UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OBAMA FOR AMERICA, DEMOCRATIC NATIONAL COMMITTEE, and OHIO DEMOCRATIC PARTY,	)	
Plaintiffs,	)	Case No. 2:12-CV-00636
v.	)	Judge Peter C. Ecnomus
JON HUSTED, in his official capacity as Ohio Secretary of State, and MIKE DEWINE, in his official capacity as Ohio Attorney General,	)	Magistrate Norah McCann King
Defendants,	)	**MILITARY GROUPS' MOTION TO INTERVENE**
NATIONAL GUARD ASSOCIATION OF THE UNITED STATES; ASSOCIATION OF THE U.S. ARMY; ASSOCIATION OF THE U.S. NAVY; MARINE CORPS LEAGUE; MILITARY OFFICERS ASSOCIATION OF AMERICA; RESERVE OFFICERS ASSOCIATION; NATIONAL ASSOCIATION FOR UNIFORMED SERVICES; NON COMMISSIONED OFFICERS ASSOCIATION OF THE USA; ARMY RESERVE ASSOCIATION; FLEET RESERVE ASSOCIATION; SPECIAL FORCES ASSOCIATION; U.S. ARMY RANGER ASSOCIATION, INC.; AMVETS; NATIONAL DEFENSE COMMITTEE; MILITARY ORDER OF THE WORLD WARS,	)	
Putative Defendant-Intervenors.	)	

MILITARY GROUPS' MOTION TO INTERVENE

Putative Defendants National Guard Association of the United States (NGAUS); Association of the U.S. Army (AUSA); Association of the U.S. Navy (AUSN); Marine Corps League; Military Officers Association of America (MOAA); Reserve Officers Association (ROA); National Association for Uniformed Services (NAUS); Non Commissioned Officers Association of the USA (NCO); Army Reserve Association; Fleet Reserve Association (FRA); Special Forces Association (SFA); U.S. Army Ranger Association, Inc.; and Military Order of the World Wars (MOWW); AMVETS; and National Defense Committee (NDC) (collectively,"**Intervenors**") respectfully move this Court, pursuant to Fed. R. Civ. P. 24(a) and (b) for entry of an order granting leave to intervene in this action, substantially in the form submitted contemporaneously with this Motion.

As grounds, Intervenors state that Plaintiffs seek injunctive relief that would adversely impact the interests of its members. Further, Intervenors are not adequately represented in this case and their abiliy to protect their interests will be impaired absent intervention. The grounds for this Motion are more fully set forth in the accompanying Memorandum in Support, which is incorporated herein by this reference. A proposed Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, as well as proposed Motion to Dismiss and supporting memorandum, are attached hereto as Exhibits 1 and 2, respectively, consistent with Fed. R. Civ. P. 24(c).

Dated: August 1, 2012

Respectfully submitted,

/s/Kevin T. Shook

Kevin T. Shook (0073718) (Trial Attorney)
Jill Meyer (0066326)
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone: (614) 559-7214
Facsimile: (614) 464-1737
Email: kshook@fbtlaw.com
jmeyer@fbtlaw.com
Attorneys for Putative Intervening Defendants

Thomas E. Wheeler, II, #13800-49
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
Fax: 317-237-3900
twheeler@fbtlaw.com

Counsel for Putative Intervening Defendants
(Motion for Admission Pro Hac Vice forthcoming)

MEMORANDUM IN SUPPORT

INTRODUCTION

The principal campaign committee of President Barack Obama, the Commander-in-Chief of the U.S. Armed Forces, is arguing before this Court that the State of Ohio has violated the U.S. Constitution by giving members of the Armed Forces—who serve under his command, and risk their lives pursuant to his orders—three extra days to participate in early voting. Complaint, Dock #1, ¶¶ 6, 8 (July 17, 2012) (hereafter, "Compl."). The Obama campaign and Democratic National Committee contend that they cannot "discern[]" any "legitimate justification" for giving members of the military extra time to participate in early voting. *Id*. ¶¶ 4, 48.

This Motion to Intervene is brought on behalf of 15 military organizations that collectively represent nearly a million members of the Army, Navy, Air Force, and Marine Corps, including members of the Active Duty, Reserve, National Guard, and Retired Components. The Intervenors respectfully request the opportunity to participate in this lawsuit to defend the fundamental constitutional right to vote of members of the U.S. Armed Forces, which includes the right to receive special accommodations, flexibility, and extra time to facilitate their voting, whether absentee or in-person. Although the ***relief*** Plaintiffs seek is an overall extension of Ohio's early voting period, the ***means*** through which Plaintiffs are attempting to attain it—a ruling that it is arbitrary and unconstitutional to grant extra time for early voting solely to military voters and overseas citizens—is both legally inappropriate and squarely contrary to the legal interests and constitutional rights of Intervenors, their members, and the courageous men and women of the U.S. Armed Forces.

THE UNDERLYING LITIGATION

Plaintiffs Obama campaign, Democratic National Committee, and Ohio Democratic Party challenge various provisions of Ohio law that, as interpreted by Defendant Secretary of State Jon Husted, allow military voters "to vote early in-person at a board of elections office up through the Monday before Election Day," but permit civilians to do so "only up until 6 p.m. on the Friday before Election Day." Compl. ¶¶ 2, 48. Plaintiffs argue that the State "has failed to articulate any justification for this differential treatment" of military and non-military voters, "and no justification can be discerned." *Id*. ¶¶ 4, 48. They conclude that "[t]his unequal burden on the fundamental right to vote violates the Equal Protection Clause of the United States Constitution." *Id*. ¶ 6. Plaintiffs seek a declaration that the state law which treats civilian voters differently from military voters in this respect is unconstitutional, *id*. p. 19, and an injunction requiring that the extra time afforded to military voters be extended to all voters, *id*. p. 20.

PUTATIVE INTERVENORS

Intervenors are military groups dedicated to promoting the interests of members of the U.S. Armed Forces. Their members include Soldiers, Sailors, Airmen, and Marines; officers and enlisted personnel; and members of the Active Duty, Reserve, National Guard, and Retired Components. They live and serve throughout the State of Ohio, across the nation, and around the world.

Among other things, these groups work to ensure that the fundamental constitutional right to vote of members of the military is not limited, denied, or abridged, and that all military personnel are given adequate opportunity to exercise their franchise. Many of these groups have lobbied Congress to enact crucial protections for military voters such as the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), Pub. L. 99-410, 100 Stat. 924 (Aug. 28,

1986), and the Military and Overseas Voter Empowerment ("MOVE") Act, Pub. L. 111-84, 123 Stat. 2190 (Oct. 28, 2009).

- The *National Guard Association of the United States* ("NGAUS"), created in 1878, includes nearly 45,000 current and former Guard officers and provides unified Guard representation in Washington, D.C. It lobbies Congress and the Executive Branch to obtain modern equipment, training, missions, and personnel benefits for the Army and Air National Guard, and to protect their voting rights. It also seeks to promote, encourage, and assist members of the National Guard in registering to vote and voting. *See* http://www.ngaus.org.

- The *Association of the United States Army* ("AUSA"), founded in 1950, is a private, non-profit educational organization that supports America's Army. It represents every American Soldier by being the voice for all components of America's Army, fostering public support of the Army's role in national security, and providing professional education and information programs. It also provides recreational and educational opportunities to Soldiers and their families worldwide, seeks to promote their voting rights, and both encourages and attempts to facilitate voting by members of the Army and their families. *See* http://www.ausa.org.

- The *Association of the United States Navy* ("AUSN"), founded in 1955, promotes the interests of Navy service members and their families by writing to the President, hosting House and Senate meetings, working with key Members of Congress, and encouraging members to support key legislation, including laws concerning voting rights. Comprised of over 20,000 members, the AUSN also encourages the professional development of officers and enlisted personnel, and educates the public and government officials regarding the nation's welfare and security. *See* http://www.ausn.org.

- The *Marine Corps League* (the "League") is a 501(c)(4) nonprofit organization, founded in 1923 and chartered by Congress in 1937. With more than 76,000 members, the League perpetuates the traditions of the Marine Corps; renders assistance to Marines, as well as their widows and orphans; aims to maximize voting by Marines and their families; and provides volunteer assistance at veterans hospitals. The League also assists veterans in obtaining benefits; sponsors the Young Marines, a physical fitness program, and scholarships for youths; and represents the interests of Marines before Congress concerning military readiness, benefits, entitlements, and voting rights. *See* http://www.mcleague.com.

- The *Military Officers Association of America* ("MOAA") is the nation's largest association of military officers, founded in 1929, with 370,000 members from all branches of service. It is an independent, nonprofit, politically nonpartisan organization dedicated to maintaining a strong national defense, and plays an active role in proposed legislation affecting the career force, the retired community, and veterans of the uniformed services. The MOAA also offers career transition assistance, military benefits counseling, educational assistance to children of military families, and military professionalism activities. *See* http://www.moaa.org.

- The *Reserve Officers Association* ("ROA") is a 60,000-plus member professional association for all uniformed services of the United States. Created in 1922 and chartered by Congress in 1950, the ROA supports and promotes the development and execution of a military policy for the United States that will provide adequate national security. It provides professional development workshops, mentoring programs, and a career center to meet the unique needs of military Reservists. It advocates for equipment, training, recruitment, and retention incentives, and employment rights for the Reserve Components, and offers expert legal information on

various federal statutes of particular importance to Reservists, including those concerning voting and voting rights. *See* http://www.roa.org.

- The *National Association for Uniformed Services* ("NAUS") was founded in 1968 to protect and enhance the rights and earned benefits of uniformed servicemembers, retirees, veterans, and their families and survivors, while maintaining a strong defense. It also seeks to foster e*sprit de corps* among uniformed services personnel and veterans of the United States, through nonpartisan advocacy on Capitol Hill and with other government officials. Among other things, the NAUS is very concerned with military voting rights, and works to ensure that all members of the military exercise their franchise. *See* http://www.naus.org.

- The *Non Commissioned Officers Association of the USA* ("NCOA") was established in 1960 and congressionally chartered in 1988 to enhance and maintain the quality of life for noncommissioned and petty officers in all branches of the Armed Forces, including the National Guard and Reserves. The NCOA offers a wide range of benefits, services, and programs designed especially for enlisted service members and their families. *See* http://www.ncoausa.org.

- The *Army Reserve Association* ("ARA") is a private, non-profit educational organization formed in 1993 that supports America's Army as well as members of the U.S. Army Reserves of all ranks. The ARA represents the interests of both the Army Reserve Component and its members before Congress, the Department of Defense, and the Department of the Army. Among other things, it is deeply concerned about the voting rights of the members of the Army community, encourages its members to exercise those rights, and seeks to protect them before both the legislative and executive branches. *See* http://www.armyreserve.org.

- The *Fleet Reserve Association* ("FRA") is a congressionally chartered, non-profit organization that represents the interests of the Sea Service community before Congress. The FRA lobbies Congress on behalf of Sea Service Personnel, presents legislative seminars about key bills on Capitol Hill, and sponsors patriotism essay awards and scholarships. See http://www.fra.org.

- The *Special Forces Association* ("SFA") serves as the voice of the Special Forces community, perpetuates Special Forces traditions and brotherhood, advances the public image of Special Forces, and promotes the general welfare of the Special Forces community. It is especially concerned about maximizing opportunities for voting for the men and women of U.S. Special Forces, who often face a range of unusual and predictable obstacles in attempting to exercise that right. *See* http://www.specialforcesassociation.org.

- The *U.S. Army Ranger Association, Inc.* ("USARA") is a § 501(c)(19) tax-exempt organization dedicated to promoting and preserving the heritage, spirit, image, and service of U.S. Army Rangers. It participates in many Ranger community causes such as the Ranger Memorial Foundation, Ranger Hall of Fame and Best Ranger Competition; provides scholarships to Rangers' dependents; and offers emergency financial assistance to Rangers and families of deceased Rangers. *See* http://www.ranger.org.

- The *Military Order of the World Wars* ("MOWW") is a congressionally chartered nonpartisan organization established in 1919 to promote the nation's welfare; preserve the memories of the World Wars; inculcate love of country and flag; defend the integrity and supremacy of the federal government and the U.S. Constitution; and encourage and assist in the holding of commemorations and the establishment of memorials of the world wars. The

MOWW is open to all officers of the federal uniformed services. *See* http://www.militaryorder.net.

- *AMVETS* is a congressionally chartered veterans service organization with a proud history of assisting veterans and sponsoring programs that serve the United States and its citizens. It has approximately 180,000 members; membership is open to anyone who is currently serving, or who has honorably served, in the U.S. Armed Forces. AMVETS maintains a network of national service offices accredited by the Department of Veterans Affairs to provide advice and action on veterans' compensation claims at no charge to the veteran. It also lobbies Congress on behalf of veterans, provides companionship to hospitalized and disabled veterans, and supports community programs. *See* http://www.amvets.org.

- *National Defense Committee* ("NDC") is a grass roots military service organization, focused on protecting and expanding the individual civil rights of military service members, improving the civil-military relationship, and preserving an effective national security and homeland defense posture. National Defense Committee is at the forefront of military voting rights issues. Its Chairman, Rear Admiral James J. Carey, USN (Ret.), also serves as Executive Director of the Alliance for Military and Overseas Voting Rights, and has testified before numerous State legislatures on needed improvements in individual State military voting laws. NDC's prior Executive Director and current Senior Fellow, Bob Carey, served as Director of the Federal Voting Assistance Program in the Department of Defense from 2009 to 2012. *See* http://www.nationaldefensecommittee.org.

ARGUMENT

This Court should allow Intervenor Military Groups to participate in this case to help protect their members' fundamental constitutional right to vote—both in Ohio and more generally—by establishing that it was neither arbitrary nor unconstitutional for the State and Secretary Husted to give members of the military three extra days to participate in early voting. The Intervenor Military Groups bring undeniable expertise and a crucial new perspective to this case, and their participation w ill not prejudice the existing parties. Consistent with Fed. R. Civ. P. 24(c), Intervenors' proposed Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction is attached as Exhibit 1, and proposed Motion to Dismiss and supporting memorandum is attached as Exhibit 2.

I. INTERVENORS ARE ENTITLED TO PARTICIPATE IN THIS CASE AS OF RIGHT

This Court should allow Intervenor Military Groups to participate in this case as of right, under Fed. R. Civ. P. 24(a). That rule provides:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The Military Groups satisfy all four prongs of this test.

A. The Motion to Intervene is Timely

First, Intervenors' Motion is timely. It comes barely two weeks after the Complaint was filed, *see* Compl., Dock. #1 (July 17, 2012), and is consistent with this Court's scheduling order on Plaintiffs' Motion for a Preliminary Injunction, *see* Order, Dock. #7 (July 20, 2012). *See Great Am. Assur. Co. v. Travelers Prop. Cas. Co.*, No. 1:06-CV-378, 2007 U.S. Dist. LEXIS

4124, at *5-6 (S.D. Ohio Jan. 19, 2007) (holding that a motion to intervene filed two-and-a-half months after the complaint was timely). "[G]iven the rapidity with which movants entered the case . . . the minimal resources expended [so far] in litigating the case, and the absence of prejudice to [plaintiffs] in granting the motion, the . . . motion to intervene [is] timely." *Chubb Ins. Co. of Eur. SE v. Zurich Am. Ins. Co.*, No. 1:09-MC-0116, 2010 U.S. Dist. LEXIS 7200, at *11 (N.D. Ohio Jan. 28, 2010).

B. Intervenors Have a Substantial Legal Interest In This Case

Intervenors also claim a "substantial legal interest in the case." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). The Sixth Circuit has adopted "'a rather expansive notion of the interest sufficient to invoke intervention of right.'" *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005), *quoting Miller*, 103 F.3d at 1245; *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("'[I]nterest' is to be construed liberally."). Most notably, "an intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing." *Id*. The Court also has "'reject[ed] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Miller*, 103 F.3d at 1245, *quoting Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). Furthermore, "'close cases should be resolved in favor of recognizing an interest under Rule 24(a).'" *Grutter v. Bollinger*, 188 F.2d 394, 399 (6th Cir. 1999), *quoting Miller*, 103 F.3d at 1247.

Intervenors have a substantial legal interest in this case in three respects. ***First***, Intervenors seek to protect the rights of their members who are registered to vote in Ohio. Organizations may intervene in litigation on behalf of their members to protect their members' legal interests. *See Dow Chem. Co. v. Taylor*, 519 F.2d 352, 353 (6th Cir. 1975) (noting that a

union "was granted to intervene as a defendant to protect the interests of [its] members"); *see also Youngblood v. Dalzell*, 925 F.2d 954, 957 n.1 (6th Cir. 1991) (same); *D.M. v. Butler Cnty. Bd. of Mental Retardation and Dev. Disabilities ("MR/DD")*, No. 08-399, 2008 U.S. Dist. LEXIS 92843, at *5 (Nov. 14, 2008) (noting that the Ohio Association of County Boards of MR/DD was permitted "to intervene on behalf of its members").

If this Court concludes that Ohio's early voting law violates the Equal Protection Clause, U.S. Const., amend. XIV, one remedy it reasonably may consider imposing—and which the State itself may advocate—would be to reduce the time period for early voting by members of the military to the earlier civilian deadline. The U.S. Supreme Court has held, "[W]e have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class." *Heckler v. Matthews*, 465 U.S. 728, 738-39 (1984) (citations omitted).

A court facing an Equal Protection claim has "'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits ***not*** extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Id.* at 738-39 (citations omitted and emphasis added), *quoting Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring); *see also Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 817-18 (1989); *Levin v. Comm. Energy, Inc.*, 130 S. Ct. 2323, 2333 (2010) ("How equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent."). Thus, a plaintiff's success in an Equal Protection case reasonably may lead to "withdrawing the statute's benefits from both the favored and the excluded class." *Heckler*, 465 U.S. at 739; *accord Jelovsek v. Bredesen*, 545 F.2d 431, 439 (6th Cir. 2008).

Intervenors therefore need to participate in both the liability phase and any remedial phase of these proceedings to protect their Ohio members' interests by ensuring this does not occur.

Second, Intervenors also seek to protect their own organizational interests. Many Intervenors actively engage in efforts to encourage either their members, or members of the military more generally, to vote (and register to vote). If the time period for early voting for members of the military registered in Ohio is reduced, Intervenors

> will have to conduct significant outreach and education programs, which will require the diversion of personnel and financial resources, to explain to [members of the military registered in Ohio] that in-person early voting is no longer allowed in the last three days prior to Election Day and to encourage [members of the military registered in Ohio] to vote in the time periods available.

Cf. Compl. ¶ 11.

Finally, on behalf of both themselves and their members, Intervenors have a strong interest in participating in this lawsuit because of the *stare decisis* impact to which an adverse ruling in this case could lead. The Sixth Circuit has held that, because the "potential stare decisis effects" of a case "can be a sufficient basis for finding an impairment of interest," an organization may intervene in litigation to attempt to prevent "the precedential effect of an adverse ruling." *Miller*, 103 F.3d at 1247; *see, e.g.*, *Esseltine v. Maxx*, No. 08-14542, 2007 U.S. Dist. LEXIS 58276, at *3 (E.D. Mich. July 9, 2009) ("Even the precedential effect of an adverse decision on future possible litigation will suffice" as an interest sufficient for allowing intervention.). Intervenors have a compelling interest in intervening in this lawsuit to defeat the Obama campaign's and Democratic National Committee's attempt to establish the precedents that: (i) laws giving special flexibility and consideration to military voters each must individually be subjected to a constitutional balancing test, and (ii) it is arbitrary and unconstitutional to give members of the military additional time to vote in person. Any such rulings—especially

depending on their breadth and rationale—could have far-reaching impacts, potentially calling into question certain aspects of both UOCAVA and the MOVE Act, which together are the bedrock upon which military voters depend.

Thus, each of these reasons is an independently sufficient basis for concluding that Intervenors have a substantial legal interest in participating in this lawsuit.

C. Intervenors' Ability to Protect Their Interests Will Be Impaired Without Intervention

This Court also should permit Intervenors to participate in this lawsuit, because their ability to protect the interests discussed above will be impaired if intervention is denied. "[A] would-be intervenor must show only that impairment of its substantial legal interest is ***possible*** if intervention is denied. This burden is ***minimal***." *Miller*, 103 F.3d at 1247, *citing Purnell*, 925 F.2d at 948; *see also Northeast Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006) ("The Supreme Court has emphasized that the requirement of impairment of a legally protected interest is a minimal one:"). Given the range of possible legislative or judicial remedies that reasonably might follow if this Court concludes that Ohio's early voting statute violates the Equal Protection Clause, *see Levin*, 130 S. Ct. at 2333; *Heckler*, 465 U.S. at 738-39, an "adverse determination in this case has the potential to hinder [Intervenors'] ability to protect their interest" in protecting the rights of military voters registered in Ohio to vote early through Election Day. *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 787 (6th Cir. 2007). Moreover, an adverse ruling in this case, by definition, would impair Intervenors' interest in avoiding adverse precedents that would limit the ability of states to afford extra opportunities, flexibility, or consideration to military voters.

D. Intervenors' Interests Are Not Already Adequately Represented In This Case

Finally, this Court should allow Intervenors to participate in this matter because their interests are not already adequately represented by Defendants. Intervenors are required to make only a "minimal" showing of this requirement, as well. *Blackwell*, 467 F.3d at 1007; *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) ("[T]he burden of making that showing should be treated as minimal."). "[I]t is sufficient to prove that representation ***may*** be inadequate. A would-be intervenor is not required to show that the current representation will in fact be inadequate." *Blackwell*, 467 F.3d at 1008 (emphasis added); *see also Miller*, 103 F.3d at 1247-48. This requirement "is satisfied if the intervenor can show that there is substantial doubt about whether his interests are being adequately represented by an existing party to the case." *Bd. of Trs. of the Ohio Laborers' Fringe Benefit Progs. v. Ford Dev. Corp.*, No. 2:10-CV-0140, 2010 U.S. Dist. LEXIS 86492, at *9 (S.D. Ohio Aug. 20, 2010).

The Sixth Circuit repeatedly has held that a putative intervenor is not required to make "'a stronger showing of inadequacy'" just because it seeks to intervene on the same side as government officials or agencies. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 479 (6th Cir. 2000), *quoting Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999). Particularly in the context of election-related litigation, the Secretary of State—and, by extension, the Attorney General—"act[] in the capacity of a government agency" and cannot be deemed to represent the personal interests of particular groups of voters or organizations. *Blankenship v. Blackwell*, 341 F. Supp. 2d 911, 918 (S.D. Ohio 2004); *see, e.g., Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001) ("[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation.").

Here, Defendant Husted's "primary interest is in ensuring the smooth administration of the election." *Blackwell*, 467 F.3d at 1008. Even assuming that both defendants also have an interest in defending the constitutionality of Ohio law, they do not adequately represent Intervenors' specific interest in minimizing the level of constitutional scrutiny to which this Court subjects laws that provide special consideration, flexibility, or accommodations for military voters. Indeed, because Defendants broadly represent the general public as a whole, they cannot be expected to vigorously argue that this Court should afford special constitutional consideration to the rights of one group of voters. *See Clark v. Putnam Cnty.*, 168 F.3d 458, 461 (holding the fact that the county commissioner defendants "represent the interests of all Putnam County citizens . . . . indicates that [they] represent interests adverse to the proposed interveners"); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993) ("Because the counties and the landowners seek to protect local and individual interest not shared by the general citizenry of Minnesota, no presumption of adequate representation arises.").

Furthermore, in the event this Court concludes that Ohio's current statutory scheme is unconstitutional, Defendants reasonably can be expected to seek to minimize the resulting expense to the State, disruption to the electoral process, and additional burden on election workers, *see Blackwell*, 467 F.3d at 1008, such as by asking this Court to reduce or eliminate the additional days of early voting for military voters. Plaintiffs, in turn, intend to seek an expansion of the early voting period through Election Day for all voters, which may impose substantial financial and logistical burdens on the State. Compl. p. 19-20. Neither party shares or represents Intervenors' exclusive focus on the rights, interests, and convenience of military voters.

Additionally, in the event this Court holds that Ohio's early voting deadlines are unconstitutionally discriminatory, Intervenors likely would argue that this Court should invalidate the later deadline insofar as it applies to overseas civilians, while retaining it for military voters, who are subjected to extensive legal restrictions on their mobility. Alternatively, Intervenors likely would contend that this Court should limit the extended deadline to military (and possibly overseas) voters who fall within the federal definitions of those terms set forth in UOCAVA, *see* 42 U.S.C. § 1973ff-6(1), (5). Thus, Intervenors will present arguments that the existing parties are unlikely to make. *See Grutter*, 188 F.3d at 400 (holding that, to establish inadequacy of representation, "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments") (quotation marks omitted); *accord Miller*, 103 F.3d at 1247.

For these reasons, the Intervenor Military Groups satisfy all of the requirements for intervention as of right.

II. ALTERNATIVELY, THIS COURT SHOULD ALLOW PERMISSIVE INTERVENTION

If this Court concludes that the Intervenor Military Groups do not qualify for intervention as of right, it should instead exercise its broad discretion to allow permissive intervention pursuant to Fed. R. Civ. P. 24(b). Rule 24(b) provides, "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). It further specifies, "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* R. 24(b)(1)(3).

"A motion for permissive intervention under Rule 24(b) is directed to the sound discretion of the district judge." *Sec'y of Dep't of Labor v. King*, 775 F.2d 666, 668 (6th Cir. 1985). "[P]ermissive intervention under Rule 24(b) is to be liberally granted." *Morocco v. Nat'l Union Fire Ins. Co.*, No. 2:03-CV-523, 2003 U.S. Dist. LEXIS 17918, at *9 (S.D. Ohio Oct. 9, 2003); *accord Wellington Res. Group, LLC v. Beck Energy Corp.*, No. 2:12-CV-00104, 2012 U.S. Dist. LEXIS 101999, at *6-7 (S.D. Ohio July 23, 2012).

This Court should exercise its broad discretion in this case to allow permissive intervention. As discussed earlier, the motion to intervene is timely. *See supra* Section I.A. Furthermore, the claims and defenses that the Intervenor Military Groups wish to raise share "common question[s] of law [and] fact" with "the main action." Fed. R. Civ. P. 24(b)(1)(B). Specifically, they wish to demonstrate that, as a threshold matter, it would be inappropriate for this Court to individually subject laws that establish special consideration, flexibility, and accommodations for military voters (and overseas citizens) to a constitutional balancing test. They further wish to demonstrate that it is neither arbitrary nor unconstitutional for the State of Ohio to allow military voters and overseas citizens extra time to participate in early voting. Finally, to the extent a constitutional violation does exist, it should be remedied in a way that does not limit the existing rights that Ohio law provides for military voters and overseas citizens.

None of the existing parties will be prejudiced by intervention. Indeed, because Intervenors wish to pursue "primarily . . . issues of law," permissive intervention is especially appropriate. *Berk v. Moore*, No. 2:10-CV-1082, 2011 U.S. Dist. LEXIS 53981, at *8-9 (S.D. Ohio May 9, 2011). Given the totality of the circumstances and the absence of prejudice, this Court should grant permissive intervention. *G.D. v. Riley*, No. 2:05-CV-980, 2009 U.S. Dist. LEXIS 106841, at *11 (S.D. Ohio Nov. 2, 2009).

CONCLUSION

For these reasons, Intervenor Military Groups respectfully request that this Court permit them to intervene in this case.

Dated: August 1, 2012

Respectfully submitted,

/s/Kevin T. Shook
Kevin T. Shook (0073718) (Trial Attorney)
Jill Meyer (0066326)
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone: (614) 559-7214
Facsimile: (614) 464-1737
Email: kshook@fbtlaw.com
jmeyer@fbtlaw.com
Attorneys for Putative Intervening Defendant

Thomas E. Wheeler, II, #13800-49
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
Fax: 317-237-3900
twheeler@fbtlaw.com

Counsel for Putative Intervening Defendants
(Motion for Admission Pro Hac Vice forthcoming)

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2012, a copy of the foregoing was filed electronically in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to the parties by operation of the court's electronic filing system. Parties may access this filing through the court's system.

/s/ Kevin T. Shook
Kevin T. Shook (0073718)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OBAMA FOR AMERICA, DEMOCRATIC NATIONAL COMMITTEE, and OHIO DEMOCRATIC PARTY, *Plaintiffs*, v. JON HUSTED, in his official capacity as Ohio Secretary of State, and MIKE DEWINE, in his official capacity as Ohio Attorney General, *Defendants*, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES; ASSOCIATION OF THE U.S. ARMY; ASSOCIATION OF THE U.S. NAVY; MARINE CORPS LEAGUE; MILITARY OFFICERS ASSOCIATION OF AMERICA; RESERVE OFFICERS ASSOCIATION; NATIONAL ASSOCIATION FOR UNIFORMED SERVICES; NON COMMISSIONED OFFICERS ASSOCIATION OF THE USA; ARMY RESERVE ASSOCIATION; FLEET RESERVE ASSOCIATION; SPECIAL FORCES ASSOCIATION; U.S. ARMY RANGER ASSOCIATION, INC.; AMVETS; NATIONAL DEFENSE COMMITTEE; MILITARY ORDER OF THE WORLD WARS, *Defendant-Intervenors*.	Case No. 2:12-CV-00636 **INTERVENOR MILITARY GROUPS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION

Ohio allows citizens to vote in numerous ways: at their local precincts on Election Day, by mail, or by submitting "absentee voter ballots" in person at certain locations during a 32-day period prior to Election Day. For the upcoming general election, that period runs from October 2 through November 2, 2012. *See* Ohio Rev. Code §§ 3509.01(B) (specifying when in-person absent voter ballots must be ready for use), 3509.03 specifying the general deadline for requesting in-person absent voter ballots).

Plaintiffs Obama for America (President Barack Obama's principal campaign committee), Democratic National Committee, and Ohio Democratic Party argue that ending in-person absent voting on the Friday before Election Day, after giving voters only 32 days to participate, unconstitutionally places a "significant" burden on their supporters' right to vote. Complaint, Dock. #1, ¶¶ 11-12 (July 17, 2012) ("Compl."); Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, Dock. #2, at 15 (July 17, 2012) ("Mot."). They further maintain that this deadline violates the Equal Protection Clause, U.S. Const., amend. XIV, because the State "arbitrarily," with "no justification," and with "no discernable rational basis" allows military and overseas voters to cast in-person absent ballots through Election Day, Ohio Rev. Code § 3511.10. *See* Mot. at 12-14.

Members of the U.S. Armed Forces risk their lives to keep this nation safe and defend the fundamental constitutional right to vote. The Obama campaign's and Democratic National Committee's argument that it is arbitrary and unconstitutional to afford special consideration, flexibility, and accommodations to military voters to make it easier for them to vote in person is not only offensive, but flatly wrong as a matter of law.

OHIO'S IN-PERSON ABSENT VOTING LAW

The State of Ohio has given its voters the choice to either cast their votes on Election Day, or to vote early (*i.e.*, before Election Day) by using "absent voter ballots." A qualified elector may request and return an absent voter ballot either by mail, or in person at specified locations, starting 35 days before Election Day. Ohio Rev. Stat. § 3509.01(B). The general deadline for requesting an absent voter ballot in person is 6:00 P.M. on the Friday before Election Day (which, for this election cycle, is November 2, 2012). *Id*. § 3509.03.

The Ohio Election Code contains numerous provisions that offer special flexibility and accommodations for "uniformed services voters" and "overseas voters." The term "uniformed services voter" (hereafter, "military voter") refers to:

- members of the Active or Reserve Component of the Army, Navy, Air Force, Marine Corps, or Coast Guard; the merchant marine; or the commissioned corps of the U.S. Public Health Service or National Oceanic and Atmospheric Administration ("NOAA"), *id*. § 3511.01(C)(1)-(2), (D)(1);

- members of the National Guard or organized militia who are "on active status," *id*. § 3511.01(C)(3), (D)(2); and

- spouses or dependents of either of the foregoing, *id*. § 3511.01(A), (D)(3).

The term "overseas voter" refers to:

- a person outside the United States who: before leaving the country, was last eligible to vote in Ohio; qualifies as an Ohio resident; and satisfies the requirements to vote in Ohio;

- a person outside the United States who: before leaving the country, would have been eligible to vote except for the fact that he had not yet turned 18 years old; qualifies as an Ohio resident; and satisfies the requirements to vote in Ohio; and

- a person who was born outside of the United States, qualifies as an Ohio resident, and satisfies the requirements to vote in Ohio.[1]

[1] A person born outside of the United States may qualify as an "overseas voter" under Ohio under this test only if Ohio was the last place within the United States in which his parent or

Id. § 3511.01(B)(1)-(3).

Ohio law contains two separate provisions which purport to establish deadlines by which military and overseas voters may request absent voter ballots in person (different rules apply to requests from such voters for absent ballots submitted by mail). Mot. at 6. Section 3511.02(C) echoes the statutory deadline for domestic civilian voters, requiring military and overseas voters to request absent voter ballots in person by 6:00 P.M. on the Friday before Election Day. *Id*. § 3511.02(C). Section 3511.10, in contrast, provides that a military or overseas voter may request an absent voter ballot in person up until "the close of the polls" on Election Day. *Id*. § 3511.10.

Ohio law provides that, when two statutes or statutory amendments are irreconcilable, "the latest in date" prevails. Ohio Rev. Code § 1.52. The current version of § 3511.02, which establishes the Friday before Election Day as the deadline for military and overseas voters, was enacted on July 27, 2011, as part of HB 224. *See* Mot. at 4-5. The current version of § 3511.10, which allows military and overseas voters to vote up through and including Election Day, was enacted afterwards, on May 15, 2012, through SB 295. *Id*. at 6. Thus, because § 3511.10 was enacted later in time, it is controlling under Ohio's rules of statutory construction, and military and overseas voters are permitted to cast absent voter ballots in person through Election Day.

Defendant Husted has issued an advisory to county boards of election that is consistent with this interpretation, stating, "In-person absentee voting ends at 6 p.m. the Friday before election day for non-uniformed military and overseas voters. R.C. 3509.03. . . . Uniformed and overseas voters may vote in-person absentee until the close of the polls on the date of the general

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guardian had been eligible to vote, and the person "had not previously registered to vote in any other state." Ohio Rev. Code § 3511.01(B)(2).

or primary election." Advisory from Secretary of State John Husted (Oct. 14, 2011), Dock. #3-8, at 2 (July 17, 2012). Although the Advisory was issued prior to the enactment of SB 295, the most recent amendment to Ohio's in-person absent voting laws, it is consistent with that law, and Secretary Husted has allowed the Advisory to remain in effect.

As Plaintiffs point out, the state legislature has been made aware of the fact that, as a result of both the canons of statutory construction and Defendant Husted's Advisory, military and overseas voters have three more days to cast absent voting ballots in person than domestic civilian voters. The legislature apparently approves of that situation, however, and has declined to change either group's deadline. *See* Mot. at 6-7 ("Concerns about creating two classes of voters with different access to the polls were raised several times through legislative testimony. . . . The General Assembly chose not to address these issues."); *id.* at 7 ("[I]t was clear that there would be conflicting deadlines for in-person early voting."); *id.* at 8 (noting that "legislative efforts" to "restore early voting for [domestic civilian] voters in the three days prior to the election were all defeated").

ARGUMENT

This Court should deny Plaintiffs' Motion for a Preliminary Injunction because they are not "likely to succeed on the merits" of their Equal Protection claim, and they have not shown that the "balance of equities tips in [their] favor." *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2008).

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Plaintiffs are unlikely to be able to show that it is arbitrary and unconstitutional for the State to offer special consideration, flexibility, and accommodations to military and overseas voters wishing to vote in person. To the contrary, it is both laudable and constitutionally

appropriate for the State to do everything in its power to facilitate voting by military personnel in any form; the fact that similar arrangements are not offered to civilians does not render them unconstitutional.

A. Ohio's Deadlines for In-Person Absent Voting Are Constitutional Under Rational-Basis Scrutiny.

Ohio's decision to extend the deadline for in-person absent voting by military and overseas voters, but not the rest of the general civilian population, is constitutional under the Equal Protection Clause. Especially as to federal elections, the State has broad constitutional discretion to determine the times at which people may vote. *See* U.S. Const., art. I, § 4, cl. 1 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof."); *see also Voting Integrity Proj., Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) ("[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject.").

Any distinctions a State makes among different groups of voters in establishing the "times" for voting are subject to strict scrutiny only if they substantially burden the fundamental right to vote or are based on suspect classifications. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993); *Zielasko v. Ohio*, 873 F.2d 957, 959 (6th Cir. 1989). Ohio's early voting laws do neither, and so are subject only to rational-basis scrutiny. *See infra* Subsections I.A.1, I.A.2. Because the Ohio legislature reasonably could have concluded that military and overseas voters require special accommodation and flexibility in voting, the State's decision to afford them an extra three days was reasonable, not arbitrary. *See infra* Subsection I.A.C. Plaintiffs therefore have no likelihood of success on their claim.

1. Ohio's in-person absent voting laws do not substantially burden a fundamental right

Plaintiffs' repeated contention that Ohio's early voting scheme places a "substantial burden" on voters' fundamental right to vote is flatly inconsistent with well-established precedent. Ohio's so-called "early voting" law is, in fact, merely an extension of its laws concerning absentee ballots. *See, e.g.*, Ohio Rev. Code §§ 3509.03, 3511.02(C), 3511.10. Indeed, the statutes repeatedly refer to the votes at issue as "absent voter's ballots." *Id*.

The fundamental constitutional right to vote does not include the right to either cast absentee ballots or vote early. *See McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969) (distinguishing between "the right to vote," which is constitutionally protected, and the "claimed right to receive absentee ballots"); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (declining to recognize "a blanket right of registered voters to vote by absentee ballot"). "That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring); *see also O'Brien v. Skinner*, 414 U.S. 524, 536 (1974) (Blackmun, J., dissenting) ("The State, after all, as a matter of constitutional requirement, need not have provided for any absentee registration or absentee voting.").

Therefore, statutes that regulate or limit a voter's privilege to vote by absentee ballots, whether in person or by mail, neither burden the constitutional right to vote nor are subject to any form of heightened scrutiny (unless they involve a suspect classification, *see infra* Subsection I.A.2). Instead, a state is required only to avoid "arbitrary discrimination" in "permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters." *Am. Party of Texas v. White*, 415 U.S. 767, 795 (1974).

Courts repeatedly have applied rational-basis scrutiny to laws that made absentee or early voting more widely or easily available to some groups of voters than others. In *McDonald*, 394 U.S. 802, the plaintiffs brought an Equal Protection challenge to a state law that prohibited pretrial detainees from casting absentee ballots. The Supreme Court held, "It is . . . not the right to vote that is at stake here but a claimed right to receive absentee ballots." *Id*. at 807. Restrictions on availability of absentee ballots "do not themselves deny . . . the exercise of the franchise." *Id*. The Court went on to subject the legislative classification to rational-basis review, holding:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.

Id. at 808; *see also Clement v. Fashing*, 457 U.S. 957, 966 (1982) (noting that the *McDonald* Court did not use "heightened" scrutiny in its Equal Protection analysis of the absentee-voting restrictions). *Cf. O'Brien v. Skinner*, 414 U.S. 524, 530 (1974) (applying rational-basis review and concluding that it was "wholly arbitrary" for the State to allow pretrial detainees and people incarcerated for misdemeanors to cast absentee ballots only if they were incarcerated outside of their home counties, and not if they were being held within their home counties).

Plaintiffs' claim in the instant case is comparable to the Equal Protection argument that the Seventh Circuit rejected under the rational basis standard in *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). In *Griffin*, the court considered an Illinois law that allowed only certain classes of people to vote absentee. The plaintiffs, a group of working mothers who claimed it was "a hardship for them to vote in person on election day," argued that the law violated the Equal

Protection Clause, and asked the Court to permit absentee voting by anyone "who find[s] it hard for whatever reason to get to the polling place on election day." *Id*. at 1129-30. The court rejected their claim without applying any heightened scrutiny, holding that it was "quintessentially a legislative judgment" as to which groups should be permitted to cast absentee ballots. *Id*. at 1131.

Likewise, in *Gustafson v. Illinois State Board of Elections*¸ No. 06-C-1159, 2007 U.S. Dist. LEXIS 75209, at *15-16 (N.D. Ill. Sept. 30, 2007), the plaintiffs brought an Equal Protection challenge to the State Board of Elections' implantation of Illinois' new early voting statute. They alleged that "wide variations of early voting availability existed" among Illinois' counties, "with some voters having much greater access to the polls than others," creating "an obvious disparity of access to early voting." *Id*. at *16. In determining the level of scrutiny to plaintiffs' claim, the court recognized that "[v]oluntary expansion of voting rights, such as absentee voting, may not warrant strict scrutiny." *Id*. at *29.

The court went on to explain:

> Notably, the law in this instance does not remove the right to vote from any individual, and indeed expands the right for all Illinois voters. Plaintiffs argue that it expands the right for some more than others; however, this is an effect rather than a purpose of the law, and in any event goes toward questions of ease of voting rather than outright denial of any fundamental right. We find that Defendants' actions or inaction in this matter are more similar to the minimal burden that "election laws will invariably impose . . . upon individual voters."

Id. at *30, *quoting Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). The court "appl[ied] the equivalent of a rational basis test," *id*. at *29, and rejected Plaintiffs' Equal Protection claim, *id*. at *33.

Thus, Ohio's deadlines for in-person absent voting do not substantially burden a fundamental right, and are subject only to rational basis scrutiny.

2. Ohio's in-person absent voting laws do not discriminate against suspect classes.

The other reason that heightened scrutiny does not apply to the extended deadline for in-person early voting by military and overseas voters is that neither of those groups is a suspect classifications. The suspect classifications that trigger "heightened scrutiny" are "race, alienage, national origin, gender, [and] illegitimacy." *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 503 (6th Cir. 2007). Legislative classifications based on membership in the military are not suspect and therefore do not require heightened scrutiny. *See, e.g.*, *Rumsey v. N.Y. State Dep't of Corr. Servs.*, 19 F.3d 83, 92 (2d Cir. 1994); *Velasquez v. Frapwell*, 160 F.3d 389, 391 (7th Cir. 1998), *vacated on other grounds*, 165 F.3d 593 (7th Cir. 1999). The same is true concerning residence overseas. *See, e.g.*, *Miller v. United States*, 73 F.3d 878, 881 (9th Cir. 1995); *De La Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994). Thus, Ohio's deadlines for in-person absent voting remain subject only to rational-basis scrutiny.

3. Ohio's decision to extend the deadline for military and overseas voters to cast in-person absent ballots was rationally related to legitimate considerations

The State of Ohio's decision to provide extra time to military and absent voters to cast in-person absent ballots was reasonable under the Equal Protection Clause. *See McDonald*, 394 U.S. at 807-08; *Griffin*, 385 F.3d at 1130; *Gustafson*, 2007 U.S. Dist. LEXIS 75209, at *15-16. Plaintiffs repeatedly reiterate the fact that the Ohio legislature did not expressly articulate any rationale for establishing two separate deadlines. Mot. at 1, 10, 12. It is well-established, however, that "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). As noted earlier, "statutory classifications will be set aside only if no grounds can be conceived to justify

them." *McDonald*, 394 U.S. at 809; *accord Schlib v. Kuebel*, 404 U.S. 357, 364 (1971); *see also Reed v. Reed*, 404 U.S. 71, 75 (1971) ("[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.").

In weighing the constitutionality of a statutory classification under the rational basis test, the court must be "tolerant of the use of broad generalizations about different classes of individuals." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 76 (2001).

> [A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.

Dallas v. Stanglin, 490 U.S. 19, 26-27 (1989) (quotation marks and citations omitted); *accord Heller v. Doe*, 509 U.S. 312, 320-21 (1993); *Bowen v. Gilliard*, 483 U.S. 587, 600-01 (1987). The Sixth Circuit specifically has recognized, "[A] law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *E. Brooks Books, Inc. v. Shelby Cnty.*, 588 F.3d 360, 364 (6th Cir. 2009).

The State of Ohio's decision to extend special consideration, accommodations, and flexibility to military voters was not only eminently reasonable, but positively commendable. "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). The "differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Parker v. Levy*, 417 U.S. 733, 743 (1974), *quoting United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *see*

also Brown v. Glines, 444 U.S. 348, 354 (1980) ("Military personnel must be ready to perform their duty whenever the occasion arises.").

Due to such "unique military exigencies," the military "must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975). It "regulates aspects of the conduct of [its] members . . . which in the civilian sphere are left unregulated." *Middendorf v. Henry*, 425 U.S. 25, 38 (1976). In the words of one court:

> It is common knowledge that military life differs significantly from civilian life. Soldiers, Sailors and Marines are not free to come and go as they please. They do not make up their own work hours. They do not choose the locations of their jobs. They do not choose what clothes they will wear to work, or even how they will wear those clothes. . . . Military life—as a matter of functionality, necessity and national security—is one of regimented, controlled, ordered existence.

Dibble v. Fenimore, 488 F. Supp. 2d 149, 160 (N.D.N.Y. 2006). As a result, "[h]ow and where [members of the military] conduct their lives is dictated by the government. The vote is their last vestige of expression and should be provided no matter what their location." *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000).

Consequently, the State of Ohio reasonably could have concluded that additional time for in-person absent voting was necessary as an additional means of helping to ameliorate the obstacles that military service can present to voting. For Active Duty members who may not be "free to come and go as they please," *Dibble*, 488 F. Supp. 2d at 160—especially those stationed in Ohio—the extra weekend of voting increased the likelihood that they will be able to travel to a polling place to vote. Likewise, for all members of the military registered and living in Ohio—including, in many cases, their families and Reservists—the omnipresent possibility of training accidents, military emergencies, last-minute orders, temporary duty in a different location, or innumerable other contingencies to which one is subject as a result of military service can

jeopardize their voting plans, and render the weekend before Election Day a critical opportunity to exercise their franchise.

Furthermore, in the 2008 election cycle, only 54% of active duty military members voted, Dep't of Def., Federal Voting Assistance Program, *Eighteenth Report: 2008 Post Election Survey Report*, at v (March 2011),[2] while only 29% did so during the 2010 cycle, Dep't of Def., Federal Voting Assistance Program, *2010 Post Election Survey Report to Congress*, at iv (Sept. 2011).[3] The extra three-day period for in-person absent voting reasonably can be seen as a part of the State's effort to further encourage and facilitate voting by members of the military, whose daily sacrifices allow the right to vote to remain alive in the first place. Even if Plaintiffs believe that the State's effort is overinclusive in some respects (*i.e.*, by including military families or Reservists who live in Ohio), that does not render it unconstitutional.

Finally, efforts to facilitate and maximize military voting should be welcomed, not viewed with constitutional suspicion. *See Bush*, 123 F. Supp. 2d at 1317 n.27 (recognizing that the men and women of the U.S. Armed Forces "fight for the very principle that our democratic society is based [upon]—the fundamental right to vote"). For these reasons, it is hardly "arbitrary" for the State of Ohio to facilitate voting by members of the military by giving them an extra weekend to cast in-person absent ballots.

The State likewise had a rational basis—albeit a far less compelling one—for allowing citizens living overseas to cast in-person absent ballots on the weekend before Election Day. The only circumstance in which that extra time would have any practical effect is if the overseas voter happened to be in Ohio that weekend (especially if he or she was departing on, or before,

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[2] *Available at* http://www.fvap.gov/resources/media/18threport.pdf.

[3] *Available at* http://www.fvap.gov/resources/media/2010report.pdf.

Election Day). The State reasonably could have concluded that, under those circumstances, allowing the person to vote in person was a reasonable and logistically feasible means of facilitating his or her vote—rather than sending an absentee ballot to the person's home country or the Ohio hotel or residence at which they are staying (in the hope that it would arrive while the voter was still there).

Alternatively, given the inherent risks and delays with international mail, *see Hilska v. Jones*, 297 F. Supp. 2d 82, 85 n.6 (D.D.C. 2003), the State could have decided to maximize in-person voting opportunities for overseas voters, for those fortuitous enough to be in a position to take advantage of them, *cf.* Mot. at 13 ("Of course, overseas voters should be treated differently from non-overseas voters."). Finally, the State could have recognized that the number of overseas voters who would be in a position to vote in person the weekend before Election Day was so *de minimus* that allowing them to do so would not burden election officials or interfere with Election Day preparations. Allowing the general public to vote throughout that weekend, in contrast, would be a substantial burden on election personnel, and risk undermining their preparations for Election Day. *See* Compl. ¶¶ 5, 22 (noting that "approximately 93,000 Ohioans voted in the three days prior to the 2008 presidential election").

Thus, neither military nor overseas voters share "similar circumstances" with the civilian voting public in Ohio, and the State's decision to grant them three extra days of in-person early voting therefore was not arbitrary. *Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974). Plaintiffs insist that "there is no reason why all voters should not have the benefit of the extra three days." Mot. at 13. As the Supreme Court held in *McDonald*, 394 U.S. at 809, however, although the State certainly could "make voting easier for all concerned by extending [in-person]

absentee voting privileges" on the weekend before Election Day to all voters, its "failure to do so" does not violate the Equal Protection Clause.

B. The In-Person Absent Voting Deadline for Domestic Civilian Voters Does Not Violate the Equal Protection Clause Under the *Burdick*/*Anderson* Balancing Test

Attempting to avoid the rational-basis test, Plaintiffs also ask this Court to review Ohio Rev. Code § 3509.03's deadline for in-person absent voting by domestic civilian voters under the balancing test that the U.S. Supreme Court set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), *cited by* Mot. at 15, and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), *cited by* Mot. at 15. The *Anderson* Court explained:

> "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes . . . inevitably affects—at least to some degree—the individual's right to vote . . . . Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Anderson, 460 U.S. at 788, *quoting Storer v. Brown*, 415 U.S. 724, 730 (1974); *accord Burdick*, 504 U.S. at 434.

Plaintiffs cannot reasonably contend that the State of Ohio has substantially burdened the fundamental constitutional rights of domestic civilian voters by allowing them to cast in-person absent ballots from October 2, *see* Ohio Rev. Code § 3509.01(B), through November 2, *see id.* § 3509.03—a period which includes four weekends—in addition to being able to vote by mail, or in person on Election Day. Particularly since States are not constitutionally required to allow absentee or early voting at all, *see McDonald*, 394 U.S. at 807; *Crawford*, 553 U.S. at 209 (Scalia, J., concurring); *O'Brien*, 414 U.S. at 536 (1974) (Blackmun, J., dissenting); *Griffin*, 385 F.3d at 1130, the State of Ohio's decision to dedicate ***32 days*** to it is "reasonable," and therefore

constitutional, under *Anderson* and *Burdick*. The simple fact that certain people may "wish to vote later," Mot. at 17—though apparently not on Election Day itself—does not render this four-and-a-half week period constitutionally insufficient.

For these reasons, Plaintiffs have failed to establish that they are likely to prevail on their Equal Protection claim.

II. THE BALANCE OF EQUITIES WEIGHS AGAINST GRANTING AN INJUNCTION

This Court also should decline to issue a Preliminary Injunction because the balance of equities tips in favor of the State. "[T]he balance of equities . . . should give great weight to the public interest in minimizing federal court control of state election law and practice." *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 249 (6th Cir. 2011) (Rogers, J., concurring).

In the 2008 general election, approximately 3 million votes were cast throughout Ohio on Election Day,[4] and just as many—if not more—are likely to be cast this year. Preparing for Election Day is a tremendous undertaking, requiring the coordination of polling locations in nearly 10,000 precincts, confirmation of staffing arrangements, delivery of all necessary equipment, installation of voting machines at polling locations, and logistical arrangements for the efficient and accurate counting of ballots. When adequate planning, preparation, and oversight does not occur, the results can be disastrous. *See League of Women Voters v. Brunner*, 548 F.3d 463, 469 (6th Cir. 2008) (discussing allegations of widespread "voter machine

[4] Overall, nearly 4 million votes were cast in the 2008 election. *See* Ohio Sec'y of State Jon Husted, *Voter Turnout: November 2, 2010*, *available at* http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2010results/20101102turnout.aspx. Of those, slightly more than 1 million were absent voter ballots that were either cast by mail, or in person prior to Election Day. *See* Ohio Sec'y of State Jon Husted, *Absentee Ballots: In-Country*, *available at* http://www.sos.state.oh.us/sos/upload/elections/2010/gen/absentee-in.xls; Ohio Sec'y of State Jon Husted, *Absentee Ballots: Out-of-Country*, *available at* http://www.sos.state.oh.us/sos/upload/elections/2010/gen/absentee-out.xls.

malfunction[s], miscounting of votes, polling places with too few ballots, late openings, inadequate staffing and training of poll workers, and poll worker corruption").

The Ohio legislature sensibly has chosen to end in-person absent voting for virtually all voters on the Friday before Election Day, to allow election personnel to spend that weekend focusing primarily on finalizing their preparations, confirming all necessary arrangements, and otherwise attempting to ensure that the election runs as smoothly and efficiently as possible. The legislature reasonably concluded, perhaps based on the State's past experiences with early voting, that requiring election personnel to attempt to process more than 93,000 early votes over the weekend before Election Day, *see* Mot. at 2—whether by staffing early voting locations throughout the state, or having those tens of thousands of people descend upon county election board offices over a three-day period—would be distracting and overwhelming. It would substantially interfere with election officials' final preparations for Election Day and create a substantial risk of error.

In light of the fact that domestic civilian voters have 32 days to cast in-person absent ballots, and also may vote by mail or at their local precinct on Election Day, the balance of equities tips sharply against allowing voters throughout the State to continue in-person early voting throughout the three days immediately prior to Election Day.

CONCLUSION

For these reasons, this Court should deny Plaintiffs' Motion for a Preliminary Injunction.

Dated: August 1, 2012

Respectfully submitted,

/s/Kevin T. Shook
Kevin T. Shook (0073718) (Trial Attorney)
Jill Meyer (0066326)
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone: (614) 559-7214
Facsimile: (614) 464-1737
Email: kshook@fbtlaw.com
jmeyer@fbtlaw.com
Attorneys for Intervening Defendants

Thomas E. Wheeler, II, #13800-49
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
Fax: 317-237-3900
twheeler@fbtlaw.com

Counsel for Intervening Defendants
(Motion for Admission Pro Hac Vice forthcoming)

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2012, a copy of the foregoing was filed electronically in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to the parties by operation of the court's electronic filing system. Parties may access this filing through the court's system.

/s/ Kevin T. Shook
Kevin T. Shook (0073718)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OBAMA FOR AMERICA, DEMOCRATIC NATIONAL COMMITTEE, and OHIO DEMOCRATIC PARTY, *Plaintiffs*, v. JON HUSTED, in his official capacity as Ohio Secretary of State, and MIKE DEWINE, in his official capacity as Ohio Attorney General, *Defendants*, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES; ASSOCIATION OF THE U.S. ARMY; ASSOCIATION OF THE U.S. NAVY; MARINE CORPS LEAGUE; MILITARY OFFICERS ASSOCIATION OF AMERICA; RESERVE OFFICERS ASSOCIATION; NATIONAL ASSOCIATION FOR UNIFORMED SERVICES; NON COMMISSIONED OFFICERS ASSOCIATION OF THE USA; ARMY RESERVE ASSOCIATION; FLEET RESERVE ASSOCIATION; SPECIAL FORCES ASSOCIATION; U.S. ARMY RANGER ASSOCIATION, INC.; AMVETS; NATIONAL DEFENSE COMMITTEE; MILITARY ORDER OF THE WORLD WARS, *Defendant-Intervenors*.	Case No. 2:12-CV-00636 Judge Peter C. Economus Magistrate Judge Norah McCann King **INTERVENOR MILITARY GROUPS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

INTERVENOR MILITARY GROUPS' MOTION
TO DISMISS FOR FAILURE TO STATE A CLAIM

Intervenor-Defendants National Guard Association of the United States (NGAUS); Association of the U.S. Army (AUSA); Association of the U.S. Navy (AUSN); Marine Corps League; Military Officers Association of America (MOAA); Reserve Officers Association (ROA); National Association for Uniformed Services (NAUS); Non Commissioned Officers Association of the USA (NCO); Army Reserve Association; Fleet Reserve Association (FRA); Special Forces Association (SFA); U.S. Army Ranger Association, Inc.; and Military Order of the World Wars (MOWW); AMVETS; and National Defense Committee (NDC) (collectively,"**Intervenors**") hereby move, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the Complaint for failure to state a claim. Plaintiffs argue that the U.S. Constitution's Equal Protection Clause, U.S. Const., amend. XIV, prohibits states from offering extra time to military (and overseas) voters to cast in-person absent ballots. To the contrary, it is not only constitutionally permissible, but affirmatively laudable for states to offer special flexibility, consideration and accommodations to military voters to facilitate their voting, whether in-person or absentee. Thus, this Court should dismiss this suit.[1]

[1] For the convenience of the Court, Defendant-Intervenors note that most of the discussion in this brief parallels the argument they have presented in their concomitantly filed Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, as the same legal analysis applies in both contexts.

Dated: August 1, 2012

Respectfully submitted,

/s/Kevin T. Shook

Kevin T. Shook (0073718) (Trial Attorney)
Jill Meyer (0066326)
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone: (614) 559-7214
Facsimile: (614) 464-1737
Email: kshook@fbtlaw.com
jmeyer@fbtlaw.com
Attorneys for Intervening Defendants

Thomas E. Wheeler, II, #13800-49
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
Fax: 317-237-3900
twheeler@fbtlaw.com

Counsel for Intervening Defendants
(Motion for Admission Pro Hac Vice forthcoming)

MEMORANDUM IN SUPPORT

OHIO'S IN-PERSON ABSENT VOTING LAW

The State of Ohio has given its voters the choice to either cast their votes on Election Day, or to vote early (*i.e.*, before Election Day) by using "absent voter ballots." A qualified elector may request and return an absent voter ballot either by mail, or in person at specified locations, starting 35 days before Election Day. Ohio Rev. Stat. § 3509.01(B). The general deadline for requesting an absent voter ballot in person is 6:00 P.M. on the Friday before Election Day (which, for this election cycle, is November 2, 2012). *Id*. § 3509.03.

The Ohio Election Code contains numerous provisions that offer special flexibility and accommodations for "uniformed services voters" and "overseas voters." The term "uniformed services voter" (hereafter, "military voter") refers to:

- members of the Active or Reserve Component of the Army, Navy, Air Force, Marine Corps, or Coast Guard; the merchant marine; or the commissioned corps of the U.S. Public Health Service or National Oceanic and Atmospheric Administration ("NOAA"), *id*. § 3511.01(C)(1)-(2), (D)(1);

- members of the National Guard or organized militia who are "on active status," *id*. § 3511.01(C)(3), (D)(2); and

- spouses or dependents of either of the foregoing, *id*. § 3511.01(A), (D)(3).

The term "overseas voter" refers to:

- a person outside the United States who: before leaving the country, was last eligible to vote in Ohio; qualifies as an Ohio resident; and satisfies the requirements to vote in Ohio;

- a person outside the United States who: before leaving the country, would have been eligible to vote except for the fact that he had not yet turned 18 years old; qualifies as an Ohio resident; and satisfies the requirements to vote in Ohio; and

- a person who was born outside of the United States, qualifies as an Ohio resident, and satisfies the requirements to vote in Ohio.[2]

Id. § 3511.01(B)(1)-(3).

Ohio law contains two separate provisions which purport to establish deadlines by which military and overseas voters may request absent voter ballots in person (different rules apply to requests from such voters for absent ballots submitted by mail). Section 3511.02(C) echoes the statutory deadline for domestic civilian voters, requiring military and overseas voters to request absent voter ballots in person by 6:00 P.M. on the Friday before Election Day. *Id*. § 3511.02(C). Section 3511.10, in contrast, provides that a military or overseas voter may request an absent voter ballot in person up until "the close of the polls" on Election Day. *Id*. § 3511.10.

Ohio law provides that, when two statutes or statutory amendments are irreconcilable, "the latest in date" prevails. Ohio Rev. Code § 1.52. The current version of § 3511.02, which establishes the Friday before Election Day as the deadline for military and overseas voters, was enacted on July 27, 2011, as part of HB 224. *See* Motion for Preliminary Injunction, Dock. #2, at 4-5 (July 17, 2017) (hereafter, "PI Mot."). The current version of § 3511.10, which allows military and overseas voters to vote up through and including Election Day, was enacted afterwards, on May 15, 2012, through SB 295. *Id*. at 6. Thus, because § 3511.10 was enacted later in time, it is controlling under Ohio's rules of statutory construction, and military and overseas voters are permitted to cast absent voter ballots in person through Election Day.

[2] A person born outside of the United States may qualify as an "overseas voter" under Ohio under this test only if Ohio was the last place within the United States in which his parent or guardian had been eligible to vote, and the person "had not previously registered to vote in any other state." Ohio Rev. Code § 3511.01(B)(2).

Defendant Husted has issued an advisory to county boards of election that is consistent with this interpretation, stating, "In-person absentee voting ends at 6 p.m. the Friday before election day for non-uniformed military and overseas voters. R.C. 3509.03. . . . Uniformed and overseas voters may vote in-person absentee until the close of the polls on the date of the general or primary election." Advisory from Secretary of State John Husted (Oct. 14, 2011), Dock. #3-8, at 2 (July 17, 2012). Although the Advisory was issued prior to the enactment of SB 295, the most recent amendment to Ohio's in-person absent voting laws, it is consistent with that law, and Secretary Husted has allowed the Advisory to remain in effect.

As Plaintiffs point out, the state legislature has been made aware of the fact that, as a result of both the canons of statutory construction and Defendant Husted's Advisory, military and overseas voters have three more days to cast absent voting ballots in person than domestic civilian voters. The legislature apparently approves of that situation, however, and has declined to change either group's deadline. *See* PI Mot. at 6-7 ("Concerns about creating two classes of voters with different access to the polls were raised several times through legislative testimony. . . . The General Assembly chose not to address these issues."); *id*. at 7 ("[I]t was clear that there would be conflicting deadlines for in-person early voting."); *id*. at 8 (noting that "legislative efforts" to "restore early voting for [domestic civilian] voters in the three days prior to the election were all defeated").

ARGUMENT

Ohio's decision to extend the deadline for in-person absent voting by military and overseas voters, but not the rest of the general civilian population, is constitutional under the Equal Protection Clause. Especially as to federal elections, the State has broad constitutional discretion to determine the times at which people may vote. *See* U.S. Const., art. I, § 4, cl. 1

("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof."); *see also Voting Integrity Proj., Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) ("[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject.").

Any distinctions a State makes among different groups of voters in establishing the "times" for voting are subject to strict scrutiny only if they substantially burden the fundamental right to vote or are based on suspect classifications. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993); *Zielasko v. Ohio*, 873 F.2d 957, 959 (6th Cir. 1989). Ohio's early voting laws do neither, and so are subject only to rational-basis scrutiny. *See infra* Sections A-B. Because the Ohio legislature reasonably could have concluded that military and overseas voters require special accommodation and flexibility in voting, the State's decision to afford them an extra three days was reasonable, not arbitrary. *See infra* Section C. This Court therefore should dismiss the Complaint.

A. Ohio's In-Person Absent Voting Laws Do Not Substantially Burden a Fundamental Right

Plaintiffs' repeated contention that Ohio's early voting scheme places a "substantial burden" on voters' fundamental right to vote is flatly inconsistent with well-established precedent. Ohio's so-called "early voting" law is, in fact, merely an extension of its laws concerning absentee ballots. *See, e.g.*, Ohio Rev. Code §§ 3509.03, 3511.02(C), 3511.10. Indeed, the statutes repeatedly refer to the votes at issue as "absent voter's ballots." *Id*.

The fundamental constitutional right to vote does not include the right to either cast absentee ballots or vote early. *See McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969) (distinguishing between "the right to vote," which is constitutionally protected, and the "claimed right to receive absentee ballots"); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (declining to recognize "a blanket right of registered voters to vote by absentee ballot"). "That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring); *see also O'Brien v. Skinner*, 414 U.S. 524, 536 (1974) (Blackmun, J., dissenting) ("The State, after all, as a matter of constitutional requirement, need not have provided for any absentee registration or absentee voting.").

Therefore, statutes that regulate or limit a voter's privilege to vote by absentee ballots, whether in person or by mail, neither burden the constitutional right to vote nor are subject to any form of heightened scrutiny (unless they involve a suspect classification, *see infra* Subsection I.A.2). Instead, a state is required only to avoid "arbitrary discrimination" in "permitting

absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters." *Am. Party of Texas v. White*, 415 U.S. 767, 795 (1974).

Courts repeatedly have applied rational-basis scrutiny to laws that made absentee or early voting more widely or easily available to some groups of voters than others. In *McDonald*, 394 U.S. 802, the plaintiffs brought an Equal Protection challenge to a state law that prohibited pretrial detainees from casting absentee ballots. The Supreme Court held, "It is . . . not the right to vote that is at stake here but a claimed right to receive absentee ballots." *Id*. at 807. Restrictions on availability of absentee ballots "do not themselves deny . . . the exercise of the franchise." *Id*. The Court went on to subject the legislative classification to rational-basis review, holding:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.

Id. at 808; *see also Clement v. Fashing*, 457 U.S. 957, 966 (1982) (noting that the *McDonald* Court did not use "heightened" scrutiny in its Equal Protection analysis of the absentee-voting restrictions). *Cf. O'Brien v. Skinner*, 414 U.S. 524, 530 (1974) (applying rational-basis review and concluding that it was "wholly arbitrary" for the State to allow pretrial detainees and people incarcerated for misdemeanors to cast absentee ballots only if they were incarcerated outside of their home counties, and not if they were being held within their home counties).

Plaintiffs' claim in the instant case is comparable to the Equal Protection argument that the Seventh Circuit rejected under the rational basis standard in *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). In *Griffin*, the court considered an Illinois law that allowed only certain classes

of people to vote absentee. The plaintiffs, a group of working mothers who claimed it was "a hardship for them to vote in person on election day," argued that the law violated the Equal Protection Clause, and asked the Court to permit absentee voting by anyone "who find[s] it hard for whatever reason to get to the polling place on election day." *Id*. at 1129-30. The court rejected their claim without applying any heightened scrutiny, holding that it was "quintessentially a legislative judgment" as to which groups should be permitted to cast absentee ballots. *Id*. at 1131.

Likewise, in *Gustafson v. Illinois State Board of Elections*¸ No. 06-C-1159, 2007 U.S. Dist. LEXIS 75209, at *15-16 (N.D. Ill. Sept. 30, 2007), the plaintiffs brought an Equal Protection challenge to the State Board of Elections' implantation of Illinois' new early voting statute. They alleged that "wide variations of early voting availability existed" among Illinois' counties, "with some voters having much greater access to the polls than others," creating "an obvious disparity of access to early voting." *Id*. at *16. In determining the level of scrutiny to plaintiffs' claim, the court recognized that "[v]oluntary expansion of voting rights, such as absentee voting, may not warrant strict scrutiny." *Id*. at *29.

The court went on to explain:

> Notably, the law in this instance does not remove the right to vote from any individual, and indeed expands the right for all Illinois voters. Plaintiffs argue that it expands the right for some more than others; however, this is an effect rather than a purpose of the law, and in any event goes toward questions of ease of voting rather than outright denial of any fundamental right. We find that Defendants' actions or inaction in this matter are more similar to the minimal burden that "election laws will invariably impose . . . upon individual voters."

Id. at *30, *quoting Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). The court "appl[ied] the equivalent of a rational basis test," *id*. at *29, and rejected Plaintiffs' Equal Protection claim, *id*. at *33.

Thus, Ohio's deadlines for in-person absent voting do not substantially burden a fundamental right, and are subject only to rational basis scrutiny.

B. Ohio's In-Person Absent Voting Laws Do Not Discriminate Against Suspect Classes.

The other reason that heightened scrutiny does not apply to the extended deadline for in-person early voting by military and overseas voters is that neither of those groups is a suspect classifications. The suspect classifications that trigger "heightened scrutiny" are "race, alienage, national origin, gender, [and] illegitimacy." *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 503 (6th Cir. 2007). Legislative classifications based on membership in the military are not suspect and therefore do not require heightened scrutiny. *See, e.g., Rumsey v. N.Y. State Dep't of Corr. Servs.*, 19 F.3d 83, 92 (2d Cir. 1994); *Velasquez v. Frapwell*, 160 F.3d 389, 391 (7th Cir. 1998), *vacated on other grounds*, 165 F.3d 593 (7th Cir. 1999). The same is true concerning residence overseas. *See, e.g., Miller v. United States*, 73 F.3d 878, 881 (9th Cir. 1995); *De La Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994). Thus, Ohio's deadlines for in-person absent voting remain subject only to rational-basis scrutiny.

C. Ohio's Decision to Extend the Deadline for Military and Overseas Voters to Cast In-Person Absent Ballots was Rationally Related to Legitimate Considerations

The State of Ohio's decision to provide extra time to military and absent voters to cast in-person absent ballots was reasonable under the Equal Protection Clause. *See McDonald*, 394 U.S. at 807-08; *Griffin*, 385 F.3d at 1130; *Gustafson*, 2007 U.S. Dist. LEXIS 75209, at *15-16. Plaintiffs repeatedly reiterate the fact that the Ohio legislature did not expressly articulate any rationale for establishing two separate deadlines. PI Mot. at 1, 10, 12. It is well-established, however, that "the Equal Protection Clause does not demand for purposes of rational-basis

review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). As noted earlier, "statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald*, 394 U.S. at 809; *accord Schlib v. Kuebel*, 404 U.S. 357, 364 (1971); *see also Reed v. Reed*, 404 U.S. 71, 75 (1971) ("[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.").

In weighing the constitutionality of a statutory classification under the rational basis test, the court must be "tolerant of the use of broad generalizations about different classes of individuals." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 76 (2001).

> [A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.

Dallas v. Stanglin, 490 U.S. 19, 26-27 (1989) (quotation marks and citations omitted); *accord Heller v. Doe*, 509 U.S. 312, 320-21 (1993); *Bowen v. Gilliard*, 483 U.S. 587, 600-01 (1987). The Sixth Circuit specifically has recognized, "[A] law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *E. Brooks Books, Inc. v. Shelby Cnty.*, 588 F.3d 360, 364 (6th Cir. 2009).

The State of Ohio's decision to extend special consideration, accommodations, and flexibility to military voters was not only eminently reasonable, but positively commendable. "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). The "differences between the

military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Parker v. Levy*, 417 U.S. 733, 743 (1974), *quoting United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *see also Brown v. Glines*, 444 U.S. 348, 354 (1980) ("Military personnel must be ready to perform their duty whenever the occasion arises.").

Due to such "unique military exigencies," the military "must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975). It "regulates aspects of the conduct of [its] members . . . which in the civilian sphere are left unregulated." *Middendorf v. Henry*, 425 U.S. 25, 38 (1976). In the words of one court:

> It is common knowledge that military life differs significantly from civilian life. Soldiers, Sailors and Marines are not free to come and go as they please. They do not make up their own work hours. They do not choose the locations of their jobs. They do not choose what clothes they will wear to work, or even how they will wear those clothes. . . . Military life—as a matter of functionality, necessity and national security—is one of regimented, controlled, ordered existence.

Dibble v. Fenimore, 488 F. Supp. 2d 149, 160 (N.D.N.Y. 2006). As a result, "[h]ow and where [members of the military] conduct their lives is dictated by the government. The vote is their last vestige of expression and should be provided no matter what their location." *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000).

Consequently, the State of Ohio reasonably could have concluded that additional time for in-person absent voting was necessary as an additional means of helping to ameliorate the obstacles that military service can present to voting. For Active Duty members who may not be "free to come and go as they please," *Dibble*, 488 F. Supp. 2d at 160—especially those stationed in Ohio—the extra weekend of voting increased the likelihood that they will be able to travel to a

polling place to vote. Likewise, for all members of the military registered and living in Ohio—including, in many cases, their families and Reservists—the omnipresent possibility of training accidents, military emergencies, last-minute orders, temporary duty in a different location, or innumerable other contingencies to which one is subject as a result of military service can jeopardize their voting plans, and render the weekend before Election Day a critical opportunity to exercise their franchise.

Furthermore, in the 2008 election cycle, only 54% of active duty military members voted, Dep't of Def., Federal Voting Assistance Program, *Eighteenth Report: 2008 Post Election Survey Report*, at v (March 2011),[3] while only 29% did so during the 2010 cycle, Dep't of Def., Federal Voting Assistance Program, *2010 Post Election Survey Report to Congress*, at iv (Sept. 2011).[4] The extra three-day period for in-person absent voting reasonably can be seen as a part of the State's effort to further encourage and facilitate voting by members of the military, whose daily sacrifices allow the right to vote to remain alive in the first place. Even if Plaintiffs believe that the State's effort is overinclusive in some respects (*i.e.*, by including military families or Reservists who live in Ohio), that does not render it unconstitutional.

Finally, efforts to facilitate and maximize military voting should be welcomed, not viewed with constitutional suspicion. *See Bush*, 123 F. Supp. 2d at 1317 n.27 (recognizing that the men and women of the U.S. Armed Forces "fight for the very principle that our democratic society is based [upon]—the fundamental right to vote"). For these reasons, it is hardly "arbitrary" for the State of Ohio to facilitate voting by members of the military by giving them an extra weekend to cast in-person absent ballots.

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[3] *Available at* http://www.fvap.gov/resources/media/18threport.pdf.

[4] *Available at* http://www.fvap.gov/resources/media/2010report.pdf.

The State likewise had a rational basis—albeit a far less compelling one—for allowing citizens living overseas to cast in-person absent ballots on the weekend before Election Day. The only circumstance in which that extra time would have any practical effect is if the overseas voter happened to be in Ohio that weekend (especially if he or she was departing on, or before, Election Day). The State reasonably could have concluded that, under those circumstances, allowing the person to vote in person was a reasonable and logistically feasible means of facilitating his or her vote—rather than sending an absentee ballot to the person's home country or the Ohio hotel or residence at which they are staying (in the hope that it would arrive while the voter was still there).

Alternatively, given the inherent risks and delays with international mail, *see Hilska v. Jones*, 297 F. Supp. 2d 82, 85 n.6 (D.D.C. 2003), the State could have decided to maximize in-person voting opportunities for overseas voters, for those fortuitous enough to be in a position to take advantage of them. Finally, the State could have recognized that the number of overseas voters who would be in a position to vote in person the weekend before Election Day was so *de minimus* that allowing them to do so would not burden election officials or interfere with Election Day preparations. Allowing the general public to vote throughout that weekend, in contrast, would be a substantial burden on election personnel, and risk undermining their preparations for Election Day. *See* Compl. ¶¶ 5, 22 (noting that "approximately 93,000 Ohioans voted in the three days prior to the 2008 presidential election").

Thus, neither military nor overseas voters share "similar circumstances" with the civilian voting public in Ohio, and the State's decision to grant them three extra days of in-person early voting therefore was not arbitrary. *Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974). As the Supreme Court held in *McDonald*, 394 U.S. at 809, although the State certainly could "make

voting easier for all concerned by extending [in-person] absentee voting privileges" on the weekend before Election Day to all voters, its "failure to do so" does not violate the Equal Protection Clause.

CONCLUSION

For these reasons, this Court should dismiss the Complaint.

Dated: August 1, 2012

Respectfully submitted,

/s/Kevin T. Shook
Kevin T. Shook (0073718) (Trial Attorney)
Jill Meyer (0066326)
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone: (614) 559-7214
Facsimile: (614) 464-1737
Email: kshook@fbtlaw.com
jmeyer@fbtlaw.com
Attorneys for Intervening Defendants

Thomas E. Wheeler, II, #13800-49
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
Fax: 317-237-3900
twheeler@fbtlaw.com

Counsel for Intervening Defendants
(Motion for Admission Pro Hac Vice forthcoming)

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2012, a copy of the foregoing was filed electronically in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to the parties by operation of the court's electronic filing system. Parties may access this filing through the court's system.

/s/ Kevin T. Shook
Kevin T. Shook (0073718)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OBAMA FOR AMERICA, DEMOCRATIC NATIONAL COMMITTEE, and OHIO DEMOCRATIC PARTY, *Plaintiffs*, v. JON HUSTED, in his official capacity as Ohio Secretary of State, and MIKE DEWINE, in his official capacity as Ohio Attorney General, *Defendants*, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES; ASSOCIATION OF THE U.S. ARMY; ASSOCIATION OF THE U.S. NAVY; MARINE CORPS LEAGUE; MILITARY OFFICERS ASSOCIATION OF AMERICA; RESERVE OFFICERS ASSOCIATION; NATIONAL ASSOCIATION FOR UNIFORMED SERVICES; NON COMMISSIONED OFFICERS ASSOCIATION OF THE USA; ARMY RESERVE ASSOCIATION; FLEET RESERVE ASSOCIATION; SPECIAL FORCES ASSOCIATION; U.S. ARMY RANGER ASSOCIATION, INC.; AMVETS; NATIONAL DEFENSE COMMITTEE; MILITARY ORDER OF THE WORLD WARS, *Defendant-Intervenors*.	Case No. 2:12-CV-00636 Judge Peter C. Economus Magistrate Judge Norah McCann King

ORDER

Upon motion by National Guard Association of the United States (NGAUS); Association of the U.S. Army (AUSA); Association of the U.S. Navy (AUSN); Marine Corps League;

Military Officers Association of America (MOAA); Reserve Officers Association (ROA); National Association for Uniformed Services (NAUS); Non Commissioned Officers Association of the USA (NCO); Army Reserve Association; Fleet Reserve Association (FRA); Special Forces Association (SFA); U.S. Army Ranger Association, Inc.; and Military Order of the World Wars (MOWW); AMVETS; and National Defense Committee (NDC) (collectively the "Intervenor Defendants") for leave to intervene in the above-captioned matter pursuant to Fed. R. Civ. P. 24, the Court finds said motion well taken. Intervenor Defendants are granted leave to intervene in the above-captioned matter. The Intervenor Defendants' Motion to Dismiss and Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction are deemed to be filed *instanter*, and the Clerk shall update the docket for this case to reflect the filing of each of those documents accordingly.

IT IS SO ORDERED.

JUDGE PETER C. ECONOMUS

Submitted by:

/s/Kevin T. Shook
Kevin T. Shook (0073718) (Trial Attorney)
Jill Meyer (0066326)
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone: (614) 559-7214
Facsimile: (614) 464-1737
Email: kshook@fbtlaw.com
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Attorneys for Putative Intervening Defendants

Thomas E. Wheeler, II, #13800-49
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
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317-237-3800
Fax: 317-237-3900
twheeler@fbtlaw.com

Counsel for Putative Intervening Defendants
(Motion for Admission Pro Hac Vice forthcoming)