Case No. 19-4112
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOMMY RAY MAYS II and QUINTON NELSON SR., individually and on behalf of all others similarly situated,

*Plaintiffs-Appellees*,

v.

FRANK LaROSE,
in his official capacity as Secretary of State,

*Defendant-Appellant*.

On Appeal from the United States District Court for the Southern District of Ohio

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**RESPONSE TO MOTION FOR EXPEDITED APPEAL OR STAY PENDING APPEAL**

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## INTRODUCTION

Ohio has created special absentee ballot rules for confined electors—those registered voters who are confined in a hospital, whose minor children are confined in a hospital, or who are incarcerated at the time of an election. Ohio Rev. Code § 3509.08. The law recognizes that confined electors, who are located in a limited number of easily identifiable locations, need special allowances to exercise their right to vote. However, while Ohio law treats hospital-confined and jail-confined electors alike in most respects, there is one critical difference: where the confinement occurs *after* the general absentee ballot deadline (noon the Saturday before Election Day), Ohio law only accommodates hospital-confined voters. Those voters are given until 3 P.M. on Election Day to request an absentee ballot. *Id.* § 3509.08(B)(2). Late-jailed voters are offered no such mechanism to vote, and if not released before the close of polls on Election Day, are afforded no mechanism to vote at all. The majority of these late-jailed voters are pretrial detainees, who are considered innocent until proven guilty and retain their constitutional right to vote. As the district court correctly ruled, this differential treatment regarding the fundamental right to vote violates the Equal Protection Clause.

In his request for a stay, the Secretary lists security concerns and difficulty locating jailed persons among the reasons that the state is justified in discriminating against late-jailed voters. Motion for Expedited Appeal or for Stay Pending Appeal

("Motion"), R. 8, at 7. As the district court noted, however, the record the Secretary presented to the court did "not cite[] anything about the security concerns themselves that explains why the Boards of Elections representatives could not still undergo the same procedures they already undergo and simply arrive with the ballots at a later date." Opinion and Order ("Op."), R. 70, PageID#4327. Indeed, election official testimony below directly supports this conclusion. Royer Dep., R. 55-7, PageID#2299.

Secretary LaRose also points to other unexpected events—such as car trouble, unexpected travel, a flooded basement—that may prevent an elector who did not request an absentee ballot from voting on Election Day in an attempt to justify the restrictions the State has placed on the ability of late-jailed voters to cast a ballot. He contends that late-jailed voters are no different than these other electors and that a line must be drawn somewhere. But only late-jailed voters are physically prevented from voting at the polls on Election Day by the State itself. Moreover, as the State has recognized, there are two identifiable classes of confined voters who always will be unable to vote because of unforeseeable circumstances and who always will be accessible to election officials in predetermined locations. Yet Ohio affords the right to vote to one group and denies it to the other. The Secretary justified this differential treatment before the district court by asserting that the legislature may have decided

that hospitalized voters, and not jailed voters, were "particularly worthy of a special deadline exception." Def.'s Mot. for Summ. J., R. 54, PageID#2056.

As Judge Watson recognized below, Appellees "have shown that the disparate treatment burdens their fundamental right to vote," Secretary LaRose "has failed to justify the disparate treatment," and "hospitalized persons *are not* more worthy of additional voting privileges under our Constitution than jail-confined persons, and offering greater access to the ballot *simply* because the legislature values the former's votes over the latter's is exactly what the Equal Protection clause forbids." Op., R. 70, PageID#4330-31 (emphasis in original) (citing *Obama for America v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) ("*OFA*")). The court's decision was correct on the merits.

Likewise, this Court should deny a stay because the Secretary has not demonstrated any irreparable harm that will result absent a stay and cannot meet the remaining factors.[1] The Secretary concedes that the Appellee class are eligible, registered voters who will not be able to cast a ballot absent the Court's order. The casting of ballots by eligible, registered voters does not harm the State and is in the public interest. Meanwhile, the denial of the right to vote to these eligible citizens

[1] The Secretary's motion is also improper, because he filed it before the expiration of the deadline for Plaintiffs to even respond to his motion filed in the district court, for no reason other than an election over three months away. *See* Fed. R. App. P. 8(a).

imposes irreparable harm. *See, e.g.*, *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) (holding that "irreparable injury is presumed" where the right to vote is "threatened or impaired"). Finally, any minor administrative inconvenience of the Court's judgment does not rise to the level of irreparable injury.

However, if this Court elects to grant a stay, Appellees request that this Court expedite the appeal so that a final decision on the merits can be made prior to Ohio's March 2020 primary.[2]

## LEGAL STANDARD

"The issuance of a stay pending appeal is not a matter of right, but an exercise of judicial discretion." *Green Party of Tenn. v. Hargett*, 493 F. App'x 686, 689 (6th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)) (internal quotation marks omitted). The Sixth Circuit determines whether to exercise its discretion by considering "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (internal quotation marks omitted). The Circuit interprets these

[2] Appellees believe that reducing the reply period to one week would be necessary in order to give this Court sufficient time to consider the merits of this case.

factors to require the applicant, "[i]n order to justify a stay of the district court's ruling," "demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004).

## ARGUMENT

### I. A Stay Is Not Warranted Because the State Faces No Irreparable Harm and A Stay Would Irreparably Harm the Appellee Class.

It is *undisputed* that the Appellee class are eligible, registered voters that will be restrained by the State on Election Day from casting a ballot and will have no other means to vote absent the relief ordered by the district court. The Secretary will not be irreparably harmed by providing these eligible voters with the opportunity to cast a ballot. But late-jailed voters will undeniably be irreparably harmed, as they will be denied the opportunity to vote if this Court grants a stay.[3]

#### A. The Secretary Has Not Established Any Irreparable Harm.

The Secretary has not established that he would suffer irreparable harm or encounter any significant administrative burdens in complying with the district court's judgment. For example, boards of elections can print a unique ballot

[3] This Court has already set a briefing schedule whereby briefing will be complete by early March. Because there are no elections before then, a stay would serve no purpose other than to make the Secretary unprepared in the event Plaintiffs prevail, as they did below.

relatively quickly for a voter based upon their precinct. Poland Dep., R. 55-15, PageID#2476; Smith Dep., R. 55-15, PageID#2452; Royer Dep., R. 55-7, PageID#2295096 (noting that the Board is able to have all hospital ballots printed and ready for delivery within two hours of the 3 P.M. deadline on Election Day). And, as one program director at the Franklin County board of elections noted, if late-jailed voters were offered the same opportunity to cast emergency absentee ballots as late-hospitalized voters, the Board would simply shift the day when they deliver absentee ballots to the jail from the Monday before an election to Election Day, and would involve the same two staff members currently processing ballots for jailed voters. Royer Dep., R. 55-7, PageID#2299; *see also id.* at PageID#2297 (noting that an increase in the number of trips the board makes to a jail would not be needed and that there was nothing Ms. Royer was aware of "that would make it such that there would be a reason the board would not be able to, on election day, after 3 p.m., receive the applications, determine the eligibility and print the ballot to deliver to the jail"); Poland Dep., R. 55-16, PageID#2469-70 (noting that it may require a few additional temporary staff if emergency hospital voting were extended to late-jailed voters).[4]

[4] Secretary LaRose seemingly attempts to argue that Ohio's laws should be upheld because other states restrict access to an absentee ballot. Motion, R. 8, at 10. Yet multiple states allow individuals to request absentee ballots up to the day before Election Day. Alaska Stat. §§ 15.20.01, 15.20.081; Del. Code § 5503(a); Mass. Gen. Laws ch. 54 § 89; Mont. Code § 13-13-211(2)-(3); Minn. Stat § 203B.04(2); N.Y.

The *only* irreparable harm that Secretary LaRose asserts is a generalized proposition that "an injunction 'seriously and irreparably harms' a State any time it wrongly 'bar[s] the State from conducting . . . elections pursuant to a statute enacted by the Legislature.'" Motion, R. 8, at 28 (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)).

But the Secretary seriously misconstrues this case law. In *Abbott*, the statutes at issue were the state's redistricting maps. Absent a stay, Texas could not conduct elections according to its redistricting plans. This is not that case.[5] This case is narrow in scope and impact. The district court did not enjoin the absentee ballot deadline generally. Rather, the court held that a targeted alteration to state election procedures must be provided to a narrowly defined class of voters to ensure that class of voters has a means to exercise their constitutionally protected right to vote.

This does not constitute irreparable harm. Indeed, the Secretary has made a similarly minor alteration to the absentee ballot procedures for hospitalized voters in order to comply with the Americans with Disabilities Act, notwithstanding his

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Elec. Law §§ 8-400, 11-308; N.D. Cent. Code § 16.1-07-05; Vt. Stat. Tit. 17, §§ 2531, 2538. And, Maryland permits any voter to request an absentee ballot until the polls close on Election Day. Md. Elec. Law § 9-305(c). In any event, the fact that other states also may violate the Constitution is not an appropriate defense.

[5] The only other case the Secretary cites is similarly inapposite; a case involving an injunction of a law permitting the collection of DNA evidence from individuals arrested for certain felonies. *Maryland v. King*, 567 U.S. 1301 (2012).

assessment that doing so deviated from Ohio's election code. He did so without any court order. Directive 2017-06, R. 55-13, PageID#2417; Seskes Dep., R. 55-4, PageID#2188-89.[6]

To the extent that Secretary LaRose argues that the administrative inconvenience imposed by the district court's order imposes irreparable harm, that argument also fails. *See Crookston v. Johnson*, 841 F.3d 396, 404 (6th Cir. 2016) (election law case) ("'Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough' to reach the level of irreparable harm." (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quotation omitted))); *see also Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (same). And administrative inconvenience does not create a compelling state interest to restrict the right to vote, particularly when the restriction results in an outright denial of that right to eligible electors. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state.").

A movant is required to "demonstrate at least serious questions going to the merits *and* irreparable harm that decidedly outweighs the harm that will be inflicted

[6] Moreover, Ohio has no legitimate interest in enforcing a law that unconstitutionally denies a class of eligible voters their right to vote.

on others if a stay is granted." *Family Trust Found. of Ky., Inc.*, 388 F.3d at 227 (emphasis added). The Secretary has failed to do so here and the stay should be denied.

### B. Appellees and Other Similarly Situated Voters Will Be Irreparably Harmed Without Access to the Ballot in March 2020 and in Future Elections.

It is undisputed that a stay of the district court's order will lead many eligible, registered Ohio voters to be unable to cast ballots in the March 2020 primary election. Denying any member of Appellee class their fundamental right to vote constitutes irreparable harm. *See Mich. State A. Philip Randolph Inst.*, 833 F.3d at 669. The district court faithfully applied this principle in considering Appellees' as-applied challenge and holding that the burden created by Ohio's deadline was not trivial as applied to late-jailed voters. Op., R. 70, PageID#4314 (citing *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (remanding an as-applied challenge to a Wisconsin voter ID law and stating that, in an as-applied challenge, a plaintiff's contention "that high hurdles for some eligible to vote entitle those particular persons to relief" is "potentially sound" 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").

The Secretary's purported interest in effectuating laws enacted by the legislature cannot hold up against the right of a class of Ohio citizens to cast a ballot

in upcoming elections. This Circuit recognizes that "it is always in the public interest to prevent violation of a party's constitutional rights." *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010) (affirming the grant of a preliminary injunction) (quotation omitted). Indeed, the interest of the State should be to ensure eligible, qualified voters can access a ballot on Election Day.

## II. Secretary LaRose is Not Likely to Succeed on the Merits.

The Secretary is not likely to succeed on the merits. The district court's analysis is well-supported by the evidentiary record, which the court correctly concluded establishes that late-jailed and late-hospitalized voters are similarly situated yet offered unequal voting opportunities. The Secretary's contention otherwise disregards the record evidence and instead is based upon his mere say-so, without any record evidence, that hospitals and jails are materially different for purposes of absentee voting.

The flimsy justifications the Secretary has put forward to justify Ohio's differential treatment of late-jailed versus late-hospitalized voters are inadequate to justify the burden they inflict on the Appellee class. Indeed, these justifications are merely pretext for the State's determination that late-hospitalized electors are more *worthy* of the vote than late-jailed electors. Motion, R. 8, at 7; Op., R. 70, PageID#4330-31.

### A. The District Court Applied Settled Case Law in this Circuit.

Secretary LaRose's merits argument hinges on a legal theory already rejected by this Circuit in *OFA*. In *OFA*, this Circuit confirmed that the *Anderson-Burdick* standard applies "[w]hen a state regulation is found to treat voters differently in a way that burdens the fundamental right to vote." *OFA*, 697 F.3d at 430. In that case, this Circuit applied the *Anderson-Burdick* standard to an Ohio law that created an earlier deadline for in-person early voting for non-military voters than for military and overseas voters. Plaintiffs showed that the deadline in fact precluded Ohio non-military voters from voting absentee during the additional three days of early voting provided to military and overseas voters. *Id.* at 431. Because the law imposed disparate burdens on similarly situated voters, the district court found the scheme violated the Equal Protection Clause. This Circuit affirmed that ruling. The same reasoning applies here: Where a state treats similarly situated voters differently without justification and those differences burden the right to vote, the state violates the Equal Protection Clause.

In *OFA*, the Secretary made the same argument he presses here: that the burden on non-military voters was "slight because they have 'ample' other means to cast their ballots." *Id.* This Court rejected this reasoning. Indeed, in *OFA*, this Court held that "plaintiffs did not need to show that they were legally prohibited from voting, but only that 'burdened voters have few alternate means of access to the

ballot.'" *Id.* And this Court upheld the district court's finding that many voters would be "precluded from voting without the additional three days of in-person early voting." *Id.* (discussing evidence provided by Plaintiffs that "approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day, and that these voters were disproportionately women, older, and of lower income and education attainment").

Ohio law outright denies late-jailed, eligible voters—voters who are under no legal disability from exercising their constitutional right—any mechanism for casting a ballot on Election Day or the weekend leading up to it. Ohio law grants individuals convicted of a misdemeanor offense or who are in jail on pending charges the right to vote. Ohio Const. art. V, § 1; Ohio Rev. Code § 3509.08; *Fair Elections Ohio v. Husted*, 770 F.3d 456, 458 (6th Cir. 2014). But for jailed voters who cannot meet the absentee deadline because of the timing of their arrest, "no practical alternative to vote remains." Op., R. 70, PageID#4318. Secretary LaRose admits as much. Def.'s Response to Second RFAs No. 8, R. 14, PageID#2423; Seskes Dep., R. 55-4, PageID#2180, 2182; *see also Fair Elections*, 770 F.3d at 458 ("The practical outcome of the current procedure is that persons jailed after 6:00 P.M. on the Friday before Election Day who are not released in time to vote in person on Election Day and who have not already voted using one of the other absent voter ballot procedures are unable to vote."). Thus, the burdens established here far

outstrip the burdens established in *OFA*.[7] *See* Op., R. 70, PageID#4318 (noting that in *OFA* the voters were aware of the early voting restrictions whereas the voters here do not anticipate an arrest restricting their right to vote).

Although states have latitude to determine how to structure their voting processes, they may not deny a group of eligible voters a necessary mechanism for exercising the right to vote that they make available to similarly situated voters. *Compare O'Brien v. Skinner*, 414 U.S. 524, 533 (1974) ("[It cannot] be contended that denial of absentee ballots to [plaintiffs] 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" given the State's role in detaining jailed voters) *with McDonald v. Bd. of Elections*, 394 U.S. 802, 809 (1969) (denying detainee voters' constitutional claims where the record did not show that pre-trial plaintiffs were unable to cast their ballots).

[7] The Secretary's argument that the burden on the right to vote is minimal because the number of voters impacted is relatively small also must fail because "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure" their vote easily. *Frank*, 819 F.3d at 386.

### B. The Record Conclusively Establishes that Late-Jailed and Late-Hospitalized Voters Are Similarly Situated In All Material Respects.

The district court correctly found that the record established. late-hospitalized and late-jailed voters are similarly situated in all material respects. Contrary to Secretary LaRose's claims, the district court carefully addressed his arguments related to alleged differences among these voters with respect to voter availability and security concerns. Op., R. 70, PageID#4326-4328. However, the district court correctly found that the Secretary failed to support his arguments with record evidence and failed to establish that any of the differences were material to the legal question at hand. Notably, the Secretary's pending motion cites to the record only to explain the process of jail voting but does not cite to a *single* evidentiary source suggesting that jail voting is more difficult than hospital voting. *See King v. United States*, 917 F.3d 409, 421 (6th Cir. 2019) ("In order to defeat a motion for summary judgment, the non-movant must show sufficient evidence to create a genuine issue of material fact.").

Ohio law regards "confined" electors as qualified electors who are unable to vote because they are in jail, hospitalized, or have a minor child who is hospitalized. Ohio Rev. Code § 3509.08(A)-(B). Persons who are late-hospitalized are similarly situated in all material respects to late-jailed voters—both groups are composed of (1) eligible electors residing in Ohio; (2) who wish to cast a ballot on Election Day;

but (3) experience unforeseen circumstances after the in-person absentee ballot deadline has passed that prevent them from making it to the polls to cast a ballot; and (4) can be reached by poll workers at a limited set of predetermined locations.

Secretary LaRose cites to three primary alleged differences between late-jailed and late-hospitalized voters: access to voters, background checks, and security concerns. But—upon a full evidentiary record including numerous depositions of the officials who serve both groups of voters—the district court held these alleged factual differences are illusory or irrelevant.

With respect to access, the district court concluded that "these groups are similarly situated when it comes to voter availability." Op., R. 70, PageID#4325 (noting that (1) both groups of voters could be away from their assigned room at the time poll workers arrive and (2) the State could provide equal treatment to both types of voters by standardizing the time poll workers wait at a hospital or jail to locate a voter). This conclusion is well-supported and uncontroverted by any record evidence. *See supra* Section I(A). The Secretary cites to no concrete evidence—indeed there is none—suggesting that assisting jailed voters is more time or resource-intensive than serving late-hospitalized voters. *See Lewis v. Philip Morris Inc.*, 355 F.3d 515, 533 (6th Cir. 2004) ("In order to survive a motion for summary judgment, the non-moving party must be able to show sufficient probative evidence [that] would permit a finding in [his] favor on more

than mere speculation, conjecture, or fantasy." (internal quotation marks and citations omitted)).

With respect to the need for background checks for Board officials to enter some jails, the district court found that the Secretary failed to provide any factual evidence that these difficulties would increase in any material way as a result of the relief sought. Ohio law *already* requires absentee ballots be hand delivered to detainees who are in custody and are able to meet the absentee ballot deadline. Ohio Rev. Code § 3509.08(A). The Secretary has "not cited anything about the security concerns themselves that explains why the Boards of Elections representatives could not still undergo the same procedures they already undergo and simply arrive with the ballots at a later date." Op., R. 70, PageID#4327. The record reflects that is what would happen. Royer Dep., R. 55-7, PageID#2299.

Finally, the Secretary argues that security concerns related to contraband may slow down the jail voting process. But this suggestion is not supported by any evidence in the record that jail voting takes longer than hospital voting and therefore cannot support the Secretary's position. Indeed, the record evidence shows that jail voting is significantly quicker and easier to administer than hospital voting. *See, e.g.*, Royer Dep., R. 55-7, PageID#2299 (testifying that jail voting involves one-fifteenth the number of voters, *one-eleventh* the number of hours, and *one-twelfth* the number of site visits compared to hospital voting in Franklin County). Likewise, the

Secretary's suggestion that "savvy prisoners could abuse the system by making a large number of requests in hopes of distracting the guards" is pure speculation. Motion, R. 8, at 13. As the district court noted, there have been no security incidents during the process of voting at the Franklin County Jail. Saxon Dep., R. 55-22, PageID#2550. Any risks or difficulties that Secretary LaRose claims differentiate these voters are no different than those Ohio already confronts when it facilitates voting in jail.

Indeed, any distinctions weigh in favor of providing access to late-jailed voters. Unlike late-hospitalized voters, the State that creates the obstacle to voting for late-jailed electors. When the State itself erects the obstacle to voting—by physically detaining the voter—it has a heightened responsibility to provide alternative access to the ballot. *See O'Brien,* 414 U.S. at 534 (Marshall, J., concurring); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("[W]hen a person is institutionalized—and wholly dependent on the State—. . . a duty to provide certain services and care does exist . . . ."); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 199-200 (1989) (noting that the "affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty" triggers affirmative duties on the State).

The district court's holding regarding the similarity of jail-confined and hospital-confined electors was based on unrefuted record evidence.

### C. The Secretary's Proposed Interests Are Insufficient to Justify the Disparate Burden Placed on the Right to Vote of Late-Jailed Voters.

Neither of Secretary LaRose's proposed interests justify the burden Ohio law and procedure place on the right to vote for Appellees and Appellee class. As this Court held in *OFA*, the Secretary's justifications must satisfy two requirements: he must justify the regulation's restrictions on class members' voting rights generally and second must justify the regulation's disparate treatment of hospital-confined and class members specifically. Op., R. 70, PageID#4311; *OFA*, 697 F.3d at 432. The Secretary cannot meet this standard.

To justify the burdens imposed by Ohio's absentee voting law generally, Secretary LaRose largely pleads the obvious: that Election Day is busy for election officials. Motion, R. 8, at 14-18. But this Circuit has already rejected the argument that a busy election cycle alone can justify disparate burdens placed on voters. *OFA*, 697 F.3d at 432-33 ("Granted, the list of responsibilities of the boards of elections is long, and the staff and volunteers who prepare for and administer elections undoubtedly have much to accomplish during the final few days before the election.").

Indeed, facilitating jail voting is *less* of an administrative burden for the State than is hospital voting. Franklin County Jail employees, for example, are able to escort each inmate to a predetermined voting location within the facility so that the inmates are ready when the Board employees arrive, Saxon Dep., R. 55-22, PageID#2550, which decreases the burden on election officials and makes locating jailed voters easier and more efficient than hospitalized voters. Similarly, in Butler County, the jail coordinates a predetermined voting time with the Board of Elections, and jail employees escort inmates who have requested absentee ballots to a voting location at a predetermined time. Fisher Dep., R. 55-27, PageID#2701-03. Although the Secretary cites Butler County's process for the proposition that jail voting is more time-intensive and difficult than hospital voting, the facts do not support that conclusion. In a hospital, no official is present to coordinate and bring the voter to the Board of Elections official—instead, the Board official must find the voter herself and secure a location and time to allow that individual to vote, without a systematic process providing insight into where the patient may be in the hospital or whether the patient is undergoing treatment. Op., R. 70, PageID#4325-26.

The burden on the State to identify and serve jailed voters is comparatively slight, because jail employees and Board of Elections officials have a greater ability to coordinate. As the district court noted, in the Franklin County Jail, no correctional officers complained about the jail voting program being too much work or disruptive

and no jail officials were aware of *any* difficulties or security incidents while the Board of Elections was on site to administer voting for the detainees. Op., R. 70, PageID#4326 Saxon Dep., R. 55-22, PageID#2549-50 (emphasis added). The Franklin County official who conducts both jail voting and hospital voting testified that administering jail voting is far less time intensive than hospital voting. Royer Dep., R. 55-7, PageID#2299.

The evidence simply does not support the Secretary's claims of overwhelming administrative burden. On Election Day last year, the Secretary was able to successfully and quickly facilitate voting for named Appellees in the November 2018 general election following the district court's entry of a temporary restraining order. Cavender Dep., R. 55-12, PageID#2410 (explaining that Named Plaintiffs voting process was completed in approximately 30 minutes). Some county election officials already conduct their jail visits on the Monday before Election Day. Poland Dep., R. 55-16, PageID#2462 ("We send bipartisan teams to the jail on Monday, the day before election day, to vote those voters."). All that would be required would be moving this process by one day. Hybrid methods could also readily be devised to accomplish jail voting in larger jail facilities, for example by establishing vote centers. Seskes Dep., R. 55-4, PageID#2165 (testifying that Ohio has "ballot-on-demand" printers and e-pollbooks, both of which sync with the county voter

registration center, allowing officials to check eligibility of a voter and print the appropriate ballot on demand).

If the Secretary were concerned with providing late-jailed persons an opportunity to vote, he could do so without expending any significant resources.[8]

## CONCLUSION

The Secretary's belief that hospitalized, but not jailed, voters are "particularly worthy" of special voting privileges, Motion, R. 35, PageID#2090,[9] is not a constitutional basis for unequal access to the right to vote.

For the foregoing reasons, Appellees and Appellee class respectfully request this Court **deny** Secretary LaRose's request for a stay. If this Court is inclined to grant Secretary LaRose a stay, Appellees request an expedited resolution to this appeal that reduces the reply period to one week after the opposition brief is filed to ensure a decision before Ohio's March primary.

[8] Although the district court did not reach the issue, Plaintiffs' separate undue burden claim is also proven by the evidentiary record.

[9] The Secretary appears to make this point, albeit more subtly, in his stay motion, emphasizing that this is a case about voters "*in jail*." Motion, R. 8, at 7.

December 6, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this Response complies with the type-volume requirements and contains 5,104 words. *See* Fed. R. App. P. 27(d)(2)(A).

/s/ Naila S. Awan
Naila S. Awan

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of December, 2019, the foregoing was filed electronically, and will be served upon all counsel of record via the Court's CM/ECF system.

/s/ Naila S. Awan
Naila S. Awan