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

TOMMY RAY MAYS, II, *et al.*,	:	
Petitioners,	:	Case No. 2:18-cv-1376
v.	:	JUDGE WATSON
JON HUSTED, in his official capacity as Secretary of State of Ohio,	:	MAGISTRATE JUDGE VASCURA
Defendant.	:	

RESPONSE IN OPPOSITION TO CLASS CERTIFICATION OF DEFENDANT OHIO SECRETARY OF STATE FRANK LAROSE

Class actions are the exception, not the rule. The "usual rule" is instead that people litigate their own interests and leave others' interests to others. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (quotations omitted). Even when a party does raise an issue that implicates people outside a case, class litigation may be unneeded. As one example, applying Sixth Circuit precedent, Rule 23(b)(2) classes are often unnecessary when litigants only seek declaratory and injunctive relief. *See Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976). This is because the benefits of such relief typically extend to others "regardless of whether th[e] action is treated as an individual action or as a class action." *Id.* (quotations omitted). Thus, a party seeking class certification must show that a class approach serves a "useful purpose," *id.*, and does more than just add extra procedures (and costs) to a case.

Here, class proceedings are unneeded. Plaintiffs challenge Ohio's election laws as applied to a fact-intensive, time-limited group—people arrested the weekend before an election who are ultimately not released from confinement by Election Day. Class proceedings would be superfluous here because a ruling on the individual Plaintiffs' constitutional challenges will

provide guidance for other people facing such circumstances regardless of whether a class is certified. That is, if Plaintiffs are ultimately successful, the Secretary will apply the judgment from this case to others. Plaintiffs provide no reason to think otherwise. Moreover, no risk of mootness exists because Plaintiffs' claims are capable of repetition yet evading review, a mootness exception that is particularly broad in the election context.

By contrast, endorsing an unneeded class will prejudice Ohio in this case and others. Federal litigants bringing constitutional challenges, such as Plaintiffs here, almost always seek to shift the fees for their litigation onto the State under Section 1988. Tacking on extra class proceedings to such cases (like the motion practice occurring right now) naturally adds unneeded costs. If courts approve needless class proceedings, Ohio's taxpayers will ultimately bear the needless costs—whether in this case or future ones.

Even setting aside that class proceedings are unnecessary, Plaintiffs also fail to satisfy class-certification prerequisites. To satisfy commonality, a proposed class definition must raise a common question capable of producing a classwide answer. *Dukes*, 564 U.S. at 349-52. Typicality similarly requires that the individual claims drive the results of class claims. *Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc). Here, material factual differences exist between proposed class members that will affect the claims of some—eliminating the possibility of a one-size-fits-all answer for the proposed class. The factual circumstances leading to an arrest can widely vary. Plaintiffs' class definition, for example, does nothing to weed out people who foresee their arrests and still fail to take advantage of Ohio's expansive early voting opportunities. The definition also includes people arrested on Friday who could meet Ohio's Saturday-at-noon absentee deadline for confined voters by having another person—such as a friend, family member, or jail personnel—deliver their absentee request. *See* Ohio Rev. Code § 3509.08(A).

Finally, the proposed class definition is improperly imprecise. To meet the definition people must *not only* be arrested the weekend before an election, *but also* remain in detention through the close of polls on Election Day. That final condition—determining who will remain in detention through the close of polls—requires election officials to make an uncertain prediction before the close of polls. A person might, for example, be arrested Sunday, request an absentee ballot on Monday, but then be released on Tuesday in time to go to the polls. Without added clarity about how and when to guess at if a person will be released, the end result will be busy election officials scrambling on Election Day to find jailed people who may not even be in jail. The Court should not certify any class, but if it does find some class appropriate, then it should tighten and clarify the class definition.

In sum, class proceedings are unneeded and will only add confusion to this case. Plaintiffs' motion for class certification should be denied.

BACKGROUND

A. Ohio affords people many chances to vote, including an absentee process for confined voters.

Ohioans have many chances to vote including, but not limited to, on Election Day. Following long lines during the 2004 election, Ohio greatly expanded voting opportunities, allowing for expansive no-excuse absentee voting either in person or by mail. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 623-24 (6th Cir. 2016). In 2019, early voting for the general election will begin on October 8, which is 28 days before Election Day. *See Voting Schedule for the 2019 Elections*, Ohio Secretary of State, https://www.sos.state.oh.us/elections/voters/voting-schedule/2019-schedule/#gref. Importantly, *any* eligible voter can avoid the risk that some unforeseen circumstances occurring on or near Election Day will disrupt their ability to vote. They just have to vote early.

Ohio law also outlines an absentee process specific to confined voters. Ohio Rev. Code § 3509.08(A). This process applies to eligible voters confined in jails. *Id.* Such voters must have their absentee applications delivered to the Board of Elections by noon on the Saturday before the election. *Id.* They then receive an absentee ballot either through the mail or through direct delivery by two board employees. *Id.* Under Ohio law, the only people who receive a more lenient application deadline than jailed voters are people hospitalized due to unforeseen medical emergencies (or whose children are hospitalized due to unforeseen medical emergencies). *See* Ohio Rev. Code § 3509.03(D); Ohio Rev. Code § 3509.08(B).

B. Plaintiffs seek a class action for a fact-intensive and time-limited scenario.

Plaintiffs are two Dayton-area residents—Tommy Ray Mays II and Quinton Nelson Sr.—who were arrested shortly before Election Day this past November. According to the Complaint, Plaintiff Nelson was arrested Friday night before the election. Compl. ¶ 10, Doc. 1. Plaintiff Mays was arrested Saturday evening before the election. *Id.* at ¶ 9. Plaintiffs filed this case on Election Day and sought emergency relief, which this Court granted that same day. Or. 3, Doc. 12. The Court, however, denied any same-day emergency relief as to a potential class. *Id.*

Plaintiffs now seek certification of a class under Rule 23(b)(2). Pls.' Mot. Class Cert., Doc. 29. They define their proposed class as follows:

> All individuals arrested and held in detention in Ohio on or after close of business for the county election board on Friday prior to the Election who (1) are eligible to vote in Ohio and are registered to do so, (2) did not vote absentee in person or by mail prior to their detention, (3) were provided neither an absentee ballot nor transportation to voting center nor access to any other method of voting while held in detention, and (4) will remain in detention through close of polls on Election Day.

Id. at 1; Pls.' Memo. Class Cert. 2, Doc. 29.

A few omissions from this definition stand out. For the fourth prong, Plaintiffs' definition does nothing to explain how election officials will be able to predict—presumably on

or before Election Day—who "will remain in detention through close of polls" and who will not. *See id.* Additionally, Plaintiffs suggest their proposed class is comparable to Ohio law for people facing unforeseen hospitalizations. *See* Pls.' Memo. Class Cert. 2-3. But their definition makes no attempt to distinguish between people who foresee their arrest and people who do not.

STANDARD

A class action represents "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348 (quotations omitted). Under Rule 23, parties seeking class actions must demonstrate numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a). They must also show that their class falls within one of three permissible class types. Fed. R. Civ. 23(b).

Plaintiffs incorrectly suggest there is a presumption requiring courts to "err on the side of favoring class treatment." Pls.' Memo. Class Cert. 2, Doc. 29. No such presumption exists. Instead, class certification requires a "rigorous analysis" beyond "a mere pleading standard." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotations omitted); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014) ("[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23[.]"). "[A] party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23." *Comcast*, 569 U.S. at 33 (quotations omitted). And the "same analytical principles govern Rule 23(b)," just as they govern Rule 23(a) prerequisites. *Id.* at 34.

A rigorous class certification analysis naturally interacts with merits-related questions. *Id.* at 33-34. The class certification analysis frequently "entail[s] some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 351. Moreover, while the certification

analysis is preliminary, the Court should resolve hard questions rather than deferring for a later stage. *See In re BancorpSouth, Inc.*, 2016 U.S. App. LEXIS 16936, at *3 (6th Cir. Sept. 6, 2016)

Class certification "must ultimately satisfy practical as well as purely legal considerations." *Lightfoot v. District of Columbia*, 273 F.R.D. 314, 337 (D.D.C. 2011) (quotations omitted); *see also Vallario v. Vandehey*, 554 F.3d 1259, 1269 (10th Cir. 2009) (noting the "intensely practical considerations informing class certification decisions"). Rule 23 "has as its roots practical considerations of efficiency in the courts and fairness to the participants." *J. M. Woodhull, Inc. v. Addressograph-Multigraph Corp.*, 62 F.R.D. 58, 62 (S.D. Ohio 1974). If class proceedings will not advance "the efficiency and economy of litigation," *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 (1982) (quotations omitted), the Court should deny certification.

ARGUMENT

The Court should deny class certification here for at least three reasons. First, no practical need for a Rule 23(b)(2) class exists in this case. Second, the proposed class fails to meet Rule 23(a) perquisites because several material factual differences exist between people who fall inside the proposed class definition. Third, the proposed class definition is unmanageable since it would require election officials to predict future events as to an inherently fluid and factually-diverse group of people (recently jailed individuals).

A. Class certification is unneeded in this case—proceeding on the individual claims will provide guidance in this area going forward.

Again, class certification is a practical as well as legal inquiry. Here, no practical need exists for class certification. This case can proceed as to the individual Plaintiffs and, in doing so, will naturally provide guidance for others facing the same circumstances.

1. Class proceedings must serve a useful purpose.

Often times a Rule 23(b)(2) class will be unnecessary. *See Craft*, 534 F.2d at 686. In *Craft*, the Sixth Circuit—following guidance from several other courts—affirmed denial of class certification based on a lack of need. *Id.* There, the named plaintiffs sought to certify a class to challenge a municipality's utility policies. The Court explained that allowing a Rule 23(b)(2) class would serve "no useful purpose" because "the determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action." *Id.* (quotations omitted). In other words, to the extent any declaratory and injunctive relief was awarded to individuals, such relief would "accrue to the benefit of others similarly situated." *Id.* (quotations omitted).

Applying *Craft*, this Court and other courts within this Circuit have considered whether a practical need exists to certify a Rule 23(b)(2) class. *See, e.g.*, *Cook v. Barry*, 718 F. Supp. 632, 635 (S.D. Ohio 1989) (holding class certification inappropriate under *Craft*); *Gandenberg v. Barry*, 687 F. Supp. 346, 349 (S.D. Ohio 1988) (same); *Meta v. Target Corp.*, No. 4:14CV832, 2016 U.S. Dist. LEXIS 128196, at *8 (N.D. Ohio Sept. 20, 2016) ("The Sixth Circuit has recognized that Rule 23(b)(2) class certification may not be appropriate when injunctive relief is unnecessary or would serve no purpose."); *Monteleone v. Auto Club Grp.*, 113 F. Supp. 3d 950, 960-61 (E.D. Mich. 2015) ("The Sixth Circuit has denied certification under Rule 23(b)(2) where the declaratory relief will inure to the benefit of proposed class members regardless of certification.").

Since *Craft*, the Sixth Circuit has outlined a few instances where class certification is useful. First, a Rule 23(b)(2) class may be proper if a claim runs a risk of mootness without class

certification. *Hill v. Snyder*, 821 F.3d 763, 771 (6th Cir. 2016).[1] Second, class certification may be necessary when a defendant has a "history of refusing to apply the court's orders to anyone other than the named plaintiffs." *Id.* at 771.

2. Class proceedings are unneeded here.

As was the case in *Craft*, no practical need exists for class proceedings here. Through the individual Plaintiffs' claims, this case will already provide guidance about whether Ohio's election laws and corresponding procedures are sufficient as to confined voters. To be sure, the Secretary will defend Ohio law and will oppose any relief. He will also submit that, if any relief is granted, it should be narrower than Plaintiffs' proposed definition suggests. *See infra* 12-16. *But if*, after this case runs its course, it ends in a finding of violation and relief for Plaintiffs, the Secretary will apply any relief to others who fall within its parameters.

Importantly, no risk of mootness exists here because courts recognize a broad exception to mootness for election litigation. Mootness does not apply when a "situation is capable of repetition yet evading review." *In re 2016 Primary Election*, 836 F.3d 584, 588 (6th Cir. 2016) (quotations omitted). Elections offer a prime example of this doctrine since "[c]hallenges to election law quintessential[ly] evade review because the remedy sought is rendered impossible by the occurrence of the relevant election." *Id.* (quotations omitted); *Morse v. Republican Party*, 517 U.S. 186, 235 n.48 (1996) ("Like other cases challenging electoral practices, therefore, this controversy is not moot because it is capable of repetition, yet evading review.") (quotations omitted). Indeed, the evading-review exception is more lenient in the election context. *In re*

[1] In *Hill*, a panel of the Sixth Circuit questioned *Craft*, but still ultimately approved of a necessity inquiry, remanding to the district court to "reconsider whether class certification may indeed be necessary and appropriate" under the specific circumstances. 821 F.3d at 771. The panel in *Hill* could not have overruled *Craft* because a three-judge panel of the Sixth Circuit cannot overrule an earlier published decision. *See* 6th Cir. R. 32.1(b). Thus, *Craft* remains binding precedent.

2016 Primary, 836 F.3d at 588. Normally, the exception applies when there is a reasonable chance the *same* party will face the same circumstances again. *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005). But in the election context it is only necessary to show that the issue "will recur with respect to *some* future potential candidate or voter." *Id.* at 372 (emphasis added) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972)).

Here, Plaintiffs' claims are capable of repetition yet evading review. The late-jailed scenario Plaintiffs present is fleeting, much like other election-related claims. And, while this fact-intensive scenario is narrow (involving far fewer people than Plaintiffs' expert suggests), others will fall within the scenario in the future. Thus, Plaintiffs' claims are exempt from mootness. And this means that Plaintiffs do not need the additional safeguard of class certification to preserve their claims.

Plaintiffs also present no reason to question the Secretary's responsiveness to any relief. Courts should not lightly assume that state officials will be unresponsive to constitutional problems. *See United States v. Michigan*, 940 F.2d 143, 168 (6th Cir. 1991) (stating that a trial court "should not have assumed that Michigan's legislature and prison officials were and continue to be insensitive" to constitutional problems surrounding prison reform). Here, the Secretary has *no* "history of refusing to apply the court's orders to anyone other than the named plaintiffs." *See Hill*, 821 F.3d at 771. Again, the Secretary will defend Ohio's approach in this case. But if the end result is adverse, the Secretary will respond accordingly for all people who fall within the scope of the relief granted.

3. Promoting unneeded class proceedings would prejudice Ohio in this and other cases.

Class proceedings would bring no practical benefit here, but endorsing such proceedings would prejudice Ohio in this case and other constitutional litigation. Granting unneeded Rule 23(b)(2) classes will add an extra layer of litigation proceedings (and costs) to such cases. Here, for example, Plaintiffs have already filed a motion on class certification. They will no doubt reply to this response. And they hint that they want a hearing on class certification as well (to which Plaintiffs' out-of-state counsel would then have to travel). *See* Pls.' Mot. Class Cert. 2, Doc. 29.

The Court should be particular sensitive to such superfluous proceedings in fee-shifting cases. Litigants raising constitutional challenges under Section 1983 nearly always seek attorney fees and costs under Section 1988. Plaintiffs follow this common practice. Compl., Demand for Relief (e), Doc. 1. While Section 1988 does allow for fee shifting, the Court should be weary of permitting extraneous class litigation when the costs might then be shifted to an adversary. This is especially true when the adversary affirmatively represents that he will apply any individual relief to others who meet its scope.

In sum, needless class litigation has practical consequences. If unneeded Rule 23(b)(2) classes became a common practice in constitutional litigation, Ohio's taxpayers will ultimately bear the correspondingly unneeded costs. *Cf. Perdue v. Kenny A.*, 559 U.S. 542, 559 (2010) (noting the negative effects of unjustified attorney-fee enhancements on taxpayers, government budgets, and public services).

B. Plaintiffs' proposed class does not satisfy Rule 23(a).

Because a Rule 23(b)(2) class would serve no useful purpose here, the Court's analysis need go no further. But the Court could also deny class certification based on a Rule 23(a)

analysis. At minimum, Plaintiffs' proposed class fails to satisfy the requirements of commonality and typicality.[2]

1. Commonality and typicality require a class that will generate classwide answers that drive the litigation; factual differences among class members can prevent commonality and typicality.

Commonality. A party seeking class certification must show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In 2011, the Supreme Court clarified commonality standards. *See Dukes*, 564 U.S. at 349-52. It explained that "[c]ommonality requires the plaintiff demonstrate that the class members have suffered the same injury." *Id.* at 349-50. "This does not mean merely that [class members] have all suffered a violation of the same provision of law." *Id.* at 350; *see also Sprague*, 133 F.3d at 397 (recognizing that parties cannot satisfy commonality by phrasing questions at an "abstract level of generalization"). "[C]laims must depend upon a common contention," so that they "can productively be litigated at once." *Dukes*, 564 U.S. at 350.

Put another way, commonality requires a question that will lead to a single, classwide answer. The proposed class must present a common contention of "such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in *one stroke*." *Id.* (emphasis added). Thus, "[c]ommon questions," "even in droves," are insufficient. *Id.* (quotations omitted). Those questions must be capable of generating "common [classwide]

[2] The Secretary will assume for the purposes of this response that the proposed class satisfies the relatively low hurdle of numerosity. *See Taylor v. CSX Transp., Inc.*, 264 F.R.D. 281, 288 (N.D. Ohio 2007) (holding that a class of forty was sufficient to meet numerosity). This assumption in no way signals that the Secretary accepts Dr. Salling's conclusions or methodology. The Secretary will likewise assume for present purposes that Plaintiffs will adequately represent the class (although Plaintiff Nelson's Friday arrest makes him a problematic representative, *see infra* 14-15). The Secretary is set to depose these individuals in the next few weeks. He reserves the right to seek decertification of any potential class based on facts uncovered during discovery.

answers apt to drive the resolution of the litigation." *Id.* (emphasis in original, quotations omitted).

Under this framework, "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (quotations omitted). In *Davis v. Cintas Corp.*, 717 F.3d 476, 487-89 (6th Cir. 2013), the Sixth Circuit affirmed denial of certification for gender discrimination claims. There, the plaintiff claimed nationwide "discriminatory employment decisions" based on "a corporate culture allegedly unfavorable to women." *Id.* at 486. But the Sixth Circuit agreed with the lower court that commonality was lacking. *Id.* at 487-89. It specifically upheld the lower court's reasoning that the hiring decisions involved many different individuals and were made for "a diverse range of reasons" based on "widely differing circumstances." *Id.* at 487 (quotations omitted).

Typicality. Rule 23 also requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality often merges with commonality. *Dukes,* 564 U.S. at 349 n.5. Both requirements "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical." *Id.* (quotations omitted).

"'The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.'" *Romberio v. UNUMrovident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009) (quoting *Sprague*, 133 F.3d at 399). "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (quotations omitted).

As with commonality, factual differences between class members can destroy typicality. In particular, typicality is lacking "[w]here a class definition encompasses many individuals who have no claim at all to the relief requested, or where there are defenses unique to the individual claims of the class members." *Romberio*, 385 F. App'x at 431. For example, in *Romberio*, the Sixth Circuit found a lack of typicality for class members "who worked in different jobs, had different vocational skills, had different impairments, and experienced different disability review procedures managed by different claim representatives." *Id.* at 432. Given these differences, the Court held that, even if the named plaintiffs had suffered "wrongful practices," separate "individualized assessment" would be needed for other class members. *Id.*

2. Factual differences between proposed class members destroy commonality and typicality here.

Applying the above standards, Plaintiffs' proposed class does not meet either commonality or typically. Plaintiffs try to satisfy these requirements by staying at an inappropriately "abstract level of generalization." *See Sprague*, 133 F.3d at 397. For example, the supposed common questions Plaintiffs present are all just high-level statements challenging the constitutionality of Ohio law. *See* Pls.' Memo. Class Cert. 6, Doc. 29. For typicality, they simply assert—without any detailed analysis—that there is "no question" Plaintiffs "are in fact identically aligned" with unnamed class members. *Id.* at 7.

Plaintiffs' curt analysis leaves much out. When reviewing the constitutionality of election laws, courts generally employ a flexible balancing approach weighing the "character and magnitude of the asserted injury" against a State's interests and justifications for its standards. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1982) (quotations omitted). As the Secretary will argue later in this case, Ohio law about confined voters—particularly when viewed in light of Ohio's expansive early voting opportunities—set forth reasonable requirements that meet this

balancing test. *But*, even if the individual Plaintiffs were to succeed on their claims, many differences exist between members of the proposed class. These differences mean that resolution of Plaintiffs' claims will not automatically drive the results for others in the proposed class.

a. The proposed class fails to account for foreseeable arrests.

Plaintiffs' claims in this case will rely heavily on the premise that they are similarly situated to people who fall within Ohio's exception for hospital emergencies. *See* Compl. ¶¶ 1, 29-34, 47.e, 50, 57; *see also* Ohio Rev. Code § 3509.08(B). At the merit stage, the Secretary will explain why this premise is false—both legally and factually. For now, even engaging with Plaintiffs' inapt comparison, the hospital exception is limited to people facing an "*unforeseeable* medical emergency." Ohio Rev. Code § 3509.08(B) (emphasis added). Plaintiffs, however, make no attempt to address foreseeability.

Arrests come in many different shapes and sizes, as the facts leading to arrests vary widely. Whether an arrested person knows an arrest is coming (or has good reason to suspect an arrest) is a fact-specific, individual-level inquiry. Plaintiffs' definition does not grapple with this topic. To begin, Plaintiffs' definition will presumably capture at least some people who are actually guilty of the crime for which they are arrested. And people who commit crimes naturally have reason to think they might be arrested.

But even tabling any inquiry into actual guilt or innocence, many arrests are still foreseeable. As one example, police might inform people that they are suspects before arrest. Or people might receive notice of an arrest through Ohio's warrant and summons process. *See, e.g.*, Ohio R. Crim. P. 4 (describing Ohio's warrant and summons process, including summons that notify a defendant "he or she may be arrested if he or she fails to appear at the time and place stated in the summons"). Or people might be on parole, or some other form of post-release

control, and aware that their release from confinement is conditional. At bottom, foreseeability depends on each individual's specific facts, which is at odds with a class approach.

These types of factual differences will subdivide the proposed class' legal claims. No claims should ultimately succeed here, but any claims from people who foresee their arrests are especially weak. As noted above, Ohio offers voters expansive, no-excuse early voting opportunities (both in person and by mail) starting about a month before Election Day. *Supra* 2-3. Ohio can hardly be blamed for people who see an availability problem coming but still fail to take advantage of these opportunities.

b. The proposed class includes people who can meet Ohio's absentee deadline.

The proposed class also includes people in different positions based on timing. Under Plaintiffs' definition, the proposed class begins to run on the Friday before an election after Boards of Elections close. Yet, under Ohio law, people confined in jail have until Saturday at noon to have their application "delivered." Ohio Rev. Code § 3509.08(A). The "delivered" provision in the confined voter statute is written in passive voice and does not limit who can deliver a person's application. *Compare id.*; *with* Ohio Rev. Code § 3509.05(A) (limiting which family members may deliver a person's actual absentee ballot). The upshot is that Plaintiffs' definition includes people who can still meet Ohio's absentee deadline without any special litigation carve-out. People arrested on Friday can have a family member, friend, lawyer, jail employee, or any other person deliver an absentee application by the noon deadline.

As with foreseeability, this difference divides the proposed class into subclasses. Plaintiffs themselves show the split. *See* Compl. ¶¶ 9-10. According to the Complaint, Plaintiff Nelson was arrested at 10:08 p.m. the Friday before Election Day, approximately fourteen hours before the application deadline. At minimum, this creates individual-level fact questions as to

whether Plaintiff Nelson was truly "unable," *id.*, to use Ohio's existing process. The same will be true for other proposed class members arrested before the Saturday-at-noon deadline.

c. The proposed class may include people who have already received an absentee ballot through the mail.

Another difference exists between proposed class members. The proposed class excludes people who have already voted or who were provided a ballot while held in detention. *See* Pls.' Mot. Class Cert. 1, Doc. 29. But it does not exclude other people who already received an absentee ballot before their arrest.

The period for requesting absentee ballots is quite broad. For a general election, people may apply for an absentee ballot as early as January 1. Ohio Rev. Code § 3509.03(D). Boards then begin mailing absentee ballots roughly four weeks before the election. *See* Ohio Rev. Code § 3509.01(B)(2). Putting these timelines together, this means that people arrested the weekend before an election may already have an absentee ballot even if they have not voted it yet. This is another factual fracture in the class. Someone who already received an absentee ballot is in a different position from someone who has not.

C. Plaintiffs' proposed class definition lacks precision; it requires an uncertain future prediction without objective guidance.

In addition to being deficient under Rule 23(a), the proposed class definition is also too vague. Without providing any guidelines, Plaintiffs' definition asks for a prediction about who "will" remain incarcerated through Election Day. *See* Pls.' Mot. Class Cert. 1, Doc. 29. This imprecision is improper.

1. A class must be precisely defined.

Certifying a class, of course, requires a class definition. Rule 23 specifically requires courts to "define the class and the class claims, issues, or defenses." Fed. R. Civ. P. 23(c)(1)(B); *see also Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) ("Although the

text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition.") (quotations omitted). The Third Circuit has summarized that Rule 23 requires "a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified." *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 126 (3d Cir. 2018) (quotations omitted). The Seventh Circuit has also found that summary persuasive. *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 904-05 (7th Cir. 2012) *vacated on other grounds by* 569 U.S. 901 (2013) (in light of *Comcast*). Said differently, no class action should proceed "if the proposed class is amorphous or imprecise." *Young*, 693 F.3d at 538 (quotations omitted).

Having a precise definition is both legally and practically important. As the Seventh Circuit recently explained, "[a]voiding vagueness is important" in part "to identify . . . who will share in any recovery." *Steimel v. Wernert*, 823 F.3d 902, 918 (7th Cir. 2018) (quotations omitted). That is, assuming "the class were to prevail on the merits," the definition must provide the means to "sort between those who were and those who were not" harmed, so that everyone knows who should "share in the recovery." *Id.* *Steimel* held that a class was "too vague" because the definition did not say how to tell whether potential class members "require" more services. *Id.* at 917-18. Such precision is important on the front end (when offering a proposed class) to prevent additional litigation on the back end (over scope and compliance with any potential relief).

A precise definition's importance goes beyond simply ascertaining class members for purposes of notice. As Plaintiffs note, ascertaining specific class members is generally less important for a Rule 23(b)(2) case than for Rule 23(b)(3) case. *See* Pls.' Mot. Class Cert. 3 n.1, Doc. 29. This is because ascertainability is "tied almost exclusively to the practical need to notify absent class members" for purposes of Rule 23(b)(3). *Cole v. City of Memphis*, 839 F.3d

530, 541 (6th Cir. 2016). Because notice is not required for Rule 23(b)(2), the ascertainability requirement does not apply in the same way. *Id.* Still, a precise definition will often be important for different reasons—particularly when plaintiffs seek an affirmative injunction for the proposed class. Notably, *Cole* focused on a negative injunction. The plaintiffs there wanted to *stop* police practices they alleged were improper. 839 F.3d at 533. *Cole* did not focus on a situation where plaintiffs wanted the government to take *more* action for the class. Taking more action naturally requires identifying class members because officials must be able to "sort between," *Steimel*, 823 F.3d at 918, who gets more and who does not.

Here, being able to identify these people will be critical if any relief is ordered. Plaintiffs seek a special affirmative exception, which would require election officials to take more action for proposed class members. Again, the Secretary will explain later why no relief is proper. But, if the Court disagrees, any relief would involve busy election officials during the final days leading to election and Election Day. *See* Pls.' Memo. Class Cert. 1, Doc. 29 (implying late-jailed people should receive a "similar mechanism" as people hospitalized right before, or on, Election Day). To administer such relief, election officials would need to be able to quickly tell who meets the class definition and who does not.

D. The proposed definition is imprecise as to who "will" remain in detention.

Under the above framework, Plaintiffs' proposed definition is too vague. The fourth prong is the most problematic. Under the prong, class members "will remain in detention through the close of polls on Election Day." Memo. Class Cert. 2, Doc. 29. The "will"—which is future tense—requires an inchoate guess about what is going to happen to a recently-arrested person. Plaintiffs' definition does not explain *who* makes that guess. Nor does it explain *how* that guess is made. Nor does it explain *when* that guess is made. Instead of clarifying these significant details, Plaintiffs offer cursory assertions, promising that the class is "easily

identifiable" and "easily administered." *Id.* at 3. They seem to assume that everyone will simply know at the time of arrest or shortly thereafter whether a person will be detained through Election Day. But real life is messier than Plaintiffs envision.

The factual circumstances facing a recently-arrested person are fluid. Whether a person will be released will often (perhaps typically) be unknown at the time of arrest. A number of examples illustrate the point. When an arrest is warrantless, it might be up to 48 hours before a judge determines probable cause. *See Graves v. Mahoning Cnty.*, 821 F.3d 772, 778 (6th Cir. 2016). Similarly, a person arrested on Saturday or Sunday might have to wait until Monday or Tuesday to appear in court for a determination about the bail amount or release on recognizance. In addition to any court-allowed release, something could happen that leads officials to drop charges. Or a recently-arrested person might be initially unable to make bail but later have a friend or family member come forward. In short, *many* different fact patterns could possible lead a person arrested near Election Day to be released before the close of polls.

Given the many possibilities, far more clarity is needed than the current class definition offers. Otherwise, the chances increase that busy election officials will be searching in vain on or near Election Day for jailed people that are not still in jail.

CONCLUSION

For the above reasons, the Court should deny class certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on May 17, 2019, and served upon all parties of record via the court's electronic filing system.

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