No. _____

In the Supreme Court of the United States

JON HUSTED, IN HIS OFFICIAL CAPACITY AS OHIO SECRETARY OF STATE,
AND MIKE DEWINE, IN HIS OFFICIAL CAPACITY AS OHIO ATTORNEY GENERAL,

Applicants/ Petitioners,

AND

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES; ASSOCIATION OF THE U.S. ARMY; ASSOCIATION OF THE U.S. NAVY; MARINE CORPS LEAGUE; MILITARY OFFICERS ASSOCIATION OF AMERICA; RESERVE OFFICERS ASSOCIATION; NATIONAL ASSOCIATION FOR UNIFORMED SERVICES; NON COMMISSIONED OFFICERS ASSOCIATION OF THE USA; ARMY RESERVE ASSOCIATION; FLEET RESERVE ASSOCIATION; SPECIAL FORCES ASSOCIATION; U.S. ARMY RANGER ASSOCIATION, INC.; AMVETS; NATIONAL DEFENSE COMMITTEE; AND MILITARY ORDER OF THE WORLD WARS,

Intervenor Applicants/ Petitioners,

v.

OBAMA FOR AMERICA, DEMOCRATIC NATIONAL COMMITTEE,
AND OHIO DEMOCRATIC PARTY,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

MILITARY GROUP APPLICANTS' JOINDER IN EMERGENCY APPLICATION FOR STAY AND SUMMARY REVERSAL

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

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Date: October 12, 2012

QUESTIONS PRESENTED

1. Does the Equal Protection Clause allow States to extend special flexibility for in-person voting to members of the military who are stationed or living in the jurisdiction where they are registered to vote?

2. Did the Sixth Circuit correctly rule that limitations on early voting and absentee voting can substantially burden the fundamental right to vote?

CORPORATE DISCLOSURE STATEMENT

None of the Military Group Applicants have any parent corporation, and no publicly held company owns more than 10% of any Military Group Applicant's stock.

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JOINDER IN APPLICATION FOR STAY AND SUMMARY REVERSAL

The Military Group Applicants join in Secretary of State Jon Husted's and Attorney General Mike DeWine's emergency application for a stay and summary reversal. The Military Groups further ask that, if this Court denies their application, it treat this filing as a Petition for Certiorari.

This case squarely presents the issue of whether a State may extend special flexibility for voting to members of the military stationed or living at home—including those on Active Duty, as well as members of the Reserve and Guard Components who may be mobilized and deployed at a moment's notice. The State of Ohio delegated discretion to counties to allow military personnel and their families to cast in-person absentee ballots over the three days before Election Day (hereafter, the "Three-Day Period"), after the period for in-person absentee voting ends for the general public. The Sixth Circuit, however, held that allowing only military voters to cast in-person absentee votes during the Three-Day Period burdened civilians' fundamental right to vote. App. 12a. The court ordered the State to either open the Three-Day Period to all voters, or withdraw it from military voters. *Id*. at 20a.

The Sixth Circuit's ruling is directly contrary to this Court's longstanding principle that a reform measure that helps a certain group overcome the barriers to voting it faces is subject only to rational basis scrutiny, and "is not invalid under the Constitution because it might have gone farther than it did," by helping other people who face similar obstacles. *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (quotation marks omitted). In particular, the ruling conflicts with holdings of both this Court and the Seventh Circuit that a state may offer absentee voting opportunities to some groups of voters—including military voters—without extending them to others. *Prigmore v. Renfro*, 410 U.S. 919 (1973) (summarily

affirming 356 F. Supp. 427 (N.D. Ala. 1972) (three-judge panel)); *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

For nearly a century, this Court has recognized that the military is a society apart from the civilian world, and that its members face a wide range of restrictions, risks, and burdens that do not apply to the civilian population at large. *See, e.g.*, *Middendorf v. Henry*, 425 U.S. 25, 38 (1976); *Parker v. Levy*, 417 U.S. 733, 743 (1974). Members on Active Duty often are closely regulated in their movements and daily activities, while those in the Reserves and Guard may be sent across the nation or around the world on short notice in response to natural disasters, attacks, or other contingencies affecting national security. The Sixth Circuit ignored over a half-century of this Court's precedents by concluding that military personnel stationed at home are "similarly situated" with civilian voters, and must be treated identically to them. App. 18a.

The Sixth Circuit's ruling will severely hamper States' efforts to make voting easier and more accessible for members of the Armed Forces. It prevents States from broadly facilitating voting by all members of the military and their families, including those stationed or living in the counties where they are registered to vote. In particular, the ruling would require the invalidation of substantial parts of the Uniform Military and Overseas Voters Act ("UMOVA"), which was promulgated in 2010 and already has been adopted by 10 jurisdictions. More broadly, it also likely would require the invalidation of excuse-based absentee voting, which 15 states have adopted, in which only voters satisfying certain criteria are allowed to vote by mail before Election Day.

Additionally, the Sixth Circuit directly contradicted this Court's unbroken line of authority holding that the fundamental constitutional right to vote does not extend to absentee voting and early voting. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969); *see also Crawford v. Marion Cnty. Election Bd.*,

553 U.S. 181, 209 (2008) (Scalia, J., concurring); *O'Brien v. Skinner*, 414 U.S. 524, 536 (1974) (Blackmun, J., dissenting). And it is not the only circuit court to apply heightened constitutional scrutiny, beyond the rational basis test, to restrictions on absentee voting. *See Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 112 (2d Cir. 2008) (applying the *Anderson-Burdick* balancing test and holding that a State's refusal to allow absentee voting in a race for county political party committee was unconstitutional).

The Sixth Circuit reasoned that, although the State may not have been constitutionally obligated to offer in-person absentee voting in the first place, the fact that so many people voted during the Three-Day Period in the 2008 election cycle now renders any restriction on voting during that timeframe a burden on their fundamental right to vote. App. 11a-12a. This Court, however, has "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires"—even in an area that directly implicates fundamental rights, such as voting—"it may never recede." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982). Under *Crawford*, the State's decision to allow the public to cast in-person absentee ballots during the Three-Day Period during the 2008 election cycle cannot give the public an increased constitutional interest or right to retain that privilege in future elections. *Id.* at 540 (reiterating that a State is under no obligation to "maintain legislation . . . when [it] was under no obligation to adopt th[at] legislation in the first place").

The preliminary injunction will lead to reduced voting opportunities for military voters. As the Military Groups cautioned the lower courts, if state and local governments cannot offer special flexibility or consideration for in-person voting to military voters without also extending it to the public at large, *cf. Katzenbach*, 384 U.S. at 657; *Prigmore*, 410 U.S. 919, then state and local governments soon will stop offering military voters such assistance. In this case,

many counties that would be willing to process votes from a handful of military voters during the Three-Day Period are unlikely to open the floodgates to in-person absentee voting by thousands of people while election officials simultaneously try to finalize and confirm preparations for Election Day. *Cf.* App. 27a (White, J., concurring in part and dissenting in part) (noting that 100,000 people voted during the Three-Day Period in 2008).

Although a few counties filed papers in the lower courts stating that they would be willing to extend in-person absentee voting in the days before Election Day to the general public, there is no evidence that other counties in the State are similarly willing to divert time, personnel, and resources from their main priority during the Three-Day Period—preparing for Election Day to ensure it runs smoothly. Thus, allowing the preliminary injunction to remain in place through the 2012 election is likely to irreparably harm military voters by reducing their voting opportunities, especially for military personnel who are subject to a last-minute activation, deployment, or temporary duty assignment. This Court therefore should grant a stay and summarily reverse the Sixth Circuit's ruling.

Even if this Court declines to grant immediate relief, it should treat this Response as a Petition for Certiorari and grant full merits consideration of this case. Granting certiorari will not only help this Court protect the voting rights in future elections of military personnel and their families, regardless of where they are stationed or living, but also clarify and reaffirm the scope of the constitutional right to vote as it applies to absentee and early voting.

STATEMENT OF THE CASE

A. Ohio's Voting Laws

1. As the district court found, Ohio is "one of the most liberal states in the country with regard to voting rights," and offers the public a wide range of convenient ways to vote. App. 155a (transcript of oral arguments on preliminary injunction). ***First***, members of the public may cast in-person absentee ballots for a total of 23 days, from October 2, 2012 through November 2, 2012, excluding weekends and holidays. *See* App. 133a (Directive 2012-35). In-person absentee voting is permitted from 8 A.M. through 5 P.M. to 9 P.M., depending on the day. *Id*.

Second, under Ohio's "no fault" absentee voting law, *see* Ohio Rev. Code § 3509.02(A), members of the public also may cast absentee ballots by mail, *id*. § 3509.03, starting on October 2, *id*. § 3509.01(B)(2). Absentee ballot requests submitted by mail must be received by noon on Saturday, November 3, *id*. § 3509.03, and absentee ballots returned by mail must be received by the time the polls close on Election Day, *id*. § 3509.06(B). Secretary Husted has mailed applications for absentee ballots to every active voter in the state, as well as every registered voter who participated in the 2008 election. *See* Sec'y of State Jon Husted, Preparation for the Statewide Mailing of Absentee Ballot Applications for the November 6, 2012 General Election, Directive 2012-24, at 1 (June 22, 2012), Dist. Ct. ECF No. 35-2 (Aug. 13, 2012).[1]

Finally, a person may choose to vote on Election Day. Polling places are open from 6:30 A.M. to 7:30 P.M., "unless there are voters waiting in line to cast

[1] Due to the urgency of the case, the Sixth Circuit allowed the parties to cite directly to the district court docket entries, rather than preparing a record for appeal. The district court docket number for this case is 2:12-cv-00636.

[2] Under the *Anderson-Burdick* balancing test,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

their ballots, in which case the polls shall be kept open until such waiting voters have voted." Ohio Rev. Code § 3501.32(A).

2. The Ohio Code contains numerous provisions that offer special flexibility and accommodations for "uniformed services voters" and "overseas voters." The term "uniformed services voter" (hereafter, "military voter") refers to members of the Active or Reserve Components of the uniformed services, members of the National Guard or organized militia who are "on active status," and spouses or dependents of any such individuals. Ohio Rev. Code § 3511.01(A), (C)-(D). The term "overseas voter" refers broadly to various categories of Ohio residents who are outside the United States, but satisfy the requirements to vote in Ohio. *Id*. § 3511.01(B).

Due to a lengthy series of legislative enactments, amendments, and repeals, Ohio law contains two purported deadlines by which military and overseas voters may cast in-person absentee votes (different rules apply to requests for absentee ballots submitted by mail). Section 3511.02(C) echoes the general statutory deadline for domestic civilian voters, requiring military and overseas voters to complete in-person absentee voting by 6:00 P.M. on the Friday before Election Day. Section 3511.10, in contrast, provides that a military or overseas voter may request and cast an in-person absentee ballot up through Election Day.

Secretary Husted issued an Advisory giving effect to the deadline set forth in § 3511.10, which was the later-enacted statute, to allow military voting during the Three-Day Period. *See* Ohio Rev. Code § 1.52 (establishing a last-in-time rule for resolving conflicts between statutory provisions). Under his Advisory, "In-person absentee voting ends at 6 p.m. the Friday before election day for non-uniformed military and overseas voters. . . . Uniformed and overseas voters may vote in-person absentee until the close of the polls on the date of the general or primary

election." Sec'y of State Jon Husted, Am. Sub. H.B. 224, Advisory 2011-07 (Oct. 14, 2011), Dist. Ct. ECF No. 3-8, at 2 (July 17, 2012).

Secretary Husted later issued Directive 2012-35, allowing in-person absentee voting to occur (for both civilian and military voters) only during weekdays from October 2, 2012, through Friday, November 2, 2012. *See* App. 133a (Directive 2012-35). In a supplemental brief to the district court, Secretary Husted explained that this Directive gave each county board of elections discretion over whether to allow in-person absentee voting by military voters throughout the Three-Day Period. Defs.' Resp. to Pls.' Suppl. Mem., Dist. Ct. ECF No. 44, at 2 (Aug. 17, 2012).

B. Lower Court Proceedings

1. Plaintiffs Obama for America, President Barack Obama's principal campaign committee; the Democratic National Committee; and the Ohio Democratic Party brought this lawsuit, claiming that the Equal Protection Clause, U.S. Const. amend. XIV, § 1, prohibits the State of Ohio from allowing counties to grant military voters and their families up to three extra days for in-person absentee voting. They moved immediately for a preliminary injunction, arguing that "there is no discernible rational basis," "no justification," and "no reason" for allowing members of the military and their families extra time to vote in person. Pls.' Mot. for Prelim. Inj. & Mem. of Law, Dist. Ct. ECF No. 2, at 13 (July 17, 2012). The district court properly exercised subject-matter jurisdiction over the case under 28 U.S.C. § 1331.

2. The district court granted Plaintiffs' Motion for a Preliminary Injunction. App. 36a. It began by holding that the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428

(1992), rather than the "rational basis" test, governs this case, App. 48a-50a, despite the fact that the Plaintiffs were not asserting a First Amendment claim.[2]

Applying that balancing test, the court declared, "Plaintiffs have a constitutionally protected right to participate in the 2012 election—and all elections—on an equal basis with all Ohio voters, including [military] voters." *Id.* at 51a. It went on to state that, because the State had allowed the general public to vote throughout the Three-Day Period in previous election cycles, "the injury to Plaintiffs" from withdrawing that privilege "is significant." *Id.*

The court then found that requiring county election boards to "accommodate in-person early voting" by the general public throughout the Three-Day Period, while the boards simultaneously were finalizing preparations for Election Day, would not jeopardize their ability to prepare adequately for the election. *Id.* at 52a-53a. It also held that Secretary Husted's decision to give counties discretion over whether to allow military voters to cast in-person absentee ballots during the Three-Day Period, rather than requiring counties to do so, showed that the state's interest in facilitating voting by military personnel was "not . . . strong." *Id.* at 55a.

The district court concluded that the State could not adequately justify the burdens it placed on the public's right to vote. It entered a preliminary injunction stating that "in-person early voting IS RESTORED on the three days immediately preceding Election Day for all eligible Ohio voters." *Id.* at 58a. The injunction added, "This Court anticipates that Defendant Secretary of State will direct all Ohio election boards to maintain a specific, consistent schedule on those three days." *Id.*

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[2] Under the *Anderson-Burdick* balancing test,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."

App. 9a (quoting *Burdick*, 504 U.S. at 434).

3. The Sixth Circuit affirmed the district court's ruling, with Judges Clay and Hood (sitting by designation from the U.S. District Court for the Eastern District of Kentucky) joining the majority opinion, and Judge White concurring in part and dissenting in part. The majority began by holding that the *Anderson-Burdick* balancing test, rather than the rational basis test, applies where an election law "burden[s] voting rights through the disparate treatment of voters." App. 8a. It found that, in prior elections, low-income and minority voters were disproportionately likely to have cast their ballots during the Three-Day Period. *Id.* at 11a. Preventing the public from voting during that timeframe in future elections therefore would burden the fundamental right to vote. *Id.* Thus, the court held, the *Anderson-Burdick* balancing test applies to limitations on in-person absentee voting during the Three-Day Period. *Id.* at 12a.

The court went on to hold that the State lacks a sufficient basis for limiting in-person absentee voting during the Three-Day Period to military voters. It rejected the argument that election personnel should be permitted to focus throughout the Three-Day Period on confirming and finalizing their preparations for Election Day, and resolving any last-minute problems that arise, rather than simultaneously attempting to manage in-person absentee voting by the general public. *Id.* at 13a-14a. The court pointed out that the State had allowed the public to vote during the Three-Day Period in the 2008 presidential election, and did not "show[] that any problems arose as a result of the added responsibilities of administering early voting." *Id.* at 14a. Thus, the court concluded, "the State has not shown that its regulatory interest in smooth election administration is 'important,' much less 'sufficiently weighty' to justify the burden it has placed on non-military Ohio voters." *Id.* at 15a.

The court went on to hold that the State also lacks adequate grounds for attempting to facilitate in-person absentee voting by members of the military who

live in Ohio. It recognized that military voters stationed outside the country are "distinct" from most civilians, and consequently may receive "special accommodations." *Id*. at 17a. Military voters who live within the State, in contrast, may not receive special treatment.

The Sixth Circuit recognized that military voters living or stationed in Ohio "could be suddenly deployed," but noted that "any voter could be suddenly called away and prevented from voting on Election Day. At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment's notice." *Id*. The Sixth Circuit held, "There is no reason to provide [civilian] voters with fewer opportunities to vote than military voters." *Id*. It later reiterated that, "[w]ith respect to in-person voting," military voters and civilians "are similarly situated," and therefore may not be treated differently. *Id*.

The court therefore affirmed the injunction, and clarified that each county board of elections may decide whether to allow in-person absentee voting during the Three-Day Period. *Id*. at 20a. If a county chooses to allow such voting, however, it must be open to the general public, not just military voters. *Id*.

4. Judge White concurred in part and dissented in part. Her opinion revealed the factual flaws in the majority's argument that the State's restrictions on voting during the Three-Day Period burdened civilians' right to vote. She explained, "[T]he record clearly establishes that [in a few previous election cycles,] a significant number of Ohio voters found it most convenient to vote after hours and the weekend before the election." *Id*. at 25a (White, J., concurring in part and dissenting in part). She pointed out, however, that the plaintiffs' evidence did not "consider the extent to which these voters would or could avail themselves of other voting options, either by mail ballot or in-person absentee ballot at other times, or in-person voting on election day." *Id*. "Thus," Judge White explained, "it

cannot be fairly said that there was evidence that a significant number of Ohio voters will be precluded from voting unless weekend and after-hours voting is restored." *Id*.

Judge White further emphasized, "[N]o case has held that voting has to be convenient." *Id*. at 26a. She cautioned, however, that the existence of burdens on the public's right to vote could not be determined "in the abstract." *Id*. She noted that, following the 2004 election, the Ohio legislature had allowed counties to permit the public to vote during the Three-Day Period, to help ameliorate the "unacceptably burdensome situation at many Ohio polling sites . . . where, in some counties, voters were required to stand in line for long hours and until late at night." *Id*. at 27a. In the 2008 election, approximately 100,000 people took advantage of the opportunity to vote during the Three-Day Period. *Id*. Thus, Judge White concluded, the subsequent amendments preventing the public from voting during that timeframe are "properly considered as a burden." *Id*. at 28a.

Judge White also adopted the majority's ruling that "concern that military voters might be deployed sometime between Friday evening and election day" did not support the State's decision to grant them extra time to cast in-person absentee ballots. *Id*. at 29a.

REASONS FOR GRANTING A STAY AND SUMMARY REVERSAL

This Court should grant the pending application for a stay, which the Military Groups hereby adopt and join, and summarily reverse the Sixth Circuit's ruling. *See, e.g., Brunner v. Ohio Republican Party*, 555 U.S. 5, 5-6 (2008) (per curiam). A stay is appropriate when there is "a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed."

Barnes v. E-Sys., Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); *accord Times-Picayune Publ'g Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers). Likewise, a circuit court's ruling is subject to summary reversal if it "runs contrary to well-settled principles of constitutional law." *City of Los Angeles v. David*, 538 U.S. 715, 716 (2003) (per curiam); *see also Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999).

This Court is likely to grant certiorari and reverse the judgment below because the Sixth Circuit's ruling is contrary to well-settled principles of constitutional law. The Sixth Circuit held that the Equal Protection Clause prohibits the State from allowing counties to grant only military voters up to three extra days for in-person absentee voting, because unexpected, last-minute emergencies also may prevent civilians from being able to vote on Election Day. App. 17a. This holding flatly violates numerous longstanding lines of this Court's precedents holding that:

- a state may offer special voting-related protections or reforms to certain groups that face barriers to voting, without extending such protections or reforms to everyone else who faces comparable difficulties in voting, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966); *see also Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974);

- restrictions on absentee or early voting, and a State's decision to extend absentee or early voting only to members of certain groups, are subject only to rational-basis scrutiny, *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969); *see also O'Brien v. Skinner*, 414 U.S. 524, 530 (1974); *White*, 415 U.S. at 795; *Prigmore v. Renfro*, 410 U.S. 919 (1973) (mem.),

- members of the military inherently face unique obstacles, restrictions, and burdens that categorically distinguish them from civilians, regardless of where they are living or stationed, *Middendorf v. Henry*, 425 U.S. 25, 38 (1976); *Parker v. Levy*, 417 U.S. 733, 743 (1974); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953); and

- a State may allow members of the military to cast absentee ballots without likewise extending the privilege to all other qualified voters, *Prigmore*, 410 U.S. 919.

See infra Part I.

Furthermore, the fact that the State previously went beyond the constitutional minimum by offering in-person absentee voting to the general public during the 2008 election cannot give the public any heightened constitutional interest in retaining that privilege, *Crawford v. Board of Education*, 458 U.S. 527, 540 (1982) (holding that a State is under no obligation to "maintain legislation . . . when the State was under no obligation to adopt the legislation in the first place"), regardless of whether certain demographic groups disproportionately chose to take advantage of that opportunity, *see* App. 4a-5a, 11a-12a; *see also Washington v. Davis*, 426 U.S. 229, 248 (1976). Thus, summary reversal is warranted.

Additionally, because the preliminary injunction requires counties that permit military voters to cast in-person absentee ballots during the Three-Day Period to extend that opportunity to the general public, as well, the Sixth Circuit's ruling creates a strong incentive for counties to simply prohibit all in-person absentee voting over the weekend before Election Day. This would inflict irreparable injury on Active Duty military voters who face the constant possibility of deployment or out-of-state temporary duty assignments, as well as on members of the Reserves and Guard who could be activated at a moment's notice to deal with attacks such as the recent terrorism at the Benghazi consulate, natural disasters, or other emergencies. *See, e.g.*, App. 101a (discussing the Ohio National Guard's Homeland Response Force, a 570-person team which must respond to a "chemical, biological, radiological, nuclear, or high-yield explosive event" anywhere in the "entire Eastern United States" within "6 to 12 hours of receiving an activation order"). Thus, the Military Groups also have satisfied the requirements for obtaining a stay of the preliminary injunction. *See infra* Part II.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI AND REVERSE THE JUDGMENT BELOW BECAUSE THE SIXTH CIRCUIT'S RULING IS CONTRARY TO WELL-SETTLED PRINCIPLES OF CONSTITUTIONAL LAW.

A. The Sixth Circuit Wrongly Undermined the Ability of States to Grant All Military Voters Special Flexibility Regarding Voting, in Direct Violation of This Court's Precedents.

This Court should grant a stay and summary reversal, because the Sixth Circuit's ruling is a direct repudiation of nearly a century's worth of Supreme Court caselaw recognizing that members of the military are not "similarly situated" with civilians. It will substantially hinder States' efforts to ameliorate the consistently low rates of voting by military personnel, and calls into question the constitutionality of the Uniform Military and Overseas Voters Act ("UMOVA"), which has been adopted by 10 states.

1. The Sixth Circuit's ruling that members of the military, unless they are stationed away from home, are "similarly situated" with civilians for purposes of in-person absentee voting, is inconsistent with this Court's repeated recognition that the military is a separate society whose members are subject to numerous restrictions and burdens that do not apply to the public at large.

This Court repeatedly has recognized that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). The "differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Parker*, 417 U.S. at 743 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)); *see also Brown v. Glines*, 444 U.S. 348, 354 (1980) ("Military personnel must be ready to perform their duty whenever the occasion arises.").

Due to such "unique military exigencies," the military "must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger v.*

Councilman, 420 U.S. 738, 757 (1975). It "regulate[s] aspects of the conduct of [its] members . . . which in the civilian sphere are left unregulated." *Middendorf*, 425 U.S. at 38. In the words of one lower court:

> It is common knowledge that military life differs significantly from civilian life. Soldiers, Sailors and Marines are not free to come and go as they please. They do not make up their own work hours. They do not choose the locations of their jobs. They do not choose what clothes they will wear to work, or even how they will wear those clothes. . . . Military life—as a matter of functionality, necessity and national security—is one of regimented, controlled, ordered existence.

Dibble v. Fenimore, 488 F. Supp. 2d 149, 160 (N.D.N.Y. 2006). As a result, "[h]ow and where [members of the military] conduct their lives is dictated by the government." *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000).

The undisputed record evidence in this case bears out these holdings. Members of the military living in Ohio, regardless of the component to which they belong—Active, Reserve, or National Guard—may learn only a few days before Election Day that they are being deployed, mobilized, or sent on temporary duty assignment. App. 100a-01a, ¶¶ 6, 8-9 (Declaration of Colonel Duncan D. Aukland); *id*. 111a-12a, ¶ 15 (Declaration of Robert H. Carey, Jr.); *id*. 118a-19a, ¶¶ 9-12 (Declaration of Rear Admiral (Ret.) James J. Carey). Members of the military who reasonably had been planning to vote on Election Day instead may find themselves being relocated across the state, across the nation, or around the world, without enough time to request an absentee ballot by mail.

The uncontradicted record evidence also establishes that, when a member of the military is unexpectedly deployed, mobilized, or sent on a temporary duty assignment, it often imposes tremendous burdens on the remaining spouse to make new arrangements on short notice for childcare, bill payments, transportation, and even civilian employment, which can prevent him or her from being able to vote on Election Day. App. 119a-20a, ¶ 13 (Declaration of Rear Admiral (Ret.) Carey); *see*

also id. 101a, ¶ 12 (Declaration of Colonel Aukland) (noting that "preparations" for deployment or temporary duty assignments "can and often do impose significant burdens on a servicemember's family, as well").

Despite this Court's precedents and the evidence in this case, however, the Sixth Circuit held that, "[w]ith respect to in-person voting," military voters and civilians "are similarly situated," and therefore may not be treated differently. App. 18a. The court emphasized that "any voter could be suddenly called away and prevented from voting on Election Day" due to "medical emergencies," "business trips," or job-related contingencies. *Id*. at 17a. Thus, the court concluded, military voters cannot be given additional flexibility for in-person voting beyond that available to the general public. *Id*. at 18a.

This ruling is squarely contrary to this Court's recognition that the military is a separate society whose members play a critical role in defending the country and are subject to unique burdens. Members of the military, regardless of where they live or are stationed, categorically cannot be considered "similarly situated" with civilians. Also, the lower court's ruling effectively creates two constitutional classes of military voters—those stationed out-of-state or overseas, who may be given additional flexibility in voting, *id*. at 17a-18a, and those stationed or living in their home jurisdictions, who must be treated like civilians, *id*. at 18a.

2. The Sixth Circuit's ruling also contravenes this Court's longstanding principle that a "reform measure aimed at eliminating an existing barrier to the exercise of the franchise" that hinders certain groups of voters, such as military voters, is "not invalid under the Constitution because it might have gone farther than it did" by helping other groups, as well. *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *see also White*, 415 U.S. at 795 (holding that, if a State "permit[s] absentee voting by some classes of voters," the Equal Protection Clause does not entitle "other classes of otherwise qualified voters" to also cast absentee

ballots unless they are "in similar circumstances"). The fact that, broadly speaking, unexpected developments may occur in anyone's life does not render unconstitutional the State's effort to specifically address the unique risks, contingencies, and restrictions that military personnel face.

This Court implicitly recognized the need to give military personnel special flexibility in voting in *Prigmore v. Renfro*, 410 U.S. 919 (1973) (summarily affirming 356 F. Supp. 427 (N.D. Ala. 1972) (three-judge panel)). The plaintiff brought an Equal Protection claim challenging an Alabama law that allowed only Active Duty members of the military and their spouses, as well as certain other classes of people, to cast absentee ballots. *See Prigmore*, 356 F. Supp. at 429. After holding that the rational basis test was the proper standard, *id*. at 432, the three-judge district court concluded that the law created "neither an invidious [n]or suspect discrimination or classification," and rejected the Equal Protection challenge, *id*. at 433. This Court summarily affirmed. *Prigmore*, 410 U.S. 919 (1973). The Sixth Circuit, however, dismissed this case as irrelevant, due to this Court's subsequent development of the *Anderson-Burdick* test. App. 12a.

3. The Sixth Circuit's ruling will make it much more difficult for States to comprehensively address the persistent problem of low voting rates by military personnel. In the 2008 election cycle, only 54% of active duty military members voted, *see* Dep't of Def., Federal Voting Assistance Program, Eighteenth Report: 2008 Post Election Survey Report, at v (March 2011),[3] while only 29% did so during the 2010 cycle, *see* Dep't of Def., Federal Voting Assistance Program, 2010 Post Election Survey Report to Congress, at iv (Sept. 2011).[4] Under the Sixth Circuit's ruling, military personnel stationed or living within the United States may

[3] *Available at* http://www.fvap.gov/resources/media/18threport.pdf (last referenced Oct. 12, 2012).

[4] *Available at* http://www.fvap.gov/resources/media/2010report.pdf (last referenced Oct. 12, 2012).

not be granted special flexibility or consideration in voting. This will severely hamper the efficacy of state and federal programs aimed at bolstering military voting rates, and reduce voting opportunities for the very people whose sacrifices help safeguard the right to vote for the rest of us.

4. Perhaps most significantly, the Sixth Circuit's ruling also would require the invalidation of key provisions of the Uniform Military and Overseas Voters Act ("UMOVA"),[5] which has been enacted in substantial part by 10 states.[6] UMOVA, like the Ohio Code, applies equally to all members of the Active and Reserve Components, as well as members of the National Guard and state militia "on activated status," regardless of where they are living or stationed. Uniform Military & Overseas Voting Act, § 2(1)(A)-(B), (9) (2010); *see also id*. § 2 cmt. ("[T]he act's coverage of uniformed service voters is based on a voter's status as an active member of one of the defined services, whether or not the voter is absent from the place of voting.").

UMOVA offers all military voters special consideration and assistance in voting in a wide variety of ways, such as by:

- allowing them to request voter registration materials and absentee ballots electronically, *id*. §§ 4(c), 6(c), 7(c);

- requiring election officials to transmit voter registration applications, absentee ballot request forms, and blank absentee ballots to military voters electronically, if requested, *id*. §§ 4(c), 6(c), 7(c), 9(b);

- allowing military voters to use the federal postcard application to register to vote and request absentee ballots, *id*. §§ 6(a), 8(a)-(b), and the federal write-in absentee ballot to cast their votes, *id*. §§ 6(b), 11;

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[5] *Available at* http://www.uniformlaws.org/shared/docs/military%20and%20overseas%20voters/umova_final_10.pdf (last referenced Oct. 12, 2012).

[6] *See* Colo. Rev. Stat. §§ 1-8.3-101 to 1-8.3-119; D.C. Code §§ 1-1061.01 to 1-1061.20; Nev. Rev. Stat. §§ 293D.010 to 293D.540; N.C. Gen. Stat. §§ 163-258.1 to 163-258.20; N.D. Cent. Code §§ 16.1-07-18 to 16.1-07-33; 26 Okla. Stat. §§ 14-136 to 14-155; Utah Code §§ 20A-16-101 to 20A-16-506; Va. Code Ann. §§ 24.2-451 to 24.2-470; *see also* 2012 Cal. Stat. ch. 744; 2012 Haw. Act 226.

- requiring election officials to transmit absentee ballots to military voters 45 days prior to the election (unless the jurisdiction obtains a waiver under the federal Military and Overseas Voter Empowerment Act, 42 U.S.C. § 1973ff-1(g)(2)), UMOVA, § 9(a);

- requiring States to establish "electronic free-access system[s]" to allow military voters to "determine by telephone, electronic mail, or Internet" whether their request for an absentee ballot was "received and accepted," and whether their completed absentee ballot "has been received and the current status of the ballot," *id*. § 14;

- requiring States to accept and count a write-in vote from a military voter, even if it contains "an abbreviation, misspelling, or other minor variation in the form of the name of a candidate or a political party," *id*. § 17(a);

- eliminating notarization requirements and limiting authentication requirements for all election-related submissions by military voters, *id*. § 17(b); and

- creating a private right of action to enforce these rights, *id*. § 18(1).

Under the Sixth Circuit's ruling, a State may extend special flexibility to "military and overseas voters [who] are *absent* from their voting jurisdictions." App. 18a (emphasis in original). According to the court, military personnel and their families living in their home jurisdictions "are similarly situated" with civilian voters, and therefore may not be given special accommodations. *Id*. UMOVA—which gives military voters special opportunities to vote, regardless of where they live—therefore would be unconstitutional. This Court should not countenance such a dangerous precedent.

Thus, the Sixth Circuit's ruling in this case not only directly violates several well-established precedents of this Court, *see McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969); *Katzenbach*, 384 U.S. at 657-58; *Prigmore*, 410 U.S. 919, but also makes it substantially harder for States to facilitate voting by members of the military and their families living or stationed where they are registered to vote, and likely would require UMOVA's invalidation. A stay and summary reversal, or certiorari, is necessary to safeguard the voting rights of the millions of members of the Armed Forces defending this Nation's freedom, regardless of where they live.

B. The Sixth Circuit Wrongly Disregarded This Court's Rulings and Established a Far-Reaching New Precedent By Holding That Limitations on Absentee and Early Voting May Burden the Fundamental Constitutional Right to Vote.

The Sixth Circuit's reasoning and holding also has important ramifications far beyond the specific context of military voting. This Court repeatedly has held that the fundamental constitutional right to vote does not extend to absentee or early voting. *See, e.g., McDonald*, 394 U.S. at 807 (distinguishing between "the right to vote," which is constitutionally protected, and the "claimed right to receive absentee ballots"); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."); *O'Brien v. Skinner*, 414 U.S. 524, 536 (1974) (Blackmun, J., dissenting) ("The State, after all, as a matter of constitutional requirement, need not have provided for any absentee registration or absentee voting."). And a state's decision to allow absentee or early voting during one election cycle does not give the public a greater constitutional right to demand such flexibility in subsequent elections. *See Crawford v. Bd. of Educ.*, 458 U.S. 527, 535, 539-40 (1982).

Consequently, restrictions on the availability of absentee ballots do not "deny . . . the exercise of the franchise," and state laws that permit only certain groups of voters to participate in absentee voting—whether in-person or by mail—are subject only to rational-basis scrutiny.[7] *McDonald*, 394 U.S. at 807; *Prigmore v. Renfro*, 410 U.S. 919 (1973), *affirming* 356 F. Supp. 427 (N.D. Ala. 1972) (three-judge panel) (applying rational basis review to statute allowing only Active Duty military members and certain other groups of voters to cast absentee ballots); *White*, 415 U.S. at 795 (holding that a state is required only to avoid "arbitrary

[7] Unless, of course, the law uses a suspect classification.

discrimination" in "permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters"); *see also Clement v. Fashing*, 457 U.S. 957, 966 (1982) (noting that the *McDonald* Court did not use "heightened" scrutiny in its Equal Protection analysis of absentee-voting restrictions); *O'Brien*, 414 U.S. at 530 (applying rational-basis scrutiny of geographic restrictions on absentee ballots for pretrial detainees).

The Sixth Circuit, in contrast, held that the State burdened civilians' fundamental right to vote by allowing only military voters to cast in-person absentee ballots during the Three-Day Period. App. 12a. Consequently, the court applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), for reviewing election laws that burden constitutional rights, rather than the "rational basis" test, and concluded that Ohio's restriction is unconstitutional. In doing so, the Sixth Circuit followed the lead of the U.S. Court of Appeals for the Second Circuit in *Price v. New York State Board of Elections*, 540 F.3d 101, 107-10 (2d Cir. 2008), in which the court held that a State's refusal to allow people to vote by absentee ballot in races for county political party committees burdened the public's right to vote. Applying the *Anderson-Burdick* balancing test, *id.* at 108, the Second Circuit invalidated the prohibition on absentee voting, *id.* at 112.

These cases not only flatly contradict this Court's precedents concerning absentee voting, but also conflict with the Seventh Circuit's reasoning and ruling in *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). The *Griffin* Court upheld an Illinois law allowing only certain groups of voters to cast absentee ballots in advance of Election Day, despite the plaintiffs' claim that other voters—such as "emergency room and other medical personnel," "persons who work two jobs," and "those who are caring for a sick or disabled family member"—cannot travel to the polls on Election Day and will "lose their vote if they can't vote by absentee ballot."

Id. at 1130-31. Although the Seventh Circuit cited *Burdick*, 504 U.S. at 438-42, it ruled that the plaintiffs did not have a constitutional right to vote by absentee ballot, *id*. at 1130, rejected their Equal Protection claim, *id*. at 1132, and did not find that the restrictions at issue burdened anyone's rights. *See also Prigmore*, 410 U.S. 919 (affirming ruling upholding the constitutionality of a state law allowing only certain groups of voters to cast absentee ballots).

The Sixth Circuit's holding that restrictions on in-person absentee voting burden the fundamental constitutional right to vote, and are therefore subject to the *Anderson-Burdick* balancing test, also calls into question the excuse-based absentee voting laws of 15 states.[8] Few, if any, of these statutes could withstand the level of heightened scrutiny to which the Sixth Circuit subjected Ohio's arrangement. Indeed, the Ohio plan is even less concerning than most other states' absentee voting statutes, since it allowed the public to cast in-person absentee ballots for 23 days, submit absentee ballots by mail for 35 days, and vote in person on Election Day. The notion that granting military voters an extra three days to cast in-person absentee ballots burdens the fundamental right to vote is both implausible, and a dramatic departure from this Court's voting rights jurisprudence that would undermine the election laws of nearly a third of the States in the country.

Thus, the Sixth Circuit's legal standard, reasoning, and holdings are riddled with errors that directly violate this Court's longstanding precedents. Its ruling will undermine both military voting in Ohio and other states' efforts to protect military voters through measures such as UMOVA, and calls into question the constitutionality of excuse-based absentee voting laws. Summary reversal is warranted.

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[8] Ala. Code § 17-11-3; Conn. Gen. Stat. § 9-135; Del. Code Ann. tit. 15, § 5502; Ky. Rev. Stat. Ann. §§ 117.075, 117.077, 117.085; Mass. Gen. Laws ch. 54, §§ 86, 91A; Mich. Comp. Laws §§ 168.758, 168.759; Minn. Stat. § 203B.02; Miss. Code Ann. § 23-15-713; Mo. Rev. Stat. § 115.277; N.H. Rev. Stat. Ann. § 657:1; N.Y. Election Law § 8-400; 25 Pa. Cons. Stat. § 3302; R.I. Gen. Laws § 17-20-2; S.C. Code Ann. § 7-15-320; Va. Code Ann. § 24.2-700.

II. ALLOWING THE PRELIMINARY INJUNCTION TO REMAIN IN FORCE FOR THE UPCOMING ELECTION WILL CAUSE IRREPARABLE INJURY TO OHIO MILITARY VOTERS

The Sixth Circuit's ruling also is likely to cause irreparable injury to military voters in Ohio. The preliminary injunction, as interpreted by the Sixth Circuit, presents counties with a stark choice—either open the floodgates to in-person absentee voting by everyone over the Three-Day Period, or prohibit it entirely. App. 20a. A handful of counties expressed willingness in the lower courts to open voting during that timeframe to the general public. It is highly likely, however, that many counties which would have been willing to allow their military voters to cast in-person absentee ballots over the weekend before Election Day will instead opt to entirely discontinue voting during that period. This will reduce voting opportunities for military personnel, especially for those who are subject to last-minute deployment, activation, or temporary duty assignment orders. *See, e.g.*, *id*. 101a (discussing the Ohio National Guard's Homeland Response Force, a 570-person team which must respond to a "chemical, biological, radiological, nuclear, or high-yield explosive event" anywhere in the "entire Eastern United States" within "6 to 12 hours of receiving an activation order").

County election officials are "extremely busy" throughout the Three-Day Period and must fulfill a wide range of "key tasks" to ensure that polling places across the state are prepared to process millions of voters that following Tuesday. App. 105a, ¶ 11 (Declaration of Matthew M. Damschroder). For example, completed absentee ballots must be processed, and the voter registration rolls updated, so that voters' records reflect whether they already have cast their ballots. *Id*. at 105a-06a, ¶¶ 13-14, 19. County boards also must confirm that each polling location has "sufficient ballots, instruction cards, registration forms, poll books, tally sheets, writing implements, and other supplies necessary for the casting and counting of

ballots," as well as sufficient provisional ballots and provisional ballot envelopes. *Id*. at 106a, ¶¶ 15-16.

Boards also are responsible for setting up "polling locations with voting equipment, table[s], chairs, and proper signage," while also ensuring that any necessary modifications are made to ensure that the polling locations are handicapped-accessible. *Id*. ¶¶ 17-18. Additionally, election officials must "handle any last-minute issues that arise, including . . . moving a polling place in the event of an emergency, [and] replacing poll workers who are unable to serve at the last minute." *Id*. ¶ 20. A large county may have as many as 500 polling locations, and thousands of poll workers, to coordinate. *Id*. ¶ 21.

For these reasons, according to Deputy Secretary of State and State Elections Director Matthew M. Damschroder, "[a]llowing all persons who wish to vote absentee in person during the three days immediately preceding Election Day could make it much more difficult for the boards of elections to prepare for Election Day." *Id*. ¶ 22. Conversely, giving counties the discretion to allow military voters, their families, and overseas citizens to cast in-person absentee votes over the three days before Election Day "will not interfere with board of elections preparations," because the number of such people who would take advantage of that opportunity likely "would be relatively small." *Id*. at 107a, ¶ 24.

Thus, many counties that would welcome military voters during the Three-Day Period reasonably can be expected to end in-person absentee voting over the weekend before Election Day, rather than opening it to the general public. *See* App. 43a (noting that "an estimated 93,000 Ohio voters in the 2008 presidential election" voted during the three days before Election Day). This would irreparably injure military voters who are at risk of sudden deployment, activation, or temporary duty assignments. This Court therefore should stay the Sixth Circuit's ruling.

ALTERNATIVE REQUEST TO TREAT THE MILITARY GROUPS' APPLICATION AS A PETITION FOR CERTIORARI

In the event this Court denies the applications for a stay and summary reversal of the Sixth Circuit's ruling, it should treat this filing as a Petition for Certiorari and consider this case on the merits. *See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 528 U.S. 1153, 1153 (2000) (mem.) ("The motion of petitioner for summary reversal is denied. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted."); *Shalala v. Schaefer*, 509 U.S. 292, 295 (1993) (explaining that the Court refused to summarily reverse the Court of Appeals, but nevertheless granted certiorari).

The district court's preliminary injunction, App. 57a-58a, will hinder indefinitely the State's efforts to facilitate voting by military personnel. As discussed earlier, while a few counties apparently are willing to open the floodgates to in-person absentee voting by the general public throughout the Three-Day Period in future elections, most counties are unlikely to undertake that burden while simultaneously attempting to finalize their preparations for Election Day. Thus, the Sixth Circuit's all-or-nothing approach is likely to leave most military voters throughout the State with no way to vote if they are deployed, activated, or sent on temporary duty assignment in the days leading up to future elections. Furthermore, as discussed above, the ruling is a dangerous precedent that renders UMOVA largely unconstitutional, and calls into question the validity of excuse-based absentee voting laws. This Court should grant certiorari to reinforce the rights of military voters and clarify the constitutional status of absentee and early voting. *Cf.* App. 12a (holding that restrictions on the availability of absentee voting opportunities burden the fundamental constitutional right to vote); *Price*, 540 F.3d at 109 (same).

CONCLUSION

For these reasons, this Court should grant a stay of the preliminary injunction and summarily reverse the Sixth Circuit's ruling. In the alternative, this Court should treat this filing as a Petition for Certiorari and issue a writ of certiorari so that it can consider this case on the merits.

Respectfully submitted,

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OCTOBER 2012

CERTIFICATE OF SERVICE

I, Michael T. Morley, a member of the bar of this Court, certify that on October 12, 2012, I served a copy of the Military Group Applicants' Joinder in Emergency Application for Stay and Summary Reversal on the listed counsel of record by electronic mail to the addresses listed below, and that all persons required to be served have been served.

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