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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ohio Democratic Party, et al., **Plaintiffs-Appellees,** -v- **Frank LaRose,** **Defendant-Appellant,** and **Donald J. Trump for President, Inc., et al.** **Intervenors-Appellants.**	**Case No. 20AP-421** **Case No. 20AP-428** **(ACCELERATED CALENDAR)** **On appeal from Court of Common Pleas of Franklin County** **Case No. 20-CV-4997**

BRIEF OF PLAINTIFFS-APPELLEES

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STATEMENT OF THE CASE

This is an appeal from the decision of the Franklin County Court of Common Pleas (the "Trial Court") to grant a preliminary injunction enjoining Ohio Secretary of State Frank LaRose's (the "Secretary") instruction in Directive 2020-13 that prohibits Ohio voters from submitting their absentee ballot applications to their boards of elections via email or fax.

Despite Appellants' efforts to overcomplicate the issues, this case primarily presents a straightforward question of statutory interpretation, and that question is whether R.C. 3509.03 prohibits qualified electors from submitting their completed absentee ballot applications to their county board of elections via email or fax. The statute contains no language prohibiting the submission of absentee ballot requests in this manner or even specifying a manner for delivery to the board, yet the Secretary concluded that electors cannot request absentee ballots in this manner.

Because the Secretary's instruction is in contravention of the plain text of R.C. 3509.03, Appellees Ohio Democratic Party (ODP) and Jay

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Michael Houlahan filed a Complaint with the Trial Court seeking declaratory and injunctive relief to ensure that Ohioans can request an absentee ballot for the 2020 General Election by emailing an image of their signed absentee ballot application to their county board of elections or by faxing it. The Trial Court agreed with Appellees and issued a preliminary injunction ("Op."), and the Appellants now appeal. For the reasons below, the Court should affirm the Trial Court's decision.

STATEMENT OF FACTS

Ohio law allows for "no fault" absentee voting in which any eligible voter can request an absentee ballot by "mak[ing] written application for those ballots the director of elections of the county in which the elector's voting residence is located." R.C. 3509.03(A). Applications need not be in "any particular form," but 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). Ohio law provides that an application for an absentee ballot shall be "delivered to the director [of the board of elections]," but does not specify the manner in which absentee ballot applications can or must

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be "made" to the director of the board of elections.

On July 17, 2020, the Secretary issued Directive 2020-13 to the county boards of elections. The directive provided instructions for how boards should prepare for the statewide mailing of absentee ballot applications and indicated that voters must submit their absentee ballot applications to their respective boards "either in person or by mail, with the voter affixing a first-class stamp." Directive 2020-13 at *1. Although this instruction was largely consistent with past instructions, it followed the Secretary publicly (though, unsuccessfully) calling for the General Assembly to enact a law allowing for an online absentee ballot request system, and it followed members of the legislature who support the adoption of an online absentee ballot request system informing the Secretary that the law already authorizes him to allow for electronic transmission of absentee ballot requests without their approval. *See* Pl. Reply in Support of Motion at 3-4.

On July 31, 2020, two weeks after the Secretary issued Directive 2020-13, Appellees filed the instant action for declaratory judgment and injunctive relief. On September 11, 2020, the Trial Court issued its

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decision granting the requested preliminary injunction.

In between the completion of the parties' briefing on the motion for preliminary injunction and the Trial Court's decision on September 11, 2020, several Republican Party-affiliated groups (the "Intervenors") moved to intervene as defendants. Their motion was ultimately granted, though their only filings with the Trial Court, other than their motion to intervene and pro hac vice motions, were an Answer that was filed 38 minutes after the Trial Court issued its decision on September 11, 2020 and a Memo in Opposition to the Motion for Preliminary Injunction that was filed on September 14, 2020, *three days* after the Trial Court granted the preliminary injunction.

Following the Trial Court's September 11, 2020 decision, the Secretary and Intervenors filed appeals with this Court.

STANDARD OF REVIEW

The preliminary injunction standard is a familiar one. A court must consider: (1) whether there is a substantial likelihood that the plaintiff will prevail on the merits; (2) whether the plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether third parties will be

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unjustifiably harmed if the injunction is granted; and (4) whether the public interest will be served by the injunction. *Vanguard Transp. Sys. V. Edwards Transfer & Storage Co. Gen. Commodities Div.*, 109 Ohio App. 3d 786, 790, 673 N.E.2d 182 (10th Dist. 1996).

The decision whether to grant or deny a preliminary injunction is "solely within the trial court's discretion." *Franks v. Rankin*, 10th Dist. No. 11AP-962, 2012-Ohio-1920, ¶ 28 citing *Garono v. State*, 37 Ohio St.3d 171, 172, 524 N.E.2d 496 (1988). As a result, "'unless there is a plain abuse of discretion on the part of [the] trial court[],' a reviewing court will not disturb a judgment granting or denying an injunction." *Id.* quoting *Perkins v. Quaker City*, 165 Ohio St. 120, 125, 133 N.E.2d 595 (1956). "In other words, absent a showing that the judgment is unreasonable, arbitrary, or unconscionable, a reviewing court will not reverse." *Id.*

With respect to a trial court's factual findings, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Williams v. Ohio Dep't of*

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Rehab. & Corr., 10th Dist. No. 18AP-720, 2019-Ohio-2194 quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1979). And in determining whether a civil judgment is against the manifest weight of the evidence, "an appellate court is guided by the presumption that the findings of the trial court are correct." *Id.* citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

ARGUMENT

I. Intervenors Cannot Raise Arguments On Appeal That They Did Not Raise To The Trial Court (All of Intervenors' Assignments of Error).

As an initial matter, Intervenors waived their ability to raise any arguments concerning the preliminary injunction because they did not make any arguments to Trial Court concerning the motion prior to the Trial Court issuing its decision. It is well settled that a "'party who fails to raise an argument in the court below waives his or her right to raise it' on appeal." *Evans v. Evans*, 10th Dist. No. 08AP-398, 2008-Ohio-5695, ¶ 8 quoting *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993). Accordingly, because Intervenors failed to timely

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make *any* arguments with respect to the preliminary injunction that they now appeal, they cannot raise any arguments concerning the motion on appeal; this precludes all their arguments made to this Court, including their standing, laches, statutory interpretation, and equitable factors arguments, all of which they make for the first time on appeal.

II. Appellees Demonstrated A Substantial Likelihood Of Success On The Merits (Secretary's First Assignment of Error; Intervenors' Third Assignment of Error).

Although obscured in Appellants' briefs, Appellees' First Amended Complaint contains four separate claims for declaratory judgment—two statutory interpretation claims and two constitutional claims—each of which Appellees demonstrated a substantial likelihood to succeed upon and each of which independently serves as a basis for the injunctive relief granted by the Trial Court.

A. Appellees demonstrated a likelihood of success on their statutory interpretation claims.

Appellees' two statutory interpretation claims are: (1) R.C. 3509.03 does not prohibit qualified electors from submitting their completed absentee ballot requests via email or fax, and that (2) qualified electors

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have a right under R.C. 3509.03 to request absentee ballots in this manner. As to the first claim, the Trial Court determined that "[n]owhere in R.C. 3509.03 does it prohibit qualified electors to submit their absentee ballot applications by email or fax…" Op. at 9; *see also* Op. at 11 ("nothing in R.C. 3509.03 prevents the use of electronic transmission"). And as to the second claim, the Trial Court determined that "the plain language of R.C. 3509.03 allows for electronic mail or facsimile filing of absentee ballot applications." Op. at 11. For the following reasons, this Court should affirm the Trial Court's decision.

1. Nothing in R.C. 3509.03 prohibits voters from submitting their absentee ballot applications via email or fax.

The Trial Court correctly determined that nothing in R.C. 3509.03 prohibits voters from submitting their absentee ballot applications by email or fax.

In construing a statute, the Court's "paramount concern is the legislative intent in enacting the statute." *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, 899 N.E.2d 120, ¶ 17 quoting *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815

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N.E.2d 1107, ¶ 21. And the "well-established rule" is that "the best indicator of intent" is the "plain language of the enacted text." *City of Cleveland*, , 157 Ohio St.3d 330, 2019-Ohio-3820, ¶ 17, quoting *Nixon v. United States*, 506 U.S. 224, 232 (1993).

The statutory provision at issue is R.C. 3509.03(A), which provides:

> Except as provided in division (B) of section 3509.08 of the Revised Code, 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.

Also related is R.C. 3509.03(D), which provides:

> Each application for absent voter's ballots shall be delivered to the director not earlier than the first day of January of the year of the elections for which the absent voter's ballots are requested or not earlier than ninety days before the day of the election at which the ballots are to be voted, whichever is earlier, and not later than twelve noon of the third day before the day of the election at which the ballots are to be voted, or not later than six p.m. on the last Friday before the day of the election at which the ballots are to be voted if the application is delivered in person to the office of the board.

As is apparent from the plain language, nothing requires completed

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absentee ballot applications to be returned only by mail or in person. Nothing prohibits completed absentee ballot applications from being submitted via email or fax. And nothing prohibits qualified electors who submit their completed absentee applications via email or fax from having their applications processed in the same manner as an application submitted by mail or in person. Appellants did not—and cannot—identify any language in R.C. 3509.03 or elsewhere stating otherwise.

Based on the plain language alone, the Trial Court correctly found—and this Court should affirm—that R.C. 3509.03 does not prohibit qualified electors from submitting their absentee ballot requests to their county boards of elections via email or fax.

2. Because R.C. 3509.03 does not prohibit voters from submitting their absentee ballot applications via email or text, voters are allowed to submit their applications in this manner.

The Trial Court also correctly determined that because R.C. 3509.03 does not prohibit voters from submitting their absentee ballot applications via email or fax, voters are allowed to submit their applications in this manner. This conclusion is well supported by the case law and by

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common sense.

First, it is apparent from the plain text of R.C. 3509.03 that the legislative intent of R.C. 3509.03 is to require absentee ballot requests to be made in writing as opposed to oral requests. By not specifying how a written application for an absentee ballot is to be "made" (R.C. 3509.03(B)) or "delivered" (R.C. 3509.03(D)), the General Assembly indicated that so long as the required information is in the written application—which "need not be in any particular form" (R.C. 3509.03(B))—then the request is valid.

Second, it is a basic principle of statutory construction that in the absence of an express prohibition in a law, courts (and the Secretary) cannot read one in. *See State ex rel. Tam O'Shanter v. Stark Cty. Bd. of Elections*, 151 Ohio St.3d 134, 2017-Ohio-8167, 86 N.E.3d 332, ¶ 17 quoting *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 ("When interpreting statutory language, '[w]e will not add a requirement that does not exist in the statute.'"); *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995) ("[a] court should give effect to the words actually

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employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting the statute"). Adopting the interpretation urged by Appellants would require the Court to insert words not used in R.C. 3509.03 in the guise of interpreting it, and the Court must, therefore, reject their interpretation.

Third, the Trial Court's conclusion was entirely consistent with the duties of courts (and the Secretary) to "avoid unduly technical interpretations that impede the public policy favoring free, competitive elections," and to "liberally construe election laws in favor of the right to vote." *Myles*, *supra,* ¶ 22, 26. Adopting the interpretation urged by Appellants, which interprets the lack of a prohibition as somehow amounting to a prohibition, not only defies logic but would result in a construction that restricts the exercise of the right to vote and impedes the public policy of favoring free, competitive elections.

Finally, the Trial Court's conclusion was entirely consistent with the case law that has dealt with similar situations. In *Myles*, for instance, the Ohio Supreme Court made simple work of rejecting an attempt by the then-Secretary of State who inserted a prohibition into R.C. 3509.03

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where one did not exist. A political campaign had distributed absentee ballot applications containing a check box next to a statement that the voters were qualified electors. *See Myles*, *supra*, ¶ 2. Although this check box was not required by R.C. 3509.03, the Secretary interpreted R.C. 3509.03 as requiring boards of elections to reject any applications that did not check the box. *Id.* at ¶ 4-5, 20. The Supreme Court held that "[b]ecause the statute does not strictly require that the box next to the qualified-elector statement be marked, we cannot require it." *Id.* at ¶ 21. The Supreme Court explained that this conclusion was consistent with its duties to not add a requirement that does not exist in the statute, to liberally construe elections laws in favor of the right to vote, and to avoid unduly technical interpretations that impede the public policy favoring free, competitive elections. *Id.* at ¶ 22, 26.

The Trial Court's conclusion was also consistent with the Ohio Supreme Court's decision in *State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36. In *Orange Twp.*, Supreme Court held that "in the absence" of a rule or policy regarding the manner in which the documents may be "filed with" or

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"certified to" the board of elections, an email transmission of the documents "was adequate to be considered a 'certification to' the board." *Id.* at ¶ 26-27. The Supreme Court explained that this decision, too, was consistent with its duty to avoid unduly technical interpretations that impede public policy in election cases. *Id.* at ¶ 30.

For all these reasons, the Trial Court correctly determined that under R.C. 3509.03, voters are permitted to submit their completed absentee ballot requests to their boards of elections via email or fax.

3. The Secretary's interpretation is not entitled to any deference because it is unreasonable, fails to apply the plain language of R.C. 3509.03, and is inconsistent with his approach to related matters.

Rather than address the lack of any language in R.C. 3509.03 that prohibits voters from submitting their absentee ballot applications via email or fax, Appellants' primary argument is that court *must* defer to the Secretary's interpretation of election laws. But the Secretary does not have carte blanche.

The Ohio Supreme Court has been clear that the Secretary's interpretation of election laws is not entitled to any deference when it is

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"unreasonable and fails to apply the plain language" of the statute at issue. *Myles*, *supra*, ¶ 26; *State ex rel. Stokes v. Brunner*, 120 Ohio St.3d 250, 2008-Ohio-5392, ¶ 29, 898 N.E.2d 23 (quoting same); *State ex rel. Brinda v. Lorain Cty. Bd. of Elections*, 115 Ohio St.3d 299, 2007-Ohio-5229, ¶ 30, 874 N.E.2d 1205 (quoting same). This is especially so when adopting the Secretary's interpretation "would result not in a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted…may be included within its scope." *Myles*, ¶ 26 quoting *Lamie v. United States Trustee*, 540 U.S. 526, 528 (2004) (internal quotations and brackets omitted). Thus, because the Secretary's interpretation of R.C. 3509.03 is not supported by the plain language of the statute, and because adopting his interpretation would require the Court to insert words not actually used therein, his interpretation is unreasonable and not entitled to any deference.

Adding to the unreasonable nature of the Secretary's interpretation is the fact that it is entirely contradictory to and inconsistent with his own practice and approach as to related issues with absentee ballot applications. During Ohio's 2020 Primary Election, the Secretary

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instructed boards of elections to "utilize…email" to notify voters if their absentee ballot applications did not contain all the required information, despite the fact that nothing in Ohio law explicitly authorizes boards of elections to use email for this purpose. Directive 2020-07 at 2-3, available at available on the Secretary's website at https://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-07pdf. Additionally, after the commencement of the instant action, the Secretary instructed boards of elections to accept absentee ballot applications that are placed in the boards of elections' absentee ballot drop boxes despite Ohio law not explicitly authorizing the return of absentee ballot applications in this manner. *See* Directive 2020-16, available at https://www.sos.state.oh.us/globalassets/elections/directives/2020/dir2020-16.pdf ("This directive requires the continuing use of that secure receptacle for the return of ballots and expands its use to include absentee ballot application forms.").

For these reasons, the Secretary's interpretation of R.C. 3509.03 is unreasonable and not entitled to any deference.

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4. A review of related provisions does not support the Secretary's interpretation that voters are prohibited from submitting their absentee ballot applications via email or text.

Further avoiding the plain text of R.C. 3509.03, Appellants contend that a review of other provisions in the Revised Code supports the Secretary's interpretation that voters are prohibited from submitting their completed absentee ballot applications via or email text. But all this argument accomplishes is that it unnecessarily creates ambiguity that Appellants then use to argue for deference to the Secretary's unreasonable interpretation. But courts "may not use canons of interpretation to create ambiguity that does not exist in the plain language itself" as "[d]oing so would be inconsistent with the well-established rule that the plain language of the enacted text is the best indicator of intent." *City of Cleveland v. State*, *supra,* ¶ 17. Moreover, a review of related election provisions does not support Appellants' interpretation.

In support of their interpretation of R.C. 3509.03, Appellants cite two other statutes, R.C. 3511.02 and R.C. 3511.021(A), which concern the return of completed absentee ballot applications for UOCAVA voters. But neither of these statues prohibit non-UOCAVA voters from

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submitting their absentee ballot requests to their county boards of elections via email or fax either.

To be sure, these provisions explicitly authorize UOCAVA voters to submit their absentee ballot requests to their boards of elections through electronic means. But this is because federal law requires it. *See* 52 U.S.C. § 20302(a)(6)(A). Pursuant to this federal mandate, the General Assembly enacted R.C. 3511.02 and R.C. 3511.021(A) parroting the federal law for UOCAVA voters.

Appellants use these two statutes to argue that they demonstrate a legislative intent to prohibit non-UOCAVA electors from submitting their completed absentee ballot requests via email or fax. But, importantly, nothing in R.C. 3511.02 or R.C. 3511.021—or in the federal law, for that matter—addresses how non-UOCAVA electors must return their completed absentee ballot applications. These statutes do not require completed absentee ballot applications for non-UOCAVA electors to be returned only by mail or in person. They do not prohibit non-UOCAVA electors from submitting their completed absentee ballot applications through electronic means. And they do not prohibit qualified non-

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UOCAVA electors who submit their completed absentee ballot applications through electronic means from having their applications processed in the same manner as an application submitted by mail or in person. Appellants' assertions otherwise further highlight their inability to justify the Secretary's interpretation of R.C. 3509.03 as prohibiting qualified electors from submitting their completed absentee ballot requests via email or fax.

Moreover, there is no logical reason for the General Assembly to draft a statute requiring some Ohioans to apply by hard copy, while allowing other Ohioans, such as those stationed at Wright Patterson Air Force Base or in the Army Reserve or National Guard, to apply electronically at any time even when they face no more obstacles to the ballot box than non-military voters.

The statutes cited by Appellants also highlight the fact that the General Assembly had the opportunity to limit the manner in which non-UOCAVA voters could request absentee ballots but chose not to. Indeed, if the Court is going to consider related election provisions to glean legislative intent, then the Court must also consider the numerous

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instances in which the General Assembly, when it has intended for voting-related documents to be filed in a particular manner, has made such requirements clear. For instance, with respect to the manner in which an elector may return their voted absentee ballot to the board of elections, the General Assembly specified that an elector "shall" either (1) "mail the [absentee ballot] identification envelope to the director from whom it was received" or (2) "deliver it to the director," either "personally" by the voter or by a close relative of the voter. R.C. 3509.05(A), third paragraph (emphasis added). The General Assembly further stated that an absentee ballot "shall be transmitted to the director in no other manner, except as provided in section 3509.08 of the Revised Code." *Id.* (emphasis added).

As another example, the General Assembly specified that if a voter is directed to provide information that was missing from their absentee ballot identification envelope, the voter must provide this information on a form that is delivered to the board "in person or by mail." R.C. 3509.06(D)(3)(b) and R.C. 3509.06(E)(2) (emphasis added).

Additionally, and with respect to the manner in which a person may register to vote or change their registration, the General Assembly

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specified that a person can do so: "[1] in person at any state or local office of a designated agency, at the office of the registrar or any deputy registrar of motor vehicles, at a public high school or vocational school, at a public library, at the office of a county treasurer, or at a branch office established by the board of elections, or [2] in person, through another person, or [3] by mail at the office of the secretary of state or at the office of a board of elections. [4] A registered elector may also change the elector's registration on election day at any polling place where the elector is eligible to vote, in the manner provided under section 3503.16 of the Revised Code." R.C. 3503.19(A). Elsewhere in the Revised Code, the General Assembly specified that a voter may register to vote or change their registration [5] using an online voter registration system established by the Secretary of State. R.C. 3503.20.

A review of these statutes demonstrates that the General Assembly did not restrict the manner in which absentee ballot applications for non-UOCAVA voters can be returned despite the General Assembly making such restrictions in other instances. Accordingly, the review of related election provisions urged by Appellants does not support their argument

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that the General Assembly intended to prohibit voters from submitting their absentee ballot applications via email or text.

For all the reasons above, the Trial Court correctly determined that Appellees demonstrated a substantial likelihood of success on their claims for declaratory judgment that R.C. 3509.03 does not prohibit qualified electors from submitting their completed absentee ballot requests via email or fax, and that qualified electors have a right under R.C. 3509.03 to request absentee ballots in this manner.

B. Appellees demonstrated a substantial likelihood of success on their constitutional claims.

The Trial Court also correctly determined that Appellees are likely to succeed on the merits of their two related constitutional claims. These are claims that the refusal to accept qualified electors' applications for absentee ballot that are timely emailed or faxed constitutes a denial of the electors' equal protection and due process rights guaranteed by Article I, Sections 2 and 16 of the Ohio Constitution, respectively.

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1. Appellees are broadly authorized to bring declaratory judgment actions to protect their state constitutional rights to due process and equal protection.

The Secretary first argues that the Ohio Constitution's due process and equal protection clauses are not self-executing and, therefore, do not create private causes of action. Sec. Br. at 14-15. But this argument, which the State has unsuccessfully made to other courts (*see City of Riverside v. State*, 2nd Dist. Montgomery No. 26024, 2014-Ohio-1974, ¶ 39-40) is irrelevant as Appellees are not bringing a private suit for damages. Instead, Appellees seek declaratory relief, and it is well-settled that citizens may bring declaratory judgment actions to enforce the rights afforded to them in the Ohio Constitution. *See Hagedorn v. Cattani*, 715 Fed. Appx. 499, 508 n5 (6th Cir. 2017) citing *City of Riverside, supra* (distinguishing a private suit for damages from a case challenging the constitutionality of a statute). Otherwise, Ohio's Bill of Rights would be dead letter, and the State would have carte blanche to restrict these rights.

Ohio's Declaratory Judgment Act "broadly authorizes plaintiffs to bring actions for a declaration of 'rights, status, and other legal relations whether or not further relief is or could be claimed.'" *Moore v. City of*

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Middletown, 133 Ohio St. 3d 55, 2012-Ohio-3897, ¶ 45 quoting R.C. 2721.02[1] (emphasis added). Moreover, it is "well settled that 'actions for declaratory judgment may be predicated on constitutional or nonconstitutional grounds.'" *Id* quoting *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶ 13 (emphasis added).

Pursuant to Ohio's Declaratory Judgment Act, numerous actions challenging legislation on state constitutional grounds have been permitted, including challenges brought under Ohio's rights to association and free speech. *See, e.g., Christensen v. Bd. of Comm'rs on Grievs. & Discipline of the Supreme Court of Ohio*, 61 Ohio St. 3d 534, 537 (1991) (explaining that a candidate could have brought a declaratory judgment action to challenge a Judicial Conduct Cannon under the Ohio Constitution's right to free speech); *Magda v. Ohio Elections Comm'n*,

[1] R.C. 2721.03 also provides that "any person whose rights, status, or other legal relations are affected by a constitutional provision [or] statute…may have determined any question of construction or validity arising under…the constitutional provision [or] statute…and obtain a declaration of rights, status, or other legal relations under it."

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10th Dist., 2016-Ohio-5043 (involving, in part, a declaratory judgment action challenging Ohio's prohibition on political candidates using the title of an office not currently held as violative of the Ohio Constitution's right to free speech); *Couchout v. Ohio State Lottery Comm.*, 71 Ohio App. 3d 371, 373 (10th Dist. 1991) (holding that the common pleas court had jurisdiction over a case requesting declaratory and injunctive relief based on claims that a statute was an unconstitutional impairment of contract, constituted a retroactive law, and denied the non-resident due process). This action is no different.

Here, Appellees seek a declaratory judgment that the Secretary, in instructing boards of elections to reject qualified electors' applications for absentee ballots that are emailed or faxed, has violated their Ohio constitutional rights to due process and equal protection. Such an action is plainly authorized under the Declaratory Judgment Act

2. The Trial Court correctly determined that the Secretary's interpretation of R.C. 3509.03 burdens the right to vote.

Appellants also contest the Trial Court's finding that Directive 2020-13 burdens the right to vote. *See* Op. 10-11.

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It is well-settled that the right to vote is a "precious" and "fundamental" right. *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012) quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966). And the United States Court of Appeals for the Sixth Circuit has explained that "right to vote is protected in more than the initial allocation of the franchise," and that equal protection "applies as well as to the manner of its exercise." *Id.* quoting *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008). In other words, a "citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* citing *Bush v. Gore*, 531 U.S. 98, 104, (2000). Therefore, any burdens on the manner in which the right to vote is exercised, including arbitrarily prohibiting one group of voters from submitting their absentee ballot requests online while allowing another group to do so, constitute burdens on the right to vote itself.

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In bringing their constitutional claims, Appellees alleged that the State has burdened voting rights through the disparate treatment of similarly situated voters. Specifically, Appellees alleged that the Secretary is arbitrarily and disparately valuing the votes of UOCAVA voters, who can electronically request absentee ballots, and voters who request absentee ballots by mail or in person over the votes of non-UOCAVA voters who, like Plaintiff-Appellee Houlahan and many of ODP's members, desire to submit their completed absentee ballot requests through electronic means.

Appellants incorrectly urge the Court to assess this claim under rational basis review. But when a plaintiff alleges that a state has burdened voting through the disparate treatment of voters, courts review the claims using the "flexible standard" outlined in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Obama for Am.*, 697 F.3d at 429. Under this standard, the Court must weigh the "character and magnitude of the asserted injury to the rights" against "the precise interests put forward by the State as justification for the burden imposed by its rule," while also taking into consideration "the extent to

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which those interests make it necessary to burden the plaintiffs' rights." *Id.* quoting *Burdick,* 504 U.S. at 434.

As to the character and magnitude of the burden, Appellees do "not need to show that they were legally prohibited from voting, but only that burdened voters have few alternate means of access to the ballot." *Id.* at 431. The Secretary contends that voters have numerous other options available, but that is not the case, especially in light of the ongoing COVID-19 pandemic and the widely reported delays in mail delivery. If voters cannot submit their completed requests for absentee ballot applications via email or fax, then their options are limited to (1) risking their health by voting in person amidst the ongoing pandemic, (2) risking their health and incurring travel expenses by submitting their absentee request in person at their county board of elections, or (3) incurring the expense of mailing their absentee ballot application while also risking that it does not get timely delivered by the postal service.

As to the State's precise interests for the prohibition and the extent to which those interests are necessary to burden Appellees' rights, the Secretary "must propose an interest sufficiently weighty to justify the

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limitation." *Obama for Am.*, 697 F.3d at 433. He failed to do so here. The Secretary asserts only that the State has a vague interest in maintaining an orderly election. Sec. Br. at 23. But he does not explain how this interest justifies treating completed absentee ballot requests submitted via email or fax any differently than absentee ballot requests submitted in person or by mail, nor does he explain how this interest justifies permitting UOCAVA voters from submitting their absentee ballot requests via email while also prohibiting non-UOCAVA voters from doing the same. Further, the Secretary does not explain how allowing non-UOCAVA voters to submit their completed applications via email or fax would be any more burdensome for the boards of elections than the current process that allows voters to submit their absentee applications in person or by mail and also allows UOCAVA voters to submit their completed applications via email or fax.

Instead, the Secretary simply indicates that non-UOCAVA voters have never been allowed to electronically submit their completed absentee ballot applications in the past, and that allowing something new might pose challenges for the boards. But given the lack of evidence from the

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Secretary to support his claims, he has not shown that the State's regulatory interest in an "orderly election" is important enough to justify the burden he has placed on non-UOCAVA voters nor has he shown that it would be burdensome to allow all voters—not just UOCAVA voters—to submit their completed absentee ballot requests online.

Accordingly, this Court should find, as the Trial Court did, that Appellees are likely to succeed on their constitutional claims.

III. Appellants Do Not Dispute That Appellees Will Suffer Irreparable Injury Absent Injunctive Relief.

Key to its decision granting the preliminary injunction, the Trial Court concluded that Appellees will be irreparably injured absent an injunction. Op. at 11-12. Tellingly, Appellants entirely disregard this factor on appeal and make no argument whatsoever challenging the Trial Court's conclusion. They, therefore, waived their ability to appeal this determination and have conceded that Appellees will be irreparably injured without an injunction. But because the Court must consider this factor in reviewing the Trial Court's decision to grant the preliminary injunction, it is worth reciting the Trial Court's (uncontested) findings.

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The Trial Court correctly concluded that the harm facing Appellees (and other voters) is irreparable and not speculative. A plaintiff's harm from denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages. Based on its review of the evidence, the Trial Court determined that the Secretary is "aware that a significant number of eligible voters would request their absentee ballot by facsimiles or email" if allowed, and that the Secretary "understands that a number of eligible voters are currently being negatively impacted under the current directive." Op. at 11. This negative impact and the denial of the right to submit an absentee ballot request via email or fax cannot be compensated with monetary damages, and it, therefore, constitutes irreparable harm. Again, this finding is uncontested on appeal.

Furthermore, the Trial Court also found that Directive 2020-13 "places an additional burden on eligible voters' access to voting" that constitutes irreparable harm. Op. at 12. The Trial Court noted the well-settled case law that irreparable harm is presumed when constitutional rights are threatened or impaired, (*see Obama for Am.,* 697 F.3d at 436 citing *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir.

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2003) ("When constitutional rights are threatened or impaired, irreparable injury is presumed")), and that constitutional protections concerning the fundamental right to vote extend to the "manner of its exercise" (*id.* at 428 quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)). Accordingly, the Trial Court correctly concluded—and Appellants do not contest—that without an injunction, Plaintiffs-Appellees' (and other voters') fundamental right to vote will be burdened and irreparably injured by Directive 2020-13.

IV. No Third Parties Will Be Unjustifiably Harmed By The Injunction (Secretary's First Assignment of Error; Intervenors' Fourth Assignment of Error).

A. There is no "unjustifiable harm" in requiring government officials to follow the law.

Appellants' argument with respect to harm to third parties prong is not that any of them will be unjustifiably harmed, but that the county boards of elections will be unjustifiably harmed by having to process absentee ballot applications that are submitted via email or fax. But the boards of elections are arms of the State, and, therefore, their foremost obligation is to follow the law. Accordingly, the Trial Court correctly determined that because Ohio law allows voters to submit their absentee

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ballot requests via email or fax, then the work associated with processing absentee ballot applications does not constitute harm or at least is justified. *See* Op. at 12.

B. The requested relief would simply require the boards of elections to use the existing process for accepting UOCAVA absentee ballot requests for all voters.

1. The Trial Court correctly found that the Secretary conceded that boards of elections have had a process in place to accept electronically submitted absentee ballot requests for 10 years.

The Trial Court also correctly found that the Secretary conceded in his submitted evidence that the boards of elections already have a secure process in place for accepting electronically transmitted absentee ballot requests for UOCAVA voters. Op. at 12. Dating back to 2009, when Congress amended the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) with the Military Overseas Voter Empowerment (MOVE) Act, Ohio's elections officials have been required by federal law to accept emailed absentee ballot requests from UOCAVA voters and to have a process in place to do so. The Secretary submitted affidavits from elections officials confirming this fact, as well as evidence outlining the security protocols that are in place for these requests. Based on this

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evidence, the Trial Court correctly determined that the Secretary "already indicated that a process is in place for accepting absentee ballot request[s] by email or facsimile and there is no reason to believe the process currently in place is not secure." Op. at 12. Appellees seek simply to extend this existing system to all Ohio's voters, a change that the Trial Court correctly determined would be "minimal" when extended to non-UOCAVA voters. *Id.*

2. The Secretary's evidence demonstrates that the process in place for accepting electronically submitted absentee ballot applications is essentially the same as the process for accepting applications submitted in person or by mail.

Not only does the evidence submitted by the Secretary plainly demonstrate that the boards of elections already have a process in place to accept emailed absentee ballot applications, but it shows that the boards' process for accepting absentee ballot requests via email is essentially the same as the process for accepting applications in person or by mail. The only difference is the manner of delivery. Indeed, this is spelled out in the affidavits of the Directors of the Delaware (Sec. Exh. D, Harron Aff.) and Hamilton County Boards of Elections (Sec. Exh. C, Poland Aff.):

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Process For Non-UOCAVA Absentee Requests	**Process For Emailed UOCAVA Absentee Requests**
1. A voter submits their request in person or by mail. 2. A Board employee must "open the application, review it, scan it, and attach it to the voter's record in the voter registration database." 3. A second Board employee "matches the application information to the data in the Boards' voter-registration system." 4. "Once it is confirmed that the information in the application matches that in the voter-registration database, an absentee ballot packet, including the ballot, instructions for it [*sic*] return, identification envelopes, and a return envelope are all created and mailed to the voter." Sec. Exh. D, Harron Aff. ¶ 8; *see also* Sec. Exh. C, Poland Aff. ¶ 11 (outlining the same process).	1. A voter submits their request by email. 2. A Board employee "opens the email, and prints, and review the [request]." a. If the voter used a particular form, and is not registered to vote, the Board processes their registration. 3. A second Board employee "matches the application information to the data in the Board's voter registration system." 4. "Once confirmed, the Board will email the absentee ballot to the email address listed on the UOCAVA's voter's [application]." Sec. Exh. D, Harron Aff. ¶ 12; *see also* Sec. Exh. C, Poland Aff. ¶ 8 (outlining the same process)

Except for the manner of delivery—and email or fax would

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unquestionably be faster than relying upon the postal service—the process for reviewing emailed and non-emailed applications is the same, and the Secretary's repeated assertion that the boards would have to develop an entirely new procedure to accept emailed absentee ballot requests is simply not true. Instead, they would just continue using the processes they already have in place.

3. The Secretary's "burden" argument is not supported by his evidence.

The Secretary also repeatedly contends that the uncontested evidence purported demonstrates that the boards have "no plan" in place to accept absentee ballot requests submitted by email or fax. But, again, this assertion is belied by the Secretary's own evidence, which shows the process *in place* for receiving an emailed UOCAVA absentee ballot is essentially the same as the process for receiving an application in person or by mail. Moreover, the Secretary and the county boards of elections have been preparing for a surge in absentee ballot requests due to the ongoing coronavirus pandemic. Indeed, the Director of the Hamilton County Board of Elections stated in her affidavit submitted to the Trial

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Court that, as of August 5, 2020, her county had seen a 4,994% increase in the number of absentee ballot applications received by the Board during the same time period for the 2016 General Election. Sec. Exh. C, Poland Aff. ¶ 14. Thus, if anything, the ongoing pandemic is burdening elections officials. But expanding the existing online absentee request process for UOCAVA voters to non-UOCAVA voters would not require the boards to do much differently than they are already required to do. Accordingly, the Trial Court correctly determined, based on this evidence, that the change brought about by the injunction would be "minimal." Op. at 12.

4. The Trial Court correctly determined, based on the Secretary's evidence, that the existing protocols for UOCAVA ballot requests are secure.

The Trial Court correctly concluded that based on the Secretary's evidence, the security protocols already in place for electronically submitted UOCAVA ballot requests are secure and that this process would continue to be secure when applied to non-UOCAVA absentee ballot requests. Op. at 12.

For instance, the Secretary submitted an affidavit from his office's Chief Information Office (CIO) detailing the security protocols already in

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place that would continue to be in place if injunctive relief is granted. *See* Sec. Exh. B, Wood Aff. This affidavit explains that each board of elections is required to "receive cyber security training from his office as well as training their own staff annually on cybersecurity." *Id.* at ¶ 5.e. citing Directive 2019-08. These training programs "cover topics such as knowing how to detect a phishing email, the importance of using strong passwords, and general cybersecurity awareness," and it has "three to five phishing-related training awareness videos." *Id.* at ¶ 5.f. Additionally training materials regarding "Top Security Threats" were "presented by Secretary of State employees at the Ohio Association of Election Officials Winter Conference held in January of 2020." *Id.* at ¶ 5.g.

Furthermore, the CIO's affidavit describes a cybersecurity directive, Directive 2019-08, issued by the Secretary. *Id.* at 5.b. Directive 2019-08 "included a checklist of 34 separate requirements that each of the 88 county boards of election must meet in order to be considered cyber security compliant." *Id.* These include five categories of requirements "(1) physical security assessments and improvements; (2) background checks of elections personnel; (3) creating a new BOE website and e-mail

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domain; (4) cyber-attack detection and tracking hardware; and (5) continuing cyber security training." *Id.*

After reviewing this evidence, the Trial Court appropriately found that the cybersecurity plan already in place for receiving emailed UOCAVA ballot requests is secure, and that it could be extended to non-UOCAVA ballot requests. Op. at 10, 12.

C. It is not too late to get it right.

Appellants contend that even if Plaintiffs-Appellants are right about the law, it is too close to the election to do anything about it. But the Trial Court correctly rejected this argument.

1. Courts have routinely awarded injunctive relief in cases far closer in proximity to an election than this action.

Appellants rely heavily upon the "Purcell principle" from the U.S. Supreme Court's decision in *Purcell v. Gonzalez* 549 U.S. 1, 4-5 (2006) in support of his position that it is too late for the Court to do anything about his interpretation of R.C. 3509.03. Although it is true that the U.S. Supreme Court stated in *Purcell* that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and

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consequent incentive to remain from the polls," (*Purcell*, 549 U.S. at 4-5), the Supreme Court has "never outlined a categorically higher burden for Plaintiffs who move for relief soon before an election." *A. Philip Randolph Inst. v. Husted,* 907 F.3d 913, 918 (6th Cir. 2018) citing *Ohio Republican Party v. Brunner*, 544 F.3d 711, 718 (6th Cir. 2008) (en banc) ("This generalization [that courts should deny relief sought soon before an election] surely does not control many election-related disputes—keeping polls open past their established times on election day or altering the rules for casting ballots or provisional ballots during election week."), *vacated on other grounds by* 555 U.S. 5 (2008) (per curiam). As a result, courts have routinely awarded injunctive relief in cases far closer in proximity to an election than this action, which was filed in July.[2]

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[2] *See, e.g., A. Philip Randolph Inst.*, *supra* (6th Cir. Oct. 31, 2018) (granting an emergency motion to require the Secretary of State to issue a directive to the boards of elections instructing them to comply with certain procedures in conducting a purge of voter rolls); *Obama for Am. v. Husted*, 888 F.Supp.2d 897 (S.D. Ohio Aug. 31, 2012) (awarding injunctive relief requiring the Secretary of State to restore in-person early voting for all eligible Ohio voters during the three days before the election); *Ohio Republican Party, supra,* (6th Cir. Oct. 14, 2008) (en banc) (awarding injunctive relief requiring the Secretary to address mismatches in the voter registration database less than a month before the

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2. The Secretary himself has ordered sweeping election changes far closer in proximity to elections than this action.

The Secretary's purported concerns about this Court making election changes too close to an election are belied by own his history of ordering sweeping election changes far closer in proximity to elections than this action. In the time since Plaintiffs filed this action, the Secretary has issued *seven* new directives to the county boards of elections (Directives 2020-14 to Directive 2020-20) as well as releasing a mammoth "48-Point Guidance Requirements and Recommendations to County Boards" addressing a range of issues for the November 3, 2020 General Election. *See* Frank LaRose, *LaRose Sends 48-Point Guidance Requirements and Recommendations to County Boards*, Aug. 12, 2020 available at https://www.sos.state.oh.us/media-center/press-

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November 2008 Election); *Project Vote v. Madison Cty. Bd. of Elections*, Case No. 1:08-cv-2266-JG, 2008 U.S. Dist. LEXIS 74016, 2008 WL 4445176 (N.D. Ohio Sept. 29, 2008) (granting motion for preliminary injunction requiring the Madison County Board to accept same-day voter registrations and absentee votes); *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio Oct. 26, 2006) (granting motion for preliminary injunction enjoining enforcement of naturalized citizen portion of the Voter ID laws).

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releases/2020/2020-08-12/. Moreover, the Secretary, along with Ohio Governor Mike DeWine, notably *cancelled* in-person voting for Ohio's 2020 Primary Election just hours before polls were scheduled to open on March 17, 2020, sending the election into chaos and creating massive confusion among voters and poll workers. Given his own track record of making dramatic changes with little notice, the Secretary cannot reasonably argue that it is too late to award Appellees' requested relief.

Accordingly, the Trial Court correctly determined that any burdens imposed upon third parties by issuance an injunction are "minimal." Op. at 12.

V. The Public Interest Will Be Served By The Injunction (Intervenors' Fourth Assignment of Error).

The Trial Court also correctly concluded that the public interest will be served by granting injunctive relief given the Secretary's concession that a significant number of qualified electors would submit their absentee ballot requests via email or fax if permitted. Op. at 13.

On appeal, the Secretary entirely ignores this factor and does not challenge the Trial Court's finding, but Intervenors contest it (for their

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first time) by baldly asserting that the benefit of the injunction is "extremely low." Int. Br. at 27. Intervenors, however, overlook the longstanding principle that the public has a "strong interest in exercising the fundamental political right to vote" and that this interest is "best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Obama for Am.*, 697 F.3d at 436-437 (internal quotations and citations omitted).

Intervenors also overlook the confusion and chaos that exist in the current system—during Ohio's 2020 Primary Election, more than 300 absentee ballots were not counted because the postal service failed to deliver them on time. *See* Jessie Balmert, *More than 300 Butler County ballots delivered late won't count in Ohio primary*, Cincinnati Enquirer, May 12, 2020 available at https://www.cincinnati.com/story/news/2020/05/12/more-than-300-butler-county-ballots-delivered-late-wont-count-ohio-primary/3119026001/. This risk will only increase for the 2020 General Election with far more voters participating.

Moreover, given the fact that the country is facing a global pandemic

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requiring many Ohioans to remain at home to prevent the spread of the coronavirus, allowing voters to request an absentee ballot through no-contact, electronic transmission would help serve the public health. In contrast, no vital public purpose or public interest that is served by *rejecting* electors' absentee ballot applications that are emailed or faxed instead of submitted in person or by mail. Thus, because the public interest "favors permitting as many qualified voters to vote as possible," (*id.* at 437) the public interest favors granting Appellees' requested injunctive relief.

For these reasons, the Trial Court correctly determined that Appellees met their burden for the issuance of a preliminary injunction, and this Court should affirm such holding.

VI. The Trial Court Correctly Determined That Laches Does Not Apply (Intervenors' Second Assignment of Error).

Grasping at straws, Intervenors—but not the Secretary—argue that Appellees' claims are barred by the doctrine of laches, which is an affirmative defense that may bar relief in an election-related matter if the person seeking relief fails to act with the "utmost diligence." *See State ex*

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rel. Stevens v. Fairfield Cty. Bd. of Elections, 152 Ohio St.3d 584, 2018-Ohio-1151, ¶ 8 (explaining that "[a] laches defense rarely prevails in election cases.") (emphasis added). But the Court should reject this argument for the following reasons.

A. Intervenors waived their ability to assert laches.

Intervenors cannot argue laches in their appeal because they failed to timely assert the defense in a responsive pleading prior to the Trial Court's decision. Laches is an affirmative defense under Civ.R. 8(C), which requires affirmative defenses to be raised in a responsive pleading. And it is well-settled that the failure to raise an affirmative defense other than those listed in Civ.R. 12(B)—laches is not listed in Civ.R. 12(B)—are waived unless they are raised in the pleadings of in an amendment to the pleadings. *UAP-Columbus* [redacted] *v. O. Valeria Stores, Inc.*, 10th Dist. No. 07AP-614, 2008-Ohio-588, ¶ 12 citing *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 20, 688 N.E.2d 506 (1998). Moreover, a party generally waives the right to raise on appeal an argument it could have raised, but did not, in earlier proceedings. *See Clemens v. Nelson Fin. Group, Inc.,* 10th Dist. No. 14AP-537, 2015-Ohio-1232, ¶ 27, citing

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Niskanen v. Giant Eagle, Inc., 122 Ohio St.3d 486, 2009-Ohio-3626, ¶ 34, 912 N.E.2d 595.

In this matter, Intervenors did not file their Answer asserting the defense of laches until after the Trial Court granted the preliminary injunction. Accordingly, Intervenors did not—and could not—argue to the Trial Court that laches barred Appellees' claims, and, therefore, they waived their ability to assert laches on appeal.

B. Laches does not bar claims for prospective relief.

Even if Intervenors had timely asserted laches in a responsive pleading and argued laches to the Trial Court, laches does not bar Appellees' claims because, as a matter of law, laches does not apply to claims for prospective relief. It is well-settled that "[l]aches only bars damages that occurred before the filing date of the lawsuit," and it "does not prevent plaintiff[s] from obtaining injunctive relief or post-filing damages." *Nartron Corp. v. STMicroelectronics, Inc.,* 305 F.3d 397, 412 (6th Cir. 2002); *see also Ohio A. Philip Randolph Institute v. Smith*, 335 F.Supp.3d 988 (S.D. Ohio 2018) (quoting same); *United States Playing Card Co. v. Bicycle Club*, 119 Ohio App.3d 597, 604, 695 N.E.2d 1197

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(1st Dist. 1997) ("where the remedy desired is prospective relief, a finding of laches alone is not sufficient [to defeat a suit for injunctive relief]."). Here, Appellees seek prospective relief in the form of declaratory and injunctive relief—they do not seek a remedy for any harm that predates the filing of the action. Consequently, laches does not bar this action.

C. Even if laches could bar claims for prospective relief, Intervenors failed to establish all the necessary elements for laches to bar this action.

Even if laches could apply here, Intervenors failed to demonstrate all the elements needed for the doctrine to bar Appellees' claims. The elements of laches, which Intervenors bear the burden of proving, 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. Beard v. Hardin*, 153 Ohio St.3d 571, 2018-Ohio-1286, ¶ 14. Establishing all these elements is essential as the Ohio Supreme Court has instructed that courts should try to follow "the fundamental tenet of judicial review in Ohio," which is "that courts should decide cases on their merits." *State ex. rel. Yeager v. Richland County Bd. Of Elections,* 136 Ohio St.3d 327, 2013-

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Ohio-3862, ¶ 14 (internal quotations and citations omitted).

1. There has been no unreasonable delay.

As an initial matter, there has been no unreasonable delay in asserting a right. The Secretary issued Directive 2020-13 on July 17, 2020 and Plaintiffs-Appellees filed their lawsuit two weeks later on July 31, 2020, which was 95 days before the election. Intervenors did not cite *any* case law explaining what constitutes an unreasonable delay let alone any case law establishing that a mere two-week delay more than 90 days before the election is an unreasonable delay.

2. Any supposed "delay" is well-excused.

Intervenors contend that Appellees could have brought this action even before the Secretary issued Directive 2020-13 on July 17, 2020. But, as the Trial Court found, Plaintiffs-Appellees waited until after Directive 2020-13 was issued because they were waiting to see if litigation would even be necessary in light of the Secretary's repeated indications that he might allow online absentee ballot requests. Op. at 10.

Given the Secretary's long-held position in favor of online absentee ballot requests, and the fact that Democratic lawmakers pointed out that

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the law currently allows for a form of online absentee ballot requests, Appellees were justified in waiting to see if he would follow through on his support for the policy. If he had, Appellees' litigation would have been unnecessary. Thus, any delays prior to the issuance of Directive 2020-13 are attributable to Plaintiffs waiting to see if litigation would even be necessary, and this is a valid excuse for any delays in bringing a lawsuit. *See Stevens*, *supra,* ¶ 10 (explaining that delays attributable to efforts to "obviate the need for litigation" are not unreasonable).

3. Appellees only recently learned that the Secretary would prohibit boards from accepting electronically transmitted absentee ballot applications for the 2020 General Election.

For the same reasons above, Appellees did not have knowledge of the Secretary's intent to prohibit completed absentee ballot requests from being submitted via email or fax for the 2020 General Election until July 17, 2020 when Directive 2020-13 was issued. Prior to this, there was a very real possibility that the General Assembly would change the law or that the Secretary himself would implement an online absentee ballot request system. Again, Appellees should not be faulted for waiting to see if the Secretary would allow some form of online absentee ballot requests.

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4. Intervenors have not been prejudiced.

Finally, Appellees' July 31, 2020 filing did not prejudice Intervenors. Intervenors do not even argue that *they* are prejudiced by the filing. Instead, they contend that the Secretary was prejudiced by the filing, but not even the Secretary made that argument to this Court.

In sum, even if Intervenors-Appellants can argue laches on appeal (they waived the argument), and even if laches can apply to claims for prospective relief (it cannot), Intervenor-Defendant failed to prove all the necessary elements for the doctrine to apply here.

VII. Appellees Have Standing (Intervenors' First Assignment of Error).

Appellees have standing to challenge Directive 2020-13. The argument that Appellees lack standing had been made to the Trial Court by the Secretary (not by Intervenors) in a Civ.R. 12(B)(6) motion to dismiss, in which the Trial Court was required to presume all factual allegations contained in the complaint as true and to draw all reasonable inferences in favor of Appellees. Additionally, only one party need establish standing per claim to advance. *See Dep't of Commerce v. U.S.*

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House of Representatives, 525 U.S. 316, 330 (1999); *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

A. The Secretary's mere conclusory statements do not establish that the Trial Court erred.

The extent of the Secretary's argument to that the Trial Court erred in finding that the Appellees have standing are three conclusory sentences devoid of any analysis of the Trial Court's decision or the Appellees' filings. Such conclusory statements do not establish that the Trial Court erred.

B. Intervenors' standing argument is remarkably disingenuous.

Aside from the fact that Intervenors submitted no arguments to the Trial Court regarding Appellees' standing, it is remarkably disingenuous of them to argue that Appellee ODP lacks standing. Among the group of Intervenors is the Ohio Republican Party (ORP), and in their Motion to Intervene, they argued that ORP is the "mirror image" of ODP and that disposition of this action may "impair or impede" their ability to protect their own interests. In other words, ORP argued to the Trial Court that this action will affect *their* rights, yet they turn around and argue to this Court

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that the action does not affect ODP's rights.

C. Mr. Houlahan has standing.

Mr. Houlahan has standing under common law principles and under the Declaratory Judgment Act. Common law standing requires litigants to show that they 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." *Moore, supra*, ¶ 22. And declaratory relief is available to a plaintiff that can show "(1) a real controversy exists between the parties, (2) the controversy is justiciable, and (3) speedy relief is necessary to preserve the rights of the parties." *Id.* at ¶ 49. Moreover, courts are to be "generous" in considering whether a party has standing. *Id.* at ¶ 48.

Additionally, the potential for future harm need not be shown with precision as Intervenors urge. Standing can rest "on the predictable effect of Government action on the decisions of third parties." *Dept. of Commerce v. New York*, 139 S. Ct. 2566 (2019).

Mr. Houlahan is an 81 year old qualified voter in Franklin County who desires to submit his absentee ballot application for 2020 General

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Election to his board of elections via email and to have his application processed in the same manner as a hard-copy application. Am. Compl. ¶ 7; Houlahan Aff. ¶ 3-4. He has several uncontested reasons for this, including not wanting to risk his health or the health of elections officials by submitting his application in person, a desire to save time and financial resources by emailing his request rather than submitting it in person or by mail, and having concerns about mail delivery due to the widely reported delays and issues with the Postal Service. Am. Compl. ¶ 39-41, 48; Houlahan Aff. ¶ 7, 9, 11-18.

Mr. Houlahan's legal right at stake here is his right to request an absentee ballot. By law, he must submit his completed application to his board of elections—the board will not pick it up from him. He, therefore, has the burden to get his application to the board, and Directive 2020-13 directly impacts his ability to do so for the 2020 General Election by limiting his options to mail delivery or personal delivery. It deprives him of the additional option to submit the request electronically. Moreover, this restriction is unquestionably traceable to the Secretary given that he issued Directive 2020-13, and awarding the requested relief would enjoin

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the Secretary's Directive, thereby redressing the injury. Accordingly, Mr. Houlahan has standing under common law principles.

Mr. Houlahan also easily satisfies the elements for standing under the Declaratory Judgment Act. There is a real controversy between him and the Secretary in that the Secretary's interpretation of R.C. 3509.03, as set forth in Directive 2020-13, restricts Mr. Houlahan's ability to exercise his right to request an absentee ballot. The claim is plainly justiciable in that it is ripe for review and resolving it will bring Mr. Houlahan relief in the form of removing the restriction. And immediate relief is needed as the 2020 General Election is imminent. Accordingly, Mr. Houlahan has standing under the Declaratory Judgment Act.

D. ODP has standing.

The Trial Court correctly determined that ODP has both independent standing as a political party and associational standing.

ODP is one of Ohio's two legally recognized major political parties whose candidates for local, state, and federal offices will stand for election at the November 3, 2020 general election. Am. Compl. ¶ 6; Pl. Exh. D, Beswick Aff, ¶ 3. ODP has hundreds of thousands of members from

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across the state, including many qualified Ohio electors who regularly support and vote for candidates affiliated with ODP. Am. Compl. ¶ 6. More than 800,000 ODP members participated in Ohio's 2020 Primary Election. Am. Compl. ¶ 6; Beswick Aff, ¶ 4. Additionally, by law, ODP has two members on each of the 88 county boards of elections. *See* R.C. 3501.06(B).

ODP devotes substantial resources to voting activities, and this is especially so in a presidential election year, like 2020, when voter turnout is at its highest. Am. Compl. ¶ 6, 42; Beswick Aff, ¶ 5. Each election cycle, ODP's staff and volunteers make calls and send mailings to inform registered Democrat and unaffiliated voters about the voting process, including providing voters with information about requesting absentee ballots. Am. Compl. ¶ 42. Additionally, ODP runs a voter protection program each election cycle to help voters with issues related to their efforts to vote, including issues related to voters' attempts to request absentee ballots. *Id.* Throughout the early voting period and on election day, paid and volunteer attorneys staff a hotline that voters can call to ask questions or report problems. *Id.* ODP intends to spend its resources to

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continue these voter education and voter protection efforts for the November 3, 2020 General Election. Am. Compl. ¶ 42; Beswick Aff, ¶ 5.

ODP projects a marked increase in the number of Ohio electors who will choose to request an absentee ballot for the November 3, 2020 General Election compared to prior elections due to the ongoing COVID-19 pandemic. Am. Compl. ¶ 38; Beswick Aff, ¶ 7.

ODP has an interest in knowing whether, under R.C. 3509.03, qualified electors have a right to submit their completed absentee ballot applications via email or by other viable forms of electronic transmission, such as facsimile, so that ODP can properly inform voters of their rights. Am. Compl. ¶ 43; Beswick Aff, ¶ 10. If it is later determined that voters do, indeed, have a right to submit their completed absentee ballot applications via email or other viable form of electronic transmission, then ODP will spend resources to inform voters about their right to request an absentee ballot in this manner. Am. Compl. ¶ 43.

Moreover, ODP has members who have suffered and will suffer injury as a result of the Secretary's interpretation of R.C. 3509.03. Am. Compl. ¶ 44. Many of ODP's members choose to vote by absentee ballot

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and will choose to vote in this manner for the 2020 General Election. *Id.* These members will thus be subject to the Secretary's interpretation of R.C. 3509.03, and as a result, these members' right to request an absentee ballot via email or through other viable forms of electronic transmission, such as facsimile, will be impeded. *Id.* Further, the Secretary's interpretation of R.C. 3509.03 will require ODP's members to choose between submitting their absentee ballot request in-person, which would require them to spend the time and resources necessary to travel to their county boards of elections and requiring them risk their health and elections officials' health in light of the ongoing COVID-19 pandemic, or submitting their requests by mail, which would require them to spend the resources necessary to mail their request and to risk disenfranchisement due to delays in mail delivery. *Id.*

In short, ODP's members, voters and candidates rely on ODP to represent its interests when it comes to voting rights and assuring that their best interests and legal rights in the election process are protected. Am. Compl. ¶ 47.

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1. ODP has independent standing as a political party.

ODP, like Intervenor ORP, has independent standing as a political party because of the injury it faces as an organization. Courts routinely find that organizations, including ODP, have standing to challenge election laws when the laws compel organizations to devote resources to combatting its harmful effects. *See, e.g., Ohio Org. Collaborative v. Husted*, 189 F. Supp.3d 708, 725-26 (S.D. Ohio 2016) (holding that ODP has organization standing to challenge an election law based, in part, upon a finding that the provision would have forced ODP to spend resources countering the negative effects of the provision); *NEOCH v. Husted*, Case No. 2:06-cv-896, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251 (S.D. Ohio June 7, 2016) *aff'ed in part, rev'ed in part by* 837 F.3d 612 (6th Cir. 2016) (holding that ODP has organizational standing based upon a showing that ODP would be compelled to devote resources to getting its supporters to the polls who would otherwise be discouraged from voting).

ODP demonstrated that it has and will continue to devote substantial resources to educate its members, its candidates, and independent voters about the Secretary's instructions set forth in Directive 2020-13.

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Moreover, there is a real controversy between ODP and the Secretary in that the Secretary's interpretation of R.C. 3509.03 as set forth in Directive 2020-13 directly impacts ODP's organizational strategies. The claim is plainly justiciable in that it is ripe for review, and immediate relief is necessary due the proximity of the 2020 General Election. Accordingly, ODP has standing to sue.

2. ODP has associational standing.

ODP also has standing to sue on behalf of its members, which include 800,000 voters who, like Mr. Houlahan, intend to vote in the 2020 General Election and will be impacted by Directive 2020-13's restrictions on the right to request an absentee ballot. Standing as an association does not require the participation of individual members in this type of lawsuit. *See Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) ("The individual participation of an organization's members is not normally necessary when an association seeks prospective or injunctive relief for its members."). Moreover, when an alleged harm is prospective, courts typically do not require that organizational plaintiffs name names because every member faces a probability of harm in the near

and definite future. *See, e.g., Florida State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008). Accordingly, the Trial Court correctly concluded that ODP has standing to sue on behalf of these members.

CONCLUSION

For the foregoing reasons, Appellees respectfully ask the Court to affirm the Trial Court's decision granting the preliminary injunction.

Respectfully submitted,

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CERTIFCATE OF SERVICE

I hereby certify that the foregoing was electronically filed and a true and accurate copy was served on September 21, 2020, upon the following via electronic mail:

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