

**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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

In the Secretary's words, Plaintiffs face "an insurmountable barrier to the right to vote." Doc. 54 at 14. To remedy that wrong, Plaintiffs seek targeted, as-applied relief for late-jailed voters like themselves, who are precluded from voting because of their restraint in the state's custody. Plaintiffs do not seek to alter Ohio's generally applicable absentee ballot application deadline for the vast majority of voters. Instead, they ask this Court to merely provide a relief valve for a readily identifiable class of voters held in the state's custody and disenfranchised by operation of state law. That relief valve is tried and tested in Ohio. And the Constitution requires it.

The Secretary calls this a "blinkerred" "litigation tactic" Doc. 64 at 2, 4. While admitting that Ohio prevents Plaintiffs from voting, the Secretary contends that Plaintiffs cannot obtain relief because the majority of Ohioans are *not* physically detained by the state, and for non-jailed voters, the absentee ballot application deadline does not place a severe burden on the right to vote. In the Secretary's view, this Court should not assess the burden from the perspective of the voters for whom relief is sought, but should instead assess the burden from the perspective of those for whom

relief is *not* sought and who would remain subject to the regular absentee ballot application deadline if Plaintiffs prevailed. The Secretary is wrong on the law and the undisputed facts, and the Court should grant Plaintiffs summary judgment.

ARGUMENT

I. As Applied to the Plaintiffs and Proposed Plaintiff Class, Ohio Law Imposes an Insurmountable Barrier to the Right to Vote.

As the Secretary has conceded, Ohio law imposes “an insurmountable barrier to the right to vote” for Plaintiffs and members of the proposed Plaintiff Class. Doc. 54 at 14. The Plaintiff Class is uniquely affected by the state’s absentee ballot application deadline, because in combination with their detention by the state, that deadline constitutes an outright denial of the right to vote. The severity of that burden is obvious, and the Constitution compels a remedy. The remedy Plaintiffs seek is narrow and targeted, disrupting Ohio’s absentee ballot system only to the minimal extent necessary to afford the Plaintiff Class the right to vote, based upon an emergency absentee ballot system already administered by the state for a similarly situated group of burdened voters—those who are, or whose minor children are, hospitalized after the absentee ballot application deadline (“late-hospitalized voters”).

The Secretary contends that this Court is powerless to remedy the “insurmountable barrier” to voting experienced by members of the Plaintiff Class because *other* voters are not affected, and the group of unaffected voters is more numerous than the group of affected voters. Yet in each of the cases the Secretary relied upon to advance this argument, the plaintiffs brought facial challenges seeking to enjoin a statute in *all* its applications, even as applied to voters who were unburdened by the law. *See Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181 (2008); *Ne. Ohio Coal. for the Homeless v. Husted* (“NEOCH”), 837 F.3d 612 (6th Cir. 2016). That is not the case here. In this case, Plaintiffs seek injunctive relief *only* for the affected voters, and *not* with respect

to those unaffected by this late-jailed scenario. *See* Doc. 55 at 39. That relief would leave in place Ohio’s absentee ballot deadline for most all Ohio voters, yet remedy the denial of the vote for the Plaintiff Class. As Plaintiffs explained in their opposition to the Secretary’s summary judgment motion, six Justices of the Supreme Court opined in *Crawford* that as-applied claims to election law burdens were appropriate, and the Sixth Circuit has adjudicated such claims in prior cases. *See* Doc. 65 at 5. As Seventh Circuit Judge Easterbrook has explained with respect 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 v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016). 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.* The Secretary’s repeated reliance on the *NEOCH* court’s “problematic at best, and prohibited at worst” comment, 837 F.3d at 631, is therefore misplaced because that court—in dicta—was referring to the use of a facial challenge to address the harm to a particularly burdened group of voters. Plaintiffs raise no such facial challenge here. The Secretary’s contention that a group of disenfranchised voters are powerless to obtain targeted judicial relief is completely foreign to constitutional law, and should be rejected.

Imagine if the Secretary’s theory of the case were correct. For example, a county board of elections could decide on the Monday before Election Day, because of budget shortfalls, to cancel Election Day voting at a particular precinct because most of its voters had cast their ballots early, effectively creating a Monday deadline for in-person voting for the precinct’s remaining voters. Under the Secretary’s view of the law, those voters could not obtain injunctive relief requiring that the precinct be open for voting on Election Day because Ohio’s practices as a whole provide *most* voters access to the ballot on Election Day, and provide all voters the opportunity to vote early in-

person or absentee-by-mail. The Secretary would compare such voters to those voters who get in car accidents on Election Day, are unexpectedly called away for work out-of-town, or have unexpected travel for family emergencies. He argues that it would be inappropriate for a court to “zero in on the [affected voters’] peculiar circumstances,” Doc. 64 at 5, and that, rather, courts must take “a holistic and systemic view . . . [in order to] appropriately weigh a deadline’s burden,” *id.* at 6. That position lacks merit. If the state is responsible for abridging a particular group’s access to the ballot, the state can be ordered to remedy that wrong for the particular group. For that reason, the Secretary’s position with respect to the Plaintiff Class makes no sense: they likewise experience an unexpected event by which the state abruptly forecloses their ability to vote on Election Day. The Court should reject the Secretary’s invitation to disregard Plaintiffs’ particular injury and the narrow scope of their requested relief and instead assess Ohio’s voting system as a whole. That is simply not how the law works.

The Secretary also contends that Plaintiffs have improperly focused on the “end-point” of voting, ignoring the opportunities to vote that preceded their arrest. *See* Doc. 64 at 5-8. For support, he cites two cases, *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973). Neither supports his position.

The Secretary describes *Burdick* as a case where “both parties agreed that the plaintiff would not be able to vote for his preferred candidate, who missed certain ballot-access deadlines.” Doc. 64 at 5. But contrary to the Secretary’s description, *Burdick* was not about a candidate who had “missed certain ballot-access deadlines.” Doc. 64 at 5. Indeed, there was no candidate in *Burdick*—the plaintiff was challenging the absence of a write-in vote option in Hawaii and asserted that “he is entitled to cast and Hawaii required to count a ‘protest vote’ for Donald Duck.” *Burdick*, 504 U.S. at 438. The Court rejected that position, reasoning that Hawaii’s ballot access provisions

provided sufficient opportunities for candidates to seek office, and thus for voters to support their preferred candidates. The Court also rejected the contention that the state was required to offer an opportunity to “vent” through casting a ballot, reasoning that “the function of the election process is ‘to winnow out and finally reject all but the chosen candidates.’” *Id.* (internal citations omitted). The Secretary’s conclusion about *Burdick*—that “[o]nly by allowing certain ballot-access deadlines to pass him by did plaintiff find himself unable to vote for his preferred candidate,” Doc. 64 at 5—is therefore wrong. The plaintiff in *Burdick* found himself unable to vote for his preferred candidate because his preferred candidate was *not real*.

In *Rosario*, the Court concluded that the New York law did not “absolutely disenfranchise” the plaintiffs, but rather “imposed a time deadline on their enrollment,” 410 U.S. at 757, which the state had an interest in enforcing to prevent inter-party raiding and thus to ensure the “preservation of the integrity of the electoral process,” *id.* at 761. Unlike in *Rosario*, Plaintiffs did not miss any deadlines that they were statutorily required to meet in order to cast a ballot. They registered to vote on time, and they were arrested prior to the deadline to cast a ballot—*i.e.*, 7:30 P.M. on Election Day. Doc. 3-1 (Mays Decl.) ¶¶ 3-5; Doc. 3-2 (Nelson Decl.) ¶¶ 2-4; Doc. 55-9 (Mays Dep.) at 11:22-12:1 & Errata Pages; Doc. 55-8 (Nelson Dep.) at 12:22-13:7, 56:20-25. Only their unexpected pre-Election Day arrest and detention by the state precluded their ability to vote on Election Day. Doc. 55-9 (Mays Dep.) at 54:15-55:5; Doc. 55-8 (Nelson Dep.) at 79:20-22.

The Secretary contends that “there is no constitutional right to an absentee ballot,” Doc. 54 at 12, but he cannot have it both ways. Voters are not *required* to cast pre-arrest absentee ballots—at least not where the state *itself* has physically detained the voter after the absentee ballot application deadline and held them through Election Day, causing them to be incapable of voting in person. *See O’Brien v. Skinner*, 414 U.S. 524 (1974) (recognizing claim for access to the ballot

in jail); *Goosby v. Osser*, 409 U.S. 512 (1973) (same). It appears to be the Secretary’s position that everyone is required to vote early to protect their right to vote. After all, no one is immune from an unexpected (and perhaps unjust) arrest. Secretary LaRose contends that anyone arrested after 6:00 P.M. the Friday before an election—while legally presumed innocent—can be properly denied the right to vote. Neither *Burdick* nor *Rosario* support the Secretary’s position that Plaintiffs cannot obtain relief in this case because they did not cast a ballot during any of the early voting days that preceded their arrests.

Indeed, the Secretary entirely misconceives Plaintiffs’ claim: Plaintiffs are not raising a general challenge to Ohio’s absentee ballot application deadline. They are challenging Ohio’s practice of holding the Plaintiff Class in detention—physically restraining them from voting at the polls on Election Day—while offering them “no alternative vehicle for voting.” *Obama for Am. v. Husted*, 697 F.3d 423, 439 (6th Cir. 2012) (White, J., concurring in part and dissenting in part). Contrary to the Secretary’s contention, this Court cannot blind itself to the very fact that gives rise to Plaintiffs’ disenfranchisement—the timing of their arrest—and pretend that Plaintiffs’ detention did not preclude them from voting because they could have voted prior to their detention. For that reason, the Secretary’s attempt to distinguish the Supreme Court’s holdings in *O’Brien* and *Goosby* fail. Plaintiffs here are absolutely barred from voting because of their arrests. The Constitution forbids that practice.

II. Ohio Has No Interest Sufficient to Justify Imposing an Insurmountable Barrier to Plaintiffs’ Right to Vote.

The “insurmountable barrier to the right to vote” the state erects for Plaintiffs should be the end of this case. Doc. 54 at 14. When the barrier to voting is insurmountable, close scrutiny applies. *Dunn v. Blumstein*, 405 U.S. 330, 357 (1972). The alleged administrative burdens the Secretary identifies are insufficient to survive close scrutiny given that the fundamental right to

vote is at stake and Plaintiffs' requested relief is tailored to address the disenfranchisement faced by Plaintiff Class. *See Dunn*, 405 U.S. 330 (holding the administrative convenience to the state of a durational residency requirement, which helped the state conclude which recent arrivals were properly residents as well as prevent fraud, was not the least restrictive means of achieving these goals and thus did not justify the presumptive exclusion from the franchise); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) ("The potential hardships that Georgia might experience are minor when balanced against the right to vote, a right that is essential to an effective democracy. In fact, the hardships that Georgia might suffer are minimized by the fact that the requested remedy is tailored to this particular circumstance."); *Bishop v. Lomenzo*, 350 F. Supp. 576, 587 (E.D.N.Y. 1972) ("Without minimizing the administrative burden upon the Board of Elections, we must not lose sight of the fact that we are here dealing with a most fundamental aspect of our free and democratic society -- the citizen's right to vote. When that is weighed in the balance against clerical inconvenience, the latter must give way."); *Affeldt v. Whitcomb*, 319 F. Supp. 69 (N.D. Ind. 1970) (quoting *Carrington v. Rush*, 380 U.S. 89, 96 (1965) for the same).

"The right . . . to choose' that [the Supreme Court] has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington*, 380 U.S. at 96 (internal citations omitted). Although the state does generally have "legitimate interests in maintaining [it's] election system," the state must "identify precise interests justifying this substantial burden" beyond a general interest in well-functioning elections in order to satisfy constitutional muster. *NEOCH v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012). As Plaintiffs demonstrated in their summary judgment motion, the record evidence shows that Ohio has—at most—a "remote administrative benefit" in sending a team of two board of elections staff members to conduct jail voting before Election Day, rather

than having them conduct jail voting in the afternoon on Election Day. *See* Doc. 55 at 30-31. But the Court need not resolve any minor factual disputes among the parties regarding the exact scope of the burden to rule that any alleged administrative burden fails to meet the high burden the state faces when the voting barrier imposed is “insurmountable.”

Nonetheless, the minimal administrative burden to the state is supported by substantial and un rebutted record evidence, *see* Doc. 55 at 20-22, 35-39, not “rank speculation [or Plaintiffs’] own say-so,” Doc. 64 at 10. As the official in charge of jail voting for Franklin County testified, the same two Board employees who now conduct jail voting on Monday could instead conduct jail voting on Election Day in order to accommodate late-jailed voters, without necessitating any further trips. Doc. 55-7 (Royer Dep.) at 74:7-75:4; 82:25-83:11, 84:14-22. And accommodating late-jailed voters is substantially easier than accommodating late-hospitalized voters. For example, the Franklin County official agreed it takes one-eleventh the amount of time to conduct jail voting as it does hospital voting. *Id.* 83:12-84:22.

Unchallenged evidence contradicts the Secretary’s contention in his opposition brief that “the boards have *never* attempted to administer Election Day voting for all late-incarcerated individuals.” Doc. 64 at 10. Before the Secretary advised that Ohio law prohibited it, the Hamilton County Board of Elections accommodated late-jailed voters in the 2008 presidential election. In an email exchange, the Hamilton County Elections Administrator said “[w]e can certainly accommodate any request that is sent to us up to and including election day. Last Presidential, we personally delivered a ballot on Election Day to a [jailed voter].” Ex. A (Poland Dep. Ex. 1).

Finally, the Secretary’s contention that “fiscal responsibility” is a sufficient justification for disenfranchising Plaintiffs is without merit. Although the Sixth Circuit noted that fiscal responsibility was a legitimate state interest in the context of upholding a statute reducing the

number of early voting days, *see Ohio Democratic Party v. Husted*, 834 F.3d 620, 634 n.8 (6th Cir. 2016), the Secretary cites no case supporting the proposition that the vague invocation of “fiscal responsibility” can justify an absolute bar on voting, as is the circumstance here. That is particularly so where the officials who actually run the jail voting process testified that the cost for shifting the process to Election Day would be minor.

The Secretary has no interest sufficient to justify denying Plaintiffs or Plaintiff Class their constitutional right to vote.

III. Plaintiffs’ Equal Protection Claim Succeeds Because Late-Jailed Voters Are Similarly Situated in All Relevant Ways to Late-Hospitalized Voters.

Plaintiffs’ equal protection claim also succeeds because late-jailed voters are similar to late-hospitalized voters, whom Ohio accommodates, in all material ways. *See* Doc. 55 at 34-35. And, those differences that do exist counsel in *favor* of the relief Plaintiffs seek. The Secretary contends that jails are more restrictive than hospitals because inmates are not free to leave, and have limited means to access information and to contact the outside world. Doc. 64 at 13. But the Secretary has not shown with any record evidence that these differences are material or that they translate to greater administrative difficulty in reaching late-jailed voters. *Id.* At the summary judgment stage, the non-moving party “cannot rest upon . . . its pleadings, but rather must set forth specific facts showing that there is genuine issue for trial.” *Jaszczynyn v. Advantage Health Physician Network*, 504 F. App’x 440, 446 (6th Cir. 2012) (internal citations omitted); Fed. R. Civ. P. 56; *see also Scott v. Harris*, 550 U.S. 372, 381 & n.8 (2007) (explaining that on summary judgment, a court must determine the relevant set of facts and draw all inferences in favor of the nonmoving party *to the extent supportable by the record*).

In fact, the record shows that differences between late-hospitalized and late-jailed voters only further illustrate the importance of a similar accommodation for late-jailed voters. It is

actually easier to locate and access individuals in a jail, where they are in their cells at defined times and their locations are monitored by jail staff, than patients in a hospital. *See* Doc. 65 at 16-18. To argue otherwise, the Secretary ignores the record evidence that Board of Elections officials have coordinated well with jail staff and are able to identify mutually workable times to conduct jail voting in an efficient manner. *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; Doc. 55-12 (Cavender Dep.) at 11:12-16:19. Thus, while the Secretary points to differences among late-jailed and late-hospitalized voters, he does not explain the relevance of these differences or establish how they have any relevance to an equal protection analysis.

The Secretary cannot defeat Plaintiffs’ equal protection claim by relying upon immaterial differences that exist outside the record, if at all, between late-jailed and late-hospitalized voters, and that on their face actually support a greater need for an accommodation for late-jailed voters.

IV. Plaintiffs’ Factual Assertions in Support of Their Requested Relief Do Not Create a New Claim for Relief but Rather Demonstrate Why Plaintiffs’ Proposed Remedy Is Necessary.

In their Motion for Summary Judgment, Plaintiffs outlined the obstacles that exist in county jails that prevent detained, but eligible, voters from being able to exercise their right to vote, even when they are incarcerated prior to the absentee ballot cut-off deadline. This was not to establish a new claim for relief or to broaden the class Plaintiffs seek to represent, as the Secretary suggests. Doc. 64 at 15-18.¹ Rather, Plaintiffs supplied this information to the Court to demonstrate why the relief they request is essential to affording members of Plaintiff Class—who are physically

¹ Plaintiffs have not asserted any *Monell* claims. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); Doc. 1 (Compl.), at 11-13; *compare* Doc. 55 (Pls.’ Mot. for Summ. J.), at 4-20, *with id.* at 21-37.

restrained from the polls by government officials, not by happenstance or the conduct of private actors—a meaningful opportunity to vote.

“Once invoked, the scope of a district court’s equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.” *Brown v. Plata*, 563 U.S. 493, 538 (2011) (internal citations omitted). If this Court finds that Ohio unconstitutionally denies late-jailed voters their right to vote, the Court should fashion a remedy that ensures that the unconstitutional denial does not simply continue *de facto* rather than *de jure*. In the voting context, courts routinely recognize that legal victories fail to provide meaningful access to the ballot absent tailored measures to educate voters and train officials. *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 256, 271-72 (5th Cir. 2016) (en banc) (noting “the State’s lackluster educational efforts resulted in additional burdens on Texas voters” and directing the district court to “consider the necessity of educational and training efforts” in fashioning a remedy for the affected voters); *Mo. St. Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 219 F. Supp. 3d 949, 962 (E.D. Mo. 2016) (requiring a “comprehensive voter education program” as part of Section 2 Voting Rights Act remedy); *United States v. Alabama*, 857 F. Supp. 2d 1236, 1243 (M.D. Ala. 2012) (“[M]erely extending the deadline, or agreeing to accept ballots after the State’s extended March 21 deadline, is ineffective if voters do not know that ballots sent by [the] election date and received by March 31 will actually be counted.”); *Georgia*, 892 F. Supp. 2d at 1376 (requiring a “public awareness campaign through direct notice and use of certain media” to remedy violation of the Uniformed and Overseas Citizens Absentee Voting Act of 1986).

The Secretary attempts to paint Plaintiffs’ targeted request for relief as micromanagement of the voting process. In fact, Plaintiffs only ask that this Court to order a remedy that translates to

real access to the ballot for late-jailed voters. To guarantee that late-jailed voters can exercise their right to vote, Plaintiffs have requested the Court order:

- (1) Secretary LaRose to issue a directive requiring boards of elections to coordinate with the jails within their jurisdiction to:
 - a) provide a sufficient supply of voter registration forms and regular and late-jailed absentee ballot applications to be distributed to those in jail custody;
 - b) coordinate the delivery of absentee ballot applications to the boards of elections through 3:00 P.M. on Election Day via email, fax, or other electronic means; and
 - c) coordinate for the delivery of absentee ballots to Ohio jails on Election Day.
- (2) Secretary LaRose to create an informational notice about voting options while in jail, disseminate the notice to all Ohio jails for posting in a central location along with a memorandum explaining all ordered changes in election procedures to jail officials, and circulate the notice to all boards of elections.
- (3) Secretary LaRose to designate a member of his election staff to be specifically responsible for overseeing and responding to questions regarding jail voting issues.
- (4) Secretary LaRose to make training available to jail staff and election officials regarding access to voting in jails.

That the Secretary calls this modest request for relief “pure fantasy” is troubling and only confirms the need for the relief Plaintiffs suggest.² Given the Secretary’s failure to take *any* steps

² The Secretary primarily attacks Plaintiffs’ request for relief to the extent that it goes beyond the extension of the absentee ballot application deadline for late-jailed voters to 3:00 P.M. on Election Day and the creation of a new absentee ballot application form for late-jailed voters (mirroring the form used for late-hospitalized voters and formulated by Secretary Husted in 2014 in response to the *Fair Elections Ohio* ruling). See Doc. 55-27. The Secretary’s only challenge to *that* relief is based on his merits positions, refuted above.

to provide education and training with respect to jail voting, Doc. 55 at 12, the demonstrated lack of consistent access provided by boards of elections, Doc. 55 at 12-20, and the actual misinformation that has been given to jailed voters, Doc. 55 at 15, Plaintiffs' request for a minimum education, training, and voter access component to this Court's remedial order is necessary and far from fantasy.

Plaintiffs' first request for relief is both clearly within the Secretary's competencies and would be necessary to effectuate late-jailed voting, as being able to request, receive, cast, and deliver a ballot are necessary if a late-jailed voter is to cast a ballot that counts. The ability to provide this relief is clearly within the ability of the office of the Secretary of State. *See* Ohio Rev. Code § 3501.05(Z) ("The Secretary of State *shall* . . . [c]onduct voter education outlining . . . absentee voters ballot . . . and other voting requirements.") (emphasis added); *id.* § 3501.05 (describing the duties and powers of the Secretary, and requiring the Secretary to "[i]ssue instructions by directives and advisories . . . to members of the boards as to the proper methods of conducting election," "[a]ppoint all members of boards of elections," "[i]ssue instructions by directives and advisories . . . to members of the boards," "[p]repare rules and instructions for the conduct of elections," and "[c]ompel the observance by [county] elections officers . . . of the requirements of the election laws"); *see also* Ohio Sec'y of State Directive 2017-06 (April 25, 2017) (Secretary of State amended absentee ballot procedures in Ohio Revised Code to avoid a "potential violation" of federal law).³

³ The Secretary's ability to remove board of election employees for "neglect of duty, malfeasance, misfeasance, or nonfeasance in office . . . or for any other good and sufficient cause," Ohio Rev. Code § 3501.16, suffices to ensure that county election officials do not intentionally neglect their responsibility to ensure all eligible residents have access to the franchise, including those electors who are detained immediately before an election.

Second, creating an informational notice on the rights of detained electors is necessary to ensure counties present the correct information to detained electors given the confusion that exists among local election officials and jail staff about the law.⁴ The Secretary admits that his administration has “not engaged in public education efforts targeted to county sheriffs or other jail administrators to inform them about the eligibility to vote for incarcerated registered voters.” Doc. 55-12 (Def.’s Second Resp. to Reqs. for Admis.) No. 17; Doc. 55-4 (Seskes Dep.) at 63:13-64:10 (noting that Defendant does not “provide logistical instructions on how to vote confined electors”). However, the ability to “advis[e] outside entities” such as “[l]aw enforcement [and] sheriff’s offices” about “things that might impact elections” falls squarely within the Secretary’s purview as chief elections officer, Doc. 55-4 (Seskes Dep.) at 19:24-20:9, and requiring the Secretary to provide law enforcement officials with the information Plaintiffs request here would serve to remedy the dearth of information and knowledge in some jails about the voting rights of detained electors. Given the misinformation and lack of knowledge surrounding jail voting laws and procedures that exist in Ohio, effective relief requires the Secretary, as the chief elections officer, to communicate information about jail voting, not only to boards of elections, but also law enforcement and sheriff’s offices.⁵

⁴ Doc. 55-4 (Seskes Dep.) at 165:19-167:3 (describing questions about jail voting posed by the Hardin County Board of Elections); *id.* at 169:8-20 (describing questions about jail voting posed by the Tuscarawas County Board of Elections); *id.* at 194:16-195:4 (describing questions posed by the Butler County Board of Elections about voting in jail); *id.* at 209:15-213:14 (describing incorrect information on absentee voting in jails disseminated by the Franklin County Sheriff’s Office).

⁵ Alternatively, this Court could order the Secretary to instruct the county boards to provide this information to the county sheriffs and jails. The Boards already coordinate with those law enforcement entities to facilitate jail voting; there is no reason they cannot do the same with respect to the information Plaintiffs seek to have communicated in their requested relief.

Third, having someone designated to field questions and oversee the coordination and dissemination of jail voting policies and procedures, particularly those changes outlined above that would be affected by a ruling in Plaintiffs' favor, is essential to the seamless implementation of the requested relief. And, having such a designee in the Secretary's office is not unprecedented. The Ohio Code already creates a full-time Americans with Disabilities Act coordinator position within the Secretary's office to ensure the state's compliance with federal law. Ohio Rev. Code § 3501.05(V). This coordinator: "(1) [a]ssist[s] the secretary of state with ensuring that there is equal access to polling places for persons with disabilities; (2) [a]ssist[s] the secretary of state with ensuring that each voter may cast the voter's ballot in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters; [and] (3) [a]dvice[s] the secretary of state in the development of standards for the certification of voting machines, marking devices, and automatic tabulating equipment." *Id.* It is hard to see why the state could not similarly designate someone within the Secretary of State's office to ensure the state meets its constitutional obligations to late-jailed voters.

Fourth, Plaintiffs merely request the Secretary, in his capacity as chief election officer for the state of Ohio, and as the state's designee responsible for the "conduct of elections," *id.* § 3501.04, make training available to jail staff and election officials regarding access to voting in jail. Of course, the Secretary cannot compel their attendance or compliance, but Plaintiffs have no reason to believe county officials would willfully deprive Ohio residents of their rights if they knew such rights existed and the contours of those rights. These items are well within this Court's broad equitable powers and are modest requests to ensure equal access to voting for those in the state's physical custody on Election Day.

Finally, the Secretary mischaracterizes the record evidence with his contention that “Plaintiffs . . . ask for greater protection” than late-hospitalized voters because they seek the provision of accurate information and absentee ballot applications for jailed voters. Doc. 64 at 12. As described above, Plaintiffs seek tailored relief that is necessary and appropriate to remedy the ongoing violation of their constitutional rights. The Secretary incorrectly states that “[n]either unforeseeably hospitalized voters nor any other disabled or confined elector . . . receive additional absentee ballot applications—other than the applications sent to *all* registered voters in major elections—or widespread informational campaigns.” Doc. 64 at 14. This is not true. As the unrebutted record evidence makes clear, the Secretary has created special absentee ballot applications for both late-hospitalized voters *and* voters with disabilities being treated at hospitals outside their counties of residence, which have been sent to hospitals. *See* Doc. 55-6; Doc. 55-11. And hospitals receive detailed information about their occupants voting rights that is not provided to jails. In Franklin County, for example, hospitals are emailed a letter with detailed instructions and links to absentee ballot applications. Ex. B (Kelly Dep. Ex. 10). The official in charge of absentee voting testified that a similar letter is not sent to jails. *See* Doc. 55-22 (Kelly Dep.) at 130:11-16 (“I wouldn’t call them similar, I wouldn’t call the way we communicate with the jails versus the hospitals similar.”); *id.* at 130:18-25 (noting that less information is provided to jails).

In sum, Plaintiffs are not asserting an additional claim not found in their complaint but rather describing how jail voting is conducted in Ohio and what reforms would need to be implemented to guarantee Plaintiffs access to the ballot and equal treatment under the law. Plaintiffs are not asking the Secretary to take over jails, nor are they asserting he has such authority. Rather, Plaintiffs ask the Secretary, as chief elections officer for the state of Ohio, to fulfill that role, and coordinate with local government entities including jails and boards of elections to fulfill

the Constitution's mandate. As such, Plaintiffs' proposed remedy is necessary and tailored to remedy the constitutional infirmities they have identified.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be granted.

Dated: August 30, 2019

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practice limited pursuant to D.C. App. R. 49(c)(3)

CERTIFICATE OF SERVICE

The foregoing was filed this 30th 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)

Exhibit A

Mallory, Joe

From: Searcy, Amy (HAM-BOE)
Sent: Thursday, October 04, 2012 1:40 PM
To: Mallory, Joe
Cc: Krisel, Sally
Subject: RE: Incarcerated AV Process

Thank you, Joe. Sorry I pressured you, but we have a public records request. Thanks, again

Amy

From: Mallory, Joe
Sent: Thursday, October 04, 2012 1:21 PM
To: Searcy, Amy (HAM-BOE)
Cc: Krisel, Sally
Subject: Incarcerated AV Process

Amy –

I have attached some documents outlining our process for dealing with anyone that would want to vote while incarcerated. We can certainly accommodate any request that is sent to us up to and including election day. Last Presidential, we personally delivered a ballot on Election day to a voter that was at the Justice Center. He voted his ballot and myself and an opposite party employee brought the ballot back here to the Board.

If you have any additional questions please contact me directly.

Joe

Joe Mallory, Elections Administrator
Hamilton County Board of Elections
824 Broadway, 2nd Floor
Cincinnati, Ohio 45202
513-632-7089
joe.mallory@hamilton-co.org
www.votehamiltoncounty.org



- * Absent/Early Voting Applications are available right now.
- * Visit our website at www.votehamiltoncounty.org to download an application or
- * Call the Absent/Early Voting Dept - 513-632-7039

Exhibit B



1700 Morse Rd
Columbus, Ohio 43229

<http://Vote.FranklinCountyOhio.gov>

(614) 525-3100
(614) 525-3489 FAX

BOARD MEMBERS: Douglas J. Preisse, Chairman ★ Bradley K. Sinnott, Esq. ★ Kimberly E. Marinello ★ Michael E. Sexton
Edward J. Leonard, DIRECTOR David R. Payne, DEPUTY DIRECTOR

Dear Hospital Administrator and Patient Relations Coordinator:

Ohio law creates special voting provisions for individuals who are unable to go to their assigned voting location to vote on Election Day due to an accident or unforeseeable medical emergency resulting in the hospitalization of the voter or the voter's minor child. **Please note that this special exception does not extend to individuals who are hospitalized due to a scheduled procedure or a matter that occurred such that the person had sufficient time to apply for an absentee ballot prior to Noon on the Saturday before the election.**

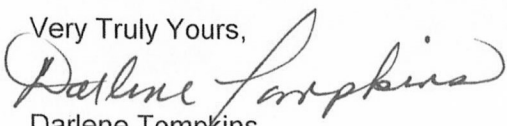
We need your assistance in order to fulfill our responsibility to accommodate Franklin County voters who find themselves in one of these two circumstances for this election .Enclosed please find a copy of the SOS Form 11-B, and the ADA 11-B2 form that can be provided at the request of voters on Monday and Tuesday. If you need additional forms, feel free to photocopy the blank form.

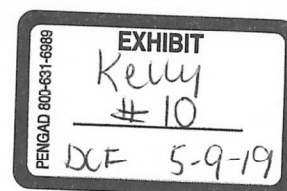
The deadline for submitting the completed form to the Franklin County Board of Elections is 3 p.m. on Election Day November 6,, 2018. Please do so via fax to **614-525-3151** or by sending scanned images to d.tompkins@vote.franklincountyohio.gov. In order to enable us to assist Franklin County voters before Election Day, you may begin forwarding applications any time after Noon on Saturday November 3, 2018 so that we can schedule our staff to deliver ballots before Election Day when applicable. The application, with the voter's original signature, must remain with the voter who will provide it to Board of Elections personnel before being given a ballot. Please advise voters to provide their hospital room number and room or cell phone number on the application when completing it.

Franklin County Board of Elections personnel delivering ballots requested under these circumstances will not leave the premises until all distributed ballots have been collected. Patients who are unable to mark their own ballots may select someone of their choosing to assist them. Otherwise, our team of election officials, comprised of one Democrat and one Republican, will assist the voter in marking the ballot. On Election Day, this process may take until after visiting hours have ended. Your indulgence in this matter is appreciated. Regardless of the hour, we will not wake sleeping patients without the permission of medical staff and we will not leave un-voted ballots with hospital personnel or family members, unless the voter provided the name of a family member on that portion of the application specified for this purpose.

It is very important that our staff be given proper access to patient rooms in order to allow timely delivery of their ballots as required by Ohio law. Board staff may arrive after regular visiting hours. Please inform security of this process and encourage voters to provide their room number and phone number to expedite ballot delivery.

If you have any questions, please contact me at (614) 525-3472 or by email sent to d.tompkins@vote.franklincountyohio.gov. Thank you for your assistance.

Very Truly Yours,

Darlene Tompkins
Supervisor Absentee Department



Form No. 11-B Prescribed by the Secretary of State (08-17)

Absentee Ballot Application

print clearly

IN-COUNTY or OUT-OF-COUNTY Non-ADA Hospitalization Due to an Accident or Unforeseeable Medical Emergency That Occurred After 12:00 p.m. (noon) on the Saturday Before Election Day and Before 3:00 p.m. on Election Day

R.C. 3509.08(B)

Voter Name Required	1	First _____ Middle _____ Last _____ Suffix _____
Date of Birth Required	2	Date of Birth (Do not write today's date here) _____ MM/DD/YYYY
Address at Which you are Registered to Vote Required	3	Street Address (No P.O. Boxes) _____ County _____ City/Village _____ ZIP _____
Reason Required Select only ONE.	4	<input type="checkbox"/> I am confined in the hospital listed below as a result of an accident or unforeseeable medical emergency; OR <input type="checkbox"/> My minor child is confined in the hospital listed below as a result of an accident or unforeseeable medical emergency.
Please Deliver my Ballot as Follows Required Select only ONE.	5	Hospital located in my county of residence: <input type="checkbox"/> I request that two election officials deliver my ballot to me at the hospital named below; OR <input type="checkbox"/> I request that the family member named below deliver my ballot to me at the hospital. Name of family member _____ Relationship to Voter* _____ Hospital located outside my county of residence (If you have a disability under the ADA, use form 11-B-2): <input type="checkbox"/> I request that the family member named below deliver my ballot to me at the hospital; OR Name of family member _____ Relationship to Voter* _____ <input type="checkbox"/> I request to receive the ballot by mail at the hospital.
Hospital Information / Where to Deliver Ballot Required	6	Name of Hospital _____ Room # _____ Admission Date _____ County _____ Hospital Street Address _____ ZIP _____ City/Village _____ Phone _____
Identification Required <small>You must provide ONE of the following.</small>	7	<input type="checkbox"/> Your Ohio driver's license number (2 letters followed by 6 numbers) _____ OR <input type="checkbox"/> Last four digits of your Social Security number _____ OR <input type="checkbox"/> Copy of a current and valid photo identification, military identification, or a current (within the last 12 months) utility bill, bank statement, government check, paycheck or other government document (other than a notice of voter registration mailed by a board of elections) that contains your name and current address.
Election Required <small>You must complete a separate application for each election.</small>	8	Date of Election (Do not write today's date here) _____ MM/DD/YYYY <input type="checkbox"/> General Election <input type="checkbox"/> Special Election <input type="checkbox"/> Primary Election For a PARTISAN primary election only, you must choose the type of ballot: <input type="checkbox"/> Political party ballot Name of Political Party _____ <input type="checkbox"/> Issues only ballot
Affirmation Required	9	<ul style="list-style-type: none"> • I wish to receive an absentee ballot via the method marked above. • I understand this request must be received by my board of elections no later than 3 p.m. on Election Day. • I understand that if an absentee ballot is mailed or delivered to me and I change my mind and go to my polling place to vote on Election Day, I will be required to vote a provisional ballot that cannot be counted until at least 11 days after Election Day. • I understand that, if I do not provide the required information, my application cannot be processed. • I hereby declare, under penalty of election falsification, that I am a qualified elector and the statements above are true. <p>Signature X _____</p> <p>Today's Date _____ MM/DD/YYYY</p>

To assist the board of election in contacting you in a timely manner if your application is incomplete, please provide the following information.

Telephone Number _____ E-mail Address _____

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.

Form No. 11-B-2 Prescribed by the Secretary of State (08-17)

Absentee Ballot Application—Voter with a Disability
OUT-OF-COUNTY Hospitalization Due to an Accident or Unforeseeable Medical
Emergency That Occurred After 12:00 p.m. (noon) on the Saturday
Before Election Day and Before 3:00 p.m. on Election Day

print clearly

R.C. 3509.08(B)

Voter Name Required	1	First _____ Middle _____
		Last _____ Suffix _____

Date of Birth Required	2	Date of Birth <i>(Do not write today's date here)</i> _____ MM/DD/YYYY
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Address at Which you are Registered to Vote Required	3	Street Address <i>(No P.O. Boxes)</i> _____ County _____
		City/Village _____ ZIP _____

Reason Required Select only ONE.	4	<input type="checkbox"/> I have a disability, and I am confined in the hospital listed below as a result of an accident or unforeseeable medical emergency that occurred <i>after 12:00 p.m. (noon) on the Saturday before Election Day and before 3:00 p.m. on Election Day</i> ; OR
		<input type="checkbox"/> My minor child has a disability and is confined in the hospital listed below as a result of an accident or unforeseeable medical emergency that occurred <i>after 12:00 p.m. (noon) on the Saturday before Election Day and before 3:00 p.m. on Election Day</i> .

Please Deliver my Ballot as Follows Required Select only ONE.	5	Hospital located outside my county of residence :
		<input type="checkbox"/> I request that the family member named below deliver my ballot to me at the hospital. Name of family member _____ Relationship to Voter* _____ <input type="checkbox"/> I request to receive the ballot by mail at the hospital; OR <input type="checkbox"/> I request that my county board of elections provide the reasonable accommodation of sending my ballot via fax or e-mail to the Ohio county board of elections in the county of my hospitalization. Two election officials from the board of elections in the county of my hospitalization will deliver my ballot to me at the hospital named below.

Hospital Information / Where to Deliver Ballot Required	6	Name of Hospital _____ Room # _____
		Admission Date _____ County _____
		Hospital Street Address _____ ZIP _____
		City/Village _____ Phone _____

Identification Required <i>You must provide ONE of the following.</i>	7	<input type="checkbox"/> Your Ohio driver's license number <i>(2 letters followed by 6 numbers)</i> _____ OR
		<input type="checkbox"/> Last four digits of your Social Security number _____ OR
		<input type="checkbox"/> Copy of a current and valid photo identification, military identification, or a current (within the last 12 months) utility bill, bank statement, government check, paycheck or other government document (other than a notice of voter registration mailed by a board of elections) that contains your name and current address.

Election Required <i>You must complete a separate application for each election.</i>	8	Date of Election <i>(Do not write today's date here)</i> _____ MM/DD/YYYY
		<input type="checkbox"/> General Election <input type="checkbox"/> Special Election <input type="checkbox"/> Primary Election For a PARTISAN primary election only, you must choose the type of ballot:
		<input type="checkbox"/> Political party ballot Name of political party _____ <input type="checkbox"/> Issues only ballot

Affirmation Required	9	<ul style="list-style-type: none"> I wish to receive an absentee ballot via the method marked above. I understand this request must be received by my board of elections no later than 3 p.m. on Election Day. I understand that if an absentee ballot is mailed or delivered to me and I change my mind and go to my polling place to vote on Election Day, I will be required to vote a provisional ballot that cannot be counted until at least 11 days after Election Day. I understand that, if I do not provide the required information, my application cannot be processed. I hereby declare, under penalty of election falsification, that I am a qualified elector with a qualifying disability under the Americans with Disabilities Act, the requested reasonable accommodation is necessary in order for me to cast a ballot, and all the statements above are true.
		Signature X _____ Today's Date _____ MM/DD/YYYY

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.