IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ohio Republican Party, et al.,	)	**Case No. 2:08-cv-913**
	)	
Plaintiffs,	)	**Hon. George C. Smith**
	)	
v.	)	**Magistrate Judge King**
	)	
Jennifer Brunner,	)	Date: September 29, 2008
Ohio Secretary of State,	)	Time: 2:00 p.m.
	)	Place: Courtroom 4
Defendants.	)	
	)	

BRIEF OF *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

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INTEREST OF AMICI

Amici curiae submit this brief in opposition to Plaintiffs' motion for a temporary restraining order requiring Secretary of State Jennifer Brunner to rescind directives permitting otherwise qualified Ohio voters to request, receive, and submit absentee ballots during the time period of September 30, 2008 through October 6, 2008. This is an issue of great concern to *Amici* and to the public at large, which threatens to disenfranchise significant numbers of Ohio citizens.

Amicus curiae the Ohio American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") represents 1,600 local unions across Ohio from 48 different international unions. The local unions that comprise the Ohio AFL-CIO represent approximately 650,000 working men and women and some 300,000 union retirees, many of whom live in the Northern District of Ohio. The Ohio AFL-CIO works to bring economic and social justice to the workplace and to the lives of working Ohioan men and women. To this end, the Ohio AFL-CIO engages in voter registration, education and other election-related activities.

Amicus curiae District 1199, the Health Care and Social Service Union, SEIU ("District 1199") is a local union affiliated with the Service Employees International Union. District 1199 represents approximately 28,000 health care and social service workers in Ohio, Kentucky, and West Virginia. Approximately 10,000 of those members reside in the Northern District of Ohio. District 1199's Constitution expressly provides that one of the organization's purposes is "to maintain, preserve and extend the democratic process and institutions of our country." District 1199 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members.

Amici represent members who will be registering to vote in Ohio in the upcoming general election, and *Amici* therefore have an interest in ensuring that their members are permitted to exercise the right to vote by absentee ballot. Additionally, *Amici* will be assisting citizens to register to vote, including during the period of September 30, 2008 to October 6, 2008, and thus have an interest in ensuring the integrity of that process. *Amici* have also filed a brief *amicus curiae* in support of the Secretary of State's interpretation of Ohio law, in the mandamus action currently pending before the Ohio Supreme Court, *State ex rel. Colvin v. Brunner*, Case No. 08-0813 ("*Colvin*").

ARGUMENT

The possibility that Ohio citizens will not be permitted to request and cast absentee ballots immediately after registering to vote during the period of September 30, 2008 through October 6, 2008 poses a serious and imminent threat to the federal rights of Ohio voters. In the instant brief, *Amici* explain why requiring Ohio citizens to wait 30 days after registering to vote before requesting and casting an absentee ballot would violate federal law, serve no legitimate purpose, and lead to absurd consequences. In addition, the brief shows that allowing citizens to register and vote absentee at the same time is consistent with the practices of numerous states.

A. Requiring Ohio citizens to wait 30 days after registering to vote before they can request and cast an absentee ballot would violate their federal statutory and constitutional rights.

1. Federal statutory protections of the right to vote

In the Voting Rights Act Amendments of 1970, Congress made findings that durational residency requirements and the lack of opportunity to register and vote absentee violate numerous federal constitutional provisions and further no legitimate state interest. 42 U.S.C.

§1973aa-1(a). Therefore, Congress prohibited the denial of the right to vote "because of the failure . . . to comply with any durational residency requirement," *id.* §1973aa-1(c), as well as forbidding the deprivation of the right to vote absentee to any voter who is qualified to vote in a Presidential election and will be absent on the day of the election, so long as the voter has applied for an absentee ballot seven days or more prior to the election and has returned the ballot by the date of the election.

> [E]ach State shall provide by law for the casting of absentee ballots [in the Presidential election] by all duly qualified residents of such State who may be absent . . . on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

42 U.S.C. §1973aa-1(d); *see also id.* §1973aa-1(c) ("[N]or shall any citizen of the United States be denied the right to vote . . . in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.").

Requiring Ohio voters to wait 30 days after registering before requesting or casting an absentee ballot would violate the Voting Rights Act Amendments. A number of examples illustrate this. First, someone who registers to vote on the 30th day prior to the election would simply not be permitted to vote absentee, even if he or she sought to apply for an absentee ballot seven days before the election. That person would become eligible to apply for an absentee ballot on Election Day, which is too late to request an absentee ballot. *See* Ohio Rev. Code §3509.01 (requiring absentee applications to be delivered by the third day before the election or,

if delivered in person, by the day before the election). Some of the individuals who register to vote on the last day before the deadline may have moved to Ohio the 30th day before the election and therefore would not have been able to register to vote before that date; thus, the deprivation of the right to vote absentee would be based on the duration of their residency.[1]

Second, people who register 30-45 days before the election (because they moved to Ohio during that time or for some other reason) but who will not physically be present in Ohio the week of the election will not be able to vote absentee, even if they try to submit an absentee ballot application before the federal deadline. Such individuals may not be able to submit a mailed application, receive the absentee ballot by mail, and return that ballot by mail before the third day prior to the election, if precluded from applying until a week or so before the election date.

Under federal law, someone who registers to vote by the applicable deadline, applies to vote absentee seven days or more prior to the election, and will not be present on the day of the election may not be deprived of the right to vote absentee. This Court should deny plaintiffs' request for a temporary restraining order that would deprive Ohio citizens of this right by ordering the Secretary of State to rescind her lawful directive.

2. Federal constitutional prohibitions of residential duration requirements

The imposition of a mandatory 30-day waiting period between the time that Ohio citizens register to vote and when they may request or cast an absentee ballot would effectively impose a durational requirement for absentee voting, in violation of both the Equal Protection Clause and

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[1] If someone moved to Ohio *less than* 30 days prior to the election, he or she would be entitled under federal law to vote absentee in the state from which he or she moved. 42 U.S.C. §1973aa-1(e).

the right to travel. *See Dunn v. Blumstein*, 405 U.S. 330, 337-38 (1972). Therefore, strict scrutiny would apply, and the State would need to establish that it has no reasonable alternate means to accomplish its compelling interests. *See id.* at 342-43.[2]

A mandatory 30-day waiting period for applying for an absentee ballot would effectively impose a durational residency prerequisite for voting absentee. People who will be absent and therefore unable to vote in person on election day will be able to vote absentee only if they have lived in Ohio for a time period that exceeds the 30-day voter registration period.

That durational residency requirement will necessarily be longer than the period between the voter registration deadline and the election.[3] Yet courts have uniformly held that states and localities may not require voters to have resided in a particular jurisdiction prior to the voter registration deadline without running afoul of the Equal Protection Clause. *See Fisher v. Herseth*, 374 F. Supp. 745, 747 (D.S.D. 1974) (180-day durational voter residency requirement, when voter registration deadline was 20 days before election, infringed right to vote, right to travel, and equal protection); *Hinnant v. Sebesta*, 363 F. Supp. 398, 400 (N.D. Fla. 1973) (when voter registration deadline is 30 days before election, imposition of additional 30-day residency

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[2] Plaintiffs may argue that a lesser standard of review would apply under *McDonald v. Board of Elec. Comm'ners of Chicago*, 394 U.S. 802 (1969). But unlike *McDonald*, the waiting period at issue here would burden the fundamental right to travel and would actually deprive voters who will be absent on election day of the right to vote. *Compare id.* at 807-08 & n.6 (explaining that lesser standard applies to depriving inmates of absentee ballots because of absence of indication that they will be unable to vote by other means and because classification does not involve protected class); *id.* at 810 n.8 (pointing out that "any person . . . , including an unsentenced prisoner, presumably can get an absentee ballot if he is outside his resident county").

[3] The length of this time period will depend on how long in advance of the election the voter will be absent and whether the voter can present him or herself in person or seeks to apply to and vote absentee by mail. *See supra* at 3-4. But either way, it will be longer than the 30-day period between the voter registration deadline and the election.

requirement is unconstitutional); *Meyers v. Jackson*, 390 F. Supp. 37, 43-44 (E.D. Ark. 1975) (striking down 30-day residency requirement when voter registration deadline was 20 days before election; "durational residency requirements of any kind cannot be upheld constitutionally, except to the extent that they are realistically related to reasonable registration requirements"); *Jackson v. Bowen*, 420 F. Supp. 315, 318 (S.D. Ind. 1976) (invalidating 60-day residency requirement: "Thus the determining factor is the time allowed for voter registration; a durational residency requirement beyond such time is impermissible.").

Requirements of residence that exceed the voter registration period are unconstitutional because they are "not necessary to promote any compelling state interest, . . . unreasonably restrict[] the exercise of the right of suffrage, . . . unreasonably restrict[] the freedom of people to move from one place to another, and . . . [are] invidiously discriminatory." *Meyers*, 390 F. Supp. at 43. The 30-day waiting period at issue here would not pass constitutional scrutiny. As explained further below, prohibiting newly registered voters from applying for and/or casting absentee ballots is not necessary in order to prevent fraud. In fact, it would accomplish no legitimate state purpose, and would therefore violate the Constitution under any standard of scrutiny *See O'Brien v. Skinner*, 414 U.S. 524, 529-30 (1974) (rule permitting inmates confined outside county of residence to vote absentee but precluding inmates confined inside county of residence from doing same has no justification so violates equal protection); *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733-34 (Minn. 2003) (rule prohibiting mailing of replacement absentee ballots but permitting voters to obtain replacement ballots in person could not be justified based on fraud prevention rationale and therefore violates equal protection).

B. No legitimate fraud-prevention purpose would be served by denying absentee ballots to individuals who register during the window period.

Plaintiffs may seek to raise the specter of voter fraud as justification for the waiting period. To the extent the "fraud" at issue is a registered voter casting an absentee ballot without having been registered for 30 days, the argument is entirely circular and obviously must be disregarded.

There is absolutely no reason why a requirement that voters register 30 days before requesting an absentee ballot is needed in order to address *real* fraud – that is, people who have registered despite their failure to satisfy requirements for voting eligibility. Ohio law already sets forth procedures for verifying and challenging eligibility of registered voters. *See, e.g.*, Ohio Rev. Code §§3503.13, 3503.19, 3503.24. And absentee ballot applicants must set forth sufficient information to determine whether they will be qualified to vote in the election at issue, and their ballots may be challenged for cause. *See* Ohio Rev. Code §§3509.03, 3509.07. The Secretary of State has further guarded against any potential fraud by issuing Directive 2008-91 which requires voters who register and vote during the overlap period to vote paper absentee ballots in identification envelopes, so that challenges may be made and resolved without compromising the secrecy of those votes. Given the adequacy of these safeguards, no legitimate purpose would be served by denying a sub-class of qualified voters the right to vote by absent voter's ballots.

C. Construing the statute to require voters to wait 30 days between registering to vote and requesting or casting absentee ballots would lead to absurd and unreasonable results.

Plaintiffs derive the requirement of a 30-day waiting period by treating the term "qualified elector" as used in the Ohio Elections Code as a status that changes from time to time,

with respect to different acts. Complaint ¶¶38-41. But this reading of the applicable law would lead to absurd results. For example, the term "qualified elector" is used throughout the statutory provisions governing the absent voter ballot process:

- *Voting.* "Any qualified elector may vote by absent voter's ballots at an election." Ohio Rev. Code §3509.02(A).

- *Applying for Absent Voter's Ballot.* "Any qualified elector desiring to vote absent voter's ballots at an election shall make written application for those ballots to the director of elections of the county in which the elector's voting residence is located." Ohio Rev. Code §3509.03; *see also id.*, §3509.031 ("Any qualified elector" who is member of state militia on active duty may make written application of absent voter's ballots).

- *Processing of Application.* "Upon receipt by the director of elections of an application for absent voter's ballots . . ., the director, if the director finds that the applicant is a qualified elector, shall deliver to the applicant in person or mail . . . proper absent voter's ballots." Ohio Rev. Code §3509.04.

- *Processing of Absent Voter's Ballot.* If, upon receipt of an absent voter's ballot, "elections officials find . . . that the applicant is not a qualified elector in the precinct, . . . the vote shall not be accepted or counted." Ohio Rev. Code §3509.07.

Thus, with respect to the absentee ballot process alone, the contention that each statutory provision that uses the term "qualified elector" creates a different 30-day period that must be considered would mean the following: (a) for purposes of voting by absentee ballot, an elector must register 30 days before voting; (b) for purposes of making an application for an absentee ballot, an elector must register 30 days before applying for an absentee ballot; (c) for purposes of having an application for absentee ballots processed by elections officials, an elector must register 30 days before the election officials receive and make findings as to the application; and (d) for purposes of having an absentee ballot considered, an elector must register 30 days before the ballot is considered. But each of these steps relates to a single procedure – *voting* by absentee

ballot. It makes no sense that the Legislature would have incorporated a fluctuating definition of "qualified elector" within this single procedure.

Moreover, such a reading necessarily would give rise to internal inconsistencies. For example, this reading would mean that a person could be a "qualified elector" on the date of an election, and thus qualified to *vote* by absentee ballot, but nonetheless ineligible to *receive* an absentee ballot. Similarly, it would mean that a person might not be a "qualified elector" at the time the person fills out an application to vote by absentee ballot, but at the time the election officials consider the application, the person could be "qualified." *See* Ohio Rev. Code §3509.04 (turning on whether "the director finds that the applicant *is* a qualified elector") (emphasis added); *see also id.*, §3509.07 (turning on whether, after submission of ballot, election officials find "that the applicant *is* not a qualified elector") (emphasis added).[4]

Such an interpretation also would raise substantial practical problems for local boards of election, in that it would require them to test whether 30 days have elapsed after each action carried out by a qualified elector. Plaintiffs point to no evidence that procedures exist that would permit all the county election boards to test whether there is a 30-day gap between when citizens register to vote and when they apply for, complete, and cast an absentee ballot.

Finally, interpreting the statutes in this manner would present a significant danger of disenfranchisement of those electors who registered to vote *before* the overlap period, but who

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[4] Plaintiffs' proposed definition would also affect numerous other statutory provisions. For example, a "qualified elector" who has mistakenly registered in the wrong precinct is entitled to apply to correct his registration form. Ohio Rev. Code §3503.30. And only qualified electors may challenge the registration of other electors, and may apply to correct a precinct registration list. *Id.* §§3503.24(A), 3505.19. Nothing in the Revised Code's election provisions, however, supports the notion that election officials are tasked with enforcing such a fluctuating 30-day period, which would shift with each action carried out by a qualified elector.

may have applied for or submitted absentee ballots before waiting a full 30 days. It would lead to the absurd consequence that election officials would be tasked with reviewing all applications for absentee ballots and disqualifying ballots of electors who are indisputably qualified to vote at the election.

D. Numerous states permit citizens to register to vote and cast a ballot on the same day.

Ohio is not unique in permitting electors to register to vote and to cast absentee ballots on the same day. The experience of other states confirms that there are no serious concerns about fraud raised by the mere fact that citizens are permitted to register and to vote absentee on the same day.

Many states permit citizens to register to vote on the same day as they cast their ballots. For example, in eight states – Idaho, Iowa, Maine, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming – citizens may register to vote on election day itself and cast a ballot. *See* Demos Policy Brief, "Voters Win with Election Day Registration," available at <www.demos.org /pubs/Voters%20Win.pdf> (last visited September 22, 2008).

Additionally, North Carolina has a "one-stop" early voting procedure where "an individual who is qualified to register to vote may register in person and then vote at a one-stop voting site in the person's county of residence during the period for one-stop voting." N.C. Gen. Stat. §163-227.3. Illinois similarly provides voters with a "grace period," where voters who missed the registration deadline may nonetheless vote in the election so long as they register and vote simultaneously during the grace period at the office of the election authority. *See* 10 Ill. Comp. Stat. 5/4-50; 5/5-50 ("If a voter who registers . . . during this grace period wishes to vote at the first election or primary occurring after the grace period, he or she must do so by grace

period voting, either in person in the office of the election authority or at a location specifically designated for this purpose by the election authority, or by mail.").

Amici also have confirmed that at least another eight states have overlap periods between the beginning of absentee voting and the end of voter registration, and permit citizens both to register to vote and to cast absentee ballots during these overlap periods. *See* Affidavit of Scott Stillman, filed in *Colvin* mandamus action, ¶¶2-8 (attached as appendix to the instant brief).[5] That these states permit voting during the overlap period indicates that state legislatures have

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[5] The length of the overlap periods in these states varies: Arkansas (5 days), Connecticut (17 days), Michigan (15 days), Missouri (15 days), Nebraska (22 days), South Dakota (27 days), Vermont (23 days), Virginia (16 days). The period of overlap between the beginning of absentee voting and the end of voter registration represents the time between each state's registration deadline and that state's deadline for providing absentee ballots:

Arkansas. *Compare* Ark. Code Ann. §7-5-407 (absentee ballots must be available not later than 35 days before election) *with* Ark. Code Ann. §7-5-201(a) (voters must be registered 30 days before election).

Connecticut. *Compare* Conn. Gen. Stat. §9-140(f) (absentee ballots be issued 31 days before election) *with* Conn. Gen. Stat. §9-23g(d)(2) (voters must be registered 14 days before election).

Michigan. *Compare* Mich. Comp. Laws §168.714 (absentee ballots must be available 45 days before election) *with* Mich. Comp. Laws §168.497 (voters must be registered 30 days before election).

Missouri. *Compare* Mo. Rev. Stat. §115.281 (absentee ballots must be available no later than the sixth Tuesday before election) *with* Mo. Rev. Stat. §115.135(1) (voters must be registered no later than the fourth Wednesday before election).

Nebraska. *Compare* Neb. Rev. Stat. §32-808(1) (absentee ballots must be available at least 35 days before election) *with* Neb. Rev. Stat. §32-302 (voter registration ends at 6 p.m. on the second Friday preceding any election).

South Dakota. *Compare* S.D. Codified Laws §12-16-1 (ballots must be in the possession of county auditors not later than six weeks prior to election) *with* S.D. Codified Laws §12-4-5 (voters must be registered 15 days before election).

Vermont. *Compare* Vt. Stat. Ann. 17, Ch. 51, §2479 (ballots must be furnished to the clerk of each town not later than 30 days before election) *with* Vt. Stat. Ann. 17, Ch. 43, §2144 (voters must be registered by the Wednesday preceding election).

Virginia: *Compare* Va. Code Ann. §24.2-614 (ballots must be printed at least 45 days preceding election) *with* Va. Code Ann. §24.2-416 (voters must be registered 29 days before election).

determined that there are no significant risks associated with such voting, and that such procedures are reasonable.

CONCLUSION

For the reasons discussed, *Amici* oppose Plaintiffs' motion for a temporary restraining order.

Dated: September 28, 2008

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. RHONDA L. COLVIN, *et al.*	:	
Relators,	:	
vs.	:	Case No. 08-1813
JENNIFER BRUNNER, SECRETARY OF STATE OF OHIO,	:	Original Action in Mandamus
Respondent.	:	Expedited Election Matter Under S.Ct. Prac. R.X. § 9

AFFIDAVIT OF SCOTT STILLMAN
IN SUPPORT OF THE MEMORANDUM OF *AMICI CURIAE* THE OHIO AFL-CIO AND DISTRICT 1199 SEIU IN SUPPORT OF RESPONDENT

FILED
SEP 24 2008
CLERK OF COURT
SUPREME COURT OF OHIO

AFFIDAVIT OF SCOTT STILLMAN

I, Scott Stillman, depose and state the following under oath:

1. I am a third-year law student at Northeastern University School of Law in Boston, Massachusetts. I am currently working as a law clerk for the law firm of Altshuler Berzon LLP, which is representing *amici curiae* the Ohio AFL-CIO and District 1199 of the Service Employees International Union (SEIU) in this matter.

2. On September 23, 2008, I spoke with Katie Clark, an administrative assistant in the Elections Division of the Nebraska Secretary of State's office. Ms. Clark informed me that during the period of time when absentee ballots have been delivered and voter registration is still available, a person may register to vote and cast an absentee ballot at the same time.

3. On September 23, 2008, I spoke with David Crossman, Elections Administrator in the Vermont Secretary of State's office. He informed me that during the period of time when ballots have been furnished to the clerk of each town and voter registration is still available, a person may simultaneously register to vote and cast an absentee ballot.

4. On September 23, 2008, Kea Warne, Election Supervisor at the South Dakota Secretary of State's office, confirmed via voice-mail that absentee voting has begun in South Dakota today, September 23, 2008 and from today until the voter registration deadline, a person can register to vote and vote absentee in person at the same time in the county auditor's office.

5. On September 23, 2008, I spoke with Nancy Crockett in the Elections Division of the Arkansas Secretary of State's office. She informed me that she believed that during the overlap period from October 2, 2008 through October 6, 2008, a person is able to simultaneously register to vote and vote absentee in person.

6. On September 23, 2008, I spoke with Dave Foster, Election Specialist in the Michigan Secretary of State's office. He informed me that simultaneously registering to vote and voting absentee in person is a well-known process in Michigan that is an understood practice supported by statutory interpretation.

7. On September 23, 2008, I spoke with Bernard Liu who is an attorney in the Legislative, Elections, and Administration Division of the General Counsel's office in the Connecticut Secretary of State's office. He informed me that during the period of time when absentee ballots have been issued and voter registration is still available, a person may register to vote and cast an absentee ballot at the same time.

8. On September 23, 2008, I spoke with Leslie Winslow, Senior Counsel for the Missouri Secretary of State's office. She informed me that during the period of time when absentee ballots have been made available and voter registration is still open, persons can simultaneously register to vote and cast an absentee ballot in person.

Further Affiant sayeth naught.

Dated: September 23, 2008

Scott Stillman

SCOTT STILLMAN

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proved to me on the basis of satisfactory evidence to be the person who appeared before me (.) ~~(,)~~

(and

(2) _____ (Name of Signer),

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

Signature _____ (Signature of Notary Public)

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CERTIFICATE OF SERVICE

The undersigned hereby certified that a copy of the foregoing was sent via regular U.S. Mail Service the 24th day of September, 2008 to the following: This document was also served by e-mail upon the following:

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon all counsel of record by means of the Court's Electronic filing system on this 29th day of September, 2008.

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