No. 12-4055

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JON HUSTED, *et al.*,
Appellants

v.

OBAMA FOR AMERICA, *et al.*,
Appellees

On Appeal from the United States District Court
for the Southern District of Ohio

OPENING BRIEF OF APPELLANTS JON HUSTED AND MICHAEL DEWINE

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Appellants seek resolution as quickly as possible. If the Court believes oral argument will aid its decision, Appellants stand ready to assist the Court.

JURISDICTIONAL STATEMENT

Plaintiffs filed their Complaint on July 17, 2012, bringing a single cause of action pursuant to 42 U.S.C. § 1983. R.1, PAGEID#1-21 (Compl.). The district court possessed subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4). Plaintiffs filed a motion for preliminary injunction on that same day. R.2, PAGEID#22-53 (Mot. for P.I.). On August 31, 2012, the district court granted Plaintiffs' motion for preliminary injunction pursuant to Federal Rule of Civil Procedure 65. R.48, PAGEID#1600-22 (Opinion). Defendants timely appealed on September 4, 2012. R.49, PAGEID#1623-24 (Notice of Appeal). Jurisdiction in this Court is proper under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred by entering a preliminary injunction on Plaintiffs' claim that the Ohio legislature's decision to limit in-person absentee voting on the three days before Election Day to voters protected by the Uniformed and Overseas Citizens Absentee Voter Act violates the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE FACTS

A. The Expansion of Early, Absentee, and Voting By Mail

The Supreme Court has recognized that "States retain the power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). As a result, there is no uniform, federal system for conducting elections. Each State is unique in this manner. In the casting of ballots in particular, States have widely varying electoral systems. New York and Pennsylvania, for example, permit regular ballots to be cast on Election Day only and require an excuse to use an absentee ballot; Florida offers no-excuse absentee voting and early voting of regular ballots (*i.e.*, immediate tabulation of the ballot just like on Election Day); New Jersey offers no-excuse absentee voting but no early voting of regular ballots; Georgia offers no-excuse absentee voting and 21 days of in-person absentee voting; and Oregon generally conducts its elections by mail. In this Circuit, Kentucky allows mail-in absentee voting with an excuse, and machine voting for voters with a valid excuse during the 12 business days immediately preceding Election Day; Michigan generally allows mail-in absentee voting with an excuse; and Tennessee allows in-person voting prior to Election Day (ending five days before Election Day), and absentee voting by mail is only available with an excuse.

This wide diversity in the casting of ballots is a relatively new occurrence. For most of American history, States provided for voting on one day: Election

Day. If a person sought to vote in an election, he or she would travel to the polls to cast a ballot on Election Day. Over time, some States began offering absentee voting to select groups of people they believed were in need of special assistance and could not otherwise make it to the polls. *See generally* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483 (2003).

"Like many aspects of American election administration, the rise of the absentee ballot is tied to military service." Daniel P. Tokaji, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 McGeorge L. Rev. 1015, 1020 (2007). Beginning in the Civil War, a number of states enacted absentee voting laws so soldiers could vote while deployed. Fortier & Orstein, *supra*, at 493-501. By 1924, after World War I, most States offered some sort of absentee balloting, though it was almost always limited to select categories of people, such as the military, those in transient professions (*e.g.*, railroad workers) or specified categories (*e.g.*, temporary or permanent disability). It has only been in the last two decades that States began significantly expanding the opportunities for alternative forms of voting, like no-excuse, in-person early voting. Robert M. Stein & Greg Vonnahme, *Early, Absentee, and Mail-In Voting* 183 (2010).

Ohio's experience reflects this overall trend. For much of its history, Ohioans who could not make it to the polls on Election Day could cast an absentee

ballot only if they had a valid excuse. This "excuse" requirement meant that only certain categories of people could vote absentee. Valid excuses included: (1) being age 62 or older; (2) full-time employment as an emergency services worker; (3) membership in the organized militia; (4) medical excuses; (5) non-felony incarceration; (6) religious observance; (7) absence from the county; (8) physical disability; or (9) being a poll worker. O.R.C. § 3509.02(A), (C) (2004). These ballots could be voted by mail or in person.

In 2005, Ohio revised its election procedures to adopt no-excuse absentee voting. HB 234 (2005); O.R.C. § 3509.02(A) (eff. Jan. 27, 2006). Voters now can request an absentee ballot without an excuse and then vote it by mail. Or, pursuant to preexisting state law, they can request and cast one in person at either the voter's county board of elections office or at another site designated by the county office. O.R.C. § 3501.10. In either circumstance, the procedure is identical: the voter must fill out an application with the required information,[1] must receive the ballot, must mark it, and must return it to the board of elections. O.R.C. § 3509.03; *id.* § 3509.05.

As a general rule, all ballots used in a particular county—whether mail-in absentee, in-person absentee, or Election Day—are identical to one another (other

[1] If the voter requests that the absentee ballot be delivered by mail, he must also provide an address for delivery. O.R.C. § 3509.03(I).

than the title absentee ballot). O.R.C. § 3509.01(A). But absentee ballots (cast in person or by mail) are verified and counted in a particular way: they are not immediately tabulated, but rather are examined to determine if they are valid and are tabulated after the fact. O.R.C. § 3509.06; PAGEID#1400-1401 (absentee ballots are not tabulated until the close of the polls on Election Day, no matter when they are cast). Since the passage of HB 234, with the State and counties devoting substantial resources to promoting the use of absentee voting generally and in-person absentee voting in particular over the five-week period preceding Election Day, Ohio has been at the vanguard of states in terms of promoting access to the polls.

B. Federal and State Protections for Military and Overseas Voters

Because military and overseas voters face unique challenges, federal law provides them special protections through, among other laws, the Uniformed and Overseas Citizens Absentee Voter Act ("UOCAVA"), the Military and Overseas Voter Empowerment Act ("MOVE Act"), and the National Defense Authorization Act for Fiscal Year 2010, Pub. Law 111-84 (2010). Following suit, Ohio likewise provides special protections to individuals protected by these statutes. O.R.C. ch. 3511 (UOCAVA voting procedures), ch. 3509 (absentee voting procedures); *compare* R.35-1, PAGEID#1125-32 (Directive 2012-20 (May 25, 2012)

(UOCAVA voting)); R.35-3, PAGEID#1137-48 (Directive 2012-26 (July 12, 2012) (absentee voting)).

Ohio law defines "uniformed service voters" as members of: (1) the active or reserve components of the U.S. Army, Navy, Air Force, Marine Corps, or Coast Guard; (2) the National Guard and the organized militia on activated status; (3) the merchant marine, commissioned corps of the Public Health Service or the National Oceanic and Atmospheric Administration; and (4) the spouse or dependent of any of the above. O.R.C. § 3511.01. Ohio law defines an "overseas voter" as a person who: (1) is considered by Ohio law to be a resident of the state, but currently is living outside the United States; and (2) was born outside the United States, but who has a parent or guardian who last resided and was last eligible to vote in Ohio before leaving the United States.

Federal and Ohio law treat UOCAVA and non-UOCAVA voters differently in many respects. Federal law allows UOCAVA voters to use the Federal Post Card Application ("FPCA") both as a voter registration form and a request for absentee ballot. 42 U.S.C. § 1973ff(b)(2). Non-UOCAVA voters must separately register before receiving an absentee ballot. O.R.C. § 3509.03. Once a UOCAVA voter requests an absentee ballot, he or she will continue to receive a ballot for each election in a calendar year. *Id*. § 3511.02. Non-UOCAVA voters must request absentee ballots one election at a time. *Id*. § 3509.03(F).

The procedures and timing for requesting an absentee ballot also differ. UOCAVA voters may request and receive absentee ballots by mail, email, fax, or in person; non-UOCAVA voters may request and receive absentee ballots only by mail or in person. *Id*. §§ 3511.04; 3509.03, 3509.05. UOCAVA voters also have an extra ten days at the front end to cast an absentee ballot by mail. On the 45th day before each election, each county board of elections must transmit an absentee ballot to every UOCAVA voter who has filed a valid application by January 1 of that year or 90 days before the election, whichever is earlier. 42 U.S.C. § 1973ff-1(a)(8); O.R.C. § 3511.04(B). County boards of election, in contrast, must have non-UOCAVA absentee ballots available on the 35th day before each election. O.R.C. § 3509.01.

In addition, UOCAVA voters are afforded special protection in the return of absentee ballots. Ohio law allows UOCAVA voters who have requested an absentee ballot but who have not received one to vote via a federal write-in absentee ballot. Non-UOCAVA voters do not have this option. O.R.C. § 3511.14. Furthermore, a postmark is not necessary for a UOCAVA ballot to be counted and the ballot will be counted if received within ten days after the election so long as the voter signed the identification envelope no later than 12:01 a.m. on the date of the election. *Id*. §§ 3511.09; 3511.11(C). A postmark prior to Election Day is necessary for a non-UOCAVA absentee ballot to be counted. *Id*. § 3509.05(B).

C. Ohio Election Changes in 2011 and 2012

On July 1, 2011, HB 194 was passed into law and created certain inconsistencies in absentee voting deadlines. Subsequently, the Ohio legislature unanimously passed HB 224, a bill to expand UOCAVA voting. R.34-4, PAGEID#561-601 (HB 224). HB 224 amended O.R.C. §§ 3509.03 and 3511.02 to resolve the conflict and end early voting on the Friday before Election Day at 6 p.m. *Id.* Before HB 224 went into effect, however, a referendum petition was filed, the immediate effect of which was to put on hold HB 194's amendments. R.34-7, PAGEID#676-77 (Certification). Thereafter, Senate Bill 295, which repealed HB 194, passed the legislature and took effect on August 15, 2012.

Ultimately, the deadline for casting in-person absentee ballots is 6:00 PM on the Friday before Election Day for non-UOCAVA voters, and there are two deadlines for casting in-person absentee UOCAVA ballots (6:00 PM on the Friday before Election Day and the close of the polls on Election Day). Because the more generous period for UOCAVA voters is given precedence, the deadline for UOCAVA in-person absentee ballots is now four days later than the deadline for non-UOCAVA voters.

D. Directive 2012-35

Prior to the changes in law in 2011 and 2012, local boards of elections and the Secretary of State retained the ability to choose the days and hours on which in-

person absentee ballots could be cast. *See* O.R.C. § 3501.11. Many local boards of elections were not open on weekends or during non-working hours. For example, in 2008, six of Ohio's 88 counties chose not to offer any in-person absentee voting on the Saturday prior to Election Day, nearly all chose not to do so on that Sunday, and all were open during their regular weekday business hours on that Monday. In 2010, when fewer voters were expected, fourteen counties chose not to offer any in-person absentee voting on that Saturday, nearly all chose not to do so on that Sunday, and all were open on that Monday. R.35-9, PAGEID#1402 (Damschroder Dec.). The Secretary of State, however, retained the ability to set statewide uniform days and hours. O.R.C. § 3501.11(E).

On August 15, 2012, Secretary Husted issued Directive 2012-35, which eliminated the problem of different counties offering varying hours for in-person absentee voting by creating standard voting hours and thus "level[ed] the playing field on voting days and hours during the absentee voting period in order to ensure that the Presidential Election in Ohio will be uniform, accessible for all, fair, and secure." R.40-1, PAGEID#1481 (Directive 2012-35). The Directive intentionally did not address early in-person absentee voting over the three-day period before Election Day because the Ohio legislature has chosen to limit any in-person absentee voting during those three days to UOCAVA voters. R.44, PAGEID#1474-75 (Defs' Resp. to Pls' Supp. Mem.).

STATEMENT OF THE CASE

A. The Complaint and Preliminary Injunction Motion

Plaintiffs Obama for America, the Democratic National Committee, and the Ohio Democratic Party ("Plaintiffs") brought this action alleging one cause of action: that Ohio violated the Equal Protection Clause by allowing only UOCAVA voters to cast an in-person absentee ballot on the three days before Election Day. R.1, PAGEID#17-20 (Compl.). Plaintiffs requested that the court: (1) declare unconstitutional certain provisions of HB 224 and SB 295, which amended O.R.C. § 3509.03 to move the deadline for in-person absentee voting to 6:00 PM on the Friday immediately preceding Election Day; and (2) enjoin Ohio from "implementing or enforcing" these statutes, "thereby restoring in-person early voting on the three days immediately preceding Election Day for all eligible Ohio voters." *Id.* PAGEID#19-20. Plaintiffs did not request that election boards be required to be open on the last weekend or that they offer any specific hours of in-person absentee voting. Plaintiffs filed a Motion for Preliminary Injunction raising the same legal claim and seeking the same relief. R.2, PAGEID#22-53 (Mot. for P.I.).

Defendants Secretary of State Jon Husted and Attorney General Michael DeWine ("Defendants") and fifteen military groups that had intervened ("Defendant-Intervenors") opposed the motion. In support of their opposition,

Defendants and Defendant-Intervenors submitted three declarations from current and former members of the military: Colonel Duncan Aukland, the Ohio Judge Advocate and a Colonel in the Ohio Army National Guard; Rear Admiral James J. Carey, the Founder of the National Defense Committee, which works to promote veterans' rights, including voting rights; and Robert H. Carey, Jr., the former Director of the Federal Voting Assistance Program, which is a program in the Department of Defense that helps military and overseas voters, among other things, to exercise their right to vote. R.35-8, 35-10, 35-11, PAGEID#1395-98, 1403-18 (Declarations).

These declarants described Ohio's military community and the special circumstances that apply to members of the uniformed services and their family members. R.35-9, PAGEID#1395-97 (Aukland Dec.). Ohio deployed over 1,300 troops overseas in 2011-2012, has sent personnel to other states to assist in disaster relief and has ordered Ohio military personnel into action to confront emergencies within the State. *Id.* PAGEID#1396. Often, deployments are made on extremely short notice, and assignments pose substantial risk of injury or incapacitation. *Id.* Additionally, once orders come in, a soldier and his or her family often devote substantial time preparing for the deployment, making it difficult to tend to other tasks. *Id.* PAGEID#1396-97. These demanding circumstances can often make it difficult for members of the military to vote in-person on Election Day. As Rear

Admiral Carey explained, "[m]embers of the military serving on Active Duty are highly regulated and limited in their movements. Last-minute changes or restrictions may make it difficult or impossible for such individuals who reasonably had been planning on voting on Election Day to do so." R.35-11, PAGEID#1413 (Carey Dec.).

Defendants also submitted the declaration of Matthew Damschroder, Deputy Assistant Secretary of State and State Director of Elections, and the former Director of the Franklin County Board of Elections. Mr. Damschroder discussed UOCAVA voting, trends in the usage of absentee voting, the burdens boards of elections face in preparing for Election Day, and the need to reserve time to prepare for that day. R.35-9, PAGEID#1399-1402 (Damschroder Dec.). Mr. Damschroder explained that "boards of elections are extremely busy during the Saturday, Sunday, and Monday immediately preceding any Election Day." *Id.* PAGEID#1400. Among their numerous tasks, they must compile final poll books, which cannot be completed until in-person absentee voting has completed, and set up the physical space where Election Day voting will take place. *Id.* PAGEID#1401-1402. Mr. Damschroder also explained that, in the past, few Ohio counties allowed in-person absentee voting on the Sunday prior to Election Day, and many did not provide the opportunity to vote early on the Saturday prior to Election Day. *Id.* PAGEID#1402. Finally, Mr. Damschroder added that, during

his tenure with the Franklin County Board of Elections, last-minute in-person absentee voting on the Monday prior to Election Day actually interfered with the county's ability to open the polls on time on Election Day. *Id.* PAGEID#1402.[2]

B. Opinion and Order

The district court issued an Opinion and Order on August 31, 2012, granting Plaintiffs' motion for preliminary injunction. R.48, PAGEID#1600-1622 (Opinion). The legal framework applied by the district court was less than clear. At times, it appeared to apply heightened scrutiny under an equal protection analysis. *See, e.g., id.* PAGEID#1611-12 (citing *Bush v. Gore*, 531 U.S. 98 (2000)). At other times, it appeared to apply a line of Supreme Court cases that address not equal protection between two groups, but rather the constitutionality of burdens on an individual's fundamental right to vote for insufficient reasons. *See, e.g., id.* PAGEID#1612-13 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

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[2] This is a bipartisan concern that has spanned administrations. In 2009, then-Secretary of State Brunner proposed shortening Ohio's early voting period from 30 days to 20 days and ending early voting at 5 p.m. on the Sunday before the election. *See* Elections Enhancements for Ohio: A Report to the Governor and the General Assembly, from Jennifer Brunner, Ohio Secretary of State (Apr. 22, 2009), *available at* http://www.sos.state.oh.us/sos/upload/news/20090422postconferencereport.pdf. As she explained, there is a "difficulty in administration for boards of elections [because] people are voting right up until the day before the election.…What ends up happening is elections workers then are trying to prepare for the election [and] get materials out to poll-workers, during those last few days. And what you end up having is sometimes election workers who don't go to bed for 48 hours. I don't think most people function that well on that little sleep. And we do want the elections to be smooth, well run, [and] accurate." Marc Kovac, *Early Voting Prompts Interesting Rhetoric*, Youngstown News (Sept. 8, 2012).

In the end, the court simply "balance[d] the injury to Plaintiffs' voting rights against the precise interests put forward by the State Defendants, mindful of the Court's caution that even where a burden may be slight, the State's interests must be weighty." *Id.* PAGEID#1613-14.

Weighing the injury against the State's interests, the court concluded that Ohio law "violates the Equal Protection Clause." *Id.* PAGEID#1622. Although the court recognized that all Ohio voters still have at least "23 days in which to cast an in-person early vote," *id.* PAGEID#1614, it found that the State had burdened the right to vote by "retract[ing]" the possibility of non-UOCAVA voting during the three days before Election Day, *id.* PAGEID#1615. The court then found the State's interests insufficiently "compelling." *Id.* PAGEID#1620-21. Despite record evidence to the contrary, the court discounted the State's interest in preserving these days for pre-Election Day administration. Furthermore, though acknowledging the unique burdens on military and overseas voters, the court also found insufficient the State's interest in accommodating UOCAVA voters, focusing myopically on the fact that the State has not "*guarantee[d]* that UOCAVA voters will be able to vote in the last three days prior to Election Day." PAGEID#1617-18 (emphasis added).

As a remedy, the district court "**ORDERED** that in-person early voting **IS RESTORED** on the three days immediately preceding Election Day for all eligible

Ohio voters" and specifically pointed out that the injunction "restores" early voting on November 3, 4, and 5, 2012, and further "anticipated" that the Secretary would direct the local election boards "to maintain a specific, consistent schedule on those three days[.]" While it is unclear whether the district court mandated that early in-person absentee voting be available to all Ohio voters each of the three days, the district court's actions following the issuance of Directive 2012-40 seem to indicate that this was his intent. *See* PAGEID#1634.

SUMMARY OF THE ARGUMENT

The preliminary injunction should be reversed. The complaint pleads a single cause of action: that O.R.C. § 3509.03, which sets an earlier deadline for non-UOCAVA in-person absentee voting than for UOCAVA in-person absentee voting, violates the Equal Protection Clause of the Fourteenth Amendment. This straightforward equal protection claim fails at the start because UOCAVA and non-UOCAVA voters are not similarly situated. And even if they were, the Supreme Court long ago held in *McDonald v. Board of Election Commissioners of Chicago*, 383 U.S. 663, 668 (1969), that a State need only a conceivably rational reason to differentiate in the provision of absentee ballots.

All equal protection claims, including those involving voting laws, are subject to the same legal analysis. At the threshold, a plaintiff must establish that the challenged law treats similarly situated persons differently; the Equal

Protection Clause does not prevent a government from applying different rules to those in demonstrably different circumstances. If a plaintiff meets that requirement, a court must then apply the appropriate level of scrutiny. Under controlling precedent, rational basis review applies unless the disparate treatment targets a suspect class or infringes a fundamental right.

Plaintiffs' equal protection challenge fails even to meet the basic threshold requirement. UOCAVA voters, which include military and overseas voters, are simply unlike other Ohio voters. Although Plaintiffs admitted at the outset that overseas voters face unique challenges, they argued that military voters and other Ohio voters are similarly situated. Defendants and Defendant-Intervenors submitted several declarations, documenting the special burdens on military voters, such as the possibility of deployment on extremely short notice and the restricted ability to travel while on active duty. Confronted with this evidence and overwhelming case law recognizing the burdens on military voters, Plaintiffs concede that military voters, like overseas voters, "have unique circumstances." Transcript of Preliminary Injunction Hearing 52-53 (Aug. 15, 2011) ("Tr."). This Court need go no further to decide the appeal. As this Court has held time and again, a plaintiff's failure to show that a challenged law treats *similarly situated* persons differently is fatal to an equal protection claim.

But even if UOCAVA and non-UOCAVA voters were similarly situated, Plaintiffs' equal protection claim could not overcome the Supreme Court's decision in *McDonald*. There, the Court rejected an equal protection challenge to an Illinois law that made absentee balloting available only to four discrete categories of people. Because the challenged law neither targeted a suspect class nor infringed upon a fundamental right, the Court applied only rational basis review. Importantly, the Court held that there is no fundamental right to receive an absentee ballot and found no evidence that the plaintiffs would be entirely unable to vote. It thus concluded that the law at issue did not impact the plaintiffs' fundamental right to vote.

The absentee voting rules here are subject only to rational basis review for the same reasons. Non-UOCAVA voters are not a suspect class. And just as in *McDonald*, there is no fundamental right to receive and vote an absentee ballot in person, and there is no evidence that non-UOCAVA voters will be entirely unable to vote. Indeed, there is conclusive proof in the record that non-UOCAVA voters still have ample opportunity—more so than in almost every other state—to exercise the right to vote. They have five weeks to vote absentee in person, more than 750 hours to vote absentee by mail, and all day on Election Day to vote at the polls. O.R.C. § 3509.03, like the law in *McDonald*, does not infringe on the fundamental right to vote.

O.R.C. § 3509.03 easily survives rational basis review. There are reasonable grounds both for setting the non-UOCAVA in-person absentee voting deadline earlier and for allowing UOCAVA voters the possibility of a few extra days. To begin with, county boards of elections are extremely busy during the three days preceding any Election Day, and restricting in-person absentee voting during those days will allow them better to prepare for Election Day. At the same time, UOCAVA voters face many unique challenges that other Ohio voters do not, and allowing them the possibility of voting in-person absentee is responsive to those challenges. Indeed, accommodations for the military are found throughout federal and state law, including of course UOCAVA itself. Plaintiffs themselves conceded at oral argument that the Ohio legislature could "[i]n theory," "in the abstract," and "in a [hypothetical] world" have created the challenged voting system. Tr. 24, 25, 47. Those concessions are fatal to Plaintiffs' claim.

Failing even to acknowledge (much less apply) the settled legal framework for equal protection claims, the district court employed a standard of its own creation. Relying on *Bush v. Gore*, 531 U.S. 98 (2000), and other cases, the court concluded that any equal protection challenge to a voting regulation must be met by "substantial justification" from the state. Then, to evaluate that justification, the court purported to employ the "balancing approach" set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

But the district court was wrong in concluding that all cases involving disparate treatment by voting regulations require "substantial justification" to survive equal protection review.

In case after case, the Supreme Court and lower courts have applied the established equal-protection framework to all manner of laws, including voting regulations. In particular, the Supreme Court has repeatedly emphasized that the Equal Protection Clause does not prohibit all classifications; the clause "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). And as the Supreme Court held in *McDonald*, voting regulations, like any other law, are subject only to rational basis review unless their disparate treatment targets a suspect class or infringes a fundamental right.

Bush and the other equal protection cases cited by the district court are consistent with this principle; they applied heightened scrutiny because the disparate treatment at issue infringed a fundamental right by entirely depriving individuals of their right to vote, making it severely difficult to do so, or failing to count a ballot on equal terms. Those concerns are not present here. This case is controlled by *McDonald*.

The district court also erred in purporting to employ the *Anderson-Burdick* "balancing approach." *Anderson*, *Burdick*, and their progeny are not equal

protection cases. They did not involve challenges to disparate treatment between persons, but rather claims that certain election regulations—irrespective of disparate treatment—burdened an individual's fundamental right to vote without sufficient justification. Those cases thus have no application here, where the only claim concerns disparate treatment.

Even so, if the district court had applied the *Anderson-Burdick* inquiry correctly, it would have denied the preliminary injunction. The question under *Anderson-Burdick* is whether the interests justifying a challenged law outweigh that law's burden on the plaintiff's constitutional rights. Here, the court should have asked is whether Ohio's interest in changing the non-UOCAVA deadline for in-person absentee voting outweighs the burden on the voting rights of non-UOCAVA voters. It does, as the balance clearly favors the State. The Ohio legislature had a conceivably strong justification for ending non-UOCAVA in-person absentee voting on the Friday before Election Day to preserve time for boards of elections to prepare for Election Day. Against this interest, the burden on non-UOCAVA voters is negligible. As the district court recognized at oral argument, given the "many other options in Ohio" for voting, Ohio "is probably one of the most liberal states in the country with regard to voting rights." Tr. 22.

The district court, however, erred in applying its own standard. First, the district court overestimated the burden on non-UOCAVA voting. Contrary to all

of the available evidence, the court speculated that thousands of non-UOCAVA voters would now be unable to vote. Underlying the district court's legal conclusion appears to be the more sweeping and radical determination that, because they were allowed to do so before, non-UOCAVA voters now have a *constitutional right* to vote in-person absentee during the three days in question. But that conclusion is flatly inconsistent with *McDonald*—which held that there is no fundamental right to absentee voting. This one-way ratchet is also contrary to common sense and basic principles of federalism, as it would, among other things, deter state-by-state experimentation with expanded voting rules and systems.

Second, the district court incorrectly held that Ohio needed a "substantial justification" to survive review under this framework. *Anderson-Burdick* is a "flexible" inquiry that only requires a substantial justification when the interference with the right to vote is severe. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (Stevens, J); *id*. at 204-09 (Scalia, J.). Moreover, the district court essentially ignored the evidence put forth by the State supporting the need to use these days to prepare for Election Day and instead credited an amicus brief from the County of Cuyahoga taking a different position. But it is the State's evaluation of these issues that has constitutional significance—not the views of the county executive (not even the board of elections) in one of Ohio's eighty-eight counties.

In sum, whether analyzed properly as an equal protection claim or alternatively under the *Anderson-Burdick* inquiry, Plaintiffs are unlikely to succeed on the merits. This alone warrants reversal of the preliminary injunction, especially where, as here, Plaintiffs have themselves relied almost exclusively on their constitutional claim to justify the preliminary injunction. But if this Court were inclined to address the equitable considerations, each weighs against the injunction.

Finally, even if the district court correctly found a constitutional violation, its chosen remedy is overbroad. Plaintiffs only brought an equal protection claim and sought to return the law to the *status quo ante*, under which county boards of elections or the Secretary of State could set the hours for early in-person absentee voting so long as they did so equally for UOCAVA and non-UOCAVA voters. To reach its remedy, the district court either exceeded the equal protection relief requested or has gone so far as to find a constitutional right to cast an in-person absentee ballot on the three days preceding Election Day. No court, however, has ever held that such a right exists. Accordingly, the decision below should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). A "preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (citations and quotations omitted). Such an "extraordinary remedy … may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

The Court reviews "the grant of a preliminary injunction for an abuse of discretion, but questions of law are reviewed *de novo*." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685 (6th Cir. 2002) (citing *Gonzales v. Nat'l Bd. of Med. Exam's*, 225 F.3d 620, 625 (6th Cir. 2000)). "The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed *de novo*." *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011).

II. THE DISTRICT COURT IMPROPERLY ISSUED A PRELIMINARY INJUNCTION.

The district court should not have granted a preliminary injunction. First, and foremost, Plaintiffs did not establish a likelihood of success on the merits. Second, none of the equitable factors warrant a preliminary injunction, especially given Plaintiffs' failure to identify an equitable basis for extraordinary relief other than their untenable constitutional claims. Last, even if the district court correctly found a constitutional violation, which it did not, the preliminary injunction was broader than necessary to redress Plaintiffs' constitutional injury. Accordingly, the district court's decision should be reversed.

A. Plaintiffs Are Unlikely To Succeed On The Merits.

The "likelihood of success on the merits" standard imposes a demanding burden on Plaintiffs. They must make a "strong" showing, *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc), that it is more than merely "possible that the plaintiffs will succeed on the merits" of their legal claims, *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). That burden is even heavier given that Plaintiffs bring a constitutional challenge. "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573 (2012) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

The Ohio legislature's decision to set the deadline for UOCAVA voters to cast early in-person absentee ballots until close of polls on Election Day is not an equal protection violation, and Plaintiffs cannot prove otherwise. And contrary to the district court's conclusion, non-UOCAVA voters do not have a fundamental constitutional right to cast an in-person absentee ballot. The Ohio legislature's decision to make this minor change to one of the most generous absentee-voting programs in the nation is constitutional. The district court's decision to the contrary is factually unsupported and legally unsustainable.

1. Plaintiffs Have Failed To Demonstrate An Equal Protection Violation.

The sole cause of action pleaded in the Complaint is that Plaintiffs have been deprived of "equal protection under the law." R.1, PAGEID#19 (Compl.). According to the Complaint, "[t]he passage of HB 224 and SB 295 created different in-person early voting deadlines for two groups of voters": UOCAVA and non-UOCAVA voters. *Id.* PAGEID#18. Plaintiffs allege that this "arbitrarily impose[s] disparate treatment on similarly situated voters," *id.*, and thus seek to enjoin the enforcement of O.R.C. § 3509.03, as amended by HB 224 and SB 295. But this equal-protection claim fails at the threshold because—as Plaintiffs concede—they are not similarly situated to UOCAVA voters. In any event, Ohio had a rational basis for allowing only UOCAVA voters to cast an in-person absentee ballot until the close of polls on Election Day.

a. *A Settled Legal Framework Applies To All Equal Protection Claims.*

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person … the equal protection of the laws." U.S. Const. amend. XIV. This provision "creates no substantive rights," *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (citation omitted), and "does not prevent the states from resorting to classification," *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). It "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *F.S. Royster*, 253 U.S. at 415; *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Vacco*, 521 U.S. at 799. Accordingly, this Court has consistently held that the "threshold element" of an equal protection claim is disparate treatment of "*similarly situated*" persons. *Scarbrough v. Morgan Cnty Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006) (emphasis added); *see, e.g.*, *Braun v. v. Ann Arbor Charter Twp.*, 519 F.3d 564, 575 (6th Cir. 2008); *Silver v. Franklin Twp., Bd. of Zoning Appeals*, 966 F.2d 1031, 1036-37 (6th Cir. 1992).

Importantly, this threshold requirement applies to *all* equal protection claims, including those arising in the voting context. In *ACORN v. Bysiewicz*, for example, the plaintiff brought an equal protection challenge to a law that allowed registered voters to cast ballots for all offices but prohibited unregistered voters from voting for any office other than President and Vice-President. 413 F. Supp.

2d 119, 141 (D. Conn. 2005). The court rejected the claim because the plaintiffs could not "make the required showing that the registration regulation treats similarly situated voters differently." *Id*. (emphasis omitted); *see also Van Susteren v. Jone*s, 331 F.3d 1024, 1027 (9th Cir. 2003); *Campbell v. Buckley*, 203 F.3d 738, 748 (10th Cir. 2000).

If a plaintiff can show disparate treatment of similarly situated persons, a court must then apply the appropriate level of scrutiny. "An equal protection claim is subject to rational basis review unless it involves infringement of a fundamental right or application to a suspect class." *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *Vacco*, 521 U.S. at 799; *Scarbrough*, 470 F.3d at 260. This analysis also applies no differently in the voting context. In *McDonald v. Board of Election Commissioners*, for example, the Court applied rational basis review to an equal protection challenge to a statute that permitted some voters but not others to vote by absentee ballot. 394 U.S. at 803-04. Determining that the distinctions drawn by the law were neither invidious nor impacted a fundamental right, the Court evaluated only whether the challenged statute bore "some rational relationship to a legitimate state end." *Id.* at 807-09; *see also Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004).

b. *The Challenged Legal Scheme Does Not Treat Similarly Situated Persons Differently.*

Applying that settled legal framework, Plaintiffs' claim fails at the start. The challenged legal scheme does not treat similarly situated persons dissimilarly. The law distinguishes between UOCAVA voters, which include military and overseas voters, and all other Ohio voters. These two groups simply are not "in all relevant respects alike." *Nordlinger*, 505 U.S. at 10. Plaintiffs have always conceded that overseas voters are uniquely situated. *See* R.2, PAGEID#43 (Mot. for P.I.) ("Of course, overseas voters should be treated differently from non-overseas voters."). Military voters are too.

"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). Temporary duty assignments or deployment orders can come on extremely short notice. R. 35-8, 35-10, 35-11, PAGEID#1396, 1406-07, 1413-14 (Declarations). Military deployment can require significant and time-consuming preparation, including, but not limited to, taking part in additional training, and drawing equipment and supplies. *See id.* PAGEID#1396. These preparations can and often do impose significant burdens on military familes as well. *Id.* PAGEID#1396, 1414-15. Those burdens increase further once the service member is deployed, as service members have restricted ability to travel and limited control over their

time. *Id.* PAGEID#1397, 1413. In short, armed service imposes special burdens on military voters and their families that civilians generally do not have to bear.

By the time Plaintiffs filed their reply brief and appeared at oral argument, they were ready to concede that military voters, like overseas voters, are uniquely situated. In their reply brief, they "agree[d] that states can, and should, make appropriate accommodations for military and overseas voters," and they "endorse[d] wholeheartedly" the "importance of flexibility for UOCAVA voters." R.20, PAGEID#253, 261 (Pl. Memo. Of Law in Further Supp. of Mot. for P.I.). And at oral argument, Plaintiffs' counsel unequivocally conceded that "the military and the non-military overseas have unique circumstances." Tr. 52-53.

This Court need go no further to decide the appeal. As discussed above, "[t]he basis of any equal protection claim is that the state has treated similarly-situated individuals differently." *Silver*, 966 F.2d at 1036. This Court has previously held that a plaintiff's failure to show disparate treatment of "similarly situated persons mandates a grant of summary judgment in the defendant's favor." *Braun*, 519 F.3d at 575. The same is true here.

c. *Even If the Challenged Legal Scheme Treated Similarly Situated Persons Differently, It Is Subject Only to Rational Basis Review.*

Even if Plaintiffs had shown disparate treatment of similarly situated people, that disparate treatment is subject only to rational basis review because it neither

targets a suspect class nor infringes a fundamental right. There is no allegation that non-UOCAVA voters are a suspect class. Nor could there be. Non-UOCAVA voters are not all of a particular "race, alienage, national origin, [or] gender." *Doe v. Mich. Dep't. of State Police*, 490 F.3d 491, 503 (6th Cir. 2007); *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see, e.g.*, *Griffin v. Roupas*, 385 F.3d 1128, 1132 (7th Cir. 2004).

The disparate treatment also does not infringe a fundamental right. The Supreme Court's decision in *McDonald* is controlling on this score. In that case, the Court held that an Illinois absentee ballot law did not infringe a fundamental right. The law made absentee ballots available only to four classes of persons, all of whom had a specific reason for not being able to vote at the polls on Election Day. 394 U.S. at 803-04. The plaintiffs—unsentenced inmates awaiting trial in jail—did not fall within any of these classes and challenged the law's disparate treatment as a violation of equal protection. The Court first held that there is no fundamental right to "receive absentee ballots." *Id.* at 807. It thus concluded that the challenged law did not "impact [the plaintiffs'] ability to exercise the fundamental right to vote." *Id.* The Court reasoned that "the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny [the plaintiffs] the exercise of the franchise." *Id.* at 807-08. Furthermore, there was no evidence in the record to

show that the class of plaintiffs was "absolutely prohibited from exercising the franchise." *Id.* at 809. Accordingly, the Supreme Court subjected the challenged law to rational basis review.

Just like the Illinois law in *McDonald*, O.R.C. § 3509.03 does not infringe a fundamental right. To begin, no court has ever held that there is a fundamental right to vote prior to Election Day or to do so in person. If there were, dozens of states would be subject to constitutional challenge because, unlike Ohio, these states do not allow in-person early voting of any kind, require an excuse to vote absentee at all, or have mostly eliminated in-person voting. *See supra* at 2; *infra* at 51. The reason why these voting rules have *never* been subjected to heightened scrutiny is because, like Ohio's decision to offer early in-person absentee voting, these laws are "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 Griffin*, 385 F.3d at 1130 (explaining that "it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting (and would it then have to buy everyone a laptop, or a Palm Pilot or Blackberry, and Internet access?"); *Prigmore v. Renfro*, 356 F. Supp. 427, 433 (N.D. Ala. 1972) ("There is no fundamental right to an absentee ballot.").

O.R.C. § 3509.03 likewise does not "impact [Plaintiffs'] ability to exercise the fundamental right to vote." *McDonald*, 394 U.S. at 807. As in *McDonald*, this law effectively makes voting more available to UOCAVA voters and "do[es] not [itself] deny [non-UOCAVA voters] the exercise of the franchise." *Id.* at 807-08. Nor is there evidence in the record to show that non-UOCAVA voters are "absolutely prohibited from exercising the franchise." *Id.* at 809. To the contrary, the record shows that the Secretary mailed absentee ballot applications to more than 6 million voters, R.35-2, PAGEID#1133-35 (Directive 2012-24), and non-UOCAVA voters still have 230 hours over five weeks of early in-person absentee voting available to them, R.40-1, PAGEID#1481 (Directive 2012-35), more than 750 hours to vote absentee by mail, and, of course, the opportunity to vote at the polls on Election Day. *See* R.34-24, PAGEID#1011 (Pls' Exh. 20). Like the law challenged in *McDonald*, then, O.R.C. § 3509.03 is subject to rational basis review.

d. *There Is A Rational Basis For Allowing Only UOCAVA Voters To Cast An In-Person Absentee Ballot Through The Close Of Polls On Election Day.*

Under rational basis review, any law—including an election law—may be set aside "only if no grounds can be *conceived* to justify" it. *McDonald*, 394 U.S. at 809 (emphasis added). "[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature … actually articulate at any

time the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15; *Zielasko v. Ohio*, 873 F.2d 957, 961 (1989) ("Whether or not the[] reasons were actually considered … is irrelevant."). The analysis "require[s] [only] that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker." *Nordlinger*, 505 U.S. at 15 (citation omitted).

Given the need to prepare for Election Day, it was entirely rational for the Ohio legislature generally to end in-person absentee voting at 6:00 p.m. on the Friday before Election Day. Each county board of elections is extremely busy during that period. R. 35-9, PAGEID#1400-01 (Damschroder Dec.). Tasks that must be completed during the last few days prior to Election Day include compiling final poll books, which cannot be completed until in-person absentee voting has concluded; tabulating absentee ballots; and setting up the physical spaces where Election Day voting will take place (in a large county like Franklin County, for example, there are over 500 polling locations). *Id.* PAGEID#1401-02. In fact, there has been at least one instance in which last-minute in-person absentee voting on the Monday prior to Election Day actually interfered with a county's ability to open the polls on time on Election Day. *Id.* PAGEID#1402.

At the same time, as noted above, military voters face many unique challenges, including the possibility of a sudden and unexpected deployment,

which would be mitigated by the availability of early in-person absentee voting during those days. *See supra* at 20-29. And the UOCAVA voters who would vote absentee in person during those three days would not interfere with board of elections preparations. *See* R.35-9, PAGEID#1402 (Damschroder Dec.). There is nothing irrational, therefore, about Ohio's decision to afford the county boards the discretion (or the Secretary of State via statewide directive) to retain a later deadline for early in-person absentee voting by UOCAVA voters.

Indeed, accommodations for the military are found throughout the law. *See supra* at 5-6. At the federal level, UOCAVA and the MOVE Act facilitate voting by the military. And the federal courts have augmented such protections when necessary. *See, e.g.*, *Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010) (extending deadline for ballots mailed by absent uniformed services and overseas voters, only); *United States v. Alabama*, --- F. Supp. 2d. ---, 2012 U.S. Dist Lexis 32424 (M.D. Al. Mar. 12, 2012) (explaining that states have a "legally mandated obligation to vindicate the fundamental rights of its military and overseas constituents to vote in federal elections" and extending deadlines for UOCAVA voters *only*).

Ohio law also provides numerous benefits to military voters—in addition to the extra days of early in-person absentee voting challenged in this case. For example, relatives of a UOCAVA voter may apply for absentee ballots on the

voter's behalf, whereas a non-UOCAVA voter must request his own. O.R.C. §§ 3509.03, 3511.02. A UOCAVA voter may request an absentee ballot by mail, fax, email, or in person; but a non-UOCAVA voter may only make such a request by mail or in person. *Id*. §§ 3511.04; 3509.03, 3509.05. UOCAVA voters begin to receive their absentee ballots 45 days before Election Day, as compared to 35 days for non-UOCAVA voters. 42 U.S.C. § 1973ff-1(a)(8); O.R.C. § 3511.04(B); *id.* § 3509.01. Finally, a UOCAVA ballot received by mail will be counted even without a postmark, but a non-UOCAVA ballot will not. O.R.C. §§ 3511.09, 3511.11(C); *id*. § 3509.05(B). Beyond the voting context, there are still more accommodations, such as the Servicemembers Civil Relief Act and the Uniformed Services Employment and Reemployment Act. To conclude that accommodating the military is not a rational basis for differential treatment would draw every one of these laws into constitutional doubt. Yet Plaintiffs "do not challenge these precedents." R.20, PAGEID#253 (Pl. Memo. Of Law in Further Supp. of Mot. for P.I.).

Importantly, the size of benefit bestowed on UOCAVA voters by the legislature is constitutionally immaterial. In this case, the legislature removed from county boards of elections and the Secretary of State any discretion to allow early in-person absentee voting by non-UOCAVA voters during the three-day period, but left with the boards and the Secretary the discretion to allow such

voting by UOCAVA voters during that period. *See supra* at 8-9. It is irrelevant under rational basis review that the statutory scheme "does *not* guarantee that UOCAVA voters will be able to vote" during the three days. PAGEID#1617-18. A legislature is fully within its rights "to take reform 'one step at a time.'" *McDonald*, 394 U.S. at 809 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). It is not required "to cover every evil that might conceivably have been attacked." *Id.*

Nor is it relevant to the legal analysis how the Secretary or individual boards of election exercised the discretion to allow in-person absentee voting by UOCAVA voters during the three-day period. The operative purpose under rational basis review is that of the "relevant governmental decisionmaker"—here, the Ohio legislature. *Nordlinger*, 505 U.S. at 15. Indeed, before the legislature took the action under review here, the county boards had the latitude to offer or not offer early in-person absentee voting on *any* day within the 35-day period absent a contrary directive from the Secretary. *See supra* at 8-9. That rule has never been subject to constitutional challenge and is not being challenged in this case. All the legislature has done with respect to the three-day period before Election Day is eliminate the discretion as to non-UOCAVA voters and preserve it for UOCAVA voters. It is *that* decision—and not the manner in which the underlying rule has

been implemented by the county boards or the Secretary—which Plaintiffs have challenged as a violation of the Equal Protection Clause.

At bottom, this Ohio law—like other state and federal laws that provide special accommodations for the military—is conceivably rational and thus constitutional under the Equal Protection Clause. Indeed, Plaintiffs' counsel ultimately conceded as much at oral argument, admitting that "in theory … the State could have arrived at the result that it did here." Tr. 24; *see also id.* at 47 ("[T]he State may, in fact, … structure an early voting system in which they have built appropriate preferences in for the military and, conceivably, also, for non-military overseas voters."). Nothing more is required to sustain the law.

e. *The District Court Failed To Apply The Correct Legal Framework For Evaluating An Equal Protection Claim.*

The district court failed to apply the established framework for assessing an equal protection claim. Rather, citing cases such as *Bush* and *Hunter*, the court concluded that "voters cannot be restricted or treated in different ways without substantial justification from the state." PAGEID#1612. The court erred in two fundamental ways.

First, the district court failed to assess whether UOCAVA voters and non-UOCAVA voters are similarly situated. As discussed above, they are not, and the analysis should have ended there. *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010) ("[T]o state an equal protection claim, a party must claim that

the government treated similarly situated persons differently." (internal quotations omitted)). The district court's decision is unsustainable and must be reversed for that reason alone.

Second, the district court erroneously concluded that all cases involving disparate treatment by voting regulations require "substantial justification" to survive equal protection review. R.48, PAGEID#1612 (Opinion). As *McDonald* and other cases clearly held, voting regulations, like other laws, are subject only to rational basis review unless their disparate treatment targets a suspect class or infringes a fundamental right. That is not an issue here. Ohio has not targeted a suspect class and absentee voting is not a fundamental right. *See supra* at 30-32.

Bush, *Hunter*, and the other cases cited by the district court—*League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008), and *Dunn v. Blumstein*, 405 U.S. 330 (1972)—involved heightened scrutiny because the disparate treatment at issue entirely deprived individuals of their vote or made it severely difficult to vote. In *Bush*, the Supreme Court held that Florida's famously varying vote-counting standards "had led to unequal *evaluation of ballots* in various respects." 531 U.S. at 106 (emphasis added). Likewise, the Tennessee residency standard struck down in *Dunn* "completely bar[red] from voting all residents not meeting the fixed durational standards," thus "denying some citizens the right to vote" for illegitimate reasons. 405 U.S. at 336. Both cases, then,

fundamentally interfered with the right to vote either by failing to count a lawfully cast ballot or by refusing to allow an eligible voter to cast one in the first place. Neither circumstance is present in this case.

Hunter also is distinguishable. In that case, the "Plaintiffs allege[d] that the Board treated some miscast provisional *votes* more favorably than others." 635 F.3d at 235 (emphasis added). In particular, the Plaintiffs alleged that there were several "categories of provisional ballots in which the Board did consider evidence of poll-worker error" while there were "other categories of provisional ballots in which the Board did not consider whether there was evidence of poll-worker error" in violation of equal protection. *Id*. at 236. That is not this case. This case does not involve the counting of some votes but not others or the issue of counting votes at all.

The district court agreed that "*Hunter* involved the actual counting of votes—as did *Bush v. Gore*—but *League of Women* concerned a plethora of problems Ohio voters faced when attempting to cast their votes." R.48, PAGEID#1612 (Opinion). Because that case reached the Court on a motion to dismiss, however, the plaintiffs' allegations were accepted as true for purposes of appeal. *League of Women Voters*, 548 F.3d at 475. As a result, the Court accepted as true the plaintiffs' unadorned allegations that the problems Ohio voters experienced during the 2004 election were serious. *See id*. at 477-78. But those

alleged problems were *not* what triggered heighted constitutional scrutiny—it was the further allegation that the problems ultimately deprived "citizens of the right to vote or severely burdens the exercise of that right depending on where they live in violation of the Equal Protection Clause." *Id*. at 478. Like *Bush*, *Dunn*, and *Hunter*, heightened scrutiny applied because of an allegation that the electoral system disenfranchised voters. That concern is inapplicable here.

Certainly, then, "'the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.'" R.48, PAGEID#1620 (Opinion) (quoting *Bush*, 531 U.S. at 104-05). But the law under review does not value the *vote* of UOCAVA voters over non-UOCAVA voters. Unlike *Bush*, *Hunter*, and the other cases relied on by the district court, the law does not preclude non-UOCAVA voters from participating in the election and having their vote counted. This case mirrors *McDonald*. *See* 394 U.S. at 807-808 (explaining that the Illinois "absentee statutes, which [were] designed to make voting more available to some groups who cannot easily get to the polls, [did] not themselves deny appellants the exercise of the franchise").

The district court tersely concluded that *McDonald* is inapplicable here because this case involves Ohio's "redefinition of in-person early voting and the resultant restriction of the right of Ohio voters to cast their votes in person," and not absentee voting. R.48, PAGEID #1620 (Opinion). But that is factually and

legally incorrect. What the district court and Plaintiffs refer to as "early voting" is in reality absentee voting made more convenient. All absentee voting in Ohio, including in-person absentee, is governed by the same provisions of Ohio law (Chapter 3509 of the Revised Code). All absentee ballots, whether mailed-in or cast in person, are requested, verified, and counted in the same way. *See supra* at 4-5. Significantly, they are not immediately tabulated, but rather are examined to determine if they are valid and are tabulated after the fact. O.R.C. § 3509.06. Ohio's provision of in-person absentee voting therefore differs from systems offered by other States, which offer what is essentially Election Day voting prior to Election Day. In Florida, for example, "early voting" involves checking in, not having to fill out an absentee ballot application, voting on machines, and immediate tabulation of cast votes that continues through to the Election Day count. See Fla. Stat. §§ 97.021, 101.657.

In any event, the distinction is legally irrelevant. No form of early in-person voting—whether via absentee ballot or otherwise—grants a fundamental right and no court has ever held otherwise. *See supra* at 30-31. The district court's decision cannot be squared with controlling precedent.

2. The District Court Incorrectly Applied The *Anderson-Burdick* Inquiry To Declare O.R.C. § 3509.03 Unconstitutional.

The district court relied on this line of cases because, in its view, "[c]ourts employ the *Anderson* 'balancing approach' when they are confronted with a

constitutional challenge to a state's restriction on voting." R.48, PAGEID#1612 (Opinion) (citations omitted). But that framework is inapplicable, as Plaintiffs only brought an equal protection challenge and *Anderson-Burdick* and their progeny are not equal protection cases. Even if it applies, however, O.R.C. § 3509.03 easily survives review under the *Anderson-Burdick* balancing inquiry. The statute imposes no more than a *de minimis* burden on the voting rights of non-UOCAVA voters. Against that, the State has an important interest in ensuring that election boards have the three days before Election Day to prepare for the election. The district court's reasons for concluding otherwise deviated from the proper inquiry and will, if the order stands, have far-reaching consequences.

a. Anderson-Burdick *Is Inapplicable To Plaintiffs' Equal-Protection Challenge.*

The *Anderson-Burdick* "balancing approach" arises out of the Supreme Court's recognition that States "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *see also Burdick*, 504 U.S. at 433 ("[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 process."). Because every aspect of a state elections code "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for

political ends," *Anderson*, 460 U.S. at 788, voting regulations "are not automatically subjected to heightened scrutiny," *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006). Instead, the Supreme Court has adopted a "balancing approach" for analyzing such challenges.

The analysis is two-fold. First, a court must examine the "character and magnitude of the asserted injury" to the plaintiffs' constitutional rights. *Anderson*, 460 U.S. at 789. Second, the court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id*. If the plaintiffs' rights are subjected to "severe" restrictions, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289). If the state law imposes only "reasonable, nondiscriminatory restrictions" upon the protected rights, however, then the interest of the state in regulating elections is "generally sufficient" to justify the restrictions. *Anderson*, 460 U.S. at 788.

Those cases did not involve challenges to disparate treatment between persons, but rather claims that certain election regulations burdened an individual's First and Fourteenth Amendment rights. *See, e.g.*, *Anderson*, 460 U.S. at 782 ("whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights" of the supporters of an independent candidate for President); *Burdick*, 504 U.S. at 430 ("whether Hawaii's prohibition on write-in

voting unreasonably infringes upon its citizens' rights under the First and Fourteenth Amendments"). Thus, cases applying the *Anderson-Burdick* balancing test have expressly noted that they "base [their] conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis." *Anderson*, 460 U.S. at 786-87 n.7; *see Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992) (same); *Libertarian Party of Ohio*, 462 F.3d at 586 n.6.

In *Biener v. Calio*, for example, the Third Circuit drew a clear distinction between "traditional equal protection analysis" and the *Anderson-Burdick* inquiry. 361 F.3d 206, 214-15 (3d Cir. 2004). *Biener* involved a challenge to the disparate treatment imposed by a Delaware law providing only indigent candidates a ballot access fee exception. The court correctly "decline[d] to apply the *Anderson* balancing test" and opted instead to "proceed on a traditional equal protection analysis, whereby only suspect classes and fundamental rights receive intermediate or strict scrutiny." *Id.* at 214-15. Because this case too involves an equal protection challenge for disparate treatment, the *Anderson-Burdick* inquiry does not apply. The district court should have followed the "traditional equal protection analysis" and found O.R.C. § 3509.03 constitutional under rational basis review. *Id.* at 215.

b. *O.R.C. § 3509.03 Is Constitutional Under The* Anderson-Burdick *Inquiry.*

Even if the *Anderson-Burdick* "balancing approach" applies, which it does not, O.R.C. § 3509.03 is constitutional. R.48, PAGEID#1612 (Opinion). First, the "character and magnitude of the asserted injury" to Plaintiffs is *de minimis*. *Anderson*, 460 U.S. at 789. A law severely burdens voting rights if: (1) it "discriminates based on content instead of neutral factors"; or (2) "the burdened voters have few alternate means of access to the ballot." *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (citing *Burdick*, 504 U.S. at 437-38). To the extent O.R.C. § 3509.03 imposes any burden at all, it does so in a "neutral" fashion. It "burdens no voters based on the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender"; "on their views on any of the substantive 'issues of the day,' such as taxes or abortion"; or on membership in any "recognized 'group.'" *Id*. at 922 (citations omitted).

In addition, non-UOCAVA voters have ample "alternate means of access to the ballot." *Citizens for Legislative Choice*, 144 F.3d at 921. As the district court recognized, given the "many other options in Ohio" for voting, Ohio "is probably one of the most liberal states in the country with regard to voting rights." Tr. 22. Even with the changed deadline for early in-person absentee voting, non-UOCAVA voters still have five weeks to vote early and in person, can request and

vote an absentee ballot by mail, or can vote on Election Day. *See supra* at 32. The restriction at issue here is simply not severe.

Second, Ohio's interest in ensuring that county boards spend those last few days preparing for Election Day is clearly sufficient to impose this *de minimis* burden on non-UOCAVA voters.[3] As the Supreme Court has explained, "the State's important regulatory interests are generally sufficient" to sustain an election law provision that imposes only "reasonable, nondiscriminatory restrictions" on eligible voters. *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788). Where the burdens imposed by the law are *de minimis*, as here, rational basis review applies. *Zielasko*, 873 F.2d at 961. A party challenging this type of law thus bears a "heavy constitutional burden," *Schrader v. Blackwell*, 241 F.3d 783, 790-91 (6th Cir. 2001), as the reasons justifying the challenged law need not

[3] This is the only interest relevant to the *Anderson-Burdick* inquiry. Although the district court also examined the State's interest in protecting UOCAVA voters, R.48, PAGEID#1617-19 (Opinion), that issue has no bearing on whether Plaintiffs have been denied a fundamental right. Because an equal-protection claim is by nature comparative, the justifications for the benefit being conferred on UOCAVA voters bears on that claim of disparate treatment. *See supra* at 34. But an *Anderson-Burdick* claim is a challenge to an across-the-board restriction on ballot access. *See, e.g.*, *Crawford*, 553 U.S. at 205-06 (Scalia, J., concurring). Thus, the legal inquiry turns on the State's reasons for the electoral regulation that has purportedly deprived Plaintiffs of a fundamental right to vote—here, the need to prepare for Election Day—not whether that regulation treats people unevenly. If Plaintiffs were seriously bringing an *Anderson-Burdick* claim, it would not matter how Ohio law treats other voters. It would only matter that a change in law has purportedly interfered with *their* right to vote.

actually have been considered by the legislature, *see id*; *supra* at 32-33, or have documented support in the record, *see Crawford*, 553 U.S. at 191, 204. The question is whether the general interest itself is important—and here it clearly is.

In any event, the importance of that interest is verified by the record. Mr. Damschroder explained that boards of elections must complete numerous tasks during the Saturday, Sunday, and Monday immediately preceding any Election Day. *See supra* at 12-13, 33. Indeed, this is a longstanding and bipartisan concern of the State. *See supra* at 13 n.2. Thus, "[a]llowing all persons who wish to vote absentee in person during the three days immediately preceding Election Day could make it much more difficult for the boards of elections to prepare for Election Day." R.35-9, PAGEID#1401 (Damschroder Dec.). This interest is more than sufficient to sustain O.R.C. § 3509.03 against constitutional challenge.

c. *The District Court's Analysis Of O.R.C. § 3509.03 Under* Anderson-Burdick *Is Flawed And Would Have Far-Reaching Consequences.*

Neither of the district court's reasons for striking down the statute under *Anderson-Burdick* can withstand scrutiny. First, the district court's conclusion that Plaintiffs' rights are severely burdened, R.48, PAGEID#1614-15 (Opinion), simply ignores the numerous options still available for voting. Noting that "thousands of Ohio voters cast their votes in person in the three days prior to Election Day" in 2008, the court baldly asserted that "thousands of voters" would now "not be able

to exercise their right to cast a vote in person." *Id.* PAGEID#1615. As the district court itself acknowledged at oral argument, that is "only an assumption," Tr. 56, and a weak one at that given the numerous voting options that non-UOCAVA voters still have under Ohio law. Indeed, the record evidence suggests that the availability of early in-person absentee voting has almost no effect on overall turnout.[4]

Even if O.R.C. § 3509.03 imposes "some burden" on individual voters who would prefer to vote in person during the three days at issue, *Burdick*, 504 U.S. at 433, the Constitution does not demand an electoral system calibrated to individual preferences. The Supreme Court's "precedents refute the view that individual impacts are relevant to determining the severity of the burden [a voting regulation] imposes." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring). The relevant

[4] *See* R.35-12, PAGEID#1424 (Early Voting and Turnout) ("We remain skeptical of those who advocate in favor of early voting reforms primarily on the basis of increased turnout. Both these results, and prior works in political science, simply do not support these claims."); *see also* Paul Gronke, *Early Voting Reforms and American Elections*, 17 Wm. & Mary Bill of Rts. J. 423, 432 (2008) ("Enough research has accumulated … to state a scholarly consensus: *early voting does not increase turnout* by bringing new voters into the system."); Lynn Hulsey, *"Easier" Voting In State Showing Little Impact: Absentee and Early Voting Are Up, but Election Day Voting Is Down, Meaning No Overall Increase*, Dayton Daily News (Aug. 28, 2012), *available at* http://www.daytondailynews.com/news/news/national-govt-politics/impact-small-from-easier-voting/nRMbg/ ("Voting has been made easier in Ohio over the last eight years, but the improved access has not led to an increase in turnout.").

question is whether the election regulation will impose a severe burden on the voting public in general.

Underlying the district court's legal conclusion appears to be the more sweeping and radical determination that, because there was the possibility that they could do so before,[5] non-UOCAVA voters now have *a constitutional right* to vote in person during those three days. Indeed, Plaintiffs argued as much, *see* R.2, PAGEID#22 (Mot. for P.I.) (alleging that non-UOCAVA voters have "the right to cast their votes in the three days prior to Election Day" and that this "critical right … was granted to all qualified Ohio voters in 2005"), and the district court appears to have adopted that extreme position, *see* R.48, PAGEID#1620 (Opinion) ("The issue presented is the … restriction of the right of Ohio voters to cast their votes in person through the Monday before Election Day.").

But that conclusion is inconsistent with controlling precedent and common sense. To begin with, the Supreme Court made clear in *McDonald* that there is only a "claimed right"—not an actual right—to absentee voting. 394 U.S. at 807. Early and absentee voting is "not a constitutional imperative that falls short of what is required." *Crawford*, 553 U.S. at 209 (Scalia, J., concurring); *Griffin*, 385 F.3d at 1129. Absentee voting or other accommodations may be required if the right to

[5] As noted, the majority of county boards were not open all three days for in-person absentee voting. *See supra* at 9.

vote is otherwise entirely deprived, *O'Brien v. Skinner*, 414 U.S. 524, 529-31 (1974), but no court has ever found a constitutional right to early or absentee voting for its own sake, *supra* at 30-31.

Indeed, Ohio's timeframe for ending early in-person absentee voting (on the Friday before the election) is not unusual. "The time period for early voting varies from state to state, but most often it is available during a period of ten to fourteen days before the election, generally ending on the Friday or Saturday immediately preceding the election." Stein & Vonnahme, *supra*, 183; *see, e.g.*, Ariz. Stat. § 16-542 ("An elector who appears personally no later than 5:00 p.m. on the Friday preceding the election at an on-site early voting location … shall be given a ballot and permitted to vote at the on-site location."); Utah Code Ann. § 20A-3-306(2)(a) ("An absentee ballot is not valid unless: in the case of an absentee ballot that is voted in person, it is applied for and cast in person at the office of the appropriate election officer no later than the Friday before election day."). All of these laws would be vulnerable if there is a constitutional right to cast an in-person absentee ballot on the three days before Election Day. This simply cannot be the case.

Moreover, the consequences of such a right would be untenable in other ways. Under the district court's reasoning, once additional modes of casting a ballot are provided they can never be taken away. *See* R.48, PAGEID#1615 (Opinion) (relying on the fact that the State "*had* included the right to vote in

person through the Monday before Election Day" but then "retracted that right" (emphasis in original)). But this would mean—counter-intuitively—that adding opportunities to vote exposes a state to greater likelihood of a constitutional violation. And it would deter state-by-state experimentation with expanded voting schemes. *See, e.g.*, Rachel La Corte, *Washington State to Unveil Voter Registration on Facebook*, Associated Press (July 18, 2012). This Court should not adopt a constitutional ratcheting principle that deters states from adding conveniences out of fear that they will not be allowed to alter them if experience proves them unwise or capable of improvement.

Under such an untenable rule, moreover, multiple states would have committed constitutional violations in the recent past. Texas has shortened "the start date for the in-person early voting period from 20 days to 17 days prior to an election." Texas SB 292, § 1 (1997). Georgia has reduced the early voting period from 45 days to 21 days. Georgia HB 92 (2011). And other states could face constitutional challenge for not adding these conveniences in the first place. Kentucky and Michigan, for example, do not allow voting before Election Day unless the voter has a valid excuse. The Kentucky and Michigan legislatures may decline to add more options because they do not want to be bound to those voting options forever. The Constitution does not force States into an all or nothing *ex ante* choice.

Second, the district court erroneously concluded that all cases involving voting regulations require "substantial justification" to survive review under this framework. R.48, PAGEID#1612 (Opinion); *see also id.* PAGEID#1614 (erroneously believing that under the *Anderson-Burdick* approach, "even where a burden may be slight, the State's interests must be weighty"). But that is simply incorrect. *See supra* at 43. As the Supreme Court recently explained in upholding Indiana's voter identification law, such a "'litmus test'" is incompatible with "*Anderson*'s balancing approach" and the "flexible standard" that approach demands. *Crawford*, 553 U.S. at 189-90 & n.8 (Stevens, J.). The State's electoral regulation need only be "justified by relevant and legitimate state interests *sufficiently weighty* to justify the limitation." *Id*. at 191 (emphasis added). When the limitation is *de minimis*, as here, the corresponding justification need only be rational—not substantial. *Burdick*, 504 U.S. at 434; *Crawford*, 553 U.S. at 204 (Scalia, J.).

The district court also faulted the State for failing "to articulate a precise, compelling interest in establishing the 6 p.m. Friday deadline as applied to non-UOCAVA voters." R.48, PAGEID#1620 (Opinion). But as discussed above, *see supra* at 45-46, O.R.C. § 3509.03 imposes only "reasonable, nondiscriminatory restrictions" on non-UOCAVA voters. *Anderson*, 460 U.S. at 788. As such, the State needed only offer rational reasons, which it did, and it had no obligation to

"justify its [election] laws with 'elaborate, empirical verification.'" *Citizens for Legislative Choice*, 144 F.3d at 924 (quoting *Timmons*, 520 U.S. at 364).

In any event, the district court erred in applying its own standard. The court found Ohio's interest in preparing for Election Day insufficient by pointing to the "different point of view," offered in an amicus brief from the County of Cuyahoga. R.48, PAGEID#1616 (Opinion). As an initial matter, this was the view of the county executive—not the county board of elections, which is the local body that must prepare for Election Day. Moreover, the fact that one county—"speak[ing] only for itself," R.48, PAGEID#1617 (Opinion)—wished to offer early in-person absentee voting during these three days says nothing about the State's interest in ensuring that all county boards of elections have sufficient time to prepare. Other counties may have wished to take a different path or view the issue differently. But it is the legislature's evaluation of these competing considerations that matters to the analysis here. *See supra* at 43.

At bottom, the State offered ample evidence—unrebutted by Plaintiffs—that it has an important interest in ensuring that county boards are prepared for Election Day. And the evidence likewise shows that O.R.C. § 3509.03 imposes only a *de minimis* burden on non-UOCAVA voters. *See supra* at 45-46. "[T]he State's interests" in preparing for Election Day are "sufficient to sustain that minimal burden. That should end the matter." *Crawford*, 553 U.S. at 209 (Scalia, J.).

B. The Equitable Factors All Weigh Against Granting A Preliminary Injunction.

The Court should vacate the preliminary injunction because Plaintiffs have not established a likelihood of success on the merits. "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal" to a request for a preliminary injunction. *Gonzales*, 225 F.3d at 625. That is especially true where, as here, Plaintiffs have relied almost exclusively on their constitutional claim as the basis for entitlement to extraordinary equitable relief. *See* R.2, PAGEID#48-50 (Mot. for P.I.). Indeed, the district court devoted only a single paragraph to the issue in which it too principally relied on the constitutional violation to determine that the equitable factors weighed in favor of the preliminary injunction. R.48, PAGEID#1621 (Opinion). Thus, the Court does not need to further examine equitable considerations to resolve this appeal. Even if the Court were inclined to address them, however, each of these factors weighs against preliminarily enjoining Ohio's decision to limit early in-person absentee voting to UOCAVA voters during this three-day period.

First, Plaintiffs will not suffer any irreparable harm in the absence of the injunction. The only possible irreparable injury here would be the inability for a non-UOCAVA voter to cast a ballot sometime during the 72 hours before Election Day. But Plaintiffs have not alleged—and indeed cannot allege—that *any* non-UOCAVA voter will be disenfranchised by this statutory change. Ohio has

installed perhaps the most generous absentee voting system in the nation. *See supra* at 4-5. The Secretary has sent over 6 million absentee applications to voters across the state. Non-UOCAVA voters can cast their ballots from home, day or night, beginning 35 days before the election, and the ballot will be counted so long as it is received by 7:30 p.m. on Election Day or postmarked the day before Election Day and received by the board of elections by the tenth day after the election. O.R.C. § 3509.05. Non-UOCAVA voters also can cast an in-person absentee ballot on 23 different days between October 2, 2012 and November 2, 2012; and, of course, voters can cast their ballot on Election Day itself. *See* R.40-1, PAGEID#1481 (Directive 2012-35). There is no credible argument that eliminating these three days of early in-person absentee voting will disenfranchise non-UOCAVA voters.

It may be true that "tens of thousands of Ohio voters" may prefer to cast an in-person absentee ballot on the days in question. R.48, PAGEID#1606 (Opinion). Other voters might like to cast a ballot in August or September. Millions of people vote in Ohio and millions of people likely have different voting preferences. However, allowing people to cast in-person absentee ballots on one of the 23 other days offered by Ohio, or casting an absentee ballot by mail during the 35-day period, or voting on Election Day itself, is not irreparable harm. *Burdick*, 504 U.S. at 450. The denial of the right to vote is an irreparable injury; a *de minimis*

restriction on a means of casting an absentee ballot that Ohio was not required to offer in the first place is not. *See supra* at 45-46.

Second, the balance of equities and public interest both counsel against a federal injunction requiring Ohio to offer early in-person absentee voting to non-UOCAVA voters on some or all of the three days before Election Day. The "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) (internal quotations omitted). As a result, "the State's interest in not having its voting processes interfered with, assuming that such processes are legal and constitutional, is great." *Summit County Democratic Cent. & Exec. Comm.*, 388 F.3d at 551; *Hunter*, 635 F.3d at 244 (explaining that states "have a strong interest in their ability to enforce state election law requirements"). "[T]he balance of equities" therefore "should give great weight to the public interest in minimizing federal control of state election law and practice." *Id*. at 249 (Rogers, J., concurring).

That interest is particularly strong here given Ohio's concern that allowing "tens of thousands" of voters to cast in-person absentee ballots during these three days will interfere with preparation for Election Day—the day on which the vast majority of Ohioans have historically voted. *See* R.35-9, PAGEID#1400 (Damschroder Dec.) That quintessentially legislative choice should be respected.

III. THE DISTRICT COURT'S REMEDY WAS OVERBROAD.

"[F]ederal courts should aim to ensure the framing of relief no broader than required by the precise facts." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000) (citations and quotations omitted). An injunction, therefore, "may be no broader than necessary to remedy the constitutional violation." *Sharpe v. Cureton*, 319 F.3d 259, 272 (6th Cir. 2003) (citation and quotations omitted). Here, however, the preliminary injunction is overbroad even if O.R.C. § 3509.03 is unconstitutional given the terms of Plaintiffs' complaint.

As explained above, Plaintiffs' claim alleged only that the disparate treatment of UOCAVA and non-UOCAVA voters violates the Equal Protection Clause. *See supra* at 25-26. Plaintiffs suggested that enjoining the enforcement of O.R.C. § 3509.03, as amended by HB 224 and enacted by SB 295, would solve the issue. R.1, PAGEID#17-20 (Compl.). Even if that were correct,[6] that was no more than a request to return state law to the *status quo ante*, under which (Plaintiffs believed) UOCAVA and non-UOCAVA voters had the same deadline for early in-person absentee voting. *See supra* at 8. Thus, the injunctive relief

[6] It is not actually correct that their requested relief would make UOCAVA and non-UOCAVA voters equal. Plaintiffs' request would return the non-UOCAVA deadline to the close of business on the Monday prior to Election Day itself, but the UOCAVA voters' deadline is close of the polls on Election Day itself. ORC § 3509.03 (2006)

should only have been to require Ohio to do what is necessary to treat UOCAVA and non-UOCAVA voters equally. Under state law, that problem is solved by the county boards in the first instance or the Secretary by directive if he concludes that a statewide solution is warranted. *See supra* at 8-9.

Yet the district court "**ORDERED** that in-person early voting **IS RESTORED** on the three days immediately preceding Election Day for all eligible Ohio voters" and specifically pointed out that the injunction "restores" early voting on November 3, 4, and 5, 2012, and further "anticipated" that the Secretary would direct the local election boards "to maintain a specific, consistent schedule on those three days[.]" R.48, PAGEID#1622 (Opinion). While it is unclear whether the district court mandated that early in-person absentee voting be available to all Ohio voters each of the three days, the district court's actions following the issuance of Directive 2012-40 seem to indicate that this was his intent. *See* R.54, PAGEID#1634 (Def. Resp. to Mot. to Enforce and Mot. to Stay); *see generally* R.56, PAGEID#1644-46 (Order).

In the end, this is the rare case in which the nature of the relief itself reveals the flaws in the court's legal reasoning. The district court could have only imposed the remedy it did by finding that Ohio voters have a constitutional right to cast an in-person absentee ballot on the three days preceding Election Day. That simply cannot be correct as a matter of constitutional law. No court has ever held that

such a right exists, and it would have sweeping ramifications for every State in this judicial circuit if the decision below is sustained. But even if the district court found only an equal protection violation—the claim pleaded in the Complaint—that would call into question the constitutionality of UOCAVA and the numerous other federal and state laws specially protecting military and overseas voters. The district court's overbroad injunction is unsustainable.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) because this Brief contains 13,831 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14 point Times New Roman.

Dated: September 10, 2012 /s/ William S. Consovoy
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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I electronically filed the original of the foregoing document with the Clerk of this Court by using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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