Case No. 19-4112

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOMMY RAY MAYS, II, QUINTON NELSON, SR., Individually and on behalf of all others similarly situated	:	On Appeal from the United States District Court Southern District of Ohio
Plaintiffs-Appellees,	:	District Case No. 2:18-cv-1376
v.	:	
FRANK LAROSE, in his official capacity as Secretary of State of Ohio	:	
Defendant-Appellant.	:	

REPLY IN SUPPORT OF MOTION FOR EXPEDITED APPEAL OR FOR STAY PENDING APPEAL

DAVE YOST
Ohio Attorney General

30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980

BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY P. KELLER
Deputy Solicitor General
ANN YACKSHAW
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Defendant-Appellant
Frank LaRose, Ohio Secretary of State

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

REPLY

Our Constitution's framers considered and rejected "a proposal to give the judiciary a veto over the laws." *Wright v. Spaulding*, 939 F.3d 695, 708 (6th Cir. 2019) (Thapar, J., concurring). They decided against the "Council of Revision" because they recognized that "judicial creativity begets chaos," and that "[j]udges are not cut out for legislative craftsmanship." *Id.*

In one sense, this case presents the question whether the Equal Protection Clause requires States to treat jailed voters and hospitalized voters the exact same way. But in another sense, the case presents the more fundamental question of which body—the federal courts or the state legislatures—ought to craft state election policy. The plaintiffs, in purporting to discuss the first question, really address the second, and thus ask the Court to act as a Council of Revision. They point to various policy reasons that might support extending the deadline for late-jailed voters to seek absentee ballots. But these policy arguments, even when dressed in legal garb, cannot justify the District Court's injunction of Ohio's distinction between late-jailed and late-hospitalized voters. The plaintiffs' contrary assertion paradoxically undermines the very freedom that the right to vote protects: the freedom to live under a republican form of government, in which elected representatives, not unelected judges, make the law.

ARGUMENT

I. The Secretary is entitled to a stay pending appeal.

Ohio allows everyone—including jailed voters—to seek an absentee ballot up until noon on Saturday before a Tuesday election. It extends the deadline for unexpectedly hospitalized voters; only those voters may seek an absentee ballot up until 3 P.M. on Election Day. Does Ohio violate the Equal Protection Clause by giving late-hospitalized voters a later deadline than late-jailed voters?

No. As even the plaintiffs silently concede, the State could not, and is not required to, facilitate late absentee-ballot requests from *everyone* unable to get to the polls on Election Day. So, if it is to extend the deadline for anyone, it must draw some distinctions. The distinction between late-hospitalized and late-jailed voters makes sense, because late-jailed voters present security and administrative difficulties that requests by late-hospitalized voters do not. For example, election boards can often send only pre-cleared officials to deliver ballots to jails. In addition, delivery to jailed voters takes more time. Election officials can enter hospitals and try to locate voters themselves. When they bring ballots to jails, they must pass through security and then rely on guards to bring jailed voters to vote, often one at a time. *See* Motion 12–14. Locating these recently jailed voters presents another related hurdle. Guards must find the voter, who might be at many different loca-

tions, including places outside the jail, like court. *Id.* In sum, jailed voters and hospitalized voters are not similarly situated.

Given the already incredibly hectic and important work of Election Day, accommodating last-minute requests from jailed voters (in addition to hospitalized voters) would undermine the State's significant interest in the orderly administration of elections. Motion 12–18. And the distinction between late-hospitalized and late-jailed voters imposes, *at most*, a moderate burden on the ability of late-jailed voters to vote; anyone worried about being jailed on Election Day can take advantage of Ohio's ample early-voting options. Thus, the "interests put forward by the State as justifications for the burden imposed" justify that burden, satisfying the Equal Protection Clause. *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

Because Ohio's law passes constitutional muster, the Secretary is likely to succeed on appeal. And he has established the other factors relevant to winning a stay pending appeal. First, enjoining a valid state law *always* imposes irreparable harm on the State. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Second, a stay will impose little if any harm on anyone, as Ohio's early-voting options ensures that every voter who wishes to can vote early and avoid the risk of missing the chance to vote. Cer-

tainly *the plaintiffs* will not be harmed by a stay; they already voted in the election that they sued for the right to vote in. Finally, a stay pending appeal will promote the public interest by permitting Ohio's valid laws to be given effect; "the public interest lies in a correct application of the federal constitutional and statutory provisions" on which a case turns. *See Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (citation and internal quotation marks omitted).

II. The plaintiffs' arguments in opposition to a stay pending appeal all fail.

The plaintiffs dispute the appropriateness of a stay. Their arguments fail. (The plaintiffs *do not* challenge the Secretary's alternative request for an expedited argument, so the Secretary is entitled to at least that much. But a stay makes more sense, since it avoids the need for a rushed decision.)

A. The Secretary will prevail on the merits.

The plaintiffs' merits argument begins with a smear. They say Ohio's motion offers mere "pretext for the State's determination that late-hospitalized electors are more *worthy* of the vote than late-jailed electors." Response 10. There is no evidence that Ohio law reflects animus toward jailed voters. If the State's legislators harbored such animus, why did they require election officials to personally deliver absentee ballots to jailed voters? Ohio Rev. Code §3509.08(A). Insofar as

the plaintiffs are insinuating that the State is jailing people to keep them from voting, *see* Response 17, they are wrong—there is no evidence, at all, of any such intention.

Moving on, the plaintiffs have no good response to the Secretary's argument that the challenged distinction imposes (at most) an intermediate burden that is justified by the State's significant interest in the orderly administration of elections.

Burden. The plaintiffs say the burden is significant because late-jailed voters cannot vote under the current system. This overlooks the fact that *all* Ohioans can vote early, thereby negating any possibility of being unable to vote because of a late jailing. Motion 3–4, 10–11. A burden so easily avoided is not significant.

The plaintiffs never address this; their entire argument turns on an attempted analogy to *Obama for America v. Husted*, 697 F.3d 423. But that case does not help them. In *Obama for America*, this Court considered the constitutionality of a law that allowed only military voters to cast early in-person votes in the three days before the election. *Id.* at 425. The Court determined that the burden imposed on non-military personnel was neither severe nor slight. *Id.* at 433. And it based that determination largely on evidence showing that the inability to vote in that three-day period would burden a significant number of actual voters—perhaps as many as "100,000 Ohio voters." *Id.* at 431. This reliance on the absolute number of affect-

ed voters refutes the plaintiffs' suggestion that "the number of voters impacted" is irrelevant to the burden analysis. Response 13 n.7. (Indeed, the plaintiffs' only support for that proposition is a Seventh Circuit case making the obvious point that plaintiffs are not *required* to show an effect on many voters to win an equal-protection challenge. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016).) Here, everyone acknowledges that the challenged Ohio law affects very few voters, which implies a minor burden on voting rights.

Justifications. In any event, the Secretary's motion showed that he would win under *Anderson-Burdick* even if the burden were, like the burden in *Obama for America*, neither severe nor slight, but rather intermediate. Motion 10–19. The plaintiffs seem to concede the significance of Ohio's interest in efficient election administration. But they contend that this interest cannot justify the burdens imposed by Ohio's law.

Some of the plaintiffs' arguments are factually incorrect. For example, they say the Secretary "does not cite to a *single* evidentiary source suggesting that jail voting is more difficult than hospital voting." Response 14. In fact, the Secretary cited many evidentiary sources establishing the unique administrative burdens presented by jails. *See* Motion 12–14 (collecting sources). The plaintiffs are also wrong that "the record evidence shows that jail voting is significantly quicker and

easier to administer than hospital voting." Response 16. The plaintiffs' lone source for this proposition shows only that, under the current system, more hospitalized voters than jailed voters seek absentee ballots, and that the election boards therefore spend more time accommodating the larger group's requests. Royer Dep., R. 55-7, PageID#2299. That does not establish that it is easier to administer requests of hospitalized voters—it shows only that there are more of them. Nor does the testimony address the relative time demands that late-jailed voters would impose if they could seek absentee ballots up until 3 P.M. on Election Day.

Other arguments parrot the District Court's *ipse dixit*. For example, the plaintiffs claim that 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." Response 16 (quoting Op., R.70, PageID#4327). The Secretary already addressed this. On Election Day, and during the immediately preceding days, election officials are tremendously busy with myriad important, time-consuming tasks. *See* Motion 14–19. That same evidence establishes that elections need to be well-staffed. *Id.* The State would therefore jeopardize orderly election administration if it required dispatching county-board employees to local jails in the waning hours of an election.

It is no answer to suggest that county boards might "simply shift the day when they deliver absentee ballots to the jail from the Monday before an election to Election Day" itself. Response 6, 20. Often, the same board employees who deliver absentee ballots to the county jails switch to the hospitals on Election Day. Poland Dep., R. 52-2, PageID#1566. No evidence in the record even suggests that these employees could accomplish both tasks in less than five hours on Election Day. Even if larger counties could find a way to arrange for that (by finding more staff, for example), arranging to deliver *all* late-jailed voters' ballots after 3 P.M. on Election Day would guarantee that more election officials are taken from the polls at the very time they are needed most. And since jails understandably insist on bringing the jailed voters to vote one by one, Fisher Dep., R.55-27, PageID#2700, this "simpl[e]" strategy could result in election officials being away from the polls for quite a while. (The novel idea of starting "voting centers" in larger jails, Response 20, is a non-starter: ballot boxes in jails, unless they are secured with quite-costly measures, are sure to undermine public confidence in elections. And interest groups, perhaps the very ones that represent the plaintiffs, would sue, arguing that the Equal Protection Clause requires similar centers in *every* jail.) To be clear, the Secretary is not arguing "that a busy election cycle alone can justify disparate burdens placed on [similarly situated] voters." Response 18. His point is that the

pressures of Election Day, combined with logistical difficulties that make late-jailed voters' requests harder to accommodate, justify the challenged burden here.

The plaintiffs also say that delivering ballots to late-jailed voters is easier than delivering them to late-hospitalized voters because, in jail, unlike in hospitals, the guards can assist in locating voters. Response 19. This overlooks the reality that election officials *must* rely on assistance from guards, who may be occupied with other matters. Officials cannot enter the jail and try to track down voters themselves, as they can in a hospital. The "assistance" from guards supports the Secretary, not the plaintiffs.

The plaintiffs protest that "no correctional officers complained about the jail voting program being too much work or disruptive." Response 20. Irrelevant. The question here is whether extending the absentee-ballot deadline for late-jailed voters would burden *election officials*, not jail officials. Anyway, it is doubtful whether the burden on jails would remain limited if the deadline were extended. The plaintiffs mock the suggestion that "savvy prisoners could abuse the system by making a large number of requests in hopes of distracting the guards." Response 17. But common sense and decades of experience confirm that, in jail, polices that can be abused will be abused.

Finally, the two named plaintiffs argue that the Montgomery County Board of Elections was able to deliver their absentee ballots on Election Day 2018 without undue difficulty. This, they say, refutes the Secretary's arguments regarding the difficulty of delivering ballots to late-jailed voters. Response 20. Not so. Whether the election board in a large county can accommodate two requests without undue disruption says nothing about what would happen if *all* late-jailed voters in Ohio could do the same.

Conclusion. Because the distinction between late-jailed and late-hospitalized voters imposes (at most) a moderate burden, and because it promotes the State's substantial interest in orderly election administration, Ohio's law is likely to be upheld. Indeed, this Court already suggested as much in *Fair Elections Ohio v. Husted*, 770 F.3d 456, 458 (6th Cir. 2014).

B. The remaining factors support a stay pending appeal.

The plaintiffs' treatment of the remaining factors fails, too.

First, the plaintiffs say that the injunction of a valid state law *does not* create irreparable harm when the injunction is "narrow in scope and impact." Response 7. But that goes to the degree of irreparable harm, not its existence, and finds no basis in the case law. *See Abbott*, 138 S. Ct. at 2324; *Maryland*, 133 S. Ct. at 3 (Roberts, C.J., in chambers). Anyway, a flawed decision jeopardizing the State's sub-

stantial interest in orderly election administration threatens substantial irreparable harm.

Second, if late-jailed voters have no right to the same 3 P.M. deadline as late-hospitalized voters, then a stay would not irreparably harm late-jailed voters—it would only preclude them from exercising an entitlement they do not have. Regardless, anyone worried about being jailed on a future election day can avoid any risk of injury by voting early.

Finally, the public-interest factor follows from the likelihood-of-success factor, since the public interest always supports giving effect to valid laws. *Coalition to Defend Affirmative Action*, 473 F.3d at 252. True, "it is always in the public interest to prevent a violation of a party's constitutional rights." *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010) (cited at Response 10). But the challenged distinction does not violate anyone's rights.

C. The plaintiffs' procedural complaints are meritless.

The plaintiffs say that the Secretary's stay motion is 'improper" under Rule 8(a) of the Federal Rules of Appellate Procedure, "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." Response 3 n.1. Rule 8(a) says nothing about waiting for the other side to file a re-

sponse in the district court—it says only that a "party must ordinarily move first in the district court." The Secretary did that. When the District Court failed to rule on his request within a couple of weeks, the Secretary moved this Court for a stay, ensuring the Court would have time to hear and resolve the case on an expedited schedule if it wished.

CONCLUSION

This Court should issue a stay pending appeal, or else expedite its resolution of this case.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY P. KELLER
Deputy Solicitor General
ANN YACKSHAW
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Defendant-Appellant
Frank LaRose, Ohio Secretary of State

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this *Reply* complies with the type-volume requirements and contains 2,574 words. *See* Fed. R. App. P. 27(d)(2)(A).

/s/ Benjamin M. Flowers
Benjamin M. Flowers

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2019, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
Benjamin M. Flowers