

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Vote Vets Action Fund, Inc. is a District of Columbia non-profit corporation (“VoteVets”).¹ VoteVets was organized in 2006 by a group of veterans of Operation Iraqi Freedom and Operation Enduring Freedom to advocate for the interests of active duty military serving in, and veterans of, the United States’ twenty-first century wars, and has since expanded its scope of work to advocate for the interests of all veterans, in this new century. The goals of VoteVets are to ensure that the troops have the resources and support they need to complete their missions, and that the nation’s veterans of these wars receive the care and support they need and deserve when they return home. VoteVets has more than 220,000 supporters in all 50 states, including 50,000 veterans and military families, thousands of whom reside in Ohio.

VoteVets has strongly advocated for policies and programs that address the special needs and burdens faced by veterans of the twenty-first century wars. The organization has advocated and lobbied for, among other things, a twenty-first century G.I. Bill, to make college affordable for returning service-members; advanced funding of the Department of Veterans Affairs; increased financial

¹ Pursuant to FED. R. APP. P. 29(c)(5), undersigned counsel certifies that no party’s counsel authored this brief in whole or in part; no party and no party’s counsel contributed money that was intended to fund preparing or submitting this brief; and, no person other than *amicus curiae* contributed money that was intended to fund preparing or submitting this brief.

support for mental health care for service-members; and an end to the “Stop-Loss” policy of involuntarily extending deployments. VoteVets has a strong interest in ensuring that service-members and veterans can enjoy the right to vote without undue burdens and on the same basis as other citizens—not only because the right to vote is a fundamental one belonging to all U.S. citizens, but also because it is critical that troops and veterans be able to fully participate in the political process if elected officials and lawmakers are to be made more sensitive and responsive to the extraordinary challenges being faced by these groups, while they serve overseas and when they return home.

VoteVets submits this brief with the accompanying motion for leave to file, pursuant to FED. R. APP. P. 29(b).

SUMMARY OF ARGUMENT

The State of Ohio has taken away the ability to cast in-person absentee ballots during the Saturday, Sunday and Monday prior to Election Day from all of the State’s 900,000-plus veterans, and from those uniformed service members who live in counties in which the local board of election decides, for any reason or no reason, not to open its offices on one or more of those days. The only group of voters now assured this flexibility is those uniformed service members who happen to reside in counties in which the local election board decides to remain open on those days.

The deprivation of the ability to vote during these three days imposes significant burdens on uniformed service-members, for reasons already explained by the Intervenor Defendant-Appellant Military Groups, and also on the State's veterans, particularly wounded and disabled veterans who can neither stand in long lines on Election Day nor, in many cases, obtain a ride to the local elections board during the work week. These burdens are not justified by, nor are they rationally related to, any asserted State interest. The State claims an interest in affording flexibility to uniformed service members and avoiding the burden of keeping local elections boards open for in-person absentee voting on the last three days prior to an election. The District Court found that the State has not convincingly demonstrated the existence of the supposed administrative difficulties; those are insufficient to justify the burdens placed on the voting rights of veterans and uniformed service-members. In addition, the State's policy does not rationally serve the interest of affording flexibility to service-members because it cuts out the last three days of voting for a wounded veteran who may have returned from overseas duty a few days before Election Day, for a disabled veteran unable to find a ride to the local election board during weekday working hours, and also for an active-duty service member residing in a county where the local board chooses not to open its offices during one or more of the last three days. For these reasons, the

State's policy is unconstitutional and the judgment of the District Court should be affirmed.

ARGUMENT

THE DENIAL OF IN-PERSON VOTING DURING THE LAST THREE DAYS BEFORE ELECTION DAY UNCONSTITUTIONALLY BURDENS THE RIGHTS OF MORE THAN 900,000 OHIO VETERANS

As the Intervenor-Defendants Military Groups note correctly in their Brief (“Int.-Def. Brief”), active duty, Reserve and National Guard service-members whose residence is in Ohio live and serve in Ohio, across the nation, and around the world. (Int-Def. Br. at 4). In addition, according to the U.S. Department of Veterans Affairs, there are more than 900,000 veterans living in Ohio. (Dept. Veterans Affairs, “State Summary—Ohio & the U.S. Dep’t of Veterans Affairs (Oct. 2010)). Of those, more than 90,000 are receiving monthly disability compensation. (*Id.*).

In the 2006 and 2008 general elections for federal office, all of those service-members and veterans residing in-state were afforded the right to vote, in-person, for a period of weeks through and including the Saturday, Sunday and Monday before Election Day. The State of Ohio—not through any considered legislative judgment, but through a maze of chaotic, confusing and contradictory statutes and rulings—has now taken away the ability to cast absentee votes in

person from *all* of these veterans and many of the active-duty service-members. There is no rational basis for, let alone a justification sufficient to justify, the burden imposed on the voting rights of these veterans and service-members. For this reason, the State's position violates the Equal Protection Clause.

If the District Court's judgment is reversed, all of Ohio's 900,000 plus veterans, including tens of thousands of wounded and disabled veterans, will be deprived of the ability to cast votes in person on the last three days before Election Day. If the District Court's judgment is affirmed, all of Ohio's veterans who are registered to vote will regain that ability. As a leading newspaper stated in an editorial only a few days ago, supporting the Veterans Job Corps Act of 2012, "The bill gives priority to those who served on or after 9/11 with good reason: . . . This is a time of persistent homelessness and unemployment among veterans and record suicides among veterans and active-duty service members, many of them stressed by the burdens of two long wars. It makes sense for the 99 percent of Americans to find new ways to pay their debt to the 1 percent who serve in uniform." ("Republicans and Veterans Jobs," *New York Times*, Sept. 17, 2012, at A20). Accordingly, the judgment of the District Court should be affirmed.

A. Standard of Review

"The right to vote is a fundamental right, 'preservative of all rights.'"

League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 476 (6th Cir. 2008)

(quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Any burden on the right to vote “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford v. Marion County Election Board*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Intervenor Defendants-Appellants argue that the “balancing test” mandated by *Crawford* should not apply, and that the “rational basis” test should apply instead, because there is no fundamental right to an absentee ballot (Brief of Intervenor-Defendants-Appellants at 27-32). What is at stake here, however, is the right to vote in-person prior to Election Day. Further, even though the State of Ohio may not have been required to afford this right to anyone, “‘Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over than of another.’” *League of Women Voters of Ohio*, 548 F.3d at 477 (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)). However the standard is characterized, there must be some justification for burdening the right to vote and for treating voters differently with respect to the exercise of that right.

B. The State’s Treatment of Voters With Respect to In-Person Absentee Voting Arbitrarily Burdens Many Service-Members and All of Ohio’s Veterans

Despite the Ohio Attorney General’s reference to a “legislative choice,” (Defendants’ Response to Plaintiffs’ Supplemental Memorandum, RE #44 at p. 2),

the Secretary of State has taken the position that the statute does not necessarily guarantee that military voters will be permitted to vote early in person during the three days before the election. Rather, this case arises out of a confused and chaotic mess left in the wake of contradictory statutes and clashing and confusing rulings by the Secretary of State, as summarized in the District Court’s Opinion and Order, RE #48 at pp. 3-7. As the State explained, even if a uniformed service-member is given the right under the Ohio statute, Ohio Revised Code §3511.19, to cast an absentee ballot in-person on Saturday, Sunday and Monday before Election Day, she may be deprived of that right arbitrarily, as a practical matter, depending on the county in which she lives. That is because “[w]hether to be open those three days for in-person absentee voting by UOCAVA voters remains in the discretion of the individual county boards of election.” Defendant’s Response, RE #44 at p. 2; see District Court Opinion & Order, RE #48 at 7.

The result is that there are now two classes of voters with respect to in-person voting at designated sites on the Saturday, Sunday and Monday before Election Day:

Class One, who will *not* be able to cast absentee ballots in-person on the Saturday, Sunday and/or Monday before Election Day, consists, among other persons, of –

- (a) Active duty troops—qualifying as “uniformed services voters” under Ohio Rev. Code §3511.01(C)—who live in counties in which the local election board decides—for any reason or no reason—not to remain open on one or more of those days; and
- (b) *All* of the 900,000-plus veterans in Ohio who are registered to vote but who are no longer on active-duty or reserve status.

Class Two, the members of which will be able to cast absentee ballots in-person on the Saturday, Sunday and/or Monday before Election Day, consists only of those uniformed services voters under Ohio Rev. Code 3511.01(C) who happen to be fortunate enough live in counties in which the local election board decides to remain open on one of those days.

C. The State’s Arbitrary Distinctions Impose Significant Burdens On the Voting Rights of Service-Members and Veterans

It is clear that the State’s distinction between the two classes imposes significant burdens on the voting rights of uniformed service-members and veterans in Class 1—those who will *not* be able to cast absentee votes in-person on the Saturday, Sunday and/or Monday prior to Election Day. First, as the Intervenor Military Groups correctly explain in their Brief, depriving active duty troops, Reserve members and National Guard members of the flexibility to vote on these days may well result in the loss of the right to vote altogether, because such

service-members may be deployed on a day's notice or less. (Int.-Def. Br. at 9-13).

Second, the deprivation of the ability to vote on these days also imposes special burdens on Ohio veterans. As noted, more than 90,000 of the 900,000 veterans in Ohio are receiving disability compensation. Wounded and disabled veterans often find it difficult to wait in long lines to vote in-person on Election Day. In-person absentee voting is available to these veterans only during regular office hours at the local board of elections, which are only Monday through Friday until 5 p.m., and up to 7 p.m. in the last two weeks prior to the election. (Opinion & Order, RE #48 at ____). Casting absentee ballots during working hours at a designated location will often be impractical for disabled veterans because, in many cases, they are unable to drive themselves and must rely for transportation on family members, who generally work and are likely to be available only on the weekends. Many veterans who are not wounded or disabled also have full-time jobs that make it difficult for them to leave during the work week to cast in-person absentee votes.

The State's policy effectively deprives many of those 900,000 Ohio veterans who are otherwise eligible to vote of the ability to do so – after those men and women wore the uniform of our country and pledged their lives to uphold the Constitution, the same Constitution that confers the fundamental right to vote.

And it is the same Constitution that, as explained below, forbids the State arbitrarily and irrationally to burden that precious right.

D. The State’s Arbitrary Burdening of the Right to Vote of Many Service-Members and All Veterans Is Unconstitutional

Regardless of which test is applied, the arbitrary and irrational distinctions drawn by the State’s current policy cannot withstand constitutional scrutiny. As noted, where a restriction on voting imposes any burden at all, “it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford*, 553 U.S. at 191 (quoting *Norman*, 502 U.S. at 288-89).

Here, the Intervenor Military Groups argue that the distinctions drawn by the State’s policy are justified by the special burdens and uncertainties faced by service-members and the “impracticality” of allowing all Ohio voters to cast in-person absentee votes during the three days prior to Election Day. (Int-Def. Br. at 17-19, 32-35). VoteVets strongly agrees that service-members *do* face the special burdens and uncertainties identified by Intervenor Military Groups and that such service-members deserve special treatment and do not need to be treated in the same way as civilians.

The State’s policy, however, discriminates against the *same* service-members who face these *same* burdens and uncertainties but who live in counties in which the local board for any reason or no reason decides to stay closed on the

three days prior to Election Day. The main justification offered for the State's discrimination thus makes no sense. Indeed, that the ability of a service-member to vote absentee in-person on the last three days now depends solely on where that service-member resides in itself establishes that the State's policy is unconstitutional. *See League of Women Voters*, 548 F.3d at 478 (“allegations could establish that Ohio's voting system deprives its 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.”).

Further, the District Court found that the evidence was, at best, inconclusive as to the impracticality of allowing all Ohio voters (Opinion & Order RE# 48 at 16-18)—which would include *all* of the State's 900,000-plus veterans—to cast in-person absentee votes on these days. Without a meaningful showing of a real administrative burden, there is no justification for depriving, at a minimum, disabled and wounded veterans of flexibility to cast in-person absentee ballots on the three days prior to Election Day. Intervenor Military Groups invoke the principle “that a statute is not invalid under the Constitution because it might have gone farther than it did.” Int-Def. Br. at 39 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)). That principle has no application, however, in the context of voting, where the distinction drawn by a law violates the fundamental rule that “every voter is equal to every other voter in his State.” *League of Women Voters*,

548 F.3d at 476 (quoting *Gray v. Sanders*, 372 U.S. 368, 380 (1963)). No justification has been shown in this case for denying wounded and disabled veterans the right to cast absentee ballots the last three days before the election while affording that right to anyone else.

Even if the rational basis test were applied, the “distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal.” *McDonald v. Board of Election Commr’s of Chicago*, 394 U.S. 802, 809 (1969) (evaluating restrictions on absentee voting). The burdens imposed by the State’s policy in this case bear absolutely no rational relationship to the supposed State interests. While purporting to be solicitous of the special situation of uniformed service-members, the State’s policy cuts out the last three days of absentee in-person voting for example, for a wounded veteran who may have returned from overseas a few days before election day; for a disabled veteran unable to find a ride to the local election board during weekday working hours; and, for an active duty service-member residing in a county where the local board chooses not to open its offices during these last three days prior to the election. If ever there were a State policy that fails the rational basis test, Ohio’s policy on in-person absentee voting would be it.

For these reasons, the State's current policy concerning in-person casting of absentee ballots on the Saturday, Sunday and Monday before Election Day is unconstitutional.

CONCLUSION

The District Court's Opinion and Order would restore the ability of Ohio's 900,000-plus veterans to cast absentee ballots in-person on the three days prior to Election Day, representing for many of them the difference, as a practical matter, between being able to participate in the 2012 general election and not being able to do so. There is no justification or even a rational basis for the State of Ohio's decision to deprive these veterans of that ability. The District Court's judgment should be affirmed.

Respectfully submitted,

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