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October 10, 2008 – *sent via facsimile and U.S. Mail*

Dear Sheriff Fischer and Mr. Haller:

The undersigned voting rights organizations are writing to express our deep concern about your actions as reported in a news article published yesterday by the Associated Press, “County Officials Seeking Ohio Voters’ Records.” According to this article, you have launched an investigation into voting by every person in Greene County who registered and cast an absentee ballot on the same day during the period September 30 through October 6, even though such voting is fully legal in Ohio as established by repeated rulings by the Ohio Supreme Court, the United States District Courts for the Northern and Southern Districts of Ohio, and the United States Court of Appeals for the Sixth Circuit. If the information and quotations attributed to you and your representatives in this article are correct, you have launched this investigation without any evidence or credible allegation that any such voter has voted illegally. Your investigation instead appears to be based merely on unsubstantiated “concerns” expressed in telephone calls by members of the public who appear to object to registration and voting by students in the community, unaccompanied by any specific allegation of actual fraud or other illegal conduct committed by any specific voter.

We believe such an investigation threatens the federally protected rights of Greene County voters under the Voting Rights Act of 1965 and the United States Constitution. We urge you immediately to cease any further investigation of persons who are not accused of anything other than exercising their lawful right to vote.

Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b), provides:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

If law enforcement officials in Greene County have launched an investigation of persons who registered and/or voted in-person absentee ballots during the six-day period from September

30 through October 6, based solely on the fact that these voters availed themselves of this entirely lawful registration and voting opportunity, it is difficult to view such an investigation as anything other than unlawful intimidation under Section 11(b) of the Voting Rights Act.

The act of registering and voting in keeping with state law obviously cannot, in and of itself, provide justification for a law enforcement investigation. There is absolutely no justification for treating persons who registered and voted an absentee ballot during the period from September 30 through October 6 as potential lawbreakers, without some independent evidence that a particular individual registered or voted illegally. The comments attributed to Greene County law enforcement officials in the news article referenced above make it clear that county officials are not acting on any evidence of illegal voting or fraud, but have instead launched their investigation solely because of unsubstantiated “concerns” expressed in phone calls by persons having no first-hand knowledge of any illegal activity.

You are no doubt aware, or should be aware, that four different federal and state courts have, in recent days, upheld the lawfulness of Ohio’s statutory provisions allowing voters to register and cast an in-person absentee ballot during the six-day window between the beginning of early voting and the end of the registration period, and have rejected any interpretation of Ohio law or federal law that would require a 30-day waiting period between registration and casting an absentee ballot.

First, the Ohio Supreme Court issued a ruling on September 29, 2008, unequivocally rejecting the contention that persons who register to vote and cast an absentee ballot on the same day during the overlap period between early voting and the close of registration are somehow violating Ohio law. In case you have not reviewed this decision, we have attached it for your convenience.

Second, the United States District Court for the Northern District of Ohio issued a temporary restraining order on September 29, 2008, enjoining the Madison County Board of Elections from imposing a 30-day waiting period between registration and casting an absentee ballot. The ruling noted that imposing such a waiting period not only was entirely unjustified under Ohio law, but also would violate the requirements of Section 202 of the Voting Rights Act of 1970. We have also attached this order for your convenience.

Third, also on September 29, 2008, the United States District Court for the Southern District of Ohio, relying on the Ohio Supreme Court’s decision upholding the legality of same-day registration during the early voting period from September 30 through October 6, rejected the request of the Ohio Republican Party for a temporary restraining order to prohibit persons who registered between September 30 and October 6 from casting an absentee ballot at the same time. This ruling is also attached.

Fourth, when the Ohio Republican Party filed an emergency appeal to the United States Court of Appeals for the Sixth Circuit, the Sixth Circuit issued a ruling on September 30, 2008, affirming that court’s denial of a temporary restraining order, again upholding the legality of Ohio’s same-day registration window. This ruling is also attached.

These rulings have entirely eliminated any argument that registering and voting during the “overlap” period between September 30 and October 6 is anything other than lawful under Ohio law. Accordingly, the mere fact that a voter has registered and cast an absentee ballot during this period cannot provide grounds for an investigation by law enforcement officials. Under these circumstances, we believe that such an investigation constitutes intimidation and harassment of persons exercising their lawful right to register and vote in a federal election, in violation of Section 11(b) of the Voting Rights Act. Voters in Greene County will now be fearful that exercising the right to vote has exposed them to law enforcement investigation, and this will surely chill their future willingness to participate in elections. Indeed, under a predecessor statute to Section 11(b), the U.S. Court of Appeals for the Fifth Circuit held that local officials in Alabama had engaged in unlawful intimidation under the 1957 Civil Rights Act when they followed persons on their way home from a voter registration meeting and arrested them for actual traffic violations. The pretext of carrying out an investigation of possible traffic violations did not immunize from scrutiny the conduct of local officials that tended to intimidate persons exercising their voting rights. Here, based on the information in the news article cited above, there is not even the pretext that your investigation is based on some independent law enforcement justification. It appears to be based instead directly on these voters’ exercise of their right to vote.

Moreover, even if it is not your intent to intimidate persons exercising their right to vote, the legislative history of Section 11(b) makes clear that a lack of intent is not a defense in a lawsuit alleging a violation of Section 11(b). While the 1957 Civil Rights Act made it unlawful to for any person “to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose,” 42 U.S.C. § 1971(b) (emphasis added), the reference to purpose was eliminated when the anti-intimidation provision was added to the Voting Rights Act of 1965 in Section 11(b). The House Report accompanying the Voting Rights Act of 1965 states: “unlike 42 U.S. C. 1971(b) (which requires proof of a ‘purpose’ to interfere with the right to vote) no subjective purpose or intent need be shown.” H. Rep. No. 439, 89th Congress, 1st Sess. 30 (1965). Moreover, “the prohibited acts of intimidation need not be racially motivated” to be actionable under Section 11(b). *Id.* Because your investigation is reasonably likely to intimidate persons in the exercise of their voting rights, it is a likely violation of Section 11(b).

In addition to constituting a likely violation of Section 11(b) of the Voting Rights Act, your unwarranted investigation of lawful voting activities creates concerns about a potential violation of the criminal prohibitions of Section 12 of the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg-10, which provides for criminal penalties against:

- A person, including an election official, who in any election for Federal office -
- (1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for -
 - (A) registering to vote, or voting, or attempting to register or vote;
 - (B) urging or aiding any person to register to vote, to vote, or to attempt to register or vote[.]

Finally, we would also note that 18 U.S.C. §§ 241 and 242 provide criminal sanctions against persons who intimidate persons in the exercise of their constitutional right to vote or deprive persons of such rights.

Moreover, we believe that an investigation of persons based on nothing more than their exercise of their right to register and vote also violates their constitutional rights under the First and Fourteenth Amendments to the U.S. Constitution.

For all these reasons, we urge you immediately to suspend any investigation of persons who have exercised their right to register and cast an absentee ballot during the September 30 - October 6 “overlap” period for registration and early absentee voting. Because of our concern about the potential violations of law referenced in this letter, we are providing a copy of this letter to the Voting Section and the Criminal Section of the Civil Rights Division of the of the U.S. Department of Justice, the Ohio Attorney General, and the Ohio Secretary of State.

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