

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

Project Vote, Northeast Ohio Coalition for )  
the Homeless, 1Matters, Sherie Penix, and )  
Daniel Robert George, )

Plaintiffs, )

v. )

Madison County Board of Elections, )

and )

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

Defendants. )

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Civil Action No. 08-2266

**PLAINTIFFS' REPLY BRIEF IN SUPPORT  
OF A TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

Defendant Madison County Board of Elections’ opposition to this motion rests on a mistaken characterization of both the subject matter of this case and the legal basis for Plaintiffs’ legal claims. Contrary to the argument of, this case is not simply about a legal opinion put forward by its prosecuting attorney on September 5, 2008. Mem. of Def. Madison County Board of Elections in Opposition to Motion for Temporary Restraining Order (ECF Doc. No. 10) at 1. It is instead about the chilling effect on the voting rights of citizens throughout the State of Ohio, posed by the interpretation of state law being advanced in *State ex.rel. Colvin v. Brunner* and embraced by three county prosecutors. In the *Colvin* case, now pending before the Ohio Supreme Court, relators (also represented by counsel for Madison County) have argued that a voter who so much as *requests* an absentee ballot within 30 days of having registered has committed a fifth-degree felony. Relators’ Br. at 6, 17-18. The prosecuting attorneys of three counties, one of them (Holmes) in the Northern District of Ohio, have adopted this interpretation.

If this interpretation of state law is adopted by the Ohio Supreme Court, it would not only close down the five-day window, within which citizens may simultaneously register and submit an absentee ballot under directives issued by the Ohio Secretary of State. It would also foreclose *any* citizen from asking for or obtaining an absentee ballot, within 30 days of having registered. As a practical matter, this will make it impracticable for countless Ohioans to exercise their constitutionally protected right to vote. The chilling effect of this position is felt not just in Madison County, but throughout the State of Ohio.

The upshot is that a voter who registered within the last month – well before the October 6 deadline under Ohio law – cannot even request an absentee ballot today, without facing the risk of criminal prosecution. While that risk is most acute in the three counties whose prosecutors have opined on the subject, it exists for any newly registered voter anywhere in the State of Ohio. Accordingly, each of Plaintiffs, along with voters and voter registration groups throughout Ohio, are injured by the conduct complained of in this case and immediate relief is necessary to protect their constitutional right to vote. There is thus no question that Plaintiffs have adequately stated injuries sufficient to confer standing.

Nor is there any serious question that venue lies in the Northern District of Ohio, both because the Secretary of State resides in this district by maintaining an office here, and because the effects of the interpretation of state law advanced by *Colvin* relators and county prosecutors flow throughout the State of Ohio. It is more than a little ironic for Madison County to take the position that this controversy is localized, when their own counsel has taken the position in *Colvin* that voters anywhere in the state would be subject to criminal prosecution, under their proffered construction of Ohio law. Although the Madison County Board of Elections is the only one which currently refuses to abide by the Secretary of State's interpretation of Ohio law,

it is simply false to suggest that the scope of this case is limited to one county. Defendant's contrary argument can only be understood as a calculated effort to steer this dispute to forum that it perceives to be friendly, through a case filed two days after this one, *Ohio Republican Party v. Brunner* case (Case No. 2:08-cv-913-GCS-NMK (S.D. Ohio)), contrary to the first-to-file rule. *See, e.g., Plating Resources v. UTI Corp.*, 47 F. Supp. 2d 899, 903 (N.D. Ohio 1999).

Madison County's opposition also rests on a mistaken characterization of Plaintiffs' legal claims. Plaintiffs' argument is not, as Defendant would have it, that there is a federal right to same-day registration and voting. There is nothing in federal law, for example, that would prevent a state from having a registration deadline 30 days before the election and not making absentee voting available until 21 days before the election. The problem with the interpretation advanced by *Colvin* relators, Defendant Madison County, and the three county prosecutors is that it contravenes federal law, which ties registration deadlines to *the date of the election*, and not the date on which a voter requests, receives, or submits an absentee ballot. Under federal law, states may not condition eligibility on registration more than 30 days in advance of the election. Yet that is precisely what the misguided interpretation of state law advanced by *Colvin* relators, Madison County, and two other county prosecutors would accomplish. Because their construction of state law conflicts with federally protected voting rights, it cannot be sustained consistent with the Supremacy Clause and the Equal Protection Clause of the U.S. Constitution.

## ARGUMENT

- I. Plaintiffs have a justiciable claim that, in the absence of adjudication by this court, will result in violations of Plaintiffs' constitutional and statutory rights.

The arguments of Defendant Madison County Board of Elections ("Madison County") concerning justiciability are misguided. They rest on a mischaracterization of the allegations of the complaint and Plaintiffs' injuries, and are unsupported by case law.

First, plaintiff Sherie Penix, a Madison County resident who is eligible to vote and wishes to register and request and submit an absentee ballot between September 30 and October 6 clearly has standing to challenge Madison County's announced intention to treat her ballot as void.

In order to satisfy the standing requirements of Article III of the Constitution, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

*Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6<sup>th</sup> Cir. 2004).

Plaintiff Penix clearly meets this standard. Madison County has announced its intention to treat absentee ballots and/or applications made between September 30 and October 6 as void with respect to any voter who did not register 30 days in advance of that period. Declaration of Carrie Davis, ¶ 9. Plaintiff Penix will face hardship if she cannot vote early by absentee when she registers during this period, because family and work obligations may prevent her from voting at her polling place on Election Day. Penix Declaration. By treating her application and/or vote as void, Madison County will be violating numerous federal rights as outlined in plaintiffs' initial memorandum. For example, it will be denying her an absentee ballot in express defiance of Section 202(d) of the Voting Rights Act, which requires issuance of an absentee ballot for presidential voting if an individual registers at least 30 days before the election and requests an absentee ballot at least seven days in advance of the election. Plaintiff Penix will satisfy both those conditions, yet defendant Madison County has announced it will treat her absentee ballot and/or application as void because she will not have been registered 30 days prior

to this period. This unquestionably creates a case or controversy that plaintiff Penix has standing to litigate.

Indeed, the Relators in the Ohio Supreme Court litigation have warned that voters such as Ms. Penix may be prosecuted for committing a felony if they seek to register and vote by absentee ballot. Relators' Br. at 6, 18. Absent a TRO and preliminary injunction requiring the Madison County Board of Elections to accept her registration and absentee ballot during the upcoming "overlap" period, Ms. Penix' registration will be futile at best and will potentially expose her to criminal penalties at worst. Thus, she clearly has standing to seek relief in this court.

The uncertainties created by the pending litigation in the Ohio Supreme Court, and the threat of criminal penalties, also underscore the justiciability of Plaintiffs' claims against Secretary Brunner. Although Secretary Brunner's existing directives would protect Plaintiffs' rights, litigation in the Ohio Supreme Court has been filed which challenges the enforceability of defendant Brunner's directive. If the Relators in the Ohio Supreme Court mandamus action are successful, Defendant Brunner will be *obligated* – in the absence of action by this Court – to issue a directive that will apply statewide to void the absentee ballots that plaintiffs and/or their members intend to execute when they register between September 30 and October 6.

Accordingly, the chilling effect on Plaintiffs' ability to take advantage of registration and voting during the coming week is more than adequate to establish both ripeness and standing to seek prospective relief against Defendant Brunner to ensure that Plaintiffs can register and cast valid absentee ballots during the coming week. Without an injunction from this Court, Plaintiffs would be risking not only the casting of void ballots, but also the possibility of criminal prosecution. This presents a classic situation when the need for pre-enforcement relief is

sufficient to satisfy the Article III case-or-controversy requirement. "When seeking declaratory or injunctive relief, the plaintiff must demonstrate actual present harm or a significant possibility of future harm to justify pre-enforcement relief." *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998). However, "an individual does not have to await the consummation of threatened injury to obtain preventive relief. Rather, if the injury is certainly impending, that is sufficient.'" *Id. citing Babbitt v. United Farm Workers Union*, 442 U.S. 289, 298 (1979). "Standing depends on the probability of harm, not its temporal proximity. When injury has occurred or is likely in the future, the fact that state litigation may be deferred does not prevent federal litigation now." *520 South Michigan Avenue Association, Ltd., v. Devine*, 433 F.3d 961, 962 (7<sup>th</sup> Cir. 2006); *accord, Doe v. Stevenson*, 2008 WL 77738 (S.D. Ohio 2008). *See also Milakoff v. Walsh*, 2007 WL 2572268, at \*1 (N.D. Ohio 2007) (pre-enforcement case ripe even though defendant has indicated she will await outcome of litigation to bring enforcement action).

For all these reasons, plaintiffs need not await the outcome of litigation in the Ohio Supreme Court to assert their claims against defendant Brunner and to obtain injunctive relief from this Court to preserve their federal rights.

Given that plaintiff Penix clearly has standing to pursue relief against both Defendants, the Court need go no further in assessing Plaintiffs' standing, because it is a well settled rule that where one party has standing, the court need not determine whether other plaintiffs have standing in order to address the merits of the claim. *Crawford v. Marion County Elections Bd.*, 128 S. Ct. 1610, 1615 n. 7 (2008); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Nevertheless, it is clear that the remaining plaintiffs also have standing sufficient to satisfy Article III requirements.

First, plaintiffs NEOCH and 1Matters have standing to sue on behalf of their members, who include homeless persons who intend to take advantage of the opportunity to register and execute their absentee ballots between September 30 and October 6 as provided by Ohio law. As the Sixth Circuit has noted:

An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Id.* at 181, 120 S.Ct. 693 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). The individual participation of an organization's members is “not normally necessary when an association seeks prospective or injunctive relief for its members.” *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (citing *Hunt*, 432 U.S. at 343, 97 S.Ct. 2434).

*Sandusky County Democratic Party*, 387 F.3d at 583-84.

Under these standards, NEOCH and 1Matters both have standing to bring this action on behalf of its homeless members, who clearly would have standing to sue in their own right. The declaration of NEOCH’s director, Brian Davis, confirms that NEOCH has numerous members who are homeless, ¶¶ 4, 9, 14, and details the harm that will be suffered by NEOCH’s homeless members if they are unable to take advantage of the opportunity to register and vote or request an absentee ballot at the same time during the upcoming “overlap” period:

Homeless individuals experience significant barriers to voting that can be minimized or alleviated by registering and immediately casting or requesting an absentee ballot. For example, many homeless individuals lack transportation, so making one trip to register and a second trip to vote poses a substantial hardship. Many homeless people need to change their address having recently lost their homes, and most have a difficult time receiving mail, such as an absentee ballot, inside the local homeless shelters.

*Id.* ¶ 11. The declaration of Ken Leslie, founder of 1Matters, also confirms that 1Matters has members who are homeless and need to register and vote during the “overlap” period for the

same reasons. Leslie Decl. ¶¶ 12, 14. As a result, the members of these organizations are likely to be unable to vote in the upcoming election if they cannot take advantage of the registration drives being organized by the two associations to bring their homeless members to polling places to register and execute their absentee ballots on the same day.

The interests at stake, moreover, clearly are germane to the purposes of NEOCH and 1Matters. NEOCH has been running voter registration and participation drives among homeless persons for nearly two decades, as part of its mission to empower homeless persons. It plans to serve nearly 2,000 persons during the next week by running shuttles to the boards of elections to assist homeless persons in registering and voting during this period. ¶¶ 8-10. 1Matters also works to build the capacity of homeless persons to have a voice in their community, and has a major initiative of assisting with voter registration and participation in this year's election, including running shuttles to boards of elections during the next week so that homeless persons it serves can register and vote or request an absentee ballot application. Leslie Decl. ¶ 7-9, 10.

Finally, neither the claim asserted nor the relief requested requires the individual participation of the members of these organizations. The claims include no request for damages or other individual relief. Moreover, the same barriers that make it difficult for homeless persons to register and vote in person make it difficult for them to bring individual lawsuits and participate directly in litigation to enforce their rights. Accordingly, NEOCH and 1Matters clearly meet the standards for allowing an association to bring suit on behalf of its members.

*Sandusky County Democratic Party*, 387 F.3d at 583-84.<sup>1</sup>

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<sup>1</sup> The decision in *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999 (6<sup>th</sup> Cir. 2006) does not affect NEOCH's standing to sue on behalf of its members in this case. In the case before the Sixth Circuit, standing was denied because the record on the standing issue consisted solely of the unverified complaint, and the complaint contained no reference to any injury suffered by NEOCH's members. *Id.* at 1010. Here, the complaint clearly alleges an injury to NEOCH's members and the record also includes a detailed declaration by NEOCH's director explaining the injury being suffered by NEOCH's homeless members.

Defendant Madison County argues that the Court lacks subject-matter jurisdiction over the claims of plaintiffs who are not conducting activities in Madison County, because of the absence of a case or controversy. This ignores the fact that plaintiffs have sought relief not only against Madison County, but against Secretary Brunner as well. Although the members of NEOCH and 1Matters are outside Madison County, their activities nevertheless are currently being chilled because of the existing litigation in the Ohio Supreme Court calling into question the enforceability of defendant Brunner's directive in other counties. If the Relators in the Ohio Supreme Court mandamus action are successful, defendant Brunner will be obligated to issue a directive that will apply statewide to void the absentee ballots that plaintiffs' members intend to execute when they register between September 30 and October 6. Moreover, the right of Plaintiffs' members to register and execute an absentee ballot during this period are being chilled because of the threat of felony prosecution that would follow if Relators' interpretation is adopted by the Ohio Supreme Court. Relators' Br. at 6, 18. This threat of prosecution is obviously not limited to Madison County, but is currently chilling the activities of plaintiff organizations and their members who justifiably fear that the registration and voting activities they intend to carry out will either be fruitless at best, or result in felony convictions at worst. The cases cited above addressing the justiciability of pre-enforcement actions when there is legal uncertainty and/or a threat of prosecution all serve to support the standing of NEOCH and 1Matters to sue on behalf of their members.

In addition to the standing of NEOCH and 1Matters to sue on behalf of their members, all three organizational plaintiffs – NEOCH, 1Matters, and Project Vote – have standing to sue on their own behalves. The complaint and supporting declarations allege that each of these

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organizations conducts voter registration and outreach as part of their mission, and that each is devoting substantial resources to assisting their target communities to register and cast absentee ballots starting September 30. In the absence of an injunction, these organizations face a Hobson's choice – (1) expend resources on these voter mobilization activities knowing that their work may be rendered futile if the Ohio Supreme Court directs defendant Brunner to revoke her directive and impose a 30-day “waiting period”; or (2) forgo the opportunity to encourage voter registration and early voting during this period. On the other hand, if plaintiffs’ federal claims are successful, imposition of this additional 30-day “waiting period” will be unlawful, and this Court can enter injunctive relief ensuring that the plaintiff organizations can proceed with their planned mobilization activities. Under these circumstances, the organizations clearly have standing to sue. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (when defendants’ violations of federal housing law impaired organizations’ ability to achieve its mission and caused a drain on organization’s resources, organization had standing to sue on its own behalf).

## II. The Northern District of Ohio is an Appropriate Venue for this Action

Defendant Madison County claims that venue does not exist in this judicial district pursuant to 28 U.S.C. § 1391(b). To the contrary, this action satisfies 28 U.S.C. § 1391(b) in multiple respects: (1) Defendant Brunner resides in the Northern District of Ohio, which satisfies venue under 28 U.S.C. § 1391(b)(1); and (2) a substantial part of the events or omissions giving rise to the plaintiffs’ claim are occurring in the Northern District of Ohio, which satisfies venue under 28 U.S.C. § 1391(b)(2).

28 U.S.C. § 1391(b)(1) provides that venue exists in “a judicial district where any defendant resides, if all defendants reside in the same State.” It is undisputed that both

defendants reside in the State of Ohio. Defendant Brunner is a resident of the Northern District in addition to elsewhere in the state. Her counsel has informed plaintiffs that she maintains an office in Northern District of Ohio. Indeed, in *Ohio Republican Party v. Brunner*, No. 08-cv-913 (S.D. Ohio), a federal challenge to Directive 2008-63 filed in the Southern District of Ohio on September 26, 2008, Secretary Brunner moved to have the case transferred to this district and consolidated with this action. See *Motion To Transfer Venue And To Consolidate*, attached hereto as Exh. A. Furthermore, as the chief election officer of Ohio, OHIO REV. CODE § 3501.04, Secretary Brunner has a number of statewide responsibilities, including promulgating rules, instructions, and directives for the conduct of elections in Ohio; appointing the boards of elections in every county, who serve as the secretary's representatives; and compelling election officers to observe the requirements of all state and federal election laws. OHIO REV. CODE §§ 3501.01, 3501.05, 3501.053(A), and 3501.06. Where a governmental official performs duties throughout the state, venue exists throughout the state. In *Bay County Democratic Party v. Land*, 340 F. Supp. 2d 802 (E.D. Mich. 2004), the court rejected a motion to transfer venue by the defendants, the Michigan Secretary of State and Director of Elections, from the Eastern District of Michigan to the Western District of Michigan, where those officials had their main offices. The district court found that the defendants had statewide duties, and as a result, venue was appropriate in the Eastern District: "It is abundantly clear that the defendants perform official duties in this district and therefore 'reside' here within the meaning of 28 U.S.C. § 1391(b)(1)."

In addition, a substantial part of the actions or omissions giving rise to this action occur in the Northern District. If the Ohio Supreme Court rules that Ohio law requires that a voter must be registered for 30 days before he or she can cast an absentee ballot and the Secretary of

State and county election officials throughout the State follow the Ohio Supreme Court, they will be in violation of federal law and this violation will be statewide. *See League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723, 734 (N.D. Ohio 2005) (request to transfer venue by Secretary of State of Ohio from the Northern District of Ohio to the Southern District of Ohio denied where court found many of the events alleged in the complaint occurred in the Northern District). Moreover, the current uncertainty in the law – including that created by a prosecutor in the Holmes County (which is in the Northern District) who claims that Directive 2008-63 violates Ohio law – has created a chilling effect on voters and organizations registering voters throughout the state. Voters who request or submit absentee ballots at the same time they register to vote cannot be certain that they will not be subject to prosecution. Therefore, because Secretary Brunner is a resident of the Northern District and a venue and a substantial part of the actions or omissions giving rise to this action are occurring in the Northern District, venue exists in the Northern District.

III. *Pullman* Abstention Is Not Appropriate in This Case But, Should the Court Conclude Otherwise, It May Simply Wait Until the Ohio Supreme Court Resolves the Disputed Issue of State Law Before Ruling on Plaintiffs' TRO Application

The Secretary of State, while agreeing with Plaintiffs' federal legal claims, suggests that this Court should abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). While the Secretary of State characterizes the *Pullman* doctrine accurately, Plaintiffs respectfully submit that abstention is not appropriate in this case, given the pressing need for clarity as to the federal voting rights of Ohio voters who wish to request or submit absentee ballots within 30 days of registering. In the event the Court concludes otherwise, however, the appropriate course is for this Court to hear Plaintiffs' TRO application but withhold a ruling,

until the Ohio Supreme Court rules on the pending Petition for Writ of Mandamus – something that should happen in the next day, if it has not already occurred by the time this motion is heard.

For abstention under the *Pullman* doctrine to be appropriate, there must be an “unclear state law” and “the likelihood that a decision on the state [law] issue would obviate our deciding the federal question.” *Tyler v. Collins*, 709 F.2d 1106, 1108 (6th Cir. 1983). Satisfaction of these criteria does not necessarily require abstention, however, since *Pullman* abstention is a doctrine of discretion. *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 728 (1996). In deciding whether to exercise this discretion, federal courts must engage in “a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.” *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)). One of these important factors is the potential harm caused by delay. *See, e.g., Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

In *Harman*, the Supreme Court upheld a federal district court's refusal to grant a stay in order for the Virginia state courts to decide the constitutionality of state statutes setting forth qualifications (residency & poll tax) for voting in state and federal elections. The Court ruled: “In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. [The right to vote.] The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain.” *Id.*; *see also City of Houston, Tex. v. Hill*, 482 U.S. 451, 470 (1987) (“delay and expense are the chief drawbacks to abstention”).

Plaintiffs do not dispute that there is a disputed issue of state law, resolution of which might ultimately obviate the need to reach their constitutional claims. The issue of whether Ohio laws should be read to impose a thirty-day waiting period between registration and submitting or even requesting an absentee ballot is currently pending in an expedited mandamus proceeding before the Ohio Supreme Court, *State of Ohio ex rel. Colvin v. Brunner*, Case No. 08-1813. If the Secretary of State's construction of state law is upheld by the Ohio Supreme Court, it may eliminate the need to reach the federal issues raised – assuming that all Ohio counties comply with the Secretary of State's directive at that point. This would be fully consistent with the federal voting rights Plaintiffs raise in this action, and would eliminate any arguable concerns arising from inter-county disparities.

The problem is that, as long as there is no order in place that clarifies Plaintiffs' federal rights, Ohio voters will be chilled from exercising their right to cast – or even to *request* -- an absentee ballot within 30 days of having registered. Thus, assuming that the Ohio Supreme Court has still not yet ruled by the time this motion is heard, a ruling from this Court will be urgently needed to eliminate the cloud that now hangs over the exercise of the fundamental right to vote. As things presently stand, there is a risk that a voter will be prosecuted if he or she merely *requests*, let alone submits, an absentee ballot within thirty days of registering. The *Colvin* relators have clearly taken the position that a voter would be subject to fifth-degree felony prosecution for even making such a request, and their interpretation of state law has been supported by the county prosecutors in Holmes, Madison, and Miami counties. The Supreme Court's precedents make it clear that “[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Moreover, the right to

vote is fundamental “because preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Given the importance and immediacy of the problems presented, and the threat to the fundamental right to vote, abstention is inappropriate here.

In the alternative, if the Court concludes that *Pullman* abstention is necessary pending resolution of the petition now before the Ohio Supreme Court, this Court may simply wait until that court rules before ruling on Plaintiffs’ TRO application. It should be a matter of days, and perhaps just a matter of hours, before the Ohio Supreme Court decides the *Colvin* petition. In the event that the Ohio Supreme Court denies the petition, there will be no obstacle to the Madison County Board of Elections being enjoined to comply with the Secretary of State’s directive. In the event that it grants the *Colvin* petition, then immediate relief from this Court – as to *both* Defendants – will be essential, in order to protect the federal voting rights asserted in this case, so that voters may request, receive, and submit an absentee ballot.

#### IV. Defendant Madison County Mischaracterizes Plaintiffs’ Arguments and Federal Law

Defendant Madison County’s argument that Plaintiffs are urging same day registration is misplaced. Rather what is required under numerous federal statutes cited in Plaintiffs’ complaint and motion for temporary restraining order is: (1) the provision of absentee ballots for the offices of President and Vice President free from the taint of the very same durational residency requirements that Madison County, the Relators in the state supreme court case, the county prosecutors in Madison, Holmes, and Miami Counties, and the plaintiffs in the *Ohio Republican Party* case would apply to Ohio voters, *see* 42 U.S.C. § 1973aa-1, *et seq.*; (2) a registration deadline sooner than 30 days for federal elections, *see* 42 U.S.C. § 1973gg-1, *et seq.*; and (3) that once a jurisdiction has made absentee voting available to voters in the jurisdiction, it cannot apply different qualifications for the absentee ballot to different voters who cast ballots in the

same county, *see* 42 U.S.C. § 1971(a)(2)(A). Plaintiffs did not set the dates for the registration deadline or the advent of early voting; thus Plaintiffs did not create, nor are they urging this court to adopt, same-day registration. However, once the state has created the deadlines and methods for casting early ballots, the state cannot discriminate based on the happenstance of how far in advance of the registration deadline a bona fide voter's name was added to the registration list.

For similar reasons, Madison County's argument that allowing newly registered voters the ability to request and mark an absentee ballot violates Section 303 of the Help America Vote Act (HAVA) or the Voting Rights Act (VRA) continues the errors that led to these legal challenges in the first place. Eligibility of a voter is determined on the date that her ballot will be counted, *i.e.*, Election Day, not the date on which she requests or marks a ballot. Voters who meet all of the requirements and registered before the registration deadline (which is tolled 30 days before Election Day, not the date on which a ballot may be requested) are eligible voters. Nothing in HAVA or the VRA says otherwise.

Because these ballots are not counted or included in the tally until Election Day, there is sufficient time and safeguards in place to address any concerns as to the voters' status. Local election officials are still able to inspect original documents and weigh the credibility of the applicant's assertions. If necessary, local election officials can check for further information through the on-line voter registration data base, and to the extent that issues arise, these officials are subject to the supervision of bi-partisan county boards of election. In the final analysis, if election officials are suspicious about the validity of an existing registrant who wishes to update his or her registration, a visual inspection of the driver's license or other documents can be conducted in the presence of the applicant. If election officials still are not satisfied as to the validity of the application and the applicant's qualifications, Directive 2008-63 authorizes them

to delay registration and immediate absentee voting. Directive 2008-63, page 2.<sup>2</sup> These provisions give election officials both the flexibility to comply with HAVA's requirements and the power to delay the issuance of an absentee ballot in instances where suspicion is aroused. Thus, Plaintiffs' argument that same-day registration and casting an absentee ballot provides no mechanism for checking the validity of the applicant's registration information must fail.

### CONCLUSION

For the reasons set forth above and in their memorandum in support of a temporary restraining order, Plaintiffs' motion for a temporary restraining order should be granted.

Respectfully submitted,

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<sup>2</sup> In this regard, it is noteworthy that OHIO REV. CODE § 3503.19 (C) (1) provides in pertinent part: "A board or elections that receives a voter registration application and is satisfied as to the truth of the statements made in the registration form shall register the applicant ...." This implies that the General Assembly intended for the verification process to occur locally. In the context of same-day registration and absentee voting, this also implies that the initial stages of the verification process would take place in the presence of the registrant.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2008, a copy of foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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