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VIA EMAIL

Paul V. Disantis, Esq.
Chief Legal Counsel
Ohio Secretary of State's Office
180 S. Civic Center Drive
Columbus, Ohio 43215

Re: Democratic Party Candidate Certification Under Ohio Rev. Code § 3505.10

Dear Mr. Disantis:

We write in response to your April 5, 2024 letter to propose a pathway forward for the Democratic Party to certify President Biden and Vice President Harris as the party's nominees for the 2024 presidential election, consistent with Ohio law as construed in light of federal constitutional requirements. We commit that the Democratic Party will provisionally certify, by the August 7 statutory deadline, that President Biden and Vice President Harris will be the Democratic Party's nominees, and will confirm the results of the Democratic National Convention ("the Convention") to the Secretary of State by August 25, 2024 (three days after the Convention concludes).

This proposal avoids the constitutional problems that would arise if your office were to interpret § 3505.10(B)(1)'s certification deadline to preclude President Biden and Vice President Harris from appearing on the Ohio general election ballot. In addition, the Ohio Secretary of State's Office has accepted the final certification of political parties' candidates in the past during a similar time period before the election. Doing so here would allow the millions of Ohioans who support President Biden and Vice President Harris to exercise their fundamental constitutional right to meaningfully participate in the presidential election.

Background

Ohio Rev. Code § 3505.10 provides that political parties that nominate their presidential candidates through a national convention are to certify the names of their candidates to the Secretary of State by ninety days before the general election. Ohio Rev. Code § 3505.10(B)(1). This year, the Convention will conclude on August 22, 2024, seventy-five days before the November 5, 2024 general election, and fifteen days *after* the certification deadline in § 3505.10(B)(1). Enforcing the ninety-day statutory deadline to potentially displace President Biden and Vice President Harris from the Ohio ballot would infringe on the constitutionally-protected associational rights of President Biden and Vice President Harris, their supporters, and the Democratic Party itself. It also runs contrary to prior practice in Ohio.

President Biden and Vice President Harris Are Already the Presumptive Nominees for the Democratic Party

President Biden and Vice President Harris will be the Democratic Party’s candidates for the 2024 presidential election. They have already secured the requisite number of pledged delegates through the state primary process.¹ There is no ambiguity on this point.

Ohio’s Deadline is the Earliest in the Country

Ohio’s deadline for parties to certify their candidates is *the earliest in the country*. Other states use a variety of approaches to provide national political parties the necessary flexibility to establish and administer their candidate selection process. For example, many states² have certification deadlines closer in time to the general election—as did Ohio itself for many years, as discussed below. Other states³ expressly tie their certification deadlines to the timing of the parties’ nominating conventions. These approaches strike the right balance, ensuring that parties may exercise their candidate selection rights and that states are able to efficiently execute their elections. Ohio’s nomination deadline, by contrast, improperly constrains the parties’ right to choose and nominate the candidates who will represent their positions and principles at the general election.

Ohio Has Previously Permitted Later Certifications

From 2003 until 2010, Ohio law provided for a sixty-day notice period.⁴ *See* Ohio Rev. Code § 3505.10(B)(1) (2003). The current ninety-day certification deadline went into effect on July 2, 2010. *See* Ohio Rev. Code § 3505.10 (2010). This “first in the nation” deadline has proven unworkable. In 2012 and 2020—two of the three presidential election cycles after the

¹ *See* Delegate Selection Rules for the 2024 Democratic National Convention, Rule 13(J), <https://democrats.org/wp-content/uploads/2023/03/2024-Delegate-Selection-Rules.pdf>; Ohio Rev. Code § 3513.12 (requiring Ohio at-large delegates to certify that “I shall, to the best of my judgment and ability, support that candidate for President of the United States who shall have been selected at this primary by the voters of my party”); *see also* Steve Peoples, *Biden and Trump Clinch Nominations, Setting the Stage for a Grueling General Election Rematch*, ASSOCIATED PRESS, March 13, 2024, <https://apnews.com/article/trump-biden-primary-georgia-washington-mississippi-hawaii-15bb0084ad656903ffef14cfae822abd>.

² *See, e.g.*, Ind. Code § 3-10-4-5(c) (second Tuesday in September); N.D. Cent. Code § 16.1-03-14(2) (64 days before general election); 100 R.I.C.R. 20-00-1.6(B) (54 days before general election).

³ *See, e.g.*, N.J. Rev. Stat. § 19:13-15 (one week after the national convention); 25 P.S. § 2878 (30 days after national convention).

⁴ We note that if the ninety-day deadline had been in place between 2000 and 2010, one or both major parties would have failed to meet that deadline each presidential election cycle.

ninety-day deadline was adopted—both the Democratic Party and the Republican Party failed to meet that deadline.⁵ To reasonably accommodate the timing of the major parties’ conventions, the state legislature passed a bill allowing the parties to certify their candidates to the Secretary of State sixty days before the general election. *See* Act of July 18, 2019, OH H.B. 166 § 735.11; Act of June 13, 2012, OH H.B. 509 § 6119.10.⁶

That past practice makes two things clear. First, sixty days’ notice of a national party’s presidential candidates provides the state sufficient time to prepare for the general election. Second, when the parties’ conventions are held within the ninety-day window, the state has made reasonable accommodations to account for the timing of the nominating conventions.

Consistent with the above, we propose that the Democratic Party will certify, by August 7, 2024 (the statutory deadline prescribed by § 3505.10(B)(1)), that President Biden and Vice President Harris have the pledged delegates necessary to win the Democratic Party nomination at the Convention. Thereafter, once the nominations have been made official following the conclusion of the Convention, the Democratic Party will confirm the results of the Convention to the Secretary of State no later than August 25, 2024.

The Ohio Secretary of State Has the Authority to Accept a Provisional Certification

This process is consistent with Ohio law. Ohio Rev. Code § 3505.10(B)(1) is satisfied by a provisional certification here because President Biden and Vice President Harris have secured the pledged delegates necessary to become the Party’s nominees. *Conrath v. LaRose*, 2022-Ohio-3594, 170 Ohio St. 3d 222, 227 (Ohio 2022) (“[I]t is not an unusual concept . . . to validate a premature action once the condition precedent occurs.”). Even were there ambiguity on that point, your general authority to “[d]etermine and prescribe the forms of ballots,” Ohio Rev. Code § 3501.05(G), would be sufficient to accept a provisional certification here, where the President and Vice President have secured the pledged delegates necessary to become the Democratic Party’s nominees. Moreover, doing so would avoid the considerable and serious constitutional concerns that, as discussed further below, would be raised if you were to read the text of § 3501.10(B)(1) to prohibit the listing of the President and Vice President on the ballot in these circumstances. *See* Ohio Rev. Code § 3501.05(EE) (the Secretary of State is expressly empowered to “perform . . . duties required by law.”). Public officials are duty-bound to uphold the Constitution, which forecloses enforcing § 3505.10(B)(1) in an unconstitutional way. *See Marcolin v. Smith*, 105 Ohio St. 570, 603 (Ohio 1922) (“We must not forget that the secretary of state has by virtue of his office certain duties to perform and that he has taken a solemn oath to

⁵ In 2012, the Democratic Party held its convention from September 4–6, 2012, the Republican Party held its convention from August 27–30, 2012, and the statutory certification deadline was August 8, 2012. In 2020, the Democratic Party held its convention from August 17–20, 2020, the Republican Party held its convention from August 24–27, 2020, and the statutory certification deadline was August 5, 2020.

⁶ Indeed, other states allow precisely this type of flexibility. For example, Alabama, Illinois, Montana, and Washington each allowed provisional certification for the 2020 election.

perform them, and that the most important obligation of his oath is that he will support the Constitution of the United States.”); *see also Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 442 (6th Cir. 2016) (observing that some laws may be so clearly unconstitutional that any reasonable officer would decline to enforce them) (citing *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979)); Ohio Const. Article XV, Sec. 7 (“Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the constitution of the United States.”).

Strict Application of § 3505.10 Would Strip Voters of Constitutionally Protected Rights

Applying the § 3505.10(B)(1) deadline to potentially bar the sitting President and Vice President from appearing on the Ohio ballot would be plainly unconstitutional. If President Biden and Vice President Harris are not listed on the ballot as the Democratic Party candidates, their supporters in Ohio will be stripped of the opportunity to associate with their preferred candidate. It is well established that the First and Fourteenth Amendments protect a candidate’s ability to appear on the ballot and his supporters’ ability to vote for the candidate of their choosing. *See generally, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983). Moreover, the Constitution protects political parties’ rights to regulate their internal party processes, including the process through which they select a standard bearer to represent the party’s views. *See California Dem. Party v. Jones*, 530 U.S. 567, 573 (2000). The constitutionally-protected associational rights of President Biden and Vice President Harris, their supporters, and the Democratic Party itself would all be substantially infringed if § 3505.10(B)(1) is interpreted as a bar to their participation in the 2024 general election in Ohio.

While the Constitution empowers the states to regulate elections, a long line of Supreme Court cases establishes that ballot access regulations that overly restrict access to the ballot are subject to strict judicial scrutiny, under which a court will uphold a regulation only if it is narrowly tailored to advance a compelling state interest. *E.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006). A severe restriction is one that “unfairly or unnecessarily burdens the availability of political opportunity,” *Anderson*, 460 U.S. at 793, and courts have underscored that “[t]here are few greater burdens that can be placed on a political party than being denied access to the ballot,” *Blackwell*, 462 F.3d at 593.

When a ballot access regulation impacts voters’ ability to support their preferred *presidential* candidate—as opposed to a candidate running for statewide or local office—the state regulation is even more vulnerable. Indeed, in the context of presidential elections, state ballot access regulations “implicate a uniquely important national interest” because the president and the vice president “are the only elected officials who represent all the voters in the Nation” and the impact of the votes cast for a presidential candidate in one state affect voters nationwide. *Anderson*, 460 U.S. at 794–95; *see also Trump v. Anderson*, 144 S. Ct. 662, 670 (2024) (quoting *Anderson*, 460 U.S. at 794–95).

Here, a court would have little difficulty finding that strict application of the ninety-day deadline imposes a severe restriction on President Biden and Vice President Harris’s access to the ballot. If strictly enforced, the deadline would prevent one of the two major party presidential candidates from appearing on the general election ballot—an unjust and unconstitutional result.

Clear precedent establishes that a court would interpret § 3505.10(B)(1) in a manner that ensures constitutionally-protected associational rights are not violated. *See Bevan & Assocs., LPA, Inc. v. Yost*, 929 F.3d 366, 376–77 (6th Cir. 2019) (“Ohio courts have a duty to liberally construe statutes to save them from constitutional infirmities. Additionally, federal courts are also obliged to avoid constitutional questions if an alternative interpretation of the statute though plainly not the best reading, is at least a possible one.” (internal citations and quotation marks omitted)). Moreover, although Ohio has an interest in the smooth administration of the election, the ninety-day deadline is not narrowly tailored to achieve that result. In fact, it exceeds the limits in every other state in the nation. Past practice in Ohio unequivocally establishes that a sixty-day certification deadline is sufficient; indeed, in four of the last five presidential elections, the Democratic and Republican parties were required to certify their candidates to the Secretary of State just sixty days before the general election. This is especially true here, where the presumptive nominees of the Democratic Party have already been decided. While there are a variety of ways that Ohio could implement a certification process without violating the associational rights of candidates, their supporters, and political parties, the application of an unnecessarily long certification deadline is not one of them.

We are available to discuss this proposal at your convenience.

Sincerely,



Donald J. McTigue