IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

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

MOTION OF DEFENDANT OHIO SECRETARY OF STATE FRANK LAROSE TO STAY THE PRELIMINARY INJUNCTION PENDING APPEAL

Pursuant to Civ. R. 62(B), Defendant Ohio Secretary of State Frank LaRose moves for a stay of the preliminary injunction entered by this Court on September 11, 2020, pending the outcome of the appeal filed by Secretary LaRose on September 11, 2020. This motion is more fully supported by the attached memorandum in support.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Heather L. Buchanan

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

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

MEMORANDUM IN SUPPORT

Defendant Ohio Secretary of State Frank LaRose filed a Notice of Appeal to the Tenth District Court of Appeals from this Court's September 11, 2020, Order Granting Plaintiffs' Motion for Preliminary Injunction. Secretary LaRose respectfully requests that this Court stay its Order Granting Plaintiffs' Motion for Preliminary Injunction pending the outcome of the appeal.

I. A stay pending appeal is required.

As a state officer, Secretary LaRose is entitled to a stay as a matter of right, and is not required to post a bond. Civ. R. 62(C) ("when an appeal is taken by this state or political subdivision* * *or by any officer thereof acting in his representative capacity and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.").

In interpreting Civ.R. 62(B) and Civ.R. 62(C), case law is clear that a state agency is entitled to a stay as a matter of right. *State ex rel. Geauga Cty. Bd. of Comm. v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, at ¶¶ 17-19 (The trial court "patently and unambiguously lacked jurisdiction to lift the stay, to which the board and commissioners are entitled as a matter of right. A contrary holding would require overruling precedent that has not been successfully challenged for more than 25 years.").

This is true even when a court – as this Court has done – orders injunctive or other non-monetary relief. *See State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 572-573 (2000). In *Curl*, a court of common pleas had ordered the State Fire Marshal to transfer a fireworks license to an applicant and then scheduled a contempt hearing when the State Fire Marshal did not do so promptly. The Ohio Supreme Court granted a writ of prohibition because, when the Fire Marshal filed its notice of appeal, "the State Fire Marshal was manifestly entitled to a stay of Judge Curl's

judgment pending his appeal." *Id*. at 570; *see also State ex rel. Ocasek v. Riley*, 54 Ohio St.2d 488, 490 (1978) (The court has no discretion and must grant the government's motion for stay of the judgment. Evidentiary hearing on the motion for stay is an inappropriate proceeding.). Accordingly, this Court has no discretion to deny a stay pending appeal here.

In addition, no supersedeas bond is required from a state agency such as the Secretary of State, or a state official. Civ.R. 62(C). As the Ohio Supreme Court held:

> Civ.R. 62 patently and unambiguously imposes on the court of common pleas and its judges the duty to issue a stay without a supersedeas bond upon an appeal and request for stay by a political subdivision. In such a circumstance, the availability of alternative remedies such as a discretionary appeal from the court of appeals' setting of a supersedeas bond is immaterial... In addition, in these cases, we have never relegated political subdivisions or public officials to motions or actions in the court of appeals to seek the same relief of a stay pending appeal without bond.

II. *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga County Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 29 (internal citations omitted). **Analysis of the relevant factors demonstrates that a stay of the injunction pending appeal should be issued.**

Even if a stay is not required by Civ.R. 62, an analysis of the stay factors shows that the Court should grant a stay pending appeal. Courts analyze four factors in considering whether to grant a stay of an injunction pending appeal:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?
>
> (2) Has the petitioner shown that without such relief, it will be irreparably injured?
>
> (3) Would the issuance of a stay substantially harm other parties interested in the proceedings?
>
> (4) Where lies the public interest?

Int'l Diamond Exchange Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc., 70 Ohio App.3d 667, 672, 591 N.E.2d 881 (2d Dist. 1991), citing, e.g., *Virginia Petroleum Jobbers Assn. v. Federal Power. Comm.* 259 F.2d 921, 925 (D.C. Cir. 1958).

Secretary LaRose is likely to prevail on the merits of his appeal for the additional reasons set forth in his Opposition to Plaintiffs' Motion for Preliminary Injunction, filed with this Court on August 11, 2020. For purposes of judicial economy, Secretary LaRose hereby incorporates those arguments contained in his Opposition addressing Plaintiffs' failure to present evidence of irreparable harm. Because Plaintiffs showed neither likelihood of success on the merits nor irreparable harm, Secretary LaRose is likely to prevail on the merits of his appeal.

As for the second prong, Secretary LaRose will be irreparably harmed if the preliminary injunction is not stayed pending appeal. As set forth in detail in Secretary LaRose's Opposition to Plaintiffs' Motion for Preliminary Injunction, implementing Plaintiffs' requested relief will jeopardize the 2020 General Presidential Election and the cybersecurity of Ohio's 88 boards of elections. Because the Court has ordered Secretary LaRose to require the county boards of elections to implement a procedure that has never been done—with a little more than two months left before the election—each of Ohio's 88 boards of elections are left to devise new and untested procedures and processes for reviewing absentee ballot applications as email attachments without compromising their networks and voter registration systems.

In addition, 7.8 million absentee ballot application packets have been printed. These applications have explicit instructions to return the applications by mail or in-person. Back-peddling on these instructions will create voter confusion and increase administrative burden on the boards of elections as they try to implement a new procedure and instruct voters—all at a time when election security and procedure is a daily news headline.

As to the third prong, issuance of a stay would not substantially harm other parties interested in the proceedings. Plaintiffs have not shown that they will suffer any harm if the injunction is stayed. Plaintiffs have introduced no evidence showing that they or anyone else will

be precluded from submitting an absentee ballot application. At a minimum, Plaintiffs have shown that Mr. Houlahan *desires* to submit his absentee ballot application by email. Indeed, Ohio voters can—and will—continue to return their absentee ballot applications like they have for over a decade: in-person or by mail. And voters can continue to do so until October 31.

Finally, as to the fourth prong, a stay of the preliminary injunction is in the public interest. It is in the public interest that elections be administered securely and orderly. Implementing the relief at issue here will add an entirely new absentee ballot application process for which there is no plan or dedicated resources. And, the new procedure will be dropped on the boards of elections during the most disruptive time. The risk of board error and voter confusion is great. The public interest is not served by changing the status quo so close to an election.

III. Conclusion

For these reasons, Secretary LaRose respectfully requests a stay of the preliminary injunction pending appeal to the Tenth District Court of Appeals.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

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