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

Plaintiffs-Appellees,

v.

FRANK LAROSE, in his official capacity as Secretary of State of Ohio

Defendant-Appellant.

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

District Case No.
2:18-cv-1376

OPENING BRIEF OF THE SECRETARY OF STATE OF OHIO

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary has asked for resolution of this appeal no later than March 14, 2020. He requests argument if, but only if, it would not prolong resolution of this case past that date.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1331 to hear this case. That court entered a final judgment on November 6, 2019. Secretary LaRose timely appealed on November 12, 2019, and this Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Ohio voters who want an absentee ballot must generally seek one by noon on the Saturday before the election. Ohio Rev. Code §§3509.03(D), 3509.08(A). There is one exception: voters who unexpectedly find themselves (or their minor children) in the hospital after the deadline passes may request absentee ballots, on an emergency basis, until 3 p.m. on Election Day. Ohio Rev. Code §3509.08(B). Does Ohio violate the Equal Protection Clause by declining to make a similar exception for voters who are unexpectedly jailed on Election Day?

2. Does Ohio, by declining to allow jailed voters to request an absentee ballot through 3 p.m. on Election Day, unduly burden jailed voters' right to vote?

3. The District Court certified an injunctive-relief class consisting of *all* voters jailed between the close of business on Friday before an election and the close of polls on Election Day. The class members are not all similarly burdened by the Saturday-noon deadline. For example, voters jailed on Friday can still comply with the deadline, and voters who *know* they will be jailed between Friday and Election Day (because of a report-by date, for instance) can plan accordingly and vote early.

Does the class satisfy Rule 23's commonality and typicality requirements, under which class members' claims must be similar enough that they can all be resolved in one fell swoop?

4. The certified class includes only voters who will be jailed through the close of polls on an Election Day. This definition makes it impossible to know which voters are entitled to apply for a late absentee ballot until voting is over. Does the class fail Rule 23's requirement that class members be ascertainable?

INTRODUCTION

"Ohio is a national leader when it comes to early voting opportunities." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016). Yet, in recent years, Ohio been forced to litigate case after case "asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes." *Id.* at 622. Ohio has even faced "cases" without plaintiffs, initiated by district courts themselves based on anonymous phone calls. *See In re 2016 Primary Election*, 836 F.3d 584, 585–86 (6th Cir. 2016).

The trend continues unabated. The District Court held that Ohio violates the Equal Protection Clause by requiring jailed voters (like almost everyone else) to seek absentee ballots by noon on the Saturday before a Tuesday election. Ohio, it held, cannot impose this deadline on *jailed* voters while simultaneously allowing unexpectedly *hospitalized* voters (and no one else) to seek absentee ballots until 3 p.m. on Election Day.

This is precisely the sort of micromanagement that this Court has decried. The Equal Protection Clause requires equal treatment of *similarly situated* people. In the election context, this means that States may distinguish between differently situated voters, provided the distinction advances a government interest strong enough to outweigh any burden imposed on the right to vote. *Obama for Am. v.*

Husted, 697 F.3d 423, 428–31 (6th Cir. 2012). The distinction between jailed and hospitalized voters, when it comes to the deadline for requesting an absentee ballot, passes constitutional muster. For one thing, it promotes Ohio's substantial interest in the orderly administration of elections. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality); *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005). The reason is that absentee-ballot requests from late *jailed* voters present logistical and administrative difficulties that last-minute requests from *hospitalized* voters do not. These difficulties include security restrictions that are unique to jails, the impossibility of accessing jailed voters without assistance from guards, challenges locating voters within jails, and more. And these difficulties are especially burdensome on and around Election Day, when election officials are busy completing the many tasks that go into carrying out an orderly election. Every resource the State has to deploy to jails—every minute of worker time it loses while dispatched employees deal with jailhouse security and wait for guards to find and bring them voters—is a resource it cannot expend completing its many important election-related tasks.

The State's interest in avoiding these difficulties more than justifies whatever burden its distinction between jailed and hospitalized voters inflicts on the right to vote. That burden is not very large; it applies *only* to voters who are unexpected-

ly jailed after the Saturday-noon deadline for requesting a mail-in ballot and who remain jailed through Election Day. And the burden is easily avoided, since anyone who fears being jailed can avail himself of Ohio's many early-voting options. Moreover, the generally applicable Saturday-noon deadline imposes no greater a burden on *jailed* voters than on other voters: with the one exception of voters who are unexpectedly hospitalized, *every voter* who fails to vote early runs the risk of being "suddenly called away and prevented from voting on Election Day." *Obama for Am.*, 697 F.3d at 435 (emphasis added). The voter who waits runs the risk of car trouble, a traffic accident, a canceled flight back home, food poisoning, a death in the family, a work emergency, or anything else.

Because Ohio's distinction between jailed and hospitalized voters does not do much to burden the opportunity to vote, and because it furthers the State's substantial interest in orderly election administration, the distinction is constitutional.

Notwithstanding all this, the District Court held that Ohio violates the Equal Protection Clause by distinguishing between jailed and hospitalized voters. Its opinion is adorned, as such opinions usually are, with praise for the importance of the right to vote. The praise is appropriate; the conclusion is not. The right to vote exists so that the People may govern themselves. Decisions that invalidate state election laws based on flawed constitutional theories do not honor the right to vote;

they dilute it, by wrongfully restricting what the public may accomplish through self-government. The way to respect the right to vote is to properly interpret and apply the Constitution, leaving the policy questions to the policy makers. The District Court—no doubt acting in good faith—failed to do that. This Court should reverse and remand, with instructions to enter summary judgment for the Secretary.

STATEMENT

1. It is easy to vote in Ohio. Very easy. Voters can choose from any of three options. *First*, they may vote in person on Election Day between 6:30 a.m. and 7:30 p.m. *See* Ohio Rev. Code §3501.32. *Second*, Ohio hosts early in-person voting at locations around the State for more than four weeks before Election Day. *See* Ohio Rev. Code §3509.051; Directive 2017-02 §1.04, R.55-34, PageID#3010–12. *Third*, any voter, for any reason, may cast a mail-in absentee ballot. *See* Ohio Rev. Code §§3509.02–.05.

This case involves the third option. Ohio makes absentee ballots available beginning thirty days before each election. Ohio Rev. Code §§3509.01(B)(2), 3503.19(B)(2)(d). Any voter who wants to vote by a mail-in absentee ballot must request one "not later than twelve noon of the third day before the day of the election at which the ballots are to be voted." Ohio Rev. Code §3509.03(D). For elec-

tions occurring on a Tuesday, this means each board of elections must receive all absentee-ballot requests by noon on Saturday. For many recent elections, including the November 2018 election at issue in this case, Ohio has made that process even easier by mailing absentee-ballot applications to all registered voters. *See* Directive 2018-18, available at https://bit.ly/2QA1EbN.

Ohio law also details procedures for delivering absentee ballots to certain categories of voters who request one. Ohio Rev. Code §3509.08(A). For example, Ohio law allows confined voters—including jailed voters—to request absentee ballots through the mail or by having someone else deliver their request to the boards of elections. *See id.* The boards then deliver the absentee ballots, either by mail or by in-person delivery. *Id.* (The in-person delivery option may be necessary in cases where a mailed ballot will not reach the voter in time.) In the case of in-person deliveries, Ohio law requires that boards of elections dedicate two employees (one from each major political party) to deliver the ballot. Those employees wait for the applicant to vote and return the completed ballot to the board. *Id.*

All voters, including confined voters, must apply for an absentee ballot by noon on the Saturday before the election. Ohio Rev. Code §§3509.03(D), 3509.08(A). This means that voters who skip Ohio's no-fault early-voting options take the chance that something unexpected might prevent them from getting to the

polls on Election Day. Ohio makes just one exception to the Saturday-noon deadline: voters who are unexpectedly hospitalized, or whose minor children are unexpectedly hospitalized, after the Saturday-noon deadline may request a ballot until 3 p.m. on Election Day. Ohio Rev. Code §3509.08(B); Directive 2017-02 §1.04, R.55-34, PageID#3016. If the request comes from a hospital located in the county in which the voter is registered, the elections board must dedicate two employees (again, one from each major political party) to deliver the ballot, wait for the applicant to vote, and return the completed ballot to the board. Ohio Rev. Code §3509.08(B)(2). The voter may alternatively request that a family member retrieve and deliver the ballot. *Id.*

In sum, voters preferring to remain at home on Election Day for any reason (or no reason at all) have until the Saturday before Election Day to request a ballot. For the most part, those who choose not to request a ballot or cast an early in-person vote will be unable to vote if something unexpected keeps them from getting to the polls on Election Day. The only exception applies to voters who are unexpectedly hospitalized, or whose minor children are unexpectedly hospitalized, between the noon-Saturday deadline and Election Day: those voters, and *only* those voters, can seek an absentee ballot until 3 p.m. on Election Day.

2. Ohio is a "national leader" in accommodating those who cannot, or do not want to, vote at the polls on Election Day. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016). To begin, while Ohio takes a no-fault approach to early voting, many States currently limit absentee voting to those with a certain recognized "excuse." *See* Ala. Code §17-11-3; Ark. Code Ann. §7-5-402(1)-(2); Conn. Gen. Stat. §9-135(a); 15 Del. Code Ann. §5502; Ky. Rev. Stat. Ann. §117.085(1)(a); La. Stat. Ann. §18:1303; Mass. Gen. Laws ch. 54, §86; Miss. Code Ann. §23-15-627; Mo. Rev. Stat. §115.277; N.H. Rev. Stat. §657:1; N.Y. Elec. Law §8-400; 25 Pa. Cons. Stat. §3146.1; S.C. Code Ann. §7-15-320; Tenn. Code Ann. §2-6-201; Tex. Elec. Code Ann. §82.001–.007; Va. Code Ann. §24.2-700; W. Va. Code §3-3-1(b).

Ohio also allows voters to freely choose between two different early-voting methods: in person and by mail. This puts Ohio ahead of States like Alabama, Connecticut, Mississippi, Missouri, New Hampshire, Pennsylvania, Rhode Island, and South Carolina, which do not currently offer any form of early in-person voting. *See Absentee & Early Voting*, National Conference of State Legislatures, https://bit.ly/359hXBL. And by combining no-fault eligibility with a Saturday-noon request deadline, Ohio's approach is the most voter-friendly in this Circuit: every other State has an earlier deadline, and both Kentucky and Tennessee restrict absentee voting to certain categories of voters. *See* Ky. Rev. Stat. Ann.

§117.085(1)(a); Mich. Comp. Laws §168.759(2); Tenn. Code Ann. §§2-6-201, 2-6-202(a)(1).

Finally, Ohio has company in providing exceptions for people who face medical emergencies without providing similar exceptions for late-jailed individuals. States from across the Union—from Massachusetts to Utah, and from Minnesota to the Carolinas—have laws that work in much the same way. *See, e.g.*, Ala. Code §17-11-3(c); Conn. Gen. Stat. §9-150c; Ga. Code. Ann. §21-2-384(a)(4); Ind. Code Ann. §3-11-4-1(b); Iowa Code §53.22(3); Ky. Rev. Stat. Ann. §117.077; Mass. Gen. Laws ch. 54, §89; Minn. Stat. §203B.04(2); Mont. Code Ann. §13-13-211(2); N.C. Gen. Stat. 163-230.1(b); 25 Pa. Cons. Stat. §3146.2a; S.C. Code Ann. §7-15-330; S.D. Codified Laws §12-19-2.1; Tenn. Code Ann. §2-6-401(a); Utah Code Ann. §20A-3-306.5; Va. Code Ann. §24.2-705; Wis. Stat. §6.86(3).

3. On November 6, 2018, the day of the general election, Tommy Ray Mays II and Quinton Nelson Sr. sued former Ohio Secretary of State Jon Husted. Both Mays and Nelson are registered Ohio voters. Both wound up in jail shortly before Election Day. Compl., R.1, PageID#2–3. Neither had taken advantage of their early-voting opportunities. *See id.* They alleged that Ohio law violates the Equal Protection Clause by denying jailed voters the same 3 p.m. deadline as unexpectedly hospitalized voters. *Id.*, PageID#11–12. They further alleged that the Saturday-

noon deadline burdened their right to vote, in violation of the First Amendment, and that it did so even setting aside the more-favorable treatment afforded hospitalized voters. *Id.*, PageID#12–13.

In addition to seeking relief for themselves, Mays and Nelson sought to certify a class of late-jailed individuals under Rule 23(b)(2). They proposed the following class definition:

> All individuals arrested and held in detention in Ohio on or after close of business for the county election board on the 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 a 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.

Compl., R.1, PageID#9; Mot. Certify Class, R.29, PageID#238–39. The proposed class thus consisted not only of truly *unexpectedly* jailed voters, but also of future voters who expect to be jailed—for example, voters who are ordered to report to jail after the Saturday-noon deadline. The class also included voters who jailed on Friday or on Saturday morning, before the Saturday-noon deadline.

A few hours after the case began, the District Court awarded Mays and Nelson individual, temporary relief; it ordered hand delivery of 2018 ballots to both plaintiffs. *See* Order, R.12, PageID#153. Over the next year, the parties conducted discovery, litigated the propriety of the proposed class, and filed cross motions for

summary judgment. *See, e.g.*, LaRose Mot. Summ. J., R.54, PageID#2056; Pls.' Mot. Summ. J., R.55, PageID#2102.

A day after the November 2019 election, the District Court certified a class and awarded the plaintiffs summary judgment. In certifying the class, the court adopted the plaintiffs' proposed class definition. Op., R.70, PageID#4308. It acknowledged potential factual differences between class members, including that some class members might foresee their arrests. *Id.*, PageID#4304. But, in its view, these differences did not "negate the Court's ability" to provide a one-size-fits-all answer for the class. *Id.*

On the merits, the District Court concluded that Ohio's law violated the Equal Protection Clause. It applied the *Anderson-Burdick* test, under which courts faced with challenges to state election laws "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed.'" *Id.*, PageID#4311 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). The District Court concluded that the distinction between jailed and hospitalized voters imposes an intermediate burden on the right to vote—a burden that, while "not severe, is not trivial." *Id.*, PageID#4315. And it struck down Ohio's law, concluding that the State had no good

reason for denying unexpectedly jailed voters the same late deadline available to unexpectedly hospitalized voters. *Id.*, PageID#4330–31.

Because the District Court resolved this case under the Equal Protection Clause, the District Court did not expressly reach the plaintiffs' First Amendment undue-burden claim. But it did express skepticism about that theory's chances of success. It explained that States "need to put a reasonable deadline on the opportunity to request an absentee ballot." *Id.*, PageID#4322. Thus, it reasoned, "a generally applicable deadline that applied to all would-be absentee voters would likely survive the *Anderson-Burdick* analysis, even if" that meant certain jailed individuals would be unable to meet the deadline. *Id.*

4. Ohio's presidential primary is fast approaching. As with all presidential elections, Ohio expects a high turnout and boards of election are already preparing. That preparation includes making plans about how they are going to use finite employees and resources. The State, therefore, asked this Court to either stay the judgment pending appeal or expedite the briefing schedule to permit a final resolution before March 14, 2020—the generally applicable deadline to request an absentee ballot for the primary. On December 11, this Court ordered expedited briefing.

SUMMARY OF ARGUMENT

I. Ohio allows unexpectedly hospitalized voters to seek absentee ballots until 3 p.m. on Election Day. It requires jailed voters, just like all other voters, to request a ballot no later than noon on the Saturday before Election Day. The District Court held that this distinction between jailed and hospitalized voters violates the Equal Protection Clause. It erred.

Under the *Anderson-Burdick* framework that governs this disparate-treatment claim, courts must balance the burden on voting rights against the State's justifications for the burdens its rule imposes. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The degree of scrutiny this test requires varies depending on the degree of the burden the challenged law imposes. When a law imposes only minimal burdens, the analysis is "akin to rational-basis review." *Ohio Council 8 Am. Fed'n of State, Cty. & Mun. Emps. v. Husted*, 814 F.3d 329, 338 (6th Cir. 2016). Severe burdens get strict scrutiny. *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Burdens that are "somewhere between minimal and severe" are assessed under a "flexible" analysis, *Schmitt*, 933 F.3d at 641, under which States have wide latitude to draw distinctions between (non-suspect) groups of voters that are not "in all *relevant* respects alike,"

Obama for Am. v. Husted, 697 F.3d 423, 435 (6th Cir. 2012) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

Ohio's distinction between jailed and hospitalized voters is constitutional. For starters, the State's decision not to extend the 3 p.m. deadline to jailed voters imposes a minimal burden on the opportunity to vote—at worst, the burden is "somewhere between minimal and severe." *Schmitt*, 933 F.3d at 641. Jailed voters may request absentee ballots on precisely the same terms as all other voters *except for* unexpectedly hospitalized voters. Anyone who fears being jailed on Election Day can avail himself of Ohio's many early-voting options. And even those who fail to timely request a ballot or vote early will miss but a single election because of this unique late-jailed scenario.

Even assuming the burden is moderate (rather than minimal), it is justified by the State's interest in the "orderly administration" of elections. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality). On Election Day, and on the immediately-preceding days, boards of elections must complete many important, time-consuming tasks, often with already-overburdened staffs. The State's substantial interest in getting all this done, correctly and orderly, justifies declining to extend the absentee-ballot-request deadline for jailed voters. The reason is this: absentee-ballot requests by jailed voters impose logistical and adminis-

trative difficulties that identical requests by hospitalized voters do not. In jails, but not hospitals, election officials must go through security before entering. Boards of elections can often dispatch to jails only those employees who have already cleared a background check. And once election officials pass jailhouse security, they must wait for guards to find and deliver voters. These additional steps take additional time—time that election officials cannot give without sacrificing work on the many other important tasks they must complete on and just before Election Day. Preventing a disruption of these important election-related tasks more than justifies the at-most-moderate burden on voting rights that Ohio's distinction imposes.

The District Court largely failed to engage with these arguments. For example, it asserted that jailed and hospitalized voters are "similarly situated when it comes to voter availability," Op., R.70, PageID#4325, but nowhere refuted or meaningfully grappled with the contrary record evidence. The District Court also hypothesized ways that the State "could," in its view, accommodate jailed voters without undermining its admittedly-substantial interest in orderly election administration. *See, e.g.*, *id*, Page ID#4326–27. Many of these hypotheses would not, in fact, work. Regardless, the question is not whether the State *could* find a way to treat jailed and hospitalized voters alike. The question is whether the State's inter-

est in refusing to do so is strong enough to outweigh the at-most-moderate burden imposed on voting rights. The answer to that question is "yes."

II. The plaintiffs' remaining claim—that the Saturday-noon deadline unduly burdens jailed voters' right to vote—likewise fails. The undue-burden claim, just like the disparate-treatment claim, arises under the *Anderson-Burdick* framework. According to the plaintiffs, the Saturday-noon deadline, even without regard to the later deadline given to unexpectedly hospitalized voters, imposes a burden on the right to vote that cannot be justified by any countervailing state interest.

The Court should reject the plaintiffs' argument. Again, the Saturday-noon deadline for seeking an absentee ballot imposes an at-most-moderate burden on the right to vote. And again, that burden is justified by the State's interest in the orderly administration of elections. Ohio cannot possibly allow *all* voters who face unexpected events at any point before the close of polls on Election Day to obtain an absentee ballot; election officials have too many critically important tasks to complete. Ohio must draw the line somewhere. And drawing it mere days before the election, thus accommodating the vast majority of voters who wish to vote with a mail-in absentee ballot, is wholly appropriate. Indeed, the District Court recognized that, owing to the State's interest in orderly election administration, "a generally applicable deadline that applied to all would-be absentee voters would likely

survive the *Anderson-Burdick* analysis, even if" some voters were unable to meet the deadline. Op., R.70, PageID#4322. The generally applicable Saturday-noon deadline survives *Anderson-Burdick* scrutiny.

III. The District Court abused its discretion by certifying a class that violates Rule 23's commonality, typicality, and ascertainability requirements.

Commonality and Typicality. To satisfy commonality, a class must present a common question that "is central" to the class members' claims and can be answered "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Typicality similarly requires that, "as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (*en banc*). Legally relevant factual differences between class members thus destroy commonality and typicality. *See Dukes*, 564 U.S. at 350.

The class here includes jailed voters who are factually different in key ways from their fellow class members. First, the class includes even those voters who *expect* to be in jail on Election Day—for example, voters who must report to jail between the Saturday-noon deadline and Election Day, or voters who knowingly risk being jailed by skipping a mandatory court date. The Saturday-noon deadline imposes an even-lesser burden on the voting rights of *these* voters than it does on the rights of unexpectedly jailed voters, because those who expect to be jailed can plan

accordingly in deciding whether to vote early. The class also includes people arrested on Friday and on Saturday morning. Those voters can still make use of the Saturday-noon deadline, so they too are burdened less by the deadline than their later-jailed peers.

These factual distinctions are legally relevant: because these two groups of jailed voters are burdened less by the Saturday-noon deadline than are voters *unexpectedly* jailed *after* the Saturday-noon deadline, the *Anderson-Burdick* balance must be conducted separately. It is therefore impossible to resolve all class members' claims in "one stroke," *Dukes*, 564 U.S. at 350, and the class fails commonality and typicality.

Ascertainability. "Before a court may certify a class pursuant to Rule 23, the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537–38 (6th Cir. 2012) (quotations omitted). The certified class fails this requirement. The class is defined to include jailed voters who "will remain in detention through close of polls on Election Day." Op., R.70, PageID#4306. Neither election officials nor the courts will be able to locate such voters with much certainty. For one thing, jailed voters might seek bail or otherwise be released before Election Day without ad-

vance warning. For another, there is no way to know which voters remained in detention "through close of polls on Election Day" until after the polls close, meaning election officials will not know, when 3 p.m. rolls around, which voters who requested a ballot will ultimately end up being class members. A class whose membership is not set by the time the defendant has to provide class members with relief is not "ascertainable."

The District Court certified the class anyway, reasoning that *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016), made the ascertainability requirement inapplicable to Rule 23(b)(2) injunctive-relief classes. Op., R.70, PageID#4306–07. Not so. *Cole* presented the question whether ascertainability applies to injunction classes seeking a *negative* injunction. It held that ascertainability does not apply in this context, since the government does not need to know the identities of class members to comply with a court order requiring it to cease an activity. *Cole* did not involve, and so it did not consider, whether ascertainability applies to Rule 23(b)(2) classes seeking a *positive* injunction, such as the one sought by the plaintiffs here. *Cole*'s reasons for rejecting ascertainability do not extend to this context, because the government cannot give the class members the affirmative relief they seek—it cannot bring them their ballots—unless it knows who they are. *See Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 495 (7th Cir. 2012).

STANDARD OF REVIEW

This Court reviews a district court's order granting summary judgment *de novo*. *Leary v. Daeschner*, 349 F.3d 888, 896 (6th Cir. 2003). For the Court to affirm, the record must show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must "view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party." *Leary*, 349 F.3d at 897.

This Court reviews an order certifying a class for abuse of discretion. *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 643 (6th Cir. 2006). Such an abuse occurs when a district court "relies on erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Id.* at 644.

ARGUMENT

This Court should reverse the District Court's judgment. The plaintiffs' equal-protection and First Amendment claims fail as a matter of law, and so the Court should remand with instructions to award the Secretary summary judgment. Moreover, the District Court erred in certifying a class that does not satisfy Rule 23's commonality, typicality, or ascertainability requirements.

I. Ohio's distinction between jailed and hospitalized voters is constitutional.

The right to vote is "implicit in our constitutional system." *Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999) (quotations omitted). Needless to say, States cannot violate that right. At the same time, the Constitution empowers States to prescribe "the Times, Places and Manner of holding elections." U.S. Const. art. I, §4. "States may, and inevitably must, enact" election rules, even if such rules, in practical effect, prevent some people from voting. *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (quotations omitted); *see also Griffin v. Roupas,* 385 F.3d 1128, 1130 (7th Cir. 2004).

These competing principles give rise to the question of how to determine whether an election regulation so burdens the right to vote that it *violates* that right. The courts have settled on a balancing test, under which courts "weigh 'the character and magnitude of the asserted injury' … against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Under this test, the level of scrutiny depends on the nature of the burden: "Laws imposing 'severe burdens on plaintiffs' rights' are subject to strict scrutiny, but 'lesser burdens … trigger less exacting re-

view.'" *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

Owing to the States' substantial authority to regulate elections, the less-exacting form of review is often easily satisfied. If a rule imposes reasonable, generally-applicable requirements, "the State's important regulatory interests" surrounding elections "are generally sufficient." *Anderson*, 460 U.S. at 788. When a law imposes only minimal burdens, the analysis is "akin to rational-basis review." *Ohio Council 8 Am. Fed'n of State Cty. & Mun. Emps. v. Husted*, 814 F.3d 329, 338 (6th Cir. 2016). But even when a law's burden "is somewhere between minimal and severe," the analysis remains "flexible." *Schmitt*, 933 F.3d at 641. This flexibility is important. Any voting law, such as a deadline, "inevitably affects—at least to some degree—the individual's right to vote." *Burdick*, 504 U.S. at 433 (quotations omitted). If such "inevitabl[e]" effects meant rigid scrutiny that "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.*

This Court's cases add another wrinkle: they hold that *Anderson-Burdick* balancing captures at least two types of claims. *See Obama for Am. v. Husted*, 697 F.3d 423, 428–31 (6th Cir. 2012). The first type of claim—the prototypical one—alleges an election regulation unduly burdens the right to vote. Such claims arise

under the Due Process Clause, although the plaintiffs here raise the same type of claim under the First Amendment. The second type of claim, arising under the Equal Protection Clause, alleges that a State "classifies voters in disparate ways" with some corresponding effect on the right to vote. *Id.* at 428. (Though it is foreclosed by circuit precedent, the Secretary preserves his argument that *Anderson-Burdick* is not the right approach for resolving equal-protection claims. *See* Op., R.70, PageID#4310 n.13.)

Even though the plaintiffs raised both types of claims, the District Court resolved just one: it held that Ohio's distinction between jailed and hospitalized voters violates the Equal Protection Clause. That is wrong. The plaintiffs' equal-protection claim fails as a matter of law, and the Court should reverse and remand with instructions to enter summary judgment for the Secretary. This section explains why. In Section II below, the Secretary shows why the undue-burden claim fails as well.

A. As a matter of law, the Equal Protection Clause permits Ohio's distinction between hospitalized voters and jailed voters.

When evaluating a disparate-treatment claim under *Anderson-Burdick*, key equal-protection principles still apply. *Obama for Am.*, 697 F.3d at 435 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)); *see also Jolivette v. Husted*, 694 F.3d 760, 771 (6th Cir. 2012). The Equal Protection Clause requires that "all persons simi-

larly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). People are similarly situated if they "are in all *relevant* respects alike." *Obama for Am.*, 697 F.3d at 435 (quotations omitted). Conversely, those who are *not* alike in all relevant ways—people with attributes that a reasonable person could find "material" to the topic at hand, *Trihealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005)—may be treated differently. "The Equal Protection Clause does not forbid classifications," *Nordlinger*, 505 U.S. at 10, especially when no suspect class is at stake.

Given this broad ability to account for relevant differences, States have "wide leeway" to pass election rules even if they treat *somewhat* similar people differently. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 808 (1969). This is true because any attempt to help one group of voters "inevitably requires that some [other] persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 108 (2003) (quotations omitted); *see also McDonald*, 394 U.S. at 810–11. Thus, *Anderson-Burdick* remains "sufficiently flexible" to allow States to address "the complexities" that come with crafting statewide election rules that cover many different people in many different situations. *Obama for Am.*, 697 F.3d at 429.

1. The distinction between jailed and hospitalized voters imposes, at most, a moderate burden on voting rights.

Ohio's distinction between jailed and hospitalized voters imposes a minimal burden on voting rights. It affects *only* those voters who are jailed after the Saturday-noon deadline for absentee-ballot applications and remain jailed through Election Day. And these affected voters have ample opportunity not to be burdened at all: given the many early-voting opportunities that Ohio extends, anyone who fears winding up in jail on Election Day (or any other curve ball life might throw) may eliminate the risk by voting early, either in person or by mail.

Other considerations reduce the character and magnitude of the burden still more. For one thing, being jailed on Election Day is presumably a once-in-a-lifetime event for most voters. This means the State's refusal to extend the deadline for jailed voters until 3 p.m. on Election Day imposes only a once-in-a-lifetime burden. This is in contrast to other election regulations, like identification requirements, that might burden a person in many elections. Additionally, many jailed voters know or expect that they will be jailed, perhaps because they received an order to report to jail on a particular date or skipped a mandatory court appearance. For that subset of jailed voters—one cannot fairly call them *unexpectedly* jailed voters—the slight burden is reduced still more.

At worst, Ohio's distinction between unexpectedly jailed and unexpectedly hospitalized voters imposes a burden "somewhere between minimal and severe." *Schmitt*, 933 F.3d at 641. That is what the District Court said. Op., R.70, PageID#4319.

2. The distinction between jailed and hospitalized voters is more than justified by the important state interest it furthers: the interest in the orderly administration of elections.

Assuming for the sake of argument that the distinction between jailed and hospitalized voters imposes a moderate burden on voting rights, its constitutionality must be assessed under the "flexible" analysis that *Anderson-Burdick* requires in these circumstances. *Schmitt*, 933 F.3d at 641. Under such an analysis, even a moderate burden on voting rights is vastly outweighed by the substantial state interest that the distinction promotes: the interest in the "orderly administration" of elections. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality); *see also Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005).

The need for orderly elections actually captures a number of interrelated interests including "preserving the integrity of the election process," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); "maintaining a stable political system," *id.*; "preventing voter fraud," *Crawford*, 553 U.S. at 197; "protecting public confidence," *id.*; and reducing administrative costs, *Ohio Democratic Party v.*

Husted, 834 F.3d 620, 634 n.8 (6th Cir. 2016). To ensure that election officials are able to administer elections in an orderly fashion, States may take steps to keep election officials from being "overburdened" and to "reduc[e] the administrative strain felt by boards of elections." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635 (6th Cir. 2016). The fact of the matter is that election officials must, especially in the days on and just before an election, complete "a host of ... tasks necessary to conduct a fair election." *Lawrence*, 430 F.3d at 375. Strained officials make mistakes—and it is important to avoid mistakes in the election context. The State cannot, of course, remove all stress from these officials during election season, but it must carefully balance what they can handle and what is too much.

The distinction Ohio draws between jailed and hospitalized voters helps to strike the balance. On Election Day, and in the days immediately preceding it, Ohio's election officials must complete numerous, important, time-consuming tasks with limited staffs, all while being careful to avoid errors. In light of all this, the State appropriately advances its interest in the orderly administration of elections by declining to extend the absentee-ballot-request deadline for groups of voters—including jailed voters—whose requests impose unique logistical and administrative difficulties. The State could not accommodate those voters without diverting resources away from the "host of other tasks necessary to conduct a fair elec-

tion," *Lawrence*, 430 F.3d at 375, thus undermining the State's interest in orderly election administration.

To understand all this, it helps to consider the matter in three steps. *First*, it is important to understand the many tasks that election officials must complete. *Second*, one must consider, in light of that context, the logistical and administrative difficulties posed by absentee-ballot requests from jailed voters (but not hospitalized voters). *Finally*, with those two steps out of the way, it becomes apparent why Ohio's distinction promotes orderly election administration and justifies the burden on jailed voters.

Election Day resources. Running an election is a difficult task for any State. But the challenges only increase in a State like Ohio, which offers its voters so many early-voting opportunities. Ohio's eighty-eight elections boards must facilitate early in-person voting, absentee voting, and Election Day voting for over eight million registered Ohioans. Simultaneously, the process must ensure that *only* those registered voters vote. Boards often must accomplish their many tasks with a small, seasonal staff. The State has a strong interest in easing this load—or, at least, not adding to it—to the greatest extent it can. The reason is perhaps obvious: the greater the demands placed on an already-thin staff, the greater the likelihood of something going wrong on Election Day and the days surrounding it, undermin-

ing the State's strong interest in orderly election administration. The Court, therefore, cannot properly evaluate the question this case presents without accounting for the fact that boards of elections are "crazy busy" on and around Election Day. *See* Kelly Dep. 83:5, R.52-6, PageID#1925.

First, consider the boards' absentee-ballot duties. From the day after registration closes until the Saturday before Election Day, board employees prepare absentee ballots for mailing. In some counties, boards may need to mail tens of thousands of absentee ballots—the Secretary's records reveal that Cuyahoga County mailed 178,319 absentee ballots in the month leading up to Election Day 2018. In Montgomery County, where Mays and Nelson reside, the board of elections mailed 41,552 absentee ballots to registered voters. *See* Absentee Supplemental Report, https://www.ohiosos.gov/elections/election-results-and-data/2018-official-elections-results/.

Issuing absentee ballots involves several levels of review and quality control. When an application comes in, board employees check it against the information in the board's voter-registration system. Poland Dep. 13:21-25, R.52-2, PageID#1501. If a match exists, the board creates an absentee-ballot packet corresponding to the voter's precinct. The packet includes the ballot, instructions, an identification envelope, and a return envelope. *Id.* 14:2–6, R.52-2, PageID#1501. Larger counties

have hundreds of precincts—even the medium-size Butler County has 282. Smith Dep. 84:19-20, R.52-3, PageID#1604. And small counties too can contain multiple precincts.

While the boards continue to review ballot applications and mail ballots until noon on Saturday, they must also examine completed absentee ballots as voters return them. Board employees must review completed ballots for deficiencies and notify voters when they need to correct their ballots. Smith Dep. 102:16-19, R.52-3, PageID#1604. One election official explained that board employees again match the voter's identifying information on the *completed* ballot to the information in the voter-registration system. Poland Dep. 55:15-22, R.52-2, PageID#1501. If the information is accurate, the board employees inspect the absentee ballot for damage or other anomalies before scanning the ballot. *Id.* Processing completed absentee ballots continues through and even after Election Day. Absentee ballots postmarked before Election Day count, so long as the boards receive them within ten days of the election. Ohio Rev. Code §3509.05(B)(1).

Second, while some board employees are busy attending to mailed ballots, others manage early in-person voting. In the days just before a presidential election, the board and its employees must staff the early-voting area from 8:00 a.m. to 7:00 p.m. on Friday, from 8:00 a.m. to 4:00 p.m. on Saturday, from 1:00 p.m. to

5:00 p.m. on Sunday, and from 8:00 a.m. to 2:00 p.m. on Monday. Poland Decl. ¶4, R.54-1, PageID#2097. The weekend before the election always sees the most early voters. In staffing the early-voting area, boards of elections must devote resources to crowd control, assisting voters, and monitoring electioneering activities. *Id.*

Third, and in the midst of all this, boards must prepare for Election Day itself. For instance, boards must locate and train many poll workers before Election Day. Large counties like Montgomery County demand the hiring and training of thousands of poll workers. Kelly Dep. 83:17-20, R.52-6, PageID#1925. Poll-worker hiring and training bleeds into the weekend before Election Day, with some counties offering trainings on that Friday and Saturday. Poland Decl. ¶5, R.54-1, PageID#2097. During this same time, every board must replace poll workers who drop out, finding and training new workers on short notice or rearranging current staff. *Id.*; Smith Dep. 104:4-6, R.52-3, PageID#1604.

In addition to this initial training, boards must also field a continuous stream of questions from voters and poll workers as an election approaches. Smith Dep., R.55-15, PageID#2454; Kelly Dep., R.55-6, PageID#2269. Voters ask about polling-place locations, voting hours, acceptable forms of voter identification, and other topics. *Id.* Poll workers pose more complicated questions, including—among,

many, many other topics—questions regarding voting-machine operation, equipment delivery, and access to voting places. All counties have to devote resources to answering these questions. The Hamilton County Board even staffs two different help desks: one for voters and one for poll workers. Poland Decl. ¶¶8-9, R.54-1, PageID#2097.

A few days before an election, boards begin to deliver the physical voting equipment to potentially hundreds of polling locations throughout the county. Smith Dep. 103:4-6, R.52-3, PageID#1604. Montgomery County, as one example, has 170 Election Day polling locations. Kelly Dep. 83:17-20, R.52-6, PageID#1925. In Hamilton County, poll workers for each precinct pick up ballots and supplies from the distribution centers the weekend before Election Day. If a poll worker fails to show up—a yearly occurrence—the Hamilton County Board of Elections must make alternative arrangements for delivering the supplies to the precincts. Voting machines are delivered separately, with the Board's staff members accompanying the machines to each polling place. Poland Decl. ¶¶6-7, R.54-1, PageID#2097.

Then comes Election Day itself. The boards must ensure that each polling location is prepared to open at 6:30 a.m. Ohio Rev. Code §3501.32(A). To that end, each county must oversee polling locations, staffing, voting equipment, and

more. The Hamilton County Board, for its part, conducts an organizational meeting on Monday night, where each polling location checks its supplies, ensures public access to the polling place, and verifies that the voting equipment works properly. The Board operates a poll-worker help desk to answer poll workers' questions during the set-up process and also employs 100 troubleshooters who can travel to polling places experiencing more-complicated problems. Poland Decl. ¶9, R.54-1, PageID#2097.

Election Day voting cannot proceed if poll workers do not have accurate voting lists. Ohioans who voted early in person or requested mailed absentee ballots cannot vote a regular ballot on Election Day; they may only vote provisionally. Ohio Rev. Code §3509.09(B). But because voters can request mailed absentee ballots until noon on Saturday and can vote in person until 2:00 p.m. on Monday, boards cannot finalize the eligible-voter lists until late Monday afternoon. After creating the lists, the boards must transmit them to the correct precincts. While large counties like Hamilton County may transmit the lists electronically, other counties may need to hand deliver updated lists to polling locations. Poland Decl. ¶10, R.54-1, PageID#2097. Butler County, for example, prints the lists on Monday afternoon and packs them with voting equipment and supplies to send to the polling locations. Smith Dep. 105:18–24, R.52-2, PageID#1604.

Once the polls open on Election Day, boards must be ready to attend to all of these responsibilities simultaneously. Their employees must ensure voters have access to polling locations, replace absent poll workers, answer poll workers' questions, answer voters' questions, address voting-machine issues, continue to process and scan completed absentee ballots, respond to ballot and other supply shortages, deliver absentee ballots to hospital-confined voters, close polling locations at 7:30 p.m. (after allowing anyone in line to vote), collect voting equipment, supplies, and ballots, and then begin to count votes. And these are only the regular and expected duties of boards on and around Election Day. When unforeseen circumstances arise—such as the death of a candidate or a widespread power outage—the boards must divert resources to deal with those issues as well.

Fourth, and also in the midst of all of this, the boards are busy ensuring that jailed, homebound, and hospitalized voters who properly request ballots, receive them. Bipartisan teams of board employees travel to hospitals, jails, and nursing homes to deliver and collect absentee ballots. Smith Dep. 12:10-24, 15:12-19, R.52-3, PageID#1604. For example, the Butler County Board of Elections creates bipartisan teams of four. *Id.* 38:8-11, R.52-3, PageID#1604. The teams typically visit nursing homes during the early-voting period, turning to the county jail the Friday before the election, bringing blank ballots to the jail, waiting for the inmates to

complete the ballots, and returning them to the Board of Elections. Smith Dep. 12:23-24, 39:12-16, 42:7-24, R.52-3, PageID#1604. Hospitals contact the Board between noon on Saturday and 3:00 p.m. on Election Day, and the Board sends a team to the hospitals as needed. *Id.* 14:3-12, R.52-3, PageID#1604.

Hamilton County uses a similar process. It hires a team of eight employees to travel to the county's nursing homes in the weeks leading up to Election Day. Poland Dep. 65:23-24, R.52-2, PageID#1501. For jails, that team waits until Monday before the Election—that is, *after* the request deadline closes—which ensures they do not need to make additional trips. *See id.* 31:11-13, R.52-2, PageID#1501. On Election Day, that *same* team travels to county hospitals after 3:00 p.m. to deliver absentee ballots to hospitalized voters under §3509.08(B) and return those ballots to the Board by the close of the polls at 7:30 p.m. *Id.* 46:6-10, 50:21-51:15, 56:18-21, R.52-2, PageID#1501; Seskes Dep. 47:12-16, R.52-1, PageID#1270.

Logistical concerns. Delivering absentee ballots to jails presents a number of logistical problems that do not arise in the hospital context. The first (and most obvious) difference between jail and hospital voting is accessibility. Access to and movement within jails requires careful preparation, patience, and time, none of which are in ample supply on Election Day. This process is "quite an ordeal." Fisher Dep. 55:25, R.52-4, PageID#1750. For example, when employees from a

county board of elections deliver *timely* requested absentee ballots to jailed voters, they must (1) bring a list of voters' names to the jail, (2) wait for an escort to the voting location, and (3) wait for the listed inmates to be located within the jail and brought to the voting location. In Franklin County, a deputy escorts the employees to the jail's chapel, while other deputies "will get the inmates out of their cell and bring them to the chapel to vote." Trowbridge Dep. 96:14-15, R.51-1, PageID#908. In Butler County, the jail employees bring inmates to the Board employees "one at a time so they can vote with the appropriate people that stand there." Fisher Dep. 57:21-22, R.52-4, PageID#1750. All this contrasts sharply with the protocol in hospitals. To be sure, hospitals can be chaotic too, and patients may not be in their rooms when board employees arrive. But unlike jails, board employees can work with the patients and hospital staff to locate the voters.

The second major difference between jails and hospitals relates to security concerns. Jail officials have an interest in keeping their facilities safe. Thus, jails often require employees of county boards of elections, like other visitors, to undergo background checks before gaining access to inmates. *See* Trowbridge Dep. 111:12-17, R.51-1, PageID#908. Further, employees' visits to jails prompt close monitoring by jail staff to prevent contraband from entering the facility. In Butler County, for example, the jail guards subject the Board's employees to a "tracking

process," verifying that everything employees bring into the jail exits with them. Fisher Dep. 107:5-6, R.52-4, PageID#1750. Something as innocuous as a left-behind pencil or pen can be a weapon in the wrong hands. Trowbridge Dep. 113:7-24, R.51-1, PageID#908. This monitoring takes time that board employees do not have on Election Day, and is best done with an already-planned list of voters. Of added concern, in the midst of Election Day time pressure, savvy prisoners could abuse the system by making a large number of requests in hopes of distracting the guards.

The third concern unique to jails is the transience of newly arrested inmates relative to inmates generally. Jailed individuals make their initial court appearances soon after being arrested. Trowbridge Dep. 21:2-19, 108:19-109:4, R.51-1, PageID#908. For inmates arrested the weekend before Election Day, these court appearances may very well occur on Election Day. In addition to being in court, inmates can move between a number of different locations: they sometimes transfer to another jail or housing unit within the jail, a medical facility, a psychiatric facility, or get released from jail. Fisher Dep. 57:16-58:7, R.52-4, PageID#1750; Trowbridge Dep. 108:19-109:25, R.51-1, PageID#908. As one sheriff's employee described, "there's a lot of work that goes into this. It's not just somebody walking

through the front door of the jail and doing the ballot." Fisher Dep. 58:17-19, R.52-4, PageID#1750.

For these reasons, to be both smooth and secure, jailed voting requires planning in advance. Even under the current deadlines, the jail voting process "can take hours." Poland Dep. 33:21–34:7, R.52-2, PageID#1501. Shifting the request deadline in a way that would require jailed voting after 3 p.m. on Election Day would only exacerbate these obstacles.

The balance of burdens and interests favors Ohio. Now comes the balancing. The States, everyone agrees, have a responsibility to conduct elections, and a strong interest in making sure those elections run smoothly. *See Crawford*, 553 U.S. at 196; *Lawrence*, 430 F.3d at 375. To fulfill that responsibility and promote that interest, they may adopt procedures designed "to ferret out" mistakes during the election process. *See Doe v. Reed*, 561 U.S. 186, 198 (2010). That is precisely what the distinction between jailed and hospitalized voters does: in declining to extend the absentee-ballot-request deadline to a category of voters whose requests are especially burdensome, the State ensures that boards of elections' already-heavily-burdened staffs are not made to divert resources away from the many important election-related tasks for which they are responsible. And by keeping resources

from being expended on a class of particularly burdensome demands, the State decreases the risk of errors in election administration.

The record confirms what common sense compels: accommodating late absentee-ballot requests from jailed voters would hinder the orderly administration of elections. One official testified that it would be "difficult, yes, to reach out and make sure everyone was in place" to accommodate jailed voters' last-minute requests. Smith Dep., R.55-15, PageID#2441. The director of Hamilton County's board testified she would need additional staff to have the capacity to deliver ballots to late-jailed individuals on Election Day. Poland Dep., R.55-16, PageID#2469–70. She further testified that the County's confined-voter team could not accommodate late requests from both hospitals and jails after 3:00 p.m. on Election Day. Poland Decl. ¶¶13–14, R.54-1, PageID#2097.

Because the distinction between hospitalized and jailed voters ensures that the boards can properly discharge their many duties, and because it does so without imposing any serious burden on voting rights, *see above* 27–28, it must be upheld under the "flexible" version of *Anderson-Burdick* that applies in these circumstances. *Schmitt*, 933 F.3d at 641.

Another way to think about the balance of interests here is by starting with the recognition that the State cannot have orderly elections while simultaneously

fulfilling every Election Day request for an absentee ballot. As just one example, there will presumably be hundreds of Ohioans who get in traffic accidents on any given Election Day. *See Traffic Crash Facts*, Ohio Department of Public Safety, at 2, (April 2018), https://bit.ly/35d3Uey. And would anyone really contend that, once the State agrees to fill *anyone*'s late request for an absentee ballot, it has to do the same for *everyone*? Does an exception for the unexpectedly hospitalized require county boards of elections to hand deliver ballots to everyone else who is unexpectedly unable to make it to the polls on Election Day, whether because of car trouble, a towed car, a family death, a flooded basement, or something else? Of course not. The State must be able to draw a line somewhere. And the State is fully justified in putting jailed voters and hospitalized voters on different sides of the line: however sympathetic their circumstances might be, jailed voters pose particularly significant administrative and logistical problems that hospitalized voters do not.

One final point before turning to the problems with the District Court's contrary analysis: the foregoing assumed for the sake of argument that the burden Ohio's distinction imposes on jailed voters' rights is "moderate." But Ohio maintains that the burden is "minimal," not moderate, and that the distinction ought to be reviewed under a lax standard "akin to rational-basis review." *Ohio Council 8*, 814 F.3d at 338. The distinction easily satisfies that standard. Laws survive ration-

al-basis review as long as there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Here, there is: given the logistical differences between delivering absentee ballots to jails and hospitals, and given the limited resources that boards of elections can afford to spare on Election Day and the days just before it, there is a "rational relationship between the disparity of treatment and" the State's "legitimate governmental purpose" in the orderly administration of elections. *Id.* The Court can and should hold that the burden imposed by Ohio's law is minimal, and then uphold the law under rational-basis review. Doing so would go a long way toward nipping in the bud misguided election-law claims like the one at issue here.

B. The District Court's equal-protection analysis fails.

The District Court's opinion fails to support its ruling. Indeed, the opinion contains many mistakes.

Election-administration concerns. The District Court did not grapple *at all* with the relevance of election officials' busy schedules on and around Election Day. It cast the topic of "election administration" aside as "not relevant" and "not responsive" to the plaintiffs' disparate-treatment claims. Op., R.70, PageID#4321–22. This cursory treatment makes little sense. Recognizing the many things election officials must do on and around Election Day provides important context for

understanding why Ohio declines to extend the Saturday-noon deadline for jailed voters.

Logistical difficulties of delivering ballots to jails. The court did address some of the many administrative difficulties posed by late requests from jailed voters. But its conclusions about those difficulties are hard to understand. For example, the District Court concluded that jailed voters are "similarly situated" to hospitalized voters "when it comes to voter availability." Op., R.70, PageID#4325. The Court rested this conclusion on two observations. First, it noted that hospitalized voters, just like jailed voters, might be at different locations within a hospital and thus hard to find. *Id.* Second, it said that, even though many jails require election officials to clear background checks before entering, "election officials already undergo whatever background checks are necessary" before Election Day. *Id.*, PageID#4327.

Neither observation supports the District Court's conclusion. First, while a hospitalized voter might *sometimes* be hard to find, jailed voters are *often* hard to find because of their transient nature. In any event, the key distinction between jailed and hospitalized voters is that board employees can enter hospitals and try to locate voters on their own. They might even contact the voters, or a family member, and determine the voters' location that way. In contrast, board employees

cannot ever enter jails without first passing through security. Once inside, they must wait for guards to locate and move the jailed voter. *See* Trowbridge Dep. 70:4-6, R.51-1, PageID#908; Fisher Dep. 57:16-22, R.52-4, PageID#1750.

As for the District Court's assertion that any background checks will already have been completed, that assumes, without any basis, that the board employees who receive background checks to deliver absentee ballots *before* Election Day will be available *on* Election Day. It would seem quite likely, especially in smaller counties, that those officials will be preoccupied attending to other issues.

The District Court's other stated basis for ignoring the unique logistical and administrative difficulties posed by jailed voters fares no better. It asserted that the "differences between how long a Board of Elections official waits to locate an inmate versus a voter confined to hospital when attempting to *deliver* the ballot … are not pertinent to whether the State is justified in imposing different deadlines for the *application* for a ballot." Op., R.70, PageID#4325. Breaking down this sentence, the court is saying that the logistical difficulties raised by the Secretary are irrelevant because they pertain only to the difficulty of delivering ballots, not to the difficulty of accommodating late applications.

That is a *non sequitur*. The difficulty of delivering the ballots on and just before Election Day *is* what justifies the State "in imposing different deadlines for the

application for a ballot." *Id*. The logistical problems of delivery bear directly on the issues in this case.

Other States' laws. As it did in this brief, *see above* 10–11, the Secretary highlighted below that Ohio's approach compares favorably to the approaches in other States. In a footnote, the District Court brushed aside any in-depth review of other States' laws. Op., R.70, PageID#4330 n.22. The Court suggested, no doubt to the surprise of the other States, that their laws are likely unconstitutional as well.

The District Court's treatment of state comparisons was another mistake. This Court has already admonished "wearing blinders" to "comparisons with the laws and experience of other states." *Ohio Democratic Party*, 834 F.3d at 629. While such comparisons might not prove dispositive, "to ignore such information as irrelevant is to needlessly forfeit a potentially valuable tool in construing" constitutional standards. *Id.* In this case, "the experience of [Ohio's] neighboring states," *id.*, indicates that some compelling state interest justifies imposing absentee deadlines and making exceptions for hospitalized voters. Why else would so diverse an array of States impose similar rules?

Level of Scrutiny. In the end, the District Court recited the *Anderson-Burdick* test without performing the "flexible analysis" that test requires. *Schmitt*, 933 F.3d at 641. For every difficulty that jails present (and that hospitals do not)—

even difficulties that bear directly on the question whether jailed voters are harder than hospitalized voters to accommodate in the waning hours of an election—the District Court hypothesized ways these difficulties "could" be resolved. For example, at one point the District Court framed the issue as whether boards of elections "could" use "the same procedures" they already use for jailed voters who timely request a ballot, and simply push the process back until Election Day. Op., R.70, PageID#4327. As an initial matter, given the press of Election Day business, it is doubtful that boards of elections could employ the same, orderly process if they waited until after 3 p.m. on Election Day to deliver *all* jailed voters' absentee ballots. In any event, the test is not whether boards *can* possibly treat late-jailed voters the same as late-hospitalized voters. To justify differential treatment of non-suspect groups under the Equal Protection Clause, the State must only show that relevant differences exist between the two groups, and that the distinction advances a state interest that outweighs any burden. It did that, many times over.

II. The Secretary is entitled to summary judgment on the plaintiffs' undue-burden claim.

This Court should reject the plaintiffs' alternative argument that Ohio's Saturday-noon deadline by itself—without regard to any disparate treatment—unduly burdens jailed voters' right to vote. Compl., R.1, PageID#12-13. The District Court did not issue a final decision on this claim. (Although, as noted below, it

did express skepticism regarding whether the claim had any merit.) Regardless, the claim so clearly fails as a matter of law that the Court should remand with instructions to enter summary judgment for the Secretary. There is no need to let the uncertainty regarding Ohio's absentee-ballot deadlines linger any longer.

To see why this claim fails, recall that it arises under the very same *Anderson-Burdick* framework as the equal-protection claim. *See above* 24–25. The only difference here is that the plaintiffs are not challenging any disparate treatment. Instead, they are arguing that the Saturday-noon deadline burdens the right to vote because it stops jailed voters from seeking an absentee ballot after the deadline, and that this burden is not justified by any competing state interest.

The application of *Anderson-Burdick* to this argument is straightforward. The deadline's effect on late-jailed individuals is no different than the effect on the many other voters who have unexpected life events. And that effect is minimal. All voters who skip Ohio's generous early-voting schedule take the chance that life might get in the way of their plans on Election Day. *See Obama for Am.*, 697 F.3d at 435. All such voters even run the risk that they, like jailed voters, will be unable to vote because of a *state-created obstacle*: A state employee might be kept from the polls if he is forced to respond on Election Day to an unexpected emergency; a driver racing to the polls before they close might miss out if she is pulled over for a

ticket; that same driver might miss her chance to vote if an improperly repaired pothole causes her to crash on State Route 315. Still, the risk of missing Election Day is small, and every voter can avoid any such risk by voting early, either in person or by mail. Given all this, the burden imposed on voters by the Saturday-noon deadline is minimal. At most, it is moderate. *See above* 27–28.

Yet the need for a deadline furthers the State's substantial interest in orderly election administration. Everyone agrees that election officials are very busy on and around Election Day. Election officials would be frustrated in carrying out their many important tasks if every voter could seek an absentee ballot at any point before the close of polls. So the State needs to set *some* deadline. Even the District Court recognized that States "need" a "reasonable deadline," and that "a generally applicable deadline that applied to all would-be absentee voters would likely survive the *Anderson-Burdick* analysis, even if" such a deadline would keep some jailed individuals from voting. Op., R.70, PageID#4322. That is exactly right. And a deadline of noon on the Saturday before a Tuesday election is a "reasonable deadline"—it gives voters a great deal of time to seek an absentee ballot, but requires them to do so before election officials' pre-Election Day activities kick into high gear. The deadline is particularly justified when it comes to jailed voters, since

their absentee-ballot requests impose unique, time- and resource-consuming difficulties.

In light of all this, there is no serious argument that Ohio's Saturday-noon deadline, in and of itself, violates the Constitution as applied to jailed voters. The Court should say so.

III. The District Court erred in certifying the plaintiffs' proposed class.

In addition to granting the plaintiffs summary judgment on the merits, the District Court also certified their proposed class. Op., R.70, PageID#4308. The class is defined to capture all Ohio voters who: (1) are jailed after the close of business on the Friday before an election; (2) did not vote early, whether in person or by mail; and (3) will remain jailed through Election Day. *Id.*, PageID#4297.

The District Court abused its discretion in certifying the class, for two reasons. First, factual differences between the class members defeat Rule 23's commonality and typicality requirements. Second, the class members are not ascertainable, as they must be to satisfy Rule 23.

A. Key factual differences between class members destroy commonality and typicality.

1. Before certifying a class, a district court must conduct "a rigorous analysis" to determine whether a plaintiff "affirmatively demonstrate[s]" compliance with Rule 23 of the Federal Rules of Civil Procedure. *Comcast Corp. v. Behrend*, 569

U.S. 27, 33 (2013) (quotations omitted). Among other things, the plaintiff must satisfy the rule's commonality and typicality requirements. Commonality asks whether "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "This does not mean merely that" class members "have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). It instead requires that class members advance 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). In other words, common questions alone are not enough; the questions must be capable of generating "common *answers* apt to drive the resolution of the litigation." *Id.* (quotations omitted).

Typicality similarly 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). The crux of typicality "is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (*en banc*). This requirement "tend[s] to merge" with commonality since both requirements "serve as guideposts" for deciding whether joint res-

olution of "class claims" is practical. *Dukes*, 564 U.S. at 349 n.5 (quotations omitted).

Commonality and typicality share a critical feature: factual differences between class members can destroy both. For commonality, the Supreme Court has explained that "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 350. A class will also fail typicality if it includes members "who have no claim at all to the relief requested," or if "there are defenses unique to" some class members. *Romberio v. UNUMProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009); *accord Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011); *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006). After all, unless resolution of the named plaintiffs' claims resolves the class members' claims too, the named plaintiffs' claims are not "typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3); *see Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 509 (6th Cir. 2015); *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 852 (6th Cir. 2013); *Romberio*, 385 F. App'x at 431–32.

This Court's decision in *Davis v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013) illustrates these principles in action. There, a group of job applicants tried to bring a nationwide class-action lawsuit challenging a corporation's hiring practices. They specifically alleged "a corporate culture … unfavorable to women." *Id.* at

486. But they failed to show commonality, because the factual circumstances of prospective class members were too different: the class claims involved "a number of women, who failed to obtain employment at many places, over a long time, under a largely subjective hiring system," with many different decisionmakers. *Id.* at 489. Thus, the plaintiffs were unable to show that "all the employees'" discrimination claims depended "on the answers to common questions." *Id.* at 488 (quotations omitted).

2. In this case, the class members are factually different from one another in ways that bear directly on their entitlement to relief. These differences defeat commonality and typicality.

The first problem with the class definition is that it includes *all* voters who are jailed between close of business on the Friday before an election and the close of polls, *without regard* to whether they expect to be jailed throughout the entire period. Often times, people know, or have good reason to suspect, that they are about to go to jail. Perhaps most obviously, people who commit a planned crime have reason to think they might be arrested. Others might know in advance that they have an obligation to report to jail on or just before Election Day. Or they might have skipped a mandatory court appearance, leading to an arrest warrant. *See* Ohio R. Crim. P. 4.

The claims of those who expect to be jailed are critically different from the claims of voters who are unexpectedly jailed. The reason is this: whatever burden the Saturday-noon deadline imposes on those who are *unexpectedly* jailed, it imposes a far lower burden on those who are *expectedly* jailed. After all, those who expect to be jailed should have an especially easy time organizing their affairs in advance and voting early. This decreased burden means that expectedly jailed members of the class are subject to an entirely different application of the *Anderson-Burdick* balancing test. Thus, the class members' claims cannot all be resolved "in one stroke." *Dukes*, 564 U.S. at 350.

The second commonality- and typicality-related problem with the definition is that it includes people arrested on Friday and on Saturday morning—*before* the Saturday-noon request deadline runs. That difference matters under Ohio law. People confined in jail have until Saturday at noon to have their application "delivered" to the board. Ohio Rev. Code §3509.08(A). That confined-voter provision does not limit who can "deliver" the application. This means that people detained on Friday can have a family member, friend, lawyer, jail employee, or any other person deliver an absentee application by the noon deadline. That difference is legally relevant, as it again means that some subset of class members are less burdened than others by the Saturday-noon deadline. (Class members jailed before the

Saturday-noon deadline are also materially different from hospitalized voters, who qualify for the 3 p.m. deadline exception only if they are hospitalized *after* the Saturday-noon deadline. Form 11-B, R.55-8, PageID#2314; Op., R.70, PageID#4293 n.5.) The *Anderson-Burdick* test must be separately applied to their claims—their claims cannot be resolved "in one stroke" with the other class members' claims. *Dukes*, 564 U.S. at 350.

These types of factual differences eliminate the possibility of one-size-fits-all answers for the entire class. As such, they defeat commonality and typicality.

3. The District Court's contrary analysis fails. It agreed with the Secretary that some "factual differences potentially do exist" between class members. Op., R.70, PageID#4304. Of particular note, the District Court stated that the Secretary was "arguably correct that some arrests are more foreseeable than others." *Id.* Nonetheless, the District Court concluded that it could certify a class including people who foresee their detentions. In its view, foreseeability differences did not matter because "[n]othing prevents" the Secretary from using some affirmation process to screen out class members who expect their arrests. *See id.*, PageID#4305.

That argument misunderstands commonality and typicality. Those requirements ask whether the class members' "claims" can be collectively answered

"in one stroke." *Dukes*, 564 U.S. at 350. Here, any one-stroke answer is improper, as explained above. That defeats commonality and typicality, without regard to whether the courts or the Secretary can use an affirmation process to screen out differently situated class members before awarding them relief. Regardless, the certified class does not even allow for this sort of back-end screening process. The court's "remedy" requires that boards of elections give *all* "Class members"—including expectedly jailed voters—the same 3 p.m. "deadline." *See* Op., R.70, PageID#4332. To the extent the Secretary can screen out class members whose cases present unique circumstances, the District Court never explained how.

The District Court's response to the differences between voters jailed on Friday and those jailed after the Saturday-noon deadline was even weaker. It simply asserted, with no analysis, that these voters had a stake in whether Ohio is "treating hospital-confined individuals differently than jailed individuals." *Id.*, PageID#4305. It is unclear what that response has to do with commonality or typicality. In any event, an assertion is no substitute for analysis.

By misapplying Rule 23's commonality and typicality requirements, the District Court abused its discretion.

B. The members of the certified class are not ascertainable.

1. The certified class presents one final problem: election officials will have to guess about who is actually in it. This presents a problem because "[b]efore a court may certify a class pursuant to Rule 23, 'the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class.'" *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537–38 (6th Cir. 2012) (quoting 5 *Moore's Federal Practice* §23.21[1] (3d ed. 1997)).

The ascertainability problem arises from the final prong of the class definition, which restricts membership to jailed voters who "will remain in detention through close of polls on Election Day." Op., R.70, PageID#4297. The trouble is, it is impossible to know for sure which jailed voters will leave jail (on bail or for some other reason) before the close of polls. The class thus consists of a fluid group of jailed voters, the makeup of which will change every election, that the Secretary can identify only in retrospect, when it becomes clear (if it ever does) which jailed voters who sought a ballot remained jailed throughout the close of polls on Election Day. Indeed, under the proposed definition, the boards of elections will not even be able to identify class members when the 3 p.m. deadline passes, because they will not know which of those requests were submitted by voters who will

still be in jail when polls close. The class definition thus requires election officials to deliver ballots to class members before the identity of those class members is established. A class definition that requires state officials to provide affirmative relief to an undefined group of voters cannot fairly be called "administratively feasible." *Young*, 693 F.3d at 537–38 (quotations omitted).

2. The District Court tried to evade the ascertainability problem in two ways.

First, it suggested that hospitalized voters are equally hard to identify. Op., R.70, PageID#4307–08. Even if that were true, it would have no bearing on ascertainability. Since hospitalized voters get the 3 p.m. deadline because of state law, not an order in a class-action case, the question whether they are ascertainable never arises. But to give a certified class of jailed voters the same deadline, the class must satisfy Rule 23. And to do that, its members must be ascertainable.

Perhaps sensing the irrelevance of that response, the District Court offered one more: it argued that, under *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016), the ascertainability requirement is inapplicable to Rule 23(b)(2) injunctive-relief classes. Op., R.70, PageID#4306-07. But *Cole* is distinguishable. It dealt with ascertainability in the context of a *negative* injunction—in other words, an injunction that barred a defendant's allegedly unconstitutional behavior. In that con-

text, ascertainability is at least arguably irrelevant, because the defendant need not know who the class members are; it can simply cease its unconstitutional conduct. *See id.* at 541–42. The same logic does not apply to this case. The plaintiffs seek an *affirmative* injunction that would require election officials to accommodate class members by delivering them absentee ballots requested before 3 p.m. on Election Day. Needless to say, neither the Secretary nor the boards of elections can deliver absentee ballots to class members without first knowing who they are. *See Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 495 (7th Cir. 2012). Thus, the ascertainability requirement implicit in Rule 23 applies here, just as it does in all other cases where providing classwide relief requires identifying class members. This Court would create a circuit split were it to hold otherwise. *Id.*

The certified class is not ascertainable, and the District Court abused its discretion in concluding otherwise.

CONCLUSION

The Court should reverse and remand with instructions to grant the Secretary's motion for summary judgment.

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 motion complies with the type-volume for a principal brief and contains 12,833 words. See Fed. R. App. P. 32(a)(7)(B)(i).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 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

DESIGNATION OF DISTRICT COURT RECORD

Appellants, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic records:

***Tommy Ray Mays, II, et al., v. Jon Husted*, 2:18-cv-1376**

Date Filed	R.No.; PageID#	Document Description
11/6/2018	R.1; 2–3, 9, 11–13	Complaint
11/6/2018	R.12; 153	Order Granting Named Plaintiffs Temporary Restraining Order
3/11/2019	R.29; 238–39	Plaintiffs' Motion for Class Certificaiton and Memorandum in Support
7/22/2019	R.51-1; 908	Deposition of Carl Trowbridge
7/22/2019	R.52-1; 1270	Deposition of Brandi Seskes
7/22/2019	R.52-2; 1501	Deposition of Sherry Poland
7/22/2019	R.52-3; 1604	Deposition of Mickey Smith
7/22/2019	R.52-4; 1750	Deposition of Nick Fisher
7/22/2019	R.52-6; 1925	Deposition of Jan Kelly
7/22/2019	R.54; 2056	Defendant Secretary of State Frank LaRose's Motion for Summary Judgment
7/22/2019	R.54-1; 2097	Declaration of Sherry Poland
7/22/2019	R.55; 2102	Plaintiffs' Motion for Summary Judgment
7/22/2019	R.55-6; 2269	Deposition of Jan Kelly
7/22/2019	R.55-8; 2314	Secretary of State Form 11-B
7/22/2019	R.55-15; 2441, 2454	Deposition of Mickey Smith

Date Filed	R.No.; PageID#	Document Description
7/22/2019	R.55-16; 2469–70	Deposition of Sherry Poland
7/22/2019	R.55-34; 3010–16	Ohio Election Official Manual
11/6/2019	R.70; 4293–97, 4304–32	Opinion and Order