IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

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

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ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in holding that Plaintiff Ohio Democratic Party has standing when it failed to identify any members harmed by Directive 2020-13 and an injunction would increase, not decrease, the resources it spends on informing voters about ballot applications? (Yes—Assignment of Error One.)

2. Did the trial court err in holding that Plaintiff Houlahan has standing simply because he prefers to submit his absentee ballot application electronically, even though he failed to show any injury different from that suffered by all Ohio absentee voters? (Yes—Assignment of Error One.)

3. Did the court err in its laches analysis by accepting Plaintiffs' unsupported excuse that they delayed in bringing this suit because of the possibility that the Secretary or the General Assembly would change the longstanding rule requiring voters to return absentee ballot applications by mail or in person? (Yes—Assignment of Error Two.)

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9. Did the court err in holding that any additional burden on the Secretary or Ohio's boards of elections did not qualify as harm for purposes of weighing the equities? (Yes—Assignment of Error Four.)

10. Did the court err in finding that Directive 2020-13 imposes a substantial burden on the right to vote when Plaintiffs failed to identify any voter unable to vote because of the directive or to otherwise present any evidence of the burden? (Yes—Assignment of Error Four.)

11. Did the court err in disregarding the longstanding problems with changing the rules for an election just weeks before the election is set to begin? (Yes—Assignment of Error Four.)

12. Did the court err in granting the preliminary injunction, given Plaintiffs are not likely to succeed on the merits and presented minimal evidence on the other equitable factors? (Yes—Assignment of Error Four.)

STATEMENT OF THE CASE

This case asks fundamental questions about Ohio elections. Who sets the rules? And when should they make those decisions? As to the first question, the General Assembly makes law—including Ohio's election laws. The executive branch, including the Secretary of State, enforces those laws. And the General Assembly has authorized the Secretary to set rules to ensure safe, secure, and fair elections. *See* R.C. 3501.05. As to the second question, the United States Supreme Court has repeatedly warned that courts should not make last-minute changes to election-administration rules. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam).

Since 2007, both Democratic and Republican Secretaries of State have followed the rule that voters must return absentee ballot applications by mail or in person. Plaintiffs, in challenging this longstanding approach, want *courts* to make the rules. Even if the Secretary adopts a reasonable interpretation of Ohio law, Plaintiffs suggest courts should impose their preferred interpretation instead. And if Ohio law is silent, Plaintiffs argue that the Secretary may set no rules

at all. As for timing, Plaintiffs suggest a party may wait until the eleventh hour to challenge an election rule simply because the Secretary *might* change it—even if there is no evidence that a change is coming.

The trial court accepted Plaintiffs' view wholesale. It enjoined Directive 2020-13 and allowed all voters to submit absentee ballot applications electronically. This Court should reverse. Plaintiffs lack standing, for one thing. Their unjustifiable delay means laches bars their claims, for another. Even if Plaintiffs could overcome those hurdles, they are not likely to succeed on the merits of their claims. The Secretary adopted a reasonable interpretation of Ohio law and acted within his authority to set election rules. Finally, the equities tilt heavily against a last-minute injunction to a longstanding election-administration rule. Plaintiffs failed to show that Directive 2020-13 imposes anything more than a minimal burden on voters—not nearly enough to establish a constitutional violation or to warrant an injunction. For these reasons, and as explained below, the Court should vacate the injunction.

STATEMENT OF FACTS

Ohio is a "national leader" in early voting. *Ohio Democratic Party*

v. Husted, 834 F.3d 620, 623 (6th Cir.2016). All voters have had expansive, no-excuse absentee-voting options since 2006. R.C. 3509.02.

Ohio makes it easy to apply to vote absentee. Voters must submit a "written application" to the director of their county's board of elections. R.C. 3509.03(A). Applications are available on the Secretary's website. *See* Form 11-A (Sec.'s Ex. A-2 at 2). Boards will mail applications at voters' request. *See* Directive 2020-18, https://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-18.pdf. And, as in past even-numbered years, Secretary LaRose has mailed applications to all registered voters. Directive 2020-13 (Pls.' Ex. A); Sec.'s Ex. A ¶¶ 16–17. But voters need not use the Secretary's form; applications are not required to be "in any particular form," so long as they include a voter's name, date of birth, signature, and other information to verify the voter's identity. R.C. 3509.03(B). Voters could submit applications by mail beginning January 1 of this year. R.C. 3509.03(D).

Overseas and military voters have more options for absentee voting—including electronic ballot applications. The Uniformed and

Overseas Citizens Absentee Voting Act ("UOCAVA") allows these voters to use a federal form to register to vote and to apply for absentee ballots. *See* 52 U.S.C. § 20302(a)(4), (b)(2). The General Assembly expanded these options to allow UOCAVA voters to "apply[] electronically." R.C. 3511.02(A). The Secretary must "establish procedures" for electronic applications for these voters. R.C. 3511.021(A)(1). On top of methods available to all voters, UOCAVA voters may return their applications "by facsimile machine," "by electronic mail," or "through internet delivery." R.C. 3511.02(A)(1).

The statute for non-UOCAVA voters makes no mention of fax, email, or internet absentee ballot applications. *See* R.C. 3509.03(A). This distinction between UOCAVA and normal absentee voters dates to the beginning of no-fault absentee voting. *See* Sub. H.B. 234, 2005 Ohio Laws vol. 151 at 5276–77 (authorizing no-fault absentee voting); *compare id.* at 5291 (permitting UOCAVA voters to return applications by fax), *with id.* at 5278 (no mention of fax applications). The General Assembly maintained this distinction when it added email and internet options for UOCAVA voters to submit absentee ballot applications in

2011. *Compare* Am. Sub. H.B. 224 (Sec.'s Ex. F) at 26 (R.C. 3511.02, UOCAVA voters), *with id.* at 18–19 (R.C. 3509.03, non-UOCAVA voters). The distinction remains today. *Compare* R.C. 3511.02 (permitting electronic applications), *with* R.C. 3509.03 (no mention of electronic applications).

Ohio Secretaries of State from both parties have long read the different language in the statutes to mean UOCAVA voters may submit electronic applications, while non-UOCAVA voters may not. In 2007, and again in 2008, then-Secretary Brunner (now a member of this Court) interpreted R.C. 3509.03 to "require[] that a voter must complete the application and submit it to the board of elections for the county in which he or she resides, *either in person or by mail*." Directive 2007-06 at 7 (Sec.'s Ex. A-4); Directive 2008-82 at 2 (Sec.'s Ex. A-5) (emphasis added). Ohio Secretaries have applied the same rule ever since. *See* Sec.'s Exs. A6, A7, A8, A9; Directive 2018-18, www.sos.state.oh.us/globalassets/elections/directives/2018/dir2018-18.pdf. On July 17, 2020, Secretary LaRose issued Directive 2020-13, which follows its predecessors by requiring voters to return applications by mail or in

person. *See* Pls.' Ex. A at 1.

Plaintiffs sued to enjoin Directive 2020-13 on July 31—just 95 days before the November 3, 2020 General Election. They sought an injunction preventing Secretary LaRose from enforcing the longstanding interpretation that R.C. 3509.03 requires voters to return ballot applications by mail or in person. They also requested an order that boards of elections *must* accept and process electronic applications. Pls.' Mem. 14. The trial court granted Plaintiffs' Motion on September 11. *See* Decision and Entry (Sept. 11, 2020) ("Op."). Secretary LaRose and Intervenor-Appellants timely appealed.

ARGUMENT

A party seeking a preliminary injunction bears a heavy burden. *See Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 786, 790, 673 N.E.2d 182 (10th Dist.1996). Four factors are relevant: (1) likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether the injunction would harm others; and (4) whether it would serve the public interest. *Id.* "[N]o single factor is dispositive." *AK*

Steel Corp. v. ArcelorMittal USA, LLC, 2016-Ohio-3285, 55 N.E.3d 1152, ¶ 10 (12th Dist.).

Appellate courts generally review the trial court's decision for abuse of discretion. *Puruczky v. Corsi*, 2018-Ohio-1335, 110 N.E.3d 73, ¶ 28 (11th Dist.). But legal questions, including constitutional questions, are reviewed de novo. *Id.* A trial court abuses its discretion when its decision is "unreasonable, unconscionable[,] or arbitrary." *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.*, 63 Ohio St.3d 498, 506, 589 N.E.2d 24 (1992).

The Court should reverse for four reasons. *First*, Plaintiffs lack standing. *Second*, their unreasonable delay means laches bars their claims. *Third*, they are not likely to succeed on the merits, as the trial court's legal conclusions were incorrect and in violation of longstanding canons of statutory construction and Ohio Supreme Court precedent. *Finally*, the equities, including the late hour of this case, cut heavily against an injunction—a point the trial court overlooked only by disregarding the State's substantial interests and harm to third parties and making assumptions and factual findings with no record support.

I. PLAINTIFFS LACK STANDING

To begin, Plaintiffs lack standing. Whether a party has standing is a legal question reviewed de novo. *Hamilton v. Ohio Dept. of Health*, 2015-Ohio-4041, 42 N.E.3d 1261, ¶ 15 (10th Dist.). A party has standing if it can plead (and prove) (1) a concrete and particularized injury, (2) caused by the defendant, (3) that the requested relief will redress. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469–70, 715 N.E.2d 1062 (1999).

A party must have standing "for each form of relief" sought. *Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461, ¶ 30 (citation omitted). To have standing to seek a declaration on the meaning of a statute, the statute must affect a plaintiff's "rights, status, or other legal relations." R.C. 2721.03. A plaintiff also must demonstrate "justiciability" (among other things). *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 19. When challenging a rule issued by Ohio's executive branch, the plaintiff must show a sufficiently "direct and immediate" impact from the rule. *Burger Brewing Co. v. Liquor*

Control Comm., Dept. of Liquor Control, 34 Ohio St.2d 93, 98, 296 N.E.2d 261 (1973). Here, neither Plaintiff has standing.

Ohio Democratic Party. Plaintiff Ohio Democratic Party ("ODP") has neither associational nor organizational standing. An organization has associational standing only when its members "have suffered [an] actual injury" sufficient to give them "standing to sue in their own right." *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994). It has organizational standing only if it can show that it suffered an injury as an organization. *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 333 (6th Cir.2002). The trial court accepted ODP's standing arguments. *See* Op. 16. It was wrong on both fronts.

ODP lacks associational standing because its Amended Complaint does not establish that any of its members have standing. To be sure, Plaintiffs argued in their reply brief that Directive 2020-13 would force ODP members to "incur additional expenses and risk their health." Reply 31. Plaintiffs also improperly attached an affidavit to their reply that stated some ODP members "will likely choose to vote in this manner." Reply Ex. D ¶ 12; *see State v. Quarterman*, 140 Ohio St.3d

464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 18. But a "preference" is not an actual injury sufficient to confer standing.

Nor does ODP itself have "organizational" standing. ODP's alleged "harm" is the need to spend resources on voter education. *See* Am. Compl. ¶¶ 6, 42. But this injunction will not enable ODP to shift resources elsewhere. Exactly the opposite: ODP would spend *more* resources "to inform voters about their right to request" ballots electronically. Op. 15. How can Directive 2020-13 harm ODP when enjoining it would *increase* ODP's voter-education efforts and costs? Plaintiffs nowhere explain how Directive 2020-13 has caused ODP to spend resources it would spend elsewhere if Plaintiffs prevail.

Houlahan. Plaintiff Houlahan's personal preferences similarly do not suffice. Again, neither Plaintiffs' Complaint nor their Motion contains allegations or evidence establishing Houlahan's standing. Houlahan cited only his preference for submitting an application electronically and his general interest in knowing the meaning of the law. The former does not establish an injury for standing. The latter is the type of "public interest" standing the Ohio Supreme Court has shut

down in recent years. *ProgressOhio.org*, 2014-Ohio-2382, ¶¶ 1, 5–8.

Even Houlahan's affidavit, which Plaintiffs improperly attached to their reply brief, is not enough. *See* Reply Ex. C. He reiterates his personal preference, but this does not give him "such a personal stake in the outcome of the controversy that" he is "entitled to have a court hear [his] case." *ProgressOhio.org*, 2014-Ohio-2382, ¶¶ 1, 7. As for health risks, Houlahan does not explain how emailing a ballot application is safer than dropping one in the mail. *See State ex rel. Food & Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 20. He raises concerns with the postal service, but ignores that he could have submitted his application today (or six months ago) and so avoided any potential problems.

That leaves the "additional expenses" Houlahan will allegedly have to pay to mail his ballot or submit it in person. Any "injury" stemming from those expenses is neither significant nor "different in character" from the "injury" suffered by any other Ohioan applying to vote absentee. *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 19. Every Ohioan who submits a mail

application must pay postage, so even were this an injury, it would be one "sustained by the public generally"—not one that confers standing. *Id.* (citation omitted); *see Burger Brewing Co*, 34 Ohio St.2d at 98.

II. LACHES BARS PLAINTIFFS' CLAIMS

Even if the Court concludes that Plaintiffs have standing, laches bars their claims. Laches applies in election cases if the plaintiff "fail[ed] to act with the requisite diligence." *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 2011-Ohio-35, 941 N.E.2d 782, ¶ 25. Laches has four elements: (1) unreasonable delay by the plaintiff; (2) no excuse for the delay; (3) knowledge of the injury; and (4) prejudice to the other party. *Id.* All are met here. The trial court therefore erred when it declined to deny the motion on laches grounds. Op. 9–11.

Unreasonable Delay. The rule limiting the return of absentee applications to mail or in-person delivery is more than 13 years old. R.C. 3509.03's language has not changed in any relevant manner over that time. Yet Plaintiffs waited to file suit until the 2020 General Election was less than 100 days away. The trial court did not address this element, but by turning to Plaintiffs' excuse (Op. 10) it suggested

Plaintiffs unreasonably delayed.

No Excuse. The trial court accepted Plaintiffs' excuse that they waited "to see what the Secretary of State was going to do this election." Op. 10. Yet none of the news articles Plaintiffs cited, *see* Reply 3, shows that the Secretary believed electronic applications were permissible or that he planned to allow them for the 2020 General Election. These articles—which involve hearsay and are not in evidence—show that the Secretary supported a *legislative* change for electronic applications. But with no sign that the Secretary's longstanding rule would change, a bare hope that the Secretary might do something different for the 2020 General Election is not a valid excuse for Plaintiffs' 13-year delay in bringing suit.

Knowledge of Injury. Similarly, the court accepted Plaintiffs' unsupported claim that they had no idea electronic applications were not allowed for the 2020 election, concluding that the Secretary's longtime rule "carries no legal significance." Op. 10. Not so. The history of this rule confirms not just Plaintiffs' unreasonable delay and lack of excuse, but their knowledge of the requirement—all relevant factors for laches.

Plaintiffs provided no evidence that Directive 2020-13 caught them by surprise. Neither the Amended Complaint nor their affidavits explain when they learned electronic applications were prohibited. *See* Reply Exs. C, D. What's more, Plaintiff ODP is one of Ohio's two major political parties. Am. Compl. ¶ 6. Two of its members sit on each of Ohio's 88 boards of elections. R.C. 3501.06(B). It can hardly claim ignorance of a 13-year-old rule for submitting absentee ballot applications.

Prejudice. Plaintiffs' delay is prejudicial. The Secretary has already mailed millions of ballot applications that tell voters they may only return applications by mail or in person. Directive 2020-13 (Pls.' Ex. A); Sec.'s Ex. A ¶¶ 16–17; Tiffany L. Denen, *Almost 1.4 million absentee ballot applications received across Ohio*, Dayton 24/7 Now, https://dayton247now.com/news/local/14-million-absentee-ballot-applications-received-across-ohio (Sept. 16, 2020). The cost to correct those applications alone is substantial. *See* Sec.'s Ex. A ¶¶ 8–11, 23–25. Even more problematic are the security concerns and administrative burdens Plaintiffs' relief would create for the Secretary and Ohio's

boards of elections this close to November. Finally, Plaintiffs have forced the Secretary to spend his time on litigating an expedited case from the trial court up, rather than on his role administering Ohio's elections. The Ohio Supreme Court has repeatedly found that plaintiffs who wait to file cases until the 90-day cutoff under Sup. Ct. Prac. R.12.08(A) prejudice defendants. *E.g.*, *State ex rel. Owens v. Brunner*, 125 Ohio St.3d 130, 2010-Ohio-1374, 926 N.E.2d 617, ¶ 19. Plaintiffs filed 95 days out, but this was "so close in time to that deadline that expediting the proceedings be[came] a practical necessity." *State ex rel. Citizens for Responsible Green Govt. v. City of Green*, 155 Ohio St.3d 28, 2018-Ohio-3489, 118 N.E.3d 236, ¶ 27.

The trial court acknowledged that "it would be up to the Secretary" and county boards "to determine the best way to implement protocols" to accept electronic absentee ballot applications from all voters. Op. 10. But it "assume[d]"—with no evidence—"that a policy or protocol is already in place." *Id.* To be sure, Ohio has in place a framework to process electronic applications from UOCAVA voters. But those voters make up barely a sliver of Ohio's absentee voting bloc. In the 2016

General Election, for example, Ohio mailed absentee ballots to just 21,830 UOCAVA voters. *See* 2016 Absentee Supplemental Report, *available at* https://www.sos.state.oh.us/elections/election-results-and-data/2016-official-elections-results/. It mailed nearly *60 times* more ballots to domestic non-UOCAVA voters. *Id.* The record contains no evidence to support the trial court's assumption that Ohio's boards of elections are prepared to handle such an exponential increase in electronic ballot applications in the waning days leading up to the imminent General Election in which millions of Ohioans will cast their votes for President, U.S. Representative, State Senator, and State Representative.

In fact, the record explains that boards cannot securely apply the process they currently use to handle electronic UOCAVA applications to all absentee ballot applications. Board employees manually review each email containing an UOCAVA application for indications of potential cybersecurity threats; there is no "separate, secure system" that prescreens emails in a manner that would make this manual review unnecessary. Sec.'s Ex. C ¶ 15; Sec.'s Ex. D ¶¶ 19–20. They can do so

in light of the relatively small number of UOCAVA applications, but do not have the resources to manually review tens of thousands of absentee ballot applications submitted over email. Sec.'s Ex. C ¶¶ 16, 18; Sec.'s Ex. D ¶¶ 20–21. Perhaps the Secretary could have solved this problem if Plaintiffs had timely brought their case. By delaying, they prejudiced the Secretary and Ohio's boards, and laches thus bars their claims.

III. PLAINTIFFS WILL NOT SUCCEED ON THE MERITS

Even if they have standing and laches does not apply, Plaintiffs are not likely to succeed on the merits. Their (and the trial court's) interpretation of R.C. 3509.03 is incorrect, as it conflicts with settled canons of statutory construction and with the Secretary's authority to issue directives that follow reasonable interpretations of Ohio law.

A. R.C. 3509.03 Does Not Permit Electronic Applications.

The best reading of R.C. 3509.03 is that it requires absentee voters to return ballot applications either by mail or in person. Three canons of statutory construction support this conclusion.

First, where the legislature uses "particular language in one section of a statute but omits it in another section of the same Act, it is generally

presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see City of Columbus v. Garrett*, 10th Dist. Franklin No. 00AP-610, 2001 WL 289980, *4–5 (Mar. 27, 2001). Since no-fault absentee voting began, the General Assembly has always permitted electronic absentee ballot applications for UOCAVA voters and never permitted them for non-UOCAVA voters. *Compare* R.C. 3509.03 (non-UOCAVA), *with* R.C. 3511.02(A), 3511.021(A)(1) (UOCAVA). If the General Assembly wanted all absentee voters capable of submitting electronic applications, it would have said so—particularly when it added email and internet-based applications for UOCAVA voters in 2011.

Second, the "administrative construction of [a] statute" can confirm its meaning. R.C. 1.49(F); *see State ex rel. Peregrine Health Servs. of Columbus, LLC v. Sears, Dir., Ohio Dept. of Medicaid*, 10th Dist. Franklin No. 18AP-16, 2020-Ohio-3426, ¶ 30; *S.D. Warren Co. v. Maine Bd. of Env't Protection*, 547 U.S. 370, 378 (2006). Secretaries of State from both parties—including a current member of this Court—

have long interpreted R.C. 3509.03 to limit return of absentee applications to mail or in person. *See* Directive 2007-06 at 7 (Sec.'s Ex. A-4); Directive 2008-82 at 2 (Sec.'s Ex. A-5). Email and fax are not new technologies and were not new in 2007. Yet the record has no evidence that any Secretary has permitted electronic applications for non-UOCAVA voters or that any board has ever accepted them. The longstanding administrative interpretation supports the Secretary's consistent interpretation in Directive 2020-13.

Finally, Ohio courts "recognize the authority of the [S]ecretary of [S]tate in election matters and have a duty to defer to the [S]ecretary's interpretations of election law if it is subject to two different, but equally reasonable, interpretations." *State ex rel. Livingston v. Miami Cty. Bd. of Elections*, 196 Ohio App.3d 263, 2011-Ohio-6126, 963 N.E.2d 187, ¶ 25 (2nd Dist.); *see State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 586, 651 N.E.2d 995 (1995) (same). Even the most charitable reading of R.C. 3509.03 shows only ambiguity—no party argues that it unambiguously *permits* electronic submission of absentee ballot applications. In similar circumstances the Ohio Supreme Court has

deferred to the Secretary's interpretation of an election statute because it was "not an unreasonable" one. *Herman*, 72 Ohio St.3d at 586. The result here should be the same.

B. The Trial Court Wrongly Concluded That Statutory Silence Robs The Secretary Of Rulemaking Authority.

The trial court instead concluded that R.C. 3509.03's *silence* rendered the Secretary's longstanding interpretation a mere "policy position." Op. 9. In its view, because R.C. 3509.03 does not explicitly "prohibit qualified electors" from submitting absentee ballot applications "by email or fax," *id.*, it must permit electronic applications. Not so.

First, the trial court overlooked the relevant canons of construction. It never addressed the different language the General Assembly chose for UOCAVA applications in R.C. 3511.02 or compared it to the language in R.C. 3509.03. It found the Secretary's longstanding interpretation to carry "no legal significance," *id.* at 10, even though the General Assembly has specifically identified administrative construction as evidence of statutory meaning, R.C. 1.49(F). And the court gave no deference at all to the Secretary's

interpretation, despite the Ohio Supreme Court's instruction that courts should defer to his reasonable interpretations of election laws. *Herman*, 72 Ohio St.3d at 586. The only way around *Herman*'s rule is to find that the Secretary's interpretation is unreasonable. But the court did not do that, either.

Second, the court instead adopted Plaintiffs' argument and used a different canon of construction: that courts "should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting the statute." Pls.' Mem. 9 (quoting *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995)). This canon applies to *courts* because they intrude on the legislature's lawmaking authority if they add words to (or delete them from) a statute. It does *not* apply to an exercise of interpretative authority by the Secretary.

The General Assembly authorized the Secretary of State to "[p]repare rules and instructions for the conduct of elections," "[i]ssue instructions by directives . . . to members of the boards as to the proper methods of conducting elections," and "[c]ompel the observance by

election officers in the several counties of the requirements of the election laws." R.C. 3501.05(B), (C), (M); *see* Am. Compl. ¶ 8. Issuing a directive, such as Directive 2020-13, that follows a textual and reasonable interpretation of Ohio law is a proper exercise of this authority. The trial court's approach, by contrast, proves too much. Its holding that statutory silence (or ambiguity) prohibits the Secretary from imposing rules or limits runs headlong into the Secretary's statutory authority to impose those very rules and limits in the election context. And it also would permit courts to impose a host of new—and potentially costly and disruptive—obligations on the Secretary and election officials on the eve of the General Election.

Finally, the trial court's view that statutory silence prohibits the Secretary's interpretation of R.C. 3509.03 conflicts with Ohio Supreme Court precedent. *See State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 37. *Colvin*'s facts largely match this case's. Ohio law requires citizens to be registered to vote for 30 days to qualify as an elector and vote in an upcoming election. *See* Ohio Constitution, Article V, Section 1; R.C. 3503.01(A). It also

requires "any qualified elector" who wishes to vote absentee to "make written application for those ballots," R.C 3509.03(A), that includes a "statement that the person requesting the ballots is a qualified elector," R.C. 3509.03(B)(7). The *Colvin* relators argued that citizens had to be registered to vote for 30 days before they could submit an absentee ballot *application*, because only at that point did they qualify as an "elector." 2008-Ohio-5041, ¶¶ 37–42.

The Supreme Court rejected the argument, holding instead that a citizen need only be registered for 30 days before the *election*, not before submitting the application. The Court found that Ohio law was "silent concerning the date by which a citizen must have been registered." *Id.* ¶ 46. Given that silence, the Court deferred to the Secretary's "administrative construction," which linked the 30-day registration requirement to Election Day. *Id.* ¶ 57. This Court should do the same and uphold the Secretary's longstanding interpretation of R.C. 3509.03.

IV. THE REMAINING FACTORS FAVOR REVERSAL

The Court also should deny Plaintiffs' Motion because the equities—including the remaining factors—weigh heavily against a last-

minute injunction against a longstanding Ohio election rule.

First, Plaintiffs were dilatory in filing suit. *See supra* Section II. Even if laches does not require dismissal of their complaint, their decision to wait until the election was just around the corner to challenge a well-established election rule strongly cuts against injunctive relief.

Second, the General Assembly specifically designated the Secretary as Ohio's Chief Election Officer, entrusting and empowering him to safeguard the integrity of Ohio's elections. R.C. 3501.04. A late judicial intervention to override his reasoned approach on absentee applications—an approach that spans Democrat and Republican Secretaries of State for more than a decade—is contrary to the will of the people and the separation of powers. *See State ex rel. Schwartz v. Leonard*, 65 Ohio App. 251, 252, 29 N.E.2d 619 (1st Dist.1940) (explaining that the courts' role has never been "to supervise elections or administer the election laws," but to determine whether the executive branch "is performing its duty under the law").

Third, the Secretary gave more than ample reason for continuing his predecessors' approach to absentee ballot applications: cybersecurity

concerns, a heavy administrative burden on boards of elections, and voter confusion from changes this close to an election. The trial court disregarded these legitimate concerns, claiming its role was "not to anticipate the difficulties and complexities of complying with the language of the statute." Op. 10. This assumes Plaintiffs have a likelihood of success on the merits, and so fails because they do not.

More fundamentally, it gets both the facts and the law wrong. Factually, the Secretary provided substantial evidence of the costs and difficulties an injunction would cause. The Secretary's Chief Information Officer detailed the cybersecurity concerns that would arise were Ohio's boards of elections required to accept absentee ballots electronically—including network overloads and potential exposure to ransomware attacks—and provided specific examples of those sort of attacks on election administrators, both in Ohio and elsewhere. Sec.'s Ex. B ¶¶ 2–4, 6; *see also* Sec.'s Ex. E at 7, 14–15 (chronicling New Jersey's "struggle[s] with email servers and fax machines that crashed as they were overloaded with ballot requests" after Hurricane Sandy). He and a board of elections official explained the catastrophic consequences

that could follow from such an attack, including the possibility that "Election Day voting could be compromised or made impossible." Sec.'s Ex. D ¶ 22; Sec.'s Ex. B ¶ 6(h)–(j). And two board officials explained why they cannot feasibly apply the current process for detecting and preventing cybersecurity threats from emailed UOCAVA applications—manually reviewing the emails for suspicious content—to a much larger number of applications for absentee ballots. Sec.'s Ex. C ¶¶ 15–16, 18; Sec.'s Ex. D ¶¶ 19–21. Plaintiffs did not rebut this evidence and the trial court failed to account for it, even stating that "there is no reason to believe the process currently in place is not secure." Op. 12. The Secretary, as the elected official charged with administering elections, is best positioned to identify and explain the burdens of changing election rules. In short, the court rejected evidence and the Secretary's expertise in favor of its own assumptions.

Legally, the preliminary-injunction standard *required* the court to consider prejudice to others, *Vanguard Transp.*, 109 Ohio App.3d at 790, including the burden an injunction would impose on the Secretary and boards of elections. The court refused even to consider it,

suggesting that forcing boards to handle a major change to the election process and address serious security concerns—all while preparing for an election with COVID-19 precautions—"is not harm." Op. 12. That is wrong as a matter of law. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635 (6th Cir.2016) (referring to "Ohio's interest in reducing the administrative strain felt by boards of elections").

Fourth, the benefit of the injunction is extremely low. The record contains no evidence regarding any voters who will be *unable* to submit an absentee ballot application unless the court enjoins Directive 2020-13. Take Plaintiff Houlahan. While he *prefers* to submit an electronic ballot application, he never claims he *cannot* submit the application through the mail or in person. Even if the minimal cost of a stamp is sufficient for standing, there is no evidence in the record that it is an obstacle for Houlahan or any of ODP's members. Given that Plaintiffs have the heavy burden to show they are entitled to injunctive relief, this lack of evidence should doom their claim.

In reaching a contrary conclusion the trial court cited federal court cases that applied the *Anderson-Burdick* framework to conclude that the

burden on the right to vote outweighed the State's interest in the existing election rules. *See* Op. 11–12 (citing *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir.2012); *League of Women Voters v. Brunner*, 548 F.3d 463 (6th Cir.2008)). Those cases have no bearing here because, again, Plaintiffs provided no *evidence* of any burden on the right to vote. To the extent federal cases are relevant, the Sixth Circuit has rejected *Anderson-Burdick* claims where—as here—there was no evidence of the number of voters affected by the challenged rule; the available evidence demonstrated that it "impose[d] a trivial burden on Ohio voters"; and that "minimal burden on voting [wa]s easily outweighed by Ohio's interest in reducing the administrative strain felt by boards of elections . . . ." *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 628, 635.

This is not an *Anderson-Burdick* case. If it were, Plaintiffs' lack of evidence would doom it from the start. Yet the trial court found that Directive 2020-13 "places an additional burden on eligible voters' access to voting" that the Secretary's "justification for maintaining its current procedure does not outweigh." Op. 12. Such a finding has no basis in the record and cannot support an injunction.

Fifth, as the United States Supreme Court has indicated, courts should not make last-minute changes to election-administration rules. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam); *see also Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (mem.); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir.2020) (per curiam). Last-minute changes made in the "weeks" before an election can engender widespread "voter confusion" and erode the "[c]onfidence in the integrity of our electoral process" that "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4–5. Such a result is particularly inappropriate here since, as discussed, the challenged policy has been in place for 13 years and is a reasonable (if not necessary) means of advancing the State's compelling interest in the integrity and security of the upcoming election.

CONCLUSION

Intervenor-Appellants respectfully ask the Court to reverse and vacate the preliminary injunction.

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Respectfully submitted,

/s/ M. Ryan Harmanis

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

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

Counsel for Intervenor-Appellants

CERTIFICATE OF SERVICE

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

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

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

Counsel for Plaintiffs

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

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

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