

address, and driver's license number, social security number, or a copy of a valid form of identification. R.C. 3509.03(B)(1)-(9).

On July 17, 2020, the Secretary of State issued Directive 2020-13 to the 88-county board of elections. The directive provided instructions for how boards should prepare for the statewide mailing of absentee ballot applications and indicated that voters must submit their absentee ballot applications to their respective county board of elections "either in person or by mail, with the voter affixing a first-class stamp." (Directive 2020-13 at *1.) On July 31, 2020 Plaintiff's filed a Complaint and Motion for Preliminary injunction. On August 4, 2020, Plaintiff's filed an Amended Complaint seeking a declaration that R.C. 3509.03 allows voters to return absentee voter applications in electronic form, such as email or facsimile. Plaintiff's also claim that the Secretary of State's interpretation of R.C. 3509.03 violates Ohio Constitution Article 1, Section 2 and 16.

LAW AND ANALYSIS

Plaintiffs move this Court for a preliminary injunction against the Secretary of State:

enjoining the enforcement of the Secretary of States interpretation of R.C. 3509.03 as prohibiting voters from making their application for an absentee ballot by emailing an image of their request to the director of the county board of elections, or by other viable electronical forms of transmission, in contravention of the plain terms of R.C. 3509.03

Under Ohio law, a party seeking a preliminary injunction "must establish a right to the preliminary injunction by showing clear and convincing evidence of each element of the claim."

Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div., 109 Ohio App.3d 786, 790 (1996), appeal not allowed, 76 Ohio St. 3d 1495, citing *Mead Corp., Diconix, Inc., Successor v. Lane*, 54 Ohio App.3d 59 (1988), jurisdictional motion overruled, 41 Ohio St. 3d 709 (1989). "In deciding whether to grant a preliminary injunction, a court must look

at: (1) whether there is a substantial likelihood that plaintiff will prevail on the merits, (2) whether plaintiff will suffer irreparable injury if the injunction is not granted, (3) whether third parties will be unjustifiably harmed if the injunction is granted, and (4) whether the public interest will be served by the injunction." *Vanguard Transp. Sys., Inc.*, at 790, citing *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 24 Ohio St.3d 41 (1986); *Goodall v. Crofton*, 33 Ohio St. 271 (1877).

I. Substantial Likelihood of Success

When considering the meaning of a statute, the first step is to determine whether the statute is "plain and unambiguous." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203 citing *State v. Hurd*, 89 Ohio St.3d 616, 2000-Ohio-2, 734 N.E.2d 365. Ambiguity in a statute exists only if its language is susceptible of more than one reasonable interpretation. *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111.

R.C. 3509.03 provides "[e]xcept as provided in division (B) of section 3509.08 of the Revised Code, any qualified elector desiring to vote absent voter's ballots at an election shall make written application for those ballots to the director of elections of the county in which the elector's voting residence is located."

Plaintiffs argue that they have a strong likelihood of success on the merits of their claims because the plain text of the R.C. 3509.03 does not prohibit qualified electors from applying for an absentee ballot by email. Plaintiffs maintain that the General Assembly did not specify in the statute that absentee ballot applications must be submitted to the county board of elections either in person or by mail. Plaintiffs argue that when the General Assembly has intended for election-related documents to be submitted or filed in a particular manner, it has made such requirement clear. In regard to R.C. 3509.03, Plaintiffs argue that the only specification is that absentee ballot requests are to be made in writing. Therefore, as long as the required information is on the written

application, which can be in any form, the request is valid. Plaintiffs further argue that by precluding voters from submitting an absentee ballot application via email or other viable electronic forms of transmission, the Secretary of State has inserted a prohibition that does not exist in the language of R.C. 3509.03.

Plaintiffs contend that absent a statutory provision specifying how a voter shall “make” their absentee ballot application, a voter must be permitted to make their application via email or by other viable electronic forms of transmission. Plaintiffs argue that refusal to accept qualified electors’ application for absentee ballots that are timely emailed or transmitted constitutes a denial of the electors’ rights to due process and equal protection. Plaintiffs maintain that the Secretary of States interpretation of R.C. 3509.03 is arbitrarily and disparately valuing one person’s vote over that of another. UOCAVA voters (Uniformed and Overseas Citizens Absentee Voting Act) are permitted to apply for absentee ballots via email or facsimile. Plaintiffs argue that given Ohio already allows UOCAVA voters to request an absentee ballot via email or facsimile, there is no compelling, important or rational interest for treating qualified non-UOCAVA voters differently. Plaintiffs maintain that this differential treatment of UOCAVA and non-UOCAVA voters constitutes a denial of the electors’ due process and equal protection rights guaranteed by the Ohio Constitution.

In his Brief in Opposition, the Secretary of state maintains that Plaintiffs interpretation of R.C. 3509.03 must be rejected. The Secretary of State argues that when the General Assembly has intended to permit email or fax of absentee ballot applications, it has done so with specific, unambiguous language, as evidenced in H.B 224 where the General Assembly specified the methods of delivery of written absentee applications to include written electronic means for

UOCAVA voters. The Secretary of State contends that had the General Assembly intended that all voters could email or fax absentee ballot applications, it would have specified in R.C. 3509.03.

In addition, the Secretary of State argues that it has been administrative practice to allow the return of absentee ballot applications by email or fax since 2007. With this, the administrative practice weighs against allowing return of absentee ballot applications by email or fax. The Secretary of State also maintains that his interpretation of R.C. 3501.01 is entitled to deference as the State's chief election officer.

Further, the Secretary of State argues that the Plaintiffs have no likelihood of success on the merits of their constitutional claims. The Secretary of State argues that the Plaintiffs fail to state any cognizable claims under Article 1, Section 2 and 16 of the Ohio Constitution as neither is a source of substantive rights. The Secretary of State maintains Plaintiffs due process and equal protection claims rely on self-executing sources of protection and must fail as a matter of law because Ohio's process for returning absentee ballot applications does not burden the Plaintiffs' fundamental right to vote.

In reply, Plaintiffs argue that the Secretary of State ignores the plain language of R.C. 3509.03 and adopting the Secretary of States interpretation would require the Court to re-write the plain language of the statute. Plaintiffs further argue that the Secretary of State's interpretation is not entitled to any deference because it is unreasonable and fails to apply the plain language of the statute. Plaintiffs maintain that in the absence of a prohibition, qualified electors must be permitted to submit completed absentee ballot requests to their county boards of elections via email or fax.

In addition, Plaintiffs argue that it has shown a likelihood of success on their constitutional claims because Plaintiffs are broadly authorized to bring declaratory judgement actions to protect their state constitutional rights to due process and equal protection. Plaintiffs seek a declaratory

judgement that the Secretary of State, in instructing boards of elections to only accept absentee ballot requests via mail or in person, has violated their Ohio constitutional rights to due process and equal protection. Plaintiffs allege that the Secretary of State has burdened voting rights through the disparate treatment of similarly situated voters. Plaintiffs argue that the Secretary of State has failed to show how allowing non-UOCAVA voters to submit their completed applications via email or fax would be any more burdensome for the boards of elections than the current process that allows UOCAVA voters to complete their completed applications by email or fax.

II. Irreparable Injury Factor Strongly weighs in favor of an injunction

Plaintiffs argue that Plaintiffs, Plaintiff ODP's members and non-UOCAVA voters in Ohio will be irreparably harmed without a preliminary injunction. Plaintiffs further argue that a restriction on the fundamental right to vote, including restrictions upon the exercise of such a right, constitutes irreparable injury.

The Secretary of State maintains that Plaintiffs cannot show that they would suffer actual and imminent irreparable injury because Plaintiffs' claimed harm is based on speculation. In addition, the Secretary of State argues that Plaintiffs' requested relief is barred by the equitable doctrine of laches. The Secretary of State maintains that the delay in seeking an emergency preliminary injunction is unreasonable. Directive 2019-28 was issued December 18, 2019 and reiterates that pursuant to R.C. 3509.03 absentee ballot applications are to be returned by mail or in person. The Secretary of State argues that a delay that ranges from 13 years to seven months constitutes a complete failure to act with the utmost diligence. The Secretary of State contends that Plaintiffs' delay will result in substantial prejudice to the boards of elections and to Ohio voters.

In reply, Plaintiffs argue that its claims are not barred by the doctrine of laches and even if this doctrine applies, the Secretary of State has failed to establish all the necessary elements.

Plaintiffs maintain that any supposed delay is excused because Plaintiffs were waiting to see if litigation was necessary, based on the Secretary's public statements regarding absentee ballot requests. Plaintiffs further maintain that Directive 2020-13 was issued on July 17, 2020 and Plaintiffs filed the current action two weeks later on July 31, 2020.

III. Harm to Third Parties and the Public Interest

Plaintiffs argue that in granting the preliminary injunction, no harm to other voters or the integrity of the election will occur by allowing qualified voters to apply for an absentee ballot via email or facsimile. Plaintiffs maintain that allowing electors to apply for absentee ballot electronically will foster civic participation. Plaintiffs further argue that there will be no additional administrative burden on the state or county election administrators as all 88 county boards of elections have email addresses and fax number. Plaintiffs argue that the public will be served by granting a preliminary injunction as it would help facilitate the right to vote. Given the current global pandemic, Plaintiffs argue that allowing voters to request an absentee ballot through no-contact, electronic transmission would help serve the public interest.

The Secretary of State argues that substantial harm to the public will result if Plaintiffs preliminary injunction is granted. The Secretary of State argues that a change in election procedure when the election is imminent would disrupt the status quo and severely impact the security, administration, and integrity of the 2020 General Election. The Secretary of State maintains that Plaintiffs' requested relief creates significant cybersecurity risks that will jeopardize the 2020 General Election. With this, developing a safe procedure for returning absentee ballot applications by email or fax ensures that applications can actually be received by the boards. The Secretary of State argues that if procedures are not implemented, board of elections could be at risk for ransomware cyber-attacks and network overload which could interfere with the 2020 General

Election. Although UOCAVA voters can email ballot applications and boards of elections have implemented precautions for accepting these applications, the Secretary of State argues that accepting all absentee ballot applications creates new vulnerabilities for which there are no precautions and boards of elections do not have the capacity to do so. The Secretary of State further argues that boards of elections could become overwhelmed and are unable to accept absentee ballot applications via email from non-UOCAVA voters.

The Secretary of State argues that implementing a process for returning absentee ballot applications by email or fax at this late stage in the election risks voter confusion. The Secretary of State is preparing to mail absentee ballot application packets to all of Ohio's registered voters. These packets contain specific instructions directing voters to return the application by mail or in person to the board of elections. Since the absentee ballot request process is currently underway, the Secretary of State maintains that creating a separate insert for mailing would conflict with the instructions on the application mailing and could create voter confusion.

In reply, Plaintiffs argue that Courts have routinely awarded injunctive relief in cases far closer in proximity to an election than this action and the Secretary of State himself has ordered sweeping election changes close in proximity to an election. Plaintiffs argue that the requested relief would require the boards of elections to expand their existing process for accepting UOCAVA absentee ballot requests to all voters. Plaintiffs maintain that boards of elections have had a process in place to accept emailed absentee ballot request for UOCAVA voters for 10 years and there would be no added burden on board of elections.

Plaintiffs further argue that they have shown that the public interest would be served by granting the injunction. Plaintiffs argue that the current system caused confusion and chaos which

would be reduced by Plaintiffs' requested relief as there is an increased risk for ballot requests to be lost in the mail.

DECISION

Upon review of the case law and arguments presented, Plaintiffs Motion for Preliminary Injunction is well taken. It is the Courts position that the question before it is whether R.C. 3509.03 allows for absentee ballot applications to be submitted to board of elections via email or fax. Under R.C. 3509.03, a qualified voter who wishes to cast an absentee ballot "shall make written application for those ballots to the director of elections of the county in which the elector's voting residence is located." R.C. 3509.03(A). Applications need not to be in "any particular form," but must include certain information, such as the voter's name, date of birth, address, and driver's license number, social security number, or a copy of a valid form of identification. R.C. 3509.03(B)(1) - (9).

In reviewing the plain language of the statute, absentee ballot applications must be in writing and need not be in any particular form. The statute does not address in what form the boards of elections are to receive absentee ballot applications. The statute only requires that the applications be made in writing. The Court finds that only allowing for absentee ballot applications to be submitted in person or by mail is a policy position implemented by the Secretary of State. Nowhere in R.C. 3509.03 does it prohibit qualified electors to submit their absentee ballot applications by email or fax and states that applications need not be in "any particular form."

The Secretary of State argues that this instruction has been in place since 2007 and has not been challenged for the 13 years that it has been in effect and that allowing for eligible voters to

submit absentee ballot applications via email or fax would create confusion, network overload, over burden boards of elections and open them up to cyber-attacks.

The arguments of The Secretary of State are that we have essentially always done it this way and the Plaintiff waited too long to challenge a process that has been in place for 13 years. The reasons posited by ODP as to why they waited, primarily to see what the Secretary of State was going to do this election, was not to purposely cause delay and confusion. It was timely filed given the rationale for waiting and the timing of when Directive 2020-13 was issued. That the Secretary of State has always instructed the boards in this manner carries no legal significance.

Regarding causing confusion, network overload and over burdening the boards, the Secretary of State acknowledges that boards of elections already have the capability to accept applications via email and fax due to already accepting UOCAVA voter applications in this manner. *R.C. 3511.021* allows an eligible person ... to apply by *electronic means (emphasis added)* to the secretary of state or to the board of elections of the county in which the persons voting residence is located for a uniformed services or overseas absent voter ballot. It is the Courts position that its role is to determine whether *R.C. 3509.03* prohibits voters from submitting absentee ballot applications via email or fax, not to anticipate the difficulties and complexities of complying with the language of the statute. As explained above, the Court finds that *R.C. 3509.03* does not prohibit voters from making their application for an absentee ballot by email or fax and it would be up to the Secretary of State and the county boards to determine the best way to implement protocols to accept absentee ballot applications in this manner. Because the Secretary of State and the boards already accept absentee ballots in this manner, the Court can assume that a policy or protocol is already in place.

Therefore, the Court hereby enjoins the enforcement of the Secretary of State's policy of mandating that eligible voters must submit their absentee ballot application by mail or in person. This allows eligible voters to submit their absentee ballot application by electronic mail or facsimile machine, as nothing in R.C. 3509.03 prevents the use of electronic transmission.

Since the Court finds that the plain language of R.C. 3509.03 allows for electronic mail or facsimile filing of absentee ballot applications, the Court finds the Plaintiff has met the first prong of *Vanguard*, the likelihood that plaintiff will prevail on the merits.

Next with regard to irreparable injury if the injunction is not granted. Defendant argues any injury would be speculative. Plaintiff's cite, *Obama for America v Husted*, 697 F.3d 423, 2012 U.S. App Lexis 20821(6th Cir) in which in person voting was changed for non UOCAVA voter so they could no longer early vote after 6:00 pm the Friday prior to the election. UOCAVA voters were still allowed to early vote up to election day. In granting the injunction allowing non UOCAVA voters to vote after the Friday before the election, the Sixth District found that equal protection applies when a state classifies voters in disparate ways.

The State argued in *Obama for America* that the burden on non-military voters is slight because they have "ample" other means to cast their ballots. The State in *Obama for America* like here also argued it would create an additional burden on the Boards of Election. Neither arguments were accepted by the Sixth Circuit. Defendant on the one hand argues that injury would be speculative but on the other hand argues if the Court were to allow this process the boards would be overrun with eligible voters wanting to utilize this process. The harm is not speculative. Clearly the Defendant also understands that a number of eligible voters are currently being negatively impacted under the current directive since he is aware that a significant number of eligible voters would request their absentee ballot by facsimile or email.

'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.'" *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quoting *Bush v. Gore*, 531 U.S. 98, 104, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000)). "[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 31 L. Ed. 2d 274. Cited in *Obama for Am v Husted* at 428. As such this Court finds that Directive 2020-13 places an additional burden on eligible voters' access to voting and the Defendant's justification for maintaining its current procedure does not outweigh this fundamental interest. Thus, Plaintiffs have met the second prong.

The Defendant argues that substantial harm will come to third parties if the preliminary injunction is granted by disrupting the process currently in place and impact the security, administration and integrity of this election. The Defendant has already indicated that a process is in place for accepting absentee ballot request by email or facsimile and there is no reason to believe the process currently in place is not secure. Arguing that the county boards of election may need to work harder to ensure eligible voters have access to a ballot is not harm.

Defendant also looks to the timing of the complaint being three months prior to an election. Nothing within *Purcell v Gonzales*, 549 U.S. 1 (2006) and *A. Philip Randolph v Husted*, 907 F.3d 913 (6th Cir. 2018) explicitly state that just because a party moves for relief soon before an election that relief must be denied. On the contrary, there have been many examples when the requested relief has been provided even on the day of the election. Here the change is minimal as it only impacts the manner in which absentee ballots can be requested and the manner is already in place for eligible UOCAVA voters. Here Plaintiffs have satisfied the third prong.

The final prong is whether the public interest will be served by the granting of the injunction. Again, The Secretary of State's argument is that by granting the preliminary injunction the public interest would be harmed because it would place more of a burden on the boards of election and create confusion. Here the Court finds the confusion argument speculative as to the general public. Eligible voters can still obtain their absentee ballot the way they have always done so if they so choose. If not, there is another option available to them. The Court does not believe this will create chaos.

Finally, any burden placed upon the boards, if any, is clearly outweighed by the public interest of additional and easier access to obtaining an absentee ballot. Again, the Defendant seems to be arguing that allowing electronic means to obtain absentee ballots also means that more people will utilize this process and therefore more work for the boards. Any argument that places more emphasis on the amount of work that may be required of the boards than the additional access afforded eligible voters cannot stand.

Standing to challenge Directive 2020-13

The Secretary of State argues that the Plaintiffs lack standing to challenge Directive 2020-13. The Secretary of State maintains that the Amended Complaint fails to contain a single allegation that any of the Plaintiffs have suffered or is threatened with any direct or concrete injury. The Secretary of State argues that Plaintiffs Houlahan and the ODP's alleged injuries are abstract and purely speculative and do not constitute actual or concrete injuries. In the Amended Complaint, Plaintiff Houlahan alleges that he is a "qualified elector of Franklin County, Ohio" who "desires to submit an application for an absentee ballot to his county board of elections via email and to have his applications processed in the same manner as a hard-copy application." (Am. Compl. ¶7.) The ODP alleges in the Amended Complaint that they intend "to spend its resources

to continue... voter education and voter protection efforts in 2020” and that it is bringing the current action on behalf of its 800,000 members statewide. (Id. at ¶42 and ¶6.)

The Secretary of State argues that Plaintiffs have failed to show that the established process for submitting absentee ballot applications has caused any harm, or that the harm flows to any of its members. The Secretary of State argues that the allegations in the Amended Complaint are insufficient to confer standing as they require the Court to speculate that Plaintiffs will experience difficulty in requesting an absentee ballot application. The Secretary of State maintains that the ODP cannot claim associational standing as it exists only when an association’s members have suffered actual injury and have standing to sue “in their own right”. With this, the Secretary of State contends that the ODP has not alleged any concrete actual harm as a result of the absentee ballot application return process and therefore lacks associational standing to bring this action on behalf of its members.

The Secretary of State further argues that the Plaintiffs cannot claim general taxpayer or public right standing because the Amended Complaint does not contain allegations with respect to status as taxpayers. The Secretary of State also argues that Plaintiffs fail to establish standing to seek relief under the Declaratory Judgement Act because they have not asserted a justiciable controversy for the Court’s review. The Secretary of State argues that Plaintiffs fail to articulate any impending injury.

Houlahan alleges that he does not want to risk his health or the health of election officials by submitting his application in person. Houlahan further alleges that submitting his ballot application in person would require him to spend time and financial resources to travel that he would otherwise not have to spend if he could submit his application via email. Houlahan alleges that he does not want to submit his absentee ballot application in the mail because it would require

him to spend financial resources on postage and an envelope that he otherwise would not have to spend if he could submit his application via email. Houlahan alleges that he is deeply concerned about delays in mail delivery.

Plaintiff Houlahan argues that he has established that Directive 2020-13 and interpretation of R.C. 3509.03 prevents him from requesting an absentee ballot in his preferred manner for the upcoming general election, and that it would cause him to incur additional expenses and risk his health and the health of elections officials if he had to vote in person or submit a request for an absentee ballot in person or by mail. Houlahan argues that this is a concrete injury that is not applicable to the public at large given not everyone is a qualified Ohio elector.

Plaintiff ODP argue that the factual allegations in the Amended Complaint also establish that the ODP has organizational and associational standing under common law principals across the state of Ohio and devotes substantial resources to voting activities. Plaintiff ODP further alleges that it runs a voter protection program each election cycle to help voters with issues related to their efforts to vote and the ODP intends to spend its resources to continue voter election and voter protections efforts for the November 3, 2020 General Election.

Plaintiff ODP argues that it has organizational and association standing under common law principles because it has an interest in knowing whether qualified electors have a right to submit their completed absentee ballot applications via email or by other electronic means under R.C. 3509.03. Plaintiff ODP further argues that if it is determined that qualified voters have the right to submit their completed absentee ballot applications via email or fax, the ODP will spend resources to inform voters about their right to request such ballots in this manner. Plaintiff ODP maintains that because of the Secretary of States directive, ODP members will be forced to incur additional expenses and risk their health and the health of election officials if they have to vote in person or

submit a request for an absentee ballot in person or by mail. In addition, Plaintiff ODP argues that courts have routinely determined that the ODP has standing to challenge the actions of the Secretary of State.

Upon review, Defendant's argument is not well taken. The Court finds that Plaintiffs Houlahan and ODP have standing to challenge the actions of the Secretary of State and have demonstrated a concrete injury.

CONCLUSION

For the aforementioned reasons, Plaintiffs' Motion for Preliminary Injunction is

GRANTED.

So Ordered

Copies to:

All Counsel (Electronically)

Franklin County Court of Common Pleas

Date: 09-11-2020

Case Title: OHIO DEMOCRATIC PARTY ET AL -VS- OHIO SECRETARY OF STATE

Case Number: 20CV004997

Type: ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "Stephen L. McIntosh", is written over a blue circular seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY, OHIO" in the center, and "ALL THINGS ARE POSSIBLE" at the bottom.

/s/ Judge Stephen L. McIntosh

Court Disposition

Case Number: 20CV004997

Case Style: OHIO DEMOCRATIC PARTY ET AL -VS- OHIO
SECRETARY OF STATE

Motion Tie Off Information:

1. Motion CMS Document Id: 20CV0049972020-07-3199850000
Document Title: 07-31-2020-MOTION FOR PRELIMINARY
INJUNCTION - PLAINTIFF: OHIO DEMOCRATIC PARTY
Disposition: MOTION GRANTED