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 CLASS CERTIFICATION

This case is a prototypical candidate for class certification under Rule 23(b)(2). Yet Defendant LaRose ("the Secretary") labors at length to create complexity where none exists. The question of class certification is simple here, as the Supreme Court has instructed is the case generally in civil rights suits. The plaintiff class members are all wrongfully precluded from voting on grounds that apply generally. The Secretary's extra-textual argument about necessity is not only misplaced as a matter of law, but also wrong as a matter of fact. So too are his objections to commonality, typicality, and the class definition. Plaintiffs easily satisfy the requirements of Rules 23(a) and (b)(2). The Court should therefore certify the Plaintiffs' proposed class.

ARGUMENT

I. There Is No "Necessity" Doctrine as a Matter of Law, but Class Treatment Is Necessary To Prevent Potential Mootness.

The Secretary's "necessity" argument, ECF No. 35 at 6-10, is meritless for two reasons. First, as a matter of law, there is no necessity requirement for Rule 23(b)(2) classes. Second, even

if there were, class treatment is necessary here to avoid potential mootness, particularly given the unique nature of the claim in this case, which only ripens in the few days prior to an election, and then is rendered moot following Election Day.

A. There Is No Necessity Requirement for Rule 23(b)(2) Classes.

There is no necessity requirement for Rule 23(b)(2) classes. The Supreme Court has abrogated case law requiring proof of necessity in Rule 23(b)(2) cases. As the Supreme Court has explained: "By its term, [Rule 23(b)(2)] creates a categorical rule *entitling* a plaintiff whose suit meets the *specified criteria* to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (emphasis added); *id.* (noting that Rule 23(b)(2)'s statement that such a suit "may be maintained" as a class action "confer[s] categorical permission"). "Necessity" is not one of Rule 23(b)(2)'s specified criteria. Fed. R. Civ. P. 23(b)(2). The Supreme Court has further explained that while class actions under Rule 23(b)(3) require a showing that class treatment is superior to individual actions, no such showing is required for (b)(2) classes. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011). "When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether a class action is a superior method of adjudicating the dispute. Predominance and superiority are *self-evident*." *Id.* (emphasis added). The Third Circuit has explained that the Supreme Court's emphasis on the enumerated requirements of Rule 23 forecloses any purported "necessity" requirement. *See Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297, 310 (3d Cir. 2016) ("[R]equiring 'necessity' over and above Rule 23's enumerated criteria would create conflict with *Shady Grove* . . . in which the Supreme Court emphasized the primacy of Rule 23's enumerated criteria . . . [which give] the

proposed class representative the right to have a class certified if the requirements of the Rule[ ] are met." (internal quotation marks omitted) (last bracket in original)).[1]

In light of the Supreme Court's subsequent precedent, the Secretary's reliance upon *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976), is misplaced. *Craft* has been abrogated and is no longer good law. In any event, even before the doctrine was abrogated, the Sixth Circuit explained that the *Craft* court's necessity rule does not apply to a claim that, "by its nature, may be capable of repetition yet evading review." *Ball v. Wagers*, 795 F.2d 579, 581 n.2 (6th Cir. 1986). As the Secretary acknowledges, "Plaintiff's claims are capable of repetition yet evading review." *See* ECF No. 35 at 9. It is difficult to imagine a claim that is *more* capable of repetition yet evading review than the one at issue in this case, which ripens only in the few days preceding an election and (in the absence of mootness exceptions) becomes moot at 7:30 P.M. on Election Day. Even if the "necessity" doctrine were otherwise good law in this Circuit, the Sixth Circuit has expressly ruled that it would not apply to cases like this one.

[1] The Supreme Court's plain-text interpretation of Rule 23(b)(2) in *Shady Grove* and *Dukes* accords with the majority (and modern) view that had emerged even before the Supreme Court's latest decisions. "Many courts have rejected the necessity doctrine outright as being non-textual, noting that a need requirement finds no support in Rule 23 and, if applied, would entirely negate any proper class certifications under Rule 23(b), a result hardly intended by the Rules Advisory Committee." 2 *Newberg on Class Actions* at § 4:35 (5th ed.) (footnote omitted); *see, e.g.*, *Brown v. Scott*, 602 F.2d 791, 795 (7th Cir. 1979), *judgment aff'd sub nom. Carey v. Brown*, 447 U.S. 455 (1980) ("In a number of cases this court has held that if the requirements of Rule 23 are satisfied class certification should not be refused because of lack of need."); *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) (finding that a necessity "requirement would effectively eviscerate Rule 23(b)(2), which was specifically designed with the benefits of collective action in mind"); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 23 (D.D.C. 2006) ("As numerous courts have observed, whether certification is 'necessary' is not a question Rule 23 directs the courts to consider.").

B. Class Certification Is Needed To Prevent Potential Mootness.

Even if necessity were an appropriate consideration (it is not), certification is necessary in this case to avoid the possibility that Plaintiffs' claims become moot before final judgment or on appeal for reasons other than those attributable to election-related litigation. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (holding that class action may continue where representative's individual suit has become moot). The risk of mootness is particularly acute in Rule 23(b)(2) class actions, which seek only declaratory and injunctive relief. For example, in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), the Supreme Court vacated a lower court's judgment in favor of the plaintiff because her claims for injunctive relief against a public employer had become moot when she left her job for private sector employment. In doing so, the Court repeatedly noted that this result could have been avoided if the plaintiff had sought class certification instead of merely proceeding as an individual. *Id.* at 72 & n.27 ("It bears repetition that [plaintiff] did not sue on behalf of a class."). The Sixth Circuit thus rejected "necessity" challenges prior to the Supreme Court's decision in *Shady Grove* where there was a risk of claims becoming moot due to a change in personal circumstances of a named plaintiff. *See, e.g.*, *Ball*, 795 F.2d at 581 n.2 (rejecting necessity argument for claim that could become moot). Courts have frequently cited potential mootness as a basis for certifying classes. *See, e.g.*, *Gayle*, 838 F.3d at 310 (holding that "[t]he circumstances in which classwide relief offers no further benefit [ ] will be rare, and courts should exercise great caution before denying class certification on that basis" and noting risk of mootness as a particular concern warranting certification); *Pederson v. La. State Univ.*, 213 F.3d 858, 867 n.8 (5th Cir. 2000), 213 F.3d at 867 n.8 ("[I]f [ ] a necessity requirement exists, the substantial risk of mootness here created a necessity for class certification . . . ."); *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985) (noting that denial of certification would be improper where, *inter alia*,

there is a risk of mootness or certification would not burden the court); *Ledford v. Colbert*, No. 1:10-cv-706, 2012 WL 1207211, at *7 (S.D. Ohio Apr. 11, 2012); *Guckenberger v. Bos. Univ.*, 957 F. Supp. 306, 326-27 (D. Mass. 1997); 2 *Newberg on Class Actions* § 4:35 (5th ed.).

This case presents a clear risk of mootness. The Secretary contends otherwise, arguing that as an election law case, the capable of repetition yet evading review exception applies here—and in its more lenient form, without the requirement that there be a "reasonable chance" Plaintiffs experience future injury. ECF No. 35 at 8-9. But the fleeting nature of the particular claim at issue in this case is not the only potential mootness concern. It is not clear that the evading-review exception would apply if the named Plaintiffs were to, for example, move out of Ohio and thus no longer be eligible to vote in the state. Nor is it clear that it would apply if, God forbid, Plaintiffs were to pass away. In *Immel v. Lumpkin*, 408 F. App'x 920, 922 (6th Cir. 2010), the Sixth Circuit held that a deceased plaintiff's claim was moot and not subject to evading-review exception because the plaintiff, who had passed away, would not experience the challenged conduct again. It also noted that mootness may have been avoided by bringing the case as a class action. *Id.* The evading-review exception is relaxed in the election law context, for example when a political party cannot show that *it* is likely to experience the same injury again, but it is clear that some other party will. *See Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005). But plaintiffs are aware of no case extending that lenient approach to election law litigation where the individual plaintiffs have moved out of the jurisdiction or passed away—causes of mootness that are unrelated to the case's election law topic. What *is* clear, however, is that certification of a class will prevent any of these novel mootness issues from arising in this case (before this Court or on appeal). *See Arizonans for Official English*, 520 U.S. at 72 n.27. The importance of that protection is paramount here, because unlike most other cases, the claims here only irregularly spring to life in the days

prior to an election, risking a significant delay in the resolution of the important legal issue raised by this case in the absence of class certification.[2]

The Secretary is therefore wrong to contend there is no risk of mootness necessitating a class action here. Moreover, the Secretary's contention that the class members will be protected should Plaintiffs prevail is misplaced. The Secretary explains that if he loses this case, he "will respond accordingly for all people who fall within the scope of the relief granted." ECF No. 35 at 9. First, Secretary LaRose cannot bind future Secretaries to do the same, and the *en banc* Sixth Circuit has already cast doubt on the obligation to apply relief generally in the absence of a class. *See Tesmer v. Granholm*, 333 F.3d 683 (6th Cir. 2003) (*en banc*) (holding that "[d]eclaratory judgment is effective as to only the plaintiffs who obtained it" and that "[w]hen a class has not been certified, the only interests of concern are those of the named plaintiffs"); *rev'd on other grounds, Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004). Secretary LaRose cannot prevent a future Secretary from advancing (and prevailing on) this argument.

Second, although the Secretary contends that he "will apply the judgment from this case to others," ECF No. 35 at 2, on the *same page* of his brief he contends that "material factual differences" exist among the class "eliminating the possibility of a one-size-fits-all answer for the proposed class," *id.* He contends that voters who somehow "foresee" their arrest should not be granted the right to vote, that those who are guilty (though not yet convicted) should likewise be excluded because they should have voted early before committing their crime, and that some jailed voters may manage to get a friend, family member, or jail employee to personally deliver their

[2] Indeed, this is not the first case attempting to address this legal wrong. Following the 2012 election, organizational plaintiffs brought a case raising a similar issue, *Fair Elections Ohio v. Husted*, 770 F.3d 456, 458 (6th Cir. 2014). That case was dismissed on standing grounds before reaching the merits of the legal issue.

absentee ballot application to the Board of Elections between 8 A.M. and noon on the Saturday preceding the election, and those voters should not be permitted to benefit from any relief in this case. *Id.* at 2. These contentions are all misplaced as a legal and factual matter as explained below, *see infra* Part II.A, but they illustrate why class certification is necessary here. In the absence of a class, it appears the Secretary plans to limit the ability to vote to only a portion of those legally entitled to do so, and based on dividing characteristics (*e.g.*, guilt or innocence) not determinable within a few days of arrest. The fact that the Secretary envisions this approach ably demonstrates why the Secretary needs to be bound to apply relief on a class-wide basis. The Secretary posits that "Plaintiffs [ ] present no reason to question the Secretary's responsiveness to any relief," ECF No. 35 at 9, but the Secretary has done so himself in his response brief arguments.

Given all of this, the Secretary is wrong to characterize Plaintiffs' class certification motion as a "frivolous proceeding[ ]" that will cause Ohio citizens to incur unnecessary additional attorneys' fees liability should Plaintiffs prevail. *Id.* at 10. Plaintiffs' counsel have repeatedly explained to the Secretary's counsel in meet-and-confers their reasons for seeking class treatment in this case. There is no requirement that the Secretary oppose this class certification request. Rather than acknowledge the unique circumstances of this case—and the good faith reasons Plaintiffs have advanced for seeking class treatment here—the Secretary chose to expend resources opposing Plaintiffs' motion for fear that acquiescing here would set a precedent for future cases. *See* ECF No. 35 at 10 (expressing concern about effect on "other constitutional litigation" and fearing increased costs if class actions "become a common practice in constitutional litigation"). That is the Secretary's prerogative, but Plaintiffs cannot be blamed for the costs Ohio has incurred opposing a motion for class treatment that the Supreme Court has held Plaintiffs are "entitl[ed]"

to under the Federal Rules, *Shady Grove*, 559 U.S. at 398, in a case in which this Court has already concluded Plaintiffs are likely to prevail, ECF No. 12 at 2.

In sum, the law does not require a showing of necessity, but even if that were so, Plaintiffs would easily satisfy such a requirement.

II. Plaintiffs Satisfy the Commonality and Typicality Requirements of Rule 23(a).

Plaintiffs satisfy the commonality and typicality requirements of Rule 23(a). Ohio denies the right to vote to anyone arrested after the absentee ballot application deadline who is held through Election Day. Ohio Rev. Code § 3509.08. As the Sixth Circuit has explained, "the practical outcome of the current [Ohio] 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*." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 458 (6th Cir. 2014) (emphasis added); *id.* at 461 ("Ohio law effectively denies the vote to eligible voters who are arrested the weekend before Election Day . . . ."") (Cole, J., dissenting). In this case, the Court is asked to decide whether this practice—denying the right to vote to eligible voters detained by the State—violates the Constitution. This case is a straightforward example of one with "the capacity . . . to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quotation marks omitted) (emphasis in original).

The Secretary contends that there are "many differences" among the class members because (1) some people might foresee their arrest, (2) some people might have the ability to get an absentee ballot application completed and delivered Saturday morning before noon, and (3) some people might already have been mailed an absentee ballot prior to their arrest. ECF No. 35

at 14-16. These supposed differences either have no legal significance to the class members' right to relief or do not even exist. None is a barrier to a finding of commonality and typicality.[3]

A. "Foreseeability" Is Not a Legally Significant Difference Relevant to the Commonality and Typicality Determinations.

Whether an arrest is "foreseeable" is not a legally significant question sufficient to defeat a finding of commonality and typicality. The Secretary contends that 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," but that this exception to the absentee ballot application deadline only applies to "*unforeseeable* medical emergencies." ECF No. 35 at 14 (quoting Ohio Rev. Code § 3509.08(B)) (emphasis in original). This argument is misplaced.

The right to vote for eligible voters held in the State's custody does not depend upon the circumstances under which the State provides voting mechanisms to hospitalized persons. Plaintiffs have cited to the hospitalized voter provision because it demonstrates the administrative feasibility of granting the Plaintiff Class access to the ballot (as the Constitution requires) and the egregiousness of denying Plaintiffs the accommodations it provides to other similarly situated voters. That is particularly so given that Ohio's county boards of elections manage to deliver ballots to larger numbers of voters, at a larger numbers of hospitals requiring greater travel, than

[3] The Secretary also misstates the legal standard for Plaintiffs' claims. The Secretary contends that the merits of Plaintiffs' claim should be judged under "a flexible balancing approach weighing the 'character and magnitude of the asserted injury' against a State's interests and justifications for its standards." ECF No. 35 at 13 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1982)). Although the vote denial challenged by this suit would fail scrutiny under the *Anderson-Burdick* undue burden approach cited by the Secretary, this case involves the *outright denial* of the right to vote—not a mere burden on that right—and therefore strict scrutiny, not "flexible balancing," is the appropriate legal standard for deciding the merits of Plaintiffs' claim. *See Kramer v. Union Free School Dist. No 15*, 395 U.S. 621, 627 (1969) ("[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and *denies* the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." (emphasis added)).

would be required to extend the franchise to the Plaintiff class. But Plaintiffs' constitutional right to vote is not bounded by the circumstance under which Ohio has chosen to accommodate hospitalized voters, nor is the hospitalized voter statute the source of Plaintiffs' legal right—the Constitution is. The Secretary cites no case law supporting the proposition that the Constitution permits the State to deny eligible voters who are held in physical detention on Election Day of their fundamental right to vote so long as their detention was foreseeable. Whether or not someone "foresees" the possibility of an arrest does not alter whether the State may constitutionally detain that person on Election Day without providing an alternative mechanism to vote.

The Secretary's discussion of foreseeable arrests does not change the fact that the Plaintiff Class has common legal claims capable of a common answer, or that are typical of one another. It is, however, alarming insofar as it suggests that the Secretary's view of the law might require election officials, rather than a judge or jury, to make discretionary determinations about prospective voters' guilt or innocence (and thus the foreseeability of their arrest) before allowing those arrested, with a presumption of innocence, to exercise their right to vote. The requirement that the State suggests exists—a determination of guilt or innocence prior to voting—would create a separate due process violation. Many such persons would have this determination made not only pre-trial, but pre-arraignment. Further, comparable questions around foreseeability exist in the hospitalized voter context, but those questions have not stopped the state of Ohio from allowing those voters to participate in the democratic process. For example, many people feel sick for some days before entering the hospital, or before their condition reaches the level of an emergency. Ohio does not deny those people access to emergency absentee ballots, nor do county election officials

investigate whether their symptoms would have made their hospitalization foreseeable, such that their emergency absentee ballot request should be denied.[4]

Foreseeability of arrests is not a relevant, legally significant question that bears on the issue of commonality and typicality.

B. People Arrested Between Friday Evening and Saturday Noon Cannot, as a Matter of Law or Fact, Submit Absentee Ballot Applications.

The Secretary contends that people arrested between Friday evening and Saturday noon can still meet Ohio's absentee ballot application deadline if they succeed in having a family member, friend, lawyer, jail employee, or someone else deliver their ballot request to the board of elections by noon Saturday. ECF No. 35 at 15. On that basis the Secretary contends those persons, such as Plaintiff Nelson who was arrested Friday evening before the 2018 election, are differently situated than other class members and thus do not have common or typical claims. The Secretary is wrong as a matter of law and fact.

Although the Secretary contends in his brief that the noon Saturday deadline permits in-person delivery of absentee ballot requests, *id.*, neither Ohio law nor the prior testimony of the Secretary of State's corporate representative necessarily supports this view. Two provisions of the Code are relevant here: (1) § 3509.08(A) provides that absentee ballot applications from confined voters must be "delivered" to the board of elections by noon Saturday, and (2) § 3509.03(D) provides that the deadline is 6:00 P.M. Friday for absentee ballot applications "delivered in person to the office of the board." Together, these statutes suggest that absentee ballots delivered in-person must be received by 6:00 P.M. on Friday, and those delivered by mail must be received by

[4] These voters merely check a box indicating that they experienced a medical emergency or unforeseen hospitalization. Ohio does not conduct any "fact-specific, individual-level inquir[ies]," ECF No. 35 at 14, into the circumstances of voters' hospitalizations.

noon on Saturday. That is how the Sixth Circuit interpreted the statutes. *See Fair Elections Ohio*, 770 F.3d at 458. That is also how the Secretary of State's corporate representative interpreted the statutes in his deposition in the *Fair Elections* case. *See* Deposition of Matthew Damschroder at 67-68, *Fair Elections Ohio v. Husted*, No. 1:12-cv-00797-SAS-SKB, ECF No. 103-1 (Q: "So for someone who is arrested after 6:00 P.M. on Friday there may be no way for them to get an absentee ballot request to the board of elections in time for it – for that noon deadline. Is that correct?" A: "So my answer would be if the board of elections doesn't receive their absentee application by mail by noon on Saturday, then the board would not issue an absentee ballot." Q: So the practical result of the mailing deadline is that someone who is arrested after Friday night – or after 6:00 P.M. on Friday may not be able to get their request to the board of elections in time for an absentee ballot to be issued for them?" A: "They may not be able to."). The Secretary's contention now that any method of delivery will do by Saturday at noon appears to be a new litigation position, and not one communicated to the county boards of elections.

Even if the Secretary's newfound position were supported by the law or actual implementation by the counties, the record evidence shows that there is no meaningful opportunity for those arrested on Friday evening to submit an application in time for the Saturday noon deadline. For example, although the Secretary contends that these jailed voters could hand off their absentee ballot requests to friends, family, *etc.*, the evidence shows that it is likely impossible. For example, the representative of the Butler County Sheriff's department testified that these individuals are allowed "video visitation only," Ex. A (N. Fisher Depo.) at 106, as did the representative of the Franklin County Sheriff's department, Ex. B (C. Trowbridge Depo.) at 19.[5]

[5] Plaintiffs note that the deposition transcripts attached as exhibits hereto have not yet been reviewed and signed by the deponents.

Family and friends are allowed no physical contact with the inmates, and so could not possibly coordinate the completion or physical transfer and delivery of an absentee ballot application. *Id.* Nor is there any real opportunity for someone arrested Friday evening to mail an application and have it arrive at the board of elections by Saturday at noon. As the Butler County Sheriff's representative testified, the latest an inmate can place an item in the mail on Friday and have it actually start the process of reaching the postal service on Friday is 5:00 A.M.; anything thereafter will not be mailed until Monday. *See* Ex. A at 33-34.

As the Sixth Circuit has recognized, the practical effect of Ohio law is to preclude those arrested after 6 P.M. on Friday and held through Election Day from voting. *See Fair Elections*, 77 F.3d at 458. The Secretary's effort to differentiate those arrested Friday evening from those arrested Saturday or thereafter is wrong as a matter of both law and fact.

C. Jailed Voters Who Already Received an Absentee Ballot Are Not Differently Situated.

Jailed voters who receive, but do not, prior to their arrest, complete and return, an absentee ballot are not differently situated from other members of the class. The Secretary contends that "[s]omeone who already received an absentee ballot is in a different position from someone who has not." ECF No. 35 at 16. But the Secretary does not explain *why* that is so. Absentee ballots must be either postmarked the Monday before Election Day or delivered in person on Election Day. *See* Ohio Rev. Code § 3509.05(A) & (B). So someone who receives an absentee ballot but is arrested before having the opportunity to vote and timely submit that ballot is in the same position as someone who did not apply for an absentee ballot prior to her arrest. Neither person can be deemed responsible for their inability to actually *cast* their ballot, because for both persons their *detention* prevents them from casting their ballot. The Secretary offers no explanation for how

these voters are differently situated for purposes of their entitlement to relief in this case, or why this supposed difference has any bearing on the commonality or typicality determination.

None of the Secretary's arguments regarding commonality and typicality have merit; Plaintiffs easily satisfy the requirements of Rule 23(a).

III. Plaintiffs' Proposed Class Definition Is Sufficiently Precise.

Finally, Plaintiffs' proposed class definition is sufficiently precise. The Secretary takes issue with the definition's reference to voters who "will" remain in detention through Election Day, contending that this may result in election officials "searching in vain on or near Election Day for jailed people that are not still in jail." ECF No. 35 at 18-19. This concern is unwarranted. The evidence shows that the jails are aware of their roster of inmates, and can easily pinpoint inmates' locations at least multiple times a day during scheduled lockdowns. *See, e.g.*, Ex. A at 65. Moreover, the Secretary's concern can be eliminated by conducting the jail voting *on* Election Day, to ensure that only those detained on that day are afforded the jail voting option. But to the extent the Secretary is concerned with lessening the burden on county boards of elections, it makes scant sense to require jailed voters to wait to apply for an absentee ballot until Tuesday based on the possibility they might find themselves released prior to Election Day. As the representative of the Butler County Board of Elections testified, staff are sent to hospitals to conduct emergency absentee voting from Sunday through Tuesday. Ex. C (Smith Depo.) at 54. This eases the burden on Election Day. So it makes sense, as a practical matter, not to wait until Election Day to determine whether an emergency absentee ballot will be needed.

Hospitalized voters can vote starting the Saturday prior to the election, but they too might be discharged from the hospital in time to vote on Election Day. Indeed, hospitalization involves a much more fluid situation, with a much greater likelihood that someone might cast their

emergency absentee ballot on Sunday yet actually be released on Monday, or might be discharged before the board of elections arrives at the hospital with the ballot. But just as these possibilities do not inhibit the administration of hospital voting, they do not do so with respect to jail voting.

To the extent the Court finds the reference to voters who "will" remain detained through Election Day problematic, the Court should revise the definition to include anyone arrested after the board of election's close of business Friday, without regard to whether they will remain in detention through Election Day. This would mirror the process for hospitalized voters, and Ohio already has procedures in place to prevent voters from casting more than one ballot in an election.

The Secretary's objections to the proposed class definition are overstated and without merit, but the definition can be easily remedied should the Court find it necessary.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Class Certification should be granted.

Dated: May 31, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2019, the foregoing was served on all counsel of record via the Court's CM/ECF system.

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