



ST. MARY'S
UNIVERSITY

The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 25 | Number 2

Article 3

10-1-2023

“Better Luck Next Election”: Late-Jailed Voters’ Constitutional Right to Vote After *Mays v. Larose*.

Grace Thomas

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Constitutional Law Commons](#), and the [Election Law Commons](#)

Recommended Citation

Grace Thomas, *“Better Luck Next Election”: Late-Jailed Voters’ Constitutional Right to Vote After Mays v. Larose.*, 25 THE SCHOLAR (2023).

Available at: <https://commons.stmarytx.edu/thescholar/vol25/iss2/3>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

**“BETTER LUCK NEXT ELECTION”:
LATE-JAILED VOTERS’ CONSTITUTIONAL RIGHT TO VOTE
AFTER *MAYS V. LAROSE***

GRACE WYNELLE THOMAS*

INTRODUCTION	106
I. LOCKED UP AND LOCKED OUT: DEFINING THE PROBLEM OF LATE-JAILED VOTERS	110
II. ESTABLISHING THE RIGHT TO VOTE FROM JAIL	119
A. <i>Outlining the Framework: McDonald and Its Limitations</i>	121
B. <i>Narrowing the Framework As Applied: Goosby and O’Brien</i>	126
III. POSSIBLE CONSTITUTIONAL CHALLENGES TO ASSERT	130
A. <i>Applying the McDonald-O’Brien Framework to Late-Jailed Voters</i>	130
B. <i>Anderson-Burdick Challenges in the Sixth Circuit and Beyond</i>	134
C. <i>Alternative Litigation Strategies</i>	145
IV. JAIL-BASED VOTING ADVOCACY: CREATING VOTING OPPORTUNITIES FOR LATE-JAILED VOTERS OUTSIDE	

*J.D. Candidate, University of Texas at Austin School of Law, 2023. Upon graduation, I will work with the Lawyers’ Committee for Civil Rights Under Law as an Equal Justice Works Fellow, sponsored by Thomson Reuters and Sherman & Sterling LLP, where they will support eligible incarcerated voters in states with increased absentee ballot restrictions. I would like to thank everyone who provided thoughtful comments and suggestions on this Note. In particular, I owe a massive thank you to Professor Hugh Brady, Meg Clifford, Zara Haq, and Sarah Noor for their support and candid conversations. This piece also would not have been possible without everyone who supports local incarcerated voters in the Travis County Correctional Complex through Austin Justice Coalition’s Project Orange and my older sister, Katie. To Katie, I cannot wait for you to be an eligible voter again. Finally, thank you to the wonderful staff editors from THE SCHOLAR: ST. MARY’S LAW REVIEW ON RACE & SOCIAL JUSTICE.

OF THE COURTS..... 147
 CONCLUSION 150

INTRODUCTION

Despite a declining trend in Election Day turnout, over fifty percent of eligible voters continue to vote in person on Election Day every midterm and presidential election.¹ In fact, during the 2018 midterm elections, over fifty-five percent of voters across the United States casted ballots on Election Day.² Tommy Mays had every intention of being an in-person voter on Election Day in Ohio.³ Like many Americans,⁴ he may have purposefully waited to vote on Election Day for a myriad of reasons. But, on November 3, 2018, at 7:05 PM, officers arrested and detained Mays pretrial for a misdemeanor offense with a \$10,000 bail.⁵ Unable to post bail and with no polling location established inside his facility, Mays could only participate on Election Day with an absentee ballot.⁶ To participate in the 2018 election, Mays’s absentee ballot request would

1. See Drew Desilver, *Amid Pandemic, the Long Decline of In-Person Voting on Election Day is Likely to Accelerate This Year*, PEW RSCH. CTR. (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/amid-pandemic-the-long-decline-of-in-person-voting-on-election-day-is-likely-to-accelerate-this-year/> [<https://perma.cc/42C8-GXJS>] (calling attention to the decline of in-person voting on Election Day and reasons contributing to the decline such as the pandemic and alternatives to in-person voting).

2. *Id.*

3. See Compl. at 2, *Mays v. Husted*, No. 2:18-CV-01376, 2019 WL 6911626 (S.D. Ohio, Dec. 19, 2019), *rev'd by Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020).

4. Scholars and researchers have frequently noted that for all the conveniences of early voting, many voters decide not to participate during early voting because voting early shortens the amount of time voters have to make electoral choices, prevents voters from changing their minds after learning new influential information about candidates, and deprives voters of the energetic tradition of casting a ballot on Election Day. See Eugene Kontorovich & John McGinnis, *The Case Against Early Voting*, POLITICO MAG. (Jan. 28, 2014), <https://www.politico.com/magazine/story/2014/01/early-voting-the-case-against-102748/> (arguing that early voting limits the set of information available to voters and helps candidates who can be in the public eye longer); see also Rich Morin, *Study: Early Voting Associated with Lower Turnout*, PEW RSCH. CTR. (Sept. 23, 2013), <https://www.pewresearch.org/fact-tank/2013/09/23/study-early-voting-associated-with-lower-turnout/> [<https://perma.cc/VHP6-F5Z8>] (explaining that early voting eliminates social pressures to vote with others).

5. See Compl. at 2, *Mays v. LaRose*, No. 2:18-CV-1376, 2019 WL 13162416 (S.D. Ohio Nov. 6, 2019), *rev'd*, 951 F.3d 775 (6th Cir. 2020) (detailing the arrest that prevented Mays from exercising his Constitutional right to vote).

6. *Id.*

have had to be received by 12:00 PM on November 3, 2018 at the latest (i.e., seven hours *before* he was arrested).⁷ Under current Ohio statutes, once detained, Mays essentially had no way to vote as an eligible incarcerated voter.⁸

Should Mays have known that he would be arrested and planned accordingly to vote earlier or requested that his ballot be sent to the jail prior to his arrest? Such a question may seem absurd to even ask—but how many eligible voters factor in a potential arrest before they vote?⁹ Perhaps in light of mass incarceration rates, voters should consider their voting options as incarcerated voters.¹⁰ While jail populations decreased due to the COVID-19 pandemic, jail populations are returning to pre-pandemic numbers, with a quarter of local jails currently exceeding their pre-pandemic population numbers.¹¹ A person may be arrested for an offense that is later dismissed or dropped for a variety of reasons, including false imprisonment.¹² Racial profiling in daily activities, like driving a car, may also cause a voter to fear an arrest.¹³ Even traditional assertions of constitutionally protected rights can result in arrests.¹⁴ For example, over ten thousand people were arrested in 2020 across the

7. *Id.*

8. *Id.*

9. *Id.*

10. See Nicole D. Porter, *Voting in Jails*, SENT'G PROJECT 5 (May 7, 2020), <https://www.sentencingproject.org/publications/voting-in-jails/> [<https://perma.cc/U4P6-QH27>] (explaining voting options for voters in jail).

11. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/SE99-5HSJ>] (describing the increase of incarceration rates post-pandemic).

12. See, e.g., Robert Williams, *I Did Nothing Wrong. I was Arrested Anyway.*, AM. CIV. LIBERTIES UNION (July 15, 2021), <https://www.aclu.org/news/privacy-technology/i-did-nothing-wrong-i-was-arrested-anyway> [<https://perma.cc/P3N9-4ZGM>] (detailing the story of Robert Williams, a Black man in Detroit, who was arrested after a facial recognition system misidentified him as a person who stole watches using a driver's license photo).

13. See Pierre Thomas, John Kelly & Tonya Simpson, *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020, 4:04 AM), <https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546> [<https://perma.cc/8C3Z-BLD7>] (emphasizing that Black individuals are five to ten times more likely than White individuals to be arrested).

14. See Anita Snow, *AP Tally: Arrests at Widespread US Protests Hit 10,000*, AP NEWS (June 4, 2020), <https://apnews.com/article/american-protests-us-news-arrests-minnesota-burglary-bb2404f9b13c8b53b94c73f818f6a0b7> [<https://perma.cc/F433-R3XZ>] (describing the arrests of protesters and people not even involved in protests).

country during the protests following the death of George Floyd.¹⁵ Even though many of these charges were later dropped as district attorneys concluded that protestors have the right to peaceful protest,¹⁶ any one of these protestors could have been deprived of their constitutional right to vote during the 2020 presidential election cycle.

Yet, why *should* eligible voters fear losing their right to vote due to incarceration or detainment, particularly when a majority of local jail populations are eligible voters? If a local government administers and oversees elections, how can a voter rely on the local government to guarantee access to the ballot when the same government prevents ballot access in other capacities?¹⁷ In some local jails, voters can expect some voter services while incarcerated.¹⁸ For example, in 2019 in Travis County, Texas, almost 74 percent of the Travis County jail population—1,586 people—consisted of pretrial detainees.¹⁹ Another three percent consisted of individuals who were convicted of a misdemeanor.²⁰ All of these individuals were eligible voters, as long as they were not concurrently serving out any part of a felony sentence while detained for another offense. These incarcerated voters had an unequivocal right to vote, and luckily, the jail offered voter registration and voting opportunities through a program called Project Orange.²¹

Programs like Project Orange are the exception, not the norm, for incarcerated voters. When incarcerated voters participate in elections, they usually vote by absentee ballots; only rarely do they vote at polling

15. *Id.*

16. See Rebecca Hennes, *Harris County DA Dismisses Hundreds of Protest-Related Charges from George Floyd March*, CHRON. (June 10, 2020), <https://www.chron.com/houston/article/Harris-County-DA-dismisses-hundreds-of-15329760.php> [<https://perma.cc/M9ZJ-3X3W>] (reporting how the arrests were resolved).

17. See PORTER, *supra* note 10 (discussing why very few eligible voters vote in jail).

18. *Id.* at 7–10.

19. *Texas Commission on Jail Standards – Abbreviated Population Report for 11/01/2020*, TEX. COMM'N ON JAIL STANDARDS, 8 (Nov. 2020), <https://www.tcjs.state.tx.us/wp-content/uploads/2020/11/AbbreRptCurrent.pdf> [<https://perma.cc/D8DA-3CZQ>] (quantifying the number of pretrial detainees in Texas counties).

20. *Id.*

21. See Bailey Moore, *Nonprofit Partner Spotlight: Austin Justice Coalition*, PHANTOM FEST (Aug. 23, 2021), <https://www.phantomatx.com/post/nonprofit-partner-spotlight-austin-justice-coalition> (describing the Project Orange program, which registers incarcerated people to vote and provides absentee ballot access inside the Travis County Correctional Complex facility).

locations located inside a jail facility.²² As discussed below, most incarcerated voters have no voting opportunities while in jail.²³ Between Election Day and the time after an absentee ballot application deadline passes, practically all incarcerated voters have no way to vote in an election unless they are released from, or bail out of, jail.²⁴ Individuals incarcerated during this period are commonly referred to as "late-jailed voters"²⁵ and, like Mays, have no opportunities to vote once arrested.²⁶ The constitutional right to vote is an empty promise if a majority of incarcerated voters across the country cannot exercise it.²⁷

This Note seeks to explore how late-jailed voters may exercise their voting rights from jail under the current legal framework for evaluating claims of jail-based disenfranchisement.²⁸ First, this Note recognizes that a late-jailed voter's rights are indistinguishable from the rights of all incarcerated voters by describing how they are excluded from political participation in practice and highlighting the number of voters affected by jail-based disenfranchisement.²⁹ After defining the problem of the late-jailed voter in practice, this Note turns to articulating where the right to vote from jail originates.³⁰ Next, this Note evaluates the right to vote under both the original *McDonald-O'Brien* framework for jail-based

22. See PORTER, *supra* note 10 (describing various states' approaches to voting support for incarcerated individuals).

23. See Ginger Jackson-Gleich & Rev. Dr. S. Todd Yeary, *Eligible, But Excluded: A Guide to Removing the Barriers to Jail Voting*, PRISON POL'Y INITIATIVE (Oct. 2020), https://www.prisonpolicy.org/reports/jail_voting.html [<https://perma.cc/5L5C-YJ4H>] ("Most people in jail are legally eligible to vote, but in practice, they can't.").

24. See *id.* (demonstrating how strict deadlines for mail in ballots hinder all but a certain few lucky voters).

25. See *Fair Elections Ohio v. Husted*, 47 F. Supp. 3d 607, 610 (S.D. Ohio 2014), *rev'd* 770 F.3d 456 (6th Cir. 2014) (defining "late-jailed voters" as, "voters [who are] legally entitled to vote under law, but impeded from doing so by their detention by the state.").

26. *Id.* (acknowledging that incarcerated individuals are disenfranchised because of their holdover periods while incarcerated).

27. See U.S. Const. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

28. See *infra* Abstract (providing the purpose of this comment).

29. See *infra* I. Locked Up and Locked Out: Defining the Problem of Late-Jailed Voters (comparing the rights of late jailed and incarcerated voters).

30. See *infra* II. Establishing the Right to Vote from Jail (providing historical background for the right to vote).

voting and under the *Anderson-Burdick* balancing test.³¹ Ultimately, this Note suggests that the *McDonald-O'Brien* framework does not protect late-jailed voters any more than it currently protects all incarcerated voters.³² Despite the recent decision from the Sixth Circuit in *Mays v. LaRose*, *Anderson-Burdick* can actualize the right to vote from jail for late-jailed voters, but likely not any time soon. This Note argues that the Sixth Circuit's first treatment of late-jailed voters' claims under an *Anderson-Burdick* balancing test should not prevent other *Anderson-Burdick* challenges because of the Court's misreading and misapplication of *Rosario v. Rockefeller*. Pending further litigation, this Note recommends legislative action and jail-based advocacy as a more immediate route for vindicating the rights of late-jailed voters.³³

I. LOCKED UP AND LOCKED OUT: DEFINING THE PROBLEM OF LATE-JAILED VOTERS

On November 1, 2021—one day before a statewide constitutional election in Texas—47,388 people were detained in a Texas county jail awaiting trial.³⁴ A year earlier, 42,255 people were detained pretrial two days before the 2020 presidential election.³⁵ Most of these individuals were qualified voters under Texas law because, at the time of the election, they were not serving out any part of a sentence resulting from a final felony conviction.³⁶ These pre-trial detainees remained qualified voters who had the right to participate in their respective upcoming elections.³⁷

Statutorily, voter eligibility for incarcerated voters is not an empty promise in Texas.³⁸ State statutes include qualified voters who are

31. See *infra* III. Possible Constitutional Challenges to Assert (applying and challenging the established framework).

32. See *infra* IV. Jail-Based Voting Advocacy: Creating Voting Opportunities for Late-Jailed Voters outside of the Courts (proposing creative solutions to voting barriers).

33. See *id.* (proposing solutions outside of the judicial and executive branch).

34. See *Texas Commission on Jail Standards*, *supra* note 19, at 8 (indicating that 37,349 people were detained with a pretrial felony, 4,498 people were detained with a pretrial misdemeanor, and 5,541 people were detained with a pretrial state jail felony).

35. *Id.*

36. See Tex. Elec. Code § 11.002(a)(4) (defining a “qualified voter” as someone who has not received a final felony conviction).

37. *Id.*

38. See Ann McGeehan, *Effect of Felony Conviction on Voter Registration*, TEX. SEC'Y OF STATE (Aug. 3, 2004), <https://www.sos.state.tx.us/elections/laws/effects.shtml>

confined in jail among the groups of people authorized to vote by mail.³⁹ The statute explicitly lists the types of incarcerated voters who qualify for an absentee ballot, and these voters include:

- (1) serving a misdemeanor sentence for a term that ends on or after Election Day;
- (2) [awaiting] trial after denial of bail;
- (3) [detained] without bail [while] appeal[ing] a felony conviction; or
- (4) pending trial or appeal on a bailable offense for which release on bail before Election Day is unlikely.⁴⁰

As the average stay in a Texas county jail is between thirteen and twenty-four days, the fourth qualification in particular recognizes that an individual may be detained for a while during the election period without the possibility to bail out in time to cast a ballot.⁴¹ Incarcerated voters still must meet the same absentee ballot requirements as any other qualified absentee voter: they must request an absentee ballot eleven days before the election⁴² and return their ballot to the early voting clerk by 5 PM the day after Election Day, if timely mailed by Election Day.⁴³ However, the Texas Election Code expressly considers and includes incarcerated voters as eligible participants in the electoral system, demonstrating incarcerated voters are not an afterthought.⁴⁴

Yet, election officials regularly forget the statutory promise to include incarcerated voters in the electoral system.⁴⁵ If the State of Texas

[<https://perma.cc/VDS2-6RUK>] (demonstrating that Texas law does not exclude incarcerated people from voting).

39. See Tex. Elec. Code § 82.004(a) (outlining requirements for qualified voters who are incarcerated).

40. *Id.*

41. See Charles Goodman & Flint Britton, *Time and Attention Sheriffs Encourage Commissioners Court to Prioritize Jail Operations*, TEX. CNTY. PROGRESS (Nov. 18, 2019), <https://countyprogress.com/time-and-attention/> [<https://perma.cc/P342-VXY4>] (stating the average time in a Texas county jail).

42. Tex. Elec. Code § 84.007(c).

43. *Id.* § 86.007(a).

44. See generally *id.* § 82.004(a) (inferring from the Texas Election Code that it directly addresses specific incarcerated individuals who qualify as voters).

45. See e.g., Madalyn Stewart, *Voting Rights Behind Bars: Election Accessibility for Voting-Eligible Populations in New York Jails*, 14 CRITIQUE: A WORLDWIDE STUDENT J. OF POL. 1, 6 (2022) ("For instance, a staggering [ninety] percent of local election officials surveyed in

monitored the number of voters who either attempted to or successfully casted a ballot while incarcerated, the results would show that eligible voters rarely participate in elections from jail.⁴⁶ Of the few facilities actively and publicly promoting voter services⁴⁷ to justice-impacted⁴⁸ voters, two county jails have about 4,500 incarcerated individuals registered to vote since 2018.⁴⁹ Many eligible voters are unable to vote simply because they are not registered prior to their incarceration; others, are not offered an opportunity to register to vote inside of a jail.⁵⁰ Of the several hundred-thousand registered voters in Texas, only a fraction actually casted a ballot over the years.⁵¹ While these recent numbers appear low given the large population of incarcerated eligible voters, they reflect significant improvements attributable to the efforts of community organizers, even in light of the administrative challenges to register a

Tennessee incorrectly recalled rules around voting rights restoration for prior felony convictions[.]”).

46. See generally Matt Vasilogambros, *Many in Jail Can Vote, but Exercising that Right Isn't Easy*, PEW CHARITABLE TR. (July 16, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/16/many-in-jail-can-vote-but-exercising-that-right-isnt-easy> [https://perma.cc/THF3-U99A] (“[T]here are around 746,000 people in local jails, and most are eligible to vote[,] . . . [b]ut very few exercise their right to vote[.]”).

47. See generally Ambar Castillo, *Are Mail-in Ballots Here to Stay?*, WASH. CITYPAPER (Jan. 7, 2022), <https://washingtoncitypaper.com/article/544525/are-mail-in-ballots-here-to-stay/> [https://perma.cc/4BCU-WWEW] (emphasizing voter services include greater access to voter registration applications, ballot access, and education efforts).

48. By “justice-impacted voters,” this term broadly refers to all individuals in the criminal justice system who can partake in the electoral process. This may include individuals who have never been disenfranchised and individuals whose right to vote has been restored.

49. See *Project Orange: Registering Voters Behind Bars*, HOUS. JUST., <https://houjustice.org/inmatejustice> [https://perma.cc/AMC8-DDNM] (“As of December 2021, we’ve registered over 3,500 eligible voters at the Harris County jail since[.]”); see also PORTER, *supra* note 10 (“The Houston Justice group launched Project Orange in 2018 and reported registering more than 870 persons in 2019 and more than 1,300 persons in 2018[.]”).

50. See generally Jackson-Gleich & Yeary, *supra* note 23 (suggesting strategies for the government to enhance efforts of coordination to ensure “eligible jailed voters have [an] opportunity to register and vote[.]”).

51. See Jasper Scherer & St. John Barned-Smith, *For the First Time in Texas, Inmates Now Have a Polling Place of Their Own at Harris County Jail*, HOUS. CHRON. (Nov. 3, 2021, 9:42 AM), <https://www.houstonchronicle.com/politics/houston/article/For-the-first-time-in-Texas-inmates-now-have-a-16588331.php> [https://perma.cc/VD3Q-F6TM] (“Though just [ninety-six] inmates used the new polling site Tuesday . . . several hundred others had also voted by mail, a massive uptick from previous elections[.]”).

person to vote and provide them access to a ballot.⁵² These efforts in Texas follow a trend of combatting jail-based disenfranchisement across the country in individual facilities.⁵³ For example, in a recent 2022 study that sampled New York jails, only one out of 4,313 eligible incarcerated voters were registered to vote inside of a jail.⁵⁴ All other voters were registered to vote outside of a jail.⁵⁵ Come election time, only twenty-six out of 5,036 eligible incarcerated people voted from jail in the 2020 election.⁵⁶ Collectively, as demonstrated in Texas, voter registration drives and absentee ballot assistance efforts inside jails demonstrate that incarcerated voters will vote if they are given the opportunity to do so.⁵⁷ Unfortunately, jails are not offering incarcerated voters these opportunities to vote.⁵⁸

52. *Id.* ("Jail staff had spent several months working with county election officials to prepare for the election . . .").

53. See Amanda Pampuro, *Colorado Inmates Get Help Exercising Their Right to Vote*, COURTHOUSE NEWS SERV. (Oct. 8, 2018), <https://www.courthousenews.com/colorado-inmates-get-help-exercising-their-right-to-vote/> [<https://perma.cc/6GTP-6BGP>] (acknowledging Colorado Criminal Justice Reform Coalition as an active nonprofit registering hundreds of incarcerated people); see also Ashish Malhotra, 'I Feel Pride': Incarcerated Residents of Washington DC Register to Vote for First Time, GUARDIAN (Oct. 2, 2020, 8:00), <https://www.theguardian.com/us-news/2020/oct/02/washington-dc-incarcerated-residents-register-to-vote> [<https://perma.cc/95BS-KXQ6>] (citing new legislation allowing incarcerated the right to vote in Washington D.C.); Michael Nafso, *New Report Shows Community Impact of Expanding Voter Access in Jails Across Michigan*, ABC 12 NEWS (Oct. 13, 2021), https://www.abc12.com/news/politics/new-report-shows-community-impact-of-expanding-voter-access-in-jails-across-michigan/article_83e3-3b6c-3234-59f5-97c3-710fa7a7dde8.html [<https://perma.cc/6NG3-TQKE>] (pointing to the Michigan organization Nation Wide that is working to inform incarcerated individuals of their right to vote); Whitney Evans, *Yes, You Can Cast a Vote From Jail*, VPM NEWS (Oct. 16, 2020), 5:16 PM, <https://vpm.org/news/articles/17316/yes-you-can-cast-a-vote-from-jail> [<https://perma.cc/V47X-N429>] (recognizing organizations such as ACLU and League of Women Votes that are working in multiple states to provide information on voting to the incarcerated); Reuven Blau & Jillian Jorgensen, *Legal Aid Kicks off Voter Registration Drive at Rikers Island*, N.Y. DAILY NEWS (Aug. 6, 2018, 7:00 PM), <https://www.nydailynews.com/new-york/ny-metro-legal-aid-voter-drive-20180806-story.html> [<https://perma.cc/R78M-LD34>] (referring to the Legal Aid Society supporting inmates at Rikers Island).

54. See Stewart, *supra* note 45, at 14 tbl.1 (expressing the rare occurrence for incarcerated individuals to be registered to vote).

55. *Id.*

56. *Id.*

57. See generally *Project Orange: Registering Voters Behind Bars*, *supra* note 49 (exemplifying voter registration drives' success in Houston, Texas).

58. See generally Stewart, *supra* note 45, at 3–4 (identifying the prohibitive obstacles for the incarcerated in New York jails).

Numerous barriers prevent incarcerated voters from exercising their right to vote from jail, both in the voter registration and voting processes.⁵⁹ As the Sentencing Project notes:

Jail administrators often lack knowledge about voting laws, and bureaucratic obstacles to establishing a voting process within institutions contribute significantly to limited voter participation. . . . In addition, many persons in jail do not know they maintain the right to vote while incarcerated and there are few programs to guarantee voting access.⁶⁰

In the absence of a formalized and publicized voter registration and voting process in a facility, many incarcerated individuals are unaware of how to exercise their right to vote from inside a jail.⁶¹ Voters who are aware of this vital information face other administrative barriers, too.⁶² Voters must first have access to application forms, which facilities might not readily possess or cannot pass out with state employees' help.⁶³ In some instances, election authorities have to wait for a voter to request an application before sending an application to a voter through mail.⁶⁴ Specifically, impending registration and ballot application deadlines

59. See, e.g., PORTER, *supra* note 10, at 6 (“Consequently, implementing a voter registration and absentee ballot collection system is a challenge in spaces where many residents are detained for relatively short periods of time.”)

60. See *id.* at 5 (contending part of the barriers for incarcerated voters include the lack of knowledge from the jail administrators and concluding some jurisdictions have taken action to adopt policies and practices to circumvent these issues).

61. *But see id.* at 13 (indicating a need for change similar to “[s]ome states [that] require county officials to submit plans ensuring voter registration efforts and ballot access for incarcerated residents.”).

62. See Jackson-Gleich & Yeary, *supra* note 23 (“One of the biggest barriers to voting in jail is the fact that local election officials often don’t know that most people in jail can vote[.]”).

63. *Id.*

64. See ARK. CODE ANN. § 7–5–409 (i)(3) (2022) (“Make paper copies of absentee ballot application forms available for distribution or to be available upon request by a qualified voter in the county clerk’s office or other governmental offices.”); see also GA. CODE ANN. § 21–2–381(a)(1)(C)(ii) (2021) (“[N]or employee or agent thereof shall send absentee ballot applications directly to an elector except upon request of such elector or a relative authorized to request an absentee ballot for such elector.”); see also IOWA CODE ANN. § 53.2 (1)(c) (2021) (“The commissioner may send an absentee ballot application to a registered voter at the request of the registered voter. The commissioner shall not send an absentee ballot application to a person who has not submitted such a request.”).

disproportionately burden incarcerated voters during short stays.⁶⁵ Correctional facilities are notorious for mailing delays.⁶⁶ Despite the time-sensitivity of election correspondence during election periods, legal mail can be delayed two to three days after a facility receives it.⁶⁷ If a person is detained and incarcerated within days of an application deadline, they are unlikely to get their mail postmarked or received in time.⁶⁸ Even if voters could get their hands on applications and ballots in time, they might lack the necessary information (i.e., a social security number or driver's license number) and necessary documentation (e.g., proof of residency, acceptable identification, or a notary) to complete a form.⁶⁹ For voters who require disability accommodations to fill out a form (e.g., sign language interpretations, braille or audio translations, or plain-language explanations), this process is even more prolonged and difficult.⁷⁰

Out of 3,134 county jails in the country that have the potential to serve as polling locations, only a handful have ever done so.⁷¹ Yet as was examined above, Texas does not face any legal or statutory obstacles

65. See generally Goodman, *supra* note 41 (describing the average stay in a Texas jail as thirteen to twenty-four days, compared to the voter registration deadline, which is thirty days before Election Day).

66. See VOTING RIGHTS FOR INCARCERATED INDIVIDUALS, BUREAU OF PRISONS (2021), <https://www.justice.gov/file/1486226/download> [<https://perma.cc/5DR7-DP6J>] (suggesting the Bureau of Prisons should treat all incoming absentee ballots as legal mail); see also Castillo, *supra* note 47 (condemning the Bureau of Prisons for not considering voter registration forms as "legal mail").

67. See Alia Nahra & Leily Arzy, *Why Mail Service Is so Important to People in Prison*, BRENNAN CTR. FOR JUST. (Sept. 29, 2020), <https://www.brennancenter.org/our-work/research-reports/why-mail-service-so-important-people-prison> [<https://perma.cc/H6FY-Y3JH>] ("After the institution receives legal mail, they say it gets priority for delivery, but there is at least a two- to three-day delay in getting it to the prisoner.").

68. *Id.*

69. See Jackson-Gleich & Yeary, *supra* note 23 (emphasizing the "ballot-casting barriers" for incarcerated individuals that can impede their voting).

70. *Id.*

71. See generally Marian Scott, *Pretrial Detainees to Vote at First Polling Place in Cook County Jail*, CHI. SUN. TIMES (Feb. 20, 2020, 4:32 PM), <https://chicago.suntimes.com/2020/2/20/21141112/pretrial-detainees-to-vote-at-first-polling-place-in-cook-county-j- il> [<https://perma.cc/U8C4-WT9D>] (recounting a person's excitement over having the opportunity to vote in jail, which was made possible only because "42 voting machines [were] brought in during the first two weekends in March—marking the first time in the country a polling place will be available for pretrial detainees.").

preventing its jail and prison facilities from serving as a polling location.⁷² State law merely restricts voters' access to in-person voting, unless otherwise permitted by the county sheriff or other authoritative figure.⁷³ Sheriffs have the authority to guarantee incarcerated voters in-person voting access.⁷⁴ Despite voter identification requirements for in-person voting, in November 2021 the Harris County Jail hosted Texas's first-ever polling location, indicating that election administrative failures—not legal obstacles—deprive eligible voters of their right to vote.⁷⁵

Perceived administrative barriers of placing a polling location inside of a county jail have convinced many jail administrators and election officials that establishing jail polling locations is not a “workable solution.”⁷⁶ Perceived administrative barriers include: (1) requiring polling locations to be open to all voters, which would be difficult to do

72. See generally Naila Awan, *Jail-based Polling Locations: A Way to Fight Voter Disenfranchisement*, PRISON POL'Y INITIATIVE (Oct. 25, 2022), https://www.prisonpolicy.org/blog/2022/10/25/jail_voting/ [https://perma.cc/VL3U-R992] (highlighting the Supreme Court's holding which emphasized an incarcerated person's right to vote and cast an absentee ballot) (listing the one county jail in Texas, Harris County Jail, that provides access to in-person voting).

73. TEX. ELEC. CODE ANN. § 82.004(b) (codifying that “[a] voter confined in jail who is eligible for early voting is not entitled to vote by personal appearance unless the authority in charge of the jail, in the authority's discretion, permits the voter to do so.”).

74. *Id.* § 63.0101(b) (defining the seven acceptable forms of identification a person can use to vote in Texas); see also Kira Lerner, *In Houston, People in Jail Can Still Go to the Polls*, TENN. LOOKOUT (Mar. 9, 2022, 5:55 AM), <https://tennesseelookout.com/2022/03/09/in-houston-people-in-jail-can-still-go-to-the-polls/> [https://perma.cc/X93A-ZEES] (detailing the struggle faced by many incarcerated voters to obtain appropriate identification, which is often due to confiscation or misplacement identification materials, or simply being detained without such. In Harris County, voters used reasonable impediment declarations to vote in person, but because a lack of access to an ID while incarcerated is not an explicit impediment on the declaration form, many incarcerated voters strayed away from voting out of fear of being subjected to additional criminal penalties from voting illegally.)

75. See Caroline Love, Paul DeBenedetto & Hous. Pub. Media, *The Harris County Jail Was Used as a Polling Place for Eligible Incarcerated Voters on Tuesday*, TEX. PUB. RADIO (Nov. 2, 2021, 6:19 PM), <https://www.tpr.org/government-politics/2021-11-02/the-harris-county-jail-was-used-as-a-polling-place-for-eligible-incarcerated-voters-on-tuesday> [https://perma.cc/Z79S-SJQR] (documenting the first time a polling place has been set up within a jail facility in Texas).

76. See Syan Rhodes, *Controversy Over Proposed Polling Location at Harris County Jail*, CLICK 2 HOUS. (Sept. 10, 2019, 6:12 PM), <https://www.click2houston.com/news/2019/09/10/controversy-over-proposed-polling-location-at-harris-county-jail/> [https://perma.cc/9DAZ-558L] (illustrating the pushback generated by county officials regarding hosting a polling location in local correctional facilities).

in a facility that limits public access; (2) prohibiting recording devices in polling locations when facilities electronically monitor incarcerated individuals; and (3) restricting cell phone access of election workers when facilities prohibit cell phone use.⁷⁷ These perceived barriers leave incarcerated voters with one voting method—casting absentee ballots.⁷⁸

Unfortunately, absentee voting is not the most feasible option for incarcerated voters, either.⁷⁹ In addition to the previously discussed registration and ballot-casting barriers, the timing of detention significantly impacts whether someone will be able to vote.⁸⁰ Absentee ballot application deadlines vary from state to state; an absentee voter must return their application to their local elections authority anytime between twenty-one days to the day before the election.⁸¹ Most states require that an application be returned within four to twelve days before the election.⁸² If a voter is incarcerated after their state's absentee ballot application deadline has passed, then the voter has no way to cast a ballot.⁸³ This type of voter, colloquially termed a "late-jailed voter," is effectively pushed out of the electoral process unless they bail out or are released before Election Day.⁸⁴ Even a polling location placed inside a jail will not benefit a late-jailed voter who is incarcerated outside of their county if the state does not offer same-day voter registration at a polling

77. See Letter from Diane Trautman, Harris County Clerk, to Harris County Judge and Commissioners Court (Sept. 10, 2019) (numbering a list of reasons why Diane Trautman, joined by other county officials, concluded that hosting a polling location in county correctional facilities presented too many issues to be feasible).

78. See *generally id.* (claiming that even "the most robust absentee voting program possible would still be insufficient to protect the constitutional rights of jailed voters in Harris County.").

79. See *id.* (highlighting the insufficiencies of Texas's absentee voting program in relation to jailed voters).

80. *Id.*

81. See R.I. Gen. Laws § 17-20-2.1(c) (1956) (noting that in some states, like Rhode Island, applications must be returned 21 days before the election).

82. See *Voting Outside the Polling Place: Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives*, NAT'L CONF. OF STATE LEGISLATURES (Jul. 12, 2022), <https://www.ncsl.org/elections-and-campaigns/table-5-applying-for-an-absentee-ballot> [<https://perma.cc/644V-FAEY>] (summarizing states' allowable time frame for returning an application for absentee ballots).

83. *Id.*

84. See PORTER, *supra* note 10, at 6 (illustrating challenges with voter registration and absentee ballot collection in jails where incarcerated individuals spend a relatively short amount of time pending bail, acquittal, or conviction).

location.⁸⁵ Given these administrative barriers stemming from statutory deadlines, these voters will have better luck participating in the next election, whether outside of jail or while incarcerated, than voting in an upcoming election while incarcerated.⁸⁶

In Texas, the majority of the 42,255 pretrial detainees on the day before the November 2021 election are likely late-jailed voters.⁸⁷ The average stay in a county jail is between thirteen and twenty-four days⁸⁸ and the state's absentee ballot application deadline is eleven days before the election; thousands of these eligible voters likely were incarcerated after the application deadline, becoming disenfranchised late-jailed voters.⁸⁹ Considering that tens of thousands of these individuals should not even be booked in jail at all due to the fine and citation eligibility for certain arrests,⁹⁰ this type of disenfranchisement is even more appalling.

Although jail-based disenfranchisement is certainly a Texas-sized problem, hundreds of thousands of voters are unjustly kicked out of the electoral process across the United States.⁹¹ In 2017, nearly 745,000 people were incarcerated in a jail, and 482,000 of those individuals—over sixty-four percent of those incarcerated—were held pretrial because of the inability to post bail.⁹² The vast majority of the 263,000 people

85. See generally *Voting Outside the Polling Place: Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives*, *supra* note 82 (recognizing statutory time constraints to complete the absentee ballot application and voting process).

86. See Letter from Diane Trautman, Harris County Clerk, to Harris County Judge and Commissioners Court, *supra* note 77 (addressing the lack of voting access incarcerated voters face while in jail).

87. See *Texas Commission*, *supra* note 19 (reporting the large number of pretrial detainees in Texas).

88. Goodman, *supra* note 41 (recalling the average length of stay in Texas county jails).

89. TEX. ELEC. CODE ANN. § 84.007(c) (setting forth the absentee ballot application deadline).

90. See TEX. APPLESEED, AN ANALYSIS OF TEXAS JAIL BOOKINGS: HOW TEXAS COUNTIES COULD SAVE MILLIONS OF DOLLARS BY SAFELY DIVERTING PEOPLE FROM JAIL 2 (Apr. 2019), <https://www.texasappleseed.org/sites/default/files/An%20Analysis%20of%20Texas%20Jail%20Bookings%20Apr%202019.pdf> (expressing its opinion that an abundance of people who are booked in Texas jails are wrongfully booked).

91. See generally Awan, *supra* note 72 (laying out absentee ballot application process for each state and noting the consequences of failing to meet a deadline).

92. See PORTER, *supra* note 10, at 5 (recalling that “[o]f the 745,000 individuals incarcerated in jail as of 2017 nearly two-thirds (64.7%), or 482,000, were being held pretrial because they had not been able to post bail.”).

serving a sentence in jail are convicted of a misdemeanor offense.⁹³ Racial and ethnic minorities also are disproportionately affected by these incarceration rates in county jails.⁹⁴ Black and Latine individuals account for 48 percent of the jail population; other groups, including Native Americans and Asian-Americans, account for another two percent of the jail population.⁹⁵ Because most states treat incarcerated voters similarly, a significant number of people across the nation are systemically disenfranchised due to their incarceration leading up to Election Day.⁹⁶ These nationwide incarceration rates mean that a significant number of qualified voters—and a disproportionate number of minority voters—are simply unable to participate in elections while they are incarcerated.⁹⁷

Given that the right to vote is constitutionally recognized, jail-based disenfranchisement on this scale is an affront to the democratic process.⁹⁸ Despite its origins, the right to vote from jail is hardly observed in practice. In the next part, this Note examines where the right to vote from jail originates and how the existing legal framework fails to support incarcerated voters in actualizing their right to vote.

II. ESTABLISHING THE RIGHT TO VOTE FROM JAIL

Few cases have been pursued asserting the voting rights of incarcerated voters, let alone late-jailed voters.⁹⁹ Given the very limited in-person voting opportunities available to incarcerated voters, establishing a constitutional right to vote by an absentee ballot would ensure that

93. *Id.*

94. *Id.*

95. *Id.*

96. See Jackson-Gleich & Yeary, *supra* note 23 (showing that Maine, Vermont, Washington D.C., and Puerto Rico are the only states and territories that do not restrict voter eligibility because of a conviction, including a felony conviction); see *Voting Outside the Polling Place: Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives*, *supra* note 82 (charting the seven states that do not statutorily recognize incarceration as a valid excuse to qualify for an absentee ballot).

97. See PORTER, *supra* note 10, at 5 (examining some of the reasons why jailed individuals do not vote even when eligible to do so).

98. See *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.”).

99. See PORTER, *supra* note 10, at 5 (acknowledging that disenfranchisement laws have been documented but less attention has been given to incarcerated people eligible to vote).

incarcerated voters would finally be offered voting opportunities in jail.¹⁰⁰ Even late-jailed voters would be beneficiaries of a right to an absentee ballot because this right would create constitutional questions in scenarios where county clerks and election officials reject late absentee ballot applications beyond a state's statutory deadline. Unfortunately, courts have consistently ruled that no such right exists.¹⁰¹ The legal landscape concerning the right to an absentee ballot is tied to the right to vote, even though they are not necessarily one and the same right.¹⁰² A court cannot truly evaluate claims for a right to an absentee ballot without assessing the other voting opportunities incarcerated voters have to participate in elections.¹⁰³ The few jailed-based voting cases that grant a person's right to vote from jail create a baseline framework to evaluate late-jailed voters' constitutional voting rights claims.¹⁰⁴ This framework starts with the United States Supreme Court's 1969 decision in *McDonald v. Board of Election Commissioners of Chicago*.¹⁰⁵

100. See Chiraag Bains, *Defending the Voting Rights of Jail Detainees*, DÉMOS (Jan. 22, 2020), <https://www.demos.org/blog/defending-voting-rights-jail-detainees> [https://perma.cc/F8X6-SY58] (providing the example that Ohio's incarcerated voters do not have the option of on-site polling places and also have limited access to absentee ballots depending upon their date of incarceration); e.g., *The Impact of COVID-19 on Voting Rights for People in Jail*, E. STATE PENITENTIARY (June 2, 2020), <https://www.easternstate.org/visit/events/impact-covid-19-voting-rights-people-jail> [https://perma.cc/J96K-BYV2] ("About 470,000 Americans detained in city and county jails nationwide have a constitutional right to vote by mail.").

101. See *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969) (stating that appellants were not denied their right to vote even without absentee status); see also *Frederick v. Lawson*, 481 F.Supp.3d 774, 792 (S.D. Ind. 2020) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), in noting that voting by absentee ballot is not a constitutionally protected interest); see also *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) (explaining the Constitution does not guarantee the right to an absentee ballot); see also *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) (stating that voting by an absentee mail ballot is not a fundamental right); see also *Martin v. Kemp*, 341 F.Supp.3d 1326, 1338 (N.D. Ga. 2020) (agreeing with the defendants that that federal rights do not cover voting by absentee ballot).

102. See *McDonald*, 394 U.S. at 807–08 (differentiating the right to vote from the challenged right to vote by absentee ballot).

103. See *O'Brien v. Skinner*, 414 U.S. 524, 528–29 (1974) (addressing the fact that incarcerated voters can vote by absentee ballot only if they are jailed outside of their residential county).

104. See *McDonald*, 394 U.S. at 803 (contending that while people are awaiting trial they still qualify as eligible voters).

105. See generally *id.* at 803 (signaling the primary issue in the case is whether Illinois statute regarding absentee voting is unconstitutional because it does not include unsentenced people awaiting trial).

A. *Outlining the Framework: McDonald and Its Limitations*

McDonald sets the stage for recognizing the right to vote from jail while also limiting the claims that these voters may bring.¹⁰⁶ Courts following in *McDonald*'s footsteps do not care to evaluate the undue burdens incarcerated voters face when the government physically constrains them; as such, they do not seem concerned with whether or not incarcerated voters have a real opportunity to cast a ballot.¹⁰⁷ *McDonald*'s legacy does not deny qualified incarcerated voters the right to vote, but it essentially tells incarcerated voters, "good luck trying."¹⁰⁸

In *McDonald*, pretrial detainees in Cook County jail were eligible to vote in Illinois, but they could not statutorily cast an absentee ballot at the time.¹⁰⁹ State statutes did not expressly declare incarceration as a reason to qualify for an absentee ballot.¹¹⁰ Despite this, incarcerated voters applied for absentee ballots, claiming a physical inability to appear at the polls.¹¹¹ The voters attempted to categorize themselves under one of the statutory qualifications of physical incapacity, but their applications were rejected because they were not medically incapacitated.¹¹² The incarcerated voters brought a Fourteenth Amendment equal protection challenge against the arbitrary distinction between medically and judicially incapacitated voters.¹¹³

The *McDonald* Court ultimately saw the incarcerated voters' claim not to be one of a constitutional right to vote but, instead, a constitutional right to an absentee ballot.¹¹⁴ The Court found that an election policy, designed to make voting easier for those with certain voting obstacles,

106. See *id.* at 809 (explaining that just because the right to vote absentee ballot hasn't been extended to the appellants doesn't mean they are not allowed to vote).

107. See *Mays v. LaRose*, 951 F.3d 775, 788 (6th Cir. 2020) (addressing the potential burdens on election board staff for allowing jailed voters to vote absentee ballot, but not addressing the burden on those jailed to vote).

108. *Id.*

109. See generally *McDonald*, 394 U.S. at 810 (contending that just because some incarcerated people have difficulty voting doesn't mean that being denied an absentee ballot is unconstitutional).

110. *Id.* at 803.

111. *Id.* at 803–04.

112. *Id.* at 804.

113. *Id.* at 804–05.

114. *Id.* at 807.

did not indirectly deprive a different class of voters from exercising their right to vote.¹¹⁵ For incarcerated voters to assert a right to vote claim, the statute had to completely deny incarcerated voters the right to vote, not just exclude them from expanded voting opportunities to which another classes of voters were privileged.¹¹⁶ The Court identified this statute as not involving a complete restriction of the right to vote and assessed the voters' challenges under rational-basis review, which is typically a low standard of review.¹¹⁷ At a glance, rational-basis review in *McDonald* is surprising, as these equal protection claims relating to voting rights are usually reviewed by the contemporary court under the stricter standard of strict scrutiny.¹¹⁸

Under rational-basis review, the *McDonald* Court held that the Illinois statute did not unconstitutionally distinguish between judicially and medically incapacitated voters.¹¹⁹ The statute did not privilege a totally unrelated group of voters in the pursuit of its goal.¹²⁰ Without much explanation—the extent of the Court's analysis of the government interest and that statute's goal is contained in one sentence—the Court pointed out that the State could have reasonably distinguished between classes of voters during its statutory construction.¹²¹ The State's decision to allow some classes of voters an absentee ballot but not others seemed reasonable to the Court when considering all the classes of voters experiencing extreme difficulties to vote in person.¹²² The Court provided a list of these potential classes of voters: voters serving on juries within their county's residence; voters with children who cannot afford a baby sitter; voters attending to sick relatives inside their county; servicemen stationed in their own counties; doctors performing

115. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969).

116. *Id.* at 809–10.

117. *Id.* at 809.

118. See Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 82–86 (1969) (highlighting the unique departure of the higher standard of review used by the Warren Court in *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969), and in *Ciripriano v. City of Houma*, 395 U.S. 701 (1969), from the standard of review used in *McDonald*).

119. See *McDonald*, 394 U.S. at 806 (affirming the district court's determination regarding the Illinois statute).

120. *Id.* at 809–10.

121. *Id.* at 809.

122. *Id.* at 810.

emergency work; and businessmen working outside of their precinct.¹²³ With the exception of servicemen who may be prohibited from leaving a military base,¹²⁴ none of these voters are physically restrained by the government from voting in person, unlike incarcerated voters. In this regard, the Court conflated the difficulties of certain classes of voters where voting is mildly inconvenient with the difficulties of physically restrained voters who are without government support.¹²⁵

The *McDonald* Court did not make this conflation without considering every possible scenario in which an incarcerated voter could cast a ballot—even if those scenarios were historically unprecedented and administratively impractical at the time.¹²⁶ According to the Court, the state could have “furnish[ed] the jails with special polling booths or facilities on Election Day, or provide[d] guarded transportation to the polls themselves for certain inmates, or entertain[ed] motions for temporary reductions in bail to allow some inmates to get to the polls on their own.”¹²⁷ The Court evaluated the plaintiffs’ voting rights claims

123. *Id.*

124. See KEVIN J. COLEMAN, THE UNIFORM AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES, CONG. RSCH. SERV. (2012), <https://web.mit.edu/supportthevoter/www/files/2013/08/CRS-Report-on-UOCAVA.pdf> [<https://perma.cc/9AFA-39AA>]. At the time *McDonald* was decided, states could prevent a person serving abroad in the military from casting an absentee ballot, because absentee voting was not guaranteed to military voters. *Id.* This was partially remedied in 1986 by the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), which required states to allow military service people and their family members to vote with an absentee ballot. *Id.* Despite the UOCAVA, military service people still face numerous obstacles to casting a ballot, contributing to only 26.5 percent of service people casting an absentee ballot in the 2006 election. *Id.* However, there has been a concerted effort by the federal government to expand voting opportunities to military personnel as far back as 1952, when President Harry Truman first asked Congress to create emergency legislation to allow military servicepeople to cast an absentee ballot. Tom Intorico, *Absentee Voting an ‘Obstacle Course’ for Military and Overseas Citizens*, NAT’L CONF. OF STATE LEGIS. (Mar. 2009), <https://www.ncsl.org/research/military-and-veterans-affairs/absentee-voting-an-obstacle-course.a-spx> [<https://perma.cc/6WXP-KR42>]. Such federal efforts cannot be said on behalf of jail-disenfranchised voters, let alone for late-jailed voters. Most recently, President Joe Biden released a broad Executive Order to promote voting access to Americans in March 2021.

125. See generally *McDonald*, 394 U.S. at 810 n.8 (comparing the access to absentee ballots between, for instance, traveling businessmen, and incarcerated individuals).

126. *Id.* at 808.

127. *Id.*

under a fact-intensive examination process to prove that they were entirely disenfranchised:

[W]e cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. . . . Since there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise, it seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot.¹²⁸

Simply, aside from an affidavit from the warden, the plaintiffs failed to show any evidence that they could not in fact cast a ballot.¹²⁹

The *McDonald* Court's running list of how incarcerated voters *could* vote did not spur states or facilities to implement incarcerated voting procedures.¹³⁰ Instead, the Court's requirement for the plaintiffs to prove complete disenfranchisement gave cover to those jurisdictions in refusing to implement such procedures.¹³¹ Plaintiffs in later jail-based voting cases make note of an exhaustion requirement to exert an affirmative right to vote.¹³² Still, the *McDonald* Court's insistence on the matter

128. *Id.* at 808–09.

129. *Id.* at 804.

130. See generally Dana Paikowsky, *Jails as Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829, 854–56 (2019) (evaluating *McDonald*'s effect on incarcerated voter's ballot access).

131. See *McDonald*, 394 U.S. at 808 n. 7 (“Appellants make two additional claims here, which were asserted below and which are unrelated to their argument based on the statute and its alleged denial of equal protection. . . . Since there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State . . . we need not reach these two contentions.”); cf. *Veasey v. Abbott*, 830 F.3d , 225 (5th Cir. 2016) (explaining that while the plaintiffs demonstrated they would experience tremendous hardships to obtain an acceptable voter ID, the *Veasey* court did not require plaintiffs to find other means to obtain an ID in order to find the voter ID law had a disparate racial impact. For example, in order to satisfy an exhaustion requirement, plaintiffs might have had to show that they could not find free or affordable transportation to the closest Department of Public Safety (DPS) office, identify nonprofits that could assist them in obtaining an ID, or ask the DPS to subsidize the cost of an ID or provide transportation to it. Plaintiffs who were eligible for absentee ballots did not even have to demonstrate that they tried to use absentee ballots, because the Fifth Circuit did not consider absentee ballots as a proper substitute to voting in person.)

132. See *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (detailing how “Petitioners allege that, unlike the appellants in *McDonald*, the Pennsylvania statutory scheme absolutely prohibits them from voting”); see also *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974) (determining “[A]ppellants

misrepresents the severity of the plight of incarcerated voters, including late-jailed voters. Dana Paikowsky addresses the challenges they face:

Consider what it takes for a jailed voter to bring a meritorious claim First, the voter must be jailed in a jurisdiction that bars her from receiving an absentee ballot in jail. Then, knowing she will be rejected, she must nevertheless know to submit her absentee ballot request form (properly filled out and timely submitted, often with no third-party assistance). Next, although she is likely not a lawyer and lacks independent access to the Internet, she must know to take the additional steps of requesting transport to the polls under guard and establishment of a mobile polling location in her jail, seeking a reduction in bail, or asking for some other set of accommodations from local officials. And she must do all of this in between the date of her arrest and Election Day.¹³³

Add the everyday challenges voters and detained individuals respectively face, such as knowing upcoming election dates, their corresponding deadlines, and mailing delays from correctional facilities sorting, inspecting, collecting, and delivering incoming and outgoing mail.¹³⁴ Finally, consider the legal challenges these voters face when seeking injunctive relief in voting rights claims: knowing voting rights; finding and affording counsel; establishing standing; filing court documents in time to participate in the election.¹³⁵ Late-jailed voters fair even worse than the broader category of all incarcerated voters, as they have anywhere between mere minutes and hours, to a couple of weeks between the absentee ballot deadline and Election Day to overcome all of these governmentally imposed hurdles.¹³⁶ These challenges prevent voters from using the courts as proper forums to vindicate their right to vote.¹³⁷ For any incarcerated voter, the exhaustion requirement to prove that these voters attempted to exert their voting rights remains intact.¹³⁸

here, like the petitioners in *Goosby*, bring themselves within the precise fact structure that the *McDonald* holding foreshadowed.”).

133. See Paikowsky, *supra* note 138, at 853 (describing the obstacles involved in jailed voters receiving judicial relief).

134. *Id.* at 840–41 (pointing out additional burdens experienced by incarcerated voters).

135. *Id.* at 852–53.

136. *Id.*

137. *Id.*

138. *Id.* at 855 (illustrating the *McDonald* framework’s sustained effect).

B. Narrowing the Framework As Applied: Goosby and O'Brien

Four years after *McDonald*, the Supreme Court revisited what it means to deny the right to vote to incarcerated voters in *Goosby v. Osser* and *O'Brien v. Skinner*.¹³⁹ Neither case fundamentally departed from *McDonald*, nor did they address either the limitations or unjust challenges created by the Court's earlier opinion.¹⁴⁰ Instead, both cases denote how an incarcerated voter can assert their constitutional right to vote in a court under *McDonald*. Incarcerated voters have only succeeded on having their case reviewed on the merits by the Court by proving an *absolute* deprivation of the right to vote from jail.¹⁴¹ *Goosby* and *O'Brien* have not foreshadowed more successful voting rights claims exerted by incarcerated voters, nor have they shepherded a plethora of voting opportunities in practice.¹⁴² However, they still complete the baseline framework for recognizing the right to vote from jail.¹⁴³

Goosby plaintiffs learned quickly from *McDonald* plaintiffs that their right to vote was absolutely denied.¹⁴⁴ In *Goosby*, pretrial detainees held in Philadelphia County prisons alleged a voting rights violation because they could not leave prison to vote and did not have a polling location placed inside the prisons; Pennsylvania law expressly prohibited incarcerated people from voting absentee.¹⁴⁵ When reviewing the lower court's dismissal, the *Goosby* Court held that *McDonald* did not make the petitioners' claims "wholly insubstantial."¹⁴⁶ In fact, when comparing their challenges to the *McDonald* plaintiffs, the Court found the state statutory scheme absolutely prohibited incarcerated voters from

139. See *O'Brien v. Skinner*, 414 U.S. 524, 524 (1974) (reviewing a New York statute which restricted ballot access to pre-trial detainees and convicted misdemeanants); see generally *Goosby v. Osser*, 409 U.S. 512, 512 (1973) (challenging a Pennsylvania statute which expressly prohibited incarcerated individuals from voting by absentee ballot).

140. See generally Robin Fisher, *Ballot Access Behind Bars*, 89 FORDHAM L. REV. ONLINE 86, 89 (2020) (explaining how *O'Brien* and *Goosby* altered the *McDonald* decision).

141. See Paikowsky, *supra* note 138, at 853 (pinpointing the difficulties faced by jailed voters seeking judicial relief).

142. See *id.* at 853-54 (drawing attention to the lack of improvements brought before the Court via litigation for incarcerated voting rights and practices).

143. *Id.*

144. See *Goosby*, 409 U.S. at 52 (challenging the constitutionality of the Pennsylvania statutory scheme).

145. *Id.* at 513-4.

146. *Id.* at 518.

voting.¹⁴⁷ The state statute expressly excluded “people confined in a penal institution” from an absentee ballot.¹⁴⁸ Furthermore, it excluded their requests to: (1) vote by absentee ballot, (2) vote in person at a polling location outside of the prison, and (3) having voting opportunities placed inside the prison.¹⁴⁹ From these facts, the appellants proved the conditions required by *McDonald* for a court to consider these justiciable issues.¹⁵⁰ The legacy of *Goosby* refines the constitutional voting rights claims available to incarcerated voters. Unless these voters can show a denial of voting rights, either by statutes or voters’ requests, incarcerated individuals will have difficulties pursuing constitutional claims under *McDonald*.¹⁵¹

One year later, when the Court considered *O’Brien v. Skinner*, it was ready to review the “problem of inmate voting” on the merits.¹⁵² In *O’Brien*, the appellants consisted of seventy-two eligible voters who were detained in New York facilities.¹⁵³ The *O’Brien* plaintiffs echoed the *Goosby* petitioners’ requests to create mobile voter registration units in the county jail, be transported to a polling location, or vote absentee.¹⁵⁴ Under the New York statutes, all voters could request an absentee ballot if they were outside their county of residence, but not inside.¹⁵⁵ As the Court noted, paradoxically, “two citizens awaiting trial . . . sitting side by side in the same cell, may receive different treatment as to voting rights.”¹⁵⁶ A voter detained inside their county of residence could not vote absentee when their cellmate, a voter detained outside of their county

147. *Cf. id.* at 521–22 (comparing Pennsylvania’s statutory scheme to the plaintiffs in *McDonald*, where there was not an absolute prohibition against incarcerated voters).

148. *Id.* (stating the applicable statute explicitly excludes this group of incarcerated individuals from the ability to vote on an absentee ballot).

149. *Id.*

150. *Goosby v. Osser*, 409 U.S. 512, 523 (1973).

151. *Id.* at 521–23 (justifying the differences between the two cases and the reasons for reaching an opposite conclusion in each).

152. *O’Brien v. Skinner*, 414 U.S. 524, 529 (1974) (“[t]his is an appeal from the judgment of the Court of Appeals of New York taken by [seventy-two] who were at the time of trial of the original action, detained in confinement[.]”).

153. *Id.* at 525.

154. *Id.*

155. *Id.* at 528.

156. *Id.* at 529.

of residence, could.¹⁵⁷ The Court concluded that the state's statutes severely restrict the constitutional right to vote—incarcerated voters detained within their county of residence are “simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote.”¹⁵⁸

Outside of demonstrating that incarcerated voters can, in some situations, show that their right to vote violated the Constitution, *O'Brien* does not expand upon *McDonald* and *Goosby*.¹⁵⁹ The *O'Brien* appellants still had to meet high exhaustion requirements to show a deprivation of their right to vote.¹⁶⁰ Yet, *O'Brien* was a significant step in incarcerated voting rights jurisprudence, indicating that eligible voters have the right to vote from jail.¹⁶¹ However, one limitation of *O'Brien* is that incarcerated voters could not succeed on the merits unless they were compared to other similarly situated incarcerated voters and proved an arbitrary deprivation of the right to vote.¹⁶² This limitation of requiring a comparison of similarly situated voters foreshadows the cases to come.¹⁶³ The latter cases brought nearly forty years later by incarcerated voters attempted to expand voting opportunities by comparing themselves to hospitalized voters.¹⁶⁴

157. *Id.*

158. *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974).

159. Compare *id.* at 529 (“Unlike the present case, however, in *McDonald* ‘there [was] nothing in the record to show that appellants [were] in fact absolutely prohibited from voting by the State . . . since there was the possibility that the State might furnish some alternative means of voting[.]’”), with *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 810 (1969) (holding the Illinois absentee voting provisions are not a violation of the Equal Protection Clause, “[c]onstitutional safeguards are not thereby offended simply because some prisoners, as a result, find voting more convenient than appellants[.]”), and *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (distinguishing the present case from *McDonald* stating the Pennsylvania scheme “absolutely prohibits them from voting” because they are “confined in a penal institution[.]”).

160. See generally *O'Brien*, 414 U.S. at 529 (contesting New York election laws are discriminatory against categories of qualified voters who were registered and denied).

161. *Id.* at 534-35.

162. *Id.* at 530.

163. *Id.* (predicting the impact of *O'Brien*'s limitation on future cases); see generally Part III (analyzing the *McDonald-O'Brien* framework and potential arguments for late-jailed voters).

164. See generally *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014) (alleging “treating late jailed electors differently from late-hospitalized electors violates the Equal Protection Clause and Due Process Clause[.]”).

The Supreme Court has not considered another jail-based voting case since *O'Brien*, solidifying the *McDonald-O'Brien* framework.¹⁶⁵ To this day, the *McDonald-O'Brien* framework offers few opportunities for incarcerated voters to assert their voting rights.¹⁶⁶ While *O'Brien* is frequently cited amongst advocates for expanding jail-based voting rights,¹⁶⁷ the Fifth Circuit recently noted that *McDonald* remains good law.¹⁶⁸ As such, incarcerated voters still must affirmatively assert their right to vote before they can vindicate their constitutional rights in a courtroom.¹⁶⁹ *McDonald* does not provide to states a checklist of opportunities which must be communicated to incarcerated voters, nor does *O'Brien* make any recommendations about how to best preserve incarcerated voters' right to vote.¹⁷⁰ Instead, incarcerated voters—or

165. See *O'Brien*, 414 U.S. at 529 (contrasting *McDonald*, where the state statute did not absolutely prohibit voting and there were other avenues for voting); see also *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 810 (1969) (affirming the lower courts).

166. See *O'Brien*, 414 U.S. at 533 (reiterating "here, it is the State which is both physically preventing appellants from going to the polls and denying them alternative means of casting their ballots[.]"); see also *McDonald*, 394 U.S. at 809–10 (contending Illinois failure to make absentee voting more accessible to incarcerated individuals isn't arbitrary).

167. See Bains, *supra* note 107 (referencing *O'Brien* stating "[i]n the 1974 case *O'Brien v. Skinner*, the Supreme Court recognized that pretrial detainees have a fundamental right to vote and cannot be absolutely denied [from] the franchise[.]"); see also *Challenging Jail-Based Disenfranchisement: A Resource Guide for Advocates*, CAMPAIGN LEGAL CTR. (2019), <https://campaignlegal.org/sites/default/files/2019-12/Jail%20Voting%20Advocacy%20Manual.pdf> [<https://perma.cc/PD7Z-WY9C>] ("In 1974 the Supreme Court ruled in *O'Brien v. Skinner* that jailed, eligible voters cannot be denied their constitutional right to vote[.]"); see generally *Ballots for All: Ensuring Eligible Wisconsinites in Jail Have Equal Access to Voting*, ALL VOTING IS LOC. ET AL., (2021), https://www.democracymodel.com/wp-content/uploads/2021/09/EDITED-20210614_WI_Jail-Based-Voting-02.pdf [<https://perma.cc/797F-ETQS>] (stating "[i]n *O'Brien v. Skinner*, the U.S. Supreme Court affirmed that Americans in jail must be provided access to the ballot. [However], [t]he manner in which jails do so is up to the state[.]").

168. See *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 406 (5th Cir. 2020) ("Regardless, the Court has not discarded *McDonald*, *sub silentio* or otherwise. By the time *McDonald* was handed down, the basic doctrinal framework was in place, and *McDonald* has not become an albatross since[.]").

169. *Id.*

170. See *O'Brien*, 414 U.S. at 531 (relying on the construction of the New York statutes by the lower courts to find "as construed, the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment[.]"); see also *McDonald*, 394 U.S. at 810 (holding, without explaining how to obtain Constitutional protection, that "[w]e are satisfied then that appellants' challenge to the allegedly unconstitutional incompleteness of Illinois' absentee voting provisions cannot be sustained[.]").

advocates on behalf of those voters—are charged with prodding facilities into providing these opportunities so that these voters can participate in the electoral process.¹⁷¹

III. POSSIBLE CONSTITUTIONAL CHALLENGES TO ASSERT

A. *Applying the McDonald-O'Brien Framework to Late-Jailed Voters*

While the *McDonald-O'Brien* framework has been developed around incarcerated voters, it has yet to be applied to late-jailed voters who face even greater vote-denial challenges.¹⁷² However, it is not surprising that late-jailed voters have not made a *McDonald* challenge. If the *McDonald-O'Brien* framework cannot protect jailed voters in practice, then how could it provide late-jailed voters any more protection? The only time a *McDonald*-based challenge succeeded was in *O'Brien* when the Court compared the denied absentee ballot opportunities of incarcerated voters detained within their county of residence to the statutorily guaranteed absentee ballot opportunities of incarcerated voters detained outside of their county of residence.¹⁷³ Late-jailed voters have a difficult time asserting *McDonald's* protections unless a statute unequally gives other groups of voters expanded access to an absentee ballot after an application deadline—even if no absentee ballot opportunities offered in practice equates to an absolute deprivation of the right to vote.¹⁷⁴

In some ways, *McDonald* made it simultaneously easier and more difficult for a late-jailed voter to assert a right to vote after an absentee ballot application deadline.¹⁷⁵ Because absentee ballots are the only option for incarcerated voters to cast a ballot from jail in the majority of facilities, once the ballot application period ends, incarcerated voters realistically have no other option to vote from jail, unless they bail out of jail or the government authorizes transportation to a polling place or

171. See *O'Brien*, 414 U.S. at 527 (asserting the need for incarcerated people to initiate the process).

172. *Id.* at 530 (naming incarcerated voters as the intended beneficiaries under *O'Brien*).

173. *Id.* at 531 (holding that “as construed, the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment”).

174. See *id.* at 530.

175. See *McDonald*, 394 U.S. at 811 (discussing the double-edged nature of the case’s holding).

creates a jail polling place.¹⁷⁶ In this regard, the late-jailed voter has an easier time demonstrating an absolute deprivation of the right to vote; they arguably have one less action (i.e., applying from an absentee ballot and being denied) to show in order to prove that they attempted to assert their right to vote.¹⁷⁷

However, *McDonald* does not necessarily make a demonstration of absolute deprivation as simple for late-jailed voters.¹⁷⁸ Just as the *McDonald-O'Brien* framework does not provide states with a checklist of how to guarantee the right to vote to incarcerated voters, it also does not give plaintiffs a checklist of actions to take in order to affirmatively demonstrate that these voters attempted to assert their right to vote.¹⁷⁹ In addition to all the challenges incarcerated voters face, late-jailed voters face a much shorter timeline to assert their right to vote.¹⁸⁰ Late-jailed voters also only have a handful of days to figure out if their state offers any alternative voting opportunities, such as emergency ballots, and to request access to those alternatives.¹⁸¹

Some courts might even require more evidence of a late-jailed voter's assertion of rights of others.¹⁸² For example, a court might want to see that plaintiffs attempted to receive an absentee ballot after the application deadline, even though statutorily a voter cannot receive an absentee ballot if they do not apply for one in time.¹⁸³ The *McDonald* Court arguably created a precedent where plaintiffs must provide this type of evidence

176. See *Mays v. LaRose*, 951 F.3d 775, 791 (6th Cir. 2020) (alleging that "Ohio's generally applicable deadline for requesting absentee ballots violates the First Amendment's guarantee of the right to vote, as applied to jail-confined electors with no other way to vote").

177. *Id.* at 787.

178. See generally *McDonald*, 394 U.S. at 809 (noting the high bar to show absolute deprivation).

179. See generally *O'Brien*, 414 U.S. at 528 (maintaining a vague standard for plaintiffs intending to secure their voting rights).

180. See, e.g., *Mays v. LaRose*, 951 F.3d at 792 (citing the Ohio deadline which requires the request be made before noon three days before Election Day).

181. See generally *Frederick v. Lawson*, 481 F.Supp.3d 774, 782 (S.D. Ind. 2020) (detailing the effects of a denied application in Indiana).

182. The plaintiffs in *McDonald*, *Goosby*, and *O'Brien* all asked for an absentee ballot despite the state statute expressly foreshadowing that the plaintiffs would be denied. However, it is immaterial to the Sixth Circuit in *Mays* that the plaintiff requests an absentee ballot when the statute does not authorize the provision. See *Mays*, 951 F.3d at 782 ("Whether Mays actually requested an absentee ballot once jailed is immaterial because any such request would have been futile.").

183. *Id.* at 780-81.

no matter how futile their attempts will be statutorily or practically.¹⁸⁴ Just as the *McDonald* plaintiffs not only had to ask for an absentee ballot when the Illinois statute did not expressly authorize these voters casting absentee ballots,¹⁸⁵ they also had to seek transportation to a polling place while incarcerated and request that a polling location be placed inside the facility, despite there being no historical precedent of either options.¹⁸⁶ *Goosby* plaintiffs still had to be denied absentee ballots despite the statute expressly denying access to the plaintiffs, opposed to being absent about a class of voters' qualification.¹⁸⁷ Late-jailed voters will reasonably be expected under *McDonald* to still request absentee ballots after the deadline, and they will have to know to request them even after the deadline.¹⁸⁸

When analyzing claims under the *McDonald-O'Brien* framework, it matters how expressly restrictive a challenged state law is to a class of voters.¹⁸⁹ The *McDonald* Court emphasized the fact that the Illinois statute did not expressly prohibit incarcerated voters from access to absentee ballots; rather, they were simply not privileged to receive them under the statute.¹⁹⁰ The Fifth Circuit even recently highlighted how a state's statute allegedly violates the right to vote as a key part of *McDonald's* calculus.¹⁹¹ Late-jailed voters must be incarcerated in a state where a statute, like an absentee ballot deadline statute, absolutely denies late-jailed voters the right to vote from jail.¹⁹² Emergency ballot statutes which extend the absentee ballot application deadline for certain

184. See generally *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 804 (1969) (taking as a given that the application for a ballot was made).

185. See *id.* (noting the requirement of asking for a ballot).

186. *Id.* at 808.

187. See *Goosby v. Osser*, 409 U.S. 512, 521–22 (1973) (discussing the statutory barriers to the voting rights of the *Goosby* plaintiffs).

188. See generally *McDonald*, 394 U.S. at 804 n.3 (conceding that demand is required in incarceration situations).

189. See *Frederick v. Lawson*, 481 F.Supp.3d 774, 787–88 (S.D. Ind. 2020) (noting that mere restrictions are not enough to constitute violation of a fundamental right).

190. See *McDonald*, 394 U.S. at 807–08 (arguing that “it is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots”).

191. See *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 405 (5th Cir. 2020) (citing instances in which the right to vote was summarily shut off from incarcerated individuals).

192. *Id.* at 404.

voters and deny extensions for others might be enough to be considered statutes denying the right to vote to incarcerated voters.¹⁹³

Lastly, an equal protection claim also brings up the question of what class of voters should late-jailed voters be compared to under a state's statute to best assert their right to vote from jail? *O'Brien* plaintiffs succeeded when their equal protection challenges were compared to the rights of similarly situated incarcerated voters detained outside of their county of residence. The fact pattern in *O'Brien* creates an arguably easy case to litigate under *McDonald* and *Goosby*—since some incarcerated voters had more voting opportunities than others.¹⁹⁴ However, which modern state statute provides some late-jailed voters more voting opportunities than another group of late-jailed voters, or, more broadly, justice-impacted voters in general?¹⁹⁵ It is highly likely that late-jailed voters will not be considered similarly situated to an entirely different class of voters if a statute creates a privilege only for the later. Thus an equal protection challenge under *McDonald-O'Brien* would fail.

Perhaps the irony for late-jailed voters under the *McDonald-O'Brien* framework is that fewer opportunities to casting a ballot equates to more endeavors these voters must undergo to assert their right to vote. Unless states pass laws that expressly limit the right to vote from jail, the *McDonald-O'Brien* framework sees the ability to implement voting opportunities (e.g., supervised transportation to polls and polling locations placed inside jails) where there are none in place or practice.¹⁹⁶ Late-jailed voters unfortunately will likely be unsuccessful with their claims under the *McDonald-O'Brien* framework. They should instead look to a different standard—specifically the *Anderson-Burdick* standard—to seek relief.

193. See *Frederick*, 481 F.Supp.3d at 788 (stating that limitations to absentee voting must survive Fourteenth Amendment analysis).

194. See generally *O'Brien v. Skinner*, 414 U.S. 524, 524 (1974) (laying the foundational facts of the case).

195. See Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights*, SENT'G PROJECT, (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/> [https://perma.cc/M7Z8-RS3E] (questioning whether some states are providing more protections to incarcerated voters than other in their legislation).

196. *Id.* at 808.

B. Anderson-Burdick Challenges in the Sixth Circuit and Beyond

The *McDonald-O'Brien* framework is not the only standard the courts can apply in election law cases.¹⁹⁷ The *Anderson-Burdick* balancing test has been widely applied by circuit courts, including in cases with jail-based voter disenfranchisement context.¹⁹⁸ By claiming that a state law or policy severely burdens the right to vote due to a disparate treatment of voters, courts can weigh the burden experienced by this group of voters against the state's interest in enforcing the law or policy.¹⁹⁹ The weighing of burdens against state interests in the *Anderson-Burdick* test offers more protection to voters than the *McDonald-O'Brien* framework. The standard of review in *McDonald-O'Brien* is highly deferential to state interests, whereas a court may not be deferential if the burden on the right to vote is too great.²⁰⁰ By asserting claims under the more stringent *Anderson-Burdick* standard, late-jailed voters may find it easier to assert Fourteenth Amendment challenges.

The Sixth Circuit first considered a late-jailed voter's equal protection claim under the *Anderson-Burdick* standard.²⁰¹ In *Fair Elections Ohio v. Husted*, incarcerated individuals who timely filed absentee ballot applications could vote on Election Day when a board of elections team was sent to county jails.²⁰² The Ohio statute set the absentee ballot deadline at 6:00 PM on the Friday before Election Day; thus, an individual who was incarcerated between 6:01 PM on that Friday and

197. See Paikowsky, *supra* note 138, at 856.

198. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the assert injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interest 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.'"); see *Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020) (specifying examples of this test in Supreme Court decisions).

199. See generally Vasilogambros, *supra* note 51 (calling attention to the difficulties of exercising rights in jail).

200. See *O'Brien v. Skinner*, 414 U.S. 524, 525 (1974) ("Applying a heightened level of scrutiny, the Court held that 'New York's election statutes . . . discriminate between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, is wholly arbitrary' and 'operate[s] as a restriction which is so severe as itself to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise.'").

201. See *Fair Elections Ohio v. Husted*, 770 F.3d 456, 458 (6th Cir. 2014) (pioneering a new hope for jailed voters to reasonably exercise their rights).

202. *Id.*

Election Day would not be able to vote.²⁰³ However, special emergency absentee ballot procedures, in which an application would be accepted by 3:00 PM on Election Day, facially discriminated between voters by only being available to certain voters.²⁰⁴ Under this procedure, emergency absentee ballots are only available to voters who are confined in a hospital as a result of an accident or unforeseeable medical emergency or who have a minor child hospitalized as a result of an accident or unforeseeable medical emergency.²⁰⁵ In the district court, the plaintiffs showed that at least four hundred late-jailed voters were prevented from voting in the 2012 elections because of Ohio's statutes, demonstrating the wide impact Ohio's statutes had.²⁰⁶ Ruling in favor of the incarcerated voters, the district court applied the *Anderson-Burdick* test because "election laws provided for early voting options as an alternative for late-jailed electors . . . [and therefore it was] appropriate to 'weigh the character and magnitude of Plaintiff's alleged injury against the precise interests described by the State as justifications for the burden imposed by the challenged statute.'"²⁰⁷ In late-jailed voters' cases, it was undisputed that they were completely deprived of their fundamental right.²⁰⁸ The court found that the Board of Elections should have "no trouble locating late-jailed electors, as they literally have a captive audience."²⁰⁹ The district court concluded that late-jailed voters' "fundamental voting rights [were] simply stripped away" and that the state minimally accommodated late-jailed voters at best.²¹⁰

On appeal, the Sixth Circuit in *Fair Elections* dismissed the case based on standing because the plaintiffs consisted of an organization without standing to sue as opposed to individual plaintiffs.²¹¹ As a result, the Sixth Circuit declined to review the district court's decision on the

203. *Id.* at 458–59.

204. *Id.*

205. Ohio Rev. Code § 3509.08(B)(1).

206. *See Fair Elections Ohio v. Husted*, 47 F. Supp. 3d 607, 610 (S.D. Ohio 2014), *rev'd* 770 F.3d 456 (6th Cir. 2014) (summarizing the foundation for incarcerated voters Equal Protection claim).

207. *Id.* at 613–14.

208. *Id.* at 614.

209. *Id.* at 615.

210. *Id.* at 616.

211. *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014).

merits.²¹² In *Mays v. LaRose*, however, the court applied the same standard as the district court, but reached a different result.²¹³ In 2020, the plaintiffs in *Mays* brought the same case before the Sixth Circuit that *Fair Elections* concerned in 2014.²¹⁴ As it did in *Fair Elections*, the district court in *Mays* applied the *Anderson-Burdick* test, ruling in favor of the plaintiffs.²¹⁵ The biggest difference between the two cases is that the plaintiffs in *Mays* had standing, whereas the *Fair Elections* plaintiffs did not.²¹⁶ Consequentially, the Sixth Circuit was able to review the late-jailed voters' claims on the merits in *Mays* whereas it declined to do so in *Fair Elections*.²¹⁷

Mays featured equal protection challenges by two individual plaintiffs, one being a late-jailed voter and the other being an incarcerated voter detained before the absentee ballot application deadline.²¹⁸ When the *Mays* court evaluated the burden late-jailed voters faced in light of all other voting opportunities, it found that the plaintiffs' burden was "intermediate, somewhere 'between slight and severe.'"²¹⁹ The *Mays* court considered all available voting opportunities late-jailed voters could have taken prior to litigation.²²⁰ Interestingly, the *Mays* court did not apply *McDonald*, although there are similarities between the *Mays* and *McDonald* decisions when the courts assess all available voting

212. *Id.* at 459.

213. *See Mays v. LaRose*, 951 F.3d 775, 781 (6th Cir. 2020) (explaining that since the plaintiffs' inability to vote was a direct result of the state's imposition of an absentee ballot request deadline, the causation requirement was met, and plaintiffs thus had standing to sue).

214. *Mays v. Husted*, No. 2:18-cv-1376, 2019 WL 6911626 (S.D. Ohio Dec. 19, 2019) at *1.

215. *Id.*

216. *Compare Mays*, 951 F.3d at 781 (finding that plaintiffs had standing to sue because they met the causation requirement) *with Fair Elections Ohio*, 770 F.3d at 459 (finding that plaintiffs did not have standing to sue because they could not prove "an injury in fact, fairly traceable to the defendant's conduct, that is likely to be redressed by a decision of the court" since plaintiffs were a third party bringing the suit on behalf of the injured, not the ones who were actually injured).

217. *Compare Mays*, 951 F.3d at 781 (finding that the plaintiffs had standing to sue and thus going on to review the merits of their claims) *with Fair Elections Ohio*, 770 F.3d at 456 (holding that plaintiffs did not have standing to sue and thus not going on to review the merits of their claim).

218. *See Mays*, 951 F.3d at 780, 781-82 (describing the background that led to the plaintiffs' cause of action and the theory upon which their action is based).

219. *Id.* at 785.

220. *Id.* at 786.

opportunities, no matter how real those opportunities are.²²¹ Instead, the *Mays* court looks to *Rosario v. Rockefeller*, a case in which eligible voters sought to enroll to vote in a primary election after the enrollment deadline.²²² In *Rosario*, the Court held that the plaintiffs were eligible to enroll before the deadline and could have registered then, but they chose not to.²²³ The *Mays* court draws a parallel from *Rosario* to hold that the plaintiffs' "choice to not participate in the opportunities Ohio provides to vote other than on Election Day was, at least in part, the cause of their inability to vote."²²⁴ Because of this, the plaintiffs were not totally denied the right to vote, so the court did not review the claims under the strict scrutiny standard.²²⁵

After using *Rosario* to reject any complete vote denial allegations, the court applies the *Anderson-Burdick* framework in light of the moderate burden late-jailed voters face.²²⁶ The court held that the administrative inconveniences faced by state outweighed the moderate burden on voters.²²⁷ Ohio, like any state administering an election, has a long list of responsibilities to complete before the end of the election.²²⁸ Ohio contended, and the court agreed, that extending the absentee ballot deadline to late-jailed voters would be too resource-intensive to accomplish.²²⁹ In light of hospital-confined voters not being similarly situated to late-jailed voters²³⁰ and considering that late-jailed voters had

221. *Id.*

222. *See Rosario v. Rockefeller*, 410 U.S. 752, 755 (1973) (describing a case where voters sought voting rights similar those incarcerated).

223. *Id.* at 757–58.

224. *See Mays*, 951 F.3d at 786 (comparing the circumstances that led to the plaintiffs' inability to vote to those presented in a previous case).

225. *Id.* at 787.

226. *Id.* at 789.

227. *Id.* at 791.

228. *See id.* at 787–88 (listing some of the many tasks election administrators are saddled with in the lead-up to a general election).

229. The Ohio Secretary of State claimed, "because humans are bound by the laws of physics, they cannot be in two places at once, and so many resources dedicated to accommodating jailed voters cannot be spent completing other tasks." *Id.*

230. *Mays v. LaRose*, 951 F.3d 775, 787–88 (6th Cir. 2020).

the option to vote earlier,²³¹ the Sixth Circuit held that no voting rights under the Fourteenth Amendment were violated.²³²

While the Sixth Circuit is the first to adjudicate late-jailed voters' claims, its reliance on *Rosario* was misplaced and causes problems for future claims by both late-jailed voters and voters in general. The Sixth Circuit overlooked the fact that the *Rosario* court was criticizing the lack of timely action of the plaintiff; the Supreme Court in *Rosario* emphasized the action which was required by a statutory deadline when assessing the severity of a burden by a state law.²³³ In *Rosario*, the window of time in which plaintiffs could have acted was secondary to the fact that plaintiffs did not act in time at all.²³⁴ The lack of timeliness resulted in plaintiffs' disenfranchisement.²³⁵ Arguably, the *Rosario* Court did not mean to emphasize the exhaustive range of opportunities the plaintiffs were being offered; rather, the Court's focus was on timely action.²³⁶ The *Mays* court did not make this distinction in *Rosario*. Instead, it emphasized *Rosario*'s recognition that a state's statute can provide multiple opportunities for a person to participate in an election.²³⁷

The focus on timely action, as opposed to numerous opportunities to vote during a period of time, might not initially seem like a consequential move, but the upshot of *Rosario* as applied in *Mays* is that the constitutional right to vote can—and most likely will in “unfortunate” situations—be deprived if voters do not immediately act on their rights.²³⁸ Under the Sixth Circuit's interpretation of *Rosario* in *Mays*, every hour, minute and second of every day that a person *may, but does not, vote* is a missed opportunity the voter failed to seize.²³⁹

231. *Id.* at 786.

232. *Id.* at 791.

233. *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (“The petitioners do not say why they did not enroll prior to the cutoff date; however, it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by 186, but by their own *failure to take timely steps* to affect their enrollment.”) (emphasis added).

234. *Id.* at 762.

235. *Id.* at 757.

236. *Id.* at 762.

237. *Mays*, 951 F.3d at 786.

238. *Id.*

239. *See id.* (emphasizing that any registered voter could have taken advantage of early voting opportunities provided by the state).

How many opportunities to vote must pass before a voter is declared to have wasted all of their opportunities? Should one missed opportunity prevent a voter from voting in the future? Why should voters anticipate not having the full range of voting opportunities allocated to them statutorily and by the courts?²⁴⁰ Voters should not be faulted for anticipating that they will be able to vote within the statutorily-permissible time; voters should not be required to vote at the first available opportunity.²⁴¹ As one New York state court found, "[a] citizen has a right to vote anytime [they] wish[] within the lawful time mandate. [They] do[] not have to anticipate [that they] will be unlawfully deprived of [their] vote."²⁴² Voters should be able to anticipate having their full range of voting opportunities.²⁴³ There is no indication in *Rosario* that plaintiffs would have been denied their right to vote, or should have anticipated that their right to vote would have been denied, if they acted in a timely manner as the statute applied to them.²⁴⁴ The *Rosario* plaintiffs were at fault simply because at the time they sought to enroll, they were not in compliance with the statute.²⁴⁵

Not only did the *Mays* court misread *Rosario*, it misapplied *Rosario* because the plaintiffs are not similarly situated.²⁴⁶ The *Rosario* plaintiffs wanted the privileges of a statute that did not apply to them *after* they failed to comply with another statute that directly applied to them.²⁴⁷ Similar to the *Rosario* plaintiffs, late-jailed voters are not offered the same amount of time as late hospital-confined voters to fill out an

240. See *People ex rel. Woodside v. Bd. of Inspectors of Election of 56th Election Dist. of Town of Hempstead*, 389 N.Y.S.2d 242, 247 (Sup. Ct. 1976) (recognizing that eligible voters have a right to vote anytime within their statutorily provided timeframe).

241. *Id.*

242. *Id.*

243. *Id.*

244. See *Rosario v. Rockefeller*, 410 U.S. 752, 757–58 (1973) (explaining that New York's statute merely imposes deadline requirements to participate in elections and does not disenfranchise voters).

245. *Id.* at 757.

246. See *Mays v. LaRose*, 951 F.3d 775, 785–86 (6th Cir. 2020) (framing the current issue similarly to the court in *Rosario*, in which all the voting opportunities the plaintiffs failed to take advantage of were considered).

247. See *Rosario*, 410 U.S. at 755 (explaining how the various statutory provisions apply to the plaintiffs).

application by statute.²⁴⁸ However, unlike the *Rosario* plaintiffs, one of the late-jailed plaintiffs in *Mays* could not apply for an absentee ballot as an incarcerated voter until after he was detained.²⁴⁹ This late-jailed voter's situation in *Mays* is not analogous to the *Rosario* plaintiffs because it was not possible for him to ever act under the special absentee ballot statute in a timely manner.²⁵⁰ Simply put, the provision never applied to him during the statute's permissible timeline.²⁵¹ Once detained, Mays could no longer vote in person or request an absentee ballot before the deadline.²⁵² No absentee ballot statute restricted Mays' ability to vote before his arrest, therefore, no statute should have restricted him after his arrest.²⁵³ The *Mays* plaintiffs were not claiming a deprivation of the right to vote because of the allegedly restrictive early voting period in which they statutorily could participate in, which is more analogous to *Rosario*. Rather, they were claiming a deprivation of the right to vote based on the special provisions statute of which they were not privileged to and had no other recourse to vote during the time after they were detained—an entirely different scenario than the *Rosario* plaintiffs.²⁵⁴

While late-jailed voters are not similarly situated to the *Rosario* plaintiffs, the argument can be made that they are similarly situated to hospitalized voters. Comparatively, the *Mays* court held that late-jailed voters were not similarly situated to hospital-confined voters.²⁵⁵ Yet, actions the election officials would have to take in order to vindicate a late hospital-confined voter's right to vote highlight how similar the same could be applied to late-jailed voters.²⁵⁶ The court points to elections staff having to ensure that a voter will be in jail, pass through jail security, and verify that an elector will be present when they arrive, as the type of advance planning unique to late-jailed voters.²⁵⁷ It is difficult to imagine

248. See *Mays*, 951 F.3d at 780 (acknowledging that the state refused to grant jail-confined voters the same deadline that is granted to hospital-confined voters).

249. *Id.*

250. *Id.*

251. *Id.* at 782.

252. *Id.* at 781–82.

253. *Id.* at 782.

254. *Mays v. LaRose*, 951 F.3d 775, 780 (6th Cir. 2020)

255. *Id.* at 788.

256. *Id.*

257. *Id.* at 789.

that the State does not or will not take similar actions for hospitalized voters.²⁵⁸ Hospitals generally have security guards and require visitors to check in before a person can access a patient.²⁵⁹ Certainly in a post-COVID-19 world, very few hospitals tolerate policies allowing non-patients to walk directly into a hospital room without being stopped or needing the assistance of hospital staff to locate a patient.²⁶⁰ Given that the average hospital stay is 4.6 days, one would also wonder why an election official would not verify that a hospital-confined voter is still confined in a hospital, considering the likelihood that they will be discharged before Election Day.²⁶¹ Similar to how the government physically restrains incarcerated voters, hospitals likewise have the authority to physically restrain patients; therefore, hospital-confined voters are similarly situated to incarcerated voters.²⁶² Despite the court's determination that late-jailed voters are not similarly situated as hospitalized voters, the *Mays* court continues with the *Anderson-Burdick* analysis by highlighting how the state would be burdened by accommodating late-jailed voters.²⁶³ Curiously, the *Mays* court arguably employs mixed, even confusing, standards of review by being remarkably

258. See *How Does Patient Voting Work?*, PATIENT VOTING, <https://www.patientvoting.com/> [<https://perma.cc/8YTY-G9J4>] (outlining the different programs that states have which might accommodate hospitalized voters).

259. See generally *The Importance of Security in Hospitals*, SILVERSEAL, <https://www.silverseal.net/insights/the-importance-of-security-in-hospitals/> [<https://perma.cc/G2AH-BWNX>] (detailing security measures at hospitals).

260. See *id.*

261. See William J. Freeman, ET AL., *Overview of U.S. Hospital Stays in 2016: Variation by Geographic Region*, HEALTHCARE COST AND UTILIZATION Project (Dec. 2018), <https://www.hcup-us.ahrq.gov/reports/statbriefs/sb246-Geographic-Variation-Hospital-Stays.jsp> [<https://perma.cc/B2LW-6YQ9>] (showing that the region encompassing Ohio has an average hospital stay of 4.4 days).

262. Compare 28 CFR § 552.22(e) (1996) (permitting staff to “apply restraints . . . to the inmate . . .”), with AM. MED. ASS’N, CODE OF MEDICAL ETHICS § 1.2.7 Use of Restraints, <https://code-medical-ethics.ama-assn.org/sites/default/files/2022-08/1.2.7.pdf> (documenting “[a]ll individuals have a fundamental right to be free from unreasonable bodily restraint.” However, in situations where the patient is at risk of self-harm, “. . . it may be ethically justifiable for physicians to order the use of chemical or physical restraint to protect the patient.”), and TEX. HEALTH & SAFETY CODE ANN. § 322.052(a) (2013) (authorizing, in Texas state law, the use and regulation of restraints to “. . . minimize the risk of harm to a facility resident. . .”).

263. See *Mays v. LaRose*, 951 F.3d 775, 788 (6th Cir. 2020) (distinguishing hospital-confined voters from jail-confined voters based on location they are confined to).

deferential to the state's justifications.²⁶⁴ In its more conventional application of *Anderson-Burdick*, the *Mays* court disagreed with the plaintiff's argument that states were not overly burdened by providing expanded voting access to late-jailed voters.²⁶⁵ Referencing its 2012 decision in *Obama for America v. Husted*,²⁶⁶ the court found that elections staff and volunteers have a long list of activities to accomplish by Election Day, and even if one county could shoulder the burden of expanding election resources to late-jailed voters, other counties likely could not.²⁶⁷ Unlike *Obama for America*, the court found that plaintiffs failed to refute the state's claim of an excessive burden, nor did they prove that expanding voter access to late-jailed voters would ease the burden.²⁶⁸ Many are critical of the *Mays* decision, as evidence in an article pointing out that "the Sixth Circuit yielded too quickly to Ohio's cry of logistics."²⁶⁹ *Obama for America* implemented a higher standard than *Anderson*—requiring the state to not only show that it is burdened, but to also justify its discriminatory restrictions on voting rights.²⁷⁰ The court in *Obama for America* applied a higher standard in an effort to prevent states from engaging in discriminatory practices by favoring the voting rights of one group while restricting all others.²⁷¹ This standard

264. *Id.* at 793.

265. *See id.* at 789 (justifying the law's constitutionality by explaining the voting opportunities electors continue to have despite the unfortunate barriers preventing them from voting on Election Day).

266. *Obama for Am. v. Husted*, 697 F.3d 423, 432-33 (6th Cir. 2012) (recognizing the extensive list of responsibilities election staff members take on near Election Day).

267. *See Mays*, 951 F.3d at 787-89 (encapsulating a county's board of elections responsibilities over a short time frame prior to Election Day) (highlighting the impracticality of expecting boards in large counties to complete these responsibilities and expand election resources, much less small counties with much fewer board members).

268. *Id.* at 790-91.

269. *See Election Law—Voting Rights—Sixth Circuit Limits Scope of Equal Protection Analysis Regarding Disparate Treatment of Voters—Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020), 134 HARV. L. REV. 1252, 1256 (2021) (arguing against the Sixth Circuit's decision that by providing applications to late-jailed voters, boards of elections would be unable to complete required tasks).

270. *See id.* at 1257 (arguing that the *Anderson-Burdick* test, applied by the *Mays* court, is inadequate to handle laws such as Ohio's) (advocating for the test used in *Obama for America* as the appropriate test to use for complex laws such as those addressed in *Mays*); *see also Obama for Am.*, 697 F.3d at 432 (finding that "the State has . . . [(1)] classified voters disparately and [(2)] has burdened their right to vote. Therefore, both justifications proffered by the State must be examined to determine whether the challenged statutory scheme violates equal protection.").

271. *Election Law*, *supra* note 249, at 1258.

would be applicable to the statute at issue in *Mays* since the statute privileges late hospital-confined voters to extended absentee ballot access while preventing other qualified absentee voters from extended access.²⁷² If the *Mays* court would have applied the *Obama for America* standard, it would have found that there was no justifiable reason why the state should be allowed to be partial to late hospital-confined voters.²⁷³ If all counties had such limited election resources, why grant ballot extensions to late hospital-confined voters in the first place?

Overall, the test a court chooses to use in analyzing voting opportunities of late jailed voters—or lack thereof—is outcome determinative in an equal protection challenge under the Fourteenth Amendment, as illustrated in the *Mays* decision.²⁷⁴ Mischaracterizing the burden can complicate choosing the appropriate review standard, and can yield confusing applications of *Anderson-Burdick*.²⁷⁵ To the same extent that the *McDonald* Court misrepresented the plight of jailed voters, the *Mays* court also misrepresents late-jailed voters' plight.²⁷⁶ Citing Justice's Blackmun's dissent in *O'Brien*, the *Mays* court agrees that "the statute's effect upon [an incarcerated voter], although unfortunate, produces a situation no more critical than the situation of the voter, just as unfortunate, who on Election Day is away attending a funeral of a loved one in a distant State."²⁷⁷ Blackmun referred to these situations as "inequalities of life."²⁷⁸ As mentioned earlier, these types of comparisons do not adequately capture the burden on incarcerated voters while being physically restrained from voting in person.²⁷⁹ Very few voters, such as hospital-confined voters, can relate to the lack of freedom experienced by physically restrained jailed voters during an election.²⁸⁰

272. See *Mays*, 951 F.3d at 780–81 (highlighting an exception in Ohio's law that allows certain voters to request an extension on their absentee ballot, thus evincing discriminatory treatment towards different groups of voters).

273. *Election Law*, supra note 249, at 1256.

274. See *id.* at 1258 (predicting the *Mays* outcome would have been different if it had properly applied the *Obama for America* test).

275. *Id.* at 1254.

276. See *Mays*, 951 F.3d at 791–92 (justifying its holding by using *McDonald*'s refusal to find a constitutional right to an absentee ballot).

277. *Id.* at 786.

278. *Id.*

279. *Id.*

280. *Id.*

Paradoxically, the court seems to agree when it later mentions a handful of cases in which jail-confined voters are not similarly situated to those outside jail.²⁸¹ Although the Sixth Circuit offers a convoluted depiction of the burdens placed on late-jailed voters' right to vote, there is no need for circuit courts and legal advocates to be dissuaded of these voters' claims, particularly under an *Anderson-Burdick* test.

Despite the Sixth Circuit's treatment of late-jailed voters and its erroneous application of Supreme Court precedent in *Mays*, right to vote challenges under *Anderson-Burdick* offer more promising results for late-jailed voters than the *McDonald-O'Brien* framework.²⁸² Late-jailed voters are clearly burdened—until the government creates new voting opportunities, late-jailed voters will be statutorily pushed out of the electoral system entirely.²⁸³ A proper framing of late-jailed voters' situation can demonstrate at least a moderate—if not severe—burden on the right to vote. However, even a moderate burden on late-jailed voters should outweigh a burden placed on a state by expanding voting access.²⁸⁴

Even in a more conventional application of the *Anderson-Burdick* test, courts could likely find that states that seek to give additional voting opportunities to certain classes of voters—like late hospital-confined voters in Ohio—will not be greatly burdened by application deadlines and other voting opportunities for late-jailed voters.²⁸⁵ In scenarios like Ohio's special absentee ballot procedures for hospitalized voters, states likely have policies in place that can be extended to late-jailed voters. Other states without these policies could still endeavor to have county officials facilitate special absentee ballot programs, reserve a polling machine for a jail, or even coordinate detainee transportation to secure

281. *Id.* at 788.

282. *See Mays v. LaRose*, 951 F.3d 775, 789-90 (6th Cir. 2020) (comparing the strict holding in *McDonald*, which permitted states to get rid of absentee voting entirely, with the more lenient standard in *Anderson-Burdick*, where it found the state's burden was actually decreased by expanding early voting).

283. *Id.* (illustrating how *Mays* would have had the opportunity to vote had he been hospitalized rather than in jail).

284. *See generally id.* at 792–93 (holding to the contrary that a state's "interest in the orderly administration of elections outweighs the minimal burden that the [s]tate's absentee ballot request deadline places on [a late-jail voter's] right to vote. . .").

285. *Id.* at 790 (analyzing *Anderson-Burdick* and the possibility that a state's burden be decreased by expanding early voting opportunities).

polling locations. Even a minimal expansion of existing programs could significantly change the voting opportunities of late-jailed voters.²⁸⁶

However, applying the *Anderson-Burdick* standard does not come without challenges.²⁸⁷ Namely, courts disagree on whether it is the right standard to apply to jail-based voting cases at all.²⁸⁸ The Sixth Circuit has noted that it is unclear whether *Anderson-Burdick* is the correct standard to apply in equal protection challenges.²⁸⁹ At the same time, the Fifth Circuit in *LULAC v. Hughs* chose to apply *Anderson-Burdick* over *McDonald* when the court determined that the state could still prevail under the stringent *Anderson-Burdick* standard.²⁹⁰ While late-jailed voters can exert more rights under *Anderson-Burdick*, it is possible that this standard may not be applicable in future litigation.

C. Alternative Litigation Strategies

Although *McDonald-O'Brien* and *Anderson-Burdick* standards are the most popular standards in jail-based voting litigation, they do not encompass the entirety of the legal challenges late-jailed voters can assert.²⁹¹ Late-jailed voters likely have viable claims under theories of due process, poll tax, and Section 2 of the Voting Rights Act.²⁹² This Note proposes that the *Anderson-Burdick* standard is the most promising for late-jailed voters in the courts. However, late-jailed voters do not have to rely entirely on the courts to enforce their rights.²⁹³ The federal

286. See E.J. Dionne Jr. & Mike Rapport, *A Dozen Ways to Increase Voting in the United States*, CARNEGIE CORP. OF N.Y. (Sept. 12, 2022), <https://www.carnegie.org/our-work/article/dozen-ways-increase-voting-united-states/> [https://perma.cc/XQ6C-EFF5] (noting that there was an expansion of early voting during the COVID-19 pandemic).

287. See *The Anderson-Burdick Standard Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, *supra* note 36 (pointing out that one challenge when applying the standard "has led to considerable divergence among lower court judges, as well as confusion").

288. *Id.*

289. *Cf. Mays*, 951 F.3d at 784 (stating that "under *Anderson-Burdick*, we first look to the burden the State's regulation imposes on the right to vote.")

290. *LULAC v. Hughs*, 978 F.3d 136, 144 n. 6 (5th Cir. 2020).

291. See generally Paikowsky, *supra* note 138, at 859–71 (discussing alternate challenges incarcerated voters may bring).

292. *Id.*

293. See generally Nicole D. Peter, *Voting in Jails*, SENT'G PROJECT (May 7, 2020), <https://www.sentencingproject.org/policy-brief/voting-in-jails/> [https://perma.cc/27U2-R547] (explaining the efforts made in some jurisdictions to preserve the rights of jailed voters).

government also has the authority to enfranchise incarcerated voters, including late-jailed voters.²⁹⁴ The Department of Justice can “correct severe patterns of abuse within the U.S. institutions,” including jails and pre-detention facilities, under the Civil Rights of Institutionalized Persons Act of 1980.²⁹⁵ The ability of federal intervention particularly becomes more persuasive in light of a recent executive order by the Biden Administration in March 2021.²⁹⁶ In this executive order, the Attorney General is required to provide educational voter registration and voting materials to “all eligible individuals in the custody of the Federal Bureau of Prisons.”²⁹⁷ While many individuals held in a Federal Bureau of Prisons (BOP) facility are disqualified from voting under a state’s felony disenfranchisement laws, all individuals held within a BOP facility in Maine, Vermont, D.C., and Puerto Rico, (states and territories that have universal enfranchisement) would be positively impacted by federal efforts to expand voting access.²⁹⁸ The executive order also extends to U.S. Marshals Service contracts, including intergovernmental agreements and jail contracts.²⁹⁹ Freedom of Information Act requests reveal that the U.S. Marshals historically have intergovernmental contracts with potentially hundreds of county jails across the nation,³⁰⁰ demonstrating that the federal government in some capacity can immediately provide thousands of individuals voting access.³⁰¹

294. See Fisher, *supra* note 148, at 96 (emphasizing the authority and the responsibility of the government to extend enfranchisement).

295. *Id.* at 96-97.

296. See generally *Executive Order on Promoting Access to Voting*, WHITE HOUSE (Mar. 7, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/07/executive-order-on-promoting-access-to-voting/> [<https://perma.cc/N6A5-W7JD>] (explaining and emphasizing the fundamental nature of the right to vote within American democracy).

297. *Id.*

298. See *Voting Outside the Polling Place: Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives*, *supra* note 82 (summarizing various excuses for absentee voting accepted by states across the United States).

299. See *Executive Order on Promoting Access to Voting*, *supra* note 325 (explicitly naming the U.S. Marshals as tasked with implementing the requirements of this executive order).

300. See DEP’T OF JUST. U.S. MARSHAL SERV., *Prisoner Operation Resources, Custody and Detention*, <https://www.usmarshals.gov/what-we-do/prisoners/operation/custody-detention#> [<https://perma.cc/WDM3-PGCK>] (acknowledging that “the U.S. Marshals Service does not own or operate detention facilities but partners with state and local governments using intergovernmental agreements to house prisoners”).

301. See generally *Executive Order on Promoting Access to Voting*, *supra* note 326 (displaying further efforts by the federal government to increase voting opportunities).

However, at the time of this Note, it remains to be seen whether the U.S. Marshals or BOP facilities have expanded voting access as a response to the executive order. Because litigation is not always the most immediate, or even best, way to actualize the right to vote, late-jailed voters' rights still should be reflected in states' statutory and election administration schemes.

IV. JAIL-BASED VOTING ADVOCACY: CREATING VOTING OPPORTUNITIES FOR LATE-JAILED VOTERS OUTSIDE OF THE COURTS

Fortunately for late-jailed voters, the judicial system and executive branch are not the only avenues by which to realize the promise of the right to vote from jail.³⁰² While the Supreme Court has secured a baseline recognition of the right to vote from jail, until the circuit courts iron out the doctrine, late-jailed voters can receive more immediate and far-reaching support to participating in elections through legislative action, administrative regulations, and third-party intervention.³⁰³ One persistent issue in incarcerated voter case law is the fact that late-jailed voters are not at all considered in election statutes.³⁰⁴ Where a few subsets of voters may have access to emergency ballots, special absentee ballot procedures, and polling location settings, late-jailed voters either are intentionally left out, as the *McDonald* Court suggests,³⁰⁵ or forgotten entirely by the legislative process. In either case, it is time to reconsider the impacts of leaving out incarcerated voters from the electoral process.

Jailed-based disenfranchisement is a significant threat to democracy because it undermines its institutional legitimacy.³⁰⁶ From a philosophical perspective, if otherwise eligible voters can be kicked out of the electoral process simply by an arrest, then democracy hinges on the state restricting its police power close to election periods.³⁰⁷

302. See generally Peter, *supra* note 320 (reviewing various efforts made by state legislatures across the United States).

303. *Id.*

304. See Paikowsky, *supra* note 138, at 840 (iterating that "many jurisdictions do not have formal policies or plans to provide alternative means of ballot access to voters in jail").

305. See *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969) (noting the apparent intention of the Illinois legislature in excluding late-jailed voters).

306. See Paikowsky, *supra* note 138, at 843 (concluding jail-based disenfranchisement is a democratic, social, and moral concern).

307. *Id.*

Democracies that struggle with mass incarceration should be particularly cautious of the de facto disenfranchisement of incarcerated voters.³⁰⁸ From a practical perspective, justice-impacted individuals' direct experience with each component of the justice system make them particularly qualified to assess elected officials' role in society. Creating electoral opportunities for justice-impacted individuals can significantly reduce mass incarceration, restore power and agency to marginalized communities, and bolster the rehabilitation and re-entry processes in our criminal justice system.³⁰⁹ Considering how jail populations are disproportionately made up of people of color and how much discretion criminal justice actors (e.g., police, prosecutors, and judges) have, many traditionally marginalized individuals can be introduced—or re-introduced—into our democracy in a meaningful way through legislative fixes.³¹⁰ It is shameful that the United States has neglected to fulfill the democratic promise of this group of voters for so long.

Among possible legislative fixes, state legislators can support late-jailed voters by enacting laws that create or extend emergency ballot or special absentee ballot procedures to incarcerated voters.³¹¹ Legislators can also codify administrative policies to support election offices and county jails in creating voting opportunities for these voters, including mandatory voter registration drives, voter education programming, and absentee ballot assistance drives. Expanded deadlines to receive an absentee ballot mailed from jail would also help accommodate jail mail-

308. *Id.*

309. *Id.* at 843–47.

310. See PORTER, *supra* note 10, at 5 (proclaiming “almost half (48%) of persons in jail nationally are African American or Latino. Other racial groups, including Native Americans and Asians, comprise about 2% of the jail population, or 13,000 persons as of 2017.”); see George L. Kelling, “Broken Windows” and Police Discretion, NAT’L INST. JUST. (Oct. 1999), <https://www.ojp.gov/pdffiles1/nij/178259.pdf> [<https://perma.cc/6YUD-2MHG>] (“Discretion was found to be used at all levels of criminal justice organizations. The idea that police, for example, made arrest decisions simply on the basis of whether or not a law had been violated—as a generation of police leaders had led the public to believe—was simply an inaccurate portrayal of how police worked.”); see also Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 74 J. CRIM. L. & CRIMINOLOGY 234, 249 (1984) (“[P]olice do appear to invoke the law selectively, with more punitive treatment directed at offenders encountered in lower status neighborhoods.”); see generally Jackson-Gleich & Yeary, *supra* note 23 (implying there are several legislative fixes that can bring thousands back into our voting democracy).

311. See Jackson-Gleich & Yeary, *supra* note 23 (extending procedures to effectively receive ballots from jailed voters).

room delays. In states that do not support same-day voter registration, legislators can also pass same-day voter registration policies to give incarcerated individuals detained outside of their county of residence an opportunity to vote in-person and via an absentee ballot.

Additionally, legislators can seize on the popularity among voting advocates by creating polling locations within jails.³¹² Considering previous voter ID cases, late-jailed voters may even be able to assert a potential legal claim to the right to vote in person.³¹³ In his *Crawford v. Marion County Election Bd.* dissent, Justice Souter puts forward the idea that "[i]t is one thing. . . for a State to make absentee voting available . . . but it is quite another to suggest that, because the more convenient but less reliable absentee ballot is available, the State may freely deprive [voters] of the option of voting in person."³¹⁴ More recently, the Fifth Circuit has adopted this sentiment, claiming that absentee ballots are not equivalent to in-person voting.³¹⁵ Passing legislation that requires the placement of polling locations inside jails would significantly impact the electoral experience of these traditionally marginalized voters.³¹⁶

While statutory and administrative fixes would be the best way, in practice, to ensure incarcerated voters will continue to have a right to vote from jail, election officials and jail staff can immediately collaborate with community activists and trusted nonprofit groups to serve incarcerated

312. *Id.*

313. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 236 (2008) (Souter, J., dissenting) (countering the majority's belief that only a limited burden occurred, and the State's violation of federal election law deserved more attention).

314. *Id.* at 212.

315. *See Veasey v. Abbott*, 830 F.3d , 225 (5th Cir. 2016) ("[W]e conclude that [mail-in voting] is not the equivalent of in-person voting for those who are able and want to vote in person. Mail-in voting involves a complex procedure that cannot be done at the last minute. It also deprives voters of the help they would normally receive in filling out ballots at the polls . . .").

316. *See Scherer & Bamed-Smith, supra* note 56 (quoting an excited new voter describing her transformative opportunity voting in the jail, "I've never been taken out of a quarantine tank and asked if I wanted to vote," Terrill said. She leaped at the chance. Terrill had voted in the two most recent presidential elections and felt the gravity of the moment then. Tuesday served as a reminder of that experience. "It was a great feeling," she said. "I knew that I was doing something for the better of me . . . (and) when I actually got there, they told me that I'm one of the first women to have been able to vote (in person at the jail). And when they told me that, I just thought, "Well, I'm making history.").

voters.³¹⁷ There are a handful of community-run jail-based voting models that facilities can emulate, proving that expanding voting access inside of jails is not only possible for many counties, but *immediately* possible under many states' current election statutes and correctional facility regulations.³¹⁸ State legislators, election officials, county commissioners, sheriffs, jail staff, community activists, and incarcerated voters do not need to wait for the courts to vindicate a late-jailed voter's right to vote from jail before taking action.³¹⁹ Otherwise, given current case law, a late-jailed voter could be waiting indefinitely.

CONCLUSION

The *McDonald-O'Brien* framework guarantees that late-jailed voters have the right to vote from jail the same as any other incarcerated voter; however, this theoretical guarantee does not go far in practice.³²⁰ When vindicating their right to vote in a courtroom, courts have essentially told all incarcerated voters, "Better luck next election." States' lack of action to ensure that late-jailed voters can assert that right requires much action inside and outside of the courts before this right becomes real.

317. See Jackson-Gleich & Yeary, *supra* note 23 (discussing how serving incarcerated voters may take a coordinated effort among parties).

318. See Pampuro, *supra* note 58 (starting a new voter registration drive in Denver, Colorado); see also Malhotra, *supra* note 58 (starting a new voter registration initiative in Washington D.C.); see also Nafso, *supra* note 58 (starting a new voter registration initiative throughout jails in Michigan); see also Evans, *supra* note 58 (showing some jails in Virginia ensure incarcerated voters can vote); see also Blau & Jorgensen, *supra* note 58 (starting voter registration at Rikers Island and other jails in New York).

319. See Ginger Jackson-Gleich & Yeary, *supra* note 23 (cooperating parties can effectuate the right to vote once they start getting to work).

320. See *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969) (establishing that absentee ballot statutes which are designed to make voting more available to some groups who could not easily get to polls do not themselves deny the exercise of franchise to vote to incarcerated people see also PORTER, *supra* note 10, at 6 (overviewing how the right to vote while incarcerated is not a regularly exercised rights due to various burdens and inaction taken by states).