

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

Project Vote, et al.,	:	
	:	
Plaintiffs	:	Case No. 1:08cv2266
	:	
v.	:	Judge James S. Gwin
	:	
Madison County Board of Elections, et al.,	:	
	:	
Defendants.	:	

**MEMORANDUM OF DEFENDANT, JENNIFER BRUNNER, OHIO
SECRETARY OF STATE, IN RESPONSE TO PLAINTIFFS’ APPLICATION
FOR TEMPORARY RESTRAINING ORDER**

Defendant, Jennifer Brunner, in her official capacity as Ohio Secretary of State, respectfully asks the Court to stay consideration of this matter, pursuant to the “Pullman abstention” doctrine, because an action now pending before the Ohio Supreme Court will resolve predicate questions of state law and likely render the federal constitutional claims in this case moot. However, should the Court elect to consider the case on its merits, the Secretary joins with the plaintiffs in their request for a Temporary Restraining Order to prohibit the Madison County Board of Elections from denying absent voter’s ballots to all registered voters, a practice which would violate federal and state law.

I. Statement of Facts

Ohio, following both its state constitution and numerous provisions of federal law, allows any eligible citizen to exercise the franchise in an election so long as he or she registered to vote at least 30 days before that election. However, since 1981, Ohioans are also entitled to obtain an absentee ballot as early as 35 days before the election. Thus, Ohio law creates a five-day window during which a prospective voter can both register

and request an Absent Voter Ballot. The window has existed in the law for years without complication and without challenge.

On August 13, 2008, Respondent Jennifer Brunner, Ohio Secretary of State, issued Directive 2008-63, which, among other things, instructed County Boards of Elections to develop procedures for same-day registration and distribution of absentee ballots during the 5-day overlap period. If, during that time, a new registrant requests an Absent Voter Ballot, Secretary Brunner directed the County Boards to provide the Ballot upon completion of the registration process. Directive 2008-63 did not change existing law, did not conflict with any term in the Revised Code, and was a valid exercise of the Secretary's powers and responsibilities as the State's chief election official.

As the Complaint acknowledges, a petition for writ of mandamus challenging Directive 2008-63 is currently pending before the Ohio Supreme Court. *Colvin v. Brunner*, Case No. 08-1813. Relators in that case have argued that various sections of the Ohio Revised Code (R.C. 3503.01, R.C. 3509.02, R.C. 3509.03, and R.C. 3509.04) require a newly-registered voter to wait an additional 30 days after registration before he or she may even request an Absent Voter Ballot and that any new voter who asks for an Absent Voter Ballot sooner than 30 days following registration is guilty of a fifth-degree felony. In response, the Secretary has argued that the Revised Code does not impose a 30-day waiting period, and if it did, it would be preempted by federal election law.

On September 5, 2008, the Prosecuting Attorney for Madison County, Stephen J. Pronai, Esq., issued an opinion letter to the Madison County Board of Elections in which he disagreed with the Secretary's legal interpretation of R.C. Chapter 3509, and concluded that Ohio law does mandate a 30-day waiting period for Absent Voter Ballots.

Mr. Pronai compounded his misinterpretation of Ohio law by exceeding his authority: he instructed the Board of Elections to disregard the Secretary's Directive and instead apply his interpretation of the law. As of this writing, the Secretary believes the Madison County Board of Elections will not comply with Ohio law and the Secretary's Directive. Instead, it will adopt Mr. Pronai's position and refuse to give Absent Voter Ballots to registered voters in violation of federal law.

The 35-day window for distribution of ballots opens in less than 48 hours, on the morning of September 30, 2008. Project VOTE and the other plaintiffs brought this action to prevent the federal constitutional deprivations that will result if the Madison County Board of Elections proceeds on its present course. However, Project VOTE's federal claims will become moot if the Supreme Court rules in favor of the Secretary and rejects the legal reasoning of the Madison County prosecutor, which is being followed by the defendant Madison County Board of Elections. Only if the Supreme Court rules against the Secretary and imposes a 30-day waiting period under state law will it become necessary for this Court to step in and protect federal voting rights.

II. This Court Should Apply The *Pullman* Abstention Doctrine

The Pullman abstention doctrine permits a federal court to abstain from deciding controversies (otherwise) properly before it when unsettled issues of state law must be resolved before deciding a federal constitutional question. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Pullman abstention is proper when a state court determination of a question of state law might moot or change a federal constitutional issue. *NYLife Distribs. v. Adherence Group*, 72 F.3d 371 376 n.8 (3rd Cir. 1995); *United States v. Anderson County*, 705 F.2d 184, 186-187 (6th Cir. 1983).

The case at bar is particularly appropriate for *Pullman* abstention. To decide the case, this Court will necessarily have to resolve issues of state law, issues which are even now pending before the Ohio Supreme Court. Moreover, two of the three ways the Supreme Court could decide the case would render this action moot. It could find that Ohio law does not impose a waiting period, repudiating the prosecutor's opinion. Or it could find that if there is a waiting period requirement in Ohio law, it is trumped and nullified by federal law. In either case, Project VOTE would have the legal outcome it seeks, and its request for review by this Court would be moot.

III. A 30-Day Waiting Period To Obtain An Absentee Ballot Would Violate Multiple Federal Laws

Should the Court elect to rule on the merits of the injunction petition, the Secretary respectfully submits that the Court should adopt the arguments set forth by Project VOTE and the other plaintiffs. Under the Supremacy Clause (Article VI) of the United States Constitution, any state voter registration laws or procedures that are inconsistent with federal election laws are preempted and superseded. *Association of Community Orgs. for Reform Now v. Miller* (6th Cir. 1997), 129 F.3d 833, 836. Should Ohio courts find that Ohio law imposes a 30-day waiting period for absentee ballots, that state law would squarely conflict with:

(1) **The Voting Rights Act of 1970**, 42 U.S.C. § 1973aa-1(d), which abolished durational residency requirements and demanded any voter be permitted to cast an absentee ballot for President and Vice President if he or she requests an absentee ballot at least seven days before the presidential election and returns the ballot by the time the polls close on election night. 42 U.S.C. § 1973aa-1(d). Under Madison County's scheme, a newly registered voter who provided her application to the board of

elections thirty-three days before a presidential election would be prohibited from obtaining an absentee ballot until three days before the election, a violation of the seven day mandate in the VRA.

(2) **The National Voter Registration Act of 1993**, 42 U.S.C. §1973gg *et seq.*, which sets a fixed 30-day deadline for voter registration, irrespective of the method used to register or vote. 42 U.S.C. § 1973gg-6. “[A]pplicants who submit a ‘valid voter registration form’ no later than the thirtieth day before any federal election **must be permitted to vote.**” *Diaz v. Cobb* (S.D. Fla. 2008), 541 F. Supp. 2d 1319, 1331, n.10 (emphasis added). Madison County’s position conflicts with the NVRA because it effectively requires some voters to register 31 days before Election Day. A qualified voter who registers on the last permissible day—30 days before the election—would not be eligible to request or receive an absentee ballot until Election Day. However, R.C. 3509.03(I) provides that an application for an absent voter’s ballot must be delivered no later than the day *before* the election (and three days before the election unless delivered in person). Thus, a person who registers 30 days before the election would be ineligible to vote absentee.

(3) **The Equal Protection Clause of the 14th Amendment**. State and federal law extend the franchise to citizens who register 30 or more days before the election. However, to qualify for an absentee ballot under Madison County’s theory, one must register—and be qualified to register—no later than 31 days before the election. Thus, a new registrant seeking to vote absentee must reside in the State longer than a new registrant who plans to go to the polls in person. But the difference in treatment, in practical terms, is far more than a single day. Ohio opens the window for absentee voting

35 days prior to Election Day. Under Relators’ theory, for a new voter to avail herself of her full statutory rights—that is, to vote absentee anytime during the 35 day window—she would have to register a full 65 days before the election, thus requiring her to prove residency a full five weeks earlier than other new voters. This operates as a durational residency requirement.

Durational residence requirements, when they represent a separate voting qualification imposed on bona fide residents, “must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.” *Dunn v. Blumstein* (1971), 405 U.S. 330, 342 (quoting *Shapiro v. Thompson* (1969), 394 U.S. 618, 634). Madison County cannot meet this heavy burden; there is no compelling reason why an individual who wants to vote absentee should be subject to a longer residency requirement than applies to the rest of the population.

(4) **The Uniformed and Overseas Citizens Absentee Voting Act**, 42 U.S.C.

§§ 1973ff *et seq.*, **requires** states to:

accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election.

42 U.S.C. §§ 1973ff-1(a)(2). Under Madison County’s theory, election officials would have to reject military absentee applications submitted alongside registration applications, even though the federal statute specifically authorizes simultaneous submission.

IV. Conclusion

Based on the Pullman abstention doctrine, the Secretary respectfully asks this Court to withhold action until the Supreme Court of Ohio issues its ruling. Alternatively, the Secretary adopts the arguments set forth by the plaintiffs and asks the Court to enter an injunction barring the Madison County Board of elections from withholding Absent Voter Ballots from registered voters.

Respectfully submitted,

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Ohio Secretary of State

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 27th day of September, 2008.

/s/ Damian W. Sikora