

Nos. 12-4055 & 12-4076

United States Court of Appeals for the Sixth Circuit

OBAMA FOR AMERICA, *ET AL.*,
Plaintiffs-Appellees,

v.

JON HUSTED, IN HIS OFFICIAL CAPACITY AS
OHIO SECRETARY OF STATE, *ET AL.*,
Defendants-Appellants,

and

NATIONAL GUARD ASS'N OF THE UNITED STATES, *ET AL.*,
Intervenor Defendants-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO, CIVIL ACTION
NO. 2:12-CV-0636, HON. PETER C. ECONOMUS

**BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION
& LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS
IN SUPPORT OF REVERSAL**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 12-4055, 4076

Case Name: Obama for America v Husted

Name of counsel: Lawrence J. Joseph

Pursuant to 6th Cir. R. 26.1, Eagle Forum Education & Legal Defense Fund

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on September 13, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund (“Eagle Forum”), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.¹ Since its founding, Eagle Forum has consistently defended not only the Constitution’s federalist structure, but also its limits on both state and federal power. In the context of the integrity of the elections on which the Nation has based its political community, Eagle Forum has supported efforts both to reduce voter fraud and to maximize voter confidence in the electoral process. In addition, Eagle Forum has a longstanding interest in applying the Constitution as written – here, the Equal Protection Clause – consistent with its anti-discrimination intent, without creating new rights that neither the Founders nor those who drafted the Constitution’s amendments intended. For these reasons and those in the accompanying motion for leave to file, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

In this litigation, the President’s campaign organization, his national political party, and the Ohio Democratic Party (collectively, the “Democrats”) have sued Ohio’s Secretary of State and Attorney General in their official capacities

¹ Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief’s preparation or submission.

(collectively, “Ohio”) to compel Ohio to provide statewide, in-person, early voting on the Saturday, Sunday, and Monday prior to this November’s Election Day. To support a purported right to early voting, the Democrats rely on the Fourteenth Amendment, combined with (a) an earlier Ohio statute that offered “no-excuse” early voting to all Ohioans, and (b) the early-voting rights afforded to military and other overseas-based voters by the Uniformed and Overseas Citizens Absentee Voter Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (“UOCAVA”), and related Ohio and federal laws.

The District Judge held that O.R.C. §3509.03 denies equal protection to non-UOCAVA voters, violating their “constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Obama for America v. Husted*, ___ F.Supp.2d ___, Slip Op. at 1 (S.D. Ohio 2012) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). The District Judge went on to criticize Ohio’s legislative process as unclear and found the Democrats likely to succeed on the merits. *Id.*, at ___, Slip Op. at 16-22. Ohio appealed the District Judge’s preliminary injunction of §3509.03 to this Court.

As Ohio explains, the right to *vote* is fundamental, but the right to *vote early* is not. Ohio Br. at 29-32; *McDonald v. Board of Election Com’rs of Chicago*, 394 U.S. 802, 807-08 (1969) (absentee voting). For example, the language that the District Judge quoted from *Blumstein* concerned state efforts to *deny* the right to

vote to certain classes of people. *Blumstein*, 405 U.S. at 331. The non-fundamental nature of the purported “right” at issue here is critical.² Federal courts use elevated scrutiny to review state laws that deny fundamental rights or that target protected classes (e.g., because of race), *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547-48 (1983), but the Democrats make no such showing here. Under the circumstances, therefore, courts use the rational-basis test to review state laws that do not trigger elevated scrutiny. *See* Ohio Br. at 32-37; *McDonald*, 394 U.S. at 807-08. The use of the rational basis test undermines the Democrats’ and the District Judge’s analysis of this case.

A successful rational-basis plaintiff must “negative every conceivable basis which might support [the challenged statute],” including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462-63 (1988). The District Judge did not attempt that analysis.

Moreover, it is enough if the challenged state actor “rationally may have been considered [it] to be true” that the challenged state law would provide

² *Amicus* Eagle Forum agrees with Ohio and the Military Intervenors that non-UOCAVA voters are not similarly situated with UOCAVA voters, which undermines the Democrats’ reliance on the Equal Protection Clause altogether. Ohio Br. at 29-32, 37-38; Military Br. at 23-27. In this brief, however, *amicus* Eagle Forum assumes *arguendo* that the Equal Protection Clause applies and demonstrates that O.R.C. §3509.03 does not deny Equal Protection of the Laws.

benefits. *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992); Ohio Br. at 33. Further, because “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data,” *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Heller v. Doe*, 509 U.S. 312, 320 (1993), the Democrats cannot prevail by marshaling “impressive supporting evidence ... [on] the probable consequences of the [statute]” vis-à-vis the legislative purpose, but must instead negate “the *theoretical* connection” between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). Here, the District Judge engaged in impermissible and wholly irrelevant “courtroom fact-finding,” *Obama for America*, ___ F.Supp.2d at ___, Slip Op. at 7-10, failing adequately to consider plausible, rational legislative speculation about the impacts of early voting on elections in Ohio.

As Ohio explains, the legislature may rationally have concluded both that (1) county boards of elections need the time over the pre-Election Day weekend and Monday to prepare for Election Day, undisturbed by waves of in-person early voters, and (2) accommodating UOCAVA voters is an important goal, particularly for military voters who sacrifice a great deal to serve this Nation. *See* Ohio Br. at 18, 33-34. In addition, as summarized in the Summary of Argument and developed under the Argument, *amicus* Eagle Forum respectfully submits that numerous additional rational bases support Ohio here.

STATEMENT OF FACTS

Amicus Eagle Forum adopts the facts as stated in Ohio’s opening brief. Ohio Br. at 2-9. In addition, however, the “facts” as relevant here are the legislative facts that Ohio plausibly may have believed in support of the rationales on which Ohio plausibly may have acted. *Lehnhausen*, 410 U.S. at 364; *Kadrmas*, 487 U.S. at 462-63. The only plausible facts *not* relevant here – and there are none – would be those facts for which the Democrats have negated the *theoretical* connection between the facts in question and Ohio’s plausible legislative purposes. *Clover Leaf Creamery*, 449 U.S. at 463-64. As indicated, the Democrats did not undertake that required effort, and there is little reason to think that they successfully could do so on remand. In summary, then, the facts that support Ohio are even wider than the facts that Ohio outlines in its brief.

SUMMARY OF ARGUMENT

Against the background outlined in the Statement of the Case and briefed by Ohio, *amicus* Eagle Forum submits that three additional rational bases support Ohio’s efforts to trim back the “no-excuse” early voting that Ohio began in 2005. First, early voting – and particularly weekend voting – impedes political parties’ ability to combat voter fraud with comprehensive poll monitoring. *See* Section I. Second, early voting without any excuse defeats the Founders’ intent that one Nation fill its elected offices on one Election Day. *See* Section II. Third, by

reducing the electorate's concentration on the electoral campaigns timed to Election Day, early voting reduces the ability of candidates to communicate effectively with the electorate and thereby depresses voter focus and turnout. *See* Section III. Any one of these rational bases supports Ohio's actions here and thus would defeat the Democrats' Equal Protection challenge, assuming *arguendo* that non-UOCAVA voters were similarly situated with UOCAVA voters

ARGUMENT

I. THE FOURTEENTH AMENDMENT POSES NO BARRIER TO STATE LAWS THAT LIMIT VOTING FRAUD AND EARLY VOTING

Perhaps the most significant additional bases for upholding §3509.03 is Ohio's interest in preventing voter fraud and the corollary interest in ensuring voter confidence. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (states have an interest in preventing voter fraud and ensuring voter confidence). "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). While other forms of early voting – such as voting by mail – may even be more problematic from the perspective of voter fraud,³ even in-person early voting presents heightened risk of fraudulent voting and voter intimidation.

³ Unlike in-person voter voting, mail-in voting does not provide a state that wishes to deter voter fraud the opportunity to require the voter to present identification, as any citizen must to enter a federal building or board an airplane.

By moving in-person voting away from the “main event” of Election Day, in-person early voting works against the adversary system that has developed in our elections, including such protections as oversight of elections by poll watchers (or poll monitors) from the two major political parties. Poll watchers from the political parties are “prophylactic measures designed to prevent election fraud,” *Harris v. Conradi*, 675 F.2d 1212, 1216 n.10 (11th Cir. 1982), and “to insure against tampering with the voting process.” *Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984). For example, poll monitors reported that 199 Chicago voters cast 300 party-line Democratic votes, as well as three party-line Republican votes in one election. *Barr v. Chatman*, 397 F.2d 515, 515-16 & n.3 (7th Cir. 1968). Ohio rationally may have believed that holding elections in the open on Election Day would foster voter confidence and eliminate fraud.

Beyond fraudulent voting, weekend early voting also raises the prospect of increased voter intimidation by organized groups that corral and drive groups of people – *e.g.*, employees, congregants, union members – to vote over the weekend, outside of the public eye, as well as outside the view of poll watchers. Under those circumstances, the voters potentially are subject to heightened supervision and coercion. Ohio rationally may have believed that holding elections in the open on Election Day would reduce intimidation and coercion.

II. LIMITING EARLY VOTING IN FEDERAL ELECTIONS ADVANCES THE VALID GOAL OF NATIONAL UNITY BY PROTECTING THE SIGNIFICANCE OF ONE NATIONAL ELECTION DAY

The U.S. Constitution expressly *requires* that the election of the president by the Electoral College occur on one and only one day throughout the Nation. U.S. CONST. art. II, §1, cl. 4. Charles Pinckney, a signer of the Constitution, explained that the purpose of this was to minimize the potential for influence on those who vote later in a multi-day scheme. *See* Beverly J. Ross and William Josephson, *The Electoral College and the Popular Vote*, 12 J. L. & POLITICS 665, 708 (Fall 1996) (*citing* 10 Annals of Cong. 129 (1800)). Expansive early voting poses that same threat, as newspapers and the internet will report on the pattern of early voting, from which the content of those votes may be inferred based on prior voting data. Indeed, as groups develop ways to game early voting for their side's benefit, it may become possible to declare the winner of the presidential election prior to Election Day itself. Ohio, whose voters decided the outcome of the presidential election in 2004, may properly act to prevent early voting from displacing the meaning of Election Day.

Allowing the equivalent of multiple election days through expansive early voting is contrary to national unity, and Ohio has a valid interest in reducing the cacophony caused by multiple voting days. With respect to the process in the Constitution for electing president, which included the same-day requirement for

Electors to vote, Alexander Hamilton wrote that it “is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents,” arguing that “if the manner of it be not perfect, it is at least excellent.” THE FEDERALIST PAPERS, No. 68, p. 410 (C. Rossiter ed. 1961). The Founders intended that elections bind this Nation together, *cf. Ex parte Yarbrough*, 110 U.S. 651, 661 (1884) (recognizing that “the election of members of congress occurring at different times in the different states” would give rise to “more than one evil”), and Ohio plausibly could have viewed the elimination of early in-person voting to foster that public goal. This is sufficient to uphold the Ohio law.

The U.S. Supreme Court struck down a Louisiana system, analogous to expansive early voting, which allowed electing congressmen prior to Election Day. *Love v. Foster*, 522 U.S. 67 (1997). Expansive early voting is not different in any meaningful way from the defects in the Louisiana system, particularly with the increasing use of statistical analysis to announce, based on scrutiny of the pattern of voting, which side has won. With current trends and if there are no limits on early voting, winners will be announced prior to the official Election Day. Regardless of whether such expansive early voting for choosing a president is unconstitutional – it may be – it is certainly constitutional for Ohio to curtail it. There was little recorded discussion about the virtues of same-day voting as

embodied in the U.S. Constitution, but Ohio can surely trim back a multi-day approach that the Founders themselves unanimously rejected.

III. EARLY VOTING REDUCES RESPECT FOR ELECTION DAY AND DEPRESSES VOTER FOCUS AND TURNOUT, WHICH GIVES STATES A VALID INTEREST TO LIMIT EARLY VOTING

This year, the presidential candidates will debate on October 3, 16, and 22, and the vice presidential candidates will debate on October 11. Although the three days of early voting affected by §3509.03 (thankfully) all post-date these debates, *amicus* Eagle Forum respectfully submits that all states should pause before allowing early voting that enables voting before candidates have presented their cases for election to the People. By enabling voters to vote before the candidates have presented their case in full, early voting diffuses voters' focus on the issues, reduces the civic significance of the communal act of voting, and degrades the candidates' ability to time their campaigns to Election Day. As such, in our age of electronic media even more than in the days of the print media, Ohio plausibly may have determined that the electorate would benefit from reducing the opportunity for early voting.

CONCLUSION

For the foregoing reasons and those argued by Ohio, this Court should reverse the District Court's granting of a preliminary injunction and remand with instructions to dismiss for failure to state a claim on which relief can be granted.

Dated: September 13, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 2,416 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2012, I electronically submitted the foregoing brief (together with the accompanying motion for leave to file the brief) to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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