No. 12-____

In The Supreme Court of the United States

Jon Husted, Ohio Secretary of State; and
Mike DeWine, Ohio Attorney General, *Applicants*

v.

Obama for America; Democratic National Committee; and
Ohio Democratic Party, *Respondents*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

EMERGENCY APPLICATION FOR STAY PENDING CERTIORARI

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

MICHAEL DEWINE
Ohio Attorney General

William S. Consovoy*
Thomas R. McCarthy
Brendan J. Morrissey
J. Michael Connolly
Wiley Rein LLP
1776 K Street NW
Washington, D.C. 20006
Tel: (202) 719-7000
wconsovoy@wileyrein.com

Special Counsel for Applicant Ohio Secretary of State Jon Husted

Stephen P. Carney
Richard N. Coglianese
Michael J. Hendershot
Assistant Attorneys General
30 East Broad Street, 16th Floor
Columbus, OH 43215
Tel: (614) 466-2872

Counsel for Applicant Ohio Attorney General Michael DeWine

**Counsel of Record*

Date: October 9, 2012

QUESTION PRESENTED

Whether the court of appeals erred in upholding a preliminary injunction premised on Respondents' claim that the Ohio legislature's decision to limit in-person absentee voting on the three days before Election Day to voters protected by the Uniformed and Overseas Citizens Absentee Voter Act violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES AND STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

EMERGENCY APPLICATION FOR STAY PENDING CERTIORARI

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Applicants Secretary of State Jon Husted and Attorney General Michael DeWine ("Applicants") respectfully move for a stay pending the timely filing of a petition for writ of certiorari. In addition, or in the alternative, Applicants request that the Court treat the application for stay as a petition for writ of certiorari, grant the petition, and summarily reverse the decision below.

I. INTRODUCTION

In 2005, Ohio enacted perhaps the most generous system of absentee voting in the entire nation. Eligible voters are able to begin casting an absentee ballot without an excuse starting 35 days before the election. Absentee ballots can be cast in-person or by mail. For the upcoming election, Secretary Husted has mailed an absentee ballot application to each of the more than 6 million registered voters in Ohio. And, more than 9,000 polling locations across the State are open for 13 hours on Election Day. Accordingly, there can be no doubt that Ohio affords its citizens ample opportunities to cast a ballot.

Respondents Obama for America, Democratic National Committee, and Ohio Democratic Party ("Respondents") nevertheless filed suit and sought a preliminary injunction challenging, under the Equal Protection Clause of the Fourteenth Amendment, O.R.C. § 3509.03, which changed Ohio law to limit *in-person* absentee voting on the three days preceding Election Day to voters protected by the

Uniformed and Overseas Citizens Absentee Voter Act ("UOCAVA"). Although the complaint and preliminary injunction motion set forth a straightforward disparate treatment claim challenging the preferential access granted to military voters and their families (a claim that would clearly fail under rational basis review), the Sixth Circuit interpreted Respondents' suit as challenging the Ohio law based on its alleged interference with non-UOCAVA voters' fundamental right to vote and declared it facially unconstitutional on that basis. Based on nothing more than supposition, the Sixth Circuit held that this modest reduction of in-person absentee voting *disenfranchised* thousands of voters even though any voter who had previously used this three-day period to vote in person still had access to 230 hours of in-person absentee voting, more than 750 hours of absentee voting by mail, and 13 hours of voting on Election Day. The Sixth Circuit also rejected the State's interest—using these three days to prepare for Election Day, while also accommodating a small but vulnerable population of military voters and their families—as not important enough to sustain this severe burden on the right to vote. The decision below is unsustainable.

This Court has unequivocally held that there is no constitutional right to absentee voting and that laws offering absentee ballots to some voters but not others are subject to rational-basis review unless the law "absolutely prohibited" voters "from exercising the franchise." *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969). That decision is controlling here. It cannot seriously be argued that *any* voter—let alone an entire class of voters—has been

disenfranchised when Ohio still offers non-UOCAVA voters 230 hours of in-person absentee voting, more than 750 hours of absentee voting by mail, and 13 hours of voting on Election Day. The Sixth Circuit's ruling that lower income and lesser educated voters would not be able to vote at all other than through in-person absentee voting on these three particular days finds no support in fact or law. Indeed, this is precisely the type of inferential reasoning the Court has found plainly insufficient to strike down an election law as facially unconstitutional. *See generally Crawford v. Marion Cnty Elec. Bd.*, 553 U.S. 181 (2008). The State's important regulatory interests in preparing for Election Day, while accommodating a small number of military voters and their families, are more than sufficient to justify this *de minimis* inconvenience to voters.

This decision is not only wrong, but it will cause wholly unwarranted interference with and disruption of the State's administration of elections. The Ohio legislature reached the measured decision to modestly reduce in-person absentee voting to allow county boards of elections ample time to prepare for Election Day. Approximately 70% of Ohioans still cast their ballot on Election Day. In the days before Election Day, officials must undertake numerous preparations to set up the over 9,000 polling locations throughout Ohio. Respondents may think that the legislature struck the wrong balance between allowing in-person absentee voting and Election Day preparation, but it is the legislature's judgment that has constitutional significance because it is the body that is ultimately responsible for ensuring an orderly and fair electoral process.

The Sixth Circuit's decision also undermines the protections afforded to military voters and their families under numerous federal and state laws. Although the court went to great lengths to profess its support for UOCAVA voters, it rejected any special protections for them unless they are deployed outside their home state. The court acknowledged that military voters residing in their home state in the days before an election might be abruptly deployed because of the need to respond to a military emergency or natural disaster, but it found that such a concern was insufficient to distinguish UOCAVA voters from the civilian population, comparing this possibility to "personal contingencies like medical emergencies or sudden business trips" that might arise unexpectedly. Appendix ("App."). 17a. Confusing the line of authority addressing disparate treatment under the Equal Protection Clause and the Court's fundamental right to vote jurisprudence, the Sixth Circuit even suggested that the State could have cured the constitutional problem by further restricting the voting rights of the military and their families. *Id*. 15a. But if O.R.C. § 3509.03 fundamentally burdened non-UOCAVA voters' right to vote, as the Sixth Circuit incorrectly found, further restricting the voting rights of military voters and their families obviously does nothing to solve that purported injury to non-UOCAVA voters.

Despite the Sixth Circuit's claim to the contrary, then, its decision does not respect the need to specially accommodate military voters and their families. Indeed, the court discounts almost any protections for military voters unless they are deployed. Yet many federal and state laws extend protections to such voters

even when they are residing in their home state, for example, by mailing them absentee ballots earlier than other voters, or by not requiring a postmark on an absentee ballot. Such laws are subject to constitutional doubt under the reasoning of the decision below.

Finally, the Sixth Circuit's decision will have ramifications far beyond Ohio. At a minimum, it will deter other states from expanding voting avenues out of fear that they will not be allowed to make changes if experience proves them unwise or capable of improvement. *See, e.g.*, Rachel La Corte, *Washington State to Unveil Voter Registration on Facebook*, Associated Press (July 18, 2012). Worse still, the reasoning underlying the Sixth Circuit's ruling might subject other states' current voting systems to constitutional attack in this election cycle or in a future one for failing to provide more absentee voting options or by scaling back early voting periods. Texas has shortened the start date for the in-person early voting period from 20 days to 17 days prior to an election. Texas SB 292, § 1 (1997). Georgia has reduced the early voting period from 45 days to 21 days. Georgia HB 92 (2011). New York, Pennsylvania, Kentucky and Michigan do not allow *any* voting before Election Day unless the voter has a valid excuse. This kind of constitutional challenge should not be allowed to proliferate.

At bottom, the Constitution allocates to the States the responsibility to run elections. Enjoining state election laws as facially unconstitutional—especially right before an election—frustrates the Framers' design and disrupts election administration in multiple ways. Thus, this Court has warned federal courts to be

cautious before doing so. The Sixth Circuit ignored that warning and starkly declared, in direct contravention of binding Supreme Court precedent, that non-UOCAVA voters have a constitutional right to cast an absentee ballot in-person on the three days immediately preceding Election Day. This untenable ruling should be set aside.

II. STATEMENT OF THE CASE

A. Background

1. *The Expansion Of Early, Absentee, And Voting By Mail*

"States retain the power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). As a result, there is no uniform, federal system for conducting elections. New York and Pennsylvania, for example, permit regular ballots to be cast on Election Day only and require an excuse to use an absentee ballot; Florida offers no-excuse absentee voting and early voting of regular ballots (*i.e.*, immediate tabulation of the ballot just like on Election Day); New Jersey offers no-excuse absentee voting but no early voting of regular ballots; Georgia offers no-excuse absentee voting and 21 days of in-person absentee voting; Oregon generally conducts its elections by mail; Kentucky allows mail-in absentee voting with an excuse, and machine voting for voters with a valid excuse during the 12 business days immediately preceding Election Day; Michigan generally allows mail-in absentee voting with an excuse; and Tennessee allows in-person voting prior to Election Day (ending five days before Election Day), and permits voting by mail only with a valid excuse.

This wide diversity in the casting of ballots is a relatively new phenomenon. For most of American history, States provided for voting on one day: Election Day. If a person sought to vote in an election, he or she would travel to the polls to cast a ballot on Election Day. Over time, some States began offering absentee voting to select groups of people they believed were in need of special assistance and could not otherwise make it to the polls. *See generally* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483 (2003).

"Like many aspects of American election administration, the rise of the absentee ballot is tied to military service." Daniel P. Tokaji, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 McGeorge L. Rev. 1015, 1020 (2007). Beginning in the Civil War, a number of states enacted absentee voting laws so soldiers could vote while deployed. Fortier & Orstein, *supra*, at 493-501. By 1924, after World War I, most States offered some sort of absentee balloting, though it was almost always limited to select categories of people, such as the military, those in transient professions (*e.g.*, railroad workers) or specified categories (*e.g.*, temporary or permanent disability). It has only been in the last two decades that States began significantly expanding the opportunities for alternative forms of voting, like no-excuse, in-person voting. Robert M. Stein & Greg Vonnahme, *Early, Absentee, and Mail-In Voting* 183 (2010).

Ohio's experience reflects this overall trend. For much of its history, Ohioans who could not make it to the polls on Election Day could cast an absentee ballot only

with a valid excuse. This "excuse" requirement meant that only certain categories of people could vote absentee. Valid excuses included: (1) being age 62 or older; (2) full-time employment as an emergency services worker; (3) membership in the organized militia; (4) medical excuses; (5) non-felony incarceration; (6) religious observance; (7) absence from the county; (8) physical disability; or (9) being a poll worker. O.R.C. § 3509.02(A), (C) (2004). These absentee ballots could be voted by mail or in person.

In 2005, Ohio enacted HB 234, which revised its election procedures to adopt no-excuse absentee voting. HB 234 (2005); O.R.C. § 3509.02(A) (eff. Jan. 27, 2006). Voters now can request an absentee ballot without an excuse and then vote it by mail. Or, pursuant to preexisting state law, they can request and cast an absentee ballot in person at either the voter's county board of elections office or at another site designated by the county board of elections. O.R.C. § 3501.10. In either circumstance, the procedure is identical: the voter must fill out an application with the required information,[1] must receive the ballot, must mark it, and must return it to the board of elections. O.R.C. § 3509.03; *id.* § 3509.05.

As a general rule, all ballots used in a particular county—whether mail-in absentee, in-person absentee, or Election Day—are identical to one another (other than the title absentee ballot). O.R.C. § 3509.01(A). But absentee ballots (cast in person or by mail) are verified and counted in a particular way: they are not immediately tabulated, but rather are examined to determine if they are valid and

[1] If the voter requests that the absentee ballot be delivered by mail, he must also provide an address for delivery. O.R.C. § 3509.03(I).

are tabulated after the fact. O.R.C. § 3509.06. Since the passage of HB 234, with the State and its counties devoting substantial resources to promoting the use of absentee voting generally and in-person absentee voting in particular over the five-week period preceding Election Day, Ohio has been at the vanguard of states in terms of promoting access to the polls.

2. *Federal And State Protections For Military And Overseas Voters*

Because military and overseas voters face unique challenges, federal law provides them special protections through, among other laws, the Uniformed and Overseas Citizens Absentee Voter Act ("UOCAVA"), the Military and Overseas Voter Empowerment Act ("MOVE Act"), and the National Defense Authorization Act for Fiscal Year 2010, Pub. Law 111-84 (2010). Following this trend, Ohio likewise provides special protections to individuals protected by these statutes. O.R.C. ch. 3511 (UOCAVA voting procedures), ch. 3509 (absentee voting procedures); *compare* App. 80a-86a (Directive 2012-20 (May 25, 2012) (UOCAVA voting)); App. 88a-89a (Directive 2012-26 (July 12, 2012) (absentee voting)).

Ohio law defines "uniformed service voters" as members of: (1) the active or reserve components of the U.S. Army, Navy, Air Force, Marine Corps, or Coast Guard; (2) the National Guard and the organized militia on activated status; (3) the merchant marine, commissioned corps of the Public Health Service or the National Oceanic and Atmospheric Administration; and (4) the spouse or dependent of any of the above. O.R.C. § 3511.01. Ohio law defines an "overseas voter" as a person who: (1) is considered by Ohio law to be a resident of the state, but currently is living outside the United States; and (2) was born outside the United States, but who has

a parent or guardian who last resided and was last eligible to vote in Ohio before leaving the United States. *Id*.

Federal and Ohio law treat UOCAVA and non-UOCAVA voters differently in many respects. Federal law allows UOCAVA voters to use the Federal Post Card Application ("FPCA") both as a voter registration form and a request for absentee ballot. 42 U.S.C. § 1973ff(b)(2). Non-UOCAVA voters must separately register before receiving an absentee ballot. O.R.C. § 3509.03. Once a UOCAVA voter requests an absentee ballot, he or she will continue to receive a ballot for each election in a calendar year. *Id*. § 3511.02. Non-UOCAVA voters must request absentee ballots one election at a time. *Id*. § 3509.03(F).

The procedures and timing for requesting an absentee ballot also differ. UOCAVA voters may request and receive absentee ballots by mail, email, fax, or in person; non-UOCAVA voters may request and receive absentee ballots only by mail or in person. *Id*. §§ 3511.04; 3509.03, 3509.05. Also, on the 45th day before each election, each county board of elections must transmit an absentee ballot to every UOCAVA voter who has filed a valid application by January 1 of that year or 90 days before the election, whichever is earlier. 42 U.S.C. § 1973ff-1(a)(8); O.R.C. § 3511.04(B). In contrast, county boards must have non-UOCAVA absentee ballots available on the 35th day before each election. O.R.C. § 3509.01.

In addition, UOCAVA voters are afforded special protection in the return of absentee ballots. Both Ohio and federal law allow UOCAVA voters who have requested an absentee ballot but who have not received one to vote via a federal

write-in absentee ballot. Non-UOCAVA voters do not have this option. O.R.C. § 3511.14; 42 U.S.C. § 1973ff-2. Furthermore, a postmark is not necessary for a UOCAVA ballot to be counted and the ballot will be counted if received within ten days after the election so long as the voter signed the identification envelope no later than 12:01 a.m. on the date of the election. O.R.C. §§ 3511.09; 3511.11(C). A postmark prior to Election Day is necessary for a non-UOCAVA absentee ballot to be counted. *Id*. § 3509.05(B). UOCAVA voters are entitled to all of these special accommodations irrespective of whether they are deployed or remain within Ohio during the pre-election period.

3. *Ohio Election Changes*

As a result of three different statutory enactments—HB 194, HB 224, and SB 295—the deadline under Ohio law for casting in-person absentee ballots is 6:00 p.m. on the Friday before Election Day for non-UOCAVA voters. App. 5a-6a, 39a-41a. The debates over all three bills show that the legislature was motivated to shorten the in-person absentee voting period to allow boards of elections to prepare for Election Day.[2] *See, e.g.*, Senate Debate on SB 295 at 56:30-57:45 (Mar. 28, 2011) (Sen. Seitz) ("[W]e listened to the people [who] administer elections for a living. . . . And the election officials felt very, very, very strongly that they would like the curtain to come down on in-person absent voting on the Friday before the Election so that they could have the weekend and Monday to get ready for the big day.");

[2] The debates are available for HB 194, *see* http://www.ohiochannel.org/MediLibrary/MediaSearchResults.aspx?keywords=HB+194, HB 224, http://www.ohiochannel.org/MediaLibrary/MediaSearchResults.aspx?Keywords=HB+224, and SB 295, *see* http://www.ohiochannel.org/ Media Library/MediaSearchResults.aspx?yeywords=sb+295.

House Debate on SB 295 at 364:00-364:40 (April 25, 2012) (Rep. Maag) ("A bipartisan association of election officials gave us many provisions in House Bill 194, including—including—removing the weekend prior to elections so they could prepare for the elections."); House Debate on HB 194 at 192:54-193:38 (June 29, 2011) (Rep. Blessing) ("The Democratic member of the Hamilton County boards of election came to our committee and said 31 days . . . is too long. It's causing problems. He wanted it shortened. And it does cause problems when you back up all of those things to Election Day."); House Debate on SB 295 at 29:12-29:26 (May 8, 2012) (Rep. Blessing) ("Election officials from both parties oppose having voting during the three days prior to the Election, and that is what this is really about. They're telling us that they need to prepare for the Election Day.").[3]

As a result of these same enactments, Ohio law includes competing deadlines for casting in-person absentee UOCAVA ballots (6:00 p.m. on the Friday before Election Day and the close of the polls on Election Day). App. 5a-6a. The parties all agree that Secretary Husted appropriately resolved the conflict by giving the more generous period for UOCAVA voters precedence; the deadline for UOCAVA in-person absentee ballots is now four days later than the deadline for non-UOCAVA

[3] This is a bipartisan concern that has spanned administrations. In 2009, then-Secretary of State Jennifer Brunner, a Democrat, proposed shortening Ohio's in-person absentee voting period from 30 days to 20 days and ending it at 5 p.m. on the Sunday before the election. App. 28a n.8. As she explained, there is a "difficulty in administration for boards of elections [because] people are voting right up until the day before the election. . . . What ends up happening is elections workers then are trying to prepare for the election [and] get materials out to poll-workers, during those last few days. And what you end up having is sometimes election workers who don't go to bed for 48 hours. I don't think most people function that well on that little sleep. And we do want the elections to be smooth, well run, [and] accurate." Marc Kovac, *Early Voting Prompts Interesting Rhetoric*, Youngstown News (Sept. 8, 2012).

voters. The Ohio legislature rejected proposed amendments that would have revoked the special accommodations afforded to military voters and their families. R.34-11, PID 922-23; R.34-12, PID 926-27; *see also* R.34-40, PID 1114.

4. *Directive 2012-35*

Prior to the changes in law in 2011 and 2012, local boards of elections and the Secretary of State retained the ability to choose the days and hours on which in-person absentee ballots could be cast. *See* O.R.C. § 3501.11. Many local boards of elections were not open on weekends or during non-working hours. For example, in 2008, six of Ohio's 88 counties chose not to offer any in-person absentee voting on the Saturday prior to Election Day, nearly all chose not to do so on that Sunday, and all were open during their regular weekday business hours on that Monday. In 2010, fourteen counties chose not to offer any in-person absentee voting on that Saturday, nearly all chose not to do so on that Sunday, and all were open on that Monday. App. 107a (Damschroder Dec.).

The Secretary of State retains the authority under Ohio law to set statewide uniform days and hours. O.R.C. § 3501.11(E). On August 15, 2012, Secretary Husted exercised that authority by issuing Directive 2012-35, which eliminated the problem of different counties offering varying hours for in-person absentee voting by creating standard voting hours and thus "level[ed] the playing field on voting days and hours during the absentee voting period in order to ensure that the Presidential Election in Ohio will be uniform, accessible for all, fair, and secure." App. 133a (Directive 2012-35).

B. Procedural History

1. *District Court Proceedings*

Respondents brought this action alleging one cause of action: that Ohio violated the Equal Protection Clause by allowing only UOCAVA voters to cast an in-person absentee ballot on the three days before Election Day. App. 75a-77a. They requested that the court: (1) declare unconstitutional certain provisions of HB 224 and SB 295, which amended O.R.C. § 3509.03 to move the deadline for in-person absentee voting to 6:00 p.m. on the Friday immediately preceding Election Day; and (2) enjoin Ohio from "implementing or enforcing" these statutes, "thereby restoring in-person voting on the three days immediately preceding Election Day for all eligible Ohio voters." App. 78a. Respondents filed a Motion for Preliminary Injunction seeking the same relief on an interim basis. *Id*. 3a, 37a.

Applicants and fifteen intervenor-military groups ("Intervenors") opposed the motion. In support of their opposition, Applicants and Intervenors submitted three declarations from current and former members of the military: Colonel Duncan Aukland, the Ohio Judge Advocate and a Colonel in the Ohio Army National Guard; Rear Admiral James J. Carey, the Founder of the National Defense Committee, which works to promote veterans' rights, including voting rights; and Robert H. Carey, Jr., the former Director of the Federal Voting Assistance Program, which is a program in the Department of Defense that helps military and overseas voters, among other things, to exercise their right to vote. App. 100a-102a, 108a-122a.

These declarants described Ohio's military community and the special circumstances that apply to members of the uniformed services and their family

members. Ohio deployed over 1,300 troops overseas in 2011-2012, has sent personnel to other states to assist in disaster relief, and has ordered Ohio military personnel into action to confront emergencies within the State. *Id.* 101a Often, deployments are ordered on extremely short notice, and assignments pose substantial risk of injury or incapacitation. *Id.* Additionally, once orders come in, a soldier and his or her family often devote substantial time preparing for the deployment, making it difficult to tend to other tasks. *Id.* 119a-120a. These demanding circumstances can often make it difficult for members of the military to vote in-person on Election Day. As Rear Admiral Carey explained, "[m]embers of the military serving on Active Duty are highly regulated and limited in their movements. Last-minute changes or restrictions may make it difficult or impossible for such individuals who reasonably had been planning on voting on Election Day to do so." App. 118a.

Applicants also submitted the declaration of Matthew Damschroder, Deputy Assistant Secretary of State and State Director of Elections, and the former Director of the Franklin County Board of Elections. Mr. Damschroder discussed UOCAVA voting, trends in the usage of absentee voting, the burdens boards of elections face in preparing for Election Day, and the need to reserve time to prepare for that day. App. 104a-107a. He explained that "boards of elections are extremely busy during the Saturday, Sunday, and Monday immediately preceding any Election Day." *Id.* 105a. Among their numerous tasks, they must compile final poll books, which cannot be completed until in-person absentee voting has completed, and set up the

physical space where Election Day voting will take place. *Id.* 105a-106a. Mr. Damschroder also explained that, in the past, few Ohio counties allowed in-person absentee voting on the Sunday prior to Election Day, and some did not provide the opportunity to vote on the Saturday prior to Election Day. *Id.* 107a. Finally, Mr. Damschroder added that, during his tenure with the Franklin County Board of Elections, last-minute in-person absentee voting on the Monday prior to Election Day actually interfered with the county board of elections' ability to open the polls on time on Election Day. *Id.*

The district court held oral argument on August 15, 2012. While taking issue with the legislative process, Respondents admitted that "in theory . . . the State could have arrived at the result that it did here" and that the Ohio legislature could "[i]n theory," "in the abstract," and "in a [hypothetical] world" have constitutionally created the challenged voting system. App. 157a, 158a, 180a. They conceded that "the military and the non-military overseas voters have unique circumstances." *Id.* 185a-186a. And, importantly, the district court challenged any claim of disenfranchisement by making clear that it is "only an assumption" that "those 100,000 or whatever the number will be this time are not going to vote because of this change in the law," that the legislature has given voters "many other options in Ohio" for voting, and that Ohio "is probably one of the most liberal states in the country with regard to voting rights." *Id.* 189a, 155a.

The district court issued an Opinion and Order on August 31, 2012, granting Respondents' motion for a preliminary injunction. While recognizing that non-

UOCAVA voters still have at least "23 days in which to cast an in-person early vote," *id.* 49a-50a, the court found that the State had burdened the right to vote by "retract[ing]" the possibility of non-UOCAVA voting during the three days before Election Day, *id.* 51a. The court found the State's interests insufficiently "compelling" to justify the change in law. *Id.* 56a. Thereafter, the district court denied Applicants' request for a stay pending appeal. *Id.* 30a-35a.

2. *The Appeal*

The Sixth Circuit affirmed on the ground that Respondents were likely to succeed on the merits.[4] It found that if Respondents had alleged only that Ohio law treated them "differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used." App. 8a (citing *McDonald*, 394 U.S. at 807-09 (other citations omitted)). "On the other extreme," in the court's view, "when a state's classification 'severely' burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard." *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). But "[w]hen a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the 'flexible standard' outline in *Anderson v. Calebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)." *Id.* (citation omitted). The court held

[4] The Sixth Circuit found that the equitable factors favored granting the preliminary injunction solely because of the constitutional violation. App. 19a ("When constitutional rights are threatened or impaired, irreparable injury is presumed."); *id.* (concluding that "[t]he balance of equities and the public interest also weigh in [Respondents'] favor" because "[t]he burden on non-military Ohio voters' ability to cast ballots . . . outweighs any corresponding burden on the State").

that the "*Anderson-Burdick* standard . . . applies" because Respondents "have demonstrated that their right to vote is unjustifiably burdened by the changes in Ohio's early voting regime." *Id*. 10a.

The Sixth Circuit found that this case was not controlled by *McDonald* because the *McDonald* plaintiffs "had presented no evidence to support their allegation that they were being prevented from voting," whereas Respondents "introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." *Id*. 11a-12a (citations omitted). The court rejected Applicants' argument that the burden "is slight because they have 'ample' other means to cast their ballots, including by requesting and mailing an absentee ballot, voting in person prior to the final weekend before Election Day, or on Election Day itself." *Id*. 11a. It instead found that "because early voters have disproportionately lower incomes and less education than election day voters, and because all evening and weekend voting hours prior to the final weekend were eliminated by Directive 2012-35, 'thousands of voters who would have voted during those three days will not be able to exercise their right to cast a vote in person.'" *Id*. (quoting App. 51a). The court acknowledged, however, that the "elimination of in-person early voting during the three-day period prior to the election does not absolutely prohibit early voters from voting." App. 14a.

The Sixth Circuit rejected the State's justifications for limiting in-person absentee voting to UOCAVA voters during this three-day period. Regarding the

need to prepare for Election Day, the court found that election boards "undoubtedly have much to accomplish during the final few days before the election. But the State has shown no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2005." App. 13a-14a. The court found the legislature's desire to use this three-day period to prepare for Election Day not "sufficiently weighty" to justify the restriction. App. 15a (quotation marks omitted). Yet despite having concluded that the "elimination of in-person early voting for non-military voters during the three-day period in question" disenfranchised thousands of voters, the court reasoned that the legislature's interest in "smooth election administration" would "likely" have been "sufficient to justify the restriction" had it "enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters." *Id.* 15a.

The Sixth Circuit also rejected the interest in affording special protections for UOCAVA voters. The court found that the Ohio legislature's desire to protect military voters and their families, "who constantly face the possibility of a sudden and unexpected deployment" is "laudable" but that it "offered no justification for not providing similarly situated voters the same opportunities." App. 16a (citation omitted). The court found that UOCAVA voters were not entitled to special protections because "any voter could be suddenly called away and prevented from voting on Election Day." *Id.* 17a.

Judge White concurred in part and dissented in part. As an initial matter, she found "it clear that the elimination of non-UOCAVA voters' access to in-person absentee ballots after 6 p.m. the Friday before the election was not a fluke, but rather the considered intent of a majority of Ohio's legislators." App. 21a. Judge White also found that "[t]here is no constitutional right to an absentee ballot" and that "only when there is no alternative vehicle for voting that the Supreme Court has found a right to an absentee ballot." App. 23a-24a (citations omitted). She agreed that the "*Anderson/Burdick* balancing test" applied—as it is "flexible enough to approximate the rational-basis test when appropriate, *i.e.*, where the burden is slight, the required showing by the state is correspondingly light"—but disagreed with the majority's characterization of the documents submitted for the district court's consideration. *Id*. 25a. Judge White found that those documents established that certain voters "found it most convenient" to vote during this period, but that they did not in any way address "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. Convenience cannot be equated with necessity without more." *Id*. (citation omitted).

Judge White nevertheless found the law unconstitutional. In her view, Respondents' claims must be viewed in light of alleged problems Ohio experienced with Election Day voting in 2004 and "the elimination of all after-hours and weekend voting preceding the final weekend." App. 28a. Even though neither of these issues was pled in the complaint or supported by the evidentiary record,

Judge White concluded that the constitutional analysis "should not be divorced from reality." App. 27a. Referring to the Ohio legislature's action from July 1, 2011 as "eleventh-hour changes to remedial voting provisions," she concluded that Applicants' concededly "legitimate regulatory interests do not outweigh the burden on voters whose right to vote in the upcoming election would be burdened by the joint effect of the statute and the directive." App. 29a.

III. REASONS FOR GRANTING A STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 130 S. Ct. 705, 709-10 (2010).[5] Applicants meet this test; a stay is therefore appropriate.

---

[5] The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4). Applicants timely appealed the district court's order granting the preliminary injunction on September 4, 2012. Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1292(a)(1). The Sixth Circuit's decision was issued on October 5, 2012, and Applicants have promptly brought this Application to the Court. The Application is made within the time limits for petitioning for certiorari. *See* Rule 13.1. Applicants have also complied with Supreme Court Rule 23.3. After the district court issued its preliminary injunction, Applicants appealed the injunction and sought a stay from the district court judge. App. 30a; *see* Fed. R. App. 8. The district court denied the motion to stay, App. 30a-35a, and the Sixth Circuit, *sua sponte* expedited the appeal obviating the need for a stay pending appeal, 6th Cir. Briefing Letter (Sept. 4, 2012). Moreover, because the standard for reviewing a preliminary injunction is the same as whether to grant a stay pending appeal, *see Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991), and because Election Day is rapidly approaching, seeking a stay pending certiorari from the Sixth Circuit would have been both impractical and futile, *see Western Airlines, Inc. v. Teamsters*, 480 U.S. 1301, 1304-05 (1987).

A. There Is A "Reasonable Probability" That The Court Will Grant Certiorari And A "Fair Prospect" That The Court Will Reverse The Decision Below Because It Squarely Conflicts With Controlling Precedent.

Respondents pled only a straightforward disparate treatment claim—*i.e.*, that military voters and their families were granted a greater opportunity to cast in-person absentee ballots than non-UOCAVA voters—and did not plead a claim that the modest reduction of non-UOCAVA in-person absentee voting burdened their fundamental right to vote. App. 75a-77a. Respondents themselves acknowledged that this was their claim. App. 184a-186a. Thus, the *Anderson/Burdick* test should not apply here. *See Anderson*, 460 U.S. at 786-87 n.7; *see Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992); *see, e.g.*, *Biener v. Calio*, 361 F.3d 206, 214-15 (3d Cir. 2004). The Sixth Circuit disagreed on both counts.

But the Court need not resolve that dispute to grant the application for stay. Even if Respondents pled a violation of their fundamental right to vote, there was no legal basis for granting a preliminary injunction under the *Anderson/Burdick* balancing test. No matter how Respondents' cause of action is framed, it fails because this case is on all fours with *McDonald*. O.R.C. § 3509.03 is an absentee voting law that does not disenfranchise *any* voters given the ample alternative means of casting a ballot. The law should easily be upheld given the *de minimis* burden it imposes and the State's important regulatory interests in preparing for Election Day and accommodating UOCAVA voters.

1. *The* Anderson/Burdick *Balancing Test*

The *Anderson/Burdick* "balancing approach" arises out of the Court's recognition that States "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *see also Burdick*, 504 U.S. at 433 ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." (citation omitted)). Because every aspect of a state elections code "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends," the Court has adopted a "balancing approach" for analyzing such challenges. *Anderson*, 460 U.S. at 788; *see also Storer v. Brown*, 415 U.S. 724, 729-30 (1974) *Burdick*, 504 U.S. at 433-34; *Crawford*, 553 U.S. at 189-90 (Stevens, J.).

The analysis is two-fold. First, a court must examine the "character and magnitude of the asserted injury" to the plaintiffs' constitutional rights. *Anderson*, 460 U.S. at 789. Second, the court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* If the plaintiffs' rights are subjected to "severe" restrictions, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289). If the state law imposes only a minimal burden on the right to vote, however, then the interest of the state in regulating elections is "generally sufficient" to justify the restrictions. *Anderson*, 460 U.S. at 788; *see also* App. 25a (White, J., concurring in part and dissenting in

part) (explaining that the test is "flexible enough to approximate the rational-basis test when appropriate, *i.e.*, where the burden is slight, the required showing by the state is corresponding light").

2. *O.R.C. § 3509.03 Does Not Burden The Right To Vote.*

McDonald establishes as a matter of law that Ohio's modest reduction of up to three days of in-person absentee voting imposes the lowest possible burden on Respondents' ability to cast a ballot. *McDonald* involved an Illinois law that made absentee ballots available only to four classes of persons. 394 U.S. at 803-04. Illinois first made absentee ballots available in 1917 only to those "who would be absent from the county on business or other duties." *Id.* at 804. The legislature gradually expanded absentee voting to three other classes, including those physically incapacitated. *Id.* The plaintiffs were unsentenced inmates awaiting trial in jail who had sought absentee ballots because of their "physical inability" to appear at the polls on Election Day. *Id.* When the applications for absentee ballots were refused, they filed suit.

In declining to apply heightened scrutiny, the Court concluded that the Illinois law did not infringe a fundamental right. The only constitutional right at issue was the right to vote, because there is no independent constitutional "right to receive absentee ballots." *Id.* at 807. The sole question thus was whether Illinois' absentee-ballot law "ha[d] an impact on [the plaintiffs'] ability to exercise the fundamental right to vote." *Id.* It did not.

First, the law did not facially "deny the exercise of the franchise." *Id.* at 807-08. Second, there was no proof that "Illinois ha[d] in fact precluded [the plaintiffs]

from voting." *Id.* at 808. The record was "barren" of any indication that Illinois would not take steps—such as providing in-jail polling booths or transportation to the polls—to allow the plaintiffs to vote. *Id.* at 808 n.6. The record thus did not show that the plaintiffs would be "*absolutely prohibited from exercising the franchise*." *Id.* at 809 (emphasis added). The Court applied rational basis review and upheld the law. *Id.* at 809-10.

In the wake of *McDonald*, the Court has found that an absentee-ballot law infringed on the right to vote *only* when it could be (or had been) proven that the plaintiffs had been disenfranchised. In *Goosby v. Osser*, the Court determined that the allegations, if true, would prove that a Pennsylvania absentee-ballot law "absolutely prohibit[ed] [the jailed plaintiffs] from voting." 409 U.S. 512, 521 (1973). Incarcerated persons could not vote absentee, and the plaintiffs alleged that requests for alternative means of voting had been denied. *Id.* at 522. The Court similarly concluded in *O'Brien v. Skinner* that a New York absentee-ballot law "completely denied the ballot." 414 U.S. 524, 530 (1974); *id.* at 525-27, 530 (finding that jailed persons could not vote absentee and proof that the plaintiffs had been denied alternative means of voting).

The principles following from *McDonald*, *Goosby*, and *O'Brien* are clear. There is no constitutional right to alternative forms of voting for their own sake. *McDonald*, 394 U.S. at 807. The constitutionally-protected right is the right to participate in the election, and a state's failure to provide absentee voting or other accommodations does not infringe on that right unless there is proof that ballot

access would otherwise be "completely denied." *O'Brien*, 414 U.S. at 530. The Court has never deviated from this understanding. Absentee voting is "an indulgence—*not a constitutional imperative that falls short of what is required*." *Crawford*, 553 U.S. at 209 (Scalia, J.) (emphasis added).

O.R.C. § 3509.03 plainly does not infringe a fundamental right under this line of cases. Like *McDonald*, this case concerns the availability of one type of absentee voting. Ohio offers two types of absentee voting—by mail and in-person—though all absentee ballots are requested, verified, and tabulated in the same way. *See supra* at 8-9. Although non-UOCAVA voters still have 230 hours of in-person absentee voting, more than 750 hours to vote absentee by mail without excuse, and 13 hours of voting on Election Day, Respondents have chosen to challenge an Ohio law that merely moves a deadline for non-UOCAVA in-person absentee voting slightly earlier than for UOCAVA in-person absentee voting. Because there is no constitutional right to absentee voting, however, the question—as in *McDonald*—is whether the record shows that the law *absolutely prohibits* non-UOCAVA voters from voting. It does not.

To begin, O.R.C. § 3509.03 does not on its face "deny [non-UOCAVA voters] the exercise of the franchise." *McDonald*, 394 U.S. at 807-08. Nor is there evidence that the legislature "has in fact precluded [non-UOCAVA voters] from voting." *Id.* at 808. Not only is the record "barren" of any proof that Ohio has affirmatively denied non-UOCAVA voters the right to vote, *id.* at 808 n.6, it is replete with facts showing that they still have ample opportunity. The Secretary has mailed absentee

ballot applications to more than 6 million voters, and non-UOCAVA voters still have 230 hours to vote in-person absentee, more than 750 hours to vote absentee by mail, and 13 hours on Election Day to vote at the polls. As the district court recognized, Ohio "is probably one of the most liberal states in the country with regard to voting rights." App. 155a. Like *McDonald*, then, there is no evidence that the affected voters will be "absolutely prohibited from exercising the franchise." 394 U.S. at 809.

3. *The State's Regulatory Interests Are Sufficient To Justify Any* De Minimis *Burden On Non-UOCAVA Voters.*

Because O.R.C. § 3509.03 does not interfere with Respondents' right to vote in a fundamental way, it may be set aside "only if no grounds can be conceived to justify" it. *McDonald*, 394 U.S. at 809. Given the need to prepare for Election Day, it was entirely rational for the Ohio legislature generally to end in-person absentee voting at 6:00 p.m. on the Friday before Election Day. Each county board of elections is extremely busy during that period. *See supra* at 15-16. Tasks that must be completed during the last few days prior to Election Day include: compiling final poll books, which cannot be completed until in-person absentee voting has concluded; processing absentee ballots; and setting up the physical spaces where Election Day voting will take place (in a large county like Franklin County, for example, there are over 500 polling locations). App. 105a-107a.

The Ohio legislature's decision to accommodate military voters and their families over this three-day period does not undermine the legitimate interest in preparing for Election Day. UOCAVA voters face unique challenges, including the

possibility of a sudden and unexpected deployment, which can be mitigated by the availability of in-person absentee voting over these three days. It is also reasonable to believe that the number of UOCAVA voters that could benefit from the special accommodation would be small enough so as not to disrupt the other legislative goal of reserving time for Election Day preparation. App. 107a. The Ohio legislature's "legitimate interests" in limiting in-person absentee voting to military voters and their families while local election boards prepare for Election Day is more than "sufficient to outweigh the limited burden" imposed by the earlier deadline for non-UOCAVA voters. *Burdick*, 504 U.S. at 440; *Crawford*, 553 U.S. at 190 (Stevens, J.). Nothing more is required to sustain the law.

4. *The Sixth Circuit's Reasons For Striking Down O.R.C. § 3509.03 Are Unsustainable.*

The Sixth Circuit principally held that this case is different from *McDonald* because Respondents had proven that "Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." App. 11a. But the court was unwilling to even stand by its own claim. The court admitted that O.R.C. § 3509.03 "does not absolutely prohibit early voters from voting," *id*. 14a, and that the "burden on non-military voters is not severe," *id*. 15a. These concessions alone make the case indistinguishable from *McDonald*.

The Sixth Circuit also curiously relied on the accommodation granted to UOCAVA voters as a basis for finding that non-UOCAVA voters had been denied the right to vote. Thus, even though the court held that this was a fundamental right to vote case—not a disparate treatment case that would have been subject to

traditional rational-basis review—it somehow found that the statute would have been constitutional if the legislature had curtailed in-person absentee voting of "all Ohio voters" instead of just non-UOCAVA voters. *Id.* Contrary to its own holding, then, the court of appeals suggests that it is only Ohio's special accommodations of military voters in those three days—and not the burden on non-UOCAVA voters—that marks the statutory system as unconstitutional.[6] Yet if the Sixth Circuit truly believed that O.R.C. § 3509.03 disenfranchises voters, which the law absolutely does not, the court would not have found that the constitutional violation could be cured by imposing the same burden on other voters. This kind of confused reasoning results from shoehorning a non-meritorious disparate treatment claim into the *Anderson/Burdick* framework.

The Sixth Circuit had to hedge its claim of disenfranchisement and mix and match its rationale for striking down the law because O.R.C. § 3509.03 does not deny *any* voter or class of voters access to the ballot and nothing in the record indicates the contrary. Although Applicants have never stipulated to the admissibility or relevance of any of the reports and studies that Respondents lodged with the district court, *see* R.35, PID 1120, the Court can credit *every one of them and there would still be nothing in the record supporting the conclusion that any class of voters (or any voter at all) has been disenfranchised.* At most, as Judge

---

[6] The Sixth Circuit also failed to grapple with the fact that UOCAVA voters had extra time to vote absentee in-person even prior to the 2011 change in the law. Thus, the preliminary injunction, which restored the *status quo ante*, still provides one extra day—Election Day itself—in which UOCAVA voters are permitted to vote absentee in-person at their local Board of Elections office rather voting at their usual polling place with other voters. The Sixth Circuit never suggested that providing this modest accommodation was constitutionally suspect.

White explained, App. 25a, these reports and studies show that approximately 105,000 (or 2%) of the over 5,000,000 Ohioans who cast a ballot in the 2004 election chose to do so via in-person absentee voting on the days in question, and that those voters were more likely than Election-Day voters to be "women, older, and of lower income and education attainment," *id.* 5a. The most these studies and reports show is that certain voters *preferred* voting on these days. But the Equal Protection Clause does not include a non-retrogression principle. "Convenience cannot be equated with necessity without more." App. 25a (White, J.) (citation omitted). Equating convenience with necessity creates a one-way ratchet that places the voting system of myriad other states in constitutional jeopardy if they decided to make changes. *See Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 535 (1982) ("We . . . reject[] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment." (footnote omitted)).

In fact, none of the studies "consider the extent to which these voters would or could avail themselves of other voting options, either by mail ballot or in-person absentee ballots at other times, or in-person voting on election day." App. 25a. (White, J.). Contrary to the Sixth Circuit's assertion, *id.* 11a, it was only Applicants that submitted documentation on this issue, *id.* 129a. Applicants submitted scholarly work demonstrating that in-person absentee voting has a negligible effect on turnout. App. 129a ("We remain skeptical of those who advocate in favor of early

voting reforms primarily on the basis of increased turnout. Both these results, and prior works in political science, simply do not support these claims.").[7] Thus, even if the district court had actually made a factual finding of disenfranchisement, which it did not,[8] such a finding would be unsustainable. Given the lack of any support in the record for a claim of disenfranchisement, and the contrary documentation that Applicants submitted, a finding on this point would have been clearly erroneous. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

In reality, both the district court and the Sixth Circuit concluded that this class of voters would be disenfranchised based on nothing more than judicial supposition. The district court acknowledged at oral argument that it is "only an assumption" that "those 100,000 or whatever the number will be this time are not going to vote because of this change in the law." App. 189a. The Sixth Circuit likewise assumed that because, according to Respondents' studies, those who voted on these days were more likely to have "lower incomes and less education," *id*. 12a, than other voters, they "*may be* unable to vote on Election Day or during the workday at local boards of elections because of work schedules," *id*. 14a-15a (emphasis added). This type of speculation is woefully insufficient to sustain a claim that any voter or class of voters has been disenfranchised. *See Crawford*, 553

---

[7] *See also* Lynn Hulsey, *"Easier" Voting In State Showing Little Impact: Absentee and Early Voting Are Up, but Election Day Voting Is Down, Meaning No Overall Increase*, Dayton Daily News (Aug. 28, 2012), *available at* http://www.daytondailynews.com/news/news/national-govt-politics/impact-small-from-easier-voting/nRMbg/.

[8] The district court's unadorned statement that some unknown group of voters will be disenfranchised can hardly be considered a "finding of fact" under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 52(a)(1)-(2).

U.S. at 202 n.20 (Stevens, J.); *Storer*, 415 U.S. at 738-39; *see also Pullman Co. v. Knott*, 235 U.S. 23, 26 (1914) (a statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are").

The Sixth Circuit's decision is also unsustainable on its own terms. Secretary Husted has mailed an absentee ballot application to every registered voter in "active" status in Ohio and every registered voter in Ohio who voted in the 2008 presidential election, even if not in "active" status. *See supra* at 1. To cast a ballot, then, a voter need not make it to the polls at all—he or she need only use the form that will arrive unsolicited at his or her doorstep and return the absentee ballot by mail. No excuse is required to vote absentee. The Sixth Circuit never explains why these voters cannot vote by mail. Poorer and less educated voters participate in states like Oregon that generally allow voting only by mail.

But even if the focus is on *in-person* voting, there is no reason to accept the Sixth Circuit's unfounded assumption that poorer and less educated voters will not find the time to cast an absentee ballot during the 230 hours of in-person absentee voting or to cast a ballot on Election Day. Poorer and less educated voters fully participate in elections in the many states that do not allow any early in-person voting or require an excuse to vote absentee. In sum, given that Ohio has perhaps the most generous system of in-person voting in the entire country with or without the three days in question, the assertion that O.R.C. § 3509.03 disenfranchises *any* Ohio voter is not credible.

Judge White's rationale for finding that Ohio law disenfranchised voters is equally untenable. While correctly rejecting the majority's reasoning, she found that other "facts on the ground in Ohio" dictate the same conclusion. App. 24a. But Judge White's conclusions are not based on "facts" at all. She adopted a kind of "butterfly effect" theory of disenfranchisement in which voters would be unable to vote because eliminating these days would lead to crowding on Election Day, which will lead "to long lines and unreasonable delays at the polls, which in turn will cause some voters to abandon their attempts at voting, as happened in 2004." App. 27a. This is just more judicial supposition. Judge White relied on an amicus brief from Cuyahoga County that, in turn, relied on a Sixth Circuit decision that ruled at the motion to dismiss stage that such "allegations, *if true*, established" a possible equal protection violation. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 471 (6th Cir. 2008). There is nothing in the record of this case that long lines have in the past—or much less will in the upcoming election—"cause some voters to abandon their attempts at voting." App. 27a (White, J.).

In any event, there is no evidence that eliminating in-person absentee voting on these three days (especially since most counties have *never* offered in-person absentee voting on all three days in any election) will cause the kind of problems that purportedly occurred in 2004. Ohio has not returned to that state of affairs. In 2004, there was only absentee voting with an excuse. Now Ohio has 230 hours of no-excuse, in-person absentee voting and more than 750 hours of no-excuse absentee voting by mail. Moreover, both the majority and Judge White assumed

that there is no longer after-hours voting. App. 11a-12a; *id*. 25a-26a (White, J.). But that is factually incorrect. On October 9, boards are required to be open until 9:00 p.m. From October 22, 2012 through October 26, 2012 and from October 29, 2012 through November 1, 2012, county boards will remain open for in-person absentee voting until 7:00 p.m. and the polls will remain open on Election Day until 7:30 p.m. App. 133a. Judge White's unsubstantiated and misguided "fear" that these changes will disenfranchise certain vague categories of voters provides no firmer basis to declare O.R.C. § 3509.03 facially unconstitutional than the dissent's similar concerns in *Crawford*.

At bottom, neither the majority nor the concurrence provided a legitimate basis for declaring that this change to in-person absentee voting will disenfranchise any voter or class of voters. And absent a proper finding of disenfranchisement, the remainder of the Sixth Circuit's decision unravels. For instance, the court found the Ohio legislature's interest in preparing for Election Day and providing special accommodations for military voters and their families insufficient only because of its conclusion that O.R.C. § 3509.03 severely burdened the right to vote. But given the *de minimis* burden that this change in law imposes, the interests put forth by the State are more than "sufficient to justify the restriction." App. 15a (citing *Burdick*, 504 U.S. at 434); *see also Crawford*, 553 U.S. at 191 (Stevens, J.) (the restriction need only be supported "by relevant and legitimate state interests *sufficiently weighty* to justify the limitation" (emphasis added); *id*. at 204 (Scalia, J.)

(the State's "important regulatory interests" are sufficient unless the law "severely restrict[s] the right to vote").

The Sixth Circuit's criticism of these interests lacks merit in any event. The court found that documentation in the record contradicted the assertion that county boards needed these three days to prepare for Election Day. App. 14a-15a. But this collateral attack on the legislation is impermissible under *Crawford*. There, Indiana's voter identification law was justified by the need to prevent voter fraud even though "the record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194-95 (Stevens, J.). The relevant issue is whether the *interest* put forward by the State is legitimate; not whether litigants can mount a challenge to the magnitude of the interest in litigation. Not even the Sixth Circuit disputed the legitimacy of Ohio's interest in preparing for Election Day. Nor could it. *See id*. at 197 (Stevens, J.); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335-40 (S.D. Fla. 2008).[9]

Although the Sixth Circuit also criticized Ohio's interest in accommodating UOCAVA voters, it ultimately accepted the interest as entirely legitimate. The court found it a "worthy and commendable goal" given that "members of the

[9] The Sixth Circuit faulted Applicants for not introducing "specific evidence to refute" the assertions of Cuyahoga County. App. 14a. But the court fails to mention that this "evidence" is an amicus brief by a county executive with no responsibility for conducting elections—not the county board of elections—and that it was submitted after briefing had concluded on the preliminary injunction motion and after oral argument had been held. And Applicants submitted ample support demonstrating the legitimacy of the interests underlying O.R.C. § 3509.03. In any event, whether a few Ohio counties wish to offer in-person absentee voting during these three days says nothing about the State's interest in ensuring that all county boards of elections have sufficient time to prepare. Other counties may have wished to take a different path or view the issue differently. But it is the legislature's evaluation of these considerations that matters to the analysis here.

military and their families . . . constantly face the possibility of a sudden and unexpected deployment." *Id.* 15a-16a. Nonetheless, the court found the interest insufficient to support the distinction (even if legitimate in the abstract) because "any voter could be suddenly called away and prevented from voting on Election Day." *Id.* But a legislature is fully within its rights "to take reform 'one step at a time.'" *McDonald*, 394 U.S. at 809 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). The legislature is not required "to cover every evil that might conceivably have been attacked." *Id.* Indeed, the Sixth Circuit's reasoning would call into question many protections afforded to the military and their families under federal and state law. *See supra* at 9-11. Laws protecting military voters should not be subject to this kind of narrow tailoring requirement—regardless of whether these voters are deployed or residing in their home state. In either case, federal and state government should be able to provide them special protections without having to meet strict scrutiny.

5. *No Equitable Factor Warrants Upholding The Preliminary Injunction Here Given The Lack Of A Likelihood Of Success On The Merits.*

The Sixth Circuit concluded that the equitable considerations all followed from its analysis of the merits. App. 19a-20a. Indeed, throughout this litigation Respondents have offered no reason other than constitutional injury—under the guise of disenfranchisement—as providing an equitable basis for enjoining O.R.C. § 3509.03. Thus, the propriety of the preliminary injunction turns entirely on the merits of Respondents' legal claims. *See, e.g.*, *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2821 (2010); *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008).

Because Respondents are unlikely to prevail on those claims, which depend on reasoning that squarely conflicts with the precedents of this Court, Applicants have shown a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari and a fair prospect that a majority of the Court will vote to reverse the decision below.

B. There Is A Likelihood That Applicants Will Suffer Irreparable Harm In The Absence Of A Stay.

Applicants will suffer two distinct types of irreparable injury in the absence of a stay, each resulting from the injunction's disruption and interference with the State's electoral processes.

First, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (staying injunction); *see also Maryland v. King*, --- S. Ct. ---, 2012 WL 3064878, at *2 (July 30, 2012) (Roberts, C.J., in chambers) (same). This type of irreparable injury to a State's sovereign interests is only magnified in the context of elections. Because the "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," *Gregory v. Ashcrof*t, 501 U.S. 452, 461-62 (1991) (internal quotations omitted), each "State indisputably has a compelling interest in preserving the integrity of its election process," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation omitted). Accordingly, the Court has cautioned that federal courts should not rewrite the rules governing the electoral process in the waning days

before an election, especially because "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5; *see also Summit County Democratic Central & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).

There can be no doubt that the State of Ohio, and thus Applicants (as the state officials charged under Ohio law with the duty to administer and enforce the State's election laws), will suffer such ongoing irreparable injury in the absence of a stay. The preliminary injunction declares HB 224 and SB 295 (which amended O.R.C. § 3509.03 to move the deadline for in-person absentee voting to 6:00 p.m.) unconstitutional and enjoins Applicants from enforcing these laws. This case falls squarely within the rule of *New Motor Vehicle Board* and *King*.

Second, Applicants will suffer irreparable injury in the absence of a stay by leaving the State with inadequate time and resources to prepare for Election Day. Ohio's elections officers and its eighty-eight county boards of elections are "extremely busy during the Saturday, Sunday, and Monday immediately preceding any Election Day." App. 105a. In those three days, they must undertake numerous tasks. *See supra* at 15-16. In the absence of a stay, Ohio and its eighty-eight counties will have to re-deploy Ohio election officials away from these important duties to accommodate in-person absentee voting. The risk that such forced reallocation of limited state resources (to accommodate voting that is precluded by Ohio's election laws) will actually hamper Election Day voting is quite real. A stay is thus warranted in order to ensure that the State has adequate time

and resources to prepare for Election Day—the day on which the vast majority of Ohioans still cast their vote.

IV. REQUEST TO TREAT THE STAY APPLICATION AS PETITION FOR CERTIORARI, GRANT THE PETITION, AND SUMMARILY REVERSE THE DECISION BELOW

In addition to granting the application for stay, or in the alternative, Applicants ask the Court to treat the application as a petition for certiorari, grant the petition, and summarily reverse the decision below. S. Ct. R. 16.1; *see, e.g.*, *Purcell*, 549 U.S. at 2. Summary disposition is appropriate where "the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman *et al.*, Supreme Court Practice 344 (9th ed. 2007).

That is precisely the circumstance here. For the reasons set forth above, this case is governed by *McDonald* as there was no basis in law or fact for the Sixth Circuit's conclusion that any voter or class of voters will be disenfranchised by this modest reduction of in-person absentee voting. Further briefing and argument will not aid the Court in resolution of the case. Rather, it will prevent Ohio from operating its entirely constitutional absentee voting system for the upcoming election. Accordingly, summary reversal is warranted in this case.

V. CONCLUSION

For the foregoing reasons, this Court should grant the application for a stay and, or in the alternative, treat the application as a petition for certiorari, grant the petition, and summarily reverse the decision below.

Respectfully submitted,

/s/ William S. Consovoy

MICHAEL DEWINE
Ohio Attorney General

William S. Consovoy*
Thomas R. McCarthy
Brendan J. Morrissey
J. Michael Connolly
Wiley Rein LLP
1776 K Street NW
Washington, D.C. 20006
Tel: (202) 719-7000
wconsovoy@wileyrein.com

Special Counsel for Applicant Ohio Secretary of State Jon Husted

Stephen P. Carney
Richard N. Coglianese
Michael J. Hendershot
Assistant Attorneys General
30 East Broad Street, 16th Floor
Columbus, OH 43215
Tel: (614) 466-2872

Counsel for Applicant Ohio Attorney General Michael DeWine

**Counsel of Record*

Date: October 9, 2012

CERTIFICATE OF SERVICE

I, William S. Consovoy, a member of the bar of this Court, certify that on October 9, 2012, I served a copy of the Emergency Application for Stay Pending Certiorari on the listed counsel of record by Federal Express Priority Overnight, that a courtesy PDF copy was sent to the listed email addresses, and that all persons required to be served have been served.

Donald J. McTigue
John Corey Colombo
Mark A. McGinnis
McTigue & McGinnis
545 E. Town Street
Columbus, OH 43215
dmctigue@electionlawgroup.com
ccolombo@electionlawgroup.com
mmcginnis@electionlawgroup.com

Robert F. Bauer
Perkins Coie
700 Thirteenth Street, N.W.
Suite 600
Washington, DC 20005
rbauer@perkinscoie.com

Counsel for Plaintiffs-Respondents

James M. Dickerson, Jr.
Bingham Greenebaum Doll
255 E. Fifth Street, Suite 2350
Cincinnati, OH 45202
jdickerson@bgdlegal.com

Counsel for Defendants-Intervenors

Dated: October 9, 2012

/s/ William S. Consovoy
WILLIAM S. CONSOVOY