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

OHIO REPUBLICAN PARTY, et al.,	:	
	:	
Plaintiffs,	:	
	:	**Case No. 2:08 cv 913**
	:	
v.	:	**Judge Smith**
	:	
JENNIFER BRUNNER,	:	**Magistrate Judge King**
SECRETARY OF STATE OF OHIO,	:	
	:	
Defendant.	:	

INTERVENOR VETERANS FOR AMERICA'S
OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Intervenor Veterans for America ("VFA"), respectfully submits this opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.[1]

INTRODUCTION

Plaintiffs seek to enjoin Ohio registration and absentee voting procedures that both Republican and Democratic Secretaries of State historically have implemented without incident. Specifically, Plaintiffs challenge the settled practice of allowing qualified voters to register to vote and then to request an absentee ballot before 30 days have passed—a procedure that is

[1] Veterans for America (VFA), also known as Vietnam Veterans of America Foundation, is an advocacy and humanitarian organization whose primary mission is to ensure that our country meets the needs of service members and veterans who have served in Operation Enduring Freedom and Operation Iraqi Freedom. VFA focuses specifically on the signature wounds of these conflicts: psychological traumas and traumatic brain injuries. VFA concentrates much of its attention on the needs of those who currently are serving in the military, since the majority of those who have seen combat in Iraq and Afghanistan are still in the military and under the care of the Department of Defense. VFA works closely with military leaders and members of Congress on a bipartisan basis to ensure that the needs of our service members and their families are well understood and that policies and legislation are implemented to better support our troops and their families as they cope with the effects of multiple deployments, high-intensity combat, inadequate dwell time, as well as sub-standard post-combat care and family support.

designed specifically to protect the right of all qualified voters to cast a ballot and one that is of special importance to members of the armed forces and to veterans confined to VA hospitals.

Plaintiffs attempt to frame their lawsuit as challenging *only* the Secretary's actions with respect what they claim will be "circus-like 'vote-a-ramas'" during the week-long "window" period of overlap between the registration deadline and the availability of absentee balloting. *E.g.*, Plaintiffs' Mem. at 2, 5.[2] But the necessary consequences of Plaintiffs' interpretation of Ohio law—bad as they are for voters who register within this "window" period—actually would threaten far more sweeping harms to many other voters, including significant numbers of military personnel and disabled veterans who depend on absentee voting. As explained below, overseas military personnel and disabled veterans (along with countless others) regularly submit voter registration and absentee ballot applications simultaneously—as they are expressly directed to do by the Defense Department and federal law. Yet, under Plaintiffs' theory of this case, those voters' absentee ballot applications are invalid and must be rejected, and those voters are potentially subject to prosecution.

As the Secretary of State correctly argues, Plaintiffs' reading of Ohio law is wrong. Nothing in Ohio law precludes the Secretary of State from directing that voters who seek to register in the "window" period may also request an absentee ballot at the time they register, or within a few days thereafter. Indeed, this has been longstanding practice in Ohio. Moreover, the Secretary's settled interpretation of state law does not violate any provision of federal law, including the Constitution. To the contrary, it is *Plaintiffs'* argument that contravenes federal law and therefore must be rejected. Moreover, the Secretary's interpretation—shared by her Republican and Democratic predecessors—avoids potentially massive disruption and confusion

[2] The window runs from September 30 (when the period for absentee balloting begins) until October 6 (the registration deadline).

regarding the voting process. Particularly at the eleventh hour in which Plaintiffs have filed this lawsuit, deference to the Secretary of State's reasonable and well-supported interpretation of the law is essential.

This Court must reject Plaintiffs' plainly invalid legal position, which will, as both a legal and practical matter, disenfranchise countless numbers of military personnel and cause them great confusion. VFA is deeply committed to safeguarding the rights of this nation's veterans and active duty military members. Because these individuals safeguard the fundamental right to vote of all Americans, it is imperative that their right to vote be steadfastly protected. A high percentage of those serving in the military must vote by absentee ballot because they are deployed away from home. Similarly, veterans confined to VA hospitals typically must vote by absentee ballot. It is critically important that our active duty soldiers and disabled veterans be guaranteed an absentee voting process that is fair, predictable, and unencumbered by confusion. As a group that represents veterans and is deeply concerned with the voting rights of active duty military members, VFA seeks to ensure that the implications of the arguments being made in this litigation are fully before the Court.[3]

This opposition memorandum focuses on the threat that Plaintiffs' arguments and proposed injunction pose to the right to vote of all who depend on absentee balloting—especially members of the armed forces and disabled veterans. VFA also will briefly address why the Secretary's interpretation of Ohio law is plainly correct and does not contravene federal law. For

[3] Along with other organizations, VFA submitted an *amicus curiae* brief in a related action now before the Ohio Supreme Court. *See State of Ohio ex rel. Colvin v. Brunner*, Ohio S. Ct. Case No. 2008-1813.

the sake of brevity and non-repetition, VFA also incorporates by reference the Secretary's arguments with respect to Plaintiffs' proposed 30-day "waiting period."[4]

ARGUMENT

In assessing Plaintiffs' motion for preliminary injunctive relief, the Court "must consider and balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997). Here, all of these factors indicate that Plaintiffs' motion for injunctive relief should be denied.

I. THE REQUESTED INJUNCTION SHOULD BE DENIED BECAUSE IT WILL CAUSE IRREPARABLE HARM TO COUNTLESS VETERANS AND MEMBERS OF THE ARMED FORCES, WHOSE ABSENTEE BALLOT APPLICATIONS WOULD BE INVALID UNDER PLAINTIFFS' THEORY OF THE CASE.

Plaintiffs' entire argument rests on their claim that Ohio law "explicitly requires a person to be registered to vote for thirty days before being considered a qualified elector." Plaintiffs' Mem. at 7 (citing Ohio Rev. Code § 3503.01).[5] From this premise, Plaintiffs argue that: a) only individuals who have been registered to vote for 30 days may even *apply* for an absentee ballot;[6]

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[4] VFA takes no position regarding Plaintiffs' challenge to the Secretary's actions regarding observers during the "window" period, and Plaintiffs' request for an injunction regarding that matter.

[5] Plaintiffs do not state explicitly whether they consider a voter "to be registered" on the date that the county election officials process a voter's registration form, as opposed to the date that a voter submits a voter registration form for processing. In any event, regardless of what meaning Plaintiffs give to the phrase "to be registered," their arguments have broad and harmful ramifications for voters other than absentee voters in the "window" period.

[6] Plaintiffs' Mem. at 7 ("Since a person must already be a qualified elector prior to applying for an absentee ballot, the Directive is in conflict with the thirty day requirement under R.C. §3503.01."); *id.* at 9 (claiming that, under Ohio law, "a person cannot request an absentee voter's ballot until the person has been a registered Ohio voter for thirty days").

b) any individual who applies for an absentee ballot without having first been registered for 30 days has committed a felony;[7] and c) a Board may not *issue* an absentee ballot to an individual who has been registered to vote for fewer than 30 days at the time the individual requests the ballot, even if that individual will have been registered to vote for more than 30 days by the time that ballot is actually counted on Election Day.[8] Plaintiffs seek an injunction that, among other things, would require rejection of all absentee ballot applications other than those submitted at least 30 days after a voter's registration. *See* Plaintiffs' Mem. at 18-20.

Plaintiffs' proposed injunction, which is based on the legal argument just set forth, should be denied because it is wrong as a matter of law (see *infra* Part III) and because it threatens massive irreparable harm on active duty military personnel and disabled veterans. "The loss of the protected right to vote 'for even minimal periods of time, constitutes irreparable injury.'" *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 827 (N.D. Ohio 2006) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The injunction sought by Plaintiffs threatens to invalidate the absentee ballot applications of thousands of absentee voters, including many who already have simultaneously submitted registrations and applications for absentee ballots in reliance on the settled understanding of existing law. Moreover, as Plaintiffs would have it, these honest citizens seeking to exercise their solemn duty in a democracy (doubtless including many in the military) potentially could be branded as felons. Because Plaintiffs' proposed injunction would *cause*—not alleviate—irreparable harm, it must be rejected.

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[7] Plaintiffs' Mem. at 8 ("Any person who attests to being a qualified voter while simultaneously registering to vote is making a false assertion."); Complaint ¶ 30 ("Thus, citizens who are not qualified electors or voters, but nevertheless request an absent voter's ballot by attesting to being a qualified voter, are subject to punishment for committing a felony.").

[8] Plaintiffs' Mem. at 9 ("claiming that "[w]hen a county board of elections simultaneously receives a person's voter registration application and application for an absent voter's ballot, the board can know with certainty that the person is not a qualified elector permitted to receive an absent voter's ballot under Ohio election law").

Plaintiffs claim that their injunction is necessary to prevent individuals from registering to vote, applying for absentee ballots and submitting those ballots during the week-long "window" period, allegedly because state and federal law require a 30-day "waiting" period between registration and application to vote absentee. But, although attempting to focus entirely on the "window" period, which Plaintiffs mock as a "circus-like 'vote-a-rama,'" *e.g.*, Plaintiffs' Mem. at 2, 5, Plaintiffs simply ignore that a necessary consequence of their proposed injunction is the threatened nullification of the votes of thousands of Ohio citizens who have every right to vote in the upcoming election because they will have been registered at least 30 days on or before Election Day. According to Plaintiffs, under Ohio and federal law, "[i]t is impossible for a person to simultaneously submit an application to register to vote and request an absentee ballot." Plaintiffs' Mem. at 8. But Plaintiffs completely ignore that many Ohioans—including substantial numbers of military personnel—*already have submitted* applications for absentee ballots prior to being registered for 30 days. This is consistent with longstanding practice in Ohio and elsewhere, which allows those voters to cast ballots because they will have been registered for at least 30 days *by the time those ballots are counted on Election Day*.[9]

Ohio voters have submitted absentee ballot applications for the upcoming election to their local election boards since January 2008, *see* Ohio Rev. Code § 3509.03, and have done so

[9] Moreover, it is longstanding practice in Ohio that voters need not actually be registered for 30 days in order to vote in person on Election Day, but simply need to have mailed their applications within 30 days of the election. *See, e.g.*, Ohio Rev. Code § 3503.19; *see also State ex rel. Oster v. Lorain County Bd. of Elections*, 93 Ohio St. 3d 480, 485 (2001). Indeed, a contrary provision of state law would be preempted by the National Voter Registration Act, which requires that applicants who have *postmarked* a "valid voter registration form" no later than the thirtieth day before any federal election must be permitted to vote. 42 U.S.C. § 1973gg-6(a)(1)(B); *see also* Ohio Rev. Code § 3503.19(A). Pursuant to this longstanding interpretation of state law, the Secretary of State and county boards have expressly informed all Ohio voters through a wide variety of written materials that registrations need only be postmarked by the 30-day deadline. *See, e.g.*, Ohio Voter Information Guide (2008) at 6 ("Your voter registration form must be postmarked by the 30th day before the first election at which you want to vote.").

without any need to show that they have been registered for 30 days before attesting that they are "qualified voters" for purposes of submitting an absentee ballot application. Thus, were the Plaintiffs' arguments accepted, vast numbers of individuals *already* would have committed felonies by submitting absentee ballot applications prior to being registered for 30 days. Worse still, according to Plaintiffs, these individuals' absentee ballot applications must be voided. [10]

Specifically with respect to overseas armed services personnel, federal law requires, Ohio law recognizes, and the federal government strongly encourages, that members of the armed services use a federal form that permits an individual to register to vote and to apply for an absentee ballot *at the same time*. *See* Federal Voting Assistance Program ("FVAP"), Federal Post Card Application, *available at* http://www.fvap.gov/ resources/media/fpca.pdf (visited Sept. 28, 2008).[11] Indeed, FVAP—the federal government entity that administers federal law regarding overseas voting—repeatedly and prominently instructs overseas military personnel and other overseas U.S. citizens that "[v]oter registration and absentee request *can be done at the same time* by submitting the Federal Post Card Application (FPCA) form." http://www.fvap.

[10] Additionally, to the extent Plaintiffs' argument assumes that an individual is not registered until their registration forms are processed, their argument also would disenfranchise absentee voters who register at or near the October 6, 2008 deadline. Under Plaintiffs' theory, voters who submit their registration forms at or near the October 6, 2008 deadline may not legally submit applications for an absentee ballot until 30 days *after* they have been registered by state officials. And, pursuant to Ohio law, state officials need not process and accept voter registration requests for up to 20 days after receipt of the registration documents, *see* Ohio Rev. Code § 3503.19(c)—a time period that does not include the time it takes for the registration request to be delivered by mail to state officials.

In any event, even assuming that a voter's registration is processed soon after receipt on October 6, 2008, under Plaintiffs' argument, that voter still must wait 30 additional days before applying for an absentee ballot. Thus, if Plaintiffs were correct, voters who register at or near the October 6, 2008 deadline cannot as a practical matter cast absentee ballots because there simply will not be enough time for them to submit absentee ballot applications, receive their absentee ballots, and return those voted ballots by the close of the polls on Election Day.

[11] *See also* Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. § 1973ff *et seq.*; Ohio Rev. Code ch. 3511 (Armed Services Absent Voter's Ballots).

gov/faq/index.html#gq1 (visited Sept. 28, 2008); *see id.* (""You may register and request an absentee ballot with a single form: The Federal Post Card Application."). Yet, under Plaintiffs' argument, Ohio voters who complete and submit both portions of the Federal Post Card—as expressly directed by the U.S. Government—are, according to Plaintiffs, falsely affirming that they are "qualified electors" and "eligible to vote," because they have not yet been registered (let alone for 30 days) at the time they submit the federal form.[12]

Contrary to Plaintiffs' novel and disruptive proposed procedure, settled practice under Ohio law is that Ohio voters may simultaneously submit voter registration paperwork and absentee ballot applications, maximizing the likelihood that they will receive absentee ballots in time to submit those ballots by Election Day. *Cf.* Ohio Voter Information Guide (2008) at 14 ("[Y]ou should submit your request as far in advance of the election as possible to ensure there is sufficient time for the board to mail you a ballot and for you to timely return that ballot."). Large numbers of military personnel have already done so, pursuant to the direction of FVAP. *See* http://www.fvap.gov/faq/index.html#gq1 ("We recommend that you register to vote/request an absentee ballot in January of each year, or at least 45 days before Election Day."). Plaintiffs have provided no support or justification for their proposed 30-day waiting period for applying for an absentee ballot—a reading of Ohio law that will disrupt the settled expectations of Ohio voters and lead to the effective disenfranchisement of absentee voters who already have made "faulty" submissions, as well as for those voters who register at or near the deadline.

[12] Under Ohio law, the federal form—like the Secretary's absentee ballot application form—requires the voter to include "[a] statement that the person requesting the ballots is a qualified elector." Ohio Rev. Code § 3511.02(a)(7). Thus, both the Federal Post Card and the Ohio Revised Code expressly contemplate that a voter may be a "qualified elector" for an absentee ballot even if she registers on the *same day* that she requests an absentee ballot. That Plaintiffs' novel interpretation conflicts with federal law, with other provisions of the Ohio Revised Code, and with this longstanding federal procedure further demonstrates that their claims lack merit.

Plaintiffs also ignore the unprecedented disenfranchisement of *in-person* voters that their position will cause. Plaintiffs' argument that one must be registered for 30 days in order to be a qualified elector, means that an individual will have to be registered for 30 days not only to apply for an absentee ballot, but also to vote in person on Election Day. Plaintiffs' argument therefore precludes in-person voting by anyone who is registered on the date of the registration deadline. This is so because the registration deadline is actually 29 days before Election Day, as 30 days before Election Day falls on a Sunday (as it always does), and under Ohio law, *see* Ohio Code § 1.14, the registration deadline thus extends to Monday, October 6, 2008—29 days before the election. Thus, Plaintiffs' argument would lead to the absurd result of refusing to allow voters to vote in-person on Election Day if they registered on the final day of the registration period.

In a related proceeding before the Ohio Supreme Court, two Relators have made the same arguments as Plaintiffs here and likewise seek to invalidate the Secretary's directives and impose a 30-day "waiting period." *See State of Ohio ex rel. Colvin v. Brunner*, Ohio S. Ct. Case No. 2008-1813. Notably, those Relators have *no* meaningful response to arguments like those made by VFA. According to Relators, arguments such as VFA's are "are simply 'straw man' arguments that refute interpretations never made by Relators," and "have no bearing on the issue before this Court." Relators' Reply Brief in *State of Ohio ex rel. Colvin v. Brunner*, Ohio S. Ct. Case No. 2008-1813, at 4. To the contrary, the arguments made by VFA necessarily follow from the premise of Plaintiffs' claim: that a voter may not apply for an absentee ballot without waiting for 30 days after registration. Plaintiffs' Mem. at 7-9. Plaintiffs' argument thus clearly implicates the rights of countless individuals who submitted registrations and absentee ballot applications at or near the same time, as authorized by state and federal law. Plaintiffs may not make a legal argument based on interpretation of Ohio state law in order to close down one

opportunity for legitimate voting that they do not like, while simultaneously and baselessly asserting that the necessary implications of that legal argument to other contexts should simply be ignored by the Court because they pertain to opportunities to vote for which they do not object.

Plainly, this Court should not accept an argument that threatens to irreparably harm and disrupt the settled expectations of so many Ohio voters. Military personnel have relied on the longstanding and widespread interpretation of Ohio law and federal law to allow voters to apply for absentee ballots at the same time they register, and without waiting for 30 days after registration. Although ignored by Plaintiffs, the necessary consequence of their argument—the disenfranchisement of absentee voters who submit registrations and absentee ballot applications at or near the same time—would be devastating to many military personnel. Plaintiffs have provided no justification for their novel legal arguments that have the potential to deprive many absentee voters, including military personnel and disabled veterans, of their right to vote.[13]

II. THE REQUESTED INJUNCTION SHOULD BE DENIED BECAUSE IT WILL UNDERMINE THE PUBLIC INTEREST IN AN ORDERLY ELECTION AND UPSET SETTLED EXPECTATIONS.

The public interest also dictates that Plaintiffs' motion be denied. As the Sixth Circuit has explained, "there is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of the submission of absentee ballots"—precisely what Plaintiffs ask this Court to do. *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006). Such disruption should not be permitted. *See,*

[13] VFA also objects to Plaintiffs' alternative proposal of requiring voters to submit provisional ballots if they do not abide by Plaintiffs' proposed 30-day waiting period. Neither Ohio nor federal law authorizes or requires any such result. Such ballots would be cold comfort to the many individuals—including active duty troops and veterans—who have complied fully with the requirements to vote absentee and thus are entitled to have their votes counted on Election Day.

e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (cautioning that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls"); *Summit County Democratic Cent. and Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("[T]he State's interest in not having its voting processes interfered with, assuming that such processes are legal and constitutional, is great. It is particularly harmful to such interests to have the rules changed at the last minute.").

There is no truth to Plaintiffs' repeated and unsubstantiated assertion that the Secretary's administration of the "window" period will result in "circus-like 'vote-a-ramas.'" *E.g.*, Plaintiffs' Mem. at 2, 5. The reality is that the opposite is true. It is Plaintiffs' last-minute effort to force through a novel interpretation of Ohio law that would potentially cause disruption and upheaval, or at the very least enormous confusion—not only during the "window" period but also throughout the entire remainder of the election. As just explained, Plaintiffs' argument affects not only "overlap" period voters, but would call into question the ability of *all* newly registered absentee voters to vote, as well as in-person voters who submit registrations at or near the registration deadline. Changing the rules for all of these voters now will cause massive disruption to the election process in Ohio, contrary to the "strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of the submission of absentee ballots." *Ne. Ohio Coal. for the Homeless*, 467 F.3d at 1012.

To begin with, Plaintiffs' argument would result in great uncertainty and confusion with respect to all absentee ballot applications *already* submitted by individuals—including military personnel and veterans—who did not wait until 30 days after registering to submit their applications. Although Plaintiffs ignore this critical issue, under their own reasoning such applications would have to be voided by the county boards. Yet, because Plaintiffs'

interpretation is contrary to Ohio law and longstanding practice, there is no statutory or other guidance for how the election boards are to handle ballot applications submitted prior to 30 days after a voter's registration. Nor are there processes or guidelines for county boards to use to determine whether a voter did in fact wait until 30 days following registration to affirm that the voter is a "qualified elector" in submitting an absentee ballot application. Given the lack of procedures or guidance to address this issue, there will be certain confusion over which pending absentee ballot applications are valid under Plaintiffs' theory and which are not. Plainly such confusion—at this late date, after thousands of registrations and absentee ballot applications have been submitted—should be avoided.

The necessity of requesting absentee ballots sooner rather than later is particularly compelling for military personnel serving overseas. Currently, it takes 11 to 13 days for priority letters to arrive in Iraq or Kuwait and 10 to 12 days for such mail to arrive in Afghanistan. *See* Military Postal Service Agency, MPSA FAQs, http://hqdainet.army.mil/mpsa/faq.htm#q1 (visited Sept. 28, 2008). For this reason, overseas military personnel are more likely to have requested their absentee ballots already, and to have done so in conjunction with registering. *See supra* (describing the Federal Post Card Application). These military personnel simply would not have time before the election to request, receive, and return an absentee ballot should their absentee ballot applications be invalidated under Plaintiffs' strained interpretation of state and federal law. Accepting Plaintiffs' arguments, therefore, would render unable to vote many overseas military personnel who relied on the common understanding of the requirements for requesting an absentee ballot. Notably, for all overseas military personnel, absentee voting is the *only* way they can exercise their fundamental right to vote.

The many harmful consequences of Plaintiffs' arguments threaten to wreak havoc in the upcoming election.[14] If voters have to wait until they are registered for 30 days even to request an absentee ballot—as Plaintiffs claim—then county boards would be faced with an influx of requests for absentee ballots in the days leading up to the election. In stark contrast, the longstanding practice in Ohio encourages voters to request absentee ballots at the same time that they submit their registration paperwork—that is, early enough to give the county boards sufficient time to process the absentee ballot requests and the voter adequate time to receive and return the ballot.

Not only would Plaintiffs' proposed framework be disruptive to the administration of the election and cause mass confusion, but it also would threaten—and in some cases, annul—voters' ability to receive and cast absentee ballots. Indeed, the consequences of accepting the Plaintiffs' argument contradict the whole point of Ohio's absent voter statute—and, in particular, the 2006 amendments—which is to increase the number of Ohioans who vote. "There is a strong public interest in allowing every registered voter to vote freely." *Summit County*, 388 F.3d at 551. Plaintiffs' legal arguments fly in the face of Ohio statutes and federal laws that seek to guarantee people who cannot make it to the polls on Election Day the right to vote, particularly overseas military personnel and veterans who are unable to vote in person because of disability.

III. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS BECAUSE THE SECRETARY'S INTERPRETATION OF OHIO LAW IS CORRECT AND IN ACCORD WITH FEDERAL LAW, INCLUDING THE CONSTITUTION.

Not only do the equities strongly weigh against the injunction sought by Plaintiffs, but they are also unlikely to succeed on the merits of their claims. The citizens of Ohio need not be

[14] Under Plaintiffs' theory, county boards also must preclude all in-person voters from voting on Election Day if they registered on the final day of the registration period—which is 29 days prior the election. *See supra*.

subjected to the bizarre consequences that would flow from Plaintiffs' proposed interpretation of Ohio and federal law. Rather, the Secretary's Directive 2008-63—which avoids all such consequences—is a correct implementation of the Ohio statutory scheme.

Ohio Revised Code § 3503.19 sets forth the voter registration deadline for Ohio elections. This law has been in effect since 1995 and provides that "[v]oter registration applications, if otherwise valid, that are returned by mail to the office of the secretary of state or to the office of a board of elections must be postmarked no later than the thirtieth day preceding a primary, special, or general election in order for the person to qualify as an elector eligible to vote at that election." Ohio Rev. Code § 3503.19(A). For the upcoming election, that date is Monday, October 6, 2008.

Ohio Revised Code § 3509.01, the current version of which went into effect in 2001, provides that "ballots shall be designated as 'Absent Voter's Ballots' and shall be printed and ready for use on the thirty-fifth day before the day of the election." Ohio Rev. Code § 3509.01. For the upcoming election, that date is Tuesday, September 30, 2008.

Accordingly, there has been an overlap of at least 5 days (depending on when weekends fall) between the opening of absentee balloting and the close of voter registration for numerous election cycles.[15] During that time, both Democratic and Republican state officials—including Secretary Brunner—have reasonably interpreted this "window" period as allowing voters to register to vote and to receive and vote their absentee ballots within this period.

[15] The Secretary has stated that "Ohio law has provided that a person can register to vote and at the same time obtain an absentee ballot by appearing at board of elections since at least 1981." Answer, *State of Ohio ex rel. Colvin v. Brunner*, Ohio S. Ct. Case No. 2008-1813, ¶ 29; *see also id.* ¶¶ 39, 45. VFA has no basis to question the Secretary's statement. Because Ohio's online Code does not include prior versions of statutes and statutes that have been repealed, VFA confines itself to the effective date of Ohio Revised Code § 3509.01—*i.e.*, August 28, 2001.

Prior to the 2006 election, however, absentee balloting in Ohio was available only to a limited group of persons with certain specific qualifications—namely advanced age, emergency-service or militia employment, medical treatment, incarceration, religious observance, absence on Election Day, or illness/disability. In October 2005, Governor Taft signed into law Substitute House Bill 234, which created a "no-fault" absentee balloting process that allowed *any* person to vote by absentee ballot, regardless whether the person met one of the previously required qualifications. *See* Sub. H.B. 234, 126th Gen. Assem. (Ohio 2005). Notably, the bill made no change to the requirement that absentee ballots be made available 35 days prior to the election. *See id.*

The 2006 election, therefore, was the first time in which *any* new registrant could take advantage of the overlap period to both register and vote by absentee ballot. According to a recent newspaper article, "[i]n Franklin County, about 60 did so for the 2006 general election, with no recorded complaints." *See* Alan Johnson, *GOP Crying Foul Over Law It Passed*, Columbus Dispatch, Aug. 15, 2008, at 1B, *available at* http://www.columbusdispatch.com/live/content/local_news/stories/2008/08/14/early_vote.html?sid=101 (visited Sept. 28, 2008). VFA also is unaware of any recorded complaints—and Plaintiffs cite none—in the 25 years before 2006 pertaining to any voter fulfilling one of the then-necessary qualifications for absentee voting, and choosing to register and vote absentee during the available window.

In anticipation of large numbers of new voter registrations in the run-up to the presidential election, the Secretary of State issued Directive 2008-63 to ensure the registration and absentee-balloting laws continue to be implemented properly. The Secretary needed to implement two equally valid pieces of legislation that, on their face, create a week-long window period in which citizens may both register to vote and apply for and cast an absentee ballot. To

avoid a scenario in which the law was applied unevenly and haphazardly by boards of election throughout the state, the Secretary of State, through Directive 2008-63, set forth procedures implementing both laws as written and fulfilling the General Assembly's unambiguous intent to expand the pool of electors permitted to both register to vote and cast an absentee ballot on the same day during this week-long window.

Specifically, Directive 2008-63 instructs Boards of Election to develop procedures for this window period to both register eligible electors and, once a registration is properly submitted, to allow the voter to receive and cast an absentee ballot that same day. This Directive ensures that absentee voters registering during the window period may exercise the same right as all Ohioans to cast an absentee ballot for any reason beginning on September 30, 2008.

The Secretary's Directive also lays out specific instructions to ensure that registration and absentee balloting within the window period proceed in an orderly and proper manner, consistent with the Revised Code. For instance, the Directive instructs Boards of Election that:

- Prior to allowing absentee balloting, Boards must first correctly register voters under Ohio Revised Code § 3503.19. Only after a registration has been established successfully can Boards provide electors the opportunity to exercise their right to vote absentee. *See* Directive 2008-63 at 1 ("A board of elections must register a person as an elector before issuing an absentee ballot to that person.").

- Boards must delay registration and absentee voting if the Boards are not satisfied as to an application's validity and the applicant's qualifications. *See id.* at 2 ("Boards of elections are required to . . . reserv[e] the right to delay registration and immediate absentee voting if a board is not satisfied as to validity of the application and the applicant's qualifications.")

In sum, Secretary Brunner's Directive correctly implements Ohio law, which does not contain a 30-day "waiting period" between voter registration and application for an absentee ballot, and which expressly contemplates a "window" period in which Ohio citizens can first register and then subsequently receive and cast an absentee ballot. This Directive also comports

with the General Assembly's purpose of expanding electoral opportunities for Ohio citizens, while ensuring orderly and proper voter registration. Furthermore, as noted above, Secretary Brunner's Directive merely follows a precedent that began under her Republican predecessor. Indeed, the procedures she has set forth track precisely how the law was implemented under Secretary of State Blackwell during the 2006 general election.

Although Plaintiffs read great significance into the requirement that an elector must have "been registered to vote for thirty days," Ohio Rev. Code § 3503.01, that language merely requires that voter registration close 30 days prior to Election Day. This is evident from the history behind the provision: it was added to the Ohio Constitution in 1977 to overturn legislation passed earlier that year that would have allowed registration on Election Day, i.e. the same day votes would be counted. *See* Michelle R. Smith, Policy Matters Ohio, Election Day Registration: Expanding the Ohio Vote 5 (July 2003), *available at:* http://www.policymattersohio.org/pdf/EDR_report.pdf (visited Sept. 28, 2008). There is no support for Plaintiffs' argument that the statutory language creates an *additional* requirement—beyond the required close of voter registration 30 days before the election—much less dictates who can cast an absentee ballot and when.

The Secretary's proper reading of Ohio law finds additional support in *State ex rel. Oster v. Lorain County Board of Elections*. In that case, the Court was called upon to interpret the Revised Code's provision that a referendum petition signer must be "qualified to vote" on the candidacy/issue that is the subject of the petition, and that "'the facts of qualification shall be determined as of the date when the petition is filed.'" *Oster*, 93 Ohio St. 3d at 485 (quoting Ohio Rev. Code § 3501.38(A)). The Court determined that as long as the signer *filed* his/her registration application before the referendum petition was filed, and the registration application

was eventually approved, then the signer would be considered "qualified to vote . . . as of the date when the petition is filed" under Ohio Revised Code § 3501.38(A). *Id.* Likewise here, at the moment that an otherwise qualified voter *files* his/her registration application (so long as the voter does so by the registration deadline), the voter is qualified to vote in the election. *See id.* Indeed, the Secretary's Directive ensures additional safeguards that are not even required by *Oster*, as her Directive ensures that for "window period" voters, registrations not only will be filed but also will be processed before a voter may receive and cast an absentee ballot.

Given the statutory and constitutional history, the settled practice prior to 2008, existing case law, and the bizarre consequences of Plaintiffs' arguments, the Secretary's interpretation of the relevant provisions is both correct and most reasonable. Moreover, it accords with the common-sense notion that even if an absentee ballot is filed prior to Election Day, the elector does not actually vote until Election Day, when the elector's ballot is opened and tabulated, along with all other eligible citizens' votes—all of whom will, at that point, have been registered for at least 30 days. Accordingly, in requesting and voting absentee ballots, electors attest to the fact that they will be qualified voters at the time their votes are effectuated—when the ballots are opened and tabulated—which will be at least 30 days after they submitted their registration forms. And even if Plaintiffs' and the Secretary's interpretations of the statutory provisions at issue are in equipoise, courts have "repeatedly held [that] '[w]hen an election statute is subject to two different, but equally reasonable, interpretations, the interpretation of the Secretary of State, the state's chief election officer, is entitled to more weight.'" *Id.* at 486 (quoting *State ex rel. Stevens v. Geauga County Bd. of Elections*, 90 Ohio St. 3d 223, 227 (2000)).

In addition to being correct as a matter of State law, the Secretary's directive challenged by Plaintiffs is entirely consistent with the requirements of federal law, including the

Constitution. VFA incorporates by reference the Secretary's arguments in this regard. Indeed, it is the *Plaintiffs'* interpretation of state law that would violate several provisions of federal law, including but not limited to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the National Voter Registration Act. Accordingly, Plaintiffs' interpretation must be rejected and provides no basis for the requested injunction.

CONCLUSION

For the reasons stated above, Intervenor VFA respectfully requests that the Court deny Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify 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.

/s Philip J. Fulton