IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TOMMY RAY MAYS II and QUINTON NELSON SR., individually and on behalf of all others similarly situated, Plaintiffs, v. FRANK LaROSE, in his official capacity as Secretary of State, Defendant.	Case No. 2:18-cv-1376 JUDGE MICHAEL H. WATSON Magistrate Judge Chelsey M. Vascura **CLASS ACTION**

PLAINTIFFS' OPPOSITION TO DEFENDANT LAROSE'S MOTION FOR SUMMARY JUDGMENT

This case is about whether Ohio may physically detain eligible voters in jail without providing them any means to cast a ballot. The Supreme Court has already answered this question: it may not. *See O'Brien v. Skinner*, 414 U.S. 524, 528 (1974) (invalidating law precluding jailed voters' access to absentee ballots because "these appellants are not disabled from voting except by reason of not being able physically—in the very literal sense—to go to the polls on election day or to make the appropriate registration in advance by mail").

The Secretary contends that there is no constitutional problem with denying those voters detained after the absentee ballot request deadline ("late-jailed voters") the ability to vote because *other* Ohioans are able to vote, and the number of those able to vote far exceeds the number of disenfranchised late-jailed voters. He asks this Court to "[v]iew[ ] the full picture . . . [of] Ohio's whole election system," Doc. 54 at 2, and decide whether, under "the entire spectrum of voting opportunities available to all Ohioans," *id.* at 18, the absentee ballot application deadline is constitutional. That is not how the Constitution works.

Plaintiffs do not dispute that Ohio offers many voters greater access to the ballot than do other states. But some Ohio voters—including Plaintiffs and the plaintiff class—suffer an outright denial of their right to vote because of the Secretary's absentee ballot restrictions.

Plaintiffs are entitled to summary judgment and the Secretary's motion should be denied.

COUNTERSTATEMENT OF FACTS

I. Ohio Excludes Late-Jailed Voters From Voting Opportunities Offered to Others.

Most Ohio voters, but not late-jailed voters, are provided the opportunity to request and cast an absentee ballot up until the Monday immediately preceding an election. Ohio voters who miss the deadlines to request mailed absentee ballots may simultaneously request and cast an absentee ballot in person until 2 P.M. on the Monday preceding Election Day. Doc. 55-34 at 5-5–5-7. Late-jailed voters cannot leave prison to vote absentee in person in the days preceding the election. *See, e.g.*, Doc. 55-11 (Roy Dep.) at 81:24-82:6. Moreover, most Ohio voters, but not late-jailed voters, can return their completed absentee ballots in person on Election Day if there is insufficient time for them to be returned by mail. *See* Ohio Rev. Code Ann. § 3509.05(A). And most Ohio voters, but not late-jailed voters, can vote in person at the polls on Election Day.

Jailed voters have one mechanism to vote—by submitting a request for a "confined elector" absentee ballot by the absentee ballot application deadline: 6 P.M. Friday (for application requests made in person) or noon Saturday (for requests made by mail) the weekend before an election. *See, e.g.*, *id.* § 3509.08. This means that voters jailed after—and as a practical matter in the days before—these deadlines have *no* mechanism to vote.

By contrast—in the same "confined elector" statute that addresses jailed voters—Ohio law extends special absentee ballot access to voters if they or their children are hospitalized after the noon Saturday deadline to request delivery of an absentee ballot. Those voters have until 3 P.M. on Election Day to request an absentee ballot. *Id.* § 3509.08(B)(2). Employees of the county

Boards of Elections hand deliver many of these ballots to the various county hospitals on Election Day, sometimes into the early morning hours after the polls have closed. *See, e.g.*, Doc. 55-7 (Royer Dep.) at 41:21-42:3. Ohio law extends no similar access to late-jailed voters.

II. Other States Provide More Flexible Absentee Voting Opportunities that Better Accommodate Late-Jailed Voters.

Other states have taken steps to shrink the window between the regular absentee ballot application deadline and Election Day, minimizing the risk of disenfranchisement for late-jailed voters. For example, Alaska allows voters to receive an absentee ballot via electronic transmission so long as the request is made by 5:00 P.M. the day before an election. Alaska Stat. §§ 15.20.01, 15.20.081. In Delaware, Massachusetts, and Montana, absentee ballot applications can be requested by any voter until 12:00 P.M. the day before an election. Del. Code § 5503(a); Mass. Gen. Laws ch. 54 § 89; Mont. Code § 13-13-211(2)-(3). Minnesota, New York, North Dakota, and Vermont also permit any voter to apply for an absentee ballot up to the day before an election. Minn. Stat § 203B.04(2); N.Y. Elec. Law §§ 8-400, 11-308; N.D. Cent. Code § 16.1-07-05; Vt. Stat. Tit. 17, §§ 2531, 2538. Maryland permits any voter to request an absentee ballot until the polls close on Election Day. Md. Elec. Law § 9-305(c).

Still other states, recognizing the risk of vote denial to voters in the days immediately preceding an election, have expansive emergency ballot procedures. Arizona allows voters who experience "any unforeseen circumstances that would prevent the elector from voting at the polls" between 5:00 P.M. on the Friday preceding the election and 5:00 P.M. on the Monday preceding the election to vote in the manner prescribed by their county's election official. Ariz. Stat. §§ 16-542(H), 16-549. In Florida, a voter may send a designated representative to pick up a ballot in person as late as Election Day, provided that they provide a reason for the emergency if the ballot is picked up on Election Day. Fla. Stat. Ann. § 101.62(4)(c). Similarly, North Dakota allows a

voter to designate a representative to pick up and return a ballot on his or her behalf for any "emergency" so long as the ballot is returned by 4:00 P.M. on Election Day. N.D. Cent. Code § 16.1-07-05. Hawaii permits county clerks to make exceptions for absentee ballot requests made after the application deadline in "special cases," as determined by the clerk. Haw. Code § 15-4; Haw. Admin. R. 3-174-2 (allowing oral requests for absentee ballots in emergency situations). Idaho voters facing an emergency preventing them from voting on Election Day may request an emergency absentee ballot during the 96-hour period prior to the close of polls on Election Day. Idaho Code § 34-1002(7) (noting that the procedure for requesting and delivering emergency ballots is left to the discretion of the county clerks). Nevada voters who are "called away from home" after the regular absentee ballot request deadline may submit a written request for an emergency absentee ballot to their county clerk by 5:00 P.M. on Election Day. Nev. Rev. Stat. § 293.316. And, in Rhode Island, emergency ballots are available to voters who cannot vote in person, can be picked up by a representative, and will be counted so long as they are returned by the close of polls on Election Day. R.I. Gen. Laws §§ 17-20-2.2, 17-20-2.

ARGUMENT

I. The Fact that Other Voters Are Not Disenfranchised Does Not Make the Disenfranchisement of Late-Jailed Voters Constitutional.

As Plaintiffs explained in their Motion for Summary Judgment, Doc. 55, Ohio unconstitutionally denies Plaintiffs and those similarly situated the right to vote by physically detaining them and simultaneously providing no means for them to access a ballot. This is a violation of Plaintiffs' fundamental right to vote that cannot satisfy any level of constitutional scrutiny. Plaintiffs are entitled to summary judgment.

The Secretary does not dispute that late-jailed voters face "an insurmountable barrier to the right to vote." Doc. 54 at 14. Yet, he contends that this Court should not "inappropriately zero[ ]

in on Plaintiffs or other late-jailed individuals," Doc. 54 at 18, and that the relevant question is whether "the absentee-ballot deadline imposes" an unconstitutional "burden on the voting opportunities available to *all* Ohioans." *Id.* (emphasis in original). This makes no sense. Plaintiffs are not mounting a facial challenge to Ohio's absentee ballot deadlines—they are (1) bringing an as-applied challenge based upon the unique burdens imposed on an identifiable class of voters and (2) requesting relief for only those uniquely affected voters. This is precisely the type of challenge the Supreme Court has endorsed. In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (cited by the Secretary at Doc. 54 at 16), the three-justice lead opinion concluded that a statewide injunction against Indiana's photo ID law was inappropriate, but noted that an as-applied challenge could proceed if the law were shown to cause a special burden on particular voters, *id.* at 199-203 (opinion of Stevens, J., joined by Roberts, C.J., & Kennedy, J.). Three justices dissented, and would have held the law facially unconstitutional in all its applications based upon the harms posed to particular voters most likely to be affected—"[p]oor, old, and disabled voters." *Id.* at 209, 212 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 237 (Breyer, J., dissenting). Only three justices—Justices Scalia, Thomas, and Alito—would have disregarded the unique burdens imposed upon particular voters in conducting the constitutional analysis. *Id.* at 205 (Scalia, J., concurring). In *Crawford*, a majority of the Court—six justices—concluded that courts *should* consider the unique burdens a generally-applicable law places on particular voters; the justices simply disagreed on whether narrow or broad relief could be granted on that basis.

The Secretary is wrong to contend that the Court should ignore the burden—outright vote denial—faced by Plaintiffs and the plaintiff class, and instead examine only the general burden posed by Ohio's absentee ballot deadline on *all* voters. The Secretary relies upon Justice Scalia's concurring opinion in *Crawford*, but as noted above, Justice Scalia's one-size-fits-all approach

was rejected by the majority of the Court. And the Secretary's reliance on other cases in which courts have assessed the overall effect of various laws on all voters is similarly misplaced. None of those cases involved an outright denial of the right to vote, as Plaintiffs face here. *See* Doc. 54 at 15-16; *Burdick v. Takushi*, 504 U.S. 428, 438-39 (1992) (upholding Hawaii's law excluding write-in vote option notwithstanding plaintiff's desire to cast a protest vote for "Donald Duck"); *Clingman v. Beaver*, 544 U.S. 581, 590-91 (2005) (concluding that Oklahoma's semi-closed primary did not unduly burden Libertarian Party which wanted all voters to participate in its primary because voters could easily change parties and "with only nominal effort [ ] are free to vote in the [Libertarian Party] primary"); *Ohio Council 8 Am. Fed'n of State, Cty. & Mun. Emps. v. Husted*, 814 F.3d 329 (6th Cir. 2016) (upholding law precluding inclusion of party affiliation of judicial candidates on ballot). The Secretary cites no case in which courts have declined to consider the particular harms of voters who are uniquely—and completely—denied their fundamental right to vote.

Moreover, the Sixth Circuit has expressly approved as-applied undue burden challenges to election laws, and analyzed the particular burden posed on impacted plaintiffs. *See, e.g.*, *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 573-74, 577 (6th Cir. 2016) (addressing as-applied ballot-access challenge by minor parties and assessing particular burden on minor parties compared to major parties); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 691-92 (6th Cir. 2015) (noting that plaintiffs can raise facial or as-applied challenges to burdens posed by election laws). Other Circuits have followed suit. *See, e.g.*, *Brakebill v. Jaeger*, No. 18-1725, 2019 U.S. App. LEXIS 22766, at *7 (8th Cir. July 31, 2019) (noting that district court could "require[ ] the plaintiffs to proceed with as-applied challenges [to voter ID law] based on their individual circumstances" and grant "narrower relief" than statewide injunction); *Frank v. Walker*, 819 F.3d

384, 386 (7th Cir. 2016) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily."); *id.* at 386-87 (approving as-applied challenge seeking "to protect the voting rights of those who encounter high hurdles" through narrower relief than statewide injunction).

This case concerns the outright denial of the fundamental right to vote to an identifiable class of eligible Ohio voters who are actively prevented from exercising the franchise as a result of the combination of their detention by the State and the Secretary's failure to provide them access to a ballot. *See* (Def.'s Resp. to Pl.'s 2nd RFAs No. 15); *but see* Doc 55-13 (creating an exception to the absentee ballot request deadline for voters with disabilities hospitalized out-of-county). Under the Supreme Court's, the Sixth Circuit's, and other Circuits' precedent, the question is whether *Plaintiffs'* right to vote is unconstitutionally burdened, not whether "99% of other [non-jailed] people" can readily vote notwithstanding the absentee ballot deadline. *Frank*, 819 F.3d at 386.

The evidence in this case demonstrates that Plaintiffs and the plaintiff class are eligible voters under Ohio law, yet Ohio law currently prevents them from exercising their constitutional right to vote. *See generally* Doc. 55 at 1-6. The Secretary has not provided any evidence or argument suggesting that late-jailed voters are under some legal disability that affects their eligibility to vote in Ohio. Nor has the Secretary argued that Plaintiffs and other late-jailed voters have *any* method of legally requesting and casting a ballot during their detention. In fact, the Secretary has conceded that both of the named Plaintiffs, Mr. Mays and Mr. Nelson, were eligible, registered voters during the 2018 general election, and that there is no mechanism under Ohio law that would permit late-jailed voters like Plaintiffs Mays and Nelson to request, receive, or cast a ballot. (TRO) at 1, Doc. 12; Doc. 55-9 (Mays Dep.) at 50:10-14; Doc. 55-8 (Nelson Dep.) at 15:17-

17:3; Doc. 55-4 (Seskes Dep.) at 105:21-24, 111:22-112:2; Doc. 55-14 (Def.'s Resp. to Pl.'s 2nd RFAs No. 15). This is despite the fact that Boards of Election routinely make trips to jails to deliver ballots to incarcerated voters as late as the day before Election Day, and that they are able to fulfill requests for absentee ballots made by late-hospitalized voters as late as 3:00 P.M. on Election Day. Doc. 55-7 (Royer Dep.) at 69:22-70:21, 82:25-83:11, 84:14-22; *see also* Ohio Rev. Code Ann. § 3509.08(B)(2).

Rather than contest Plaintiffs' claims on the merits, the Secretary instead points to a variety of other methods of casting a ballot that are generally available to Ohio voters, Doc. 54 at 5-7—methods he has acknowledged are *not* available to late-jailed voters. Doc. 55-14 (Def.'s Resp. to Pl.'s 2nd RFAs No. 15); Doc. 55-4 (Seskes Dep.) at 105:21-24, 111:22-112:2. The Secretary's argument that Plaintiffs are requesting special treatment for late-jailed voters is inaccurate. Plaintiffs do not argue that Ohio is required to accommodate any "personal contingencies" that might lead "any voter to be suddenly called away and prevented from voting on Election Day," as the Secretary suggests. Doc. 54 at 3 (internal quotations omitted). The examples the Secretary provides, such as unexpected work-related travel or a death in the family, are inapposite to the circumstances faced by Plaintiffs and other late-jailed voters, who are prevented from voting due to actions by the state, not a non-government, third party or self-imposed obstacle.

Although the state is not required to accommodate every possible eventuality that might prevent a voter from reaching their polling place on Election Day, when state law results in complete vote denial to individuals in the custody of the state, the Constitution requires the state to provide those voters a mechanism to cast a ballot. *See O'Brien*, 414 U.S. at 533 (Marshall, J., concurring) ("Nor can it be contended that denial of absentee ballots to [jailed voters] does not deprive them of their right to vote any more than it deprives others who may 'similarly' find it

'impracticable' to get to the polls on election day; here, it is the State which is both physically preventing appellants from going to the polls and denying them alternative means of casting their ballots.") (internal citations omitted).[1] The Secretary makes no attempt to square his argument with this Supreme Court precedent.

The Secretary's cavalier discussion of the outright denial of the franchise to eligible voters is particularly troubling given that most members of the plaintiff class are being held in pre-trial detention and remain under a presumption of innocence, with many in custody on Election Day solely because they cannot afford the cost of bail. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966). When a law effectively bars a particular class of eligible voters from exercising their right to vote, the Court's constitutional inquiry must focus on those voters, not *unaffected* voters who happen to outnumber the affected voters. Here, Plaintiffs are entitled to summary judgment because Ohio law operates as an outright denial of their right to vote, an outcome the Constitution forbids.

---

[1] The Secretary's reliance on *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 811 (1969) is misplaced. *See, e.g.*, Doc. 54 at 4, 33. As the Supreme Court subsequently explained in *O'Brien*, the plaintiffs in *McDonald* failed to adequately establish that the Illinois law being challenged resulted in a complete denial of the right to vote. *O'Brien*, 414 U.S. at 529. In deciding *O'Brien*, the Supreme Court noted that the chief deficiency in the *McDonald* plaintiffs' argument was a lack of evidentiary support for their position. Conversely, the *O'Brien* plaintiffs had demonstrated through a detailed evidentiary record that New York's refusal to provide detainees with absentee ballots was tantamount to a complete denial of the right to vote; the Supreme Court distinguished its decision in *McDonald* on that basis. *Id.* at 529-30; *see also Goosby v. Osser*, 409 U.S. 512, 521 (1973) (reversing denial of jailed voters' suit because "unlike the appellants in *McDonald*, the Pennsylvania statutory scheme absolutely prohibits them from voting"). Here, just as in *O'Brien*, Plaintiffs have provided this Court with an ample evidentiary record demonstrating that Ohio's absentee ballot law and policies result in the complete denial of late-jailed voters' right to vote. (Pl.'s Mot. for Summ. J. 9-18); (TRO) at 1, ECF No. 12.

The distinction between *McDonald* and *O'Brien*—which applies here—is also why the Secretary's argument that rational basis applies to all absentee ballot laws fails. Doc. 54 at 12. That may be generally true. *But see Martin v. Kemp*, 341 F.Supp.3d 1326, 1338 (N.D. Ga. 2018) ("[O]nce the state creates an absentee voting regime, they must administer it in accordance with the Constitution.") (internal quotation marks omitted). But it is not the case here because "[d]enial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to these appellants." *O'Brien*, 414 U.S at 533.

II. The Number of Affected Voters Does Not Affect the Constitutional Analysis.

The denial of Plaintiffs' and the plaintiff class's right to vote is unconstitutional regardless of how many late-jailed voters are affected during any given election. The Secretary contends that the number of disenfranchised voters is low, quibbling with Plaintiffs' expert's conclusions. Doc. 54 at 18-23. Likewise, the Secretary contends that the burden will not likely reoccur for any particular voter. *Id.* at 17. For these reasons, the Secretary posits that denying late-jailed voters the right to vote is constitutional. The Secretary's arguments are legally and factually wrong.

First, no matter how many late-jailed voters there are in any particular election cycle, the constitutional inquiry into Ohio's law and policies as applied to late-jailed voters remains unchanged. Every eligible citizen has a First and Fourteenth Amendment right to vote. *Stein v. Thomas*, 672 F. App'x 565, 569 (6th Cir. 2016); *Harper*, 383 U.S. at 665. As Judge Easterbrook explained in discussing the as-applied challenge to Wisconsin's photo ID law, "if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort," the as-applied challenge may succeed. *Frank*, 819 F.3d at 386. This is so because "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Id.* A state cannot disenfranchise a single voter or a subset of voters merely because the majority of voters are not disenfranchised.

The Secretary's contrary argument is without merit. The Secretary contends that even if the Court assesses the particular burdens faced by late-jailed voters (rather than Ohio voters generally), the record does not show there is a sufficient quantity of late-jailed voters to constitute a "heavy burden" on the right to vote. Doc. 54 at 18. But for every late-jailed voter—regardless of how many there are in total—Ohio's law creates the heaviest burden possible: vote denial. Plaintiffs are not asking the Court to invalidate Ohio's generally-applicable absentee ballot

deadline for all voters; they are only asking that relief be granted for late-jailed voters. Whether the Constitution requires that relief be provided for late-jailed voters does not turn on how many such voters exist in any given election year.

The Secretary's reliance on *Crawford* and *Northeast Ohio Coalition for the Homeless* to contend that a large and quantified number of voters must be burdened, is misplaced. *See* Doc. 54 at 16-17. In both cases, the plaintiffs sought a statewide injunction against the challenged laws, which would invalidate the laws as applied to *all* voters, based on allegations that a particular subset of voters were particularly burdened. *See Crawford*, 553 U.S. at 199-200 (acknowledging "somewhat heavier burden on a limited number of persons" but holding that "even assuming that burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief [(*i.e.*, a statewide injunction against the law in *all* its applications)] they seek in this litigation"); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016) (reversing injunction against *all* applications of statutory provisions based upon burden faced by unquantified number of voters without a home and voters with limited literacy skills). Thus, those courts noted the importance of quantifying the number of affected voters and demonstrating a heavy burden sufficient to warrant enjoining an election law in all its applications, even as applied to those unburdened by the law.

Unlike the plaintiffs in *Crawford* and *Northeast Coalition for the Homeless*, Plaintiffs here do not ask the Court to facially invalidate the law they are challenging in all its applications. Ohio's absentee ballot application deadline will continue to apply for the bulk of Ohio voters for whom it does not pose a burden. Instead, Plaintiffs seek narrow, as-applied relief that will remedy the extreme burden—an outright denial of the right to vote—that Ohio law imposes on them. For late-jailed voters—whatever their precise number—judicial relief is required to permit them any

opportunity to vote. The burden these voters face on their fundamental right to vote could not be greater, and the requested relief could not be more narrowly tailored.[2] The concerns of the *Crawford* and *Northeast Coalition for the Homeless* Courts cited by the Secretary do not apply here.

Second, the Secretary's belabored criticism of Plaintiffs' expert Dr. Salling's analysis of the number of affected voters is misplaced. As explained above, the precise number of late-jailed voters affected is legally irrelevant because relief is only being sought as-applied to affected voters. The number of affected voters is, therefore, not a *material* dispute of fact and does not affect Plaintiffs' entitlement to summary judgment. Moreover, despite the Secretary's contention that Plaintiffs have only proven that "two individuals" are impacted by this policy, Doc. 54 at 22, there is no genuine dispute that there are a substantial number of impacted late-jailed voters in Ohio in each election—indeed, the Secretary did not challenge that Rule 23's numerosity requirement was satisfied in this case, *see* Doc. 35 at 11. Nor could he. Publicly available booking data showing the arrest of thousands in the days preceding any given Election Day and voter registration rates alone make that proposition obvious.

But in any event, the Secretary's criticisms of Dr. Salling's report are wrong. The Secretary identifies three supposed "methodological flaws" that he contends invalidate the analysis, but none is problematic. Doc. 54 at 19-20. First, Dr. Salling used a dataset that was prepared by a third-party that matched individuals between public booking data and voter registration data. *See* Doc.

[2] Beyond the fact that the right to vote is a fundamental, individual right possessed by each citizen of the United States, which forms the bedrock of our democratic constitutional system, each vote matters to the outcome of elections. As former Secretary of State Husted rightly pointed out, "[t]he nearly 200 elections that have been decided by one vote or tied" underscore the fact that "one vote really does make a difference." Ex. A, Press Release, Ohio Sec'y of State, Secretary Husted: A Single Vote Makes All the Difference (June 14, 2018), Doc. 139-5, *Ohio A. Phillip Randolph Inst. v. Husted*, 2:16-cv-00303-GCS-EPD, 350 F. Supp. 3d 662 (S.D. Ohio 2018) (noting that in just the first six months of 2018, 59 local elections were decided by a single vote or tied).

30-1 at 4 & n.4. The Secretary argues this was improper because Dr. Salling did not see the matching algorithm that third-party used. Doc. 54 at 19. But that dataset was prepared by a company that specializes in matching data to voter registration records and an expert may rely upon reliable third-parties to obtain facts for his analysis. *See* Resp. to Mot. to Exclude. Next, the Secretary complains that Dr. Salling used a national voter registration database instead of an Ohio database (Doc. 54 at 19), but the Ohio data in the registration database is the publicly available voter file from the Ohio Secretary of State. *See id*. Finally, Dr. Salling's analysis relied on a 13-county sample of actual data that the Secretary contends Dr. Salling admitted was biased, doc. 54 at 19-20, but Dr. Salling actually testified that he believes the sample was representative, doc. 50-1 at 91:19-96:2, 157:7-18. The Secretary also argues that Dr. Salling's numbers were inflated (Doc. 54 at 20), but Dr. Salling's analysis was quite conservative. The Secretary argues that by choosing the 11 most populous counties in Ohio as part of the sample, that somehow inflates the final number of affected voters (Doc. 54 at 21), but Dr. Salling's methods reach a final estimate by *comparative* population size, so the larger population size of the counties in the sample is controlled for. See Doc. 30-1 at 4. Indeed, by including most populous counties in the sample, Dr. Salling ensures the greatest percentage of the population is accounted for by actual, rather than estimated, data. The Secretary also argues that Dr. Salling improperly assumed all affected persons intended to vote, were new arrests rather than transfers, and included persons arrested earlier on Friday than 6 P.M. or released on Election Day earlier than 3 P.M. Doc. 54 at 21. But all of these are minor controls that would have little impact on Dr. Salling's final tally—and are all still persons who almost certainly lost the opportunity to vote due to circumstances related to their arrests.

III. Late-Jailed Voters Are Similarly Situated to Late-Hospitalized Voters, and as a Result, the Fourteenth Amendment Requires They Receive Equal Treatment.

The Secretary's defense against Plaintiffs' Equal Protection claim must fail because he mischaracterizes (1) the Equal Protection Clause's reach when a state law discriminatorily distributes individual rights protected by the Constitution and (2) Ohio's absentee ballot laws.

The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). And when state laws and procedures impinge on personal rights protected by the Constitution, such as the right to vote, the state does not enjoy "the deference [it is] usually given." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969). When a law or procedure establishes a classification that "jeopardizes exercise of a fundamental right," a "heightened review" is employed. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper*, 383 U.S. at 670; *Carrington v. Rash*, 380 U.S. 89 (1965). Like other cases involving a state law selectively distributing the franchise, Ohio law must be given "close and exacting examination," as "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer*, 395 U.S. at 626.

The Secretary contends, citing *Obama for America v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012), that late-jailed voters and late-hospitalized voters are not alike "in all relevant respects," Doc. 54 at 32, and therefore Plaintiffs' equal protection challenge cannot succeed. But *Obama for America* supports Plaintiffs' position. In *Obama for America*, the Sixth Circuit affirmed the district court's grant of a preliminary injunction based upon its conclusion that Ohio violated the Equal Protection Clause by granting more time for in-person absentee ballot voting to military service-

members than to voters at large. 697 F.3d at 435-36. The court reasoned that although their absence from the country ordinarily makes military members unique, there was no distinction between military and non-military voters when it came to in-person absentee voting. *Id.* at 435. Although the state contended that "military voters need extra early voting time because they could be suddenly deployed," and thus otherwise miss their chance to vote on Election Day, this possibility was not materially different from the exigencies any voter faced. *Id.* ("At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters, and other first responders could be suddenly called to serve at a moment's notice. There is no reason to provide these voters with fewer opportunities to vote than military voters, particularly when there is no evidence that local boards of elections will be unable to cope with more early voters."). The court's conclusion was that the exigencies faced by non-military voters—though different in type—were not different in a *relevant* way. The same logic applies to late-jailed voters and late-hospitalized voters.

The Secretary does not explain what *relevant* difference exists between late-jailed and late-hospitalized voters to warrant offering the latter more voting opportunities than the former. Ohio law refers to two types of voters—jailed and hospitalized voters—as "confined voters." Ohio Rev. Code Ann. § 3509.08(A) (discussing how eligible voters "confine[d] in a jail or workhouse" can obtain an absentee ballot); *id.* at § 3509.08(B)(1) (discussing how eligible voters "confined in a hospital" or whose minor children are "confined in a hospital" may obtain an absentee ballot). Late-jailed voters who are arrested and held through Election Day lose the ability to vote for the same reason as voters who are late-hospitalized—they are physically unable to vote in-person on Election Day as a result of unforeseeable confinement.[3] However, under Ohio law only late-

[3] The Court need not consider whether *other* categories of voters, such as those involved in traffic accidents, called away on business, or traveling to attend a family funeral, must also be provided access to emergency

hospitalized voters are able to apply for an absentee ballot after the regular deadline has passed up until 3 P.M. on the day of an election. *Id.* at § 3509.08(B)(2). In trying to distinguish late-hospitalized from late-jailed voters, the Secretary observes that "[h]ospitals provide healthcare services and patients paying for these services are free to leave at any time." Doc. 54 at 37. But this cuts against the Secretary's analysis. Because late-jailed voters are *not* free to leave at any time to go to the polls due to government detention, there is all the more reason why jailed voters must be extended at least the same opportunities provided late-hospitalized voters.

The Secretary also posits—with no evidentiary support—that it is easier to access a hospital because Board of Elections employees can "simply go to the front desk, ask for a [hospitalized] voter's location, and then readily gain access to the voter." Doc. 54 at 37. Hospitals are not hotels, and their patients are not simply lounging stationary in rooms. Anyone who has tried to visit a patient in a hospital, has themselves been admitted to a hospital, or has even watched an episode of ER is aware that patients are frequently moved around for tests, procedures, surgeries, *etc.*, without by-the-minute tracking by the front desk personnel. Indeed, the evidence shows that the Board of Elections employees must roam the halls of the hospitals to locate voters. *See* Doc 55-7 (Royer Dep.) at 41:21-42:24 (testifying that hospital voting can take until 4 A.M. to complete in Franklin County, where there are "a lot of hospitals," because "there may be more than five or six in a hospital, and they are on every floor"). By contrast, the record shows that jails frequently have the inmates all come to one place to vote, that there are multiple scheduled times throughout the day when voting is convenient because the inmates are otherwise on lockdown, that difficulty

absentee ballots on terms equal to hospitalized voters. Whether those voters are similar in all relevant respects is not an issue before the Court. Furthermore, many of those voters are likely *not* similar in all relevant respects because they are scattered across the county, state, or country rather than in a set number of identifiable locations that election officials already know and visit during the election cycle.

locating an inmate is rare, and there have been no security incidents in administering voting for inmates. *See, e.g.*, Doc. 55-22 (Saxon Dep.) at 77:14-80:4; Doc. 55-27 (Fisher Dep.) at 61:17-62:7; 65:9-19. Certainly, the Secretary cannot obtain summary judgment on his own say-so, citing no record evidence while contradicting the record evidence.

As a legal matter, the fact that illness or injury causes one confinement and physical detention causes the other is of no relevance. And, the fact that Ohio election statutes and policies discriminate between categories of confined electors is wholly arbitrary, or worse, invidious. Indeed, the Secretary's only real justification in support of limiting the additional voting access to hospitalized voters is his contention that the group is "particularly worthy of a special deadline exception." Doc. 54 at 35. This admission is telling. As far as the Constitution is concerned, people who are arrested and confined—typically under a presumption of innocence—are no less worthy of access to voting than are those who are hospitalized. *See Obama for Am.*, 697 F.3d at 435 ("While we readily acknowledge the need to provide military voters more time to vote, we see no corresponding justification for giving others less time.").

The fact that extending equal protection to late-jailed voters would "add[ ] yet another process onto election day," Doc. 54 at 35 (quoting (Poland Dep.) at 49:10-50:7), does not make late-jailed voters differently situated, for equal protection purposes, than late-hospitalized voters. In *O'Brien*, the Supreme Court granted an equal protection challenge brought by jailed voters wherein in-county jailed voters were treated less favorably than out-of-county jailed voters. 414 U.S. at 529 ("Although neither is under any legal bar to voting, one of them can vote by absentee ballot and the other cannot.").[4] Providing absentee ballots to in-county jailed voters undoubtedly

[4] In *O'Brien*, the Court also noted that in-county jailed voters were treated differently than those in hospitals or unable to vote in person due to illness or disability. 414 U.S. at 526.

added another population of voters for election officials to accommodate but that was not the relevant question. As the Sixth Circuit has explained, it would be "worrisome . . . if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges." *Obama for Am.*, 697 F.3d at 435. The state picking and choosing amongst similarly situated voters—confined electors—as to whom to dole out voting privileges is precisely what is at issue in this case.

Ohio's arbitrary distinction between equally qualified and similarly situated electors—*i.e.*, late-jailed and late-hospitalized voters—is both unjustifiable and unconstitutional. The disenfranchisement forced upon late-jailed voters is rendered all the more indefensible by the fact that Ohio voters generally cast ballots between noon three days before an election and close of polls on Election Day.

III. The Secretary's Refusal to Provide Late-Jailed Voters with Absentee Ballots Serves No Compelling Interest.

Secretary LaRose contends that election officials cannot accommodate late-jailed voters because elections are "crazy busy" and describes the general workload and responsibilities of election officials in great detail. Doc. 54 at 24-28. No one doubts that the management of election is a difficult and significant task. However, if that alone were a sufficient reason for denying citizens the right to vote, there could be no limit of restrictions placed on the right to vote. Instead, the question is whether this complete denial of the right to vote to late-jailed voters—particularly in light of election officials' proven ability to administer absentee ballots for late-hospitalized voters through Election Day—is justified by any compelling election administration purpose. It is not and the Secretary provides no such justification.

The Secretary suggests that it is easier for election officials to assist late-hospitalized voters than late-jailed voters. *Id.* at 37-39. While this alone could not justify the complete denial of the

right to vote, his assertions also ignore the record developed in this case. The Secretary notes that the secure nature of jail facilities requires some additional work to provide clearance to election officials, monitor and bring jailed voters to election officials, and eliminate opportunities for contraband. But all that work—which is just part and parcel of everyday jail life—happens *regardless* of what day an election official visits a jail. These are burdens on the jails, not the election officials, and jail officials are no busier on Election Day than any other day. And jail officials were not aware of any security incidents that have occurred while facilitating voting in jails. *See, e.g.*, doc. 55-22 (Saxon Dep.) at 76:23-81:6. The Secretary cites testimony indicating that election officials can spend one or more hours assisting jailed voters and can sometimes have to wait for jailed voters to become available. Doc. 54 at 38. But this does not differentiate late-jailed voters from hospitalized voters, which is more time-consuming and involves a population that moves around in a facility and may not always be immediately available for voting.[5] *See, e.g.*, Doc. 55-16 (Poland Dep.) at 51:9-16. Notwithstanding these challenges, election officials have always made both hospitalized and jailed voting work. *See, e.g.*, Doc. 55-4 (Seskes Dep.) at 87:17-88:8, 128:5-14; Doc. 55-16 (Poland Dep.) at 56:14-57:3; Doc. 55-7 (Royer Dep.) at 42:4-13, 44:14-20; *see also* Doc. 55-16 (Poland Dep.) at 45:20-46:14.

While the Secretary brazenly proclaims that "[i]f Boards were forced to treat late-jailed individuals the same as hospitalized voters, the Boards could not cope," Doc. 54 at 28,[6] that assertion is not supported by the record. The Secretary cites only a few statements by officials that

[5] Moreover, this case does not raise the question of whether election officials must wait for a late-jailed voter if he or she is unavailable at the time of delivery. It only raises the question of whether election officials must process their application, creating an *opportunity* for them to cast a ballot.

[6] This assertion of extraordinary burden is at odds with the Secretary's alternative defense that a vanishingly small number of voters are affected by this restriction. Doc. 54 at 23. As discussed *supra* and *infra*, neither is supported by the record.

the change would require some additional resources or would be "difficult," as many election administration tasks are (including voting for late-hospitalized voters). *Id.* However, the record establishes—without any material dispute—that Boards could assuredly "cope" with a requirement to provide late-jailed voters a means to cast a ballot. *See* Doc. 55 at 18-20 (detailing record evidence of feasibility); Doc. 54 at 35 (citing election official's testimony that "[i]f that became the law in Ohio, we would comply and obtain whatever resources necessary to do that"). Indeed, no election official that testified during this case has suggested that they could not accommodate late-jailed voters or that such a rule would derail "an efficient and orderly election." Doc. 34 at 29.[7]

CONCLUSION

This is a straightforward case. It is undisputed that Ohio law denies late-jailed voters who did not cast an absentee ballot prior to their period of confinement the ability to vote. This outright denial of the right to vote is unconstitutional. Plaintiffs' Motion for Summary Judgment should be granted and the Secretary's should be denied.

[7] Ohio's Boards of Elections already receive absent voter's ballots from noon three days before an election until the close of polls on Election Day, so accommodating late-jailed voters would not categorically change how Boards of Elections handle and count absentee ballots. It is only the *application* deadline for an absent voter's ballot, which Ohio has extended for late-hospitalized voters, that Plaintiffs request be extended to the one other group of confined electors: late-jailed voters. In practice, that would only mean that election officials would need to (1) continue processing applications until 3 P.M. on Election Day and (2) shift the day they visit the jails to Election Day itself. Even though election officials deliver absentee ballots to jails after the absentee ballot deadline, those officials are currently barred by state law from delivering applications and ballots to those voters who have been detained after the absentee ballot request deadline.

Dated: August 16, 2019

Respectfully submitted,

Mark P. Gaber*
Danielle M. Lang*
Jonathan M. Diaz*
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC, 20005
(202) 736-2200
mgaber@campaignlegalcenter.org
dlang@campaignlegalcenter.org
jdiaz@campaignlegalcenter.org

Locke E. Bowman*
Alexa Van Brunt*
Laura C. Bishop*
RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-1271
l-bowman@law.northwestern.edu
a-vanbrunt@law.northwestern.edu
laura.bishop@law.northwestern.edu

/s/ Naila S. Awan
Naila S. Awan, Trial Attorney (0088147)
Kathryn C. Sadasivan*
DĒMOS
80 Broad Street, 4th Floor
New York, NY 10004
(212) 485-6065
nawan@demos.org
ksadasivan@demos.org

Chiraag Bains*†
DĒMOS
740 6th Street NW, 2nd Floor
Washington, DC 20001
(202) 864-2746
cbains@demos.org

Attorneys for Plaintiffs

**admitted* pro hac vice
†*admitted to practice only in Massachusetts; practice limited pursuant to D.C. App. R. 49(c)(3)*

CERTIFICATE OF SERVICE

The foregoing was filed this 16th day of August, 2019 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

/s/ Naila S. Awan

Naila S. Awan (0088147)