

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

Project Vote, Northeast Ohio Coalition for )  
the Homeless, IMatters, Sherie Penix, and )  
Daniel Robert George, )

Plaintiffs, )

v. )

Madison County Board of Elections, )

and )

Jennifer Brunner, Secretary of State of Ohio, )  
in her official capacity )

Defendants. )

Civil Action No. 08-2266

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION  
FOR A TEMPORARY RESTRAINING ORDER AND FOR DECLARATORY RELIEF**

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## INTRODUCTION

Plaintiffs bring this case to obtain immediate relief for a threatened violation of voting rights protected by federal statutes and the United States Constitution. They respectfully seek an order that would preserve the *status quo ante* and require Ohio counties to comply with federal laws that prohibit states from requiring voters to register more than 30 days before Election Day. The prosecuting attorneys of three Ohio counties (Holmes, Madison, and Miami) have embraced a contrary interpretation of Ohio law, one that conflicts with federal statutory and constitutional law.<sup>1</sup> Their position is that voters are prohibited from receiving or submitting an absentee ballot until at least 30 days *after the date of their registration*. In fact, a voter who merely *requested* an absentee ballot within 30 days of registering would have committed a fifth-degree felony, under their interpretation of Ohio law. Defendant Madison County Board of Elections presently requires voters to be registered for 30 days before requesting and receiving an absentee ballot. As explained more fully below, federal law requires that voters be allowed to exercise their right to vote, so long as they register at least 30 days before Election Day – not 30 days before they request, receive, or submit an absentee ballot.

As long as the threat of criminal prosecution exists, Ohio voters will be chilled from exercising their right to register and vote an absentee ballot. Voters who need to vote absentee will also suffer irreparable injury from being denied the opportunity to do so, and anyone who submits an absentee ballot within thirty days of registering is at risk of not having their votes

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<sup>1</sup> The Directors for the Boards of Elections for Holmes and Miami Counties have responded to Plaintiffs' counsel's demand letter indicating that they will follow the directives of the Secretary of State until otherwise ordered by the Supreme Court of Ohio. *See* Exh. 6 (decl. of Carrie Davis), ¶¶ 3, 6, 8.; Exh. 7 (letters to County Boards of Elections). The Board of Elections for Madison County has responded that they will not issue an absentee ballot to any voter who has not been registered for 30 days. *Id.* at ¶ 9. To date, Defendant Secretary of State Brunner has not exercised her powers under Title 35 of the Ohio Revised Code to require compliance by the Board of Elections of Madison County, or any other county that has failed to implement her directives. Furthermore, prosecution remains a real threat for voters in all three counties because of the prosecutors' letters.

counted. Plaintiffs therefore seek a temporary restraining order or, in the alternative, declaratory relief to remove this pall over the right of Ohio bona fide registered voters to cast an absentee ballot. Relief no later than September 30, 2008, the date on which absentee voting commences under Ohio law is necessary to prevent irreparable harm. OHIO REV. CODE § 3509.01 (absentee ballots “shall be printed and ready for use on the thirty-fifth day before the day of the election”); Ohio Secretary of State Directive 2008-91.

Although a petition on related *state* issues is now pending before the Ohio Supreme Court,<sup>2</sup> expeditious relief in this case is necessary to protect Plaintiffs’ rights under *federal* law, regardless of the outcome of the state case. The petition for writ of mandamus in *State ex rel. Colvin v. Brunner*, Case No. 08-0813 (“*Colvin*”), asks the Ohio Supreme 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 election). The Madison County Board of Elections and the prosecuting attorneys in Madison, Holmes, and Miami counties have endorsed this very interpretation. If accepted, this interpretation would create 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 have already requested absentee ballots – would be guilty of a felony. *See Colvin Relators’ Br.* at 17-18. Voters would be deemed ineligible and their votes would be rejected *even though* they registered before the October 6 registration cut-off. To take just one example, a voter who registered on December 31, 2007 and requested an absentee

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<sup>2</sup> Plaintiffs are submitting with this motion, and request that this Court take judicial notice of, the documents that have been filed to date in the state-court litigation. These documents may also be found at: <http://moritzlaw.osu.edu/electionlaw/litigation/Colvinv.Brunner.php>. Throughout this brief, we refer to the relators in that case, Rhonda L. Colvin and C. Douglas Moody, simply as “relators.”

ballot on January 1, 2008 (the first day for doing so under Ohio law), could not have that request honored under the reading adopted by county prosecutors and the *Colvin* relators, since the request was submitted fewer than thirty days after the voter registered. Accordingly, county boards would be prohibited from sending out absentee ballots to those voters, and the voters making those requests would even be subject to criminal prosecution. As we explain below, such a result is not only nonsensical, but also in direct conflict with federal voting rights laws.

In the event that the petition in *Colvin* is *granted*, relief from this Court will be even more urgent. For if the Ohio Supreme Court interprets state law as *Colvin* relators demand, and on that basis issues relief against Defendant Ohio Secretary of State Jennifer Brunner, then it will be necessary for this Court to issue a TRO barring all counties, including Madison County, and her from taking action that would violate the voting rights of Plaintiffs under *federal law*. Such relief would be essential in order to prevent the imposition of a pre-registration requirement that runs afoul of the Voting Rights Act (“VRA”), the National Voter Registration Act (“NVRA”), the Civil Rights Act of 1964 (“CRA”), the federal election day statutes, and the Fourteenth Amendment to the U.S. Constitution.

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). Under the federal election-day statutes, 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 November, which this year falls on November 4. *See* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. To read state law as 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 these federal laws allow. Such an interpretation of Ohio law also violates 42 U.S.C. § 1971(a), by discriminating against voters based on their date of registration. To interpret state law as the county prosecuting attorneys have done would, accordingly run afoul of federal law and therefore violate the Supremacy Clause of the United States Constitution.

The interpretation advanced by the three county prosecuting attorneys would also violate voters' rights under the Fourteenth Amendment to the U.S. Constitution, in two important respects. First, it creates an unconstitutional durational residency requirement, in violation of *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). Where, as here, the legislature has set a deadline for voter registration of thirty days before the election, no additional waiting period can be justified. Second, their interpretation threatens to result in differential treatment of voters from county to county. Voters in at least one county, including Plaintiff Penix, would be required to wait for thirty days before requesting an absentee ballot, while those in the other counties would be free to request and submit an absentee ballot so long as they registered at least thirty days before the election. Such unequal treatment of voters in different counties threatens a violation of the principle of equal treatment articulated in *Bush v. Gore*, 531 U.S. 98 (2000).

Plaintiffs are irreparably injured by virtue of the threat to their right to vote and the prospect of criminal prosecution, should they attempt to exercise that right by requesting or submitting an absentee ballot within thirty days of registering. While Defendants may 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 hypothetical invalid ballots. To the extent there was any doubt on this question, it is dispelled by the Secretary of State's Directives 2008-67 and 2008-91, which clarify 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, 2008, poses no risk of ineligible persons having their votes counted, since those ballots will not actually be counted until November 4. Relief before September 30 is needed to remove the cloud of uncertainty over the fast-approaching presidential and congressional elections, and to protect those who are entitled to receive and submit absentee ballots starting on that date.

#### **FACTS AND PROCEDURAL HISTORY**

At the core of this action is the denial of the right to vote, and in particular to cast an absentee ballot, to bona fide registered voters based solely on the date of registration. 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>. 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 long-ago by Congress. *See, e.g.*, 42 U.S.C. § 1973aa-1(a).

Under Ohio law, voters are entitled to request absentee ballots as early as January 1 on the year in which an election is to take place. OHIO REV. CODE § 3509.03. Thus, Ohio voters could request an absentee ballot for the November 4 general election as early as January 1, 2008. The period for absentee voting, either in person or by mail, opens on September 30, 2008, thirty-five days before the election. OHIO REV. CODE § 3509.01; Secretary of State Directive 2009-91. That means that voters may actually receive and submit an absentee ballot starting on that date, although those ballots will not actually be processed until ten days before the election and may not be counted until 7:30 pm on Election Day. Ohio Secretary of State Directive 2008-67. The registration deadline under Ohio law is thirty days before the election. OHIO REV. CODE § 3503.06. Because this date would fall on a Sunday, the actual registration deadline in this year's general election is October 6, 2008. Ohio Secretary of State Directive 2008-91. These statutes create a five-day "overlap" within which voters should be allowed simultaneously to register and vote an absentee ballot, starting with the date that absentee voting begins (September 30, 2008) and ending with the registration deadline (October 6, 2008). That, at least, is how the Secretary of State of Ohio has interpreted state law. *See* Ohio Secretary of State Directives 2008-63, 2008-67, and 2008-91.

The problem arises from the fact that at least one county (Defendant Madison County Board of Elections), three county prosecutors, as well as relators in the *Colvin* case now pending before the Ohio Supreme Court, have taken a contrary view of state law. The county prosecutors in Holmes, Madison, and Miami have each advised their boards of election that it is not enough for voters to be registered thirty days *before Election Day*, in order to vote absentee.

*See* Pls' Compl., Attachment 1, Exhs. B-C (letters of prosecutors). Rather, they have interpreted state law as requiring that voters be registered for thirty days *before requesting, receiving, or submitting* an absentee ballot. On this basis, they assert that their county boards of election should not issue absentee ballots to newly registered voters who request one within the "five-day overlap" period – or, indeed, at any time fewer than 30 days after a voter registers. Madison County has gone so far as to adopt and implement this position.

The petition in *Colvin* takes the same position. It argues that voters who do so much as even request an absentee ballot fewer than 30 days after registering have committed a fifth-degree felony. Relators' Br. at 17-18. According to relators' brief, filed just two days ago (on September 22, 2008), a "simultaneous application to register to vote and to request an absentee voter's ballot" would necessarily require the would-be voter to make a "false" statement in contravention of Ohio law. *Id.* at 17-18. They further argue that such citizens "are potentially guilty of a felony." *Id.* at 18. On this basis, relators seek a writ of mandamus, requiring the Secretary of State to reverse the position taken in the directives noted above, and to deny an absentee ballot to Ohio voters who have been registered for fewer than thirty days, and to void all applications for absentee ballots submitted fewer than thirty days after the voter registered.

Plaintiffs are individual voters and groups whose mission is to register voters and assist them in voting. 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. *See* Exh. 1 (Decl. of Michael Slater). The mission of Project Vote is to strengthen American democracy by ensuring broad participation in the country's civic life. *Id.* In particular, Project Vote seeks to promote political involvement by minority and low-income voters, whose voices it believes are under-represented in the current political process. *Id.* Project Vote conducts several programs in order

to enhance participation in American democracy. *Id.* Its primary program is to conduct a Voter Participation Program, as part of which it seeks to register as many Americans to vote as possible and encourage them to vote. *Id.* at ¶3. In addition to its work assisting eligible Ohio citizens to register to vote, Project Vote runs an extensive get-out-the-vote program and is developing plans for a simultaneous registration and get-out-the-vote program during the five-day window of time in Ohio in which voters may register and cast an absentee ballot to be counted on November 4, 2008 as outlined in by Ohio Secretary of State, Jennifer Brunner, in Directives 2008-63, 2008-67, and 2008-91. *Id.* at ¶ 4. Plans for the registration and get out the vote project encompass various parts of the state, including the greater Columbus, Cleveland, Cincinnati, Akron, Toledo, and Dayton areas, including Miami County. *Id.*

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. Exh. 2 (Decl. of Brian Davis). NEOCH provides services to approximately 20,000 homeless people each year. *Id.* 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. *Id.* 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. *Id.* at ¶ 8. NEOCH has administered non-partisan voter registration and get out the vote efforts among homeless people since its founding in 1989. *Id.* at ¶ 10. 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. *Id.* at ¶ 14. NEOCH expects to serve approximately 2,000 homeless voters, including but not limited to its members, by this service. *Id.* at ¶¶ 9, 14.

1Matters is a non-profit volunteer member organization that serves the homeless community in Lucas County, Ohio. Exh. 3 (decl. of Ken Leslie). 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. *Id.* at ¶ 7. 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. *Id.* at ¶ 10. 1Matters expects to bring at least 500 homeless individuals and volunteers to vote early this year. *Id.* at ¶ 11, *see also* ¶ 9 (discussing efforts to have a town hall, candidate event, and shuttles to and from the Lucas County Board of Elections to take advantage of early voting at “Tent City”).

Sherie Penix (Penix) has been a resident of Madison County, Ohio since 1957. Exh. 4 (decl. of Sherie Penix), ¶ 3. She meets all of the requirements to register to vote and intends to register before October 6, 2008. *Id.* at ¶ 5. She intends to cast a ballot for the November 4, 2008 election by completing an absent voter’s ballot. *Id.* at ¶ 6. Because of an uncertain work schedule and family matters, it would be a hardship to vote early. *Id.* at ¶ 7. The Madison County Board of Elections will not permit her to registered to vote and then receive an absent voter’s ballot to be marked in person. *See* Exh. 6 (decl. of Carrie Davis), ¶ 9.

Daniel Robert George (George) is a resident and registered voter in Cuyahoga County, Ohio. Exh. 5 (decl. of Daniel R. George), ¶¶ 2, 3. He is the volunteer organizer of a program to help elderly individuals and those residing in assisted living care centers to register to vote and

request absentee ballots for the November 4, 2008 election. *Id.* at ¶¶ 5, 6. This effort includes a program currently scheduled for September 30, 2008 in Cleveland, Ohio to register new voters at a local senior center and either help them file absentee ballot request forms or arrange for them to vote early at the board of elections. *Id.* He also will drive a shuttle to and from the Cuyahoga County Board of Elections and the Northeast Ohio Coalition for the Homeless to assist homeless individuals wishing to register and vote early from September 30, 2008 through October 6, 2008. *Id.* at ¶ 7.

All the Plaintiffs therefore having an interest in preserving the five-day window and, more broadly, in ensuring that Ohio voters are permitted to request, receive, and submit an absentee ballot within thirty days of registering, so long as they are otherwise qualified to vote. Plaintiff Penix has an interest in exercising her rights free from arbitrary discrimination based solely upon when she registers to vote. Furthermore, Plaintiffs Project Vote, NEOCH, 1Matters, and George have an interest in protecting their service constituencies from criminal prosecution for exercising their right to vote.

### **ARGUMENT**

When ruling on a motion for preliminary injunctive relief, four factors are to be considered: “(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.” *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 431 (6<sup>th</sup> Cir. 2004); *Blue Cross & Blue Shield Mut. of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6<sup>th</sup> Cir. 1997). These factors are not meant to be “rigid and unbending requirements,” but should instead be

“balanced.” *McPherson v. Michigan High School Athletic Ass’n*, 119 F.3d 453, 459 (6<sup>th</sup> Cir. 1997)(en banc). In this case, as explained below, all the requirements counsel in favor of issuing a temporary restraining order.

**I. PLAINTIFFS ARE HIGHLY LIKELY TO PREVAIL ON THE MERITS, BECAUSE DEFENDANTS’ THREATENED ACTIONS WILL IMPEDE VOTING RIGHTS PROTECTED BY FEDERAL STATUTES AND THE U.S. CONSTITUTION**

**A. Federal Voting Rights Laws Prohibit State Registration Deadlines More Than 30 Days Before an Election, and Specify That the “Election” Occurs When Votes Are Tabulated.**

Defendant Madison County Board of Elections, the relators in the state case, and the county prosecutors in Holmes, Madison, and Miami 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.<sup>3</sup> The county prosecutors’ interpretation of state law creates the additional very real threat of prosecution for any voter who requests an absentee ballot within thirty days of registering. Such an interpretation is also contrary to federal 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

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<sup>3</sup> For simplicity, this brief refers to the county prosecutors in these three counties simply as “county prosecutors.”

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 or 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 first relevant federal statute is the Voting Rights Act (“VRA”), 42 U.S.C. §§ 1973aa-1, *et seq.* Section 202 of the VRA 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).

The position of the county prosecutors and *Colvin* relators threatens to impose precisely the sort of obstacle to voting that Congress tore down in 1970 with the enactment of these provisions of the VRA. 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 the county prosecutors’ and relators’ reading of state law and adopt the Secretary of State’s construction, which is perfectly consistent with the VRA.

Adoption of Defendant Madison County’s, the relators’, and the county prosecutors’ arguments 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)).<sup>4</sup> The NVRA establishes minimum federal requirements with which states must 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

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<sup>4</sup>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.

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 in the manner that the Secretary of State has directed. But if Defendant Madison County Board of Elections, the county prosecutors', and relators' contrary interpretation of Ohio law were accepted by the Ohio Supreme Court, 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. State law would then run afoul of the NVRA. And under the Supremacy Clause and the Elections Clause of the U.S. Constitution, the contrary 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 county prosecutors' 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, county prosecutors' 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 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 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 county prosecutors’ proposed interpretation of state law would run afoul of the federal election-day statutes. Mandating 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.

Defendant Holmes County Board of Elections and the county prosecutors' interpretation of Ohio law also runs afoul of the Civil Rights Act of 1960. Section 1971(a)(2)(A)<sup>5</sup> 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[.]*

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<sup>5</sup> Plaintiffs acknowledge *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000)(involving § 1971 (A)(2)(B), not § 1971(A)(2)(A)), in which the Sixth Circuit held that 42 U.S.C. § 1971 (a)(2)(B) was directly enforceable only by the attorney general. The Sixth Circuit's one paragraph treatment of § 1971 is contrary to the statutory history of the Act, precedent discussing the enforcement of federal voting rights legislation, and the decision of another circuit, *Schwier v. Cox*, 340 F.3d 1284, 1294-97 (11th Cir. 2003). Even should this Court find that there is no independent private right of action created in § 1971, parties have the ability to sue under 28 U.S.C. § 1983 to remedy a violation of their rights under § 1971. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes... Once a plaintiff demonstrates that a statute confers an individual right the right is presumptively enforceable by § 1983.). The test of whether a federal statute creates enforceable rights cognizable under § 1983 is: "First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing v. Firestone*, 520 U.S. 329, 340-41 (1997). Here plaintiffs' claims under 1971 satisfy these requirements. A defendant may attempt to rebut the presumption that a statute is enforceable created through § 1983, but to do so has to show that Congress "specifically foreclosed a remedy under § 1983." *Gonzaga*, 536 U.S. at 284, n. 4 (citation omitted). As discussed in the following text, the opposite occurred because Congress affirmatively strengthened the private right of action in 1957 when it added the Attorney General's authority to sue.

42 U.S.C. § 1971(a)(2)(A) (emphasis added).<sup>6</sup> Defendants would 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. Plaintiff Penix and other newly registered voters (including those who have recently moved into the state or county) would be denied this right, extended by state law, even though they are fully qualified residents who have met the registration deadlines. In fact, a voter who registered on December 3, 2007 and requested an absentee ballot for the November 4, 2008 general election on January 1, 2008 (the earliest date for such a request permitted by Ohio law), would have violated Ohio law, under county prosecutors' and the County Defendant's interpretation. Such a voter would not have waited 30 days from registering to request an absentee ballot, as their reading would require for a voter to be deemed "qualified." Indeed, such a voter would have committed a fifth-degree felony, by falsely (in the county prosecutors' view) affirming that he or she is qualified.

Even if such an interpretation comports with state law, it cannot be given effect under the Civil Rights Act. 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

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<sup>6</sup> 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).

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).<sup>7</sup> *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, 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 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

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<sup>7</sup> 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).

includes ‘all action necessary to make a vote effective,’”<sup>8</sup> 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.

Defendant Madison County Board of Elections’, the county prosecutors’, and relators’ suggested reading of state law would thus run afoul of the Voting Rights Act, the National Voter Registration Act, federal election-day statutes, and the Civil Rights Act by requiring certain voters to have been registered more than 30 days before Election Day. That reading therefore cannot be given effect, consistent with the Supremacy Clause.

**B. Imposing a 30-Day Waiting Period Between Registration and Absentee Voting Would Create a Durational Residency Requirement That Violates 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, Madison County Board of Elections and the county prosecutors have effectively endorsed 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

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<sup>8</sup> *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.”

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).

The waiting period the county defendant and the prosecutors urge is not justified by administrative necessity. On the contrary, there is 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 five-day overlap period. Directive 2008-63. The State itself does not argue that there is a compelling interest in having a thirty-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 is purely a durational residency requirement.

According to the County Defendant and prosecutors, a person would have to be registered 60 or 65 days before the election in order to vote during the five-day absentee window between September 30 and October 6. 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, this 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 the Madison County Board of Elections, the county prosecutors, and the *Colvin* relators 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>).

County Defendant may 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.” Secretary of State 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,<sup>9</sup> and two more allow same-day registration in presidential elections.<sup>10</sup> Any 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.<sup>11</sup> 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.<sup>12</sup>

In light of this experience, and because Ohio's limited period for same-day registration ends thirty 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 the argument that the procedure presents a danger to proper election administration. Defendant Madison County Board of Elections, the county prosecutors, and the *Colvin* relators have not advanced any threat

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<sup>9</sup> 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).

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> *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>.

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).

There is a separate equal protection problem created by the threat that Defendant Madison County will impose a thirty-day waiting period between the date they register and the date they request, receive, and submit an absentee ballot: It creates an inter-county disparity between would-be absentee voters in those counties, and those in the other counties. Based on conversations that Plaintiffs' counsel has had with representatives of the boards of election in Holmes, Madison, and Miami counties, it appears that the boards in Holmes and Miami counties will be complying with the Secretary of State's directive, pending a contrary interpretation from the Ohio Supreme Court. *See generally*, Exh 6. (decl. of Carrie Davis). The Madison County Board of Elections, however, does *not* presently intend to comply with the Secretary of State's directive, and as of the time of this filing, Secretary Brunner has failed to take steps to address this inter-county disparity. *Id.* Accordingly, as things presently stand, voters in that county,

including Plaintiff Penix, will be accorded different treatment from voters in all the other counties. As the *Colvin* relators themselves have argued, this differential treatment creates an equal protection problem under *Bush v. Gore*, 531 U.S. 98 (2000). See *Colvin Relators' Br.* at 20-21. Would-be absentee voters will be treated differently, based solely on the happenstance of where they reside. But contrary to the *Colvin* relators' argument, the proper solution to this problem is not to deny *all* voters an absentee ballot until 30 days after they registered, a position that contravenes federal law as detailed above. It is, instead, to make sure that voters in all 88 Ohio counties are allowed to request, receive, and submit an absentee ballot, so long as they register at least 30 days before the election and are otherwise qualified.

## **II. PLAINTIFFS WILL BE IRREPARABLY INJURED UNLESS INJUNCTIVE RELIEF ISSUES BY SEPTEMBER 30, AND THE BALANCE OF HARDSHIPS TIPS DECISIVELY IN THEIR FAVOR**

Plaintiffs' will suffer irreparable injury if injunctive relief is denied, in the form of harm to their federal voting rights. The Supreme Court has long held that voting is among the most fundamental rights granted to United States citizens. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. All other rights are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); see *Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964). It is therefore elementary that the loss of the right to vote constitutes irreparable injury. See *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 827 (N.D. Ohio 2006) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and granting injunction against enforcement of statute unduly burdensome to the right to vote); *Summit Co. Democratic Ctr. & Exec. Comm. v. Blackwell*, 2004 WL 5550698, at \*7 (N.D. Ohio Oct. 31, 2004) (enforcement of statutory provisions burdensome to right to vote

would constitute irreparable harm). As such, the interference with the right to vote constitutes irreparable harm. *United States v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570, 582 (E.D. Pa. 2003); *Coleman v. Board of Education of the City of Mount Vernon*, 990 F. Supp. 221, 226 (S.D.N.Y. 1997) (“The deprivation or dilution of voting rights constitutes irreparable harm.”); *Puerto Rican Legal Defense and Education Fund v. City of New York*, 769 F. Supp. 74, 79 (E.D.N.Y. 1991) (“it is well-settled that the claimed deprivation of a constitutional right such as the right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm.”); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984). The denial of the fundamental right to vote cannot be compensated by an action at law for money damages. Further, any remedy that requires delay until the likely conclusion of this litigation will be inadequate.

In this case, the harm to Plaintiffs and others Ohioans who would avail themselves of the opportunity to request, receive, and submit an absentee ballot is especially severe. The threat of prosecution hangs over them, should they so much as *request* an absentee ballot. For under the county prosecutors and relators’ interpretation of state law and its application and execution by Defendant Madison County Board of Elections, a citizen who meets all the other requirements of Ohio law to vote would be deemed unqualified, unless and until 30 days has elapsed from the date of his or her registration. *See* Exh. 7 (Letters from Holmes, Madison, and Miami County Prosecutors). Under this interpretation, such a voter is “potentially guilty of a felony.” Relators’ Br. at 18. Accordingly, a voter who registered on September 22, and wishes to request an absentee ballot today, is subject to a potential prosecution for election fraud under county prosecutors’ reading of the statute. The chilling effect on the right to vote is comparable to the

chilling effect on free speech rights arising from laws that violate the First Amendment. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (threat to freedom of expression arising from potential prosecution under overbroad law was sufficient to show “irreparable injury”).

Even if there were no prospect of prosecution, there would still be irreparable injury. Voters who submit their absentee ballots within 30 days of having registered will not have their vote counted, and will thereby be denied the right to vote, if relief from this Court does not issue. Moreover, if any board of election fails to follow the instructions concerning absentee ballot applications set forth in Directives 2008-63, 2008-67, and 2008-91, and instead denies an absentee ballot to voters who have been registered for fewer than thirty days, that failure will irreparably harm numerous newly-registered voters who need to cast absentee ballots by depriving them of the right to vote.

Specifically, any board of elections that refuses to follow the Secretary of State’s directives (and the statutes on which they are based) and insists that a voter cannot apply for an absentee ballot until 30 days after registering would thereby disfranchise, at minimum, any voter within its jurisdiction who (1) needs to vote by absentee ballot, (2) registers during the five weeks preceding the October 6, 2008 deadline to register for the 2008 general election, and (3) is unable to apply for and obtain an absentee ballot during the narrow window of time beginning 30 days after registration and concluding on the deadlines for receipt of an absentee ballot application set forth in OHIO REV. CODE § 3509.03.<sup>13</sup> The deadline to be eligible to vote in this

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<sup>13</sup> OHIO REV. CODE § 3509.03 provides, in relevant part, that an applicant for an absentee ballot shall submit his or her application “not later than twelve noon of the third day before the day of the election at which the ballots are to be voted, or not later than the close of regular business hours on the day before the election at which the ballots are to be voted if the application is delivered in person to the office of the board.” Thus, because the general election is on November 4, 2008, the deadline to deliver an application in person is November 3, and the deadline for delivery by any other means is November 1.

year's general election on November 4, 2008 is October 6, 2008. *See* OHIO REV. CODE § 3503.01(A). Thus, a voter who registered on October 3 would do so three days in advance of the statutory deadline. Nevertheless, such a voter would, according to those who have counseled or threatened disobedience to Directive 2008-63, first become eligible to request an absentee ballot only on November 1 – the cutoff date to submit an application by mail, and two days before the November 3 cutoff for applications submitted in person. *See* OHIO REV. CODE § 3509.03. A voter who registered on October 4, would be limited to applying in person, and a voter who registered on October 6 would not even have that option. Thus, voters who register in early October (as is their right) and need to vote absentee would have few or no days in which to apply – let alone to obtain the ballot. September registrants would have more days the earlier they registered, but many would still find the interval too short. If such voters were unable to apply, obtain ballots, and cast them within those narrow confines, they would simply not be able to vote, contrary to the statutory intent. This would plainly constitute irreparable harm.

While Ohio voters will be irreparably injured if injunctive relief does not issue before September 30, 2008, the date on which the five-day window opens, Plaintiffs would not oppose this Court delaying a ruling on the instant motion until either the Ohio Supreme Court rules or September 29, 2008, whichever comes first.<sup>14</sup> In the event that the state court litigation is resolved in Secretary of State Brunner's favor, it is possible that the county prosecutors will reverse their position and that the Defendant county boards will all comply with her directives –

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<sup>14</sup> Waiting until this time should dispel any conceivable ripeness or abstention arguments that Defendants might raise. This case is ripe now, given that Plaintiff Penix will be denied an absentee ballot by Defendant Madison County Board of Election and by the inaction of Defendant Secretary of State to exercise authority under Title 35. Further, voters who registered fewer than thirty days ago face the threat of criminal prosecution if they even request an absentee ballot. Once the five-day window opens, however, the harm will be even greater and more immediate, since Ohio voters will be inhibited from voting – on pain of potential criminal prosecution – if they try to vote an absentee ballot. In addition, all outstanding issues of state law should be resolved, once the Ohio Supreme Court rules. And if the Ohio Supreme Court fails to rule by Monday, then the imminent harm to voters' speech rights will necessitate prompt judicial intervention.

thus keeping the window open for Ohio voters. But if the Ohio Supreme Court adopts the interpretation of state law embraced by county prosecutors and Madison County, or if it fails to rule by this Monday, September 29, then the rights of Plaintiffs and countless other Ohio voters will be placed in jeopardy.

There is, by contrast, no risk of harm to Defendants if the requested TRO is denied. Absentee ballots will not – and, in fact, cannot under federal law – be tabulated until November 4. Accordingly, there is absolutely no risk of ineligible voters’ ballots being counted. 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 OHIO REV. CODE § 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 any 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, 2008. 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.

Granting the relief Plaintiffs seek will also avoid administrative headaches for election officials across the state, which would follow from the county prosecutors and relators' construction of state law. As we have explained, such an interpretation would impose a floating, voter-specific ban on requesting or submitting an absentee ballot, starting when the voter registers and ending thirty days later. 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. It is unclear what election officials caught in this administrative dilemma are to do next. One could presume two scenarios: (1) the election officials simply 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 also a very real possibility of a post-

election dispute, in cases where voters have *already* requested, received, or submitted absentee ballots fewer than thirty days after registering. Those ballots could presumably give rise to post-election litigation over whether they should be counted, which could very easily throw the results of close races into doubt.

For all these reasons, issuance of an injunction in this case would serve the public interest. It would protect the federal voting rights not only of the named plaintiffs, but of all those Ohio voters who would seek to register and submit an absentee ballot within the five-day window that opens on September 30. It would remove the specter of criminal prosecution, created by the reply of the Madison County Board of Election, the county prosecutors' letters and the *Colvin* petition, from anyone who seeks to request, receive, or submit an absentee ballot within thirty days of registering. And finally, it would allow those who registered close to the deadline, and who must cast an absentee ballot in order effectively exercise their right to vote, to request and submit one in a timely manner. Issuance of a TRO will thus protect the voting rights of countless Ohioans, difficult to locate and impossible to name at this stage, who wish to have their voices heard when the votes are finally counted on November 4, 2008.

**III. IN THE ALTERNATIVE, SHOULD THE COURT CONCLUDE THAT AN INJUNCTION IS NOT APPROPRIATE, DECLARATORY RELIEF SHOULD ISSUE REGARDING PLAINTIFFS' RIGHTS AND DEFENDANTS' OBLIGATIONS UNDER FEDERAL LAW**

For the reasons set forth above, Plaintiffs submit that the requirements for immediate injunctive relief are easily satisfied in this case. Should this Court disagree, however, and believe that an injunction is improper under the circumstances, Plaintiffs submit that declaratory relief provides an alternative – if somewhat less efficacious – remedy for the violations described in Part I. The Supreme Court has recognized that declaratory relief under 28 U.S.C. §§ 2201 and 2202 may sometimes be an appropriate substitute for the “strong medicine” of an injunction.

*Steffel v. Thompson*, 415 U.S. 452, 467 (1974). Congress intended declaratory relief to serve as a “milder alternative to injunctive remedy.” *Id.* (quoting *Perez v. Ledesma*, 401 U.S. 82, 111 (1971)). A district court has “a duty to to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.” *Steffel*, 415 U.S. at 468 (quoting *Zwickler v. Koota*, 389 U.S. 241, 254 (1967)). In particular, a failure to show irreparable injury is not fatal to a request for declaratory relief. *Steffel*, 415 U.S. at 471-72 (“Thus, the Court of Appeals was in error when it ruled that a failure to demonstrate irreparable injury – a traditional prerequisite to injunctive relief, having no equivalent in the law of declaratory judgments ... precluded the granting of declaratory relief.”).

Accordingly, even if injunctive relief were deemed improper in this case, this Court could and should still rule on the violation of federal voting rights asserted by Plaintiffs. And while declaratory relief might not be as effective as an injunction against the county defendant, in terms of ensuring the vindication of those rights on pain of contempt, it would provide a clear statement of those rights that Plaintiffs hope would be followed by Defendants and other election officials in Ohio.

## **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request the following relief:

- (1) A temporary restraining order requiring the county defendant to allow otherwise qualified Ohio voters to request, receive, and submit absentee ballots, and to count those ballots, provided that voters register at least thirty days before Election Day, November 4, 2008.
- (2) In the event that the Ohio Supreme Court grants the relief sought by relators in *State of Ohio ex rel. Colvin v. Moody v. Brunner*, a temporary restraining order requiring

Defendant Brunner to allow otherwise qualified Ohio voters to request, receive, and submit absentee ballots, and to ensure that those ballots are counted, provided that voters register at least 30 days before Election Day.

(3) In the alternative, declaratory relief that it violates federal statutes and the U.S. Constitution for Defendants to deny otherwise qualified voters the right to request, receive, and submit absentee ballots for thirty days after they register.

Respectfully submitted,

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