

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel.)
RHONDA L. COLVIN, et al.,)
) CASE No. 08-1813
Relators,)
) Original Action in Mandamus
v.)
) Expedited Election Matter
JENNIFER BRUNNER,) Under Supreme Court Rule X § 9
SECRETARY OF STATE OF OHIO,)
)
Respondent.)

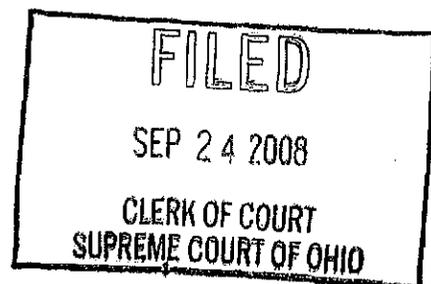
BRIEF OF AMICI CURIAE IMATTERS, AMERICAN CIVIL LIBERTIES UNION OF OHIO AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC. VOTING RIGHTS PROJECT, DEMOS, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LEAGUE OF WOMEN VOTERS OF OHIO, PROJECT VOTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND UNITED STATES HISPANIC LEADERSHIP INSTITUTE, INC.

Meredith Bell-Platts (OH 72917)
Counsel of Record
Neil Bradley*
230 Peachtree Street, NW
Suite 1440
Atlanta, Georgia 30303
(404) 523-2721 (phone)
(404) 653-0331 (fax)
mbell@aclu.org
nbradley@aclu.org
*pro hac vice application pending

Carrie L. Davis (OH 77041)
Jeffrey M. Gamso (OH 43869)
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2220 (phone)
(216) 472-2210 (fax)
cdavis@acluohio.org

Daniel P. Tokaji*
55 W. 12th Avenue
Columbus, Ohio 43210
(614) 292-6566 (phone)
(614) 688-8422 (fax)
dtokaji@gmail.com
*pro hac vice application pending

Paul Moke (0014099)
1252 Pyle Center
Wilmington College
Wilmington, Ohio 45177
937-382-6661 ext. 415 (phone)
937-382-7077 (fax)
paul_moke@wilmington.edu



Teresa James (0031671)
23556 Marion Road
North Olmsted, Ohio 44070
(440) 503-5422
tjames@projectvote.org

Richard Saphire (0017813)
300 College Park
Dayton, Ohio 45469-2772
937-229-2820 (phone)
937-229-2469 (fax)
saphire@udayton.edu

Brenda Wright*
358 Chestnut Hill Avenue
Suite 303
Brighton, Massachusetts 02135
(617) 232-5885 ext. 13 (phone)
(617) 232-7251 (fax)
bwright@demos.org
*pro hac vice application pending

Jon Greenbaum*
Bob Kengle*
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8600 (phone)
(202) 783-0857 (fax)
jgreenbaum@lawyerscomm.org
*pro hac vice application pending

Jennifer R. Scullion*
Matthew Morris*
1585 Broadway
New York, New York 10036
(212) 969-3600 (phone)
(212) 969-2900 (fax)
jscullion@proskauer.com
mmorris@proskauer.com
jsnyder@proskauer.com
*pro hac vice application pending

Attorneys for Amici Curiae on behalf of Respondent

Donald C. Brey
Elizabeth J. Watters
Deborah A. Scott
Chester, Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
(612) 221-4000 (phone)
(614) 221-4012 (facsimile)
dbrey@cwslaw.com
ewatters@cwslaw.com
dscott@cwslaw.com

Attorneys for Relators

Nancy H. Rogers
Damian W. Sikora
Richard Coglianese
Office of the Attorney General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-4320 (phone)
(614) 263-7078 (facsimile)
drogers@ag.state.oh.us
dsikora@ag.state.oh.us
rcoglianese@ag.state.oh.us

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
Statement of Interest of <i>Amici CURIAE</i>	1
INTRODUCTION	5
ARGUMENT.....	9
Proposition of Law I. Under Ohio’s Election Laws, Citizens Are Eligible To Vote If They Registered at Least 30 Days <i>Before Election Day</i> . Relators’ Contrary Argument Would Require This Court to Insert Language That Does Not Appear in the Statute.	9
Proposition of Law II. Ohio Law Must Be Interpreted Consistent with Federal Law Prohibiting State Registration Deadlines More Than 30 Days Before an Election, and Specifying That the “Election” Occurs When Votes Are Tabulated, Not When Voters Request, Receive, or Submit Their Ballots.....	15
Proposition of Law III. Relators’ Interpretation of State Law Should Be Avoided, Because It Would Impose a Durational Residency Requirement That Conflicts with the Fourteenth Amendment to the U.S. Constitution.....	26
CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases

<i>ACORN v. Miller</i> , 912 F. Supp. 976 (W.D. Mich. 1995)	22
<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969)	19
<i>Association of Community Organizations for Reform Now v. Edgar</i> , 56 F.3d 791 (7th Cir. 1995)	16
<i>Association of Community Organizations for Reform Now v. Miller</i> , 129 F.3d 833 (6th Cir. 1997)	16
<i>Ball v. Brown</i> , 450 F. Supp. 4 (D.C. Ohio 1977).....	19
<i>Bell v. Marinko</i> , 367 F.3d 588 (6 th Cir. 2004)	20
<i>Bishop v. Lomenzo</i> , 350 F. Supp. 576 (E.D.N.Y. 1972).....	17
<i>Brown v. Post</i> , 279 F. Supp. 60 (W.D. La. 1968).....	19
<i>Burns v. Fortson</i> , 410 U.S. 686 (1973).....	26, 28
<i>City of Akron v. Rowland</i> , 67 Ohio St. 3d 374 (1993).....	8
<i>Crosby v. Nat'l Foreign Trade Council</i> , 530 U.S. 363 (2000)	15
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972).....	8, 26
<i>Foster v. Love</i> , 522 U.S. 67 (1997).....	23
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	16
<i>Hinnant v. Sebesta</i> , 363 F. Supp. 398 (M.D. Fla. 1973).....	27
<i>Marston v. Lewis</i> , 410 U.S. 679 (1973).....	26
<i>McKay v. Thompson</i> , 226 F.3d 752 (6th Cir. 2000)	18
<i>Meyers v. Jackson</i> , 390 F. Supp. 37 (E.D. Ark. 1975)	28
<i>Millsaps v. Thompson</i> , 259 F.3d 535 (6 th Cir. 2001)	23, 24
<i>National Labor Relations Board v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979)	8
<i>Schwier v. Cox</i> , 340 F.3d 1284 (11 th Cir. 2003)	19

<i>Smith v. Meese</i> , 821 F.2d 1484 (11 th Cir. 1987)	31
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966).....	19
<i>State ex rel May v. Jones</i> , 16 Oh App. 2d 140, 242 NE 2d 672 (Ohio App. 1968).....	14
<i>State ex rel. Walsh v. Board of Elections of Ashtabula County</i> , 65 Ohio St. 3d 197 (1992).....	12
<i>United States v. McLeod</i> , 385 F.2d 734 (5 th Cir. 1967).....	19
<i>United States v. Mississippi</i> , 380 U.S. 128 (1965).....	19
<i>Voting Integrity Project v. Bomer</i> , 199 F.3d 773 (5 th Cir. 2000).....	24
<i>Voting Integrity Project v. Keisling</i> , 259 F.3d 1169 (9 th Cir. 2001).....	23
<i>Voting Rights Coalition v. Wilson</i> , 60 F.3d 1411 (9 th Cir. 1995)	16
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964).....	31
Statutes	
42 U.S.C. § 1971 (a)(2)(A).....	18
42 U.S.C. § 1971 (e)	18
42 U.S.C. § 1973aa	16, 17
42 U.S.C. § 1973aa-1	7, 17
42 U.S.C. § 1973ff.....	29
42 U.S.C. § 1973gg-6(a)(1)	7, 21
Ohio Rev. Code § 3501.01(N).....	12
Ohio Rev. Code § 3503.01(A).....	12
Ohio Rev. Code § 3503.02(I).....	14
Ohio Rev. Code § 3503.06.....	6, 10, 13, 21
Ohio Rev. Code § 3503.19(C)(1).....	14, 15
Ohio Rev. Code § 3503.24.....	25

Ohio Rev. Code § 3505.19.....	25
Ohio Rev. Code § 3509.02.....	31
Ohio Rev. Code § 3509.03.....	7
Ohio Rev. Code § 3509.06(D).....	27, 29
Ohio Rev. Code § 3509.06(E).....	27

STATEMENT OF INTEREST OF *AMICI CURIAE*

1Matters is a non-profit volunteer member organization that serves the homeless community in Lucas County, Ohio. 1Matters has approximately 300 members. One of the primary roles of 1Matters is advocacy, working on building the capacity of the homeless to not only have a seat at the table, but to have a voice at that table. A major initiative to that end is 1Votes - assisting with voter registration, verifying and updating registration, requesting absentee ballots, providing transportation to take advantage of early voting, and providing volunteers to accompany voters overcome barriers. 1Matters plans to assist area homeless voters register or re-register up until the October 6 deadline, and plans to assist with early voting from September 30 up until the November 4, 2008 election. 1Matters expects to bring at least 500 homeless individuals and volunteers to vote early this year.

The American Civil Liberties Union Foundation, Inc. (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 550,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU and its 53 affiliates, including the ACLU of Ohio, have been active in defending the equal right of all citizens to participate in the electoral process. The ACLU has operated a Voting Rights Project since 1966. The ACLU of Ohio has nearly 30,000 supporters and members statewide. Through the Voting Rights Project, the ACLU of Ohio, and other ACLU offices nationwide, the ACLU has sought to protect the voting rights of citizens in Ohio and elsewhere and has provided representation to plaintiffs in literally hundreds of voting cases involving electoral processes throughout the country, including Ohio. The attorneys for the Voting Rights Project of the ACLU have represented voters, candidates and political parties in courts within the areas covered by each of the Circuits of the United States Courts of Appeals. Together, the Voting Rights Project of the ACLU and the ACLU of Ohio have litigated several

cases on behalf of Ohio voters, namely *Stewart v. Blackwell*, 5:02-cv-02028 (N.D. Ohio); *Boustani v. Blackwell*, 1:06-cv-02065 (N.D. Ohio); *ACLU of Ohio v. Brunner*, 1:08-cv-00145 (N.D. Ohio); and *ACLU v. Taft*, 02-00766 (S.D. Ohio).

Dēmos: A Network for Ideas and Action is a non-profit, non-partisan organization committed to building an America that achieves its highest ideals. This requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement; an economy where prosperity and opportunity are broadly shared and disparity is reduced; and a revitalized public sector that works for the common good. Removing barriers to political participation and ensuring full representation of America's diverse citizenry are key to Dēmos' goals. Dēmos works with elected officials and advocates across the nation to successfully implement electoral reforms such as same-day registration, and has published extensive research, reports and testimony on the topic, including *Election Day Registration: A Study Of Voter Fraud Allegations And Findings On Voter Roll Security* (2007), by Dēmos Senior Fellow Lorraine Minnite, available at <http://www.demos.org/pubs/EDR%20VF.pdf>.

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the effort to assure civil rights for all Americans. Protection of the voting rights of racial and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting rights cases throughout the nation over the past 45 years, including several cases in Ohio. *See, e.g., League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723 (N.D. Ohio 2005); *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006); *Harkless v. Blackwell*, 467 F. Supp. 2d 754 (N.D. Ohio

2006). The Committee has also participated as *amicus curiae* in many other significant voting rights cases and plays a leading role in election-day voter protection efforts.

The League of Women Voters, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. Established in 1920, the state League supports 33 locally organized, volunteer-driven Leagues across Ohio.

The Northeast Ohio Coalition for the Homeless (NEOCH) is a non-profit, non-partisan membership organization located in Cleveland, Ohio and serving the needs of the local homeless community. NEOCH provides services to approximately 20,000 homeless people each year. NEOCH's mission is to organize and empower homeless and at risk men, women and children to break the cycle of poverty through public education, advocacy and the creation of nurturing environments. One of NEOCH's goals is to work to assure that all homeless people are registered to vote, and reduce barriers to registering and homeless people actually voting. NEOCH has administered non-partisan voter registration and get out the vote efforts among homeless people since its founding in 1989. In furtherance of its mission and goals, NEOCH plans to run shuttles to the Boards of Elections during the time period of September 30, 2008 through October 6, 2008, in order to help homeless individuals to register and vote absentee. NEOCH expects to serve approximately 2,000 homeless voters, including but not limited to its members, by this service.

Project Vote is a non-partisan, non-profit 501(c)(3) organization incorporated in Louisiana, with headquarters in Washington, D.C, and an Ohio office located at 23556 Marion Rd. North Olmsted, Ohio 44114. The mission of Project Vote is to strengthen American democracy by ensuring broad participation in the country's civic life. We do this by trying to

facilitate the registration and participation of as many eligible American voters as possible. In particular, we seek to promote political involvement by minority and low-income voters, whose voices we believe are marginalized in the current political process. Among other programs to enhance participation in American democracy, we conduct a Voter Participation Program, as part of which we seek to assist as many eligible Americans to register and to vote as possible. Project Vote has litigated issues affecting voter participation in Ohio including *Project Vote v. Blackwell*, U.S. District Court, N.D. Ohio (*Case 1:06-cv-01628-KMO*).

United States Hispanic Leadership Institute, Inc. (USHLI) is a non-profit 501(c)(3) organization headquartered in Chicago, IL. The mission of USHLI is to fulfill the promises and principles of democracy by empowering minorities and similarly disenfranchised groups and by maximizing civic awareness and participation in the electoral process. While USHLI actively promotes and supports civic participation among all eligible persons, the organization focuses heavily on youth, newly naturalized citizens, and low-income voters, all of whom are largely unfamiliar with the process of civic participation due to simply being first time voters because of their age (youth), or lacking any history of civic participation in their original country of origin (naturalized citizens), and being historically marginalized in the electoral process (low-income minorities). USHLI is currently implementing SALSA (Strategic Alliance for Latino Student Action) on over 70 college campuses in 21 states, including four (4) in Ohio. Through SALSA, student organizations will be conducting nonpartisan voter registration during the period allowed, and nonpartisan get-out-the-vote activities from the start of early voting through Election Day on November 4. Participating SALSA organizations will be registering their fellow students on campus and low-income minority voters and newly naturalized citizens in the community by going door-to-door. They will also be transporting non-registered voters to

designated sites during the 5-day window in Ohio that allows such individuals to register to vote and all registered voters to cast an absentee ballot to be counted on November 4, 2008, as outlined by Ohio Secretary of State Jennifer Brunner in Directive 2008-67.

INTRODUCTION

Across the state, Ohioans have increasingly voted by absentee ballot. In 2006 in the first general election in Ohio permitting any registered voter to cast an absent voter's ballot, 707,856 people voted absentee. *See* "Absentee and Provisional Ballot: November 7, 2006" located at <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/Absentee%20and%20Provisional%20Ballot%20November%207,%202006.aspx>. Even in the March 2008 primary, it was reported that over half a million voters in Ohio voted by absentee ballot. *See, e.g.,* "Secretary Brunner: 'Ohio Sets Record for Absentee Ballots'" (March 13, 2008), located at <http://www.sos.state.oh.us/SOS/PressReleases/2008%20Press%20Releases/2008-03-12.aspx>. This number is only expected to grow for the November election. Many voters will be unable to vote in person on Election Day – a fact recognized by Congress. *See, e.g.,* 42 U.S.C. § 1973aa-1(a). At the core of this action is the denial of the right to vote to bona fide registered voters based solely on the date of registration.

Relators ask this Court to close the five-day window between the opening of absentee voting on September 30, 2008 (thirty-five days before the November 4, 2008 election) and the close of voter registration on October 6, 2008 (thirty days before the same election). This is a window, expressly provided by state law and affirmed by the Secretary of State, within which qualified voters may simultaneously register and receive an absentee ballot that will be counted on Election Day. But Relators' argument actually sweeps much more broadly than that. Relators would have this Court judicially amend Ohio law to impose a new floating 30-day

“waiting period” on voters between the date they register (or change their address) and the date on which they may request, receive, or submit an absentee ballot. Voters who do not comply with this waiting period – including newly registered voters who, as of today, already have requested and received absentee ballots – would be deemed ineligible and their votes rejected *even though* they timely registered and submitted their absentee ballot. Such relief, which includes a post hoc barrier for some voters, is unprecedented and unjustified as a matter of law, and would result in an unmanageable and unconstitutional presidential election.

The extraordinary relief Relators seek would necessarily require this Court to insert substantive deadlines into Ohio statutes that were not included by the legislature, throwing them into direct conflict with federal law. Specifically, Relators would require that voters be registered at least thirty days before absentee ballots are *issued* to them, rather than thirty days before Election Day, when those ballots may be counted. Relators labor mightily to stretch certain provisions of state law to suit their preferred outcome. Yet they ignore the state and federal law statutes and cases that contravene their arguments. It is on these unmentioned provisions, and especially the federal laws governing federal elections such as the one that will occur November 4, that this brief focuses.¹ As we explain, granting this Petition would needlessly plunge this Court and the State of Ohio deep into a federal constitutional and statutory thicket.

First, Relators fail to mention Ohio Revised Code § 3503.06, which explicitly states that the voters need only be registered “thirty days *at the time of the next election*” (emphasis added) – not at the time they request, receive, or submit their ballots, as Relators argue – to be deemed eligible to vote. The provisions of state law Relators cite do not purport to deny an absentee

¹ Amici presume that the Secretary of State will discuss the relevant provisions of Ohio law in greater detail than we do here.

ballot to voters for 30 days after their registration. These provisions should instead be read *in pari materia* with § 3503.06 to allow voters to request, receive, and submit absentee ballots so long as they were registered at least 30 days before Election Day. If Petitioners argument were accepted, by contrast, it would make felons of the countless Ohio voters who requested absentee ballots within 30 days of having registered – even though they may have registered many weeks or even months before Election Day.²

Second, Relators fail to mention the federal election and voting rights statutes that contradict their interpretation of state law. Under the Voting Rights Act (“VRA”), states must permit registration of voters up to 30 days “prior to any presidential election” and must also permit such voters who are physically absent from the state to vote by absentee ballot if they apply for such a ballot “not later than seven days immediately prior to such election.” 42 U.S.C. § 1973aa-1. Likewise, under the National Voter Registration Act (“NVRA”), states are required to accept voter registration applications submitted at least “30 days ... *before the date of the election.*” 42 U.S.C. § 1973gg-6(a)(1) (emphasis added). To read state law as Relators demand – requiring would-be absentee voters to have been registered 30 days before they may even apply for, let alone receive or cast, an absentee ballot – would impose earlier deadlines than the VRA, NVRA, and other federal laws permit. Relators also fail to mention the federal constitutional and statutory provisions that set the timetable for federal elections. Under these federal laws, the date of the “election” is *not* the date on which ballots are received or cast, but the date on which those votes may first be counted – the first Tuesday after the first Monday in

² Under Ohio law, voters may request an absentee ballot as early as January 1 of the calendar year of an election. Ohio Revised Code § 3509.03. Thus, a voter who registered to vote on December 30, 2007 could, under Ohio law, request an absentee ballot for the November election on January 1, 2008. Under Relators’ interpretation of Ohio, such a voter would be committing a fifth-degree felony, because they would have been registered for less than 30 days at the time of requesting an absentee ballot. Relators’ Br. at 17-18.

November, which this year falls on November 4. Relators do not dispute that, under Ohio law and the directives issued by the Secretary of State, no absentee ballot will be counted until the close of polls on Election Day and until election officials have verified that the voter casting the ballot was lawfully registered on or before October 6, 2008 – 30 days before the election.

Relators' interpretation of Ohio law as keyed to the date that ballots are received or submitted, rather than the date on which they are counted, would contravene federal law.

Finally, Relators' argument is contrary to the Fourteenth Amendment of the U.S. Constitution. Though unmentioned by Relators, the Equal Protection Clause has long been interpreted to prohibit states from imposing durational residency requirements on voters unless narrowly tailored to serve a compelling interest. *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). Where, as here, the legislature has set a deadline for voter registration of 30 days before the election, no additional waiting period (such as Relators propose) can be justified. To the contrary, if Ohio law did impose an additional waiting period for absentee ballots, that period would unconstitutionally discriminate against newly arrived voters. Because Relators' spin on state law conflicts with the Fourteenth Amendment – and, at the very least, gives rise to serious constitutional questions – it must be avoided. *See, e.g., National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (statutory interpretations that give rise to “serious constitutional questions” should be avoided); *City of Akron v. Rowland*, 67 Ohio St. 3d 374, 380 (1993) (“if it is reasonably possible, validly enacted legislation must be construed in a manner ‘which will avoid rather than ... raise serious questions as to its constitutionality.’”) (citation omitted).

Viewed in the most charitable light, Relators' arguments may be understood as reflecting an unwitting disregard of the federal statutory and constitutional scheme within which Ohio's

election statutes must operate – and to which state law must conform if it is to avoid preemption under the Supremacy Clause of the U.S. Constitution. But if Relators were aware of these laws, and chose not to cite them, then the Petition is difficult to characterize as anything other than a direct effort to make it more difficult for eligible voters (particularly young people, the homeless, or individuals who have not previously voted), to participate in our democratic process. This Court should not countenance such partisan gamesmanship.

While Relators attempt to justify the closure of this window by raising the specter of voting fraud, the reality is that there will be plenty of time between the close of registration and the counting of absentee ballots, within which to ascertain voters' eligibility – and, following appropriate legal channels, to reject any of the invalid ballots that Relators hypothesize. To the extent there was any doubt on this question, it is dispelled by the Secretary of State's Directive 2008-91 (issued the day before the Petition was filed), which clarifies the procedure for challenging ballots cast by voters alleged to be ineligible. Allowing voters to register and receive an absentee ballot starting on September 30 poses no risk of ineligible persons having their votes counted – a phenomenon of which Relators present no evidence – since no ballots will actually be counted until November 4. All Relators seek to do is to chill and impede eligible voters' lawful exercise of their constitutional right to vote and to cast a cloud of uncertainty over the fast-approaching presidential and congressional elections.

ARGUMENT

Proposition of Law I. Under Ohio's Election Laws, Citizens Are Eligible To Vote If They Registered at Least 30 Days *Before Election Day*. Relators' Contrary Argument Would Require This Court to Insert Language That Does Not Appear in the Statute.

Relators challenge the Secretary of State's Directive (2008-63) providing that voters "may appear at the board of elections office and simultaneously submit for that election applications to register to vote or to update an existing registration and to request an absentee ballot." (Relators' complaint, ¶ 35) Relators would read Ohio law to impose a floating, *voter-specific* 30-day waiting period between the date of registration and the date on which the voter may request, receive, and submit an absentee ballot. This would necessarily require election officials to check each would-be absentee voter's request or application to ascertain that person's date of registration. Relators offer no direction as to what election officials caught in this administrative dilemma are to do next. One could presume two scenarios: (1) the election officials reject the applications and tell voters to reapply when the thirty days have tolled, assuming the voter knows the date of his registration; or (2) the election officials could treat such applications as premature and wait until the thirty days toll to send out the ballots. Regardless which course election officials take, such additional steps and confusion add nothing to maintaining the integrity of the election systems and force both voters and election officials to jump through unnecessary hoops that do nothing to enhance the integrity of Ohio elections.

There is no basis in Ohio law for creating such a requirement. The Petition provides a partial and misleading view of the provisions of Ohio law when it comes to registration and voting. There is no provision of state law requiring that voters be registered at least 30 days *before they request, receive, or submit an absentee ballot*. What state law does require – as made perfectly clear by a statutory provision and cases that Relators neglect to mention – is that voters must have been registered for 30 days *as of the date of the election* to be eligible to have their vote counted. OHIO REV. CODE § 3503.06 (requiring voters to be "registered as an elector ... for at least thirty days *at the time of the next election*.").

Relators cite several provisions of Ohio law (Relators' Complaint, ¶ 7), but their textual argument focuses on Article V of the Ohio Constitution and R.C. § 3503.01. Neither provision will bear the weight that Relators seek to place upon it.

Article V, in setting qualifications for voting, states that "Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector." Relators' reading of this section demands that the words "at the time that citizen receives his or her ballot," be read into Article V. Yet the state constitution includes no such language, which would produce nonsensical results that, as explained below, would run afoul of the U.S. Constitution. Under their reading, a voter who registered on September 29 (36 days before the election) and went to the Board of Elections to request an absentee ballot on October 27 would be ineligible, while a voter who registered on September 26 (39 days before the election) would be eligible, even though both are bona fide residents and registered voters.

If two voters have met the registration deadline, there is no justifiable reason Ohio should deny an absentee ballot to one of them but issue an absentee ballot to the other when both request a ballot on the same day if that denial is based on the date of registration. As a practical matter, this would be completely unmanageable. Whether an absentee ballot should be counted would, on Petitioner's reading of Ohio law, depend on when the voter received or submitted it. Election officials will have difficulty ascertaining exactly when each and every absentee ballot was received by the voter or submitted to election authorities. In the event of a disputed election, ascertaining which of those disputed ballots should be counted would create a logistical nightmare that would rival that experienced in Florida in 2000. By contrast, election officials

will know – in fact, as a matter of law, they must know – whether each would-be voter registered at least 30 days before Election Day (*i.e.*, by October 6, 2008). It is this registration deadline that triggers eligibility to vote in Ohio elections, not any other date.

The same problem inheres in Relators’ reading of § 3503.01. Like the Ohio Constitution, this statute states that citizens are eligible if they have been “registered to vote for thirty days.” OHIO REV. CODE § 3503.01(A). It does not say, as Relators would have it, thirty days *at the time the voter receives or casts her ballot*. The statute simply does not include the words that Relators would have this Court insert. Again, it would make no sense at all for a voter’s eligibility to turn on the happenstance of the number of days between the date of registration and the date the voter requested, received, or submitted her absentee ballot. Instead, eligibility turns on whether or not the voter registered at least 30 days *before the date of the election*. None of the other provisions of state law that Relators cite can even remotely be read to impose a requirement that voters be registered for 30 days before requesting, receiving, or submitting an absentee ballot.³ Indeed, this Court has rejected similar arguments in interpreting other provisions of Ohio election law. Thus, in *State ex rel. Walsh v. Board of Elections of Ashtabula County*, 65 Ohio St. 3d 197 (1992), this Court held that a candidate could file a petition of candidacy under OHIO REV. CODE § 3513.261 with an affirmation that he is “qualified to vote for the office he seeks” so long as, on the date the petition was filed, the candidate had taken steps

³ Petitioners also cite § 3509.03(G), Relators’ Br. at 17-18, but there is absolutely nothing in that provision which suggests that a voter must have been registered 30 days before requesting an absentee ballot to be deemed eligible to vote in the election, as they mistakenly claim. This provision states simply that a voter applying for an absentee ballot shall include “A statement that the person requesting the ballots is a qualified elector.” Contrary to Petitioners’ contention, § 3509.03 says nothing at all about what it means to be a qualified elector. As explained in the text above, Ohio law is explicit in saying that, to be qualified, an elector need only have registered at least 30 days *before the date of the next election*, §3503.06 – not 30 days before the date on which an absentee ballot is requested, obtained, or submitted.

that would qualify him to vote as of election day. *Id.* at 201-02. So too here, the requirements of OHIO REV. CODE § 3501.01(N) that a “qualified elector” be “a person having the qualifications provided by law to be entitled to vote” are to be measured based on whether the elector will have such qualifications as of Election Day – including the requirement to have been registered for 30 days.

If there were any doubt on this point, it is dispelled by a provision of the Ohio code that Relators conspicuously fail to cite. Section 3503.06(A) provides that “[n]o person shall be entitled to vote in any election ... unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days *at the time of the next election.*” This section makes unmistakably clear that the 30-day registration requirement is keyed to the date of the election, not the date on which the voter requests, obtains, or submits an absentee ballot. In other words, the voter need only have been registered for 30 days *as of Election Day* to be eligible under Ohio law, not 30 days at the time that his or her ballot was requested. The other provisions of Ohio law should be read *in pari materia* with § 3503.06.

Moreover, Relators’ assertions about alleged “massive voter fraud” being committed by students and homeless persons who may register and vote during the statutory overlap period are deeply offensive and entirely lacking in evidentiary support. Relators’ evidence of “fraud” is the mere fact that NEOCH intends to help homeless persons, and the Democratic party plans to assist students, in using the very same process that other Ohio voters have used to register and vote absentee without incident for years, *see, e.g.*, Answer, ¶45. Br. at 14-15. Those whom Relators have thus baselessly accused of fraud include the many homeless military veterans in Northeast Ohio served by NEOCH; numerous Ohio families who have been displaced from their

homes by the foreclosure crisis, job loss, or countless other reasons; and countless college and university students, all of whom are guilty of nothing more than wanting to exercise their fundamental right as Americans to register and vote. Furthermore, if Relators are arguing that “fraud” will be committed by these potential voters merely because they will execute absentee ballots without waiting for 30 days after registering, then Relators are merely begging the question that they are required to prove: namely, whether the long-standing practice of issuing absentee ballots without requiring proof that the voter has already been registered for 30 days has suddenly in 2008 become unlawful in Ohio. For the reasons already canvassed, this argument is entirely without merit.

With all due respect to Relators, students and even homeless people have the right to vote in Ohio, including the right to vote by absentee ballot.⁴ In fact, absentee voting may be especially important for these populations. They present absolutely no *evidence* of any fraud, much less the “massive voting fraud” they hypothesize. To the contrary, the new requirement that they would insert into Ohio law would actually make felons of the countless people who – as allowed by state law – have already requested an absentee ballot within 30 days of having registered.

Any implication that a 30-day period is necessary to fully process and verify a voter’s registration also ignores that, by Ohio law, election officials must process registrations within a *maximum* of 20 days. OHIO REV. CODE § 3503.19(C)(1) (election official receiving registration

⁴ Of course, the mere fact that a person is homeless does not deprive that person of the right to vote. Under Ohio Revised Code § 3503.02(I):

RC 3503.02(I) If a person does not have a fixed place of habitation, but has a shelter or other location at which the person has been a consistent or regular inhabitant and to which the person has the intention of returning, that shelter or other location shall be deemed the person’s residence for the purpose of registering to vote.

Similarly, students whose domicile is in Ohio are fully eligible to vote in this state. *See* State ex rel May v. Jones, 16 Oh App. 2d 140, 242 NE 2d 672 (Ohio App. 1968).

request more than 30 days before the election “*shall register the applicant not later than twenty business days after receiving the application*” if the application meets the registration requirements) (emphasis added). Under Relators’ misreading of Ohio law, a new voter unable to appear in person at the polls on election day would be denied the right to vote – and supposedly commit a felony – *even if* (a) they submit their application for registration 51 days before the election, (b) are registered 20 days later (the maximum time permitted under OHIO REV. CODE § 3503.19(C)(1) and 31 days before the election), and (c) go on-line the very next day to fill out an application for absentee ballot, 30 days before the election and well in advance of the deadline for requesting an absentee ballot. Moreover, Relators’ arguments would – right now – purport to disfranchise newly registered voters who already *have requested and received (and, in some case, cast) an absentee ballot* because local election officials were, as they have lawfully for years under Ohio law, accepting requests for absentee ballots based on whether the voter had registered at least 30 days before election day, not 30 days before the request for the absentee ballot. Ohio law does not support such an illogical and impractical result – either in letter or spirit.

Proposition of Law II. Ohio Law Must Be Interpreted Consistent with Federal Law Prohibiting State Registration Deadlines More Than 30 Days Before an Election, and Specifying That the “Election” Occurs When Votes Are Tabulated, Not When Voters Request, Receive, or Submit Their Ballots.

Relators also ignore federal laws that contradict their reading of Ohio law. Under the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2): “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme law of the land.” State laws must therefore be interpreted in conformity with federal laws, or they

must give way. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“state law is naturally preempted to the extent of any conflict with a federal statute”). A state law is preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This principle holds special importance when it comes to the conduct of congressional elections. The Elections Clause of the U.S. Constitution (Article I, Section IV), gives Congress broad power to “make or alter” the rules by which elections for U.S. Senators and Representatives are conducted. This provision specifically “grants Congress the authority to force states to alter their regulations regarding federal elections.” *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 n. 2 (6th Cir. 1997) (power includes the “manner” of such elections, including registration); see also *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1414-15 (9th Cir. 1995).

The reading of the statutes set forth under Directives 2008-63 and 2008-91, under which voters are eligible so long as they registered 30 days before Election Day, is perfectly consistent with federal law and thus presents no Supremacy Clause problem. By contrast, Relators’ proposed interpretation of Ohio law would conflict with federal law regarding registration deadlines, absentee voting, and the dates for congressional and presidential elections.

The first relevant federal statute is Section 202 of the Voting Rights Act of 1970 (“VRA”), 42 U.S.C. §§ 1973aa, *et seq.* Section 202 sets forth Congressional findings, *inter alia*, that the imposition of state “durational residency requirement[s] as a precondition to voting for the Offices of President and Vice President” and “the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections” “denies and abridges” the

constitutional right to vote, to move across state lines, to equal access to the franchise regardless of the method of voting used and “does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.” 42 U.S.C. § 1973aa-1(a). Accordingly, the VRA sets federal minimum standards for voter participation in presidential elections, including “nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.” § 1973aa-1(b).

First, the VRA mandates that voters must be permitted to vote in a presidential election so long as they register “not later than thirty days immediately prior to any presidential election.” § 1973aa-1(d). Any additional “durational residency requirement” is “completely abolish[ed].” § 1973aa-1(b), (c).

Second, the VRA mandates that such duly registered voters must be permitted to vote by absentee ballot for President and Vice-President if they request such ballot at least “seven days immediately prior to such election” and return the ballot “not later than the time of closing of the polls in such State on the day of such election.” § 1973aa-1(d).

Relators’ proposed additional 30 day “waiting period” above and beyond Ohio’s 30 day pre-election registration cut off is an attempt to throw up exactly the obstacles to voting that Congress tore down in 1970 with the enactment of the VRA. Thus, even if Ohio law were susceptible to the reading that Relators urge, the result would be that Ohio law would violate the VRA and could not lawfully be enforced under the Supremacy Clause. *See Bishop v. Lomenzo*, 350 F. Supp. 576 (E.D.N.Y. 1972) (three-judge court) (holding that requirements of Section 202 of VRA supersede conflicting state requirements under the Supremacy Clause, *id.* at 582, and noting that one of Congress’ purposes in enacting Section 202 was to prohibit “the imposition of unreasonable preconditions to absentee registration”, *id.* at 585). This Court, accordingly,

should reject Relators' reading of state law and adopt the Secretary of State's construction, which is perfectly consistent with the VRA.

Relators' rewriting of Ohio law also runs afoul of the Civil Rights Act of 1964. Section 1971(a)(2)(A)⁵ prohibits the application of different standards in determining whether persons within the same county or other political subdivision are qualified to vote:

No person acting under color law shall –
(A) In determining whether any individual is qualified under State law or laws to vote in any election, **apply any standard**, practice, or procedure **different from the standards**, practices or procedures applied under such law or laws to other individuals **within the same county**, parish, or similar political subdivision who have been found by State officials to be qualified to vote[.]

42 U.S.C. § 1971 (a)(2)(A) (emphasis added).⁶ Relators seek to have election officials enforce a durational residency requirement which will treat some voters within the same county differently than others, based solely on when they registered to vote. Those who have been registered for 30 days and of necessity have been residents for 30 days will be allowed to request and cast absent voter's ballots. Newly registered voters (including those who have recently moved into the state

⁵ In *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000) (involving § 1971 (A)(2)(B), not § 1971(A)(2)(A)), the Sixth Circuit held that 42 U.S.C. § 1971 (a)(2)(B) was directly enforceable only by the attorney general. How this section may be enforced, of course, has no bearing on whether Petitioners' suggested statutory interpretation conflicts with federal law.

⁶ Though in existence in various forms since 1871, Section 1971 was strengthened by the Civil Rights Act of 1960, Pub. L. 86-449, Title VI, 74 Stat. 86 (1960), when an expansive definition of the word "vote" was added:

When used in the subsection, the word "vote" includes all action necessary to make a vote effective **including, but not limited to, registration or other action required by State law** prerequisite to voting, **casting a ballot, and having such ballot counted** and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election...

42 U.S.C. §§ 1971 (e) (emphasis added). The paragraph offended by Petitioners' arguments, § 1971(a)(2)(A), was added in the Civil Rights Act of 1964, Pub. L. 88-352, Sec. 101, 78 Stat. 241 (1964). It is significant that, in the 1964 amendments, Congress included 42 U.S.C. § 1971(a)(3)(A) specifically providing that the broad definition of "vote" quoted above from § 1971(e) applies to these additions to § 1971(a).

or county) would be denied this right extended by state law, even though they are fully qualified residents who have met the registration deadlines.

Once a citizen has been determined eligible to vote and placed on the registration list, such discrimination against that voter relating to his or her registration date violates 42 U.S.C. § 1971 (a)(2)(A). For example, election officials cannot discriminate between different groups of qualified electors once the right to vote by absentee ballot has been granted. *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968). The court in *Brown* held that even though the outcome of the election was unaffected by these absentee votes, failure to treat similarly situated potential absentee voters equally was a violation of § 1971(a).⁷ *Id.* at 64.

Section 1971(a)(2)(A) covers unequal application of voting standards whether imposed by state law or local enforcement such as through unequal application of voting and registration standards by county or municipal officials. In enacting various voting rights statutes, Congress was concerned both with changes in implementation by local officials, regardless of what state law required, and with states adopting new discriminatory legislation when facing a court decision invalidating an existing practice. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). As with the Voting Rights Act of 1965, the clear language of § 1971 is liberally construed. *United States v. McLeod*, 385 F.2d 734, 748 (5th Cir. 1967) (§ 1971 should be construed “liberally” to fulfill the protective aspect of “American Federalism”); *United States v. Mississippi*, 380 U.S. 128, 137-38 (1965) (relying on the language of the statute to reject defense argument that “otherwise qualified by law” could include laws “even though those laws were

⁷ Although *Brown v. Post* involved allegations of race based action, race is not a required element under § 1971(a)(2)(A). See *Ball v. Brown*, 450 F. Supp. 4, 10 (D.C. Ohio 1977) (finding practice of automatically canceling woman’s registration form upon her marriage without determining whether woman actually changed her name through marriage violated § 1971); accord *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003)(challenging under § 1971(a)(2)(B) requirement of applicants to disclose their social security numbers in order to register to vote).

unconstitutional”); *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (construing various sections of the Voting Rights Act of 1965, noting that “compatible with the decisions of this Court the Act gives a broad interpretation to the right to vote, recognizing that voting includes ‘all action necessary to make a vote effective,’”⁸ and concluding with other indicia that Congress intended “to give the Act the broadest possible scope.”). With § 1971(a)(2)(A), Congress sought to place all registration applicants on an equal footing and to remove the unequal and pretextual excuses for denial of the right to vote.

Adoption of Relators’ argument would also conflict with the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg, *et seq.*, which sets an outside limit on state registration deadlines of 30 days before *the date of the election* – not the day on which the voter requests, receives, or submits her ballot. As the Sixth Circuit has recognized, the NVRA was borne of Congress’ recognition that “many practical barriers ... may inhibit the free exercise of th[e] right [to vote],” including “restrictively or prohibitively inconvenient voter registration requirements that may discourage or prevent qualified voters from registering and voting.” *Bell v. Marinko*, 367 F.3d 588, 591 (6th Cir. 2004) (quoting *ACORN v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997)).⁹ The NVRA establishes minimum federal requirements with which states must

⁸ *Allen v. State Bd. of Elections* construed the definition of “vote” found in 42 U.S.C. § 1973(l)(c)(1). The definition of “vote” in § 1971(e) is not different in any relevant respect. Both sections include the phrase “all action necessary to make a vote effective.”

⁹ In *Bell v. Marinko*, the narrow issue before the U.S. Court of Appeals for the Sixth Circuit was which of two residences constituted the plaintiffs’ domiciles for purposes of voting, an island residence or a mainland residence. The narrow holding of the case was that the NVRA did not preclude removal of the plaintiffs from precinct voting lists *if* they had never established residence in the precinct in the first place. As all but one of the plaintiffs had never established residence, they had never been properly registered. The court reasoned that they had never been “eligible” voters in the precinct and thus were not protected by the act. The court also held that an Ohio statute that determined the residency of a married voter based on where the family lived did not violate the “uniform and nondiscriminatory” requirements of the NVRA because the Ohio statute did not raise an irrebutable presumption.

comply in maintaining their voter registration lists for federal elections. In addition to requiring that registration opportunities be made available at state motor vehicle agencies, the NVRA prohibits state and local election authorities from establishing registration deadlines more than 30 days before a federal election day. The NVRA requires, in pertinent part, that:

In the administration of voter registration for elections for Federal office, each State shall

(1) ensure that any eligible applicant is registered to vote in an election -

(A) in the case of registration with a motor vehicle application ..., if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of *30 days*, or the period provided by State law, *before the date of the election*;

(B) in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of *30 days*, or the period provided by State law, *before the date of the election*;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of *30 days*, or the period provided by State law, *before the date of the election*; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of *30 days*, or the period provided by State law, *before the date of the election*...

42 U.S.C. § 1973gg-6 (a).

The NVRA thus sets an outside limit on the date by which states by which voters may be required to register in order to participate in a federal election. Voters may not be required to register any more than 30 days before the date of such election. Ohio has chosen the earliest deadline that is allowed by federal law, requiring that voters register 30 days before Election Day (i.e., by October 6, in this year's presidential and congressional elections). OHIO REV. CODE § 3503.06. Ohio law is thus consistent with the NVRA, so long as it is interpreted as Amici have urged in Part I of this brief. But if Relators' contrary interpretation of Ohio law were accepted, that construction would directly conflict with the NVRA by imposing an earlier registration date

on certain voters – namely, on those who request, receive, or submit an absentee ballot fewer than 30 days after registering. Again, there is no need or warrant to interpret Ohio’s election statutes in this way. But if this Court were to adopt such an interpretation, then state law would run afoul of the NVRA. And under the Supremacy Clause and the Elections Clause of the U.S. Constitution, state law could not be given effect.

It is no answer to say that states are generally free to establish voter qualifications under the NVRA. See *ACORN v. Miller*, 912 F. Supp. 976, 985 (W.D. Mich. 1995). The NVRA certainly does not bar states from declaring certain citizens ineligible, such as convicted felons and those whom it deems incompetent. But a state cannot evade the NVRA’s registration mandates simply by labeling its own contrary rules “qualifications.” See *id.* at 986 (rejecting a state’s attempt to condition registration on “[c]ontinuous and uninterrupted voting” in the state). For example, a state could not avoid the NVRA’s 30-day limit by purporting to make it a “qualification” for voting that citizens register at least *60 days* before a federal election. The NVRA is properly understood as “setting a limit on how an *otherwise qualified and registered voter* may be prevented from exercising the right to vote.” *Id.* at 985 (emphasis added). Accordingly, the NVRA does not restrict states from imposing qualifications unrelated to its requirements -- such as not having been convicted of a felony or being mentally competent. But a state may not circumvent the NVRA’s outside registration limit of 30 days, or any of its other requirements, by labeling its own rules “qualifications” rather than registration rules, as Relators’ arguments would require. Such a reading would elevate formalism over the clear and ambiguous substantive requirements of the NVRA.

In addition to conflicting with the NVRA, Relators’ proffered interpretation of Ohio’s election laws would run afoul of the federal statutes governing the timing of congressional and

presidential elections. The U.S. Constitution gives Congress the authority to set the dates for both congressional and presidential elections. U.S. Const., Art. I, § 4, Cl. 1 (“the Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations...”); Art. II, § 1, Cl. 3 (“Congress may determine the Time of choosing the Electors [for the Electoral College]...”). Acting pursuant to this constitutional authority, Congress has set the date for federal elections, as the Tuesday after the first Monday in November. 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. Thus, November 4, 2008 is Election Day for this year’s U.S. presidential and congressional elections.

The U.S. Supreme Court has interpreted the term “election” to mean the date on which voters’ ballots may actually be counted and tabulated, rather than the date on which ballots are requested, received, or submitted. For purposes of the federal election-day statute, “election” is defined as “the combined actions of voters and officials meant to make a final selection of an officeholder.” *Foster v. Love*, 522 U.S. 67, 71 (1997); *see also Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001); *Voting Integrity Project v. Keisling*, 259 F.3d 1169 (9th Cir. 2001). This interpretation of federal law is necessary, in order to uphold the consistent and decades-long practice of absentee balloting in Ohio and all the other states. In all the states, many voters actually receive, complete, and return their absentee ballots many days and sometimes weeks before Election Day. Yet federal law specifies that there be a singular “day for the election,” not multiple election days. To reconcile state practice with federal law, the term “election” has been interpreted to mean the “‘consummation’ of the process of selecting an official.” *Voting Integrity Project*, 259 F.3d at 1175. On this same basis, the Sixth Circuit upheld Tennessee’s early voting laws, concluding that the election takes place not on the dates that election officials

receive ballots from voters, but rather on the date that a “final selection” is made. *Millsaps*, 259 F.3d at 546. The Ninth Circuit similarly upheld Oregon’s all-mail election system for federal elections, in which most voters actually receive, complete, and return their ballots prior to Election Day. The process of selecting officials was not actually “consummated” until the Election Day prescribed by federal law, since vote tabulation did not begin until that date. *Id.* at 1175; *see also Voting Integrity Project v. Bomer*, 199 F.3d 773, 774 (5th Cir. 2000)(upholding early voting in Texas, because “final selection is not made before the federal election day”).

As a matter of federal law, then, the “day for the election” is the day on which votes are tabulated and the process of choosing officials thereby consummated. It is not the day on which voters receive or cast their ballots – which will necessarily be different for different voters given the now-widespread practice of absentee voting. It follows that Relators’ proposed interpretation of state law would run afoul of the federal election-day statutes. Relators’ argument that voters must be registered at least 30 days before requesting, receiving, or submitting an absentee ballot necessarily requires that one or more of these days be treated as the day of the “election.” But it is firmly established as a matter of federal law that the “election” does not occur until the process is consummated by the tabulation of votes.

Relators’ suggested reading of state law would run afoul of the Voting Rights Act, the Civil Rights Act, the National Voter Registration Act, and the federal election-day statutes by requiring certain voters to have been registered more than 30 days before Election Day, Relators’ proposed reading of state law would run afoul of federal law. That reading therefore cannot be sustained, and Ohio’s election laws should instead be read consistently with federal law – in other words, in allowing voters to request, receive, and cast a provisional ballot, so long as they register at least 30 days before Election Day.

The fact that absentee ballots will not – and, in fact, cannot under federal law – be tabulated until November 4 also helps explain why there is absolutely no risk of ineligible voters’ ballots being counted, the worry that ostensibly motivates Relators’ claims (Relators’ complaint, ¶ 23). In particular, Relators express concern that college students may attempt to register in counties where they are not in fact eligible. Putting aside the fact that there is nothing in the single media report they cite that shows illegal registration (much less voting) by anyone, there is ample means and time to deal with the problem that Relators hypothesize. Under Secretary of State Directive 2008-67, boards of election are prohibited from counting or tabulating absentee voters’ ballots until 7:30 pm on Election Day. Under this same directive, the “processing” of absentee voters’ ballots (*i.e.*, the “handling and examining” of them) may not occur any sooner than ten days before Election Day. These restrictions will give counties ample time to assess the ineligibility of all absentee ballots, including those which are submitted fewer than 30 days after the voter registered.

Moreover, voters who simultaneously register and cast absentee ballots during five-day window recognized by Directive 2008-63 (going from September 30 to October 6), are subject to challenges under Ohio’s election laws, as Relators themselves acknowledge. OHIO REV. CODE §§ 3503.24, 3505.19. Under § 3505.19, pre-election day challenges may be filed prior to the nineteenth day before the election (*i.e.*, by October 16). In addition, § 3503.24 provides a process for challenging the eligibility of any registered elector, whether or not that person has yet cast a ballot. If Relators or other concerned voters truly believe that ineligible voters have registered or cast absentee ballots, there is plenty of time to challenge them, and a prescribed method for doing so under Ohio law.

Any doubt on this score is dispelled by a directive that the Secretary of State issued on September 11, the day before the instant Petition. Directive 2008-91 sets forth a procedure by which absentee voters' registration and ballots may be challenged. This directive will ensure a fair and orderly process for resolving any legitimate questions about the eligibility of one who attempts to register at least 30 days before the election and cast an absentee ballot within 35 days of the election, as state law permits. Those voters will be required by this directive to cast provisional ballots with identification envelopes. This will allow any ballots cast by would-be voters who really are ineligible to be pulled out, while preserving the secrecy and integrity of the ballot for all Ohioans.

Proposition of Law III. Relators' Interpretation of State Law Should Be Avoided, Because It Would Impose a Durational Residency Requirement That Conflicts with the Fourteenth Amendment to the U.S. Constitution.

By insisting that an elector in Ohio be registered to vote for 30 days before receiving an absent voter's ballot, Relators urge the Court to endorse an unconstitutional durational residency requirement. The Supreme Court held in *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) that durational residence requirements are unconstitutional "unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest." The Court has subsequently held that registration cutoffs are allowed *only* when the State can demonstrate that the cutoff was enacted because of administrative necessity. *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973) (holding that Arizona requirement reflected a state legislative judgment that the period was necessary to permit preparation of accurate voter lists.); *Burns v. Fortson*, 410 U.S. 686 (1973).

Relators are not urging the cutoff because of administrative necessity. On the contrary, they are urging the Court to endorse the cutoff despite clear evidence that the State has no administrative concerns, much less any necessity. Though voters mark their ballots before Election Day, the board of elections will not count the votes until election night. OHIO REV. CODE § 3509.06(E); Directive 2008-67. Only votes that have been verified as valid votes are included in the tabulation on election night. Voters who register and vote the same day must meet the same identification requirements as other voters. Though their vote is cast, the board of elections will not count it if it determines before election night that the voter was not eligible to vote. OHIO REV. CODE § 3509.06(D).

Secretary of State Jennifer Brunner, the chief election official of Ohio, has determined that boards of elections are able to register prospective voters and allow them to vote on the same day during this 5-day overlap period. Directive 2008-63. The State itself does not argue that there is a compelling interest in having a 30-day cutoff. On the contrary, the State has explicitly indicated that it believes that “[i]t is critical that all Ohio election officials work to ensure that persons eligible to vote in the general election by absentee ballot be afforded a timely opportunity to do so.” *Id.* The State has recognized that “promot[ing] the ability of all eligible electors for the general election to vote by absentee ballot if they so choose” is a greater State interest than potential administrative concerns. *Id.* The State has advised boards of elections that have administrative concerns to hire temporary employees. *Id.*

In *Hinnant v. Sebesta*, 363 F. Supp. 398, 399-400 (M.D. Fla. 1973), the court held that where Florida has already determined “that 30 days is sufficient to accommodate its needs between the end of registration and election day . . . the imposition of an additional 30-day period . . . is purely . . . a durational residency requirement.” In the case at bar, the State has

determined that it can register and allow people to vote on the same day during the overlap period. The additional 30-day period Relators wish to create is purely a durational residency requirement.

According to Relators, a person would have to be registered 60 or 65 days before the election in order to vote during the five-day absentee window at issue. The Court held in *Burns*, 410 U.S. at 753 that a “50-day registration period approaches the outer constitutional limits in this area.” In addition, Relators’ interpretation of Ohio law creates a residency requirement in excess of the 30-day registration by requiring newly registered voters to reside in Ohio for periods far longer than the registration deadline in order to avail themselves of absentee voting. Courts have held that discrepancies in residency and registration requirements are unconstitutional. *See, e.g., Meyers v. Jackson*, 390 F. Supp. 37, 39, 43 (E.D. Ark. 1975) (noting that “precinct residency requirements in excess of pre-election registration requirements” have been held “unconstitutional,” and striking down a requirement that a voter reside in his precinct for at least 30 days prior to the election after moving from another precinct since registration for other residents remained open up to 20 days prior to the election.). With admissions from state and local election officials that the current election administrative system can ascertain eligibility in time for these votes to be counted on election night, the 60-65 day requirement would unconstitutionally single out newly registered voters and force them to make unnecessary trips to the polls.

Far more troubling is the broader impact of what Relators and the prosecutors in Holmes, Madison and Miami counties are urging. If voters must be registered for 30 days before even receiving a ballot, any voter who registered within 30 days of requesting an absent voter’s ballot would be denied or delayed from voting. For instance, a voter who registered on October 3,

2008 and needed to vote absentee would not be able to receive a ballot until November 2, 2008 – far too close to Election Day to receive, cast and return his ballot. Voters who registered any time after August 31, 2008 would find themselves caught in a system of unnecessary delays and needless trips to the polls simply because of an unconstitutional residency requirement. Sadly many of these voters might not be able to vote due to this arbitrary distinction. This is especially problematic when state and county election officials frequently encourage Ohio voters to vote early or by absent voter’s ballots. *See e.g.*, “To Avoid Long Lines, Ohio Officials Say Vote by Mail, NPR, Sept. 9, 2008 (located at <http://www.npr.org/templates/story/story.php?storyId=94428993>).

Relators nevertheless suggest that the 30-day waiting period is needed to prevent fraud. But the Supreme Court has held that durational residency requirements are not tailored to address a compelling interest in fraud prevention. *Dunn*, 405 U.S. at 345. No vote will be counted if the board determines that the voter was not eligible to vote. OHIO REV. CODE § 3509.06(D). Boards of elections are permitted “to delay registration and immediate absentee voting if the board is not satisfied as to the validity of the application and the applicant’s qualifications.” Directive 2008-63.

Furthermore, the availability of this method of registering and voting was not created in an administrative bubble; these opportunities were created during a comprehensive overhaul of the state’s entire electoral administrative system in 2006. The state has already implemented other safeguards which arguably would reduce fraud: (1) a voter identification requirement which arguably permits the board to verify identity and address in many cases, and (2) a statewide computerized database of registered voters which would catch double registrations were they to occur. Finally, those with personal knowledge of a voter’s ineligibility remain free

to challenge voters. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff, *et seq.*, governing overseas voters requires states to make provisions for simultaneous registering and receiving absentee ballots. *See* 42 U.S.C. § 1973ff-1 (a). Indeed, given that nine states currently allow eligible persons to register and vote on the same day in most elections,¹⁰ and two more allow same-day registration in presidential elections,¹¹ Relators' claims of administrative chaos and fraud resulting from the limited five-day window now available in Ohio ring particularly hollow. Most of these states allow same-day registration *on Election Day itself*—without the 30-day time period available in Ohio to check the eligibility of same-day registrants and process any challenges – and several have been doing so for well over three decades.¹² A study of states allowing election-day registration shows minimal incidence of voter fraud, a finding confirmed by election officials experienced with the practice in these states.¹³

In light of this experience, and because Ohio's limited period for same-day registration ends 30 days before the election and is subject to numerous safeguards allowing for eligibility to be verified during that 30-day period, there is simply no rational basis for Relators' claim that the procedure presents a danger to proper election administration. The Relators have advanced no

¹⁰ Idaho Code Ann. § 34-408A; Iowa Code § 48A.7A; Me. Rev. Stat. Ann. tit. 21-A, § 122.4; Minn. Stat. § 201.061.3; Mont. Code Ann. § 13-2-304; N.C. Gen. Stat. § 163-82.6(d); N.H. Rev. Stat. Ann. § 654:7-a; Wis. Stat. § 6.55; Wyo. Stat. Ann. § 22-3-104(h).

¹¹ Conn. Gen. Stat. § 9-158c; R.I. Gen. Laws § 17-1-3. North Dakota does not require registration as a condition of voting. N.D. Cent. Code § 16.1-01-04(1), § 16.1-01-05.1.

¹² Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin and Wyoming allow persons to register and vote on Election Day, including presidential elections; Connecticut and Rhode Island allow this only in presidential elections. Maine, Minnesota and Wisconsin have had election-day registration for over 30 years.

¹³ *See* Lorraine Minnite, Dēmos: A Network For Ideas & Action, Election Day Registration: A Study Of Voter Fraud Allegations And Findings On Voter Roll Security (2007), available at <http://www.demos.org/pubs/EDR%20VF.pdf>.

threat of fraud even remotely sufficient to compel the drastic relief they seek; moreover, in the case at bar, the time cutoff would not deter fraud.

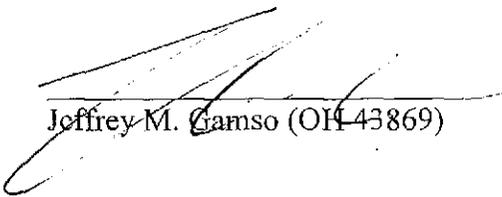
At issue in this litigation are the fundamental rights to vote and to have one's vote counted. *See Wesberry v. Sanders*, 376 U.S. 1, 17-8 (1964). Once Ohio began to allow universal, no fault absentee voting in 2006 and allowed applications to begin prior to the registration deadline, absentee ballots in Ohio were no longer a matter of privilege or merely for the voters' convenience. The State of Ohio is not required to offer voters present in the state on Election Day the opportunity to vote by absent voter's ballot.. However, once a state establishes absentee voting as an option to all voters, as Ohio has done, OHIO REV. CODE § 3509.02, constitutional principles guaranteeing the right to vote and to have the vote counted apply. "The constitutional protection for the right to vote encompasses protections about registering to vote and voting with absentee ballots." *Smith v. Meese*, 821 F.2d 1484, 1490 (11th Cir. 1987).

Relators make much of an equal protection problem because the boards of elections in three counties (Holmes, Madison, and Miami) have been advised by their legal counsel not to comply with Secretary Brunner's directive. *See Relators' Complaint*, ¶¶ 19-26. Indeed they assert that a writ of mandamus is "necessary" to ensure "statewide uniformity." *Id.*, ¶26. If in fact certain counties prevent bona fide registered voters from receiving absent voter's ballots because the voters have not been registered for 30 days, then this equal protection argument can be quickly dismissed by bringing those recalcitrant counties into compliance with state and federal law by requiring them to issue ballots to all applicants who are timely registered.

CONCLUSION

The petition in this case ignores not only the statutory framework of Ohio's election code but also numerous federal statutory and constitutional provisions and principles. For these reasons, the Petition should be denied.

Respectfully submitted,


Jeffrey M. Gamso (OH 43869)

Meredith Bell-Platts (OH 72917)

Counsel of Record

Neil Bradley*

ACLU Voting Rights Project

230 Peachtree Street, NW

Suite 1440

Atlanta, Georgia 30303

(404) 523-2721 (phone)

(404) 653-0331 (fax)

mbell@aclu.org

nbradley@aclu.org

*pro hac vice application pending

Carrie L. Davis (OH 77041)

Jeffrey M. Gamso (OH 43869)

American Civil Liberties Union of Ohio

Foundation, Inc.

4506 Chester Avenue

Cleveland, Ohio 44103

(216) 472-2220 (phone)

(216) 472-2210 (fax)

cdavis@acluohio.org

jmgamso@acluohio.org

Daniel P. Tokaji*

55 W. 12th Avenue

Columbus, Ohio 43210

(614) 292-6566 (phone)

(614) 688-8422 (fax)

dtokaji@gmail.com

*pro hac vice application pending

Paul Moke (0014099)

1252 Pyle Center

Wilmington College

Wilmington, Ohio 45177

937-382-6661 ext. 415 (phone)

937-382-7077 (fax)

paul_moke@wilmington.edu

Teresa James (0031671)

Project Vote

23556 Marion Road

North Olmsted, Ohio 44070

(440) 503-5422

tjames@projectvote.org

Richard Saphire (0017813)

300 College Park

Dayton, Ohio 45469-2772

937-229-2820 (phone)

937-229-2469 (fax)

saphire@udayton.edu

Brenda Wright*

Demos

358 Chestnut Hill Avenue

Suite 303

Brighton, Massachusetts 02135
(617) 232-5885 ext. 13 (phone)
(617) 232-7251 (fax)
bwright@demos.org
*pro hac vice application pending

Jon Greenbaum*
Bob Kengle*
Lawyers Committee
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8600 (phone)
(202) 783-0857 (fax)

jgreenbaum@lawyerscomm.org
*pro hac vice application pending

Jennifer R. Scullion*
Matthew Morris*
Proskauer Rose LLP
1585 Broadway
New York, New York 10036
(212) 969-3600 (phone)
(212) 969-2900 (fax)
jscullion@proskauer.com
mmorris@proskauer.com
jsnyder@proskauer.com
*pro hac vice application pending

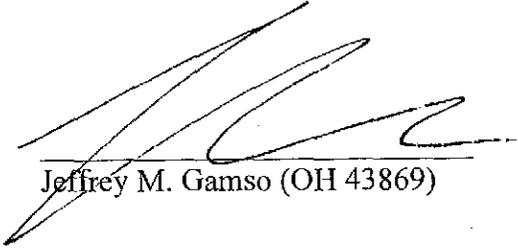
Attorneys for Amici Curiae on behalf of Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief was served via Federal Express overnight delivery on this 24th day of September, 2008, upon the following:

Donald Carl Brey
Deborah Scott
Elizabeth Watters
Chester, Willcox & Saxbe
65 East State Street
Suite 1000
Columbus, OH 43215

Richard Coglianesse
Damian Sikora
Nancy Rogers
Ohio Attorney General's Office
30 East Broad Street
16th Floor
Columbus, OH 43215-6001



Jeffrey M. Gamso (OH 43869)