IN THE TENTH DISTRICT COURT OF APPEALS

FRANKLIN COUNTY, OHIO

OHIO DEMOCRATIC PARTY, *et al.*, Plaintiffs-Appellees, v. FRANK LAROSE, in his official capacity as Secretary of State of Ohio, Defendant-Appellant, DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*, Intervenors-Appellants.	Case No. 20-AP-421 Case No. 20-AP-428 On Appeal from the Franklin County Court of Common Pleas, No. 20-CV-4997 ACCELERATED CALENDAR

BRIEF OF AMICI CURIAE ELECTION CYBERSECURITY EXPERTS AND VOTING RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF AMICUS CURIAE

Amici are leading cybersecurity experts and nonprofit voting rights organizations who have advanced the security, integrity, and accessibility of election systems nationwide and in Ohio, with the goal of ensuring that every eligible voter has the opportunity to cast a ballot and have that ballot accurately counted. Election officials regularly rely on their research and knowledge to identify and address vulnerabilities in voting machines, registration databases, and other election infrastructure. In response to the unprecedented challenges associated with conducting a free and fair election this year, including those brought on by the COVID-19 pandemic, *Amici* believe that Ohio can increase voting accessibility without compromising security, and that doing so is critical to ensuring that every American have the opportunity to exercise their right to vote.

Dr. Dan Wallach serves as Professor of Computer Science and of Electrical and Computer Engineering and a Rice Scholar at the Baker Institute for Public Policy at Rice University. He served as the director

of an NSF-funded multi-institution research center, ACCURATE (A Center for Correct, Usable, Reliable, Auditable, and Transparent Elections), from 2005-2011. Dr. Wallach is the recipient of the 2013 Microsoft SEIF Faculty Research Award, served as a member of the Air Force Science Advisory Board from 2011-2015, and the USENIX Association Board of Directors from 2011-2013.

Dr. Juan E. Gilbert is the Andrew Banks Family Preeminence Endowed Professor and Chair of the Computer & Information Science & Engineering Department at the University of Florida where he leads the Human Experience Research Lab. He is also an ACM Fellow, a Fellow of the American Association of the Advancement of Science, a Fellow of the National Academy of Inventors, and a Senior Member of the IEEE. Dr. Gilbert is the inventor of Prime III, an open source, secure and accessible voting technology that was recently used in statewide elections in New Hampshire and in Butler County, Ohio. Dr. Gilbert was a member of the National Academies Committee on the Future of Voting: Accessible, Reliable, Verifiable Technology that produced the report titled, "Securing the Vote: Protecting American Democracy". Dr.

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Gilbert is originally from Ohio, having grown up in Hamilton, where his family still resides. He is also a graduate of Miami University and the University of Cincinnati.

Dr. J. Alex Halderman is a Professor of Computer Science & Engineering and the Director of the Center for Computer Security and Society at the University of Michigan. He is the 2020 recipient of the University of Michigan's President's Award for National and State Leadership, a 2019 Andrew Carnegie Fellow, and was named one of Popular Science's "Brilliant 10" in 2015. Dr. Halderman is a co-founder and Board Member of the Internet Security Research Group (ISRG) and serves on the Verified Voting Foundation's Board of Advisors. He is also the co-chair of the Michigan Secretary of State's Election Security Advisory Commission.

Dr. Poorvi L. Vora serves as Professor of Computer Science at George Washington University. Dr. Vora was a Faculty Computer Scientist for the National Institute of Standards and Technology's Security Technology Group from 2008-2011 and former Associate Editor for the *IEEE Transactions on Information Forensics and*

Security. She currently serves on the Verified Voting Foundation's Board of Advisors.

Dr. Edward W. Felten is the Robert E. Kahn Professor of Computer Science and Public Affairs at Princeton University, and a member of the United States Privacy and Civil Liberties Oversight Board. He previously served as Deputy United States Chief Technology Officer, and as Chief Technologist at the Federal Trade Commission. He was elected to the National Academy of Engineering in 2013 and was selected an ACM Fellow in 2007.

Dr. Douglas Jones serves as Associate Professor of Computer Science at the University of Iowa. He was appointed to the Iowa Board of Examiners for Voting Machines and Electronic Voting Systems in 1994, and served for a decade, including a term as chair. Dr. Jones was one of four technical and scientific experts to the U.S. Election Assistance Commission's Technical Guidelines Development Committee from 2009 to 2012. He is co-author with Barbara Simons of the book *Broken Ballots*. He was also a technical consultant for the 2006 Emmy-nominated HBO documentary film, *Hacking Democracy*.

Dr. Ronald Rivest serves as Institute Professor at the Massachusetts Institute of Technology (MIT). He is a member of MIT's Computer Science and Artificial Intelligence Laboratory (CSAIL), a member of the lab's Theory of Computation group, and a founder of its Cryptography and Information Security Group. Dr. Rivest is also a founder of RSA Data Security and a co-founder of Verisign and of Peppercoin. He is an ACM Fellow, an IEEE member, and was named to the National Inventors Hall of Fame in 2018. He currently serves on the Board of the Verified Voting Foundation.

Dr. Matt Blaze is the McDevitt Professor of Computer Science and Law and Chair of the Department of Computer Science at Georgetown University. He a recipient of the EEF Pioneer Award, a co-founder of DEF CON Voting Village, and an inventor of *Trust Management*, which provides the abstract layer in which a system decides whether to allow some potentially dangerous action. Dr. Blaze was also a designer of *swIPe*, a predecessor of the now standard IPSEC protocol for protecting Internet traffic.

The Brennan Center for Justice at NYU School of Law ("the Brennan Center") is a nonprofit, nonpartisan public policy and law institute that seeks to improve systems of democracy and justice.[1] The Brennan Center advocates for election administration reforms, litigates voting rights cases, and conducts empirical and qualitative research on issues related to election law and administration. Through its Election Reform Program, the Brennan Center has engaged in extensive efforts to ensure that elections throughout the country this year are accessible, safe, and secure given the difficult and unprecedented challenges created by the novel coronavirus ("COVID-19"). The Brennan Center has worked for many years with local organizations in Ohio to advocate for election reforms throughout the state.

The American Civil Liberties Union of Ohio Foundation ("ACLU of Ohio"), is the Ohio affiliate of the national American Civil Liberties Union, one of the oldest and largest groups in the nation dedicated to preserving and defending civil rights and liberties. The ACLU of Ohio is

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[1] This brief does not purport to convey the position, if any, of the New York University School of Law.

a non-profit, non-partisan membership organization, with over 100,000 members and supporters in Ohio alone. For nearly 100 years, the ACLU of Ohio, and the national affiliate, have litigated questions involving civil liberties in the state and federal courts, helping to establish literally dozens of precedents that today form part of the basic framework of our constitutional jurisprudence. The issues relating to voting rights implicated by this case are among the core issues on which the *Amicus* represents its members and constituencies and the reason the ACLU of Ohio appears in this case.

Northeast Ohio Voter Advocates ("NOVA") is a grassroots organization that believes in expanding voter participation so that all voices are heard in our democracy. NOVA works to enable and expand turnout in under-represented areas of Northeast Ohio and to improve the election process in Ohio through research and advocacy for legislative and administrative changes.

SUMMARY OF ARGUMENT

Amici come before the Court to urge it to affirm the trial court's preliminary injunction order. *Amici* recognize Appellant-Defendant Secretary LaRose's commitment to promoting secure and accessible elections in Ohio. However, they must respectfully agree with the trial court that his refusal to afford the vast majority of Ohio voters any means for the electronic submission of absentee ballot applications cannot be squared with state law or constitutional guarantees for the right to vote. *Amici* write to briefly address two key points that bear particularly on their expertise and interests.

First, the COVID-19 pandemic has created an urgent need for effective absentee voting options. Projections estimate that almost three quarters of Ohio voters will vote absentee in the upcoming general election. Particularly in light of recent Postal Service disruptions that have caused significant delays in mail service, having some means to electronically transmit applications to vote absentee is critical to ensuring that none of these voters is disenfranchised.

Second, election officials can easily facilitate electronic submission of applications at little cost while minimizing associated security risks. Ideally this should be done through a secure online portal, but it is also feasible to do so using email. In his brief, Secretary LaRose raises two core security concerns: phishing and ransomware attacks, and network overloads. The former can be addressed by simply establishing a dedicated email address that is only accessed via a computer isolated from other election infrastructure to prevent the spread of malware. The latter can be addressed by using systems to redistribute traffic that county boards of elections are already required to have in place, adjusting email settings, and taking other simple mitigation steps. With these measures in place, the benefits of allowing electronic submission of absentee applications clearly outweigh any security risks.

ARGUMENT

I. ONLINE SUBMISSION OF ABSENTEE BALLOT APPLICATIONS IS CRITICAL IN THE FACE OF COVID-19 AND POSTAL DELAYS.

The COVID-19 pandemic has made widely available absentee voting indispensable to ensuring that all voters have the opportunity to

cast a ballot. In its guidance on election day polling places, the Centers for Disease Control and Prevention (CDC) warns that "[t]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread."[2] While many voters will still choose to vote in-person this November, many others, especially individuals with a heightened risk for severe illness, will face disenfranchisement without access to remote voting options.

In the face of these challenges, voters are choosing to vote absentee in unprecedented numbers this year.[3] During the April primary in Ohio, 85 percent of all votes cast were absentee.[4] And experts expect this trend to continue in November; a recent model based on historical data and a survey of Ohio voters projected that 71 percent of likely

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[2] *Considerations for Election Polling Locations*, Centers for Disease Control and Prevention (June 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

[3] Nathaniel Rakich, *There Have Been 38 Statewide Elections During the Pandemic. Here's How They Went.*, FiveThirtyEight (Aug. 3, 2020), https://fivethirtyeight.com/features/there-have-been-38-statewide-elections-during-the-pandemic-heres-how-they-went/.

[4] Pia Deshpande, *Ohio's 2020 Presidential Primary*, Healthy Elections (July 27, 2020), https://healthyelections.org/sites/default/files/2020-08/Ohio%20Election%20Memo(1).pdf.

voters intend to vote absentee for the general election.[5] Secretary LaRose predicted that the November general election will have "not only the highest turnout election in [the] state's history, but also the highest percentage of vote by mail ballots [the state has] ever seen."[6]

Exacerbating these already challenging circumstances, the United States Postal Service (USPS) is currently experiencing serious delivery delays and other service disruptions.[7] Under current rules, Ohio voters who wish to vote absentee must submit a request to do so either in person (raising many of the same concerns that in-person voting raises) or by mail.[8] In the week before the April primary election, however, Secretary LaRose expressed concern that "[a]s Ohioans rush to submit

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[5] *Citizen Projects Higher Levels of Vote by Mail in Key States*, Citizen Data (Aug. 6, 2020), https://citizendata.com/news/citizen-projects-higher-levels-of-vote-by-mail-in-key-states/.

[6] Clare Roth, *Ohio Secretary of State Expects Record Voter Turnout for November Election*, WOSU (June 17, 2020), https://radio.wosu.org/post/ohio-secretary-state-expects-record-voter-turnout-november-election#stream/0.

[7] Emily Badger, Quoctrung Bui & Margot Sanger-Katz, *Is the Mail Getting Slower? We're Tracking It*, New York Times (Sept. 14, 2020), https://www.nytimes.com/interactive/2020/09/14/upshot/is-the-mail-getting-slower-tracker.html.

[8] Ohio Secretary of State Directive 2020-13.

their vote-by-mail requests, and [county] boards work overtime to fulfill them, we are finding that the delivery of the mail is taking far longer than what is published by the United States Postal Service (USPS) as expected delivery times."[9] Secretary LaRose explained that first-class mail was taking "as long as 7–9 days" for delivery, rather than the expected "1–3 days."[10] In May, the USPS noted similar delays nationwide in a letter to state and local election officials, and warned that officials and voters should allow at least one week for delivery of absentee applications and mail ballots.[11]

The absentee voting process relies on a series of deliveries between election officials and voters, all of which must be completed before election day. A postal disruption resulting in late delivery of an absentee ballot request can set off a chain reaction leading to disenfranchisement.

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[9] Letter from Ohio Secretary of State Frank LaRose Re: Conflicting Information from the USPS Related to Election Mail (Apr. 23, 2020), https://www.ohiosos.gov/globalassets/media-center/news/2020/2020-04-24.pdf.

[10] *Id.*

[11] Letter from United States Postal Service Re: Election Mail (May 29, 2020), https://about.usps.com/newsroom/national-releases/2020/2020-05-29-marshall-to-election-officials-re-election-mail.pdf.

Online submission of absentee ballot applications eases this process. Voters do not need to spend time and money going out to purchase stamps. Applications do not need to spend up to a week or more in the mail system before they reach county election offices for processing. And ballots ultimately get to voters faster, leaving more time for return before election day.

II. OHIO CAN ALLOW VOTERS TO SUBMIT ABSENTEE APPLICATIONS BY EMAIL WITHOUT COMPROMISING SECURITY.

Secretary LaRose is right to ask how the state can securely accept absentee applications by email. Fortunately, there are well-established best practices and industry standards that election officials can apply to do so. *Amici* agree, as the Secretary has noted elsewhere, that the best approach would be to establish a secure online portal for submitting applications.[12] Critically, however, it is also possible to design a system for email submission that minimizes overall security risks.

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[12] Rick Rouan, *Could Ohio Develop Online Absentee Ballot Requests in Time for November Election?*, Columbus Dispatch (June 10, 2020), https://www.dispatch.com/news/20200610/could-ohio-develop-online-absentee-ballot-requests-in-time-for-november-election.

In his brief, the Secretary raises two core security concerns with allowing voters to submit applications by email: phishing and ransomware attacks, and network overloads. *See* Brief of Appellant-Defendant Ohio Secretary of State Frank LaRose, at 26.

Phishing and Ransomware Attacks: Secretary LaRose is correct that the biggest security threat associated with electronic submission of applications is that the process will be used as a conduit for malware, including ransomware, to infect or access other election infrastructure systems. But election officials can take steps to both decrease the likelihood of opening a malicious link or email attachment and mitigate the damage that can occur if such a link or attachment were opened.

The most important step is to use a dedicated email address for the sole purpose of receiving absentee applications. The dedicated email address should be accessed from one or more isolated, dedicated computers or laptops with virus scanning software installed to help detect suspicious attachments and make it less likely that an election

worker opens a malicious email attachment.[13] These computers should also have security controls that restrict access to the broader network, with all printing from one of these computers done on a printer that is directly connected to the computer. By isolating the email account from other critical networks, election officials can reduce the risk of hackers gaining access to the entire election system even if an election worker inadvertently opens an infected link or attachment.

Network Overload: The Secretary is also correct to be concerned about network overloads, including intentional Distributed Denial of

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[13] Cybersecurity & Infrastructure Security Agency, "Protecting Against Ransomware," (Apr. 11, 2019), https://us-cert.cisa.gov/ncas/tips/ST19-001 ("Install antivirus software, firewalls, and email filters—and keep them updated—to reduce malicious network traffic"); Clayton Miller, "Email-Based Attacks: Avoiding Compromise," Crowe (June 15, 2020), https://www.crowe.com/cybersecurity-watch/email-based-attacks-avoiding-compromise?utm_source=google&utm_medium=cpc&utm_campaign=CMR2100-009C&utm_content=Email_Attacks&utm_term=%2Bemail%20%2Bsecurity&matchtype=b&device=c&gclid=CjwKCAjwzIH7BRAbEiwAoDxxTvk0q-QQZKO3jOMXAGeHbNkBLk8xM2SabQvGvVy-oj7XhXUe0R0vGxoCmpcQAvD_BwE (Recommending the use of email filtering solutions that scan incoming mail for potential phishing and similar threats and emphasizing that these features may already be available for organizations that use cloud-based email providers).

Service (DDoS) attacks[14] and inadvertent overloads caused by a high volume of requests. But these problems also have easy solutions, some of which are already in place in Ohio.

First, election officials can mitigate the risk of DDoS attacks or inadvertent overloads using services that redistribute traffic that would otherwise overwhelm the system and render it unusable. In fact, the Secretary has already required all boards of elections in Ohio to utilize these services.[15] The Secretary's directive also notes that boards of elections can sign up for these services "at no cost."[16]

Election officials can also take steps to ensure that email systems are prepared for the surge in absentee applications that will occur between now and the general election. Most email servers have a default setting that caps the amount of email that can be received and may

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[14] Distributed Denial of Service (DDoS) attacks occur when a malicious actor inundates a system with traffic in order to overwhelm the system and render it unusable. *See* Cybersecurity & Infrastructure Security Agency, *Understanding Denial-of-Service Attacks* (last revised Nov. 20, 2019), https://us-cert.cisa.gov/ncas/tips/ST04-015.

[15] Ohio Secretary of State Directive 2020-12 at 4, https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-12.pdf.

[16] *Id.*

prevent applications from being processed in a timely manner. Some servers also block large attachments or filter emails with attachments into spam folders.[17] But election officials can — and should — revise these settings to ensure that every voter's application reaches the office for processing.

To further mitigate any potential confusion, officials should also have a policy of sending confirmations to let voters know when their application has been received and processed. This will provide confidence to voters and decrease the likelihood that duplicate applications are submitted. If a voter does not receive a confirmation, they can notify their election office and officials can determine whether a system issue is preventing applications from getting through. And if a voter receives a confirmation for a request that he or she did not initiate, the voter can notify officials for further investigation.[18]

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[17] See, e.g., *Overview of the Junk Email Filter*, Microsoft, https://support.microsoft.com/en-us/office/overview-of-the-junk-email-filter-5ae3ea8e-cf41-4fa0-b02a-3b96e21de089.

[18] It is true that current technology does not allow for the secure electronic submission of actual absentee *ballots*, but the same considerations do not apply to absentee applications. Unlike ballots, the

While Secretary LaRose's brief points to the example of New Jersey after Hurricane Sandy to argue why Ohio cannot accept absentee application by email or fax, *See* Brief of Appellant-Defendant Ohio Secretary of State Frank LaRose, at 28, that example is far different from the challenges that election officials would face if the trial court's ruling were upheld. After Hurricane Sandy made landfall on October 29, 2012, New Jersey's Governor issued a directive on November 3 to designate all displaced voters as "overseas voters" and permit these voters to cast a ballot by e-mail or fax for the election that would take place on November 6.[19] Without any notice, county clerks were expected to do something that had never been done before: give every

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information on applications is not secret. Both the voter and the election worker recipient have access to the information in the application and can confirm the accuracy of all information submitted. If there is an issue with the application, election officials can contact the voter who submitted it and provide them with an opportunity to complete or correct the information. And because they are not entitled to secrecy, absentee applications can easily be tracked by voters from submission to acceptance.

[19] Christine S. Boyle et al, *Expecting the Unexpected: Election Planning for Emergencies*, Election Protection at 4 (Oct. 29, 2013), https://lawyerscommittee.org/wp-content/uploads/2015/07/Emergency-Planning-Report-10-29-13.pdf.

voter the opportunity to vote by internet in the *three days* up to and including Election Day.[20] It is unsurprising that the county clerks did not have the time or capacity to process all incoming applications under these extraordinary circumstances. That is not the case here. The preliminary injunction simply requires Ohio election officials to accept emailed absentee applications for mail ballots — something that 23 other states already do.[21] Unlike setting up a system for electronic

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[20] *Id.* at 8.

[21] Alaska Division of Elections, *By-Mail Ballot Delivery*, https://www.elections.alaska.gov/Core/votingbymail.php; Arizona Secretary of State, *Voting by Mail: How to Get a Ballot-by-Mail*, https://azsos.gov/votebymail; Arkansas Secretary of State, *How to Complete the Absentee Ballot Application*, https://www.sos.arkansas.gov/uploads/elections/How_to_Complete_the_ Absentee_Ballot_Application.pdf; Delaware Department of Elections, *Request for an Absentee Ballot for Primary, General and/or Special Elections*, https://elections.delaware.gov/pubs/pdfs/absentee_ballot_application.pdf ; Florida Division of Elections, *Vote-by-Mail*, https://dos.myflorida.com/elections/for-voters/voting/vote-by-mail/; Georgia Secretary of State, *Absentee Voting in Georgia*, https://sos.ga.gov/index.php/Elections/absentee_voting_in_georgia; Illinois State Board of Elections, *Application for Vote by Mail Ballot*, https://elections.il.gov/Downloads/VotingAndRegistrationSystems/PDF/ AbsenteeVoting/ClarkAbsentee2020GeneralElection.pdf?T=637328236 655368728; Indiana Secretary of State, *Absentee Voting*, https://www.in.gov/sos/elections/2402.htm; Maryland State Board of

Elections, *Vote by Mail,*
https://elections.maryland.gov/voting/documents/Absentee_Ballot_Appl
ication_English.pdf; Massachusetts Secretary of the Commonwealth,
Absentee Voting,
https://www.sec.state.ma.us/ele/eleabsentee/absidx.htm; Michigan
Secretary of State, *Obtaining an Absent Voter Ballot,*
https://www.michigan.gov/sos/0,4670,7-127-1633_8716_8728-21037--
,00.html; Minnesota Secretary of State, *Vote Early by Mail,*
https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/vote-
early-by-mail/; Missouri Secretary of State, *Absentee Voting,*
https://www.sos.mo.gov/elections/goVoteMissouri/howtovote#Absentee
; Nebraska Secretary of State, *Early Voting,*
https://sos.nebraska.gov/elections/early-voting-0; New Mexico Secretary
of State, *Absentee Ballot Application,*
https://portal.sos.state.nm.us/OVR/WebPages/AbsenteeApplication.aspx
?type=RA&AspxAutoDetectCookieSupport=1; North Carolina State
Board of Elections, *Requesting an Absentee Ballot,*
https://www.ncsbe.gov/Voting-Options/Absentee-
Voting#RequestingAbsenteeBallot; North Dakota State Board of
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https://www.ok.gov/elections/documents/Oklahoma%20Absentee%20B
allot%20Application%20-%20fillable.pdf; Tennessee Secretary of State,
Absentee Voting, https://sos.tn.gov/products/elections/absentee-
voting#3; Texas Secretary of State, *Application for Ballot by Mail,*
https://webservices.sos.state.tx.us/forms/5-15f.pdf; Virginia Department
of Elections, *Absentee and Early Voting,*
https://www.elections.virginia.gov/casting-a-ballot/absentee-
voting/index.html; West Virginia Secretary of State, *2020 General
Election Absentee Ballot Application,*
https://sos.wv.gov/elections/Pages/AbsenteeApplication.aspx; Wyoming

voting, as in New Jersey after Hurricane Sandy, Ohio counties are already processing mail ballot applications. And there is still substantial time for election officials to set up an account that can safely receive mail ballot applications to the extent that counties do not have this in place already.

CONCLUSION

Electronic submission of absentee ballot applications is common across the United States. As Secretary LaRose himself has noted, "[i]t just does not meet expectations in the year 2020 to require people to print a form and to put a wet ink signature on a dead tree piece of paper to fold it up, root through their junk drawer to find a stamp and mail it to their board of elections."[22] The experiences of the 23 other states that accept email absentee applications show that, with proper precautions,

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Secretary of State, *Absentee Voting in Wyoming*,
https://sos.wyo.gov/elections/state/absenteevoting.aspx.
[22] Darrel Rowland & Rick Rouan, *After a Problem-Plagued Primary, Ohio Leaders Disagree about November Election Plan*, Columbus Dispatch (Apr. 28, 2020),
https://www.dispatch.com/news/20200428/after-problem-plagued-primary-ohio-leaders-disagree-about-november-election-plan.

election officials do not have to choose between accessibility and security in their absentee application process. Avoiding such a false choice is more important now than ever.

For the foregoing reasons, this Court should affirm the trial court's grant of preliminary injunction.

Respectfully submitted,

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