

Case Nos. 12-4055 & 12-4076

United States Court of Appeals for the Sixth Circuit

OBAMA FOR AMERICA, *et al.*,
Plaintiffs-Appellees,

v.

JON HUSTED, *et al.*,
Defendants-Appellants.

On Appeal From the United States District Court for the
Southern District of Ohio (Economus, J.)

**AMICUS CURIAE BRIEF OF
THE AMERICAN CENTER FOR LAW AND JUSTICE
SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL**

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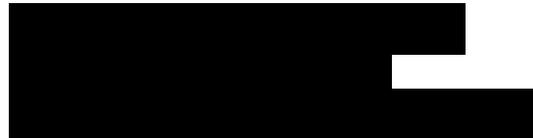
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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Sixth Circuit Case Number: 12-4055 & 12-4076

Case Name: *Obama for America, et al. v. Husted, et al.*

Name of counsel: Jay Alan Sekulow

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I certify that on September 17, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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INTEREST OF AMICUS¹

Amicus, the American Center for Law and Justice (“ACLJ”), is an organization dedicated to the defense of constitutional liberties secured by law, including the protection of the ability of the men and women in the armed forces to exercise the rights that they fight to protect for us. ACLJ attorneys have argued in numerous cases involving constitutional issues before the Supreme Court of the United States and other federal and state courts. *See, e.g., Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987). The ACLJ also submits this brief on behalf of over 100,000 Americans who signed a petition supporting this brief.

The resolution of this case is a matter of substantial concern to the ACLJ because it raises the issue of whether the State of Ohio may provide accommodations to military personnel and their immediate families that are not provided to civilian Ohioans, and the decision in this case may impact a host of federal, state, and local legislation around the country that provides accommodations to military personnel and their families.

¹ No party or party’s counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

“Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. 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) (emphasis added). As both Congress² and the Ohio General Assembly have reasonably concluded, civilian voters who reside in the United States and are not the spouse or dependent of a member of the armed services are not similarly situated in all relevant respects to members of the armed services, their spouses and dependents, and individuals who reside overseas in terms of the difficulties they face in being able to exercise their right to vote. The Ohio General Assembly’s decision to provide military and overseas voters with a minor accommodation due to their unique circumstances is reasonable and fully consistent with the United States Constitution.³ As such, the district court’s decision should be reversed and the preliminary injunction should be vacated.

The district court incorrectly equated the inconveniences of everyday life that all Americans (including military personnel) face with the unique,

² Through enactment of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended by the Military and Overseas Voter Empowerment Act (the MOVE Act), 42 U.S.C. §§ 1973ff *et seq.*

³ This brief focuses on the key differences between civilian and military voters, rather than between resident civilian and overseas civilian voters.

government-imposed demands of military service. The Supreme Court has repeatedly emphasized that, in many respects, military personnel and civilians are not similarly situated given the unique demands of military life. *See, e.g., Brown v. Glines*, 444 U.S. 348, 360 (1980) (referring to “the special character of the military”); *Dep’t of Air Force v. Rose*, 425 U.S. 352, 367-68 (1976) (referring to “the unique role of the military”); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (“[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline . . . are founded on unique military exigencies.”); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (noting that “the military is, by necessity, a specialized society separate from civilian society”); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (noting that “the military constitutes a specialized community governed by a separate discipline from that of the civilian”). The Ohio General Assembly’s accommodation of military voters reflects the uniqueness of military life recognized in these cases.

Civilian Ohioans, including Plaintiffs-Appellees’ members, will have roughly one month to vote absentee in person or by mail prior to election day, in addition to the option of voting on election day. Plaintiffs-Appellees could not allege with any credibility that any of their members will be unable to cast a ballot during the month-long advance voting period or on election day but *would* be able to vote during the short period immediately preceding election day available to

military and overseas voters. To the extent that Plaintiffs-Appellees have relied upon an asserted “right” of their members to willingly forgo voting during the advance voting period in order to factor in potential last minute campaign developments, that reliance is misplaced for two reasons. First, this argument illustrates that Plaintiffs-Appellees’ members *are not similarly situated* to armed service members and their families who, *by necessity*, must often cast their ballots weeks in advance in order to ensure that their vote will count. Second, Plaintiffs-Appellees’ members who wish to delay voting as long as possible already have the most effective means of doing so available to them: voting on election day.

The reality is that members of the armed services and their spouses and dependents often have, in practical terms, a much smaller window of time than other Ohioans to exercise their right to vote due to the rigors of military life. Plaintiffs-Appellees’ civilian members are not faced with the kind of government-imposed family dislocations and disruptions created by the demands of military service, including preparation for, and recovery from, temporary duty and deployment assignments. Members of the armed services (unlike Plaintiffs-Appellees’ members) have to pack up and go wherever the Department of Defense tells them to go, often on short notice, leaving them with a small window of time to make sure that all of their family and personal affairs are in order. As the Supreme

Court has noted, “[m]ilitary personnel must be ready to perform their duty whenever the occasion arises.” *Glines*, 444 U.S. at 354.

When a service member receives notice of a temporary duty assignment or deployment, there is a laundry list of important tasks that the service member and his or her family must take care of, often in a short period of time. For example, the American Bar Association’s website offers a 13-page pre-deployment checklist that advises armed service members and their families to do the following things upon receiving a temporary duty or deployment assignment:

- Put copies of important documents and information in a safe place, such as citizenship papers, passports, power of attorney documents, birth and marriage certificates, adoption papers, Social Security cards, tax records, life insurance papers, securities, deeds, etc.
- Review medical immunization records and confirm the location of medical and dental records for each family member.
- Complete a list of medical, emergency, dental, poison control, and veterinary contact information.
- Find a reliable local babysitter who would likely be available in case of absence or emergency.
- Make a list of names and dosages of any medications taken by each family member.
- Review financial details such as how and when the family will receive money on a continuing basis, whether that money will cover all household necessities, etc.
- Ensure that the family knows where checkbooks, safety deposit box keys, credit cards, and various finance agreements are located, what utility,

insurance, and other regular payments must be made, and how to check account balances.

- Gather necessary documents and information concerning vehicle financing, titles, registration, insurance, licenses, inspection, and maintenance.
- Review the location and instructions for use of the family residence's electrical control box and water and gas control valves.
- Make a list of names and contact information for neighbors and household repair companies.
- Make several copies of the armed service member's orders.
- Verify that the family's military identification cards will be valid until after the armed service member's return.
- Complete or update a will and review and update beneficiary information for insurance policies, bank accounts, and investments.
- Complete and discuss a monthly family budget that addresses how unexpected expenses will be paid for.⁴

In addition, armed service members who receive temporary duty or deployment assignments will often need to, among other things: prepare co-workers to take over their job responsibilities (for both military and civilian work), take part in additional training including overnight trips, search for and obtain additional gear and supplies, and make medical appointments for necessary

⁴ American Bar Association, *Family Member Pre-Deployment Checklist*, <http://www.americanbar.org/content/dam/aba/migrated/legalservices/helpreservists/forms/checklist.authcheckdam.pdf>; *see also* USAA, *Deployment Checklist*, https://content.usaa.com/mcontent/static_assets/Media/Deployment_Checklist_082009.pdf?cacheid=1635274717.

vaccinations and hearing and vision tests. Understandably, many service members desire to spend the minimal time remaining before they have to leave with their friends and family members. Plaintiffs-Appellees' civilian members are not subject to analogous government-imposed mandates that require abrupt relocation and wide-ranging changes to their lives that significantly curtail their ability to exercise their right to vote. Given the many differences between military and civilian life, Plaintiffs-Appellees' argument that their civilian members are similarly situated to armed service members and their families concerning their ability to exercise their right to vote is demonstrably false.

The constitutionality of the Ohio statutory scheme at issue here is bolstered by the legislative history of the MOVE Act, which illustrates the difficulties that service members and their families face in being able to vote regardless of whether they happen to be in the United States or overseas on election day. A statement of the MOVE Act's background and purpose explained that "our military men and women *servicing abroad and at home*, who put their lives on the line every day to defend [the right to vote], *often face obstacles in exercising their right to vote.*" Military and Overseas Voter Empowerment (MOVE) Act of 2009, 156 Cong. Rec. S 4513 (May 27, 2010) (emphasis added).

During a Senate committee hearing, Gail McGinn, Acting Under Secretary for Personnel and Readiness, noted that the kind of rapid mobility necessary for

effective military operations often makes voting difficult for armed service members and their families:

Our military and overseas voters are a dynamic group. Where they are located today may not be where they will be located for the next election. As we are a Nation at war, our military members face a high operating tempo which includes undergoing individual and collective training, participating in exercises and deployments.

*Problems for Military and Overseas Voters: Why Many Soldiers and Their Families Can't Vote, Hearing on S. 1415 Before the S. Comm. on Rules and Administration, 111th Cong., 1st Sess., at 9-10 (May 13, 2009) (statement of Gail McGinn, Acting Under Secretary for Personnel and Readiness).*⁵ Under Secretary McGinn also explained that the Department of Defense supports expansion of the manner in which service members can vote: “[b]ecause each voter has a unique set of circumstances, the Department wants to provide as many alternative methods as possible for registering, requesting a ballot, and returning the ballot.” *Id.* at 11.

The Senate committee also heard testimony highlighting the problems caused by temporary duty or deployment assignments made shortly before election day, situations that Plaintiffs-Appellees’ civilian members do not face. A retired Elections Director for Okaloosa County, Florida stated, “with more and more [temporary duty] and . . . deployment overseas assignments given at the last minute to military members, many whose records show that they are located in the United

⁵ Available at http://www.rules.senate.gov/public/?a=Files.Serve&File_id=fcb96f23-960d-4e3a-bcd4-84afe4e3b3f5.

States are actually overseas temporarily during election time.” *Id.* at 23 (statement of Patricia Hollarn, retired Elections Director, Okaloosa County, Florida). In addition, Robert Carey, Executive Director of the National Defense Committee, reflected on his personal experience:

Being mobilized [to the U.S. Navy Reserves] two weeks prior to the [2004 general] election, I was unable to apply for an absentee ballot at my new delivery address and it was only by my taking leave at my mobilization preparation site, flying back at my own expense to New York City and voting in person, was I able to guarantee my right to vote.

Id. at 33 (statement of Robert Carey, Executive Director, National Defense Committee). In light of situations like Robert Carey’s—hardly unique given the mobility on short notice that is a necessary part of military life—it was perfectly reasonable for the Ohio General Assembly to conclude that a minor accommodation for military voters was warranted.

In addition, while most Ohioans are in a position to deal with unpredictable and difficult life situations *as they arise*, members of the armed services and their families are often unable to address those situations until they are able to return home (often months later) due to the requirements of their military service. For example, Lieutenant Colonel Joseph DeCaro, United States Air Force, told the Senate committee:

Being deployed to support and conduct combat operations is difficult as it is. I still had a family back home to worry [about]; and in addition to the normal trials and tribulations that are associated with

military life, my wife and daughter were dealing with the aftermath of Hurricane Ivan during this period, a storm which caused damage to our home that I still had to repair when I returned from this deployment.

Id. at 30 (statement of Lt. Col. Joseph DeCaro, USAF). Although dealing with difficult situations like a natural disaster or a death in the family is not something unique to military families, the *additional burden* imposed by the often lengthy delay in being able to address those matters due to the requirements of military service *is unique*, further underscoring that Plaintiffs-Appellees and their civilian members are not similarly situated to service members and their families.

Courts have also observed that the unique nature of military life justifies legislative accommodations for military personnel that are not extended to civilians. For example, the United States Court of Appeals for the Second Circuit has noted, in the context of a challenge to the provision of military chaplains, that the Constitution affords the government significant leeway to provide special accommodations for military personnel given the short notice that often precedes military deployments:

The problem of meeting the religious needs of Army personnel is compounded by the mobile, deployable nature of our armed forces, who must be ready on extremely short notice to be transported from bases (whether or not in the United States) to distant parts of the world for combat duty in fulfillment of our nation's international defense commitments.

Katcoff v. Marsh, 755 F.2d 223, 228 (2d Cir. 1985); *see also Simmons v. Brown*, 497 F. Supp. 173, 177 (D. Md. 1980) (“I must . . . take judicial notice of the inherently mobile nature of military life and the general requirement that a soldier on active duty must be eligible to accept any assignment required of him.” (quoting *Crawford v. Davis*, 249 F. Supp. 943, 947 (E.D. Pa. 1966))). Similarly, the unique problem of ensuring that military personnel and their families are afforded an adequate opportunity to exercise their right to vote is compounded by the need for mobility on short notice, and the Ohio General Assembly has taken a reasonable step to address this problem by providing a minor accommodation for military personnel and their families.

CONCLUSION

The Constitution, including the Equal Protection Clause, allows governments to recognize the reality that armed service members and their families make tremendous sacrifices that other Americans do not make. The Ohio General Assembly has enacted a sensible accommodation that addresses, albeit to a minor degree, a most troubling irony: military service to protect fundamental principles such as the right to vote makes the ability to exercise that right much more difficult for members of the armed services and their families. This accommodation is constitutionally sound.

For the foregoing reasons, the district court's decision should be reversed and the preliminary injunction should be vacated.

Respectfully submitted on September 17, 2012.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). As measured by the word count provided by Microsoft Word 2007, this brief contains 2,645 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

September 17, 2012.

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CERTIFICATE OF SERVICE

I certify that on September 17, 2012, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I also certify that, to the best of my knowledge, all other participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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