No. 12-4055

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Obama for America, et al.,

Plaintiffs-Appellees,

vs.

Jon Husted, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio
No. 2:12-cv-636
The Honorable Hon. Peter C. Economus

BRIEF FOR PLAINTIFFS-APPELLEES

Donald J. McTigue
Trial Counsel
Mark A. McGinnis
J. Corey Colombo
McTigue & McGinnis LLC
545 East Town Street
Columbus, Ohio 43215
Tele: (614) 263-7000
Fax: (614) 263-7078

Attorneys for Plaintiffs-Appellees, Obama for America, et al.

Robert F. Bauer
Perkins Coie
700 Thirteenth Street, Suite 600
Washington, DC 20005
Tele: (202) 434-1602
Fax: (202) 654-9104

General Counsel for Plaintiffs Obama for America and the Democratic National Committee

Jennifer Katzman
Obama for America
130 East Randolph
Chicago, IL 60601
Tele: (312) 985-1645

National Voter Protection Counsel for Plaintiff Obama for America

Will Crossley
Democratic National Committee
430 South Capitol Street, SE
Washington, DC 20003
Tele: (202) 863-8000

Chief Voter Protection Counsel Democratic National Committee

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

CODES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This is a case about a significant burden on the right to vote imposed by the State of Ohio arbitrarily and without justification, the effect of which is without precedent in that State or any other: Ohio has opened its polling places to some qualified voters, but closed them to most others, over the last three days prior to Election Day. Nowhere else in the country will a voter be turned away from an open polling place because the polling place is not open *for that particular voter*. As the district court properly determined, Ohio's restriction of access to the ballot on unequal terms cannot be substantiated by any State interest, and in fact the district court found that, in enacting the burden at issue, the State consistently acted in a manner inconsistent with the purpose it now declares, *post hoc*, in this litigation.

The burden the State seeks here to impose eliminates an opportunity to vote originally enacted for the benefit of all voters to address a widely experienced electoral breakdown. In 2004, before the advent of early voting in the State, voting machine malfunctions and other administrative breakdowns led to election-day lines up to twelve hours long, effectively depriving thousands of the opportunity to cast their ballots. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008); Powell & Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio*, Wash. Post, Dec. 15, 2004, at A1.

To prevent the recurrence of that situation, the General Assembly reformed the electoral system in Ohio by introducing, among other reforms, in-person early voting. Under the early voting system, any duly qualified voter could cast a ballot at a designated location, during the 35-day period leading up to Election Day. In the 2008 presidential election, approximately 100,000 Ohioans cast their ballots in-person in the three days preceding Election Day. R.3-3, PAGEID#88-89 (Data Compiled by Norman Robbins).

But in June 2011, the system was arbitrarily changed through a confused flurry of legislative enactments, repeals and technical corrections. The State initially sought to eliminate all early voting over this three-day period, but then, over three separate enactments, it passed into law separate deadlines for military and overseas (UOCAVA) voters, on the one hand, and all other (non-UOCAVA) voters, on the other. And to confuse matters further, the UOCAVA voters were themselves subject to two conflicting deadlines, one allowing for voting the Saturday, Sunday, and Monday before the election, and the other ending such voting as of 6 p.m. the Friday before Election Day. The deadline for all other (non-UOCAVA) citizens was that same Friday, eliminating the three ensuing days available to all voters throughout the State beginning in 2005.

Once the legislative process had run its erratic course, and until the injunction issued by the court below, the law provided that if an election office is

open during the three days prior to Election Day, an American expatriate who formerly lived in Ohio and returned to the State to visit a relative is entitled to cast his vote in-person; but an Ohio veteran who is present in his home county will be turned away from his open polling place. At no time did the Legislature offer a coherent, consistent—or indeed any—justification for its actions. But the record shows that among the motives for the frenzied and confused enactment of these deadlines was avoiding a referendum on this change and others that had been qualified by the voters for the ballot this November. That referendum would have had the effect of preventing the Legislature from proceeding with *any* change in the law this year—including the very change in early voting opportunities available to Ohio voters since 2005.

Defendants do not even attempt to deny the wholly arbitrary origins of this differential access to the ballot. Instead they argue that it should be sustained so long as any conceivable, *post hoc* rationalization is offered—regardless of whether the justification offered has any relationship to the actual conduct of the State. But that is not the law. While States have considerable discretion in designing their electoral systems, equal protection principles prohibit them from abusing this discretion in the manner established by the record here: by restricting access to the ballot—in this case, to open polling places—on unequal terms and without justification.

For this reason, the district court's order granting the preliminary injunction should be affirmed.

STATEMENT RESPECTING ORAL ARGUMENT

This case involves arbitrary state action implicating the fundamental right to vote. Plaintiffs request oral argument.

STATEMENT OF JURISDICTION

Plaintiffs filed this action pursuant to 42 U.S.C. § 1983. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4). On August 31, 2012, the district court entered an order granting plaintiffs' motion for preliminary injunction. On September 4, 2012, defendants noticed their appeal (No. 12-4055). Because this case involves "[i]nterlocutory orders of the district courts of the United States . . . granting . . . injunctions," this Court has jurisdiction under 28 U.S.C. § 1292(a)(1).[1]

STATEMENT OF ISSUE PRESENTED

Whether the district court properly exercised its discretion in granting Plaintiffs' motion for preliminary injunction as to changes in Ohio's early-voting

[1] On September 7, 2012, a group of Intervenors filed a separate notice of appeal (No. 12-4076). Plaintiffs note that the district court's Order has no impact on the pre-existing rights of military voters to vote early in-person in the three days prior to Election Day—indeed, the district court's Order re-affirms that right.

law, which restricts access to in-person early voting for some—but not all—voters on an arbitrary basis and without justification.

STATEMENT OF FACTS

During the three days before Election Day 2012, polling sites in Ohio will be open for in-person early voting. But rather than permit all qualified voters to cast their ballots, Ohio law reflects a two-tiered system: civilian voters resident in Ohio are excluded from polling sites on the three days leading up to the election, while military and overseas voters are eligible to cast their ballots. This system did not emerge as a matter of intentional, deliberative legislative policy, but rather from an utterly confused series of legislative enactments, repeals and technical corrections that produced an arbitrary and unjustified distinction among voters in their access to the ballot box.

A. The State's Adoption of In-Person Early Voting

Ohio's system of early voting was introduced after the State's notoriously flawed 2004 General Election, which was marked by machine shortages in certain areas, malfunctions elsewhere, and egregious wait-times for voters attempting to cast their ballots.

Outraged voters decried the resulting disenfranchisement. As this Court recounted their complaints:

> Voters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting

> machines. . . . [In] at least one polling place, voting was not completed until 4:00 a.m. on the day following election day. Long wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line.

League of Women Voters, 548 F.3d at 477-78.

Because "[l]ong lines at voting booths in recent years, inclement weather and work demands of Ohioans have discouraged some citizens from voting on Election Day," those voters launched a campaign to amend the Ohio Constitution to recognize a right to early voting.[2] But before that vote could take place, the General Assembly introduced legislation to expand the vote in Ohio.[3] In October 2005, the Legislature enacted Substitute House Bill 234, 126th General Assembly (Oct. 19, 2005). As explained by Republican Senator Gary Cates, the sponsor of the bill, H.B. 234 operated under a simple premise: "We're expanding Election Day by a 35-day window." Carrie Spencer Ghose, *Senate Committee Recommends*

[2] *See* Herb Asher and Ron Alexander, "State Issue 2: Explanation and Argument FOR," submitted to Ohio Secretary of State, *available at* https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2005ElectionsResults/05-1108Issue2/State%20Issue%202%20Explanation%20and%20Argument%20FOR.aspx.

[3] On April 20, 2005—the day that no-fault, in-person absentee voting was first introduced in the State Assembly—Kevin DeWine, the lead sponsor of H.B. 3 (the predecessor of H.B. 234), "said the plan is designed to address voting-related issues that arose before, during and after the 2004 presidential election." 74 Ohio Report No. 77, Gongwer News Service, Inc. (Apr. 20, 2005).

Absentee Voting Bill, Associated Press, Oct. 12, 2005.[4] Following the creation of early voting in Ohio, any registered voter could cast a ballot, in-person, at the site designated by the local elections office, and thereby avoid the risk of losing the vote because of Election Day mishaps.

When considering the legislation, the Ohio Legislature considered early *in-person* voting to be fundamentally different than traditional absentee voting. Although, at the time, the Republican caucus would not support "no fault" absentee voting by mail, Majority Whip Kevin DeWine (R-Fairborn), the lead sponsor of H.B. 3, the precursor to H.B. 234, endorsed in-person early voting. 74 Ohio Report No. 36, Gongwer News Service, Inc. (Feb. 23, 2005). Accordingly, in the first version of its no-excuse legislation, the House Elections & Ethics Committee included only in-person early voting. 74 Ohio Report No. 77, Gongwer News Service, Inc. (Apr. 20, 2005). In that bill, "any voter could cast an absentee ballot in person at a board of elections up to 35 days prior to an election without needing to provide a reason. Voters who wanted their ballot mailed to them still would have to cite one of the reasons currently required of all absentee voters." 74 Ohio Report No. 77, Gongwer News Service, Inc. (Apr. 20, 2005). The

[4] As Senator Cates later explained: "The concept of a no-fault ballot is something that the general public overwhelmingly supports. It would give voters more flexibility, encourage increased participation in voting, and help alleviate long lines at the polls." Statement of Senator Gary Cates, *available at* http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=111489&startTime=260&autoStart=True (October 18, 2005).

Committee later incorporated no-excuse absentee voting by mail, but only after considering it as a separate issue. 74 Ohio Report No. 82, Gongwer News Service, Inc. (Apr. 27, 2005).

Following the implementation of early voting, a substantial number of voters took advantage of the new option. In 2008, more than 1.7 million voters—30 percent of those casting ballots—voted early. R.48, PAGEID#1607 (Opinion); R.34-31, PAGEID#1032-1033 (Study on Early Voting). Of those, approximately 100,000 voters cast in-person ballots in the three days leading up to Election Day. R.48, PAGEID#1607 (Order); R.34-32, PAGEID#1054 (N. Robbins Supplement).

Based on Ohio's experience, in-person early ballots tend to be used by voters with a substantially different demographic makeup than those who cast ballots on Election Day. A study of 2010 early voters, for example, concluded that early voters "'tend to have lower income than election-day voters' with the difference 'most noticeable among people with annual incomes of less than $35,000.'" R.48, PAGEID#1607 (Opinion) (quoting R.34-31, PAGEID#1045 (Study on Early Voting)). Likewise, a study of voters in Cuyahoga County showed that African American voters comprised 56.4 percent of the early-voting population but only 25.7 percent of the Election Day or vote-by-mail electorate. R.34-35, PAGEID#1076-1084 (Racial and Ethnic Proportions of Early-In Person Voters); *see also* R.34-34, PAGEID#1068 (2008 Early In-Person Voting)

(concluding that African American voters comprised a disproportionate share of early voters in Franklin County).

Notwithstanding the universally-acknowledged success of early voting in Ohio, in July 2011, Governor Kasich signed into law Amended Substitute House Bill Number 194, an omnibus election law bill. H.B. 194, 129th General Assembly (June 29, 2011). The bill, which passed on a party-line vote, changed various deadlines related to early voters. In particular, brand new language was added to Ohio Rev. Code § 3509.01 to end early voting on the Friday preceding Election Day at 6 p.m. Likewise, for UOCAVA voters, the Legislature amended § 3511.10 to eliminate the Monday deadline for early voting by UOCAVA voters and place them on the same footing as everybody else. But the Legislature failed to amend the two preexisting Monday deadlines in the Code: § 3509.03 (for non-UOCAVA voters) and § 3511.10 (for UOCAVA voters). Thus, the result of H.B. 194 was to create inconsistent early-voting deadlines for both UOCAVA and non-UOCAVA voters.

To fix the problem, the Legislature enacted Amended Substitute House Bill Number 224, which made "technical corrections to the laws governing elections." H.B. 224, 129th General Assembly (July 13, 2011). H.B. 224 fixed the deadlines in §§ 3509.03 and 3511.10 for both UOCAVA and non-UOCAVA voters to bring them into line with the Friday deadlines specified by H.B. 194.

Meanwhile, a broad coalition of legislators and voting rights advocates had begun gathering signatures to put Ohio's omnibus election law to a referendum. *See* Terri L. Enns, *Thoughts on HB 194 and Ohio's Referendum Process*, (Apr. 3, 2012), *available at* http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9075. More than 300,000 Ohioans signed petitions to reject H.B. 194, and on December 9, 2011, the Secretary of State certified a referendum under which the people of Ohio would vote on the measure. R.34-7, PAGEID#676-677 (Press Release, *Secretary of State Husted Certifies HB 194 Referendum Petition Signatures* (Dec. 9, 2011)). The effect of this successful petition drive was to suspend the implementation of the law for this election cycle, allowing the voters to pass judgment by casting their ballots for or against the law on the November general election ballot. A further effect, immediately relevant to this case, was that early in-person voting was restored for the last three days prior to the general election.

Just a few months later, in an unprecedented move, the Legislature acted to preempt a vote on the referendum in the November general election by repealing H.B. 194 through Substitute Senate Bill Number 295. *See* S.B. 295, 129th General Assembly (May 8, 2012). However, in the rush to repeal H.B. 194 and prevent a referendum vote, the Legislature neglected to repeal H.B. 224, which had included the technical corrections to the original errors in H.B. 194. As a result, after all of

the legislative maneuvering, the Ohio Revised Code reflected H.B. 224's technical corrections—and only the technical corrections—which left two inconsistent deadlines for UOCAVA voters: one on Friday and one on Monday.[5]

B. Secretary of State's Advisory

In the wake of these maneuvers, the Secretary of State issued Advisory 2011-07. R.34-18, PAGEID#993-995 (Advisory 2011-07).[6] The Advisory provided that, notwithstanding the referendum and repeal of H.B. 194, early voting for non-UOCAVA voters would end on Friday. For UOCAVA voters, voting would be permitted through Election Day. *Id.*

Subsequent efforts by local boards of elections to extend the in-person early voting deadline for non-UOCAVA voters to the Monday before the election were all denied by the Secretary of State, on the ground that Ohio Rev. Code § 3509.03 (as revised by H.B. 224) prohibited him from authorizing voting during this window of time for non-UOCAVA voters. *See* R.34-21, PAGEID#1002-1004 (Letter from Secretary Husted to the Director and Deputy Director of the Montgomery County Board of Elections (Oct. 25, 2011)); R.34-22,

[5] As a result of S.B. 295, the Secretary of State advised the Ohio Ballot Commission that the people's referendum on H.B. 194 would be removed from the ballot. R.42-5, PAGEID#1512-1515 (House Activity Report (Aug. 15, 2012)).

[6] The Secretary of State's Advisory preceded the repeal of H.B. 194 because, under Ohio law, H.B. 194 became inoperative upon the certification of the referendum.

PAGEID#1005-1007 (Letter from Secretary Husted to the Director of the Darke County Board of Elections (Oct. 27, 2011)).

STATEMENT OF THE CASE

Plaintiffs filed suit in the U.S. District Court for the Southern District of Ohio on July 17, 2012. R.1, PAGEID#1-21 (Compl.). That same day, Plaintiffs filed a motion for preliminary injunction, seeking to prohibit Defendants from implementing or enforcing the "technical amendments" to Ohio Rev. Code § 3509.03 made by H.B. 224 and S.B. 295, thereby restoring equal ballot access for UOCAVA and non-UOCAVA voters during the three days preceding Election Day. R.2, PAGEID#22-53 (Mot. for P.I.).

Defendants opposed the motion. Although they acknowledged that Ohio law "allows UOCAVA voters to cast an in-person UOCAVA ballot for the three days before the election," they contended that the disparate treatment is consistent with the Equal Protection Clause because "UOCAVA voters and non-UOCAVA voters are not similarly situated." Defendants further argued that local boards of elections need those three days to prepare for Election Day and their ability to do so would be impaired by a large volume of non-UOCAVA in-person early voters. R.9, PAGEID#205-206 (Defs' Mem. in Opp.).

Several Ohio counties broke ranks with the State and supported Plaintiffs' motion. Cuyahoga County filed a brief as *amicus curiae* advocating the need for

early voting during the final three days preceding the election. R.38, PAGEID#1432-1440 (Cuyahoga County Brief). As Cuyahoga County explained, such voting defrays costs to the County by absorbing a volume of voting that would occur on Election Day and that would strain Election Day machinery and systems. The County explained that the cancellation of early voting during the final three days preceding the election raised the "risk of voting problems on Election Day" that would "interfere[] with th[e] fundamental right" to vote. R.38, PAGEID#1438 (Cuyahoga County Brief).

Moreover, the record in the case includes the Master Plan used by Franklin County to prepare for the election, and it, too, refutes the State's argument that in-person early voting by non-UOCACA voters would impede the ability of local boards of elections to complete the many required tasks to prepare for Election Day. R.57-2, PAGEID#1658 (Franklin County Letter). It shows that the vast majority of the tasks that the Board has to perform are, in fact, completed by the weekend before the election. R.42-4, PAGEID#1508-1511 (Franklin County Calendar). Still another county issued a public statement supporting the restoration of in-person early voting in the last three days prior to the election for all voters. *See, e.g.*, R.57-1, PAGEID#1657 (Mahoning County Press Release).

On August 15, 2012, the district court conducted a hearing on Plaintiffs' motion. Following the hearing, Defendant Husted issued a directive setting

"uniform business hours" for all Ohio Election Boards during the early voting period up to the last three days prior to Election Day; that uniform schedule eliminated all weekend hours during that time period, including for UOCAVA voters. R.40-1, PAGEID#1480-1481 (Directive 2012-35). In so doing, Defendant Husted stated that he had decided to "level the playing field on voting days and hours during the absentee period in order to ensure that the Presidential Election in Ohio will be uniform, accessible for all, fair and secure." *Id.*

That directive did not instruct election boards to be open the weekend prior to Election Day for UOCAVA voters, however. At the August 15 hearing, Defendants took the position (for the first time) that local election boards have discretion to determine the extent of ballot access for UOCAVA voters during the three days leading up to Election Day. R.43, PAGEID#1672 (Tr.). Defendants subsequently reiterated that position, stating in a supplemental memorandum filed with the district court that, "[w]hether to be open those three days for in-person absentee voting by UOCAVA voters remains in the discretion of the individual county boards of election . . . [unless] the Secretary exercises his authority to issue a future directive." R.44, PAGEID#1575 (Defs' Resp. to Pls' Supp. Mem.). No such directive has been issued.

The district court granted Plaintiffs' motion. The court found that the challenged law, as interpreted by the Secretary of State, burdened the right to vote

without sufficient justification. In short, the State had, by "arbitrary and disparate treatment, value[d] one person's vote over that of another." R.48, PAGEID#1620 (Opinion). Moreover, the Court specifically found that the justifications offered *post hoc* by the State could not be credited in light of the record evidence that a) the State had not acted at any time to secure the alleged interests of military voters, whose access to the polling place was left to the discretion of each County Board; and b) the State had not accurately stated the ability of Counties to provide for early voting over this period while preparing for election day, both of which they did to general acclaim in 2008. Accordingly, the district court enjoined the operation of § 3509.03 to the extent it created a different deadline for non-UOCAVA voters, and restored early voting for such voters at open polling places during the three days preceding Election Day. R.48, PAGEID#1621-1622 (Opinion).

The Secretary of State responded with a directive prohibiting county boards of election from establishing any business hours in the three days prior to Election Day. R.50-1, PAGEID#1628 (Directive 2012-40). That directive, however, was rescinded after Plaintiffs sought additional relief from the district court. R.50, PAGEID#1625-1627 (Pls' Emergency Motion to Enforce Judgment). Defendants' subsequent motion to stay the district court's order pending appeal was denied. R.60, PAGEID#1665-1670 (Order Denying Motion for Stay).

SUMMARY OF ARGUMENT

The district court properly granted Plaintiffs' motion for preliminary injunction. Its order should be affirmed.

The Equal Protection Clause prohibits states from providing differential access to the ballot box on arbitrary terms. Even when states adopt evenhanded rules of election administration, courts will assess the states' precise and actual justifications if those neutral rules burden voters differently. Where, as here, the challenged restrictions are *not* evenhanded, the Equal Protection Clause manifestly requires an actual, legitimate justification for that differential treatment. The State cannot satisfy its showing merely by articulating any conceivable, post-enactment justification developed in the course of litigation. In protecting the integrity of the franchise more is required.

The restrictions at issue here curtail access to the ballot on disparate and wholly arbitrary terms. As the district court correctly found, the State lacks *any* actual, credible justification for the discriminatory rules that it adopted—and its *post hoc* rationalizations are belied by the State's own conduct.

The two-tier system the State adopted was a result of arbitrary happenstance. It emerged because of a harried legislative effort to preempt a public referendum on earlier legislation that restricted voting rights, including by eliminating the last three days of in-person early voting for all voters; at no point did the General

Assembly enact legislation that intentionally treated UOCAVA and non-UOCAVA voters differently. The attempts of the State's attorneys, during this litigation, to create a post-enactment rationalization for the State's wholly arbitrary restrictions on the franchise are unavailing.

The State first contends that its policy furthers the needs of election administration. But in addition to being based on evidence entirely overstated by the State, any such burdens of holding an election do not provide a justification for arbitrary disparate treatment of voters. The State further contends that military voters are entitled to a special accommodation. But its law provides no such accommodation to military voters; it accords special treatment to the broader group of UOCAVA voters, which includes civilians. The State has offered no credible explanation for why this broader group, including expatriates, requires preferential access to early *in-person* voting in the three days preceding the election.

In any event, as the district court properly found, the policy for UOCAVA voters merely provides local discretion to offer early-voting opportunities during the final three days preceding Election Day; as such, the disparate treatment between UOCAVA and non-UOCAVA voters cannot be justified on the basis of the need to provide ballot access for military voters facing sudden deployment. Finally, the State does not answer why any of its supplied justifications warrant

providing less ballot access to other eligible voters who may experience similar obstacles to Election Day voting.

The fact that this case involves early voting does not change the legal analysis. In effect, Defendants insist that only Election Day voting is entitled to protection under the Equal Protection Clause. But, in safeguarding the right to vote, the Equal Protection Clause is not so limited. Ohio introduced in-person early voting to protect the fundamental right to vote, which had been compromised in the State when in-person voting was limited to Election Day. Ohio's decision to expand Election Day to a 35-day period means that the 35-day election period for in-person voting is subject to the demands of equal protection.

The district court correctly concluded that equitable considerations further support preliminary injunctive relief. Burdens on the right to vote necessarily inflict irreparable injury, and the State has no interest in sustaining an unconstitutional policy. It is always in the public interest to prevent violations of constitutional rights.

Finally, the district court's remedy was appropriately tailored to the equal-protection violation that it identified. The district court restored the *status quo ante*—placing voters on equal footing during the three days preceding Election Day. Although the Court anticipated that the Secretary of State would issue uniform hours given his prior statements as to the importance of such uniformity,

the district court did not mandate a particular schedule for local election offices during that period.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

"[A] trial court's decision to grant a preliminary injunction is accorded great deference." *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004); *accord Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 (6th Cir. 1999). This Court will "disturb such a decision only if the district court 'relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.'" *Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir. 1994) (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir. 1991)). A factual finding is "'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION.

On October 2, 2012, 35 days before Election Day, polling places will open across Ohio for all voters.[7] But on the final three days before Election Day, those polling places will close for some—but not all—voters. That selective access to voting resulted from no rational decision-making and has no rational justification, let alone an actual, legitimate justification. Rather, it is the consequence of a muddled legislative record marked by incoherence and confusion.

The Equal Protection Clause prohibits Ohio from denying equal access to the ballot to one group of voters on arbitrary terms. In light of Ohio's troubled history of election administration, the State has made the decision to expand the period in which voters may cast their ballots. Having done so, the State cannot arbitrarily exclude some voters, but not others, from the polling place on any day during the voting period. *See Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011).

In the absence of any legitimate basis on which to distinguish among voters who happen to be in Ohio on the days leading up to Election Day, the district court

[7] Indeed, as discussed *infra*, the Ohio Supreme Court has explained that as a matter of state law, the in-person casting of absentee ballots constitutes part of the general election, even though some of it may occur before Election Day. *State ex rel. Stokes v. Brunner*, 898 N.E.2d 23, 28 (Ohio 2008) (per curiam).

concluded that Plaintiffs are likely to succeed on the merits of their equal-protection challenge to Ohio's two-deadline system and that the equities favor equal access to the ballot. Accordingly, and with all parties concurring that UOCAVA voters can and should be able to vote over this three-day period, the district court entered a preliminary injunction preventing Ohio from maintaining separate rules for similar voters. In so doing, the district court properly exercised its discretion, and its order should be affirmed.

A. Plaintiffs Are Likely to Succeed on the Merits of their Claim that Ohio's Restriction of Early In-Person Voting on Unequal Terms and Without Justification Violates the Equal Protection Clause.

1. Because the State has restricted access to the ballot on unequal terms, the Equal Protection Clause requires an actual, legitimate justification.

The right to vote is fundamental. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is "preservative of all rights"). It "'rank[s] among our most precious freedoms,'" *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)), for "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

As this Court has recently reaffirmed, "'[t]he right to vote is protected in more than the initial allocation of the franchise.'" *League of Women Voters*, 548 F.3d at 477 (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000)). "'Equal protection

applies as well to the manner of its exercise.'" *Id.* Every "citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665-70 (1966).

Accordingly, where the State provides access to the ballot on unequal terms, the "discriminatory treatment must be justifiable." *Hunter*, 635 F.3d at 238 n.16; *League of Women Voters*, 548 F.3d at 477 ("At a minimum, the [Supreme] Court [has] held, equal protection requires 'nonarbitrary treatment of voters.'") (quoting *Bush*, 531 U.S. at 105). Indeed, any "*unanticipated* inequality is especially arbitrary." *Hunter*, 635 F.3d at 238 n.16. (emphasis in original).[8]

Even where the challenged rule is an "'evenhanded restriction'" aimed at "protect[ing] the integrity and reliability of the electoral process itself," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-90 (2008) (plurality op.) (quoting

[8] Defendants' attempt to evade the law of this Circuit (Appellants' Opening Brief ("AOB") at 39-40) is unavailing. Defendants contend that *League of Women Voters*, 548 F.3d 463, is distinguishable because that case concerned allegations that the electoral system disenfranchised voters. AOB at 40. Defendants ignore the district court's well-supported factual finding that the restrictions here at issue also impede access to the ballot. As detailed at (AOB at 41), the district court was well within its discretion to conclude that "thousands of voters who would have voted during th[e] three days [preceding Election Day] will not be able to exercise their right to cast a vote in person" so that "the injury to Plaintiffs is significant." R.48, PAGEID#1615 (Opinion). Defendants' attempt to limit *Hunter* to vote counting is similarly misguided. The wholly arbitrary differential treatment of similarly situated *voters* is no more tolerable than the differential treatment of their *votes*.

Anderson 460 U.S. at 788, n.9), where that neutral rule burdens voters differently, courts assess the "'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 789). However slight the burden on voters, "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Where, as here, the challenged restriction is *not* evenhanded, that disparate treatment itself warrants credible, actual justification by the State. *See, e.g., Harper*, 383 U.S. at 667-70.[9] Put differently, the unprecedented decision of the State to turn some voters and not others away from an open polling place itself constitutes a serious burden to the exercise of the franchise. R.48, PAGEID# 1615 (Opinion); *see League of Women Voters*, 548 F.3d at 476 (emphasizing the "'equal weight accorded to each vote and the equal dignity owed to each voter'") (quoting *Bush*, 531 U.S. at 104). "Having once granted the right to vote on equal terms, the State may not, by later *arbitrary and disparate* treatment, value one person's vote over that of another." *Hunter*, 635 F.3d at 234 (quoting *Bush*, 531 U.S. at 104-05) (emphasis added)). Accordingly, the restriction at issue cannot be sustained absent

[9] *See also Crawford*, 553 U.S. at 205 (Scalia, J., concurring in judgment) (distinguishing between "nonsevere, nondiscriminatory" restrictions on voting to which lesser review applies, and those requiring more stringent scrutiny).

relevant, legitimate justification. *See Crawford*, 553 U.S. at 189-90; *Burdick*, 504 U.S. at 434.

The State cannot meet this burden merely by articulating any conceivable, post-enactment justification developed by its lawyers in the course of litigation. Indeed, the Supreme Court has *never* upheld a restriction on the right to vote or on differential access to the ballot on the basis of *post hoc* rationalizations alone. The reason for this is apparent: in regulating elections, the State "is not a wholly independent or neutral arbiter … [but] is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). For this reason, while the State has considerable discretion in designing its elections, where it allocates access to the ballot on unequal terms, there is "cause for concern that those in power may be using electoral rules to erect barriers to electoral competition." *Id.* In those cases, heightened scrutiny ensures that restrictions on the vote "are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Id.*

2. The district court correctly found that the State lacks a sufficient justification for its curtailment of the franchise on unequal terms.

As the district court found, the State lacks any actual, credible justification for the discriminatory rules it adopted. Moreover, not only are its *post hoc* rationalizations insufficient as a matter of law; they are both unavailing and belied by the State's own actions.

a. The State lacks an actual, credible justification for the disparate treatment at issue in this case.

When evaluating whether a sufficient justification exists, courts must assess the particular circumstances that gave rise to the disparate treatment, for "the problem of equal protection in election processes generally presents many complexities." *Bush*, 531 U.S.at 109; *see also Hunter*, 635 F.3d at 234. Defendants fail to offer any actual, credible justification for the series of missteps that resulted in the disparate treatment challenged in this case. That is unsurprising. The convoluted process that generated the disparity demonstrates that the Legislature had no noble purpose of accommodating military voters—or expatriates. To the contrary, under even the most cursory examination, it is abundantly clear that the disparate treatment at issue in this case arose from a confused series of legislative maneuvers the results of which were, at best, accidental. The Legislature never adopted an accommodation for UOCAVA voters—it adopted conflicting deadlines for UOCAVA voters (pursuant to Ohio

Rev. Code §§ 3511.02 and 3511.10), that were resolved by the Secretary of State in favor of the longer deadline, thereby creating a disparity among voters.

It would be difficult to develop a coherent theory of the Legislature's conduct that does not qualify as "arbitrary," and Defendants do not even try. But voting rules deserve better, and the State's litigation reliance on happenstance manifestly fails under the law of this Circuit. *See Hunter*, 635 F.3d at 238 n.16 ("discriminatory treatment must be justifiable, *see Crawford*, 553 U.S. at 189-90, and *unanticipated* inequality is especially arbitrary").

Defendants' counsel have offered two *post hoc* rationalizations for the Legislature's conduct: the need for local officials to prepare for the general election and the appropriateness of accommodating military voters. Neither explanation supplies "a plausible policy reason" for offering conflicting deadlines for UOCAVA voters. *See Nordlinger v. Hahn*, 505 U.S. 1, 12, 14-16 (1992). Rather, as the district court found, the *post hoc* rationalizations offered by the State's lawyers are simply not credible. Indeed, the State's *post hoc* rationalizations are belied by the State's own conduct.[10]

[10] In *Nordlinger*, the Supreme Court held that a state statute can survive an equal protection challenge only if there is a legitimate state interest that "may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." 505 U.S. at 15 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959)) (emphasis added). Thus, justifications supplied by the State's lawyers cannot retroactively cure the Legislature's equal protection violation if the lawyers' justification is manifestly inconsistent with the

b. Defendants' post hoc *arguments about election administration are wholly unsupported by the record and implausible; election administration concerns actually undermine Defendants' position.*

Defendants contend that it is rational to distinguish between UOCAVA and non-UOCAVA voters for the three days preceding an election because "[e]ach county board of elections is extremely busy during that period." AOB at 33. But the district court correctly found that "Defendants offer little in support of their claim that Ohio elections boards cannot simultaneously accommodate in-person early voting and pre-Election Day preparations during the three days prior to Election Day." *See* R.48, PAGEID#1616 (Opinion). To the contrary, Cuyahoga County, Ohio's most populous County, submitted an *amicus curiae* brief that demonstrated not only that it had the budget to accommodate early in-person voting by all voters, but that election administration in that County would be *improved* if all voters had the opportunity to vote early in-person in the three days prior to Election Day, because it would ease congestion on Election Day itself. R.38, PAGEID#1438 (Cuyahoga County Brief). Similarly, Franklin County's written plan for election preparation demonstrates that the vast majority of pre-election administration tasks would be completed prior to the weekend before

---

Legislature's conduct in enacting the statute. *See also Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080 (2012) (holding that rational-basis review is satisfied only if the justification supplied is "'within the knowledge and experience of the legislators'") (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938)).

Election Day. *See* R.57-2, PAGEID#1658 (Franklin County Letter). Yet another county similarly expressed public support for expanding in-person early voting to all eligible Ohio voters. *See, e.g.*, R.57-1, PAGEID#1657 (Mahoning County Press Release).

Moreover, Ohio successfully administered early voting in more than eleven elections since 2006, including the 2008 Presidential and 2010 Gubernatorial elections. The State submitted no evidence demonstrating a change in circumstances or an increase in board duties that has suddenly made in-person early voting too much of a burden to administer. Indeed, in the Secretary's Directive 2012-40, he stated: "I am confident there will be sufficient time after the conclusion of the appeal process to set uniform hours across the State [for voting during the final three days before the election]." R.50-1, PAGEID#1628 (Directive 2012-40). This directive directly contradicts the State's argument that there is insufficient time to prepare.

In any event, Defendants' purported justification, even if it were true, cannot justify arbitrarily giving some voters the ability to vote early and not others. By that logic, an appeal to administrative difficulties would authorize a rule under which only registered Libertarians could vote early (because Democrats and Republicans might overwhelm the system). *Cf. Bush*, 531 U.S. at 104–05.

The actual rules prescribed by the Secretary of State demonstrate that administrative necessity is not a plausible explanation for the State's disparate treatment of voters. In the final three days, no non-UOCAVA voter is permitted to vote under any circumstances, but a local elections board has the authority to permit UOCAVA voting on any schedule of its choosing. The possibility of administrative complications surely does not warrant local discretion that is limited to UOCAVA voters; if a local elections board deems itself prepared to handle all voters in the lead-up to Election Day, then there is no rational reason why it should be permitted only to allow UOCAVA voters to vote.[11] Indeed, as noted, election administration concerns cut the opposite direction: As the historical and evidentiary record shows, early voting has vastly improved the administration of elections in the State of Ohio. *See* LAWRENCE NORDEN, BRENNAN CENTER FOR JUSTICE, FINAL REPORT: 2008-2009 OHIO ELECTION SUMMIT AND CONFERENCE (2009).

[11] As noted above, the district court credited Cuyahoga County's assertion that it "has a great interest in providing in-person early voting to its constituents the weekend before Election Day" and faces no additional administrative burdens. R.48, PAGEID#1616-1617 (Opinion).

c. Defendants' post hoc *arguments about accommodating military voters are unavailing because the disparate treatment does not actually advance the asserted goal, nor is it relevant to actual differences among the classes of voters at issue; for purposes of in-person voting, the voters at issue are similarly situated.*

In the alternative, Defendants insist that military voters are entitled to special accommodations in light of their unique circumstances, "including the possibility of a sudden and unexpected deployment, which would be mitigated by the availability of early in-person absentee voting." AOB at 33-34. The general goal of protecting military voting remains both important and laudable and all parties support military voting over this period, but the district court properly found that the State could not rationally have been animated by that interest in this case.

There are three principal problems with Defendants' "unexpected deployment" theory, which, taken together, eviscerate any claim of sufficient justification for the law. *First*, the special treatment accorded by the state law is not limited to military voters: it includes the spouses and voting age dependents of military personnel, along with overseas voters. As such, a Luxembourger expatriate with an Ohio voting address is also entitled to preferential treatment under Ohio law. Because the "unexpected deployment" theory plainly does not apply to the Luxembourger expatriate, that theory could not have motivated the Ohio Legislature in creating this scheme, nor can it justify the scheme *post hoc*. In contrast, other states have provided for extensions of time for military personnel on

the basis of actual deployments that will prevent them from being present in their home county. *See* R.34-37, PAGEID#1091-1093 (Wendel Memo.).

Second, the disparate treatment provided to UOCAVA voters does not guarantee any particular voting hours. As the district court recognized:

> [T]he 'statutory scheme' described by Defendants does *not* guarantee UOCAVA voters will be able to vote in the last three days prior to Election Day—even those suddenly deployed. Why? Because the Secretary of State's Directive, which carefully sets forth non-UOCAVA in-person voting times, permits local election boards to determine their hours for the last weekend before Election Day.

R.48, PAGEID#1618 (Opinion). Thus, the notion that "the military *requires* this extra voting opportunity . . . is completely eviscerated" because the State has not guaranteed ballot access; it has merely created an arbitrary system in which local officials have discretion to grant ballot access to UOCAVA voters but not to anybody else. *Id*.

Third, the Defendants' *post hoc* rationalization of disparate treatment fails because the classes of voters at issue are, with respect to in-person early voting, similarly situated. That is, assuming, *arguendo*, that Ohio had intentionally granted an accommodation only to military voters that actually guaranteed them expanded in-person voting times, that would only beg the question of why other in-state voters similarly at risk of unexpected emergencies are not entitled to similar treatment. As Ohio's largest county explained, "[t]here is no downside to

permitting Ohio's veterans, firefighters, police officers, nurses, parents of young children, owners of small businesses … and other citizens to exercise their fundamental constitutional right to vote during the three days before the election." R.38, PAGEID#1438 (Cuyahoga County Brief). The State cannot answer why the line it advocates would pass constitutional muster.[12]

Defendants argue that "[t]his Court need go no further to decide the appeal" than to acknowledge that military and overseas voters are different from other voters. AOB at 29. But there are differences between any groups of voters. Urban voters and rural voters are different. Working voters and unemployed voters are different. Landowning voters and voters with rental apartments are different. But those differences do not warrant entirely different regulatory schemes for these competing groups. Rather, when assessing government action under the Equal

[12] In any event, Defendants are wrong to suggest that there can be an equal protection violation only if similarly situated persons are treated differently. *See* AOB at 26-27. In the context of ballot access, the Supreme Court has held otherwise. In *Harper*, for example, the Court invalidated a $1.50 poll tax on the ground that it burdened voters who could not afford to pay that sum—even though that group was not similarly situated to voters who could afford to pay the poll tax. As a general matter, where the law imposes a burden, even on a discrete class of voters, "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands" as to whether the justification is sufficient. *Crawford*, 553 U.S. at 190 (quoting *Anderson*, 460 U.S. at 790). Thus, although this case involves disparate treatment of voters who are *not* materially different, scrutiny would still be warranted if the voters were materially different.

Protection Clause, "[c]ontext matters." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

The question is not whether UOCAVA voters are different *at all*; it is whether they are different in a way that matters to the regulation at issue. In this case, the relevant context involves in-person voting in the three days preceding an election. As between expatriates who formerly resided in Ohio and civilian Ohioans still resident in the State, Defendants offer no explanation for why UOCAVA voters are materially different. While it is true that overseas voters may face greater uncertainty or delay with mail, the perils of foreign mail systems are obviously irrelevant for voters who would appear at the ballot in-person. And any voter—a parent, a policeman, a laborer, or a lieutenant—is susceptible to a last-minute emergency that would make an anticipated trip to the polls on Election Day impossible.[13]

The classes of voters at issue in this case are surely not so different—as far as early voting during the final three days is concerned—to warrant a free pass on

[13] No other jurisdiction in the country has found it necessary to distinguish between military and non-military voters in establishing in-person, early voting programs. *See* R.34-37, PAGEID#1091-1093 (Wendel Memo.). In fact, in the seventy years since the United States Congress first recognized the need to focus on the difficulties facing military voters, no one has ever proposed a program similar to the one in Ohio.

constitutional scrutiny, when the fairness of an election and equal access to the ballot box are directly at issue.[14]

On Defendants' preferred standard, any curtailment of the right to vote would be permissible so long as it does not target a suspect class and, presumably, so long as it leaves Election Day itself intact. Under that standard, legislatures could engage in wide-ranging arbitrary and disparate treatment of eligible voters without contravening the Constitution. So a legislature could provide a lengthy early voting period for rural voters, but permit urban voters to cast their ballots only on Election Day; or could permit schoolteachers to vote only on certain days, and police officers only on others. *Cf. Harper*, 383 U.S. at 667 ("neither homesite nor occupation 'affords a permissible basis for distinguishing between qualified voters within the State'" (discussing *Gray v. Sanders*, 372 U.S. 368, 380 (1966)); *Carrington v. Rash*, 380 U.S. 89 (1965) (voting prohibition on member of the armed forces violated Equal Protection Clause).

Moreover, it is not clear why Defendants' logic would stop at Election Day; presumably, so long as some hours remained available on Election Day itself, Defendants' rule would permit the curtailment of hours even on Election Day. On

[14] The district court's factual findings provide independent support for the conclusion that Ohio's law is not evenhanded. As the court recognized, Ohio's law targets a group representing "a large percentage of those who voted in person in the last three days before Election Day" in past elections. Thus, the notion that non-UOCAVA voters do not require equal access to the polls during those crucial days has been factually disproven.

that approach, a State could permit only certain voters to cast ballots between 6 p.m. and 8 p.m., based on purported occupational considerations, turning away all other eligible voters who attempted to exercise their franchise during those hours. The Equal Protection Clause, with its special solicitude for the right to vote, cannot be read to permit such a result.

3. Ohio's disparate treatment of early voters is not subject to reduced scrutiny, but in any event the statute fails under even the most lax review.

Defendants elsewhere contend that, even if Ohio is engaging in "disparate treatment of similarly situated people," its revocation of early voting for some—but not all—voters is still subject only to the most deferential form of rational-basis review because this case does not involve a "fundamental right." AOB at 29-30. For that proposition, Defendants rely on the Supreme Court's decision in *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). As detailed below, that reliance is misguided. Defendants also attempt to evade scrutiny by suggesting that disparate treatment somehow warrants *lesser* scrutiny than an evenhanded rule that has a disparate impact. That unfounded assertion also cannot save the statute. In any event, the law cannot survive even the most deferential of review.

a. McDonald does not control.

In *McDonald*, the Court considered whether Illinois was required to provide absentee ballots by mail to unsentenced inmates who were incarcerated awaiting trial. The Court found "nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." *Id.* at 807. Moreover, there was nothing in the absentee statutes, which were "designed to make voting more available," that denied voting rights to the plaintiff-inmates. *Id.* And the Court found that Illinois was permitted to address access to the polls on a piecemeal basis, solving one problem at a time. *Id.* at 809. Accordingly, the Court held that Illinois' system of absentee ballots was subject only to rational-basis review, which it satisfied. *Id.*

On every score, this case is materially different from *McDonald*. *First*, this case involves a procedure that is central to the franchise in Ohio. The Ohio system of early voting was developed in the aftermath of the chaotic 2004 election, which revealed substantial deprivations of the right to vote. Early voting was adopted as a prophylactic measure to ensure that Ohio voters would not face the franchise-imperiling delays and malfunctions that had plagued past elections. In-person early voting was a distinct component of these reforms that was considered separate from extensions of traditional absentee voting by mail. 74 Ohio Report No. 36, Gongwer News Service, Inc. (Feb. 23, 2005).

From the standpoint of the voter, in-person early voting is functionally identical to Election Day voting.[15] Voters go to a designated polling location and cast a ballot on the spot. Indeed, all the requirements and prohibitions under Ohio law that apply to polling places apply equally to in-person voting at the county board of elections office or alternative polling location. Ohio Secretary of State, Election Official Manual for Ohio County Boards of Election (2010), available at http://www.sos.state.oh.us/SOS/Upload/elections/EOresources/general/2010EOM_Final.pdf. ("On any day on which an elector may vote in-person at the office of the board or at another site designated by the board, consider the board or other designated site a polling place for that day. All requirements or prohibitions of law that apply to a polling place shall apply to the office of the board or other designated site on that day.") (citing Ohio Rev. Code § 3501.11 (2012)).

And the centrality of early voting in Ohio is corroborated by its usage statistics. In 2008, 25.2 percent of Ohio voters—more than 1.4 million—cast their votes before Election Day; approximately 100,000 voted early in-person in the last three days.[16] Thus, whereas Illinois' provision of absentee ballots in narrow

[15] *See* Paul Gronke and Eva Galanes-Rosenbaum, "The Growth of Early and Nonprecinct Place Balloting: When, Why, and Prospects for the Future," *in* America Votes: A Guide to Modern Election Law and Voting Rights 266 (Benjamin E. Griffith, ed., 2008) ("Other than being able to cast a ballot early and the necessity of going to a less convenient polling place, the mechanics of most in-person early voting systems are identical to precinct place voting.").

[16] *See* http://elections.gmu.edu/Early_Voting_2008_Final.html.

circumstances in 1967 was viewed as a courtesy that was ancillary to the right to vote itself, the same cannot be said of in-person early voting in Ohio in 2012. There is no longer any meaningful distinction between in-person early voting—which, by the determination of the Ohio Legislature, is available to all registered voters—and Election Day voting.

Indeed, the Ohio Supreme Court has affirmed, in the context of election observers, that "[t]he general election encompasses the in-person casting of absentee ballots for the election, which is manifestly part of the general election, even though some of it may occur before November 4." *State ex rel. Stokes,* 898 N.E.2d at 28. Similarly, the Ohio Legislature viewed the State's in-person early voting law as "expanding Election Day by a 35-day window." Ghose, *supra* at 6 (quoting Republican Senator Gary Cates, sponsor of H.B. 234).

In assessing the scope of *McDonald*, it is essential to take heed of the electoral context. Although Defendants go to great lengths to stress that early voting in Ohio can technically be called "absentee," *see* AOB at 40–41, that formality must give way to the substance of Ohio's system. Voting processes vary widely across the United States. Two States—Oregon and Washington—have gone so far as to do away with polling sites altogether.[17] If a State may conduct its

[17] Oregon and Washington conduct their elections exclusively by mail. *See* Ballot Measure 60 Results, *available at* http://oregonvotes.org/pages/history/

elections *entirely* by "absentee" voting, and absentee voting is subject to weaker constitutional protections, then partisan or other efforts to craft rules that manipulate election results will lack the scrutiny required to preserve the integrity of the electoral process.

Second, record evidence and factual findings from the district court support the conclusion that the cancellation of early voting for certain voters in Ohio will have an "impact" on voters' "ability to exercise the fundamental right to vote." *McDonald*, 394 U.S. at 807. *Cf. O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) ("[T]he Court's disposition of the claims in *McDonald* rested on failure of proof."). In light of its "history of long lines and Election Day confusion and break downs," R.3-12, PAGEID#122 (Marshall Legis. Test.), Ohio's experience with early voting has effectively extended the franchise to "voters that have real difficulty getting to the polls on Election Day due to job or family commitments or transportation problems." *Id.* Closing the polling station to those voters during the lead-up to the election—when many voters will be deciding whom to support—necessarily deprives a subset of the electorate of a meaningful opportunity to participate in the democratic process. Moreover, that burden is felt disproportionately across society. Early voters have historically included higher proportions of women, the

---

archive/nov31998/other.info/m60.htm; http://blogs.sos.wa.gov/FromOurCorner/index.php/2011/04/wa-now-all-vote-by-mail/.

elderly, and those with lower levels of income and education. R.3-3, PAGEID#88-89 (Data Compiled by Norman Robbins).

In light of that evidence, the district court found that "thousands of voters who would have voted during th[e] three days [preceding Election Day] will not be able to exercise their right to cast a vote in person" and that "the injury to Plaintiffs is significant." R.48, PAGEID#1615 (Opinion). Those findings are entitled to deference.

Third, whereas the Supreme Court in *McDonald* understood the burden in that case to emerge from the fact of the inmates' incarceration, rather than some legislative objective to target those voters, the burden in this case arises directly from the early voting statutes. Thus, in *McDonald*, any voting-rights burden on the inmates was incidental—and concerns about partisan or other improper tinkering with the electoral process were less pronounced. But this is a case in which a State has taken affirmative steps to burden one subclass of the electorate.

In such a circumstance, greater scrutiny must apply.[18] Otherwise, courts will be powerless to confront legislation that "'invade[s] or restrain[s]'" the "'voting

[18] The Supreme Court has recognized the limitations of *McDonald* in subsequent cases. In *Goosby v. Osser*, 409 U.S. 512 (1973), the Court considered whether inmates imprisoned in Philadelphia County, Pennsylvania, had raised a substantial equal protection challenge to their denial of absentee ballots. Unlike the Illinois policy at issue in *McDonald*, *Goosby* involved a "specific provision affirmatively exclud[ing] 'persons confined in a penal institution' from voting by absentee ballot." 409 U.S. at 521. In light of that distinction, the Court held that

rights'" of a subset of the population. *McDonald*, 394 U.S. at 807 (quoting *Harper*, 383 U.S. at 670). Under Defendants' view, a partisan legislature could take any number of actions with impunity—say, mailing absentee ballots to all union households and to nobody else, because union members are likelier to hold jobs that make it more difficult to make it to the polls; or permitting early voting only in rural counties, because the average voter in a rural county is farther from the polling place.

In sum, in light of the Constitution's special concern with protecting the "right to participate in elections on an equal basis with other citizens," *Dunn*, 405 U.S. at 336, the courts must have the tools to ferret out manipulation in the electoral process when a legislature's regulation of electoral matters is not even-handed. Thus, Defendants' assertion that "[n]o form of early in-person voting—whether via absentee ballot or otherwise—grants a fundamental right" (AOB at 41) surely proves too much.

b. Disparate treatment does not warrant lesser scrutiny than disparate impact.

In a last-ditch effort to distract from the incontrovertible conclusion that the challenged law is unconstitutional, Defendants suggest that cases of disparate

---

"*McDonald* d[id] not 'foreclose the subject' of petitioners' challenge" to the Pennsylvania law. *Id.* at 522. Accordingly, *McDonald* should not be read to foreclose challenges to laws that affirmatively discriminate among would-be absentee voters.

treatment are somehow subject to *less* exacting scrutiny than evenhanded rules of election administration. *See* AOB at 43-44.

Defendants' logic would turn longstanding Supreme Court precedent on its head. The Constitution is concerned with equal access to the ballot. *See, e.g.*, *Dunn*, 405 U.S. at 336; *Harper*, 383 U.S. at 665-70. Accordingly, even a genuinely *neutral* time, place, and manner restriction of election administration may not have discriminatory effects on voters absent sufficient justification from the State. For this reason, the court will assess whether an evenhanded rule in fact burdens voters differently. *See Crawford*, 553 U.S. at 189-90; *Burdick*, 504 U.S. at 434. Where the provision is itself discriminatory, the need for heightened scrutiny is manifest from the terms of the statute.

Defendants' suggestion to the contrary is not only contradicted by Supreme Court and Sixth Circuit precedent in voting cases, *see, e.g., Harper*, 383 U.S. at 665-70; *League of Women Voters*, 548 F.3d at 476-77; *Hunter,* 635 F.3d at 234, n. 13, it is also inconsistent with the entire thrust of constitutional doctrine.[19]

Defendants' only support for their bold claim is the decision of the Third Circuit in *Biener v. Calio*, 361 F.3d 206 (3d Cir. 2004). That case, however, is entirely inapposite. In *Biener*, the Third Circuit held that the right to vote is not

[19] In the First Amendment context, for example, courts afford *less* exacting scrutiny to evenhanded time, place, and manner restrictions than to content-based restrictions on speech, which are constitutionally suspect. *See, e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

implicated when a potential candidate chooses not to run for office because he is unwilling, but not unable, to comply with reasonable state requirements. Having so concluded, the Third Circuit applied rational-basis review to the plaintiff's challenge of that requirement. *Biener* thus says nothing about the constitutionality of voting regulations that facially discriminate between classes of voters.

c. The voting restrictions at issue do not survive under any standard of constitutional review.

Even if *McDonald* supplied the governing standard, or even if disparate treatment cases were subject to the most lax standard of review, Ohio's system could not survive. For the reasons the district court explained, it "is wholly arbitrary" and therefore unconstitutional. *O'Brien*, 414 U.S. at 530. As the district court properly found, *see supra* Part A.2, Ohio has asserted no legitimate governmental interest that justifies the particular disparity it has created in its system of early voting—and it has consistently exhibited conduct which is utterly at variance with the justification offered. Even if *post hoc* rationalizations developed in the course of litigation were sufficient, as detailed above, those post-enactment rationalizations fail on their own terms. *See supra*, at Part A.2.b-c. Accordingly, the law cannot survive even deferential rational-basis review.

B. The Equitable Factors Weigh in Favor of Plaintiffs.

Having found that Plaintiffs are likely to prevail on the merits of their constitutional claim, the district court correctly concluded the equitable factors of

the *Winter* standard favor entry of a preliminary injunction. Courts have consistently held that an abridgement or dilution of the right to vote constitutes irreparable harm. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 907 (9th Cir. 2003) ("Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury") (citation and internal quotation marks omitted); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (the denial of the fundamental right to vote is unquestionably "irreparable harm"); *Miller v. Blackwell*, 348 F. Supp. 2d 916, 922 (S.D. Ohio 2004) ("Because this Court has found that the Defendants' challenged actions threaten to impair both Plaintiffs' constitutional right to due process and constitutional right to vote, the Court must find that Plaintiffs will suffer an irreparable injury if the temporary restraining order does not issue.").

Defendants concede that a "denial of the right to vote is an irreparable injury," but they argue that voting rights are not really at issue in this case. AOB at 55. Not so. Plaintiffs adduced evidence—and the district court properly found—that the provision of early voting expands access to the franchise, such that the elimination of early voting necessarily impacts voters. Moreover, the arbitrary and discriminatory elimination of early voting seriously burdens the right to vote and skews the electoral process, which undermines the integrity of the elections and dilutes the value of Ohioans seeking to participate in a fair democracy.

Conversely, and in stark contrast to the severe and irreparable harm that Plaintiffs will face if the preliminary injunction is reversed, Defendants cannot show that they will suffer any significant harm if the preliminary injunction is affirmed. Thus, the balance of equities tips in favor of Plaintiffs. Once a plaintiff "shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001).

Finally, "it is always in the public interest to prevent violation of a party's constitutional rights." *Id.* (citation omitted). In particular, the public interest is served by ensuring that elections proceed in a manner that complies with constitutional requirements and that allows every individual who wants to vote the right and ability to do so. *See Hunter*, 635 F.3d at 244 (finding that "[m]embers of the public…have a strong interest in exercising the fundamental political right to vote" and that "[t]hat interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful") (internal quotation marks and citations omitted). In contrast, making it more difficult for people to vote serves no public interest.

II. THE SCOPE OF THE DISTRICT COURT'S INJUNCTION IS APPROPRIATE.

Defendants separately challenge the scope of the district court's remedy, on the theory that the district court implicitly found "that Ohio voters have a constitutional right to cast an in-person absentee ballot on the three days preceding Election Day." AOB at 58. But the district court made no such finding; and its injunction is properly tailored to the nature of the constitutional harm identified.

The district court's order explicitly restored the *status quo ante*—how the law operated prior to H.B. 194. In clear terms, the district court directed the Boards to *restore* to all voters the same opportunity to vote in-person over the weekend and on the Monday before the election that has been available to them since the State instituted early voting. R.48, PAGEID#1622 (Opinion) ("in-person early voting is restored on the three days immediately preceding Election Day for all eligible Ohio voters"). Consistent with that directive, and as in recent years, each Board should be able to determine how to provide for this opportunity.

Defendants object to their own suggestion that the district court require a particular schedule during the final three days preceding Election Day. But the district court did no such thing. Rather, the district court "anticipated" that the Secretary of State would, as he has consistently maintained that he must, issue a Directive to assure scheduling uniformity across the different Counties or adopt some uniform criteria to make these scheduling determinations. *Id.*; *see e.g.*, R.40-

1, PAGEID#1480-1481 (Directive 2012-35). There was no error in that observation.

CONCLUSION

The district court's order granting Plaintiffs' motion for preliminary injunction should be affirmed.

Dated: September 17, 2012

Respectfully submitted,

/s DONALD J. MCTIGUE

Donald J. McTigue
Trial Counsel
Mark A. McGinnis
J. Corey Colombo
McTigue & McGinnis LLC
545 East Town Street
Columbus, Ohio 43215
Tele: (614) 263-7000
Fax: (614) 263-7078
dmctigue@electionlawgroup.com

Attorneys for Plaintiffs-Appellees, Obama for America, et al.

Robert F. Bauer
Perkins Coie
700 Thirteenth Street, Suite 600
Washington DC 20005
Tele: (202) 434-1602
Fax: (202) 654-9104

General Counsel for Plaintiffs Obama for America and the Democratic National Committee

Jennifer Katzman
Obama for America
130 East Randolph
Chicago, IL 60601
Tele: (312) 985-1645

National Voter Protection Counsel for Plaintiff Obama for America

Will Crossley
Democratic National Committee
430 South Capitol Street, SE
Washington, DC 20003
Tele: (202) 863-8000

Chief Voter Protection Counsel
Democratic National Committee

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

XX this brief contains 10,955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

__this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

XX this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14 point Times New Roman font, or

__this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

(s) MARK A McGINNIS
Attorney for Plaintiffs-Appellees
Dated: September 17, 2012

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 17th day of September, 2012. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this through the Court's system.

/s/ MARK A. McGINNIS

Mark A. McGinnis, Attorney at Law

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R.	Description	PAGEID#
1	Complaint	1-21
2	Motion for Preliminary Injunction	22-53
3-3	Data Compiled by Norman Robbins at Northeast Voter Advocates, *Elections are About Voters, but Legislative Measure Under Consideration Ignores Voting Preferences*.	88-89
3-12	Testimony Submitted by Eric Marshall of Lawyers' Committee for Civil Rights Under Law re: HB 194 (May 10, 2011)	119-127
8-1	Intervenor Military Groups' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction	158-177
8-2	Intervenor Military Groups' Motion to Intervene	223-224
9	Defendants' Memorandum Contra Plaintiffs' Motion for Preliminary Injunction	198-216
12	Order Granting Military Groups' Motion to Intervene	223-224
19	Amicus Curiae Brief of the American Center for Law and Justice Opposing Plaintiffs' Motion for Preliminary Injunction and Supporting Defendant-Intervenors' Motion to Dismiss	238-251
20	Plaintiffs' Memorandum of Law in Further Support of Plaintiffs' Motion for a Preliminary Injunction and in Opposition to Intervenors' Motion to Dismiss	252-264
34-7	Secretary of State's Certification of Referendum on HB 194	677
34-11	Ohio Senate Journal (March 28, 2012)	921-923
34-12	Ohio House of Representatives Journal (May 8, 2012)	925-927
34-18	Secretary of State Advisory 2011-07 (Oct. 14, 2011)	993-995
34-21	Letter from Secretary Husted to the Director and Deputy Director of the Montgomery County Board of Elections (October 25, 2011)	1002-1004
34-22	Letter from Secretary Husted to the Director of the Darke County Board of Elections (October 27, 2011)	1005-1007
34-31	A Study of Early Voting in Ohio Elections, Ray C. Bliss Institute of Applies Politics	1030-1051
34-32	Norman Robbins Supplement	1052-1054
34-34	DANIEL BRILL, FRANKLIN COUNTY BOARD OF ELECTIONS, 2008 EARLY IN-PERSON VOTING (2012)	1066-1075
34-35	Norman Robbins and Mark Salling, *Racial and Ethnic Proportions of Early In-Person Voters in Cuyahoga County, General Election 2008 and Implications for 2012*	1076-1084

34-37	Memorandum from Emily E. Wendel, Staff Attorney, Ohio Legislative Serv. Comm'n on Early Voting Deadlines to Sarah Cherry, Legal Counsel, Minority Caucus of the Ohio House of Representatives (Aug. 1, 2012)	1091-1093
34-40	Testimony Submitted by Carrie Davis of League of Women Voters re: SB 295 (May 10, 2011)	1112-1114
35-1	Secretary of State Directive 2012-20	1125-1131
35-2	Secretary of State Directive 2012-24	1132-1136
35-3	Secretary of State Directive 2012-26	1137-1147
35-8	Declaration of Colonel Duncan A. Aukland	1395-1398
35-9	Declaration of Matthew M. Damschroder	1399-1402
35-10	Declaration of Robert H. Carey, Jr.	1403-1410
35-11	Declaration of Rear Admiral (Ret.) James J. Carey	1411-1418
35-12	Paul Gronke, Eva Galanes-Rosenbaum, Peter A. Miller, Early Voting and Turnout, PSOnline (Oct. 2007)	1419-1426
38	Amicus Brief of the County of Cuyahoga, Ohio in Support of Plaintiffs' Motion for Preliminary Injunction Concerning the Budgetary Implications of Granting Plaintiffs' Motion	1432-1440
40-1	Secretary of State Directive 2012-35	1480-1481
42	Plaintiffs' Supplemental Memorandum	1483-1488
42-4	Franklin County Board of Elections, Election Administration Plan: General Election 2012	1507-1511
42-5	Ohio House of Representatives Activity Report Volume 81, Report 158, Article 2 (Aug. 15, 2012)	1512-1515
43	Transcript of Proceedings of Oral Arguments on Preliminary Injunction Held on August 15, 2012.	1516-1573
44	Defendants' Response to Plaintiffs' Supplemental Memorandum	1574-1580
48	Opinion and Order on Preliminary Injunction	1600-1622
49	Notice of Appeal	1623-1624
50	Plaintiffs' Emergency Motion to Enforce Judgment	1625-1627
50-1	Secretary of State Directive 2012-40	1628
56	Order Vacating Hearing	1644-1646
57-1	Board of Mahoning County Commissioners Press Release (Sep. 5, 2012)	1657
57-2	Letter from Franklin County Board of Commissioners to Jon Husted, Secretary of State (Aug. 30, 2012)	1658
60	Order Denying Motion for Stay	1665-1670

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-4055 Case Name: OBAMA FOR AMERICA V. HUSTED

Name of counsel: DONALD J MCTIGUE, TRIAL COUNSEL

Pursuant to 6th Cir. R. 26.1, OHIO DEMOCRATIC PARTY
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NO

CERTIFICATE OF SERVICE

I certify that on SEPTEMBER 17, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ MARK A MCGINNIS

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-4055 Case Name: OBAMA FOR AMERICA V. HUSTED

Name of counsel: DONALD J MCTIGUE, TRIAL COUNSEL

Pursuant to 6th Cir. R. 26.1, OBAMA FOR AMERICA
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NO

CERTIFICATE OF SERVICE

I certify that on SEPTEMBER 17, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ MARK A MCGINNIS

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-4055 Case Name: OBAMA FOR AMERICA V. HUSTED

Name of counsel: DONALD J MCTIGUE, TRIAL COUNSEL

Pursuant to 6th Cir. R. 26.1, DEMOCRATIC NATIONAL COMMITTEE
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NO

CERTIFICATE OF SERVICE

I certify that on SEPTEMBER 17, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ MARK A MCGINNIS

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.