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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY

OHIO DEMOCRATIC PARTY, et al.,	:	Case No. 20 AP 421 ACCELERATED CALENDAR
Plaintiffs-Appellees,	:	
v.	:	On appeal from the Court of Common Pleas Franklin County
FRANK LAROSE, in his official capacity as Ohio Secretary of State,	:	Case No. 20-CV-4997
Defendant-Appellant.		

REPLY BRIEF OF APPELLANT-DEFENDANT OHIO SECRETARY OF STATE FRANK LAROSE

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REPLY

Appellees want the Court to believe that the issue here is simple. They posit that this is a "straightforward question of statutory construction." (App.Br. at 1.) This theory of the case is short-sighted and wrong on the law. There is no "plain language" in R.C. 3509.03 addressing appellees' requested relief—that all voters, for the first time ever, be allowed to deliver absentee ballot applications electronically. The Secretary's interpretation of the statute is reasonable and entitled to deference. And, while appellees and the trial court made "assumptions" about the simplicity of implementing the requested relief, ignoring entirely the cybersecurity concerns of the Secretary, the brief submitted by Amici validates these concerns. Amici confirm that the trial court erred in "assuming" that the current process UOCAVA voters use to electronically return absentee ballot applications is sufficient for all other voters.

For the reasons stated here, and in his Brief, Appellant Secretary of State LaRose respectfully asks this Court to reverse and vacate the preliminary injunction entered by the trial court.

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A. R.C. 3509.03 is silent on electronic delivery of absentee ballot applications; at a minimum, it is ambiguous.

Electronic delivery of absentee ballot applications is not explicitly *prohibited* in R.C. 3509.03; the statute makes no mention of email, fax, or any other electronic method of delivery. That is a fact. But the trial court erred as a matter of law when it concluded that this fact alone is dispositive of appellees' statutory claims.

Appellees maintain that the trial court was applying the "plain language" of the statute. (App.Br. at 10.) This is incorrect. The trial court's decision focused solely on the format of an absentee ballot application, as specified in R.C. 3509.03(A) and (B). (R.104, Op. at 9.) These provisions provide that a voter "shall make written application" for a ballot, R.C. 3509.03(A), and an application need not be in "any particular form," R.C. 3509.03(B). The trial court completely ignored the section that addresses *delivery* of absentee ballot applications, R.C. 3509.03(D). Nor did the trial court address R.C. 3509.03(E), which addresses postage for applications. The parties do not dispute the format of an application—it must be in writing and need not be in "any particular form." R.C. 3509.03(A)-(B).

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But this case is not about format; it's about *delivery*. The trial court clearly did not base its decision on the "plain language" of the statute (App.Br. at 10) if it entirely ignored the relevant provision of the statute. *See Jacobson v. Kaforey*, 149 Ohio St. 3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 9 (In statutory construction, a court should not to "pick out one sentence and disassociate it from the context.") (citation omitted).

Appellees further insist that, because electronic delivery is not *prohibited* in R.C. 3509.03, the "plain language" of the statute allows it. (App.Br. at 9-10.) Not so. If electronic delivery is neither prohibited nor expressly allowed, the "plain language" of the statute does not support appellees' position. Appellees' own analysis concedes that the statute is subject to more than one interpretation: (1) "nothing requires completed absentee ballot applications to be returned only by mail or in person," and (2) "[n]othing prohibits completed absentee ballot applications from being submitted via email or fax." (App.Br. at 9-10.) Whether all voters have a right to deliver absentee ballot applications electronically is anything but "plain" under R.C. 3509.03.

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The only accurate description of the statutory language on this claim is that it's silent. R.C. 3509.03 does not address electronic delivery of absentee ballot applications. The statute is ambiguous. *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16 (For purposes of statutory interpretation, a provision is ambiguous if it is "capable of bearing more than one meaning.") (citation omitted).

B. The Secretary's interpretation of R.C. 3509.03 is reasonable and entitled to deference.

Because R.C. 3509.03 is ambiguous, the Court must defer to the Secretary's interpretation of "deliver" *unless* that interpretation is unreasonable. *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 23. Here, the Secretary's interpretation is reasonable and appellees have failed to show otherwise.

Appellees first maintain that the Secretary's interpretation is unreasonable because it ignores the "plain language" of the statute. (App.Br. at 15). But, as addressed above, there is no plain language here. The statute is silent on electronic delivery of absentee ballot applications.

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Nor have appellees shown why the UOCAVA statutes, R.C. 3511.02 and R.C. 3511.021, do not support the Secretary's reasonable interpretation of "deliver" in R.C. 3509.03. The UOCAVA statutes have explicit language that allows UOCAVA voters to submit absentee ballot applications electronically; R.C. 3509.03 does not. It is reasonable for the Secretary, as has been done by secretaries of both parties since 2007, to interpret these statutes to mean UOCAVA voters may electronically submit applications and non-UOCAVA voters may not.

Moreover, ignoring the explicit language in the UOCAVA statutes is counter to rules of statutory construction that require giving effect to all words in a statute. That is, to interpret "deliver" as that word is used in R.C. 3509.03(D), to mean all electronic means of delivery, renders the specificity in R.C. 3511.02 and R.C. 3511.021 meaningless. The Court should avoid such a result. *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Educ.*, 131 Ohio St. 3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 19 ("No part [of the statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that

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construction which renders a provision meaningless or inoperative.") (internal quotations omitted).

Appellees ignore the tens of thousands of UOCAVA voters deployed or residing overseas by asserting "there is no logical reason" in allowing UOCAVA voters to apply for a ballot electronically. (App.Br. at 19.) That assertion is absurd. The reason is not, as appellees quip, "because federal law requires it." (*Id*. at 18.)

UOCAVA voters located overseas need special accommodations to allow them to vote. *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir.2012) ("*OFA*"). These special accommodations "are based on highly relevant distinctions between service members and the civilian population" and "account for inconsistencies and delays in foreign mail systems" and the "communication difficulties" encountered by UOCAVA voters located overseas. *Id*.

The General Assembly has decidedly not extended these accommodations to non-UOCAVA voters. Though technology has advanced, the statute has not. To be sure, the delivery provision in subsection (D) has remained functionally the same since 1987 when electronic delivery of

applications would not have been contemplated as a delivery method. Am.Sub.H.B. 23 (effective October 20, 1987). But it is for the General Assembly to evolve the statute, not the courts.

Appellees also claim that the Secretary's interpretation improperly inserts a "prohibition" not in the statute and rely on *State ex rel. Myles v. Brunner* to support this position. (App. Br. at 11-13). But the statutory provision in *Myles* is inapposite to this case. At issue in *Myles* was the requirement that an absentee ballot application "'shall contain' certain items, including a 'statement that the person requesting the ballots is a qualified elector.'" 120 Ohio St.3d 328, 2008-Ohio-5097, 899 N.E.2d 120, ¶ 18. Secretary Brunner took this requirement a step further and mandated that electors check a box affirming this statement. *Id*. at ¶ 20. The court concluded that Secretary Brunner's interpretation was improper because R.C. 3509.03 did not require an elector to mark a box next to the qualified-elector statement. *Id*. at ¶ 21.

The court in *Myles* took issue with Secretary Brunner adding a requirement to something already required in the statute. But that is not the case here. Unlike the requirement in *Myles*, in R.C. 3509.03 "deliver" has

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no express requirements or limitations. The Secretary is not improperly inserting a "prohibition" into the statute, but giving reasonable limits to an undefined—and potentially limitless—term.

The more appropriate comparison is *Colvin v. Brunner*, where the statutes at issue were silent. In *Colvin* relators claimed that a voter had to be registered for 30 days prior to applying to vote absentee. 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 38. Secretary Brunner interpreted the relevant statutes to mean that a voter need only be registered 30 days before the election, but need not be registered for 30 days before applying to vote absentee. *Id*. at ¶ 44. The statutes were silent on the date by which a citizen must have been registered for the specified 30 days to be entitled to vote. *Id*. at ¶ 46. The court thus analyzed whether Secretary Brunner's interpretation was reasonable. *Id*. at ¶ 57. Answering yes, the court concluded that the statutes did not prevent the secretary's interpretation. *Id*. And, because "the secretary of state's construction is reasonably supported by the pertinent provisions,…the court *must* defer to that reasonable interpretation." *Id.* at ¶ 57 (emphasis added).

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Here, too, there is statutory silence. There is no express prohibition or allowance—no "plain reading"—to support either the trial court's or appellees' interpretation of the statute. And the Secretary's interpretation is reasonable given that a nearby statute, R.C. 3509.05 requires electors to deliver absentee ballots by "mail" or "personal[] delivery."

Indeed, it is the trial court and appellees' interpretation that enlarges the scope of the statute. Appellees are asking for a novel interpretation of R.C. 3509.03, counter to the administrative construction that has existed for 13 years. And the trial court set a rule that significantly expands how voters deliver absentee ballot applications based on a statutory provision that addresses the *form* of applications, not their *delivery*.

To be sure, how an absentee ballot application can be "delivered" has endless possibilities. If the trial court can insert whatever it believes to be the proper means of delivery, based only on the lack of an explicit prohibition in the statute and assumptions, there is no end to the statute's expansion. But that is precisely why courts defer to secretaries of state when faced with statutory silence or ambiguities. The Secretary's interpretation of R.C. 3509.03 is reasonable and entitled to deference.

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C. The Secretary's interpretation passes constitutional muster.

Although it is clear that rational-basis review applies to appellees' constitutional claims, *see* Br. at 15-18, key admissions in appellees' brief show that their constitutional claims fail even under the more lenient *Anderson-Burdick* standard appellees urge, *see* App.Br. at 27-28. Earlier this year, the Sixth Circuit concluded that "Ohio's interest in orderly election administration is weighty enough to justify [a] moderate burden" on plaintiffs' right to vote under this standard. *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020). Those same elements are present here.

First, appellees have not shown even a moderate burden on voting. Appellees do not argue that Directive 2020-13 excludes them from the ballot. (App.Br. at 28.) Appellees readily admit that at least three voting alternatives are available to them: in-person voting, submitting an absentee application in person, and mailing an absentee application. (*Id.*) But they contend that these alternatives are not truly available because the "COVID-19 pandemic and the widely reported delays in mail delivery" make these alternatives risky or expensive or both. (*Id.*) This contention has no support in the facts or the law. Appellees ignore health-and-safety

measures like curbside voting, *see* Directive 2020-11, implemented to avoid the risks of in-person voting and reported slowdowns in mail delivery. Legally, this contention ignores recent authority finding that the cost of postage is not a burden on the right to vote, *League of Women Voters v. LaRose*, S.D.Ohio 2:20-cv-1638, 2020 U.S. Dist. LEXIS 91631, at *21, 29-30 (Apr. 3, 2020), and that COVID-19 does not transform moderate burdens into severe ones. *Thompson v. LaRose*, 959 F.3d 804, 810 (6th Cir. 2020) ("[J]ust because procuring signatures [for a ballot initiative] is now harder . . . doesn't mean that Plaintiffs are *excluded* from the ballot.").

Second, as in *Mays*, the State asserted its interest in orderly election administration as a justification for Directive 2020-13.[1] Appellees contend that the Secretary failed to support this claim with evidence, *see* App.Br. at 29, but a cursory look at the record reveals that to be false.

[1] To the extent appellees claim there is no state justification for treating UOCAVA voters differently than non-UOCAVA voters, *see* App.Br. at 29, not even *OFA* supports appellees. There the court specifically noted that permitting "absent military and overseas voters to request an absentee ballot by mail, fax, email, or in person, while other voters may only do so by mail or in person" was "tailored to address the problems that arise from being overseas." 697 F.3d at 434.

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Karla Herron, Director of the Delaware County Board of Elections, stated that emailed absentee ballot applications would require the board to divert resources from Election Day voting, hire additional staff, put a plan in place for reviewing emailed applications, and procure computers and fax machines for such purposes. (R.42, Herron Aff., ¶¶ 17-18.) Spencer Wood, the Secretary's Chief Information Officer, noted that emailed absentee ballot applications would require boards to depart from current best practices *not* to click on unsolicited or suspicious emails and open them up to cyberattacks. (R.40, Wood Aff., ¶ 6(f).) There is no question that "allowing something new *might* pose challenges for the boards." (App.Br. at 29.) The uncontested evidence shows that appellees' requested relief would throw the upcoming election into disarray.

Under the standard recently articulated by *Mays*, "Ohio's interest in orderly election administration is weighty enough to justify [a] moderate burden" on the right to vote. 951 F.3d at 792. It comes as no surprise, then, that both the trial court and appellees never mention *Mays*. It's clear that appellees' constitutional claims cannot survive it.

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D. The equities do not support the trial court's decision; appellees fail to show otherwise.

As an initial matter, the Secretary did not concede irreparable harm to appellees. (App.Br. at 30.) The trial court addressed appellees' alleged harm in the context of *OFA* (Op. at 11) and the Secretary followed suit (Br. at 16-17, 19-23). The Secretary stated clearly that appellees offered no evidence to show that they are or will be precluded from voting, and have thus shown no harm. (*Id.*) As opposed to *OFA*, where plaintiffs introduced substantial evidence that they will be entirely precluded from voting based on the change in law, appellees have shown only a preference to apply for an absentee ballot in a certain way. (*Id*. at 17.) Appellees had and continue to have ample opportunities to vote between now and November 3. (*Id*. at 16.) They failed to show irreparable harm if the injunction is not granted and the trial court erred deciding otherwise.

Appellees also incorrectly state that the Secretary failed to raise laches. (App.Br. at 44). The Secretary stated that the trial court erred in disregarding appellees' delay and the consequences of such delay. (Br. at

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25, citing *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815, N.E.2d 1107, ¶ 13.)

Finally, appellees go to great lengths to buttress the trial court's assumption that boards of elections have a process in place to accept absentee ballot applications electronically. (App.Br. at 33-38.) Appellees do not account for the volume difference between UOCAVA and non-UOCAVA voters. (R.40, Wood Aff., ¶ 6-e-g.) Nor do they note the evidence showing that even with current security protocols and training, boards of elections have been victim to Ransomware attacks after clicking on phishing emails. (*Id*. ¶ 4-b.) These attacks resulted in compromised voter registration systems at best, and a completely unusable system at worst. (*Id*. at ¶ 4-c.) Also unmentioned is what happened to New Jersey when that state implemented the same kind of process that appellees seek here, on-the-fly, just like appellees propose. (R.43.) This evidence is uncontested.

Notably, Amici contradict the trial court and appellees. According to the trial court and appellees, the email addresses and fax numbers that boards already have are sufficient. Implementing appellees' relief is as simple as opening an email, the same way it is done for the relatively small

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number of UOCAVA voters. Amici, however, agree with the Secretary that this is not "the best approach." (Am.Br. at 18.) Instead, the Secretary must "design a system for email submission." (*Id*.)

The first step in this system, in direct contradiction to the trial court and appellees, is *not* to use the email addresses boards already have, but to dedicate a separate email address for the sole purpose of receiving applications. (*Id*. at 19.) The boards should use computers—with virus-scanning software and other security controls installed—dedicated solely to receiving applications. (*Id*. at 19-20.) Amici also recommend revising server settings to prevent network overload and new policies to inform voters that their emailed applications were received. (*Id*. at 21-22.)

How can all of this be accomplished weeks before Election Day? And how will it be funded? Amici don't have answers. But one thing is clear from Amici's proposal: the current system, the one that the trial court and appellees say is just fine, is wholly *insufficient* to safely and securely accept emailed absentee ballot applications. What is also clear is that implementing any injunction at this late juncture would jeopardize the integrity of a critical election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

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CONCLUSION

For the above reasons, as well as those set forth in his original Brief, Secretary of State LaRose respectfully asks this Court to reverse and vacate the preliminary injunction entered by the trial court.

Respectfully Submitted,

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Certificate of Service

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