UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

A. PHILIP RANDOLPH INSTITUTE OF OHIO, et al., Plaintiffs, v. FRANK LAROSE, in his official capacity as Secretary of State of Ohio, Defendant.	Case No. 1:20-cv-01908 Hon. Dan Aaron Polster

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

Plaintiffs demonstrated in their opening brief that, at a time when record numbers of Ohioans will vote absentee because of the pandemic, when Defendant LaRose himself and the United States Postal Service itself have given voters good reason to doubt that their absentee ballots will be delivered by mail on time, and when voters cannot mail absentee ballots on Election Day, Defendant's Directive 2020-16, which limits drop boxes to a single location per county, substantially burdens Ohioans' right to vote. Moreover, Plaintiffs demonstrated that the burdens will be disproportionately felt in certain counties—like Cuyahoga, Franklin, and Hamilton—and certain cities—like Cleveland and Cincinnati—and on certain populations—notably those who are poorer.

In response, Defendant and Intervenor dance around the merits. They ignore the key issue in this case that counties like Cuyahoga with over 850,000 voters have the same number of drop box locations as counties with a voting population 1% that of Cuyahoga's. They ignore that voters in Cleveland and Cincinnati are 2.5 times more likely to have to travel 90 minutes or more to their respective drop box and back than voters in the State as a whole. They ignore the evidence that voters in counties with large cities will likely confront waiting times at the drop box of such magnitude on Election Day that tens of thousands will undoubtedly go home without voting.

Their primary arguments are diversions. First, they argue that Plaintiffs lack standing, ignoring settled precedent and clear testimony that Organizational and Individual Plaintiffs have demonstrated concrete injury. Then, they argue laches and the *Purcell* doctrine as time-barring this suit, when it is Defendant's own decision to create the unlevel playing field on August 12, which has led to Plaintiffs' diligent filings that have teed this up for a decision on September 23.

Then, they argue that the Directive helped voters, by creating at least one drop box, forgetting that counties were ready to establish multiple drop boxes until prohibited by Defendant.

None of this touches upon the crux of this case: The Directive has created a situation where voters will not be able to cast their ballots in November—particularly those in Ohio's largest counties and cities and particularly those who are poor.

II. Legal standards that govern this case.

On September 14, 2020, the Court ordered the parties to brief the standard of review as to their equal protection claims: "1) the suspect classification(s); 2) the level of scrutiny the Court should apply; and 3) the state interest(s) advanced by prohibiting drop boxes at locations other than at the Boards of Elections." Minute Order (Sept. 14, 2020).

Plaintiffs' claims do not hinge on the identification of a suspect classification. Rather Plaintiffs' right-to-vote claim is brought under the First and Fourteenth Amendments, which call for weighing the character and magnitude of the burden imposed on Plaintiffs' rights against the interests put forward by the state as justification for the burden imposed by its rule. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). If the burden imposed is severe, courts apply strict scrutiny; if it is reasonable and nondiscriminatory, a rational basis test is applied. *Burdick*, 504 U.S. at 434. Most cases, such as this one, fall between the two extremes and apply the *Anderson-Burdick* flexible test. *Obama for America v. Husted*, 697 F. 3d 423, 429 (6th Cir. 2012). "In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Plaintiffs' equal protection claim is brought under the doctrine exemplified in *Bush v. Gore*, 531 U.S. 98, 104 (2000), which calls for the invalidation of state action that, by "arbitrary

and disparate treatment, value[s] one person's vote over that of another," including based on where voters live. *See, e.g., League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008) (noting that "a "lack of statewide standards effectively denied voters the fundamental right to vote" and holding that insufficient allocation of machines to certain Ohio jurisdictions "deprives its citizens of the right to vote or severely burdens the exercise of that right depending on where they live in violation of the Equal Protection Clause"); *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011) (Ohio had to institute "specific standards for reviewing provisional ballots . . . otherwise [there could be] 'unequal evaluation of ballots'" (quoting *Bush*, 531 U.S. at 106)); *NEOCH v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012) (joining "the parties and the district court in finding that the consent decree's different[ial] treatment of similarly situated provisional ballots likely violates equal protection…").

III. Plaintiffs have standing to bring their claims.

At the preliminary injunction stage, plaintiffs must prove that they are likely to succeed ultimately in proving standing. *See U.S. Student Ass'n Foundation v. Land*, 585 F. Supp. 2d 925, 942 (E.D. Mich. 2008). As long as one plaintiff has standing to request a preliminary injunction, the court must then consider the merits of the injunction. *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 652 (6th Cir. 2007). Here, all of the Plaintiffs, both individuals and organizations have standing, because they have pled and proven the likelihood of (1) an "injury in fact," *i.e.*, "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of;" and (3) that it is "likely" the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

A. Individual Plaintiffs' claims are concrete.

Defendant argues that Individual Plaintiffs' claims are not sufficiently "concrete," belittling them as mere preferences of people who "subjectively fear the postal service," "don't want to travel to the board of elections to return their ballot because it might be a far drive," or "think the line might be long" if they wait until Election Day to vote. Def.'s Br. ("Db.") 7–8. Defendant goes so far as to mock Plaintiffs as undoubtedly wishing that the board of elections would provide them "door-to-door pick up" of their ballots. *Id.* at 7. Defendant's lack of solicitousness for Ohio voters is regrettable, but Plaintiffs have amply demonstrated that the burdens imposed on many Ohio voters by the Directive, predominantly those living in poverty, is real and substantial: drive times for many of more than 90 minutes and wait times of extraordinary lengths. Nowhere does Defendant refute the substantiality of the burden. Nor is it fair to criticize voters for waiting until Election Day to vote—as it is their absolute right to take advantage of late-breaking information that could affect their vote. There is ample evidence in the record that election officials know that the plurality of voters cast their ballot on Election Day. And there is sufficient evidence in the record—including the Postal Service's own letter to Ohio, warning of delays in service that could affect postal delivery of ballots and the enormous publicity attendant to problems with the Postal Service—that supports the concreteness of Plaintiffs' injury.

No more is needed, but even if it were, Individual Plaintiffs' stories should suffice. Plaintiffs Griffin and Connally are over 65 years old and cannot vote in person because they are at high risk of contracting COVID-19. Griffin Decl. ¶ 13 (Doc. 13-13); Connally Decl. ¶ 14 (Doc. 13-14). Plaintiff Rikleen is a healthcare professional who cares for COVID-19 patients and cannot vote in person because she does not want to risk infecting others or getting infected herself. Rikleen Decl. ¶¶ 6–7 (Doc. 13-17). Plaintiffs Jesionowski, Nowling, and Collins do not

want to vote in person because they do not want to infect high-risk family members or expose themselves to COVID-19 at polling places where voters may not be wearing masks. Jesionowski Decl. ¶ 8 (Doc. 13-11); Collins Dep. 12:1–13; Nowling Dep. 16:4–25. Individual Plaintiffs have expressed they do not trust that the Postal Service will timely deliver their ballots and that they will have difficulty getting to their boards of elections office (either because they do not have transportation, (Nowling Dep. 17:1–4), or have hectic schedules, Jesionowski, (Dep. 8:4–10; Rikleen Decl. ¶ 9), or cannot risk exposure at a crowded drop box at their boards of elections offices, (Griffin Dep. 10:19–24; 13:2-10; Nowling Dep. 17:1–4).

In *New York v. Department of Commerce*, 139 S.Ct. 2551 (2019), the Supreme Court found that plaintiffs had standing based on the prospect that the addition of a citizenship question to the 2020 Census would deter noncitizen households from responding to the Census leading to an undercount of these populations was not speculative. The facts supporting the concreteness of Individual Plaintiffs' injury here are at least as strong. *Id.* at 2565.

B. Organizational Plaintiffs' injuries are concrete.

A "drain on an organization's resources . . . constitutes a concrete and demonstrable injury for standing purposes." *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013). Organizational Plaintiffs have detailed their diversion of resources resulting from the Directive. LWVO, Ohio NAACP, and Ohio APRI staff have fielded calls from members and their constituents about the changing circumstances around ballot drop boxes and questions concerning difficulties members face around the Postal Service. Miller Dep. 7–10; Miller Decl. ¶¶ 13–14; Roberts Decl. ¶ 12 (Doc. 13-20); Washington Dep. 14–15; Washington Decl. ¶ 17 (Doc. 13-18). Organizational Plaintiffs have had to increase their education and outreach efforts in response to Defendant's Directive. *Miami Valley*, 725 F.3d 571, 576 (6th Cir. 2013) (staff time diverted towards identifying a discriminatory advertisement and bringing it to

the attention of authorities resulted in a "drain on the organization's resources").[1] Defendant's only response to this is to mischaracterize it as Plaintiffs' "expenditure of funds to educate voters that drop boxes will not be [sic] appear in locations that never had drop boxes before." Db. 10. To the contrary, Plaintiffs are expending resources in educating their constituents on how to best navigate a burdensome situation that Defendant created. That is a concrete organizational injury.

Defendant's reliance on *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014), Db. 11, is misplaced. There, the court denied standing to organizations who had based their standing on training volunteers re recently jailed prisoners who wanted to vote. *Fair Elections*, 770 F.3d at 461. The court said that was insufficient, because the organizations had been training these volunteers anyway, and had not provided specific facts as to how the organizations were addressing the prisoners' issues. *Id*. at 459. Here, to the contrary, not only have the Organizational Plaintiffs provided specifics, but also the education is not of volunteers who would have been trained in any case, but of voters who are initiating the contact with the organizations. See Washington Dep. 19–20. LWVO's executive director testified that two members called her to share that their absentee ballots never arrived in time for them to postmark and mail the ballots. Miller Dep. 7–12.

C. All Plaintiffs meet the other elements of standing

Defendant and Intervenor make a series of other attacks on all Plaintiffs' standing which can be summarily dispatched.

[1] Defendant relies on *Miami Valley Fair Housing Ctr., Inc. v. Preferred Real Estate Invs.*, LLC, 2017 WL 914735, at *6 (S.D. Ohio Mar. 8, 2017), claiming that there the court "den[ied] standing to a fair housing group where there was no evidence that the group *increased* its education and outreach efforts in response to the Defendants' actions" (Db-10; emphasis that of Defendant). But there, the court denied standing because (1) it doubted that the person upon whom the organization rested its standing was actually an employee of the organization and (2) any education was not in "response" to the challenged action. *Id.* at *8. Further, Defendant fail to note that, in another, much more expansive, part of the opinion, the court found standing for another organization because it expended resources investigating housing discrimination for the purpose of bringing litigation.

Defendant argues that Plaintiffs' injury is not traceable to Defendant, but rather caused by COVID-19 or the U.S. Postal Service, relying on *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020). Def.'s Br. 8. But *Thompson* did not deal with standing at all, let alone the traceability requirement. *Thompson* concerned a claim brought by plaintiffs, who sought an exemption from signature requirements for petitions, because of the pandemic. The court held that there was not state action to support the claims, because the State had made clear that its stay-at-home restrictions did not apply to petition circulators. *Id.* at 809; *cf. Esshaki v. Whitmer*, 813 F. App'x 170, 171 (6th Cir. 2020) (holding statute requiring a certain number of petition signatures by deadline severely burdensome because of state restriction prohibiting all gatherings even for First Amendment activities during COVID-19). Here, to the contrary it is the very specific action that Defendant has taken—the issuing the Directive-that is being challenged. Plaintiffs' claims are directly traceable to Defendant's action.

Next, Defendant and Intervenor argue that Plaintiffs' claims are not redressable by Defendant, but rather only by the counties. Db. 8; Intervenor's Br. ("Ib.") 4–5.[2] It is the directive that is blocking the counties from adding drop box locations. Contrary to Intervenor's contention, the facts are undisputed that certain counties were ready to add drop box locations before the Directive, and will do so now, if the ban is lifted. Faux Aff. ¶¶ 21–25 (Doc. 13-9) (Exh. A to Shuster Decl.); Faux Dep. 20–25. Indeed, in the past week, Cuyahoga County approved a plan to have drop-off sites at public libraries across the county from where a bipartisan team of election officials was to collect ballots.[3]

[2] Intervenor also argues, oddly, that Plaintiffs lack standing, because they have "eschewed any legally protected interest" to compel any board to install more than one drop box location. Ib. 4. As this Court is aware, at this Court's urging, Plaintiffs confirmed that they did not intend to sue any county. Even if this constituted the "eschew[ing]" of "any legally protected interest" – which it does not-there is no doctrine that strips standing from a party if it chooses not to sue others who may or may not be liable.

[3] *See* Andrew J. Tobias, *Ohio Secretary of State Frank LaRose Blocks Cuyahoga County Elections Plan Offering Ballot Drop-Off Sites at Libraries*, Cleveland.com (Sept. 14, 2020), https://www.cleveland.com/open/2020/09/ohio-

IV. The statutory issue is not before the Court.

A Franklin County judge has affirmed that Ohio Revised Code § 35009.05(A) does not prohibit multiple drop boxes. *Ohio Democratic Party et al. v. LaRose*, Case No. 20-CV-005634, at *29 (Franklin Cty. Ct. Common Pleas Sept. 15, 2020) (pending appeal). Although, contrary to his prior statements,[4] Defendant is not agreeing to allow counties to add drop boxes now that it is clear that there is no statutory impediment, the issue of the statute's construction is not before this Court. Aug. 31, 2020, Hr'g Trans. at 11, 9-25 (Doc. 12). The only issue is the constitutionality of the Directive. And even if there were a statutory issue, this case is about the constitutionality of whether counties are prohibited from having more than one drop box location.[5]

V. Plaintiffs have proved they will succeed on their right-to-vote claim under *Anderson-Burdick*.

A. The burden on the right to vote is substantial.

Nowhere in their 30-pages of argument do either Defendant or Intervenor challenge the substantial factual record Plaintiffs have presented demonstrating that Ohio's "one-drop-box-per-

secretary-of-state-frank-larose-blocks-cuyahoga-county-elections-plan-offering-ballot-drop-off-sites-at-libraries.html.

[4] In late August, Defendant stated, "I think it would be a great thing if we could if the state legislature were to authorize it, *or a judges [sic] order*. I would be happy to see more drop boxes in more places throughout the state. As long as it had the bipartisan support of those boards of elections, and as long as those drop boxes were secure and under video surveillance." Janet Rogers, *Secretary of State Answers Questions About More Secure Drop Boxes*, 21WMFJ (Aug. 30, 2020), https://www.wfmj.com/story/42564719/secretary-of-state-answers-questions-about-more-secure-ballot-drop-boxes-warren-oh. (emphasis added). After the state court judge in Franklin County issued an opinion that Ohio statute did not prevent counties from installing multiple ballot drop boxes, Defendant LaRose's spokesperson delivered the following message: "[Tuesday's] ruling didn't change anything and the secretary's directive remains in place. The law is clear: Absentee ballots must be delivered by mail or personally deliver[ed] to the director' of their county board of elections and in no other manner. Ohioans are fortunate that the judicial branch offers the opportunity to appeal a single trial judge's opinion." Justin Dennis, *LaRose: Court Ruling to Allow Multiple Drop Boxes Doesn't Change Anything*, Mahoning Matters (Sept. 16, 2020), https://www.mahoningmatters.com/local-news/larose-court-ruling-to-allow-multiple-drop-boxes-doesnt-change-anything-2716038.

[5] Intervenor devotes substantial space in its brief to the statutory construction issue. Plaintiffs rely on the decision of the Franklin County court in refutation of Intervenor's irrelevant argument.

county" rule violates the right to vote. Most prominently, neither offers a word of dissent to the conclusions reached by Dr. Chatman. These include that Ohio's drop box restriction will result in a substantial travel burden (more than 90 minutes roundtrip) to access a drop box for over 70% of the Ohio voting age citizens who reside in a household that lacks a motor vehicle (hundreds of thousands of voting-age citizens). This lack of access to a vehicle is strongly correlated with low income status.[6] Chatman Decl. ¶¶ 7–8, 47–51 (Doc. 13-5). Moreover, the restriction on drop boxes will likely produce extremely long waiting times in Ohio's major population centers on Election Day such that thousands of voters will be discouraged from, and prevented from, voting. *Id*. at ¶¶ 11–12, 66–76. Likewise, nowhere in their briefs do either Defendant or Intervenor challenge Dr. McCool's opinion, as an expert in voting behavior, that there is a "high probability" that these burdens will lead to the disenfranchisement of "tens of thousands" of Ohio voters. McCool Decl. Attachment. 2 at p. 30 (Doc. 13-6).

Rather than confront these facts, Defendant and Intervenor choose to try to deflect them, making essentially a single argument against Plaintiffs' assertion that the Directive results in a substantial burden on Ohio voters. There is no burden, they say; in fact, the Directive provides a benefit, i.e., requiring every county to have a drop box location. Db. 13–14; Ib. 2. This argument fails both factually and legally.

The opposing parties' mistakes arise from their failures to grasp what this case is about. Repeatedly, Intervenor characterizes Plaintiffs' *Anderson-Burdick* claim as a facial challenge to the Directive, similar to that in *Crawford v. Marion County Election Board*, 553 U.S. 181, 186 (2001). Ib. 12. It is anything but. This claim is rooted firmly on the circumstances surrounding the issuance of the Directive: the pandemic that led both to the fear of voting in-person and the

[6] In light of this, it is odd that Intervenor argues that there is no evidence that poor people are particularly burdened by the Directive. *See* Ib. 12.

expansion of Ohio's absentee ballot eligibility, the concomitant result of an unprecedented number of people voting by mail in November 2020, Ohio's absentee ballot laws, and the highly publicized problems about U.S. Postal Service delays. Whether, without these facts, the vote would be burdened by the Directive's prohibition of more than one drop box location per county is an issue for another day.

Under the circumstances of this case, the Directive can scarcely be viewed as an unqualified "benefit" to voters. Before 2020, many counties did provide some form of a drop box for voters. Hamilton County started using a drop box in 2012. Faux Dep. 11:1–25; Faux Aff. ¶ 10 (Exh. A to Shuster Decl.). Cuyahoga County provided a drop box since 2012. Chappell Dep. 18:19–24. The Franklin County Court noted that Athens County had provided a drop box since 2018. *Ohio Democratic Party v. LaRose*, at *8. What the Directive did was stop these and other counties from installing more drop boxes. *Id.* at 8–9 (Hamilton, Sandusky, Franklin, Athens, Huron, and Ashtabula counties were considering installing more drop boxes but halted any further discussions or preparations after Directive 2020-16). Defendant should not be allowed to prevent counties from making voting more accessible.

Further, as a matter of law, that a state confers an alternative avenue of casting ballots does not mean that it can confer that benefit with impunity. *See, e.g., Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018), *appeal dismissed as moot sub nom. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790 (11th Cir. 2020) (finding that signature-match procedure for absentee ballots without opportunity to cure violated the *Anderson-Burdick* test). Both in and outside the COVID-19 context, courts have held the state to constitutional requirements, even when bestowing the "benefit" of additional means of voting. *LWV of Va. v. Bd. of Elections*, 2020 WL 2158249, at *1, *8 (W.D.

Va. May 5, 2020) ("In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote," but "these are not ordinary times."); *Garbett v. Herbert*, 2020 WL 2064101, at *12 (D. Utah Apr. 29, 2020) ("On balance, considering the current pandemic and the totality of the State's emergency measures to combat it, Utah's ballot access framework as applied this year imposed a severe burden…."); *Thomas v. Andino*, 2020 WL 2617329, at *20 (D.S.C. May 25, 2020) (witness requirements for absentee ballot significantly burdened the plaintiffs' right to vote); *Frederick v. Lawson*, 2020 WL 4882696, at *16 (S.D. Ind. Aug. 20, 2020) (state's rejection of absentee ballots for signature-matching without notice and opportunity to cure placed significant burden on the right to vote, especially during a pandemic); *Harding v. Edwards*, 2020 WL 5543769, at *4, *18 (M.D. La. Sept. 16, 2020) (ordering state to expand who can vote absentee and early voting period during COVID-19 pandemic); *Texas v. Hollins*, 2020 WL 5584127, at *4 (Tex. CoA. 14th Judicial Dist. Sept. 18, 2020) (affirming county's decision to mail all registered voters absentee ballot applications during pandemic). [7]

Intervenor also argues that the problems with the Postal Service do not exacerbate burdens on voters because Postmaster general DeJoy has supposedly reversed course and halted any and all changes that could delay delivery of absentee ballots. Intervenors' Br. at 11. Whether that is true—and at least one federal court has ruled that it is not[8]—whether absentee ballots will actually be delivered on time through the mail is not the issue in this case. Rather, it is the massive publicity forecasting delays that could affect delivery – and the Postal Service's own

[7] Intervenor mischaracterizes these cases as all involving "signature requirements" that compelled voters to come into close contact with others. Ib-10. To the contrary, the majority of these cases deal with notice and an opportunity to cure rejection of ballots for signature mismatch and other reasons, and had nothing to do with voters coming into contact with others. And, while Intervenors cites to several out-of-state cases (including a lower court case from Pennsylvania) where relief – usually dealing with changing ballot delivery deadlines – was denied (Ib-10 to11), they fail to cite to the Pennsylvania Supreme Court's recent decision, permitting the counties to install multiple ballot drop boxes based on the court's interpretation of an ambiguous state statute that did not outright mention or prohibit drop boxes. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, at *17–20 (Pa. Sept. 8, 2020).

[8] *Washington v. Trump et al.*, 2020 WL 5568557 (E.D. Wash. Sept. 17, 2020).

notice to the State of Ohio – that is relevant. *See, e.g.*, Schuster Aff. Exh. A (30 articles from major publications over the last month reporting on the breakdown in the Postal Service as a result of top-down systemic changes). The record is replete with sworn statements from election officials (Chappell Dep. 35–37; Faux Dep. 36–37; Faux Aff. ¶ 15 (Exh. A to Shuster Decl.), Organizational Plaintiffs (Miller Dep. 9–12; Washington Dep. 19:18–25, 20:1–4; Roberts Dep. 10:1–9), expert witnesses (Ditchey Decl. 18 (13-2); Ditchey Dep. 17:19–25; McGuire Decl. ¶ 38 (Doc. 13-10)), and Individual Plaintiffs (Griffin Dep. 12:4-18; Nowling Dep. 15:5-16; Rikleen Decl. ¶ 11; Collins Decl. ¶ 5; Jesionowski Decl. ¶ 6), as to the effect of this publicity on decisions to forego using the Postal Service to deliver absentee ballots. Moreover, Defendant wrote to Ohio's Congressional Delegation this year *before* Postmaster DeJoy's actions expressing concern about how postal delays were affecting the absentee ballot process in Ohio.

Intervenor also tries to lay the blame on voters, who, they say, should not wait until Election Day to vote. Ib. 11. Intervenors forget that the widespread use of mail voting in Ohio is, due to the pandemic, in lieu of most people voting in-person on Election Day. Voters have the right, as most of them have always done, to wait until campaigning is concluded and vote on the basis of all of the information. Election officials understand this, if Intervenors do not. The burden imposed by the Directive is to be expected by Defendants, given natural voting habits.

B. The State has no countervailing interest that outweighs the burden on voters.

Although Defendant and Intervenor variously cite to stopping fraud and elevating election integrity as justification for the Directive, their arguments lack any real basis. For example, Intervenor cites to general fears of absentee ballot fraud, but nowhere explain how that alleged fraud—however small—is different when dealing with delivery of ballots to a drop box rather than a mail box. In fact, in the prime example cited by Intervenor—the Cuyahoga

incident—an election official noticed an individual dropping off multiple ballots in a drop box.[9] Limiting deliveries to mailboxes will not stop that sort of incident—one person delivering multiple ballots—indeed, it might be easier to commit that crime at a mail box, and limiting drop boxes to one location encourages the use of mail boxes.

In any event, not only is voting fraud in general exceedingly rare, as Dr. McCool explains, McCool Decl. Attachment 2 at pp. 23–28, drop boxes are a secure and reliable method for receiving absentee ballots. Plaintiffs' expert Paddy McGuire, who has extensive experience with ballot drop boxes in two vote-by-mail states, Oregon and Washington, stated that neither Oregon nor Washington has experienced any instances of voting fraud associated with these states' wide-ranging use of drop boxes. McGuire Decl. ¶¶ 32–33. McGuire emphasized that using such procedures as "chain of custody" tracking regarding who handles a drop box, and "numbered seals" to track every time a drop box is opened or emptied, are straightforward and effective in ensuring ballot security. *Id.* at ¶ 35.

As to the cost and election administration, the testimony of the county officials – those who will be bearing these costs – is that it is feasible, doable, and can be done economically. As Mr. McGuire testified, decommissioned mail boxes and even cheaper off-the-shelf alternatives are available. *Id*. at 31; McGuire Dep. 50:52-53, 50:59–60. Moreover, Defendant was planning to spend $3 million from his budget so that absentee ballots would be postage prepaid until the Ohio Controlling Board denied his request. He could repurpose a portion of those funds portion of provide grants to counties to purchase and install drop boxes.

[9] Intervenor fail to mention that the Board did not find evidence that there was fraud or tampering attributed to these ballots but rather noted that the Cleveland resident was attempting to help her neighbors who were poor, did not have cars, or feared exposure to COVID-19. Ib. 31 Board minutes at 3 (Doc.31-4).

Finally, while Defendant certainly has an interest in upholding election integrity, it would seem that that interest is furthered more by facilitating eligible voters to vote, not by burdening them. Whatever the Defendant's interests are, they are certainly not tailored narrowly to justify the substantial burden on voters.

VI. Plaintiffs have shown that they will succeed on their *Bush v. Gore* equal protection claim.

Defendant and Intervenor contend that the Directive does not treat counties differently because it requires uniformity—one drop box per county. Db. 15; Ib. 15. But they do not question—and cannot question—that the effect of this "uniformity" is to make it much more difficult for voters to vote in certain parts of the state than in others. Nowhere do they challenge Dr. Chatman's conclusions that voters in Cincinnati and Cleveland will be disproportionately burdened because of the travel time to the single drop box location than voters elsewhere. Chatman Decl. ¶¶ 46–48. Nowhere do they challenge Dr. Chatman's conclusions that voters in Ohio's largest counties will face extraordinary lines at the drop box that will voters elsewhere will not face. *Id.* ¶¶ 48, 66–72. None of this is surprising. Allowing a county with 850,000 voters the same single drop box location as a county with 9,000 voters is a recipe for disparate treatment based on where voters live. And that is unconstitutional under *Bush v. Gore.* Plaintiffs have shown that the Directive is arbitrary in application even though it may appear to be uniform on its face.

Defendant and Intervenor next contend that permitting counties to install ballot drop boxes will create a reverse Equal Protection problem because some counties will install drop boxes and others will choose not to do so. Db. 15; Ib. 15. Defendant complains that this would result in "spin off" litigation against the counties. Db. 9. This concern is premature and does not justify denying thousands their right to vote safely during a pandemic. The Pennsylvania

Supreme Court rejected a similar argument that permitting counties to install drop boxes would create equal protection problems in *Pa. Democratic Party v. Bookvar*:

> Petitioner and the Secretary, which we have, then the county boards of election will employ myriad systems to accept hand-delivered mail-in ballots, which allegedly will be unconstitutionally disparate from one another in so much as some systems will offer more legal protections to voters than others will provide. However, the exact manner in which each county board of election will accept these votes is entirely unknown at this point; thus, we have no metric by which to measure whether any one system offers more legal protection than another, making an equal protection analysis impossible at this time.

2020 WL 5554644, at * 9 (Pa. Sup. Ct., Sept. 17, 2020). That same logic applies here. Counties are best situated to determine in the first instance the need for and location of additional drop boxes, and any allegation that multiple drop boxes will cause equal protection problems for those counties that do not install them versus those that do is unripe.

VII. The timing of this action was dictated by the timing of the Directive.

To the extent that Defendant and Intervenor suggest that Plaintiffs waited too long to file this action, that problem was caused by Defendant, who waited until August 12, 2020 to issue his Directive. There is sufficient time for the Court to grant relief and for boards of elections to install more drop boxes. That sort of remedy can be implemented a week before election day without causing prejudice or harm to any party. *See* McGuire Decl. ¶ 30 (noting public libraries are well-known, trusted locations for drop boxes, and also that Boston, added drop boxes just 11 days before an election). There will be no *Purcell* issue, as there will be no voter confusion. To the contrary, voters will simply be given an additional means of casting their ballot.

VIII. Conclusion

For reasons stated above, the Court should grant Plaintiffs' motion for preliminary injunction.

Dated: September 21, 2020

Respectfully submitted,

/ James Schuster /

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 21, 2020, a true and correct copy of the foregoing was furnished by electronic filing with the Clerk of the Court via CM/ECF, which will send notice of electronic filling to all counsel of record.

/ James Schuster /