

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

OHIO DEMOCRATIC PARTY <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	Case No. 20CV-5634
vs.	:	
	:	
FRANK LAROSE, Secretary of State,	:	
<i>et al.</i>	:	
	:	
Defendants.	:	

OPINION

McTigue & Colombo LLC, Derek S. Clinger, J. Corey Colombo, and Donald J. McTigue, for plaintiffs.

Dave Yost, Attorney General, Bridget Coontz and Halli Brownfield Watson, Assistant Attorneys General, for defendant Frank LaRose, Ohio Secretary of State.

Jones Day, Edward Carter and M. Ryan Harmanis for Intervenor-Defendant Ohio Republican Party.

Zach Klein, City Attorney, Richard Coglianesse and Alana Tanoury, Assistant City Attorneys for City of Columbus; Barbara J. Doseck, City Attorney for City of Dayton; Andrew W. Garth, Interim City Solicitor for City of Cincinnati; Eve V. Belfance, Director of Law for City of Akron; Deborah S. Matz, Director of Law for Summit County; and Montgomery County Commissioners Judy Dodge, Carolyn Rice and Deborah A. Lieberman, *pro se*, all on joint brief as *amici* in support of plaintiffs.

Fritz Byers, for Lucas County Commissioners, and Dale Emch, Law Director for City of Toledo on joint brief as *amici* in support of plaintiffs.

Kimm A. Massengill-Bernardin, General Counsel, Kyle Beatty Asst. General Counsel for *amicus* Ohio Council 8, AFSCME, AFL-CIO in support of plaintiffs.

Frye, Judge.

I. Introduction.

This case concerns how voters may return absentee ballots for the November 3, 2020 general election, and specifically the possible use of multiple ballot “drop boxes” in each county to which Ohio voters might return their absentee ballots if they elect not to

rely upon the U.S. Mail. There is no dispute about the obligation of each county to use one secure receptacle for the November 3, 2020 general election. There is also no dispute about the protocol in place for security of drop boxes, which must be monitored 24/7 and from which absentee ballots must be retrieved by at least one Republican and one Democratic member of the board of elections or board staff at least once daily. The question presented is whether Ohio Secretary of State Frank LaRose acted within his legal authority in adopting a limitation on additional drop boxes.

The Secretary issued administrative Directive 2020-16 on August 12, 2020. Sent to all county boards of elections, the “Directive provides instructions on the continuing use of a secure drop box at each board of elections, and on curbside voting.” It includes this statement: “Boards of elections are prohibited from installing a drop box at any other location other [sic] than the board of elections.”

II. Procedural Background.

The Ohio Democratic Party [“ODP”] and retired law professor Lewis Goldfarb brought this case on August 25, 2020 to challenge Directive 2020-16. They seek a declaratory judgment and potentially injunctive relief as to the Secretary’s authority to issue a limitation of one drop box per county. The case was reassigned to the undersigned after 13 other Franklin County judges recused. Shortly after the case began the Ohio Republican Party [“ORP”] intervened under Civ. R. 24(A) aligned with the Secretary. A number of *amicus* parties have tendered briefs, all in support of plaintiffs.¹

Following several pre-trial hearings, an evidentiary hearing was held on September 11, 2020. Thanks to the diligence of counsel many facts are stipulated or addressed in agreed exhibits. By agreement affidavits from twenty witnesses were presented. Plaintiff Goldfarb and ODP Executive Director Gregory Beswick both testified in court. The Secretary declined to testify at court or by deposition. No member of his elections staff testified either.²

¹ As is already clear on the record, *amicus* briefs were accepted only insofar as they offered legal argument; to the extent they offered or argued affidavits or other evidentiary material that was not properly admitted they cannot be considered.

² The Secretary asserted in a motion to quash that neither he nor staff should be required to testify, arguing a so-called “high-ranking government official” privilege, and that probing advice received might

It merits mention that a somewhat parallel case remains pending before United States District Judge Polster in the Northern District of Ohio. *A. Philip Randolph Institute of Ohio v. LaRose*, Case No. 20CV-1908. Importantly, a clear indication was given to that court that the Secretary will abide by a ruling in this state court case. (The transcript of a pretrial conference before Judge Polster on August 31 was stipulated into evidence here, as Ex. “N”). Counsel for Secretary LaRose represented that if the Ohio courts determine that additional drop boxes are required “or it’s the Boards of Elections’ determination, then absolutely we would implement that.” (Tr. at p. 11; see also, at pp. 14, 18, 20, 22.) The Secretary’s argument in his motion to dismiss this case (filed September 8 at pp. 9 – 11) that a ruling here will not terminate the uncertainty or controversy appears to contradict those assurances given to Judge Polster. Resolution of state law issues here may, in short, resolve both cases.

There is a pragmatic reason for this state court to address issues that it can. Of late federal courts follow the rule that they “should ordinarily not alter the [state] election rules on the eve of an election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. ____, 140 S. Ct. 1205, 1207 (2020) (*per curiam*); *see also, Kishore v. Whitmer*, ____ F.3d ____, 2020 U.S. App. LEXIS 26827, 2020 WL 4932749 (6th Cir. 2020) (affirming denial of preliminary injunction addressing Michigan election statutes during the pandemic) and *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020) (Stay of District Ct. order at 2020 U.S. Dist. LEXIS 87773 (Sargus, J.) addressing Ohio election law requirements during the pandemic). Judge Polster may conclude his remedial authority is truncated as the election nears; but such decisions are not applicable to a state court.

III. Unusual Background Factors.

A. The Pandemic.

Three unusual factors frame the background for this case. The first requires little discussion. A worldwide pandemic began to impact the United States in early spring.

implicate attorney-client privilege. Following a hearing, and in view of some stipulations that appeared by then to be agreed upon, the court ruled that it would not enforce the subpoenas. The court was sensitive to demands the upcoming election is placing on the Secretary, but expressly cautioned his counsel that it seemed unusual for a public official not to “seek an opportunity to explain why their decision is well-considered and reasonable.” (Order filed Sept. 8, 2020, at p. 2).

According to government reports, COVID-19 virus has since claimed roughly 200,000 American lives. As yet, no vaccine has been scientifically proven to avoid COVID, and no medication offers a sure cure. Avoiding large gatherings - so-called social distancing - together with the use of face masks remain the primary tools recommended by medical professionals to avoid infection. The pandemic continues to seriously disrupt America's economy and everyday life, not least by undermining the confidence many Americans have in going out to public places.

Ordinarily voting occurs in public locations on an election day. However, the 2020 general election will be different. The Secretary has mailed roughly 7.8 million absentee ballot applications – one to each registered voter in Ohio – and as of September 4 around one million of them had already been returned. (The deadline for requesting an absentee ballot is not until three days before the election, pursuant to R.C. 3509.03(D).) The parties have stipulated that – consistent with the one million absentee ballot requests already made two months before the November 3 election – “election officials expect a major increase in mail-in voting this year due to the coronavirus.” The parties also agree that while 20% of Ohioans usually vote by mail, Secretary LaRose has predicted there could be as many as 50% of registered voters who will use absentee ballots this year.³

B. The Absence of Statutory Law.

The second factor framing this case is that, at present, no state statute explicitly authorizes using absentee drop boxes; but, nothing prohibits their use either.

Ohio adopted no-fault absentee voting in 2006. R.C. 3509.05(A) provides that in addition to using “mail *** to the director” from whom an absentee ballot was received a voter may “personally deliver it to the director”⁴ of the county board of elections. The word “deliver” is not defined in the statute.

Concern at the highest levels of state government over potential spread of COVID-19 disrupted Ohio's March 17, 2020 primary. As a result, in-person voting was suspended at the last minute in favor of a largely absentee-ballot election. Late on the evening of

³ Two stipulations (¶¶ 8, 9) demonstrate this is not a partisan issue. “Secretary LaRose has said that historically there is no significant difference between Republican and Democratic voters when it comes to voting by mail in Ohio.” Further, “[b]oth major parties heavily organize around encouraging their supporters to vote by mail.”

⁴ R.C. 3509.05(A) also provides that the spouse or another close relative of the “elector” may also “deliver” their ballot in an envelope to the director.

March 16, about nine hours before polls were to open and several hours after this court denied a requested temporary restraining order to halt the primary and re-set it for several months later,⁵ the Director of the Ohio Department of Health ordered polling places not to be opened. Eight days later Am. Sub. H.B. 197 passed the General Assembly. On March 27 the Governor signed it with an immediate effective date. H.B. 197 included provisions to address the primary election during the COVID-19 pandemic.⁶ Section 35(E), an uncodified provision that applied only to the primary, mandated a ballot drop box be obtained and used in each Ohio county. The parties have stipulated, however, that “House Bill 197 temporary law section 32(E) does not apply to the 2020 general election.”

C. Delay of U.S. Mail Delivery.

The third unexpected factor that frames this case is recent, widely publicized controversy over the speed and accuracy of mail delivery by the United States Postal Service. Voters who in another year might have felt comfortable simply mailing back their general election absentee ballot have reason to lack confidence this year that all ballots will be delivered in time to be counted. The key point for present purposes is that this concern is likely to impact some voters’ behavior and increase their desire to deliver ballots in person, rather than relying upon the U.S. Mail. No evidence suggests this concern is not rather wide-spread, since the Secretary has commented publicly about it.

U.S. Mail delivery is addressed in affidavit testimony of a number of the witnesses summarized below. In requesting a formal Opinion about ballot drop boxes from the Attorney General on July 20, the Secretary commented favorably on using the mail to return absentee ballots. (Ex. “D” p. 3). Ten days later, however, the General Counsel and Executive Vice President of the United States Postal Service sent a lengthy letter to the Secretary (following up on another letter sent two months earlier which is not in the

⁵ *Reardon v. LaRose*, Franklin Co. Common Pleas No. 20CV-2105 (Frye, J.).

⁶ In H.B. 197 the deadline for voting by absentee ballot was extended until April 28, 2020. For the first time, an Ohio statute explicitly provided for – and required - a ballot drop box at each board of elections location. See, Directive 2020-07, explaining H.B. 197 to the boards of elections. However, the provision in H.B. 197 addressing drop boxes was not made part of the permanent election law in Ohio. That was another of the legal ambiguities that resulted in this case. See, *Maynard v. Eaton Corp.*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, ¶ 7, and *Professionals Guild of Ohio v. Lucas Cty. Correctional Treatment Facility Bd.*, 10th Dist. No. 17AP-885, 2019-Ohio-2522, 140 N.E.3d 90, ¶ 20, explaining uncodified law in Ohio.

record.) That July 30, 2020 U.S.P.S. letter acknowledged that “specific transit times” for mail “cannot be guaranteed” although “most domestic First-Class Mail is delivered 2 – 5 days after it is received by the Postal Service.” (Ex. “C-1” p. 1). “Mailing completed ballots to election officials” was then discussed, with the advice that “[t]o allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state’s due date.” After noting the Postal Service had reviewed Ohio election laws, the letter went on to say that “there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with your election rules and returned promptly, **and yet not be returned in time to be counted.**” *Id.* p. 2 (emphasis added.)

Consistent with that letter, mail delivery in the context of the national election has been the subject of hearings in both the House of Representatives and the United States Senate this summer.⁷ Whether mail delivery ultimately interferes in a material or widespread way with delivery of absentee ballots in Ohio remains to be seen. But, voter apprehension about it has been proven, and is not irrational. Voter concern about mail service is, therefore, another factor fairly weighed by boards of elections if they have the legal authority to implement additional drop boxes or other methods to receive absentee ballots.

IV. Adoption of Directive 2020-16.

Three weeks before the Secretary issued this Directive he sought a formal Opinion from the Ohio Attorney General about using additional ballot drop boxes for the November 3 election. His request for a formal opinion was made in a detailed letter dated July 20, 2020. After referencing the pandemic and the primary election conducted under H.B. 197, the Secretary asked the Attorney General for a formal opinion on whether county boards of elections could “continue to use the single, secure receptacle *** installed for the completion of the 2020 Primary Election.” He asked a second question, too: “even if a county board of elections may continue to use the one secure receptacle

⁷ *Examining the Finances and Operations of the United States Postal Service During COVID-19 and Upcoming Elections*: Hearing Before the Senate Committee on Homeland Security & Governmental Affairs, 116 Cong. (August 21, 2020); *Protecting the Timely Delivery of Mail, Medicine, and Mail-in Ballots*: Hearing Before the House Committee on Oversight and Reform, 116 Cong. (August 24, 2020).

outside their offices, does Ohio law permit the installation of one or more *additional* secure receptacles in a county for absentee voters to return their voted ballots to the board of elections?” (The word “additional” was italicized in the Secretary’s letter.)

In concluding, the Secretary asked the question in reverse: “Or must the General Assembly pass legislation to authorize the installation and use of more than one secure receptacle in a county?” In seeking a formal Opinion, the Secretary conceded that the answer to whether “there may be more than one secure ballot ‘drop box’ in a county *** is not clear.”

No Opinion issued.⁸ Three weeks later on August 11 the Secretary’s staff sent an email message stating he was “withdrawing this request for a formal Opinion of the Attorney General.” The following day the Secretary issued “Directive 2020-16.”

Directive 2020-16 was adopted without any public notice, hearing, or comment. Although in seeking the Attorney General’s opinion three weeks earlier the Secretary acknowledged he had recently been asked about multiple drop boxes, the record shows no input was obtained from any board of elections, the major political parties, or ordinary citizens before he acted. While expedited adoption of “temporary directives” (having effect only during the ninety days prior to an election and ending on the fortieth day following an election) are allowed by R.C. 3501.053, this procedure left no administrative record for this court to consider.

V. *Additional Findings of Fact.*

Ohio has 88 counties. The size and population of those counties varies dramatically.

The Ohio Development Services Agency shows two Ohio counties (Franklin and Cuyahoga) each had over 1.2 million residents in 2018, and roughly 900,000 registered voters. The three least populated Ohio counties (Vinton, Monroe, and Morgan) had less than 15,000 residents, and fewer than 10,000 voters. The geographic disparity between

⁸ Perhaps the reason no Opinion issued in 2020 is because a prior Opinion concluded that the Secretary of State could not dictate election systems to a local board of elections. “By statute, the authority to determine the type of voting equipment used in a county is made on the county level.” 2005 Ohio Op. Atty Gen. No 6, 2005 Ohio AG LEXIS 11, *12, citing R.C. 3506.02. Thus, “[t]he Ohio Secretary of State is not empowered to require by means of an administrative directive that the board of elections of each county must *** select a precinct count optical scan (PCOS) voting system ***.” (Syllabus).

Ohio's counties is similarly vast. Ashtabula County covers over 700 square miles; Ottawa, Erie and Lake each cover 255 square miles or less. https://development.ohio.gov/reports/reports_countytrends_map.htm. (accessed Friday September 11, 2020.)

While the time of day, road network, traffic patterns, availability of public transportation, and other features within each county are obvious factors that impact the accessibility of one or more ballot drop boxes, as a generalization it can be said that counties covering a relatively larger geographic area will require more travel time by voters than is needed in smaller counties. Traffic volume in counties with larger populations will also, generally, result in more road congestion and travel time than in less populated counties. Data in the record from Bradley W. Thomas specifically documents time that voters could save if public library branches in Cincinnati and Columbus were used for additional absentee ballot drop boxes. The potential time savings for some voters would be substantial.

The record also proves that drop boxes were used at some places in Ohio even before H.B. 197. Hamilton County began using a secure ballot drop box for the return of absentee ballots in 2012. Currently it has a drop box inside the board office, and a second drive-through box located outside the office. However, the 2020 primary election resulted in serious traffic safety problems due to the increased number of voters personally delivering their absentee ballot.⁹ According to the evidence, on the last day of primary voting lines of vehicles waiting to get to the drop box extended onto a nearby four-lane state highway, and were estimated to be as long as a mile in both directions. Such an arrangement raises serious public safety concerns. Multiple boxes might well alleviate them, or so a board of elections could conclude. A related but less significant problem is determining, as of 7:30 p.m. on election night, who the last voter is in line to vote. Waiting cars extending a great distance back from a single drop box – conceivably out on a limited access highway – may make it nearly impossible to determine that all voters waiting in line at 7:30 actually get to deliver their ballot. Apparently recognizing

⁹ Two additional features of the Ohio absentee voting system deserve mention. First, only the voter or a close family member may deliver ballots back to the board of elections. This is apparently intended to cut down on the possibility of fraudulent voting, such as might occur if a stranger could obtain someone's ballot with the promise it would be delivered with others from the same neighborhood (sometimes termed "ballot harvesting.") Second, voters cannot return an absentee ballot to a precinct polling location.

these problems, following the 2020 primary the Hamilton County board of elections voted 3 – 1 to study adding additional boxes and additional locations. As of September 4, there have already been over 81,000 non-military absentee ballots requested in Hamilton County, against a total of just under 600,000 registered voters. That equates to early – with two months until the election – absentee requests from 13.5% of voters.

Montgomery County has used an exterior drop box on Third Street, Dayton’s main east-west thoroughfare. That led to traffic congestion. The election board then moved the drop box to the loading dock of a county building, but “[s]till, only a small number of vehicles can wait in line *** to use the exterior drop box before traffic backs up on to Third Street.” As also reported by other witnesses, Montgomery County voters have raised concern about delays in mail delivery which may interfere with their ability to cast an absentee ballot in the general election this fall. Understandably, according to a Board member, the director and deputy director have established and maintained a positive, collaborative working relationship with local U.S. Postal Service operations. Yet, it remains to be seen how that will impact delivery of general election ballots.

Sandusky County includes the city of Fremont, and covers almost the same geographic area as Hamilton County. However, Sandusky County has only 40,000 voters, or about 7% of the total in Hamilton County. As of September 4, 4,400 voters had requested absentee ballots for the November 3 election, or 11% of registered voters. Before the Secretary issued Directive 2020-16 limiting drop boxes to one per county, the board of elections “was moving forward on a plan to add secure absentee ballot drop boxes in different parts of Sandusky County to provide voters with alternative means to cast their vote early without risking any delays caused by the postal system” according to one member of that board. “[L]imiting the county boards of elections to installing absentee ballot drop boxes only at their offices will prevent the boards from taking steps they feel are necessary to address the mail delivery issues that prevented voters from having their absentee ballots counted during the 2020 Primary Election” and from effectively dealing with the high turnout for the general election, according to a longtime elections board member in Fremont.

The director and deputy director of the Franklin County board “had been exploring installing additional absentee ballot drop boxes at locations throughout Franklin County” including perhaps “adding 4 – 5 drop boxes in the west, south, and east sides of Franklin

County, including libraries, other county agency buildings or branch offices of the Franklin County Sheriff.” That evaluation stopped following issuance of Directive 2020-16. Yet, as of September 4, over 145,000 non-military absentee ballot requests had been received, which is nearly the total number of absentee ballots cast in Franklin County in the 2016 general election.

Mahoning County includes Youngstown, Ohio. The director of that board has explained that local mail goes through a postal facility in Cleveland, then back down to Mahoning County, and “typically takes 5 – 7 days for mail to be delivered from one address in Mahoning County to another in the same county.” Sporadic deliver by the Postal Service was also observed during the 2020 primary election. Mail delay may explain why absentee requests as of September 4 lag the rate in other counties at about 3% (5,100 requests against 163,000 registered voters.) In any event, the director of the Mahoning County board has suggested that if not stopped by Directive 2020-16 her county “would install 10 additional drop boxes” at locations other than the board’s office. The court recognizes things might not go that way in Mahoning County, based upon the affidavit of the Chairman of their board of elections. Mr. Monroe appears to be the sole witness submitting testimony to this case flatly stating he “would be personally” opposed to adding drop boxes, although he acknowledges there had been “informal discussions about drop boxes” before the Directive. Mr. Monroe says his concerns are “security, cost and administrative burden.”

Athens County has had an absentee ballot drop box at its office since 2018, and in late July 2020 “there was a discussion among members on the merits of installing additional drop boxes around Athens County” because it is “primarily rural” and voters might then have the “convenience of having drop boxes installed at some of the public libraries around the county.” Those discussions stopped with Directive 2020-16.

Huron County includes the City of Norwalk. The Chair of their board of elections testified to problems with mail delivery for the 2020 primary election including ballots being returned to the board rather than being delivered to voters. “Long delays in mail delivery with the daily mail” are being reported by residents of her county. Still, as of September 4 nearly 4,600 nonmilitary absentee requests had been made out of 36,000 registered voters (or at nearly 13% rate.) Before discussion stopped in the wake of Directive 2020-16, that board had one absentee drop box in the northern part of the

county and was “interested in installing an additional drop box in the southern part of Huron County.”

Another affidavit in the record reflects the longtime experience of the Director of the Ashtabula County Board of Elections. He alone among the witnesses before the court actually explained how he acquired the drop box used in the 2020 primary. New drop boxes cost only about \$2,000 each, and require only a two-week delay for delivery unless they are backordered. Like other witnesses, he points out that arrangements must also be made to install each drop box, mount remote cameras for the required surveillance if there is not already video surveillance (as might be the case on a library or other public building), assure wifi connectivity, and have personnel available to empty the box each day. Staff of a board of elections may therefore, to some degree, be diverted from other tasks if additional boxes were obtained, installed, and used.

Finally, the court takes note of the testimony of the executive director of the ORP. He asserts that enjoining enforcement of Directive 2020-16 that prohibits county boards “from installing additional drop boxes for absentee ballots would alter the structure of the competitive environment in which the ORP, its members, its voters, and its supported candidates participate in elections Ohio. [sic]” He explains this position by stating that if additional drop boxes were used, “the ORP will fund and support activities designed to provide Ohio voters with information about drop boxes that are not located on county board of elections premises” such that “[t]he ORP would have to divert resources from other activities to provide this information.” This assertion seems to ignore the fact that the parties formally stipulated in this case that Secretary LaRose “has said that historically there is no significant difference between Republican and Democratic voters when it comes to voting by mail in Ohio.” Given that history, and the abundant proof that a high percentage of Ohioans intend to vote absentee, the added convenience and safety of additional drop boxes should enhance voting for members of both major parties. Independent voters will presumably turn-out at a higher rate as well if voting is not made too inconvenient or confusing. So, the court does not accept the ORP’s claim that additional drop boxes will somehow alter the competitive environment. It is not evidence based.

VI. Procedural Objections raised by defendants.

Rather than moving straight to a determination of Ohio law on absentee ballot boxes, defendants invest great effort in arguing that plaintiffs ODP and Mr. Goldfarb cannot seek a declaratory judgment. Why defendants do not welcome a straightforward ruling on whether “[b]oards of election are prohibited from installing a drop box at any other location other than the board of elections” as set out in Directive 2020-16 is unclear. Similarly, defendants contend that only an impermissible “advisory opinion” is at stake. Another argument is that the Secretary has absolute discretion under state law to make rules about elections. So, they argue, plaintiffs cannot accept on one hand his Directive that each board of elections must use the ballot box acquired as recently as the 2020 primary election, while challenging his limit that they may not use more than one. (ORP post-hearing brief, at pp. 1 – 2.) Before addressing standing to sue, the court will briefly address these objections.

Beginning with the last, the Secretary cannot defend his one-per-county limitation merely by asserting he was not legally required to permit any boxes at all. The Secretary is obligated to conduct Ohio elections “as are prescribed in Title XXXV of the Revised Code.” R.C. 3501.04. Thus, “[t]he Supreme Court of Ohio has stated that the orders of the Secretary of State, which are to be obeyed by boards of elections, must be lawful orders supported by the Code.” *State ex rel. Donegan v. Cuyahoga Co. Bd. of Elections*, 136 Ohio App.3d 589, 596 (8th Dist. 2000), citing *State ex rel. Sagebiel v. Montgomery Cty. Bd of Elections*, 144 Ohio St. 162 (1944). The Eighth District decision also refers to *State ex rel. White v. Franklin Co. Bd. of Elections*, 65 Ohio St.3d 5, 8 (1992), which recognized that decisions of a board or the Secretary “are subject to judicial review, however, for fraud, corruption, abuse of discretion, or a clear disregard of statutes or applicable legal provisions.” See also, *State ex rel. West v. LaRose*, Slip Opinion 2020-Ohio-4380, ¶ 16.

In the context of administrative action an interpretation of law which is not “reasonable” or “within the contemplation of the statute” constitutes an abuse of discretion. *State ex rel. Ernst v. Brunner*, 144 Ohio Misc.2d 73, 2007-Ohio-7265, ¶ 12 (Franklin Co. C.P.) citing *Strongsville Bd. of Edn. V. Zaino*, 92 Ohio St.3d 488, 490, 751 N.E.2d 996 (2001). Similarly, for federal law purposes arbitrary and capricious action can violate the Fourteenth Amendment, such as when “defendants arbitrarily deny Ohioans the right to vote depending on where they live.” *League of Women Voters v.*

Brunner, 548 F.3d 463, 476 (6th Cir. 2008.) The mere fact that the Secretary’s judgment is entitled to some deference in election matters does not mean he has carte blanche.

There is another dimension to this rule. Arbitrary and ill-considered administrative directives may well run afoul of constitutional minimums required in dealing with elections. “Although the Constitution does not require a state to create an *** [election] procedure, if it creates such a procedure the state cannot place restrictions on its use that violate the federal Constitution.’ [citations omitted].” *Thompson v. Dewine*, 959 F.3d 804, 808 (6th Cir. 2020). Much the same rule is commonly understood as a part of general administrative law. Earlier this summer in dealing with the Deferred Action for Childhood Arrivals or DACA program, Chief Justice Roberts observed:

Justice Holmes famously wrote that “men must turn square corners when they deal with the government.” [citation omitted]. But it is also true, particularly when so much is at stake, that “the Government should turn square corners in dealing with the people.” [citation omitted]. The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

Dept. of Homeland Security v. Regents of the Univ. of California, 591 U.S. ___, 140 S.Ct. 1891, 1909-10, 207 L.Ed.2d 353 (2020).

The parties have stipulated that “[p]laintiffs do not assert that Directive 2020-16 is unconstitutional in this case; and that they “do not claim a legal right to a certain number or location of drop boxes in this case” or “seek to require any county board of elections to provide additional drop boxes in this case.” (Stipulations, ¶¶ 11 – 13.) What plaintiffs seek, quite simply, is a declaration about the lawfulness of the Secretary’s limit of one drop box per county. Effectively, he restricted all eighty-eight county boards of elections from examining their own local needs and reacting appropriately with what is best for their neighbors. This is a classic case for issuance of a declaratory judgment.

Ohio’s declaratory judgment statutes and Civ. R. 57 were adopted to allow courts to address legal uncertainty in a timely way. R.C. 2721.03 specifically allows “any person *** whose rights, status, or other legal relations are affected by a *** statute *** [to] have determined any question of construction or validity arising under the *** statute *** and [to] obtain a declaration of rights, status, or other legal relations under it.” Civ. R. 57 allows a court to accelerate the decision in such a case, when appropriate. Given that the

Secretary publicly admitted he was unclear about his legal ability to permit additional ballot drop boxes, and certainly in view of the undisputed evidence that he has told members of the public he would like to allow them, this court has an obligation to resolve the uncertainties in a timely manner. What individual county boards of elections do once the law is clarified is up to them but the law presumes – and based on the evidence there is no reason to doubt – that they will act in the public interest and having in mind the needs of their local communities.

“If the secretary’s ‘advice to the boards of elections is an erroneous interpretation of the election laws there must be some remedy to correct the error and to require proper instructions in lieu of those erroneously given.’ [citation omitted].” *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, ¶ 20.¹⁰ It is disingenuous for defendants to argue that this suit should simply be dismissed leaving the Secretary, local boards of elections, and the public generally with no judicial guidance as the November 3 general election approaches.

VII. Standing to Sue.

Defendants challenge the standing to sue of both plaintiffs who seek clarity about Ohio law on absentee ballot drop boxes. This seems a particularly disingenuous position for intervenor ORP to take. Having sought intervention in this case as a matter of right under Civ. R. 24(A), ostensibly because ORP is the “mirror image” of plaintiff ODP and because “the disposition of th[is] action may as a practical matter impair or impede the applicant’s ability to protect *** [its own] interests,” ORP turns around and says ODP cannot seek a court ruling. The law protects the rights of both major parties equally. No doubt ORP itself has sued its own share of cases seeking to clarify election law. A decision here that ODP lacked standing would invariably threaten ORP’s own access to the courts.

Standing may be analyzed from three perspectives. First, does ODP have standing in its own right, because of potential harms due to the alleged misstatement of law in Directive 2020-16? Will the outcome of this case impact ODP’s own mission and juse of

¹⁰ *Colvin* addressed another procedural point that defendants argue. This case was brought by ODP and Mr. Goldfarb for a declaratory judgment and potential injunctive relief, rather than in mandamus. However, ¶¶ 20 – 23 in the *Colvin* decision make clear that where there is no “command to perform an affirmative act” a mandamus request is inappropriate; instead a declaratory judgment and, if appropriate, injunction may be sought.

its resources? Second, does ODP have associational standing, that is, because members would have standing to sue? Third, does plaintiff Goldfarb have individual standing?

A. Independent Standing of a political party.

Participation by an organized political party in a case like this one has been permitted by the Supreme Court of the United States, and a number of appellate courts. Participation turns not merely on whether the organization may gain standing from injury to members of the party having individual standing (called organizational standing) but can also be found when a political party has standing independently. The Executive Director of ODP has nearly six years in his position. Approximately 800,000 people from all 88 counties voted in the 2020 Democratic primary election and are thereby considered “members” of the party. Tens of thousands of people make financial contributions to ODP. Two Democrats are members of each of the eighty-eight boards of elections around Ohio.

The greatly changed nature of the recent primary resulted in about 1.5 million people who had voted with ODP in the 2016 and 2018 primaries not voting this year. Mr. Beswick believes some of that drop-off was due to the pandemic, and secondly that there was confusion about the mechanics of voting absentee in the changed 2020 primary election process. As a result, ODP has had to perform substantial voter education, including explaining how to mail back ballots or deliver them to a drop box. If the limitation in Directive 2020-16 is lifted, the ODP will give county-specific instructions, like digital ads directed to individual voters, on the locations of all drop boxes.

Mr. Beswick believes that if it remains in effect, the one-box limit in Directive 2020-16 will cause ODP to spend more time explaining the absentee process to voters. There has been voter confusion this year. Like other witnesses, Mr. Beswick has personally heard concern, and even apprehension and distrust expressed over the postal service, in view of news reports including those advising that mail sorters have recently been taken out of some Ohio post offices. Such news stories will prompt some people to decide to deliver their ballots rather than use the mail, in his experience. For some, unfortunately, factors like these may discourage voting entirely. When voting seems too difficult, some throw up their hands and decide not to vote, in Mr. Beswick’s experience. Long lines can do that. Distrust in the system can do that. But, when voters have more options they are more likely to be at ease and get their ballot submitted.

Testimony proves that many ODP voters rely upon public transportation, giving ODP another legitimate basis for concern that travel to a single drop box will adversely impact its voters. Those who must travel by public transportation across large counties to a single box, assuming there is public transportation and the box is on or near a bus line, must still be given information about making the trip. Boards of elections are often not in the easiest locations, Mr. Beswick has observed. Inferentially, as opposed to having drop boxes at local libraries or other places which voters may find more familiar and conveniently accessible, they may lack familiarity with election board offices.

Like several other witnesses, Mr. Beswick is personally familiar with long lines of vehicles and traffic back-up caused by single drop boxes. He experienced this during the 2020 primary when dropping his own ballot at the Franklin County drop box on Morse Road in north Columbus. Again, his experience supports the concern expressed by others over traffic congestion and traffic safety issues associated with limited drop boxes. That seems likely to be exacerbated with much higher absentee turnout expected for the general election.

The ODP has around 300 candidates on ballots around the state this fall. To assist candidates, the party distributes slate cards and otherwise assists voters in understanding the entire process of voting, including how to return absentee ballots.

“[A] voting law can injure an organization enough to give it standing ‘by compelling it to devote resources’ to combatting the effects of that law that are harmful to the organization’s mission. *** [A law that] likely discouraged some of the party’s supporters from voting *** thus struck directly at the organization’s mission and forced it to spend resources to get discouraged voters to the polls.” *Common Cause Indiana v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019) citing in part *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). That court also recognized that an organization can have standing when a voting law “has created a culture of voter confusion” requiring the organization to “expect further concrete and specific adverse consequences: they will be required to increase the time or funds (or both) spent on certain activities to alleviate potentially harmful effects” of the challenged provision. This, in turn, “will displace other projects they normally undertake” and are “enough to allege injury in fact.” *Id.* at 952.

The court in *Common Cause Indiana* also noted a second Supreme Court decision in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) holding that “we

also agree with the unanimous view of those judges that the Democrats have standing to challenge the validity of the law.” Beyond that, the Seventh Circuit recognized last year that “[o]ur sister circuits have upheld the standing of voter advocacy organizations that challenged election laws based on similar drains on their resources.” *Id.* Recent decisions from four circuits, including the Sixth Circuit in *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (2016), were cited for that conclusion. *Id.* at 953. *Havens Realty Corp.* and *Common Cause Indiana* were followed earlier this year in *Cook County v. Wolf*, 962 F.3d 208, 219 (7th Cir. 2020) and in *Common Cause/New York v. Brehm*, 432 F.Supp.3d 285, 308-09 (S.D.N.Y. 2020).

Explaining to Ohio voters how important it is to overcome any confusion or distrust of the system, to return ballots in a timely manner, to deal with anxiety that the United States Mail may be delayed, and to vote absentee using no more than one ballot drop box in each county will occupy the time of both parties if Directive 2020-16 remains unchanged. Party communications will be enhanced if the arbitrary one-box limit is dropped. This will help both ODP and ORP since assuredly both parties will continue to encourage their members and the general public to overcome any perceived obstacles to voting. This conclusion is rooted in the stipulation that both major parties in Ohio heavily organize around encouraging their supporters to vote absentee. (Stipulation ¶ 9.)

Experience teaches that inevitably some voters will require a drop box if they are to deliver their ballot in time to have it counted. Some will fall ill in October, procrastinate, forget to mail their ballot, have no postage stamp, or experience other life events requiring the last-minute safety valve of one or more ballot drop boxes. Party resources will be expended in educating voters about candidates, voting deadlines, and regular mail-in absentee voting. If even more effort is required due to problems presented by the inconvenient one drop box per county limit, both major political parties will divert resources unnecessarily. Directive 2020-16 presents more than an abstract harm. For all these reasons, the court concludes ODP has standing to sue.

B. Mr. Goldfarb's Standing to Sue.

Mr. Goldfarb is a qualified voter in Franklin County, who intends to use an absentee ballot. He requested one in August. He hopes to vote using the drop box closest to his residence. Because of COVID-19 and his own health history, he does not feel comfortable voting in person. Although Mr. Goldfarb does not believe his personal mail has been delayed in recent months, Mr. Goldfarb has “been keeping up on what’s going on with the post office” and does not trust that if he mails his ballot it will definitely be delivered to the board of elections in time. A resident of Hilliard in the western part of Franklin County, Mr. Goldfarb will be obligated by Directive 2020-16 to drive 15 – 20 miles to the board of elections office on Morse Road in north Columbus – an hour round trip even with light traffic – unless additional boxes are permitted and located closer to his home. He simply seeks more drop boxes.

Defendants argue that Mr. Goldfarb and other voters who have already requested absentee ballots could vote quickly once those ballots are received. (The earliest they will be mailed-out is October 6.) Defendants are correct that a voter could mail their ballot back immediately allowing the Postal Service about a month to complete delivery before Ohio’s election deadline. But, voters doing so would miss almost the entire last month of the campaigns. During the last weeks several Presidential and Vice-Presidential debates are scheduled, along with local candidate nights (by ZOOM sometimes), and other educational opportunities will be presented by ODP up to Election Day. Standing cannot be defeated by requiring exceptional or unusual steps from a plaintiff.

The Ohio Supreme Court is liberal in recognizing individual standing in election cases. There is “a long line of cases” establishing that suits can be brought to enforce public duties related to an election even if the duty only affects the plaintiff generally. *State ex rel. Barth v. Hamilton Cty. Bd. of Elections*, 65 Ohio St.3d 219, 221-22, 602 N.E.2d 1130, (1992). Mr. Goldfarb has standing to sue.

C. ODP's Organizational Standing.

Because Mr. Goldfarb did not specifically testify to membership or other affiliation with ODP, it is unclear if ODP can premise derivative or organizational standing squarely on him. However, given the record it is reasonable to infer that among ODP’s 800,000 members are other voters who will be impacted by the one-box limitation in Directive 2020-16. Standing as an association does not require the participation of individual

members in this type of lawsuit. “The individual participation of an organization’s members is ‘not normally necessary when an association seeks prospective or injunctive relief for its members.’ [citations omitted].” *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004). ODP has standing to sue on behalf of its members.

D. Harm fairly traceable to the Secretary’s Directive.

Defendants argue that this case rests only on speculation about voter behavior if Directive 2020-16 remains unchanged. Thus, they argue, the case can result only in an advisory opinion.¹¹

Assuredly, although there is a widely held expectation that a great percentage of Ohio voters will avoid in-person voting on November 3, one cannot know precisely how voting will play out and, specifically, how many people will vote absentee by mail as opposed to using ballot drop boxes. Likewise, one cannot predict precisely how many voters would be discouraged from voting by the inconvenience of the Secretary’s one ballot drop box limitation. Yet, redressability is available. A declaratory judgment clarifying the law and effectively affording individual boards of elections discretion to consider adding drop boxes in time for the November 3 election could significantly improve the process for many Ohio voters. In that sense, there is a proper legal basis for challenging the limitation in Directive 2020-16 using this lawsuit.

Contrary to the suggestion in some of the arguments made by defendants, legal standing is not defeated merely because the potential for future harm cannot be shown with precision. Standing can rest “on the predictable effect of Government action on the decisions of third parties.” *Dept. of Commerce v. New York*, 588 U.S. ____, 139 S. Ct. 2566, 204 L.Ed.2d 978 (2019). Courts “have excused definitive proof where the injury was impossible to prove with absolute certainty [citation omitted] or where the injury could not be ‘specifically identified in advance.’ [citing *Sandusky Co. Democratic Party*, supra, at 574.]” *Tenn. Republican Party v. SEC*, 863 F.3d 507, 517 (6th Cir. 2017). In other words, claims of past harms are necessarily analyzed differently from claims of future harms. “When an alleged harm is prospective, we have not required that the

¹¹ In this regard it is not to be overlooked that all that the Secretary could have received from the state Attorney General six weeks ago was an “advisory opinion.”

organizational plaintiffs name names because every member faces a probability of harm in the near and definite future. The Supreme Court has accepted imminent harm as satisfying the injury-in-fact requirements of Article III standing. *** ‘Imminence’ as a doctrinal standard is ‘somewhat elastic.’ [citation omitted].” *Florida State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008).

Standing to sue exists. This court may hear and decide this declaratory judgment case and, if appropriate, grant relief.

VIII. Failure to Join All Eighty-Eight Boards of Election.

A declaratory judgment cannot be issued without joinder of all persons who have or claim any interest that would be affected by the declaration. R.C. 2721.12. Joinder of all interested persons is jurisdictional. The Secretary therefore argues that plaintiffs “are seeking a declaration regarding the boards’ rights” (Memorandum filed Sept. 8, at p. 16) and therefore should have joined all 88 county boards.

The factual difficulty with this argument is that so long as Directive 2020-16 is deemed lawful no local board of elections can even consider adding more ballot drop boxes. The Secretary has authority to “[p]repare rules and instructions for the conduct of elections.” R.C. 3501.05(C). He may also issue “directives, advisories, other instructions or decisions” under R.C. 3501.05(B). Each board of elections “‘is [only] the supervisor of elections under the direction of the Secretary of State.’ [citation omitted].” *State ex rel. Donegan v. Cuyahoga Co. Bd.*, *supra*, 136 Ohio App.3d at 596.

The Supreme Court of Ohio recognized in *State ex rel. Dreamer v. Mason*, 129 Ohio St.3d 94, 2011-Ohio-2318, ¶ 23, that “statutory authority over the boards of elections is vested in the secretary of state. *** ‘[M]embers of the boards of election act under the direct control of and are answerable only to the Secretary of State in his capacity as the chief election officer of the state. They perform no county functions and are not county officers’. [State ex rel. Columbus Blank Book Mfg. Co. v.] Ayres at paragraph two of the syllabus.” *Dreamer v. Mason*, citing *Ayres*, 142 Ohio St. 216 (1943).

This suit seeks clarity about a Directive issued by the Secretary, not about action taken by any board of elections. A ruling as to the lawfulness of additional ballot drop boxes and the discretion of boards of elections in locating them at places in their community will not *require* any of the 88 boards of elections to do anything different, but

that does not mean this case merely yields an academic or advisory opinion. Under R.C. 3501.11(C), each board of elections has authority to provide for “ballot boxes *** and equipment used in *** elections.” Each board may “[m]ake and issue rules and instructions, not inconsistent with law or the rules, directives, or advisories issued by the secretary of state” and may “receive the returns of elections.” R.C. 3501.11(E) and (L). Clarifying requirements in the election Code and, secondarily, the validity of Directive 2020-16 are, therefore, matters legitimately in dispute only between the Secretary and plaintiffs. Resolution does not demand including each board of elections as a party.

IX. The meaning of “personally deliver” the absentee ballot.

Defendants make arguments about the meaning of the word “deliver” in the absentee voter statute. R.C. 3509.05(A). That word is not defined in the election code (Title 35), but is used 21 times. As a matter of plain English, the statute says a voter “shall mail the identification envelope [containing their ballot] to the director from whom it was received in the return envelope, postage prepaid, ***or the elector may personally deliver it to the director*** ***. The return envelope shall be ***transmitted to the director*** in no other manner except as provided in section 3509.08 of the Revised Code.” (emphasis added). (R.C. 3509.08 deals with disabled or confined electors, medical emergencies, and similar issues of no relevance to this case.)

It is readily apparent that the words “deliver” and “transmitted to” were used interchangeably by the General Assembly. It is also plain that delivery or transmission of an absentee ballot can be accomplished using a drop box that puts the ballot securely into the custody of the director of a board of elections, or by actually handing the ballot over to the director face-to-face, or delivering it to his or her staff. No statute says that delivery must occur with only one box per county. No statute says that delivery would be improper to a drop box controlled by a board and placed at a safe location separate and apart from the main board office. The statute is silent on such matters. The Secretary cannot slip new words into the law.

ORP offers dictionary definitions that the word “deliver” means “to carry and turn over to the intended recipient” or “to take something, especially goods or letters, to a place.” But, such definitions tell us nothing about the final destination of or manner of final delivery. Based upon the evidence in this case, the court concludes R.C. 3509.05(A)

is ambiguous. It does not support the Secretary's announced one ballot drop box limit. A voter is personally delivering their absentee ballot to the director of their board of elections whether they drop it in the only available box, or potentially deposit the ballot in one of multiple boxes under the control of their elections board. Either way, ballots are delivered. This is true regardless of the location at which a box is placed in the county.

A court may consider the history and administrative construction of a law in resolving statutory ambiguity.¹² The evidence in this case proves that *de facto* acceptance of ballot drop boxes was part of the "administrative construction of the statute[s]" regulating elections even prior to H.B. 197. Pursuant to R.C. 1.49(F), that past practice may be considered in resolving legal ambiguities. *See also, State ex rel. Schwerdtfeger v. Husted*, Franklin Co. C.P. No. 16CV-2346, 2016 Ohio Misc. LEXIS 16, at * 20. So far as the record shows drop boxes generally worked smoothly. Neither major party complained. No Directive or other legal material issued by any Secretary of State has been identified prohibiting use of ballot drop boxes or asserting they violated R.C. 3509.05(A).

Leaving aside prior use of drop boxes before this year, R.C. 1.49 also teaches that if a statute is ambiguous a court may consider the "object sought to be attained" in determining the "intention of the legislature." This yields an even clearer view of the proper meaning of R.C. 3509.05(A). The right to vote, and to have every vote counted, is fundamental in American democracy. Nothing in the Revised Code suggests that minimizing time needed to cast a ballot and other inconvenience for absentee voters as they "personally deliver" ballots is not a legitimate goal of Ohio law.

More than a half century ago the United States Supreme Court recognized that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free **and unimpaired** manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (emphasis added.) The right to vote unquestionably

¹² A significant body of administrative law addresses voting in Ohio. Formal documents include not only "Directives" but also an *Election Official Manual* published by the Secretary that is nearly 400 pages long. (The online version of the Manual is current as of August 6, 2020, and available at OhioSoS.gov/publications.) The Secretary's predecessors in office used a comparable combination of statutes and administrative materials.

includes the collateral right to have one's vote counted on equal terms with others. *League of Women Voters v. Brunner*, 548 F.3d 463, 476 - 77 (6th Cir. 2008), citing *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (*per curiam*) recognized:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. 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. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

The *Bush* decision also termed this the "equal dignity owed to each voter." *Id.* at 104.¹³

The equal protection and dignity due each Ohio absentee voter is squarely recognized in one Ohio statute, as well as many court decisions. R.C. 3501.05 sets forth a lengthy list of the duties of the Secretary. Among them is the obligation to establish a full-time staff position to "[a]ssist the secretary of state with **ensuring that each voter may cast the voter's ballot in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters.**" R.C. 3501.05(V)(2) (emphasis added). Beyond that, one cannot ignore the quick and explicit adoption of absentee ballot drop boxes in H.B. 197 earlier this year. Ohio court decisions also show a longstanding commitment to voter access and equal treatment. *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, ¶ 26 (*per curiam*) rejected "the secretary of state's interpretation [of an election statute] because it is unreasonable" and to be "consistent with 'our duty to liberally construe election laws in favor of the right to vote'. [citation omitted]." Other decisions recognized the same principal of liberally interpreting election statutes to encourage voting. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, ¶ 62 and cases cited. *See also, State ex rel. Schwerdtfeger v. Husted, supra*, * 18.

In a year in which voters are justifiably apprehensive about voting in person and about returning absentee ballots by mail, the Secretary must demonstrate some basis in fact before limiting voters' broad delivery options referenced in R.C. 3509.05(A). The court recognizes that the Secretary is entitled to make reasonable, even-handed

¹³ An Equal Protection clause is also found in Section 2, Art. I of the Ohio Constitution, interpreted as "nearly identical" in scope to the federal provision. *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 424 (1994).

regulations to assure the efficiency and honesty of elections in Ohio. Rules sometimes will burden voters, but may nevertheless be lawful even in the time of a pandemic. *E.g.*, *Thompson v. DeWine*, *supra*; *League of Women Voters v. LaRose*, U.S. Dist. Ct., S.D. Ohio, No. 2:20-cv-1638, 2020 U.S. Dist. LEXIS 91631, *18 -*25 (Watson, J.) (reviewing the relative burdens on voters balanced against difficulties for the State in rearranging the 2020 primary election.) “There is no litmus test to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state’s asserted justifications and make the hard judgment that our adversary system demands.’ [citations omitted.]” *Northeast Ohio Coalition for the Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012). Yet, in view of the importance of the right to have one’s vote counted and the need to avoid voter suppression, as a matter of state law voting rules cannot be created out of thin air cannot or imposed arbitrarily. Treating voters differently without regard to obvious factors like the population and geographic size of their county is arbitrary.

At the hearing, the Secretary’s counsel suggested that having just one drop box per county somehow assures “equal treatment.” Unless Ohio rearranges its government structure so that every county has roughly the same population and comparable geographic access to a drop box and places for voting, there will inevitably be serious inconvenience caused many voters by such an arbitrary rule. Treating one drop box per county as “equal” is equivalent to arguing that every county needs only 100 (or some other arbitrary number) of voting machines, regardless of the population. That view of “equal” treatment is nonsense. In addition to more recent decisions noted above, one must consider *American Party of Texas v. White*, 415 U.S. 767 (1974). There the Supreme Court recognized that “it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination.” 415 U.S., at 795. *See also*, *Bullock v. Carter*, 405 U.S. 134 (1972) in which a unanimous court held “a State cannot achieve its objectives by totally arbitrary means; the criterion for differing treatment must bear some relevance to the object of the legislation.” 405 U.S., at 145.

Ohio courts defer to the Secretary’s construction of pertinent statutes when it is a “reasonable interpretation.” *State ex rel. Lucas Cty. Republican Party v. Brunner*, 125 Ohio St.3d 427, 2010-Ohio-1873, ¶23; *Colvin*, *supra*, at ¶ 57 and cases cited. Deference

is due the Secretary's "interpretation of election law if it is subject to two different, but equally reasonable interpretations." *Colvin, supra*, citing *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 2005-Ohio-5795, ¶ 13. However, decisions about elections which rest on "purely conclusory, tautological, or illusory" reasoning are unenforceable. *State ex rel. Webb v. Bliss*, 99 Ohio St.3d 166, 2003-Ohio-3049, ¶ 14.

The factual record contains no evidence from which one can reasonably question the wisdom of allowing local boards of elections to consider additional ballot drop boxes, or perhaps other ways that permit voters to safely deliver absentee ballots. The \$2,000 cost per drop box is no obvious reason to ignore such equipment. Disruption of other ongoing work by board employees is also not necessarily dispositive. Remember, all 88 Ohio election boards just recently used drop boxes to complete the 2020 primary, so they are not a novelty. Thus, ORP's argument (post-hearing brief at p. 4) that "[b]efore any additional drop boxes could be installed, Ohio's boards would have to work through myriad issues to ensure a secure, safe, and fair process" is sophistry. Again, the court emphasizes, no evidence has been produced that allowing additional boxes or other new means for delivery of ballots will result in a partisan advantage to one party over another. That is in no small part because local boards of elections are balanced evenly with two members each of the ORP and the ODP.

The evidence proves that less than a week after issuing Directive 2020-16 the Secretary held a conference call with people from around the state addressing additional drop boxes. State Representative Paula Hicks Hudson from Toledo participated. So too did Andre Washington, President of the A. Philip Randolph Institute in Ohio and a member of the Secretary's own Diversity and Empowerment Council. Both gave affidavits admitted by agreement in this case. Both testified that on August 19 the Secretary "stated that if a judicial order made it clear that the Ohio Secretary of State has the authority to allow county boards of elections to install secure drop boxes at locations other than the boards' offices, then he would allow the boards of elections to do so." (Washington Aff'd ¶ 6; substantially identical language in Rep. Hudson's Aff'd ¶ 4.) Although both affidavits have been part of the record since this case was filed three weeks ago, the Secretary has offered no response contradicting their testimony.

Allowing additional drop boxes is plainly sensible public policy, recognized as such by the independent, bipartisan U.S. Election Assistance Commission, established under

the Help America Vote Act of 2002. The Commission is a national clearinghouse of information on election administration. The court takes judicial notice that U.S. EAC currently publishes material about ballot drop boxes for election officials “on how to administer and secure election infrastructure in light of the COVID-19 epidemic.”¹⁴ Relevant here is the following:

General Considerations

Why do you need ballot drop-off locations when you are paying for return postage?

Some voters prefer to deliver their mail ballots to a drop box rather than sending them back through the mail. These voters may be motivated by lack of trust in the postal process, fear that their ballot could be tampered with, or concern that their signature will be exposed. Voters may also be concerned about meeting the postmark deadline and ensuring that their ballot is returned in time to be counted.

Ballot drop boxes and drop-off locations allow voters to deliver their ballots in person. More importantly, the availability of ballot drop boxes and drop-off locations ensures that even voters who wait until the last minute to vote or who receive their requested ballot in the mail at the last minute will be able to return their ballots in time to be counted.

*** Setting up ballot drop boxes and educating voters to use them mitigates a number of COVID-19-related risks associated with in-person voting. It also minimizes the number of people that will need to access voting locations, thereby providing more space for those who are engaged in in-person voting.

How many ballot drop boxes will you need?

At a minimum, you should have a drop box at your main county or city office building. Voters generally know the locations of these buildings and are already accustomed to voting or doing business there. Some other best practices include:

- Have one drop box for every 15,000 – 20,000 registered voters.

¹⁴ U.S. Election Assistance Commission, *Ballot Drop Box*, https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot_Drop_Box.pdf (accessed September 14, 2020).

- Consider adding more drop boxes to areas where there may be communities with historically low vote by mail usage.
- Use demographic data and analysis to determine whether there should be a different formula for rural and urban locations (i.e., 1 for every 15,000 residents may be every mile in an urban area, but every 50 miles in a rural area).

Where should ballot drop boxes be located?

Ballot drop boxes should be placed in convenient, accessible locations, including places close to public transportation routes, near or on college campuses, and public buildings, such as libraries and community centers familiar to voters and easy to find. ***

All drop box locations should be evaluated for:

- Security
- Lighting (well-lit 24 hours a day)
- High visibility
- Security cameras (more on cameras in the *Security Considerations* section below)
- Accessibility
- Voter convenience
- Parking or drive-through options

Recognition in the U.S. EAC material that demographic and geographic data require tailoring drop box locations in individual communities supports plaintiffs' position that individual boards of elections ought to be permitted to address the subject. Again, the common-sense points set out by U.S. EAC are not contradicted by anything else in the record.

This issue did not simply sneak-up on the Secretary and somehow result in a hasty and ill-considered Directive. In seeking an Attorney General's Opinion in mid-July the Secretary noted twice in his request letter that he had "been asked whether there may be additional secure receptacle installed in a county for absentee voters." (Ex. "D", pages 1 and 3.) Just days later the Mayor of Cleveland and the League of Women Voters of Oxford, Ohio independently inquired about additional boxes in letters to the Secretary. (Exhibits "AB" and "AD".) Despite the high profile of this issue, Directive 2020-16 was issued without any explanation or justification of the one box limitation.

Finally, there also appears to be actual in-the-field evidence about absentee drop boxes as used in other states. Apparently, additional ballot drop boxes are a legitimate tool that assists voters in this pandemic year, despite voter anxiety over ordinary mail delivery of absentee ballots. *See*, David Leonhardt, “A Smooth Election: Massachusetts shows that a smooth election is possible,” September 3, 2020 N.Y. Times, (In this week’s primary in Massachusetts *** [l]ocal officials set up dozens of ballot drop-off boxes, to reduce mail volume.”) <https://www.nytimes.com/2020/09/03/briefing/trump-coronavirus-massachusetts-your-thursday-briefing.html>. (last visited September 11, 2020.) So far as the record before this court, any such data from other states about absentee drop boxes has apparently never been evaluated by the Secretary or his staff.

The direct and circumstantial evidence in the record, and inferences reasonably drawn from the record about voter behavior in this very unusual pandemic year accompanied by public apprehension over delays in mail delivery lead inescapably to one conclusion: the Secretary acted arbitrarily in directing “Boards of elections are prohibited from installing a box at any other location other than the board of elections.” The Secretary lacked a legitimate basis in evidence for that portion of Directive 2020-16. It was unreasonable and unlawful.

X. Conclusions.

1. Pursuant to R.C. 2721.02 and Civ. R. 57, a court may declare rights, status and other legal relations whether or not further relief is, or could be, claimed. “A declaratory judgment may be either affirmative or negative in form and effect.” Under R.C. 2721.03, those whose legal relations “are affected” by a statute “may have determined any question of construction or validity” arising under the statute “and obtain a declaration of rights, status, or other legal relations under it.”

2. Plaintiffs have standing to seek a declaratory judgment relative to the meaning of the word “deliver” as used in R.C. 3509.05(A), and the Ohio Secretary of State’s related Directive 2020-16 (issued August 12, 2020). Both address means of delivery of absentee ballots to county boards of elections when a voter elects not to use the United States Postal Service.

3. The word “deliver” in R.C. 3509.05(A) is ambiguous. It does not squarely answer whether ballot drop boxes are permitted under Ohio law, or if so how many boxes may be used, or where they may be located by a board of elections.

4. Having considered the statutory ambiguity in light of all the direct and circumstantial evidence presented, and the arguments of counsel and *amici*, the court finds and declares that R.C. 3509.05(A) permits county boards of election to obtain and use ballot drop boxes consistent with voting security arrangements specified by the Secretary. The court further finds that the Secretary had legal authority to require at least one box to be used in each county for the 2020 general election, as set forth in Directive 2020-16. Longstanding administrative acquiescence in the use of ballot drop boxes in Ohio; the fact that H.B. 197 (temporary legislation for the 2020 primary election) required a drop box in each county earlier this year, (presumably leaving each county with at least one box already on hand for the general election); and the consequences of this reading of the law to enhance access and encourage participation by voters all support a finding that this means to deliver absentee ballots to a board of elections is lawful.

5. The evidence offers no explanation for the Secretary’s separate determination in Directive 2020-16 that “Boards of elections are prohibited from installing a drop box at any other location other [*sic*] than the board of elections.” As a result, the court finds that in the present context of the 2020 general election this restriction is arbitrary and unreasonable. This restriction blocks individual county boards of elections from even considering the use of more than one drop box, or placing boxes at locations separate from board offices. Given the ambiguity of R.C. 3509.05(A), this is not required by law. Instead, every board of elections is legally permitted to consider enhancing safe and convenient delivery of absentee ballots, and may tailor ballot drop box locations or conceivably other secure options to the needs of their individual county.

6. While the Secretary has broad discretion to issue Directives and otherwise guide local boards of elections, his actions must be reasonable to be legally enforceable. Wholly arbitrary rules are entitled to no deference.

7. Neither R.C. 3509.05(A) nor any other statute supports the Secretary’s ban on local boards of elections employing multiple absentee ballot drop boxes at locations in their county, as they deem proper.

8. While this court may grant further relief based upon a declaratory judgment pursuant to R.C. 2721.09, it may be unnecessary in this case. The Secretary has stated publicly he supports additional drop boxes if they are legal; and his lawyer represented on the record in the Northern District of Ohio that his client would abide by a state court ruling. A court has “the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.” *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121 (1974) (internal quotations and citations omitted.)

9. The court retains jurisdiction to rule on plaintiffs’ motion for a preliminary injunction, or other matters left unresolved in this Opinion.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 09-15-2020
Case Title: OHIO DEMOCRATIC PARTY ET AL -VS- FRANK LAROSE
Case Number: 20CV005634
Type: ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Richard A. Frye". The signature is written over a blue circular official seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY, OHIO" in the middle, and "ALL THINGS ARE POSSIBLE" at the bottom.

/s/ Judge Richard A. Frye