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

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OBAMA FOR AMERICA, *et al.*,	:	
	:	Case No. 2:12-cv-636
Plaintiffs,	:	
v.	:	Judge Economus
	:	
JON HUSTED, *et al.*,	:	Magistrate Judge King
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO INTERVENORS' MOTION TO DISMISS

Plaintiffs Obama for America, Democratic National Committee and Ohio Democratic Party respectfully submit this Memorandum of Law in Further Support of their Motion for a Preliminary Injunction and in Opposition to Intervenors' Motion to Dismiss. For the reasons stated below and in Plaintiffs' opening Memorandum of Law, this Court should issue a preliminary injunction barring Defendants Husted and DeWine from implementing or enforcing those portions of HB 224 and SB 295 that eliminate in-person early voting for most Ohio voters in the three days prior to Election Day, thereby restoring this critical right for all Ohio voters.

I. INTRODUCTION

Plaintiffs, Defendants and Intervenors agree that states can, and should, make appropriate accommodations for military and overseas voters when necessary to facilitate their ability to cast a ballot. Such accommodations – typically designed to assist voters stationed away from home – have not been found to violate the Equal Protection Clause and Plaintiffs do not challenge these precedents. Moreover, none of the parties – Plaintiffs, Defendants nor Intervenors – seek to prevent military and overseas voters from voting early in-person in the three days prior to Election Day. These are not issues separating the parties in this case.

What this case is about is the Ohio General Assembly's elimination of in-person early voting in the three days prior to Election Day for all other eligible voters, for no apparent reason and quite possibly by accident. There is no dispute that states have considerable discretion to administer elections. But the Equal Protection Clause prohibits the arbitrary and disparate treatment of voters in their access to the ballot box. Yet, that is exactly what occurred when the Ohio General Assembly enacted HB 224 and then subsequently repealed HB 194 through SB 295. Prior to the enactment of these laws, all eligible Ohio voters could vote early in person in the three days prior to Election Day. Now, Ohio law requires election officials to turn most Ohio voters, including veterans, firefighters, police officers, nurses, small business owners and countless other citizens, away from open voting locations, while admitting military and non-military overseas voters and their families who are physically present in Ohio and able to vote in person.

Although Defendants attempt now to concoct a last minute, post-hoc justification for the Ohio General Assembly's actions, there is no evidence that the legislature contracted the early

voting period for most Ohio voters to advance some legitimate policy interest. Quite the contrary. The specific statutory history here, which Defendants and Intervenors completely ignore, makes it abundantly clear that this differential treatment is entirely arbitrary and irrational – nothing more than the by-product of a confused series of statutory maneuvers and "technical corrections." When it comes to the fundamental right to vote, this kind of arbitrary and irrational state action, resulting in unequal access to the ballot box, is a violation of the Equal Protection Clause. This Court should immediately enjoin the offending statutory provisions, thereby restoring in-person early voting for all eligible Ohio voters in the three days prior to Election Day.

I. ARGUMENT

A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT OHIO'S ELIMINATION OF EARLY IN-PERSON VOTING IN THE THREE DAYS PRIOR TO ELECTION DAY FOR MOST OHIO VOTERS VIOLATES THE EQUAL PROTECTION CLAUSE.[1]

1. The unique statutory history here demonstrates that Ohio's disparate treatment of UOCAVA and non-UOCAVA voters with respect to in-person early voting in the last three days before Election Day is arbitrary.

Defendants and Intervenors do not dispute that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's

[1] In addition to opposing Plaintiffs' Motion for Preliminary Injunction, Intervenors also filed a Motion to Dismiss the complaint under Rule 12(b)(6). To defeat a motion to dismiss, Plaintiffs need only plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788, 799 (6th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The moving party bears the burden of proving that no claim exists. *Erickson v. Pardus*, 550 U.S. 89, 89 (2007). For the reasons set forth below and in Plaintiffs' Memorandum of Law in support of Plaintiffs' Motion for Preliminary Injunction, Plaintiffs have more than stated a plausible claim under 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; they have demonstrated that they are likely to succeed on the merits of their claim. Accordingly, Intervenors' Motion to Dismiss should be denied.

vote over that of another." *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011) (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *League of Women Voters v. Brunner,* 548 F.3d 463, 477-478 (6th Cir. 2008). Nonetheless, Defendants suggest that because "there is no fundamental right to in-person early voting," Defendants' Br. at 3, the Constitution imposes no limits on Ohio's ability to administer its early voting scheme. This is simply wrong. While it is true that Ohio was under no obligation to permit early voting at all, once it chose to allow its qualified voters to participate in early voting on an equal basis, it could not then arbitrarily withdraw that right from some, but not all, of its voters. *See O'Brien v. Skinner*, 414 U.S. 524, 530 (1974); *cf. Meyer v. Grant*, 486 U.S. 414, 424 (1988) (rejecting Colorado's argument that "because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right"); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution"). Ohio has violated these constitutional constraints by choosing to have early voting, and then permitting some voters greater access to the polls than others, without the credible justification the Equal Protection Clause requires when it comes to the right to vote.

As explained in detail in the Memorandum in Support of a Preliminary Injunction, prior to 2011, all eligible Ohio voters could vote early in-person through the Monday before Election Day – a system put in place after the serious administrative problems with the 2004 election, when extremely long lines effectively disenfranchised many voters. In short, early voting was not extended to Ohio's voters as a mere convenience, but as a critically needed measure to

protect the right to vote throughout the voting period and on Election Day itself. This early voting system was highly successful and resulted in significantly increased participation in the 2008 and 2010 elections. Indeed, one study found that 93,000 Ohioans voted early in-person in the last three days prior to Election Day in 2010.

In 2011, the Republican-dominated General Assembly passed HB 194, which restricted voting rights in a number of ways and included an attempt to eliminate the last three days of early in-person voting for all Ohio voters, including military and overseas voters within the scope of the Uniformed and Overseas Citizens Absentee Voter Act ("UOCAVA"). In doing so, however, the General Assembly amended only two of four applicable statutes, accidentally creating inconsistencies in the deadline for in-person early voting for both UOCAVA and non-UOCAVA voters. The General Assembly then corrected this legislative oversight by enacting HB 224, which contained "technical corrections" that made all four provisions dealing with early voting consistent. Thus, after the enactment of HB 194 and HB 224, the deadline for in-person early voting was the same for both UOCAVA and non-UOCAVA voters: no voters were permitted to vote early in-person the last three days prior to Election Day.

At the same time, hundreds of thousands of Ohio citizens who objected to the General Assembly's attempt to restrict their voting rights signed a petition to put HB 194 to a referendum vote. After that petition was certified, the General Assembly enacted yet another election-related bill: SB 295, which repealed changes made to the election law by HB 194, in apparent attempt to moot the referendum. But the Ohio General Assembly did not also repeal those sections of HB 224 that operated as the companions to HB 194's early voting restrictions.

As a result, the technical corrections made in HB 224 are still in effect, but no longer serve their purpose of creating consistency. HB 224, standing alone, imposes an in-person early voting deadline of 6 p.m. on the Friday before Election Day for non-UOCAVA voters. However, two provisions still apply to UOCAVA voters: Friday at 6 p.m. and the close of polls on Monday. Defendant Husted appropriately resolved the conflicting UOCAVA deadlines in favor of the more generous time frame, thereby allowing UOCAVA voters to cast their ballots early in person in the last three days before Election Day. Although a number of local election officials wanted to do the same for non-UOCAVA voters, Defendant Husted denied those requests on the ground that the applicable statute, Ohio Rev. Code § 3509.03 as amended by HB 224 and re-enacted by SB 295, compelled disparate treatment of non-UOCAVA voters.

These facts are undisputed. Yet, Defendants and Intervenors completely ignore the statutory history because it unequivocally demonstrates that the legislature's disparate treatment of UOCAVA and non-UOCAVA voters was entirely arbitrary. Indeed, it was likely accidental. The legislature restricted access to early voting for one group of voters but not another, simply because it overlooked an applicable statute in a flurry of larger election-related legislative maneuvering. How this error came about and the extent to which the legislature detected the error but then eschewed corrective action under the influence of partisan considerations, cannot be known. Still, the result is clear: some Ohio voters have access to the ballot box the weekend before the Election, while most Ohio voters do not, and for no real reason at all. Such arbitrary disparate treatment violates the Equal Protection Clause. *See Hunter*, 635 F.3d at 234.

Defendants' post-hoc rationalization of this disparate treatment – that active-duty <u>military</u> voters could face abrupt and unexpected deployment – fails to save the legislature's actions,

particularly in light of the arbitrary process described above.[2] Despite the suggestion in Defendants' and Intervenor's papers, it is simply not the case that the legislature expanded voting rights for UOCAVA voters in order to advance its views of a legitimate state interest. To the contrary: the legislature actually attempted to eliminate the last three days of in-person early voting for UOCAVA voters as well.[3] *See Nordlinger*, 505 U.S. at 14-16 (noting that the facts of a particular case may preclude an inference that there is a plausible policy reason for the unequal treatment).

Moreover, Defendants fail to explain how removing three days of early voting from most Ohio voters advances that interest. Here, designated locations will be open for business in the three days prior to Election Day so that UOCAVA voters and their families can vote in person. The only question is whether the state can constitutionally require these open voting locations to turn away thousands of Ohio voters, including veterans, firefighters, teachers, police officers,

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[2] To the extent that Defendants argue that any rational justification will suffice, they are incorrect. The justification must be one that the Legislature may have reasonably considered, *see Nordlinger v. Hahn*, 505 US 1, 12, 14-16 (1992), which, for the reasons stated below, is clearly not the case here. In addition, the rational relationship between the means and ends that a legislature must establish depends on the enactment at issue, and it is well settled that the standard is more exacting for a case involving fundamental rights than it is for a case addressing a commercial transaction or tax statute. *See Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2079-80 (June 4, 2012); *Nordlinger*, 505 U.S. at 10. _

[3] It is true, of course, that policies have been appropriately developed over the years to ensure that absent military and overseas voters have a meaningful opportunity to exercise their right to vote. UOCAVA and the MOVE Act, both of which focus on accommodations for absent voters, are two such efforts that Plaintiffs fully support. *See e.g.,* 42 U.S.C. § 1973ff-1(a)(1) (requiring states to "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in…elections for Federal office."). But there is no evidence here of any proposal that Ohio could claim to have considered and adopted to address the unique circumstances of military voting by holding open the polls for these voters--and non-military overseas voters--but shutting out all others. Indeed, as Ohio's bi-partisan Legislature Service Commission has reported, only Ohio has created an in-person early voting arrangement of this kind. Two states have extended early voting by servicemen and servicewomen, but only in cases where it addresses, as do all such proposals, the unique requirements of such voters--servicemen or servicewomen absent from the country during the regular registration period but who return home shortly before the election.

Of course, further measures to enhance access to the ballot for our military are appropriate and certain to be developed, with the full support of Plaintiffs and others across the country. But the State cannot simply, and in the most general terms, invoke this laudable objective as a defense when it has acted arbitrarily to the detriment of the vast majority of the voters of the State.

nurses, and small business owners. The specific statutory history here demonstrates that the answer is no: with respect to the fundamental right to vote, it is a violation of the Equal Protection Clause for the State to arbitrarily impose unequal access to the ballot box.

The cases Defendants and Intervenors rely on to support their opposition – all cases relating to absentee ballots – are unavailing given the unique circumstances presented by the in-person early voting system in Ohio. Unlike the absentee ballot cases, which involve rational determinations by government actors to expand access to voting for particular categories of voters through absentee ballots, Ohio has arbitrarily decided to turn most, but not all, voters away from open in-person voting locations for no reason at all. This unprecedented action is of an entirely different nature than the government decisions addressed in the cases Defendants and Intervenors cite.

For example, Respondents rely heavily upon *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), which addressed the constitutionality of a state law permitting individuals to vote absentee if they were absent from their county of residence, among other reasons. *Id.* at 803-04. Prisoners imprisoned in their own county sued, claimed that the law unconstitutionally prevented them from voting absentee. The Court rejected this challenge, because any limitation on their exercise of the franchise was not due to the absentee ballot law, but to the very fact of their incarceration. *Id.* at 807-08. Here, in contrast, the state has directly restricted access to the ballot box: the polls will be open and some voters will be permitted in, but others will not. This kind of arbitrary and disparate treatment with respect to the right to vote violates the Equal Protection Clause. *See Hunter*, 635 F.3d at 234.

The remaining absentee ballot cases cited by Respondents are also inapposite. None of these cases involved a legislature acting to restrict the opportunity to vote in person on wholly arbitrary—and hence unconstitutional—terms. *See Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004) (extension of absentee voting to some, but not all, eligible voters does not violate the Equal Protection Clause); *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001) (declining to invalidate Congress' decision to exclude from UOCAVA individuals residing in U.S. territories); *Gustafson v. Illinois State Board of Elections*, No. 06-C-1159, 2007 U.S. Dist. LEXIS 75209 (N.D. Ill. Sept. 30, 2007) (locality-by-locality variation in the administration of Illinois' new early voting law constitutionally permissible).

2. Ohio's elimination of the last three days of early in-person voting also violates the Equal Protection Clause because it burdens the fundamental right to vote for most, but not all, voters without a sufficiently weighty justification.

Even if the Court determines that Defendants have articulated a justification for the legislature's action that is not wholly arbitrary, that justification – the risk that military voters may be abruptly and unexpectedly deployed – does not explain, much less outweigh, the burden placed on all other Ohio voters who can no longer vote early in-person in the three days prior to Election Day. As the Court explained in *Crawford v. Marion County Election Board*, "[h]owever slight [a] burden [on the right to vote] may appear, … it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 553 U.S. 181, 191 (2008) (plurality opinion) (internal quotation marks and citations omitted). Accordingly, the State must identify with precision the "relevant and legitimate" justifications for the burden it has created, and it must demonstrate that those interests "make it necessary" to burden the plaintiffs' rights. *Id.* at 191, 211 (citations omitted). Moreover, in the voting realm, unlike in other realms,

not just any post hoc rational explanation will do, for "even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford,* 553 U.S. at 189.

Both Defendants and Intervenors speak in broad generalities about the importance of flexibility for UOCAVA voters, a proposition Plaintiffs endorse completely. But they are silent as to why it is necessary to restrict early voting in the last three days prior to Election Day for all others to advance this interest. Both groups are physically present in the jurisdiction and qualified to vote, and they enjoyed the right to do so on equal terms until the legislature's recent actions. The lack of any justification demonstrates that the disparate treatment at issue here violates the Equal Protection Clause.

B. The Balance Of Hardships Tips Sharply In Favor Of Granting A Preliminary Injunction And A Preliminary Injunction Would Be In The Public Interest.

Defendants do not—because they cannot—dispute that the violation of a constitutional right, such as an abridgement or dilution of the right to vote, constitutes irreparable harm. Accordingly, if the Court agrees that the arbitrary withdrawal of access to the ballot box from most, but not all, Ohio voters in the three days immediately preceding an election constitutes a constitutional violation, the irreparable harm prong of the analysis indisputably weighs in favor of granting a preliminary injunction. *See* Mot. 18 (citing authorities).

Meanwhile, as Plaintiffs have demonstrated, granting an injunction will not cause any significant harm to Defendants. *See* Mot. 19-20. Quite the opposite. Because Plaintiffs "show[] a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.,* 274 F.3d 377, 400 (6th Cir. 2001); *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 538 (S.D. Ohio 2004) (same).

Moreover, if an injunction is *not* granted, there is every indication that Defendants may face significant hardship. As Ohio's previous experience, and the establishment of early voting shows, the potential increase in Election Day voting predictably makes an already "tremendous undertaking" (Intervenors' Opp. at 15) even more burdensome on election officials. As Intervenors correctly point out, previous Ohio elections were plagued with "'voting machine malfunction[s], miscounting of votes, polling places with too few ballots, late openings, inadequate staffing and training of poll workers, and poll worker corruption.'" *Id.* at 15-16 (quoting *League of Women Voters v. Brunner*, 548 F.3d 463, 469 (6th Cir. 2008). The absence of early in-person voting in the next election is likely to exacerbate, rather than relieve, these problems. Thousands of people—who might otherwise have voted in the three days preceding the election—may instead seek to cast their ballot on Election Day, thereby adding to the administrative burden of administering Ohio's election. Indeed, the Ohio Legislature implemented early in-person voting as part of a larger effort to eradicate this very problem.

In other words, if no injunction is granted, Plaintiffs, Defendants and the public's interest in an orderly and efficient election will all be harmed. As a result, all of the factors in the balance of hardships analysis weigh uniformly and decisively in favor of granting a preliminary injunction.

II. CONCLUSION

The Ohio General Assembly arbitrarily, and quite possibly unintentionally, changed Ohio's early voting system in a manner that will require local election officials to turn away most Ohio voters from voting locations that will be open anyway for other voters and their families. Plaintiffs have demonstrated that such arbitrary and disparate treatment cannot be justified by

any sufficiently weighty interest and therefore violates the Equal Protection Clause. Because the balance of hardships and the public interest weighs in favor of preventing this result, a preliminary injunction should issue to prohibit Defendants from implementing or enforcing lines 863 and 864 of § 3509.03 (I) in HB 224 and the SB 295 enactment of Ohio Rev. Code § 3509.03 with the HB 224 amendments.

This requested relief would redress the equal protection violation generated by the Ohio General Assembly's actions by restoring in-person early voting on the three days prior to Election Day for all eligible voters. Should the General Assembly then wish to reconsider the structure of early voting in Ohio, whether or not guided by the will of the voters expressed in the pending referendum, it is, of course, able to do so, but only within the constitutional boundaries it has failed to observe to date.

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on August 8, 2012 and served upon all parties of record via the court's electronic filing system.

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