections.

Relying solely on *Obama for Am. v. Husted*, ("OFA"), Plaintiffs argue the State's process governing absentee ballot requests "arbitrarily and disparately value[s] one person's vote over that of another." Mot. for PI, at 11. But *OFA* is strikingly distinguishable from this case both on the facts and the law. Plaintiffs there challenged the unequal elimination of early voting opportunities for *some* voters that had previously existed for *all* voters. *OFA*, 697 F.3d 423 at 431. Specifically, the legislation challenged in *OFA* eliminated early in-person voting after the Friday before Election Day, except for military voters. *Id.* In applying the *Anderson-*

Burdick framework, the Sixth Circuit rejected the justifications proffered for the difference in availability in early voting opportunities for military in comparison to non-military voters: that county boards of elections could not accommodate early voters because they were too busy preparing for Election Day and that military members and their families faced unique challenges voting on Election Day. *Id.* at 432-44. Significantly, the Court held that there was no evidence of additional burden on the county boards of elections, given that the same early voting period was available in prior years. *Id.* at 433. (finding "no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2005.").

By contrast, here, Plaintiffs would have the 88 county boards of elections create a wholly new system—entirely on the fly—for processing what directors have anticipated would be tens of thousands of applications transmitted electronically, without the benefit of any additional technological training or technology professionals to administer an untested process. The State's interests in maintaining the status quo of its current absentee ballot application return process are amply supported by the numerous affidavits and other evidence attesting to the extensive and unquestionable burden that would be imposed on the State if the requested relief were granted. This relief is wholly unjustified given the, at best speculative, evidence of a burden on Plaintiffs' right to vote.

c. The State's regulatory interests in ensuring an orderly and secure election are compelling and more than justify any burden imposed on Plaintiffs.

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." *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 (emphasis added). The State also has the corollary interests in minimizing election disorder and easing the burdens on the boards of elections. The boards have in place processes that have been tried and tested over years of elections administration: processing absentee ballot applications, sending absentee ballots, counting ballots as they come in, and attending to the litany of other tasks to facilitate orderly absentee *and* in-person elections. True, the volume of absentee applications will greatly exceed past numbers, but the boards already have processes in place and plans to handle the influx of requests submitted by mail and in-person. And the boards certainly have in place processes to review and respond to UOCAVA requests submitted electronically.

But, contrary to the Plaintiffs' speculations, the county boards of elections have neither the resources nor the processes to administer what they anticipate would amount to tens of thousands of absentee applications by email were the Court to grant the relief Plaintiffs here seek. Nor do the Boards have the technological expertise to securely process and review these applications electronically in a manner that preserves the safety and security of the elections networks they maintain.

Under the *Anderson-Burdick* test, Plaintiffs here cannot even articulate a moderate burden on the right to vote. And on the other side of the scale, the State's interests include minimizing the burden on the boards of elections by keeping an already developed processes, and preserving the integrity of reducing the vulnerability of its systems to cyberattacks. These interests more than justify any speculative burden on voting.

4. Even assuming Plaintiffs state a due process claim, this claim fails as a matter of law.

Plaintiffs' Amended Complaint does not seek relief under the Due Process Clause to the U.S. Constitution, but their preliminary injunction motion relies solely on federal

precedent to challenge Ohio's absentee-ballot mechanics. Mot. for PI, 10-12. Because Plaintiffs' Amended Complaint does not seek relief under the federal Due Process Clause, any federal Due Process arguments should be disregarded. *See, e.g., Boddie v. Landers*, 10th Dist. Franklin No. 15AP-962, 2016-Ohio-1410, ¶ 33 (claims must be raised in complaint, not motion). Plaintiffs' only due process challenge rests on the due process clause of the Ohio Constitution, which is not self-executing and not an independent bases for any cause of action for the reasons explained above. Plaintiffs do not explain how or why the analysis that governs the review of *federal* constitutional claims applies to the due process clause of the Ohio Constitution. Indeed, Plaintiffs do not offer *any* analytical framework for analyzing their purported due process claim under Ohio's Constitution. Accordingly, Plaintiffs' claims must fail as a matter of law.

Plaintiffs fail to identify any authority establishing that Ohio's due process clause is implicated when the state regulates the return of absentee ballots. Rather, the Sixth Circuit has made clear that "[t]he [federal] Due Process Clause protects against extraordinary voting restrictions that render the voting system 'fundamentally unfair.'" *Northeast Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir.2012) (citations omitted). "[G]arden variety election irregularities" do not rise to that level." *Id.* (citations omitted). Plaintiffs cannot prove the challenged statutes "result in significant disenfranchisement and vote dilution." *Id.* Indeed, Plaintiffs have offered *no* evidence that the process governing absentee ballot applications resulted in any voter disenfranchisement.

Moreover, since Plaintiffs' Motion for Preliminary Injunction relies on the Equal Protection Clause to raise their claims, the Due Process Clause is not available as a separate source of rights. Indeed, "the Supreme Court has consistently declined to separately consider

substantive due process when a more specific provision of the United States Constitution applies…Therefore, it is a general rule of constitutional interpretation that when a specific constitutional provision applies, it controls over more general notions of substantive due process." *State v. Anderson*, 148 Ohio St.3d 74, 2016-Ohio-5791, 68 N.E.3d 790, ¶ 26. And, in the election context, due process claims are "addressed . . . collectively using a single analytic framework." *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)). As outlined above, the elections regulations that Plaintiffs challenge satisfy both rational basis and *Anderson-Burdick* review. Thus, Ohio's compelling regulatory interests also justify the challenged process under a due process analysis. *See Dudum*, 640 F.3d at 1114 (analyzing due process claims under *Anderson-Burdick*). Accordingly, Plaintiffs have failed to allege a truly distinct Due Process claim. Their claim therefore fails for the same reasons their Equal Protection claims fail.

IV. PLAINTIFFS ARE NOT ENTITLED TO FEES OR COSTS UNDER R.C. 2335.39.

Plaintiffs are not eligible for the attorneys' fees and costs they seek in their Motion for Preliminary Injunction because there is no "final judgment in the action or appeal" rendering them "prevailing eligible parties" under R.C. 2335.39. Mot. for PI, 20, Prayer for Relief, ¶ 9. Plaintiffs are also not entitled to any fees and costs because the Secretary's action—issuing a directive that reaffirmed the longstanding methods for voters to return their absentee ballot applications—was "substantially justified." *See* R.C. 2335.39(B)(2). Secretary LaRose's actions comport with the controlling statutes and the Ohio Constitution. In short, Plaintiffs are ineligible for any award of attorneys' fees or costs.

V. PLAINTIFFS LACK STANDING TO CHALLENGE DIRECTIVE 2020-13.

It is well-settled that all litigants, whether private litigants or associations that challenge a legislative enactment or policy, are required to prove standing. Thus, to demonstrate standing, a plaintiff must show "a concrete injury in fact, rather than an abstract or suspected injury." *State ex rel. Consumers League of Ohio v. Ratchford*, 8 Ohio App.3d 420, 424, 457 N.E.2d 878 (10th Dist.1982). The Amended Complaint does not contain a single allegation that any of the Plaintiffs have suffered or is threatened with any direct and concrete injury. Plaintiffs' preference for electronic submission of absentee ballot applications does not entitle them to an advisory opinion from this Court absent any claimed injury.

VI. PLAINTIFFS LACK STANDING TO CHALLENGE SECRETARY LAROSE'S IMPLEMENTATION OF R.C. 3509.03.

Two Plaintiffs bring this litigation challenging the process governing the return of absentee-ballot applications: (1) Mike Houlahan, a "qualified elector of Franklin County, Ohio" who "desires to submit an application for an absentee ballot to his county board of elections via email and to have his application processed in the same manner as a hard-copy application" (Am. Compl. ¶7); and (2) Ohio Democratic Party ("ODP"), who "intends to spend its resources to continue…voter education and voter protection efforts in 2020." (Am. Compl. ¶42). Neither of these plaintiffs has standing, therefore the Court should dismiss their Amended Complaint.

Standing is a threshold jurisdictional issue and a requirement to file suit. "The Ohio Constitution expressly requires standing for cases filed in common pleas courts." *ProgressOhio.org, Inc. v. JobsOhio,* 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 11. Specifically, Article IV, Section 4(B) of the Ohio Constitution provides: "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters. . ." "A matter is justiciable only if the complaining party has standing to sue."

ProgressOhio.org at ¶ 11, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 1. Plaintiffs bear the burden to demonstrate standing at the time they file suit. *Fed. Home Loan Mtge. Corp.* at ¶ 27. "Traditional standing principles require 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.'" *ProgressOhio* at ¶ 7, citing *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22.

As an initial matter, Plaintiffs fail to show an actual, concrete injury fairly traceable to Secretary LaRose. To meet the actual injury requirement, plaintiffs must show that they have suffered an "invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not hypothetical or conjectural." *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, 840 N.E.2d 1101, ¶ 10 (10th Dist.), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A particularized injury must be "different in character from that sustained by the public generally." *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 19. An "imminent" injury must be "certainly impending." *Clapper v. Amnesty Internatl. USA*, 568 U.S. 398, 409 (2013) (quotation and emphasis omitted).

Purely abstract and speculative injuries, like the ones Plaintiffs Houlahan and the ODP assert, do not constitute actual or concrete injuries for standing purposes. *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."). The Amended Complaint contains no allegations of any such injury resulting from the established process governing the returns of absentee-ballot applications. Accordingly, none of the Plaintiffs—either as an Ohio elector, taxpayer, or

association—has standing to bring this action.

ODP alleges that it "plans to devote significant financial resources to its 'get out the vote' (GOTV) efforts for the 2020 General Election, including a concentrated effort to encourage Ohio voters to vote by absentee ballot," and purports to bring this action on behalf of its 800,000 members statewide. Am. Compl. ¶6. ODP, however, fails to identify any action, provision, or policy by Secretary LaRose that interferes with its advocacy or educational goals or with any of its legal rights. Instead, Plaintiffs speculate that if this Court finds that absentee ballot applications may be submitted electronically, only then will ODP "spend resources to inform voters about their right to request an absentee ballot in this manner." Am. Compl. ¶43.

This allegation begs the question: were they spending resources instructing voters to submit absentee ballot applications using *another* method not recognized by law (e.g. email and fax?). If so, misinforming voters on the law and having to pivot to inform them correctly can hardly form the basis for standing. If anything, awarding the requested relief would require Plaintiffs to divert *more* resources to advise voters as to the change law. Applying ODP's logic, their relief would cause them harm. Regardless as to how it is couched, ODP's relief is purely theoretical. It fails to show that the established process for submitting absentee ballot applications has caused it any harm, or that the harm flows to any of its members. As Plaintiffs acknowledge, voters were permitted to request absentee ballot applications for the 2020 General Election beginning on January 1, 2020. Am. Compl. ¶19; R.C. 3509.03(D). The window for requesting an absentee ballot application does not close until noon on Saturday, October 31, 2020, for mailed requests, and 6:00pm on Friday, October 30, if the request is submitted to a board of elections in person. R.C. 3509.03(D).

Voters have had, and still have, months to submit their absentee ballot applications.

Given that no voter needs to print an absentee ballot application and Secretary LaRose will be mailing an unsolicited prefilled absentee ballot to every voter, all that is needed to vote absentee in Ohio is a stamp. Am. Comp. ¶¶30, 31; Pls' Exh. A, Directive 2020-13. Plaintiffs do not claim that they are unable to purchase postage stamps or timely mail their applications. Thus, they fail to allege any facts regarding a concrete harm sufficient to confer standing.

Accordingly, to the extent ODP brings this action on behalf of its membership as a whole, ODP lacks standing to do so. Associational standing only exists when an association's "members have suffered actual injury" and thus "have standing to sue in their own right." *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994). The Ohio Supreme Court has "emphasized that 'to have standing, the association must establish that its members have suffered actual injury.'" *State ex rel. Am. Subcontrs. Assn. v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011-Ohio-2881, 950 N.E.2d 535, ¶ 12, quoting *Bicking*, 71 Ohio St.3d at 320. Thus, "[a]t least one of the members of the association must be actually injured," and the injury "must be concrete and not simply abstract or suspected." *Id.* (internal quotation and citation omitted). Here, ODP has not alleged any concrete actual harm as a result of the absentee ballot application return process; therefore, ODP lacks associational standing to bring this lawsuit on behalf of its members.

The allegations, if any, supporting Plaintiff Houlahan's standing to sue are likewise deficient because the Amended Complaint only identifies him as "a qualified elector of Franklin County, Ohio who is eligible to request and cast an absentee ballot at Ohio's 2020 general election." Am. Compl. ¶7. This Plaintiff "desires to submit an application for an absentee ballot to his county board of elections via email and to have his application

processed in the same manner as a hard-copy application." *Id.* But, he too does not identify any concrete injury flowing from the process to return absentee ballot applications. Rather, he merely articulates a wishful "desire" or preference to return his absentee ballot application electronically. But, the Supreme Court has "long held that a party wishing to sue must have a direct, personal stake in the outcome of his or her case; ideological opposition to a program or legislative enactment is not enough." *ProgressOhio.org*, ¶ 1.

The remaining abstract and speculative injuries asserted by Plaintiffs are insufficient to confer standing. They require this Court to layer speculation upon speculation to presume that at some point in the indefinite future, Plaintiffs will experience some difficulties requesting an absentee ballot application. Even Plaintiffs acknowledge that these speculations are based in part on "*projected* delays" by the mail service. Am. Compl. ¶40 (emphasis added). Projected by whom? Regardless, Plaintiffs speculate that returning absentee applications by mail *may* cause "a voter's absentee ballot request not arriving to the respective county board of elections in time through no fault of the voter." *Id.* ¶¶34, 39-41. They further predict that this "would require them to spend the resources necessary to mail their request and to risk disenfranchisement due to delays in mail delivery." *Id.* ¶¶41-48. This theoretical injury is wholly insufficient. Plaintiffs fail to allege in their Amended Complaint or show by any affidavits that they have or will suffer any injury that is concrete, not speculative, and not different from that suffered by the public in general.

Plaintiffs' hypothetical scenarios of mail delays are equally hollow. In Plaintiffs' hypothetical chain of events, at some point in the future they will submit a request for an absentee ballot and it will not arrive within the time-frame required by statute because of "projected delays" in mail service. If anything, these allegations establish Plaintiffs are aware

of the deadline for absentee applications. They know that they have until Saturday, October 31, 2020, to return their mailed requests. R.C. 3509.03(D). If they do not wait until the last minute to return their applications (as they did in the filing of this lawsuit) even their speculative harm is eliminated.

Finally, Plaintiffs fail to establish any injury traceable to Secretary LaRose's conduct. The elements of standing require Plaintiffs not only show a concrete injury, but also that the injury is traceable to the challenged conduct and that the requested relief would redress the concrete injury. *Walgate* at ¶ 20. Plaintiffs' claims are rooted in their numerous fears of "risk [to] their health and elections officials' health in light of the ongoing COVID-19 pandemic" and "projected delays [in mail service]." Am. Compl. ¶¶40-41. Here, it is COVID-19 that Plaintiffs blame, not Secretary LaRose or the longstanding and lawful requirements governing the return of absentee-ballot applications.

Ohio law simply does not recognize one's status as an association or concerned citizen as a basis for challenging a State law or policy. Accepting Plaintiffs' bare-bones allegations to establish standing would eviscerate the doctrine of standing and enable any Ohio citizen who expresses a policy preference or "desire" (Am. Compl. ¶7) to undo established and lawful procedures governing crucial election mechanics.

A. Plaintiffs cannot claim general "taxpayer" or "public right" standing.

Plaintiffs cannot establish standing as taxpayers or under the "public right" doctrine. First, the Amended Complaint contains no allegation with respect to any purported status as taxpayers. Nor have Plaintiffs alleged any injury to a property interest resulting from Directive 2020-13. Accordingly, Plaintiffs do not have standing to bring this action as a taxpayer.

In any event, "a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy." *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954), at paragraph 1 of the syllabus. That is, "private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally." *Id.* at 368. Plaintiffs do not and cannot claim standing as taxpayers to file this action.

Second, Plaintiffs lack standing under the public-right doctrine. As the Supreme Court has made clear, public-right standing only applies to actions for extraordinary writs, not for declaratory judgment actions. *ProgressOhio.org* at ¶ 10 citing *Sheward*, 86 Ohio St.3d at 469–470, paragraph 1 of syllabus. This standing doctrine "does not apply to declaratory-judgment actions filed in common pleas courts, and we have never used the doctrine in such a case." *Id.* Accordingly, this standing doctrine is inapplicable here and Plaintiffs cannot advance a claim to standing under it.

B. Plaintiffs fail to establish standing to seek relief under the Declaratory Judgment Act.

Plaintiffs similarly lack standing under Ohio's Declaratory Judgment Act, R.C. 2721.03. That Act applies only to "person[s] *whose rights, status, or other legal relations are affected* by a constitutional provision [or] statute." To be entitled to declaratory relief, a plaintiff must establish 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." *ProgressOhio.org*, ¶ 19. The Amended Complaint fails to satisfy the basic requirements for declaratory judgment. This case does not present a justiciable controversy. Rather, for the reasons already outlined above, Plaintiffs fail to articulate any actual injury

that is traceable to Secretary LaRose; defects that render their claims non-justiciable. The Supreme Court held that a party that lacks standing similarly fails to present a justiciable controversy for the court's review. "Indeed, for a cause to be justiciable, it must present issues that have a 'direct and immediate' impact on the plaintiffs. *ProgressOhio.org* at ¶ 11 (citation omitted.).

Because Plaintiffs lack standing, they have not asserted a justiciable controversy for this Court's review. Under similar circumstances, the Tenth District Court of Appeals held that plaintiffs, composed of individuals and associations, failed to show standing to challenge a City of Columbus ordinance regulating certain firearm accessories. *Ohioans v. City of Columbus*, 2019-Ohio-3105, 140 N.E.3d 1215, ¶ 45 (10th Dist.) (noting that plaintiffs "did not allege the challenged ordinance affected them in particular, as opposed to the general public, either as a result of their current status or due to potential future prosecution."). Here, Plaintiffs offer nothing more than generalized concerns that absentee ballot applications will be delayed in the mail and hypothesize that voters may be harmed by having to buy stamps and put applications in the mail. Simply put, Plaintiffs fail to identify any legal interest or right that has been or will be imminently affected by the requirements for returning absentee ballots.

Additionally, as to the third declaratory judgment element, there is no urgency because Plaintiffs fail to articulate any impending injury. Rather, Plaintiffs' claims rest on speculation of injuries that may come about depending on when and how voters will submit their absentee ballot applications. *Galloway v. Horkulic*, 7th Dist. Jefferson No. 02 JE 52, 2003-Ohio-5145, ¶ 30 (declaratory judgment complaint dismissed, in part, because there was "no indication of why speedy relief was necessary").

Accordingly, because Plaintiffs have failed to demonstrate the requisite standing to bring this case, the Court should dismiss their Amended Complaint without consideration of their constitutional claims. *See, e.g., Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461 ¶ 32.

VII. CONCLUSION

For the foregoing reasons, the motion to dismiss of Defendant Ohio Secretary of State Frank LaRose should be granted, and Plaintiffs' Motion for Preliminary Injunction should be denied.

Respectfully Submitted,

DAVE YOST
Ohio Attorney General

/s/ Renata Y. Staff
RENATA Y. STAFF (0086922)
HEATHER L. BUCHANAN (0083032)
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 Frank LaRose, in his official capacity of Ohio Secretary of State

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed and a true and accurate copy was served on August 11, 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

/s/ Renata Y. Staff
RENATA Y. STAFF (0086922)
Assistant Attorney General