

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

OHIO REPUBLICAN PARTY, et al.)	
)	
Plaintiffs,)	
)	Case No. 2:08-cv-913
v.)	
)	Judge Smith
JENNIFER BRUNNER,)	
Secretary of State of Ohio)	Magistrate Judge King
)	
Defendant.)	

**BRIEF OF *AMICUS CURIAE* ACLU OF OHIO, PROJECT VOTE, NEOCH,
1MATTERS, DANIEL GEORGE, SHERIE PENIX IN OPPOSITION TO PLAINTIFFS'
APPLICATION FOR A TEMPORARY RESTRAINING ORDER**

INTRODUCTION

This case is a last-ditch effort to persuade a federal court to overturn a state official's interpretation of state law, on a question now pending before the state's highest court. Plaintiffs' application for a temporary restraining order invites this Court to violate basic principles of federalism and judicial restraint. The Ohio Secretary of State has interpreted Ohio's election statutes to allow a voter to request, receive, and submit an absentee ballot, so long as he or she registers at least 30 days before Election Day, November 4, 2008.

Although Plaintiffs dress their arguments in federal-law garb, a careful reading of their moving papers reveals that their real complaint is with the Secretary of State's interpretation of state law. Issues of state law are ultimately for the Ohio Supreme Court to resolve, and there is right now a Petition pending before that court, *State ex rel. Colvin v. Brunner*, which raises the very state-law issue that the instant case seeks to smuggle into this Court under cover of Article

II, Section 1, Clause 2 of the U.S. Constitution. Plaintiffs' claims that the Secretary of State has violated federal voting rights laws are not even colorable and, if accepted, would turn those laws on their head. In fact, the very relief Plaintiffs seek plainly would *violate* federal law, as Amici have argued in another federal case, *Project Vote, et al. v. Madison County Board of Elections, et al.*, now pending in the Northern District of Ohio.¹

This Court should reject Plaintiffs' claims out of hand. Their Article II claim is really a challenge to the Secretary of State's interpretation of state law, thinly disguised as a federal-law claim. Plaintiffs' other claims are wholly without merit and, in fact, would contravene the very statutory and constitutional provisions they purport to enforce.

ARGUMENT

I. PLAINTIFFS' ARTICLE II ARGUMENT IMPROPERLY INVITES A FEDERAL COURT TO SECOND-GUESS A STATE ELECTION OFFICIAL'S INTERPRETATION OF STATE LAW.

Reduced to its essence, Plaintiffs' principal argument is that Ohio Secretary of State Jennifer Brunner erred in her interpretation of state law. Article II of the Constitution does not provide authority for this Court to reverse her interpretation of state law.

In Directive 2008-63 (August 13, 2008), issued more than six weeks ago, the Secretary of State properly interpreted Ohio state law to allow voters to request, receive, and submit an absentee ballot upon their registration. Contrary to the impression that Plaintiffs seek to create, those absentee ballots will not – and, as a matter of law, *cannot* – be counted when they are submitted. Under another directive issued by the Secretary of State, absentee ballots may not be tabulated or counted until Election Day, nor may they be processed any sooner than ten days before Election Day (Directive 2008-67, August 15, 2008). This leaves plenty of time for the

¹ The complaint and TRO brief in *Project Vote v. Madison County Board of Elections* are attached to this amicus brief.

eligibility of would-be absentee voters to be verified, and for challenges to voter eligibility to be made through appropriate legal channels, before any absentee ballots are counted. Accordingly, there is absolutely no risk of ineligible voters' ballots being counted under Secretary of State Brunner's directives.

Though the issue is not properly before this Court, the Secretary of State's directives are in fact perfectly consistent with Ohio law. Ohio Revised Code Section 3503.06(A) provides that: "No person shall be entitled to vote in any election ... unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days *at the time of the next election*" (emphasis added). This section makes unmistakably clear that the 30-day registration requirement is keyed to the date of the election, not the date on which the voter requests, obtains, or submits an absentee ballot. In other words, the voter need only have been registered for 30 days *as of Election Day* to be eligible under Ohio law, not 30 days at the time that his or her ballot was requested. The other provisions of Ohio law should be read *in pair materia* with § 3503.06.

Plaintiffs' interpretation of the law, by contrast, would impose a floating, voter-specific 30-day waiting period between the date of registration and the date on which the voter may request, receive, and submit an absentee ballot. Their position is that voters are prohibited from requesting, receiving, or submitting an absentee ballot until at least 30 days *after the date of their registration*. In fact, a voter who merely *requested* an absentee ballot within 30 days of registering would have committed a fifth-degree felony, under their interpretation of Ohio law.

Plaintiffs cite several provisions of Ohio law, but their textual argument focuses mainly on Article V, § 5 of the Ohio Constitution and Ohio R.C. § 3503.01. ORP TRO Br. At 6-7.²

² Plaintiffs also cite § 3509.03(G), ORP TRO Br. At 8, but there is absolutely nothing in that provision which suggests that a voter must have been registered 30 days before requesting an absentee ballot to be deemed eligible to

Neither provision will bear the weight that Petitioners seek to place upon it. Article V, in setting qualifications for voting, states that “Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector.” Plaintiffs would have this Court insert words “at the time that citizen receives his or her ballot” into Article V. The same problem inheres in Plaintiffs’ reading of § 3503.01. Like the Ohio Constitution, this statute states that citizens are eligible if they have been “registered to vote for thirty days.” R.C. § 3503.01(A). It does not say, as Plaintiffs would have it, thirty days *at the time the voter receives or casts her ballot*. The state statute simply does not include the words that Plaintiffs would have this federal court insert.

Even if Plaintiffs’ novel construction of state law were plausible, which it decidedly is not, ascertaining the best interpretation of state law is not a judgment for this Court to make. Under basic principles of federalism and comity, federal courts are required to defer to state-court interpretations of state law. *See Murdock v. City of Memphis*, 87 U.S. 590 (1875). Even the Supreme Court is limited to issues of federal law in its review of decisions from a state’s highest court; it may not reverse on the ground that state courts have misinterpreted state law. *Id.* In this case, the proper construction of Ohio state law is a question for the Ohio Secretary of State in the first instance, and the Ohio Supreme Court in the last instance. And there is currently pending before the Ohio Supreme Court a petition for writ of mandamus, involving the very

vote in the election, as they mistakenly claim. This provision states simply that a voter applying for an absentee ballot shall include “A statement that the person requesting the ballots is a qualified elector.” Contrary to Plaintiffs’ contention, § 3509.03 says nothing at all about what it means to be a qualified elector. As explained in the text above, Ohio law is explicit in saying that, to be qualified, an elector need only have registered at least 30 days *before the date of the next election*, § 3503.06 -- not 30 days before the date on which an absentee ballot is requested, obtained, or submitted.

interpretation of state law that the Plaintiffs in this case invite this Court to adjudicate. It is up to Ohio state officials and the Ohio Supreme Court to decide how state law should be interpreted.

Plaintiffs invite this Court to circumvent these hornbook rules of federalism and comity, by pointing to Article II, Section 1, Clause 2 of the Constitution. There is nothing in this or any other provision of the Constitution, however, that authorizes the sort of intermeddling that Plaintiffs urge. The relevant language from Article II provides that:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ...

Like every other state, Ohio has complied with this provision of the Constitution. Its state legislature has enacted comprehensive rules that govern the process by which presidential elections are conducted. Included among these provisions are ones giving the Secretary of State the authority to interpret state law and issue directives and advisories to state election officials, a power that is vital to ensure consistent application of the law across the state. *See, e.g.*, Ohio R.C. §§ 3501.01, 3501.05, 3501.053(A).

There is absolutely nothing in Article II that prevents the Ohio legislature from delegating responsibilities to the Secretary of State, or to any other state or local official, when it comes to presidential elections. Nor is there anything in the U.S. Constitution that prevents state courts, like the Ohio Supreme Court, from interpreting state election statutes – much less that foists that responsibility on the federal courts. Plaintiffs cite *McPherson v. Blacker*, 146 U.S. 1 (1892) and *Bush v. Palm Beach Canvassing Commission*, 531 U.S. 70 (2000), but neither of these cases stand for such a remarkable proposition. In *McPherson*, the Court held simply that Article II means what it says: that it is up to the *state legislature* to prescribe the rules by which

presidential electors are selected. As the Court explained, Article II, “while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.” *Id.* at 25. In other words, the legislature has the power to prescribe the means by which a state’s presidential electors are allocated. *McPherson* certainly does not prohibit a state legislature from delegating implementation responsibilities to state or local election officials.

Were there any doubt on that question, it is dispelled by the 2000 Florida election cases, upon which Plaintiffs seek to rely. In *Bush v. Palm Beach Canvassing Commission*, the Court relied on this language from *McPherson* as its basis for remanding a decision of the Florida Supreme Court, which appeared to rely on the state *constitution* in adjudicating a controversy over how that state’s presidential electors should be assigned. 531 U.S. at 76-78. The Court remanded on the ground that “we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority.” *Id.* at 78. The arguable problem with the state court’s decision was not that it interpreted state election statutes, or even that it interpreted them wrongly, but rather that it may have relied on the state constitution in its ruling regarding the recount process for a presidential election.³

Bush v. Palm Beach Canvassing certainly does not prohibit the state legislature from delegating certain responsibilities to its Secretary of State – such as interpreting and implementing state election statutes – as the State of Ohio has done. Were there any such prohibition, then the Florida election controversies of 2000 would necessarily have come out the

³ It was not ultimately necessary for the U.S. Supreme Court to decide the question whether reliance on a state constitution in resolving a presidential recount controversy would violate Article II because, on remand from *Bush v. Palm Beach Canvassing Commission*, the Florida Supreme Court issued a ruling which interpreted state election statutes without relying on the state constitution. *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1273 (Fla. 2000). The Court’s decision in *Bush v. Gore*, reversed a different order from the Florida Supreme Court, *Gore v. Harris*, 772 So.2d 1243 (Fla. 2000), relying on the Equal Protection Clause and not Article II. 531 U.S. at 103.

opposite way. The Supreme Court would have been compelled to rule then-Florida Secretary of State Katherine Harris' interpretations of Florida election law unconstitutional under Article II. But there is no language in either *Bush v. Palm Beach Canvassing Commission* or *Bush v. Gore*, 531 U.S. 98 (2000), that even remotely suggests such a prohibition on the state legislature delegating interpretive responsibilities to executive-branch officials like its secretary of state. In fact, the Court in *Bush v. Gore* ultimately *upheld* the interpretation of state law articulated by Florida Secretary of State Harris and the Florida Elections Canvassing Commission. *Id.* at 101, 110-11.

Plaintiffs' attempt to rely on the recent decision in *Libertarian Party of Ohio v. Brunner*, 2008 U.S. Dist. LEXIS 64375 (S.D. Ohio July 17, 2008), is similarly unavailing. In that case, the district court concluded that a directive issued by the Secretary of State "does not interpret provisions of legislation or resolve factual disputes arising under Ohio law." *Id.* at *12. It did not question the Secretary of State's authority, under Ohio law or the U.S. Constitution, to interpret state election statutes. Here, by contrast, the Secretary of State *has* interpreted state law – albeit in a different way from what Plaintiffs would prefer. Whether or not one agrees with Plaintiffs' interpretation or that adopted by the Secretary of State is irrelevant: Article II of the U.S. Constitution does not give federal courts a blank check to strike down state officials' interpretation of state law.

In sum, Plaintiffs' Article II argument is predicated on a disagreement over the meaning of state law and, in particular, how Directive 2008-63 interprets state statutes governing eligibility and absentee voting. Their invitation for this Court to revise state law is particularly improper here, given that the very issue they seek to have this Court decide is presently before the Ohio Supreme Court. It is that Court, not this one, that has the ultimate authority to decide

what state law means. However fervent Plaintiffs’ disagreement with the Secretary of State’s interpretation of state law, there is no remotely plausible argument that she has violated the U.S. Constitution by exercising the responsibilities that Ohio law bestows upon her.

II. FAR FROM VINDICATING FEDERALLY PROTECTED VOTING RIGHTS, THE RELIEF SOUGHT IN THIS CASE WOULD VIOLATE FEDERAL VOTING RIGHTS STATUTES.

Plaintiffs’ statutory arguments turn federal voting rights statutes on their head. Through the Voting Rights Act of 1965 (“VRA”), the National Voter Registration Act of 1993 (“NVRA”) and the Help America Vote Act (“HAVA”), Congress has sought to reduce barriers to eligible citizens participating fully in our democracy. Nothing in Secretary of State Brunner’s interpretation of state law would remotely impinge on the voting rights protected by these statutes, and Plaintiffs’ contrary contentions are frivolous. In fact, it is the very relief that they seek – a construction of Ohio law that would impose a 30-day waiting period between the date on which a voter registers and the date when that voter requests, receives, or submits an absentee ballot – that would violate federal law. *Amici* first explain why Plaintiffs’ requested relief would violate federal voting rights statutes, and then why the violations of federal law that Plaintiffs’ assert are wholly without merit.

A. Plaintiffs’ Construction of Ohio Law, Which Would Prohibit Voters from Requesting or Receiving an Absentee Ballot for 30 Days After They Register, Is Contrary to Federal Voting Rights Statutes.

Plaintiffs’ suggested interpretation of state law would create a new floating 30-day “waiting period” on voters between the date they register or change their address and the date on which they may request, receive, or submit an absentee ballot. Voters who do not comply with this waiting period – including newly registered voters who have already requested absentee ballots – would be guilty of a felony. Those voters would be deemed ineligible and their votes would be rejected *even though* they registered before the October 6 registration deadline. To take

just one example, a voter who registered on December 31, 2007 and requested an absentee ballot on January 1, 2008 (the first day for doing so under Ohio law), could not have that request honored under the reading Plaintiffs embrace, since the request was submitted fewer than thirty days after the voter registered. Accordingly, county boards would be prohibited from sending out absentee ballots to those voters, and the voters making those requests would even be subject to criminal prosecution.

Plaintiffs' requested relief, if granted, would violate several federal voting laws, under which registration deadlines are keyed to the *date of the election*. These laws set the outside limit for registration deadlines at 30 days before Election Day, *not* 30 days before a voter requests, receives, or submits an absentee ballot, as Plaintiffs would have it.

Under Section 202 of the VRA, states must permit registration of voters up to 30 days "prior to any presidential election." 42 U.S.C. § 1973aa-1(d). Any additional "durational residency requirement" is "completely abolish[ed]." 42 U.S.C. § 1973aa-1(b), (c). Under Section 202, states must permit voters who are physically absent from the state to vote by absentee ballot if they apply for such a ballot "not later than seven days immediately prior to such election." 42 U.S.C. § 1973aa-1(d). If accepted, Plaintiffs' arguments would deny absentee ballots to voters who were registered at least 30 days before the election. Construed in this way, Ohio law would violate the VRA and could not be given effect under the Supremacy Clause. The result would be that Ohio law would violate the VRA and could not lawfully be enforced under the Supremacy Clause. *See Bishop v. Lomenzo*, 350 F. Supp. 576, 582-585 (E.D.N.Y. 1972) (three-judge court) (holding that requirements of Section 202 of VRA supersede conflicting state requirements, and noting that one of Congress' purposes in enacting Section 202 was to prohibit "the imposition of unreasonable preconditions to absentee registration").

Adoption of Plaintiffs' arguments would also conflict with the National Voter Registration Act of 1993 ("NVRA"), which was designed to eliminate practical barriers to voting. *ACORN v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997). The NVRA sets an outside limit on state registration deadlines of 30 days "before *the date of the election*," 42 U.S.C. § 1973gg-6(a) (emphasis added) – *not* the day on which the voter requests, receives, or submits her ballot. Ohio has chosen the earliest deadline that is allowed by federal law, requiring that voters register 30 days before Election Day (*i.e.*, by October 6, in this year's presidential and congressional elections). Ohio R.C. § 3503.06. Ohio law is thus consistent with the NVRA, so long as it is interpreted in the manner that the Secretary of State has directed. But if Plaintiffs' interpretation of Ohio law were accepted, that construction would directly conflict with the NVRA by imposing an earlier registration date on certain voters – namely, on those who request, receive, or submit an absentee ballot fewer than 30 days after registering.

In addition to conflicting with the NVRA, Plaintiffs' proposed interpretation of Ohio's election laws would run afoul of the federal statutes governing the timing of congressional and presidential elections. Congress has set the date for federal elections, as the Tuesday after the first Monday in November. 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. The U.S. Supreme Court has interpreted the term "election" to mean the date on which voters' ballots may actually be counted and tabulated, rather than the date on which ballots are requested, received, or submitted. *Foster v. Love*, 522 U.S. 67, 71 (1997). On this basis, the Sixth Circuit upheld Tennessee's early voting laws, concluding that the election takes place not on the dates that election officials receive ballots from voters, but rather on the date that a "final selection" is made. *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001); *see also Voting Integrity Project v. Bomer*, 199 F.3d 773, 774 (5th Cir. 2000) (upholding early voting in Texas, because "final selection is not made before the

federal election day”). As a matter of federal law, then, the “day for the election” is the day on which votes are tabulated and the process of choosing officials thereby consummated, *not* the day on which voters receive or cast their ballots. It follows that Plaintiffs’ proposed interpretation of state law would run afoul of the federal election-day statutes. Mandating that voters must be registered at least 30 days before requesting, receiving, or submitting an absentee ballot necessarily requires that one or more of these days be treated as the day of the “election.”

Plaintiffs’ interpretation of Ohio law also runs afoul of the Civil Rights Act of 1960 Section 1971(a)(2)(A) prohibits the application of “different *standards*, practices or procedures applied under such law or laws to other individuals *within the same county*, parish, or similar political subdivision who have been found by State officials to be qualified to vote....” 42 U.S.C. § 1971(a)(2)(A) (emphasis added). Plaintiffs would enforce a durational residency requirement which will treat some voters within the same county differently than others, based solely on when they registered to vote. Such discrimination cannot stand under the Civil Rights Act: Once a citizen has been determined eligible to vote and placed on the registration list, discrimination against that voter relating to his or her registration date violates 42 U.S.C. § 1971 (a)(2)(A). *See, e.g., Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968) (failure to treat similarly situated potential absentee voters equally was a violation of § 1971(a)).

Plaintiffs’ suggested reading of state law would thus conflict with the Voting Rights Act, the National Voter Registration Act, federal election-day statutes, and the Civil Rights Act by requiring certain voters to have been registered more than 30 days before Election Day. Under the Supremacy Clause, such a construction of state law could not stand.

B. Directive 2008-63 Is Fully Consistent with the Help America Vote Act’s Requirements Concerning Verification of Voter Registration Applications.

Plaintiffs' argue that Directive 2008-63 violates Section 303 of the Help America Vote Act because it fails to comply with rules governing the verification of voter information at the time of registration. 42 U.S.C. § 15483 (a). This argument relies on a misstatement both of federal law and of what Secretary of State Brunner has actually done, and should be rejected out of hand.

Plaintiffs misquote and misconstrue the relevant federal and state statutory provisions. Section 303(a)(5) of HAVA provides:

(i) *Except as provided in clause (ii)*, notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes –

- (I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or
- (II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) *If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes.* To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

42 U.S.C. § 15483(a)(5) (emphasis added)

Nothing in the cited directives violates this provision of HAVA. The statute requires the registrant's application to include either his or her driver's license number, the last four digits of

the social security number, or an identifying number that the county election worker assigns. These steps involve information that either is directly on the applicant's person or numerical information that is in the control of and readily available to elections officials at the time of the transaction.

Secretary of State Brunner's directive does not prohibit election officials from complying with HAVA, and it is puzzling why Plaintiffs assert otherwise. It is reasonable for the Secretary of State to delegate the verification function to local election officials, who are in a position to inspect original documents and weigh the credibility of the applicant's assertions. If necessary, local election officials can check for further information through the on-line voter registration database, and to the extent that issues arise, these officials are subject to the supervision of bipartisan county boards of election. In the final analysis, if election officials are suspicious about the validity of an existing registrant who wishes to update his or her registration, a visual inspection of the driver's license or other documents can be conducted in the presence of the applicant. If election officials still are not satisfied as to the validity of the application and the applicant's qualifications, Directive 2008-63 authorizes them to delay registration and immediate absentee voting. Directive 2008-63, at 2.⁴ These provisions give election officials both the flexibility to comply with HAVA's requirements and the power to delay the issuance of an absentee ballot in instances where suspicion is aroused. Thus, Plaintiffs' argument that the Secretary of State's directive provides no mechanism for checking the validity of the applicant's registration information is simply false.

C. The Secretary of State's Directive Creates No Risk That Ineligible Voters Will Gain Access to the Ballot in Violation of the NVRA.

⁴ In this regard, it is noteworthy that R.C. § 3503.19 (C) (1) provides in pertinent part: "A board or elections that receives a voter registration application and is satisfied as to the truth of the statements made in the registration form shall register the applicant" This implies that the General Assembly intended for the verification process to occur locally.

Plaintiffs also argue that the Secretary of State's Directive violates the NVRA by preventing states from verifying the eligibility of voters. They are wrong. There is plenty of time between the submission and counting of absentee ballots, to resolve any disputes that may arise over a voter's eligibility. Absentee ballots may not be tabulated or counted until Election Day, nor may they be processed any sooner than ten days before Election Day. Directive 2008-67. There is, accordingly, no risk of ineligible voters having their votes counted as a result of the absentee voting procedures that the Secretary of State has prescribed.

Plaintiffs' argument also appears to rest on a misunderstanding of Ohio law regarding the qualifications of voters. They express particular concern that ineligible felons will be permitted to vote. But under Ohio law, felons are only disenfranchised during the time period they are incarcerated as their sentence for said felony conviction. Ohio Revised Code Sec. 2961.01(A).⁵ Upon release from incarceration, the convicted felon's eligibility to vote is immediately restored. *Id.* Without distinction to the jurisdiction under which the person was convicted, R.C. Sec. 2961.01(A) restores the right to vote during the person's "period of community control, parole, post-release control, or release or until the conditions of the pardon have been performed" and "thereafter following final discharge."

⁵ This version of RC 2961.01 is effective September 30, 2008:

(A)(1) A person who pleads guilty to a felony under the laws of this or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned, unless the plea, verdict, or finding is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit.

(2) When any person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit is granted parole, judicial release, or a conditional pardon or is released under a non-jail community control sanction or a post-release control sanction, the person is competent to be an elector during the period of community control, parole, post-release control, or release or until the conditions of the pardon have been performed or have transpired and is competent to be an elector thereafter following final discharge. The full pardon of a person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit restores the rights and privileges so forfeited under division (A)(1) of this section, but a pardon shall not release the person from the costs of a conviction in this state, unless so specified.

Furthermore, while Ohio Revised Code Sec. 3503.21(A)(3) provides that one's voter registration is revoked upon conviction of a felony, the revocation cannot occur until the felon is sentenced and a final judgment entry issued. *See*, Ohio Rules of Criminal Procedure, Rule 32(C).⁶ Thus, if a voter is convicted of a minor felony and released on bond pending sentencing, he has not yet lost his right to vote and is still eligible to do so. *cf. Hughes v. Brown*, 62 Ohio App.3d 417, 575 N.E.2d 1186 (Ohio App. 10th Dist., 1989) (“[h]owever, there is a conviction, even though an appeal is taken and is pending, and the conviction remains valid and enforceable during the pendency of an appeal”). In addition, someone who is convicted of a felony but is not sentenced to a period of incarceration is never stripped of eligibility to vote. *See, e.g., State of Ohio v. Moon*, 1977 WL 199886 (Ohio App. 10 Dist.) (defendant receiving a sentence imposing a fine but not incarceration was not deprived of his franchise under RC 2691.01).

Thus, the only time during which someone with a felony conviction cannot lawfully register to vote is during the time they are incarcerated as a result of the felony conviction and sentence.

If someone presents themselves at their local board of elections during the five-day window when absentee voting begins on September 30 and before the close of registration on October 6, then it would be self-evident that said person is not presently incarcerated. Only in the highly unlikely occurrence that a convicted felon escaped from prison and appeared at the board of elections wanting to vote, would there be even a remote chance of an ineligible felon wishing to register and vote. And even in such a highly improbable scenario, that person's registration would still be processed and their eligibility verified just like anyone else prior to

⁶ Oh.R.Crim.Proc. Rule 32(C) states: “A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.”

their absentee ballot being counted on Election Day. Plaintiffs' suggestion that Directive 2008-63 creates a risk that disenfranchised felons will unlawfully gain access to a ballot is wholly without merit.

D. There Is No Evidence That the Secretary of Secretary's Actions Would Discriminate Against Minority Voters in Violation of Section 2 of the Voting Rights Act.

Plaintiffs refer to their Voting Rights Act claim as "possible intimidation in violation of the Voting Rights Act." ORP TRO Br. at 5. Plaintiffs contend somewhat more specifically that Advisory 2008-24 violates Section 2 of the Voting Rights Act, 42 U.S.C. 1973. ORP TRO Br. at 16-17. Plaintiffs argue that "[t]his advisory would unreasonably prohibit plaintiff from insuring that the rights of voters are protected, and in particular, that minority voters are provided an opportunity to fully participate in the electoral process. For example, voters who support candidates of a particular party may face undue pressure if large numbers voters support candidates of another political party." ORP TRO Br. at 16-17. These allegations are completely unsupported by evidence.

Were the Court free to decide the issue by speculation, as Plaintiffs appear to expect, it is far more likely that any given voter would feel intimidated if she is watched over by an unknown challenger (to use the correct name for the Plaintiffs' euphemistic term "observer") than if she votes in the presence of "friends and neighbors" who happen to be present at the board of elections at the time she votes absentee.⁷ Moreover, Plaintiffs' argument clearly presupposes that Board of Elections personnel will allow the allegedly intimidating "policing" to occur under

⁷ *Amici* note that prior to the 2004 general election, vote challengers were the subject of federal litigation in both the Northern and Southern Districts of Ohio with regard to a plan to engage in mass voter challenges. The claims were of sufficient concern that district courts in both districts issued preliminary injunctions, although the Sixth Circuit subsequently granted emergency stays pending appeal. *Summit County Democratic Central & Exec. Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004). The impossibility of Plaintiffs' success on the merits here effectively moots this Court's need to weigh the equities; however, equity would demand that the Court closely examine the Plaintiffs' true motivations in raising the instant claims as a predicate to any injunctive relief.

their very noses – a damning accusation for which Plaintiffs offer not a shred of support. Nothing in the Plaintiffs’ submission establishes that minority voters – or any other voters -- will suffer the slightest concrete, non-speculative harm from being permitted to vote pursuant to Advisory 2008-24.

Plaintiffs make rote averments of the Section 2 “Senate factors” in the complaint upon their “information and belief.” *See* Complaint Par. 52-58. But here there is no evidence that the individual plaintiff in this case has “friends” or “neighbors” who would intimidate him if he attempted to vote in-person absentee without a challenger being present, let alone that his Board of Elections would permit such intimidation to occur in the absence of challengers. Nor is there any factual showing that intimidation of the type complained of has any demonstrable likelihood of occurring, let alone that it would disproportionately affect minority citizens.

Thus, there is no basis upon which to conclude that Advisory 2008-24 will cause minority voters to suffer any impairment of their right to vote, much less a greater impairment than other voters or an impairment *specific* to them. Plaintiffs thus fail to satisfy the most elemental condition to stating a claim for dilution or denial of the right to vote under Section 2: “The essence of a [Section] 2 claim” is “that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). “[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts.” *Johnson v. DeGrandy*, 512 U.S. 997, __ (1994). “Thus, it is clear that whether a particular practice results in vote denial or vote dilution in violation of Section 2 always depends on the

‘totality of the circumstances’ in which the practice operates.” *Farrakhan v. Washington*, 338 F.3d 1009, ___ (9th Cir. 2003), *cert. denied sub nom Farrakhan v. Locke*, 543 U.S. 984 (2004).

Because Plaintiffs make no effort to establish that a racially-specific harm will result from the interaction between the challenged practice and the “totality of the circumstances,” they cannot succeed on the claim they purport to raise under Section 2 of the Voting Rights Act. Plaintiffs have no likelihood of success on this claim.

III. THE RELIEF PLAINTIFFS’ SEEK WOULD CREATE A DURATIONAL RESIDENCY REQUIREMENT THAT VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

While Plaintiffs’ argue that the relief they seek is needed to avoid a Fourteenth Amendment violation, in reality, the reverse is true. By insisting that an elector in Ohio be registered to vote for 30 days before receiving an absent voter’s ballot, Plaintiffs have effectively endorsed an unconstitutional durational residency requirement. The Supreme Court held in *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), that durational residence requirements are unconstitutional “unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.” The Court has subsequently held that registration cutoffs are allowed *only* when the State can demonstrate that the cutoff was enacted because of administrative necessity. *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973) (holding that Arizona requirement reflected a state legislative judgment that the period was necessary to permit preparation of accurate voter lists.); *Burns v. Fortson*, 410 U.S. 686 (1973).

The waiting period Plaintiffs urge is not justified by administrative necessity. On the contrary, there is clear evidence that the State has no administrative concerns, much less any necessity. Though voters mark their ballots before Election Day, the board of elections will not count the votes until election night. OHIO REV. CODE § 3509.06(E); Directive 2008-67. Only votes that have been verified as valid votes are included in the tabulation on election night.

Voters who register and vote the same day must meet the same identification requirements as other voters. Though their vote is cast, the board of elections will not count it if it determines before election night that the voter was not eligible to vote. OHIO REV. CODE § 3509.06(D).

Secretary of State Jennifer Brunner, the chief election official of Ohio, has determined that boards of elections are able to register prospective voters and allow them to vote on the same day during this five-day overlap period. Directive 2008-63. The State itself does not argue that there is a compelling interest in having a thirty-day cutoff. On the contrary, the State has explicitly indicated that it believes that “[i]t is critical that all Ohio election officials work to ensure that persons eligible to vote in the general election by absentee ballot be afforded a timely opportunity to do so.” *Id.* The State has recognized that “promot[ing] the ability of all eligible electors for the general election to vote by absentee ballot if they so choose” is a greater State interest than potential administrative concerns. *Id.* The State has advised boards of elections that have administrative concerns to hire temporary employees. *Id.*

In *Hinnant v. Sebesta*, 363 F. Supp. 398, 399-400 (M.D. Fla. 1973), the court held that where Florida has already determined “that 30 days is sufficient to accommodate its needs between the end of registration and election day . . . the imposition of an additional 30-day period . . . is purely . . . a durational residency requirement.” In the case at bar, the State has determined that it can register and allow people to submit absentee ballots on the same day during the overlap period. Any additional waiting period constitutes a durational residency requirement. *See Burns*, 410 U.S. at 753 (“50-day registration period approaches the outer constitutional limits in this area.”)

If voters must be registered for 30 days before even receiving a ballot, any voter who registered within 30 days of requesting an absent voter’s ballot would be denied or delayed from

voting. For instance, a voter who registered on October 3, 2008 and needed to vote absentee would not be able to receive a ballot until November 2, 2008 – far too close to Election Day to receive, cast and return his ballot. Voters who registered any time after August 31, 2008 would find themselves caught in a system of unnecessary delays and needless trips to the polls simply because of an unconstitutional residency requirement. Sadly many of these voters might not be able to vote due to this arbitrary distinction. This is especially problematic when state and county election officials frequently encourage Ohio voters to vote early or by absent voter's ballots. *See e.g.*, "To Avoid Long Lines, Ohio Officials Say Vote by Mail," NPR, Sept. 9, 2008 (located at <http://www.npr.org/templates/story/story.php?storyId=94428993>).

The availability of this method of registering and voting was not created in an administrative bubble; these opportunities were created during a comprehensive overhaul of the state's entire electoral administrative system in 2006. The state has already implemented other safeguards which arguably would reduce fraud: (1) a voter identification requirement which arguably permits the board to verify identity and address in many cases, and (2) a statewide computerized database of registered voters which would catch double registrations were they to occur. Finally, those with personal knowledge of a voter's ineligibility remain free to challenge voters. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff *et seq.*, governing overseas voters requires states to make provisions for simultaneous registering and receiving absentee ballots. *See* 42 U.S.C. § 1973ff-1 (a).

Because Ohio's limited period for same-day registration ends thirty days before the election and is subject to numerous safeguards allowing for eligibility to be verified during that 30-day period, there is simply no rational basis for the argument that the procedure presents a danger to proper election administration. The State of Ohio is not required to offer voters

present in the state on Election Day the opportunity to vote by absent voter's ballot. However, once a state establishes absentee voting as an option to all voters, as Ohio has done, constitutional principles guaranteeing the right to vote and to have the vote counted apply. "The constitutional protection for the right to vote encompasses protections about registering to vote and voting with absentee ballots." *Smith v. Meese*, 821 F.2d 1484, 1490 (11th Cir. 1987).

To the extent that Plaintiffs' real worry is that voters in different counties may be treated differently, ORP TRO at 17, there is an easy solution: All counties should comply with the Secretary of State's directive. At present, it appears that only one county – Madison County -- does *not* intend to comply with the Secretary of State's directive. Contrary to Plaintiffs' argument, the proper solution to this problem is not to deny *all* voters an absentee ballot until 30 days after they registered, a position that contravenes federal law as detailed above. It is, instead, to make sure that voters in all 88 Ohio counties are allowed to request, receive, and submit an absentee ballot, so long as they register at least 30 days before Election Day and are otherwise qualified.

CONCLUSION

For the foregoing reasons, Plaintiffs' application for a temporary restraining order and preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing service on this 29th day of September, 2008.

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