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

LEAGUE OF WOMEN VOTERS OF OHIO, A. PHILIP RANDOLPH INSTITUTE OF OHIO, GEORGE W. MANGENI, and CAROLYN E. CAMPBELL,	
Plaintiffs,	**Case No. 2:20-cv-3843-MHW-KAJ**
v.	**Judge Michael H. Watson**
FRANK LAROSE, in his official capacity as Secretary of State of Ohio,	**Magistrate Judge Kimberly A. Jolson**
Defendant,	
DONALD J. TRUMP FOR PRESIDENT, INC., THE OHIO REPUBLICAN PARTY, THE REPUBLICAN NATIONAL COMMITTEE, and THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,	
Intervenor-Defendants.	

INTERVENORS DONALD J. TRUMP FOR PRESIDENT, INC., THE OHIO REPUBLICAN PARTY, THE REPUBLICAN NATIONAL COMMITTEE, AND THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs nowhere mention the binding precedent that requires denial of their Motion for Preliminary Injunction. Four years ago, the Sixth Circuit rejected the very same principal challenge that Plaintiffs advance here: that Ohio Revised Code § 3509.06(D)(3)(b)'s statutory requirement that voters cure absentee-ballot errors within seven days after Election Day unconstitutionally burdens the right to vote. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635 (6th Cir. 2016) ("*NEOCH*"). As in this case, the *NEOCH* plaintiffs argued that this deadline could leave voters unable to cure ballot mistakes during the three days between the cure

deadline (seven days after Election Day) and the ballot-acceptance deadline (ten days after Election Day). *Id.* at 628. The Sixth Circuit, however, rejected the plaintiffs' claims because there was "no evidence of the number of voters" who were unable to cure their ballots, or otherwise had been harmed, by the seven-day deadline. *Id.* at 628, 635. In fact, the plaintiffs presented "no evidence of the magnitude of the burden" purportedly imposed on voters; the available evidence demonstrated that the deadline "imposes a trivial burden on Ohio voters"; and that "minimal burden on voting is easily outweighed by Ohio's interest in reducing the administrative strain felt by boards of elections before they begin to canvass election returns." *Id.*

Plaintiffs not only fail to cite *NEOCH*, but also offer no argument or evidence to distinguish it. As in *NEOCH*, Plaintiffs have not identified even a single voter who has been burdened by the cure deadline. Take the one individual Plaintiff, George Mangeni, whose ballot was excluded due to a signature mismatch. Mangeni *admitted* that his signature on the absentee ballot did *not* match the signature on his voter registration. What is more, Mangeni's failure to cure his error had nothing to do with the cure procedures or the length of the cure period.

The organizational Plaintiffs fare no better. The A. Philip Randolph Institute ("APRI") failed to identify anyone who was unable to cure an absentee ballot due to the deadline. And while the League of Women Voters ("LWV") mentioned a few people who had ballots rejected for mismatched signatures, they too could not identify anyone who was unable to cure a rejected ballot by the deadline. Plaintiffs have had four years and several elections to build a record that might distinguish *NEOCH*. They have not come close.

Plaintiffs' various challenges to certain counties' signature matching on absentee-ballot applications fare no better. The lone voter they identify whose application was rejected due to a signature mismatch is Plaintiff Carolyn Campbell. Campbell admitted, however, that she had changed her signature between her voter registration and her application, and she cured the

mismatch by updating the signature on her registration after receiving notice from the county board of elections. Plaintiffs' own evidence thus proves that county boards of elections *are* providing adequate notice and opportunity to cure signature mismatches on applications. And Plaintiffs once again have failed to identify even a single voter who has been burdened by the application signature matching rule and have "no evidence of the magnitude of the burden" allegedly imposed on voters. *Id.* at 635.

Making matters worse, Plaintiffs waited until after the eleventh hour to bring this case. The November 3 General Election is just 52 days away—and the absentee-voting period starts even sooner on October 6. The signature matching and cure framework Plaintiffs challenge is not new, yet they waited until the last day in July to bring suit, then delayed another month before moving for injunctive relief. The Supreme Court and the Sixth Circuit have repeatedly cautioned that "federal courts are not supposed to change state election rules as elections approach." *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (per curiam). Doing so creates an untenable risk of widespread "voter confusion" and erodes the "[c]onfidence in the integrity of our electoral processes" that "is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam).

As explained more fully below, Plaintiffs' inability to succeed on the merits and their delay in bringing their claims foreclose their request for injunctive relief, and in particular the "disfavored" facial injunctive relief they seek. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). The Court should deny the Motion.

BACKGROUND

A. Ohio Makes It Easy To Apply For And Submit An Absentee Ballot.

"Ohio is a national leader when it comes to early voting opportunities." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016). One option is no-excuse absentee voting,

which allows any "qualified elector" to cast an absentee ballot. Ohio Rev. Code § 3509.02(A). Since 2006, Ohio has given all voters expansive absentee-voting options, along with plenty of time to apply for and submit their ballots. *See* Sub H.B. 234, 2005 Ohio Laws vol. 151 at 5276–77, 5303, § 3509.02.

Absentee Ballot Applications. Ohioans who wish to vote absentee must submit a "written application" for an absentee ballot to the director of their county's board of elections. Ohio Rev. Code § 3509.03(A). The Secretary of State makes applications available online that voters can download and return. Ohio Sec'y of State, Elections Officials Manual, at 5-1 (2019), https://www.ohiosos.gov/elections/elections-officials/rules/#manual (last visited Sept. 11, 2020). As in past even-numbered years, Secretary LaRose has mailed absentee ballot applications to all registered Ohio voters for the November 3, 2020 General Election. *See* Sec'y Answer ¶ 29, R.37, PageID#584. Voters have been able to submit absentee ballot applications by mail since January 1 of this year. *See* Ohio Rev. Code § 3509.03(D). They may submit them by mail through noon the third day before the election, and in person by the Friday before the election. *Id.*

Contrary to Plaintiffs' assertion, absentee ballot applications require a voter's signature to match the signature on the voter's registration. Applications must include "[t]he elector's signature." *Id.* § 3509.03(B). Under Ohio's Election Code, a voter's "signature" means either (A) "that person's written, cursive-style legal mark written in that person's own hand," or "(B) [f]or persons who do not use a cursive-style legal mark during the course of their regular business and legal affairs, . . . that person's other legal mark that the person uses . . . that is written in the person's own hand." *Id.* § 3501.011(A)–(B). "[W]henever a person is required to sign or affix a signature . . . on any . . . document that is filed with or transmitted to a board of elections," *id.* § 3501.011(A), the voter's signature "shall be considered to be the mark of that elector as it appears on the elector's voter registration record," *id.* § 3501.011(C). In other words, if the

signature on an absentee ballot application does not match the signature on the voter's registration, the application does not include the required "signature." *Id.* § 3509.03(B).

If a qualified elector's application "contains all of the required information" (including a matching signature), the director of the board of elections delivers an absentee ballot to the elector. *Id.* § 3509.04(B). If an application does not meet the requirements, the director must "promptly" notify the applicant "of the additional information required to be provided by the applicant to complete that application." *Id.* § 3509.04(A). Ohio law does not define "promptly," but Secretary LaRose issued Directive 2020-11 to ensure voters receive notice "as quickly as possible." Ohio Sec'y of State, Directive 2020-11 at 12 (July 6, 2020), https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-11.pdf. Specifically, boards must use voters' phone numbers and email addresses where possible to provide notice in a fast and efficient manner. *Id.*

Absentee Ballots. Once the board accepts a completed application, it delivers the voter an absentee ballot. Ohio Rev. Code § 3509.04(B). To cast an absentee ballot by mail, a voter must mark the ballot, seal it in an "identification envelope," complete and sign "the statement of voter on the outside of the identification envelope," and submit the envelope to the director of the board of elections. *Id.* § 3509.05(A). Voters may return absentee ballots by mail, personally deliver them to the board, or direct a close family member to deliver their ballot. *Id.* Ballots must be returned by the close of the polls on election day. *Id.* Ballots postmarked before election day are counted so long as they are received up to the tenth day after the election. *Id.* § 3509.05(B)(1). Voters also may cast absentee ballots in person without submitting an identification envelope, so long as they comply with the identification requirements for in-person voters. *Id.* § 3509.051.

B. Ohio Law Has Long Required Voters' Signatures To Match.

Absentee voting is "more convenient but less reliable." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 213 n.4 (2008) (Souter, J., dissenting). Ohio law thus has included signature-

matching provisions to protect against fraud for more than a century. *See* S.B. 48, 1917 Ohio Laws vol. 107 at 56, § 5708-6. The requirements have changed little over time, consistently instructing election officials to reject ballots if the "signatures do not correspond with [the] registration signature." Ohio Rev. Code § 3509.07 (1953).

Today, Ohio law directs election officials to "compare the signature of the elector on the outside of [an] identification envelope with the signature . . . on the elector's [voter] registration form" and verify that the signature on the envelope "correspond[s] with the person's registration signature." *Id.* §§ 3509.06(D)(1), 3509.07(B). Any official "may challenge" a ballot "upon the ground that the signature on the envelope is not the same as the signature on the registration form." *Id.* § 3509.06(D)(2). If the challenge fails, the ballot counts. *Id.* § 3509.06(D)(4). If, however, "the election officials find that . . . the information contained [on the envelope] does not conform to the information contained in the statewide voter registration database"—because, for example, the signatures do not match—"the election officials [must] mail a written notice to the voter, informing the voter of the nature of the defect." *Id.* § 3509.06(D)(3)(b). Ballots with uncured defects are not counted. *Id.* § 3509.07.

C. Ohio Law Provides Ample Opportunity For Voters To Cure Defects.

Although voters' absentee ballots may be rejected for a number of reasons (missing signatures, other missing information, mismatched signatures), Ohio provides a generous framework to allow voters to cure those defects. The Ohio Elections Manual requires election officials to notify voters with defective absentee ballots quickly: they must do so within two days for ballots received by the third Saturday before an election, within one day for ballots received between the third Monday and last Friday before an election, and on the same day for ballots received the Saturday before an election through the sixth day after an election (so long as they were postmarked before the election). Election Official Manual at 5-31. The Secretary recently

supplemented this procedure by requiring boards to use phone numbers and email addresses to notify voters "as quickly as possible." Directive 2020-11 at 13.

The statutory cure provision is itself a relatively recent development. Before 2014, only a non-statutory directive allowed voters to cure absentee ballots with mismatched signatures. *See* Ohio Sec'y of State, Directive 2010-68 at 6–7, https://www.ohiosos.gov/globalassets/elections/directives/2010/dir2010-68.pdf. S.B. 205, whose "basic contours . . . originally appeared in a report of the bipartisan" Ohio Association of Election Officials, *NEOCH*, 837 F.3d at 636, allows voters to cure such deficiencies by "provid[ing] the necessary information to the board of elections in writing and on a form prescribed by the secretary of state," Ohio Rev. Code § 3509.06(D)(3)(b). The Secretary of State has instructed voters to use Form 11-S for this purpose. Election Official Manual at 5-31. Voters may submit a Form 11-S by mail or in person. *Id*. Voters must "provide" the necessary information via the Form 11-S within seven days after the election. Ohio Rev. Code § 3509.06(D)(3)(b). Forms post-marked by the seventh day after the election will be considered as long as they are received by the board of elections before the eleventh day after the election, Election Official Manual at 5-32—the day on which canvassing can begin, Ohio Rev. Code § 3505.32(A). Canvassing must be completed within twenty-one days of the election. *Id*.

D. Ohio's Absentee-Ballot Acceptance Rate Consistently Tops 98%—And Very Few Ballots Are Rejected For Mismatched Signatures.

Ohio has an extremely high absentee-ballot acceptance rate. In the 2016 General Election, for example, Ohio counted 98.91% of returned mail-in absentee ballots. *See* U.S. Election Assistance Commission, *The Election Administration and Voting Survey, 2016 Comprehensive Report* at 24, https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf (last visited Sept. 12, 2020) ("2016 EAVS Report"). In the 2018

General Election, Ohio counted 98.78% of returned mail-in absentee ballots. *See* U.S. Election Assistance Commission, *The Election Administration and Voting Survey, 2018 Comprehensive Report* at 30, https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf (last visited Sept. 12, 2020) ("2018 EAVS Report").

What is more, the percentage of ballots rejected for signature mismatches is miniscule. In 2016, for example, county boards of elections rejected only 324 mail-in absentee ballots for a signature mismatch out of the approximately 1.2 million that were cast—just 0.027%, or roughly one out of every 3,700 ballots. Street Report, Table A1, R.24-8, PageID#479–81; 2016 EAVS Report at 24. Similarly, in 2018 boards rejected only 225 mail-in absentee ballots for signature mismatches out of the more than 900,000 ballots cast—approximately 0.024%, or one out of every 4,100. Street Report, Table A2, R.24-8, PageID#482–84; 2018 EAVS Report at 30.

Plaintiffs have not provided any data on how many of the few hundred absentee ballots rejected for signature mismatches over the last few election cycles could have been cured. They also provide no evidence or data regarding the number—if any—of voters who were unable to cure because they received notice of their defective ballot in the three-day "gap" between the end of the seven-day cure period and the ten-day period during which county boards of elections accept valid ballots. And that is the focus of their case: Plaintiffs allege that Ohio's signature match procedures deny the right to vote to voters whose signature matches are not cured, not every voter whose absentee ballot or application is rejected.

E. Plaintiffs Sue Just Three Months Before The Election To Try To Change The Existing, Effective Absentee-Ballot Framework.

Even though Ohio's laws on signature matching have remained unchanged since 2014 (except for the Secretary's recent enhancements to notification procedures), Plaintiffs waited until just three months before the election to ask a federal court to strike them down. Plaintiffs provide

no explanation for this delay. This lack of explanation is notable because the two organizational Plaintiffs—APRI and LWV—claim that Ohio's signature-matching requirements have harmed them by compelling them to shift resources from other efforts to programs designed to ensure compliance with those requirements. Compl. ¶¶ 18, 23, R.1, PageID#6,7.

However, neither organization has provided meaningful evidence that any particular member has had his or her absentee ballot or application rejected for a signature mismatch without receiving an adequate opportunity to cure. The individual Plaintiffs did have a ballot or application rejected, but, as explained below, those rejections were not traceable to a constitutional injury from the challenged signature-matching regime.

ARGUMENT

A party seeking a preliminary injunction bears a heavy burden. *See City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014). Four factors are relevant to assessing whether a party has satisfied this burden:

1. Whether the movant has a strong likelihood of success on the merits;
2. Whether the movant would suffer irreparable injury without the injunction;
3. Whether issuance of the injunction would cause substantial harm to others; and
4. Whether the public interest would be served by issuance of the injunction.

Id. "When a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits will often be the determinative factor.'" *Id.* (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)).

Plaintiffs' burden is particularly heavy because they seek a facial injunction invalidating the challenged rules "in all of [their] applications." *Wash. State Grange*, 552 U.S. at 449. "Facial challenges are disfavored for several reasons." *Id.* at 450. Such claims "often rest on speculation" and, thus, "raise the risk of 'premature interpretation of statutes on the basis of factually barebones

records.'" *Id.* (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotation marks omitted). And "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.*

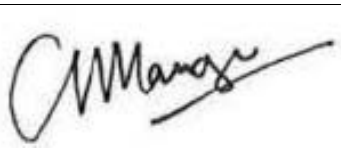
Plaintiffs have not demonstrated a strong likelihood of success on the merits of any of their claims, and the public interest and other equitable factors weigh heavily against issuing a facial preliminary injunction on the eve of the imminent General Election in an untimely case challenging longstanding election-administration rules. The Court should deny the Motion.

I. PLAINTIFFS LACK STANDING

Plaintiffs have failed to establish a strong likelihood of success on the merits of their claim for a facial preliminary injunction because none of the four Plaintiffs have standing. To have standing, a plaintiff must demonstrate (1) an injury in fact (2) caused by the defendant's conduct (3) that would be redressed by their requested relief. *Bearden v. Ballad Health*, 967 F.3d 513, 516 (6th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). To establish an injury in fact, "plaintiffs must show that they have already suffered an injury or that a threatened injury is 'certainly impending.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). Plaintiffs have failed to do so.

Take Plaintiff George Mangeni. Mangeni had his absentee ballot rejected for a signature mismatch, and for good reason. Mangeni Decl. ¶ 10, R.24-5, PageID#355. Mangeni "occasionally sign[s his] full name in cursive and occasionally print[s his] first name." *Id.* ¶ 3, PageID#354.

Mangeni signed his full name in cursive on his voter registration, Mangeni Dep. Ex. 1, R.40-3, PageID#737, but printed his name on his absentee ballot, *id.*, PageID#744:

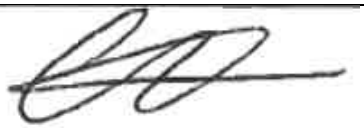
 *Id.*, PageID#737 (registration).	 *Id.*, PageID#744 (ballot).

An untrained lay person or an expert signature-matcher would have arrived at the same conclusion: that Mangeni's signatures did not match. Accordingly, the rejection of Mangeni's absentee ballot was not caused by any constitutional infirmity in Ohio's signature-matching procedures. Mangeni therefore lacks standing to challenge those procedures.

Mangeni also does not have standing to challenge Ohio's notice and cure procedures for signature mismatches on absentee ballots. Mangeni mailed his ballot on April 22, 2020. Mangeni Decl. ¶ 8, R.24-5, PageID#355. As long as it was received by May 4, 2020 (and there are no facts suggesting it was not), Ohio law required Franklin County election officials to notify Mangeni that his ballot was rejected for a signature mismatch. Election Official Manual at 5-31. According to Mangeni, that never happened. *Id.* ¶ 9, PageID#355. Thus, it was not Ohio's rules on notification and cure, but rather Franklin County's failure to follow them, that injured Mangeni. Nor is there a possibility that Ohio's notification and cure procedures could injure Mangeni in the imminent future, as he will be voting in person in the 2020 General Election. Mangeni Dep. 34:12–22, R.40-3, PageID#724. Accordingly, Mangeni does not have standing to challenge Ohio's notification and cure procedures for absentee ballots. And Mangeni does not have standing to challenge Ohio's rules on signature matching for absentee ballot applications, as his application for an absentee ballot for the 2020 Primary Election was approved. Mangeni Decl. ¶ 7, R.24-5, PageID#355.

Plaintiff Carolyn Campbell, on the other hand, did have her application for an absentee ballot for the 2020 Primary Election (correctly) rejected because of a signature mismatch.

Campbell Decl. ¶ 7, R.24-4, PageID#352. Since last registering to vote, Campbell changed her signature from her full name in cursive to "a stylized version of [her] initials." *Id.* ¶ 4, PageID#351.

	
Campbell Dep. Ex. 1, R.40-2, PageID#712.	*Id.*, PageID#714.

Campbell was notified of the signature mismatch and cured it by updating her signature on her voter registration. Campbell Decl. ¶ 3 R.24-4, PageID#351; Campbell Dep. Ex. 1, R.40-2, PageID#714. As is clear, she was not injured by Ohio's signature-matching procedures in the past (as any lay person would have noticed the difference in signatures and she received notice and an opportunity to cure), and she will not be injured by them in the future (as her signatures now match). Accordingly, she does not have standing to challenge those procedures.

More fundamentally, Campbell lacks standing to challenge any Ohio election procedures because she is not eligible to vote in Ohio. To be eligible to vote in Ohio, one must "ha[ve] been a resident of the state thirty days immediately preceding the election." Ohio Rev. Code § 3503.01. A person's residence is the place "in which the person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning." *Id.* § 3503.02(A). Further, with exceptions that are not relevant here, if a person "continuously resides outside [Ohio] for a period of four years or more, the person shall be considered to have lost the person's residence in [Ohio], notwithstanding the fact that the person may entertain an intention to return at some future period." *Id.* § 3503.02(F).

Campbell has lived in Indiana since 2015, works full time at an office in Indiana (Mondays through Thursdays), regularly volunteers in Indiana, and has a personal doctor in Indiana. Campbell Dep. 8:5–16, 9:6–7, 39:6–40:4, 40:16–23, R. 40-2, PageID#687, 695. Indiana is where her habitation is fixed, and that has been true for more than four years. Accordingly, even if she

"entertain[s] an intention to return [to Ohio] at some future period"—she stated in her deposition that she does not have set plans to leave Indiana but also does not plan to stay there for the rest of her life, *id.* 35:13–16, PageID#694—she is not an Ohio resident. Thus, she is not eligible to vote and, consequently, has no cognizable interest in, and has not been and will not be injured by, Ohio's voting laws.

APRI and LWV also do not have standing. *First*, neither APRI nor LWV can establish that their purported injury—spending resources to educate voters about Ohio's rules on signature matching, Compl. ¶¶ 18, 23, R.1, PageID#6–7—would be redressed by their requested relief, as they do not request an injunction against signature matching generally, but an injunction against signature matching absent an adequate opportunity to cure, Pls.' Mem. 38. Requiring Ohio to adjust its cure procedures will not change APRI and LWV's incentive to inform their voters about Ohio's signature-matching regime. If anything, a change in the law will incentivize them to provide more information on (and devote more resources to) that topic than they already have.

Second, neither APRI nor LWV have "associational standing" to bring claims on behalf of their members. For an organization to have associational standing, its members must "otherwise have standing to sue in their own right." *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1010 (6th Cir. 2006) (citation omitted). Here, there is no evidence that any individual member of APRI or LWV would have standing to bring the claims before the Court because there is no competent evidence that any member has ever had her signature rejected and not been given an adequate opportunity to cure. *See* Washington Dep. 22:2–13, R.40-1, PageID#619 (stating that no APRI member has ever reported having a ballot rejected for a mismatched signature or complained about the cure period); Miller Dep. 67:13–68:4, R.40-4, PageID#762 (stating that the deponent's staff informed her of examples involving individuals whose ballots were rejected but whose names could not be provided). Nor is there any evidence

that any particular member of either organization will submit an absentee ballot so late that she will not have enough time to submit a Form 11-S within ten days of the election. To the extent that the possibility that a member will do so is sufficient, *see Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004), that possibility is so remote that the Constitution's case-or-controversy requirement is not met here, *see Bearden*, 967 F.3d at 516 ("To establish an injury in fact, plaintiffs must show that they suffered 'an invasion of a legally protected interest' that is . . . 'actual or imminent, not conjectural or hypothetical.'" (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). None of the Plaintiffs have standing, so the Court should deny the Motion and dismiss the Complaint.

II. PLAINTIFFS HAVE FAILED TO SHOW A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

Even if the Court concludes that Plaintiffs have standing, it still should deny the Motion because Plaintiffs have failed to establish a likelihood of success on the merits. The Sixth Circuit already has rejected the very same challenges to § 3509.06(D)(3)(b)'s seven-day deadline that Plaintiffs assert here. *See NEOCH*, 837 F.3d at 635–37. Plaintiffs do not even mention this binding holding, much less offer any basis in law or fact to depart from it. Plaintiffs' challenges to certain counties' signature matching on absentee ballot applications fare no better: once again, Plaintiffs fail to identify even a single voter who has been harmed by such signature matching and, thus, cannot establish any constitutional harm or violation. Plaintiffs therefore have failed to establish a likelihood of success on the merits, and denial of their Motion is warranted on this basis alone.

A. Plaintiffs Have Failed To Establish A Strong Likelihood Of Success On Their Unconstitutional Burden Claims.

"[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic

processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Acknowledging this reality, the U.S. Supreme Court has adopted a "flexible standard" to adjudicating unconstitutional burden challenges to state election laws:

> A court . . . must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise 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.

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal quotation marks omitted).

Under this *Anderson-Burdick* framework, "any severe restriction" on the right to vote must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). But at the other end of the spectrum—where the challenged law "imposes only reasonable, nondiscriminatory restrictions" on the exercise of the franchise, "the State's important regulatory interests are generally sufficient" to justify them. *Burdick*, 504 U.S. at 434 (internal quotation marks omitted); *see also NEOCH*, 837 F.3d at 630–31. For regulations that fall "somewhere in between the two extremes, the burden on the plaintiffs is weighed against the state's asserted interest and chosen means of pursuing it." *NEOCH*, 837 F.3d at 631 (internal quotation marks omitted). At all times, a court must conduct this balancing analysis in light of "all available opportunities to vote." *Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020).

As explained more fully below, Plaintiffs have failed to establish a likelihood of success on their unconstitutional burden challenges to the seven-day deadline or the application signature matching.

1. The Sixth Circuit Already Has Upheld The Seven-Day Cure Period.

The Sixth Circuit already has upheld § 3509.06(D)(3)(b)'s seven-day deadline as constitutional under the *Anderson-Burdick* framework. *NEOCH*, 837 F.3d at 635. The plaintiffs

in *NEOCH* challenged the General Assembly's reduction of the absentee ballot cure period from its previous ten days after Election Day to its current seven days after Election Day, arguing that the loss of three days to cure ballots imposed an unconstitutional burden on voters. *See id*. The Sixth Circuit upheld § 3509.06(D)(3)(b) because neither the seven-day deadline nor the three-day reduction of the cure period imposed such a burden. *See id*.

The Sixth Circuit concluded that the seven-day deadline "imposes a trivial," "minimal," and "negligible" "burden on Ohio voters." *Id*. That minimal burden is "easily outweighed by Ohio's interest in reducing the administrative strain felt by boards of elections before they begin to canvass election returns." *Id*. "The official canvass must begin eleven to fifteen days after Election Day," and "[t]he possibility of unforeseeable post-election issues thrust upon boards is a legitimate concern." *Id*. "Building in a three-day buffer between the cure period and the official canvass is a common-sense solution." *Id*.

The Sixth Circuit reached this conclusion even though "none of the board [of elections] officials who testified indicated that the ten-day cure period inconvenienced them." *Id*. After all, "a state certainly need not wait for an election issue to arise before enacting provisions to avoid it." *Id*. And, of course, "no case mandates any particular length of time that states must provide after Election Day for voters to cure ballot errors." *Id*. The seven-day deadline is therefore constitutional. *See id.*

2. Plaintiffs' Challenge To The Application Signature Matching Contravenes The Governing Law.

The U.S. Supreme Court's seminal decision in *Crawford* demonstrates that Plaintiffs have failed to establish a likelihood of success on their unconstitutional burden challenge to the application signature matching. The plaintiffs in *Crawford* claimed that an Indiana law requiring in-person voters to present a photo ID imposed an unconstitutional burden. *See* 553 U.S. at 185.

The Supreme Court noted that because the plaintiffs brought a facial challenge "that would invalidate the statute in all its applications, they bear a heavy burden of persuasion." *Id*. at 200. The plaintiffs, however, did not introduce "evidence of a single, individual Indiana resident who [would] be unable to vote" under the challenged law. *Id*. at 187 (internal quotation marks omitted). This evidentiary gap made it impossible to quantify "the magnitude of the burden" or to conclude "how common the problem is." *Id*. at 200, 202. The Supreme Court ultimately held that the plaintiffs had failed to carry that burden and rejected their claim. *See id*. at 200–04.

The Supreme Court analyzed the character and weight of the burden imposed by the photo ID requirement. *See id*. at 198. The Supreme Court recognized that the law placed some burden on voters, particularly voters who lacked a photo ID. *See id*. The Supreme Court noted that voters who did not already have a photo ID must bear "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph." *Id*. The Supreme Court concluded, however, that such inconvenience "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id*.

The Supreme Court also addressed the State's asserted interests in adopting the photo ID requirement—"deterring and detecting voter fraud," "moderniz[ing] election procedures," and "safeguarding voter confidence." *Id.* at 191. The Supreme Court concluded that those interests were "legitimate" and that the photo ID requirement "is unquestionably relevant to the State's interest in protecting the integrity and reliability of the election process." *Id*. Accordingly, the Supreme Court held that the plaintiffs' unconstitutional burden claim failed. *See id*. at 200–04.

Here as well, Plaintiffs have failed to show a likelihood that certain counties' signature matching on absentee ballot applications unconstitutionally burdens the right to vote. Plaintiffs have failed to identify "evidence of a single, individual [Ohio] resident who [would] be unable to

vote" due to such signature matching. *Id.* at 187. Moreover, the burden of providing a matching signature on an application—either before or after notice and an opportunity to cure, *see* Directive 2020-11—is no more than the "usual burdens of voting." *Id.* at 198. After all, that burden also (constitutionally) exists for an absentee ballot. *See* Ohio Rev. Code § 3509.07(B); *NEOCH*, 837 F.3d at 635.

Furthermore, the application signature matching advances at least two "legitimate" and "unquestionably relevant" State interests related to "protecting the integrity and reliability of the election process." *Crawford*, 553 U.S. at 191 (internal quotation marks omitted); *see also NEOCH*, 837 F.3d at 630–31.

First, the application signature matching promotes the State's important interest in "deterring and detecting voter fraud." *Crawford*, 553 U.S. at 191. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Id.* at 196. Thus, "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id*.

The State's interest in protecting its elections against fraud is particularly acute in the context of absentee voting. Numerous courts and commentators have recognized the legitimacy of states' concerns about voter fraud—and especially in the context of absentee voting. *See, e.g.*, *id.* at 195–96 (explaining history of in-person and absentee fraud "demonstrate[s] that not only is the risk of voter fraud real but that it could affect the outcome of a close election"); *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting." (citing John C. Fortier & Norman J. Ornstein, *Symposium: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. & Reform 483 (2003))); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill. App. Ct. 2004) ("It is evident that the integrity of a vote is even more susceptible to influence

and manipulation when done by absentee ballot."); *see also* Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, News21, https://votingrights.news21.com/article/election-fraud (last visited Aug. 19, 2020) (study of election crimes from 2000–2012 finding that more fraud crimes involved absentee ballots than any other category).

The renowned Commission on Federal Election Reform, which was chaired by former President Jimmy Carter and former Secretary of State James A. Baker III and whose report was cited in *Crawford*, reached the same conclusion. The Report determined that "[a]bsentee ballots remain the largest source of potential voter fraud." Building Confidence In U.S. Elections: Report of the Commission on Federal Election Reform 46 (Sept. 2005) ("Commission Report"), https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf. "Absentee balloting is vulnerable to abuse in several ways," including because ballots can be requested fraudulently or "intercepted" on their way to or from the voter. *Id.*

Indeed, history shows these fears are justified and that absentee-voting fraud can even affect election results. Just last year, the North Carolina State Board of Elections invalidated a congressional election because of absentee-voting fraud. *See* Order ¶¶ 63–64, 153, *In re Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.* (N.C. State Bd. of Elections Mar. 13, 2019), https://dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf. In 2004, Indiana ordered a new primary in East Chicago after rampant ballot fraud that involved "inducing . . . the infirm, the poor, and those with limited skills in the English language, to engage in absentee voting." *Pabey v. Pastrick*, 816 N.E.2d 1138, 1145, 1154 (Ind. 2004). In 1998, a "pattern of fraudulent, intentional and criminal conduct" resulted in the invalidation of all of the absentee votes cast in Miami's mayoral election—and a different winner. *Matter of Protest Election Returns & Absentee Ballots in Nov.*

4, 1997 Election for City of Miami, Fla., 707 So. 2d 1170, 1171, 1175 (Fla. Dist. Ct. App. 1998). And in 1994, an election in Philadelphia was overturned due to fraudulent ballot-harvesting activities. *See Marks v. Stinson*, 19 F.3d 873, 877 (3d Cir. 1994); *Marks v. Stinson*, 1994 WL 396417, at *1 (E.D. Pa. July 21, 1994).

The application signature matching advances the State's legitimate interest in combatting voter fraud. That signature matching provides a quick and convenient mechanism for election officials to confirm that the individual requesting an absentee ballot is who she says she is. By providing a layer of identity check, the application signature matching helps to ensure that ballots are sent only to intended eligible-voter recipients and not to fraudsters.

Second, the application signature matching promotes the State's interest in "protecting public confidence in the integrity and legitimacy of representative government." *Crawford*, 553 U.S. at 197 (internal quotation marks omitted). This interest is tied to, but distinct from, "the State's interest in preventing voter fraud." *Id.* "Public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Id.* As the Commission Report observed, "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud." Commission Report 18. The application signature matching advances this important interest by giving Ohio voters confidence that the State double-checks a voter's identity before sending her a ballot. This, in turn, demonstrates that the State takes seriously, and imposes safeguards against, voter fraud. The application signature matching is constitutional.

3. Plaintiffs' Various Arguments Fail To Establish An Unconstitutional Burden.

Plaintiffs offer seven main arguments in an attempt to bolster their unconstitutional burden claims, but none establishes a likelihood of success on the merits. *First*, Plaintiffs contend that the

seven-day cure period and application signature matching impose a "substantial burden" on the right to vote. Pls.' Mem. 20–25. But Plaintiffs make no attempt to square that assertion with the Sixth Circuit's holding that the burdens at issue here are "trivial," "minimal," and "negligible." *NEOCH*, 837 F.3d at 635; *see* Pls.' Mem. 20–25. And they make no attempt to explain how those alleged burdens are anything more than the "usual burdens of voting." *Crawford*, 553 U.S. at 198; *see* Pls.' Mem. 20–25. Surely, if the burdens imposed by Ohio's signature-matching scheme were as "substantial" and widespread as Plaintiffs suggest, they could identify voters who have been "disenfranchised" or otherwise harmed by that scheme. Pls.' Mem. 20–25. Plaintiffs, however, have failed to identify even "a single, individual [Ohio] resident who" has been or will be "unable to vote" due to the seven-day deadline or application signature matching. *Crawford*, 553 U.S. at 187. They therefore have failed to demonstrate—or to make it possible for the Court to make findings regarding—"how common the problem is" or "the magnitude of the burden." *Id*. at 200, 202; *NEOCH*, 837 F.3d at 631.

The two Sixth Circuit cases Plaintiffs cite, *see* Pls.' Mem. 21, only underscore their evidentiary failure. Neither of those cases uses the term "substantial burden." *See Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 664 (6th Cir. 2012); *Obama for Am.*, 697 F.3d at 430–31. Moreover, each involved far different evidence than the meager record Plaintiffs have assembled here. One of those cases involved evidence that voters had been, or would be, unable to vote, *Mich. State A. Philip Randolph Inst.*, 833 F.3d at 664, while the other involved a facially discriminatory state law that "treat[ed] voters differently in a way that burdens the fundamental right to vote," *Obama for Am.*, 697 F.3d at 430.

Plaintiffs' citation to out-of-circuit cases is even farther afield. Plaintiffs incorrectly claim that two cases arising in Florida involved "analogous circumstances" as Ohio's signature-matching regime. Pls.' Mem. 22. In fact, one of those cases involved a cure period that expired *before* the

deadline for submitting absentee ballots—and evidence that ballots submitted after the cure deadline but before the submission deadline had been invalidated without notice to the voter and an opportunity to cure. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320–21 (11th Cir. 2019). The other involved a statutory scheme that provided no cure opportunity whatsoever. *See Fla. Democratic Party v. Detzner*, 2016 WL 6090943, at *1 (N.D. Fla. Oct. 16, 2016). Plaintiffs' two other signature-matching cases likewise involved schemes that provided no notice and cure opportunity. *See Frederick v. Lawson*, 2020 WL 4882696, at *16 (S.D. Ind. Aug. 20, 2020); *Self Advocacy Sols. N.D. v. Jaeger*, 2020 WL 2951012, at *9 (D.N.D. June 3, 2020). They therefore have no bearing here, where the State provides notice and a cure period that already has been upheld as constitutional. *See NEOCH*, 837 F.3d at 635; *see also* Directive 2020-11 at 12.

Second, Plaintiffs attempt to bolster their description of the "magnitude of the burden" by insinuating that some large "number of Ohioans . . . will be disenfranchised" by Ohio's signature-matching regime "without notice or the opportunity to cure." Pls.' Mem. 24. Plaintiffs baldly assert, without any citation to evidence, that Ohio's signature-matching scheme "threaten[s] to erroneously disenfranchise thousands of eligible voters." *Id.* at 27. But even if Plaintiffs had shown such a "threat" of "disenfranchisement" to "thousands" of voters—and they have not—such a showing would *not* demonstrate an unconstitutional burden. After all, the *Anderson-Burdick* burden analysis examines the *difficulty* in complying with the burden, not whether noncompliance has *consequences* for voters or even a large number of voters. *See, e.g.*, *Crawford*, 553 U.S. at 187, 198, 200, 202 (upholding photo ID law even though non-compliance resulted in inability to vote in person); *NEOCH*, 837 F.3d at 635 (upholding cure period even though non-compliance results in invalidation of ballot). Indeed, the *Crawford* plaintiffs asserted a similar inference regarding a "threat" to "thousands" of allegedly affected voters, to no avail. *See*

Crawford, 553 U.S. at 209 ("Indiana's 'Voter ID Law' threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens . . . .") (Souter, J., dissenting).

In all events, Plaintiffs have not proven any such "threat" to "thousands" of voters. Pls.' Mem. 27. To the contrary, their insinuations of such a threat rest upon statistical hand-waving. For example, Plaintiffs cite putative expert testimony recounting a study in which "lay individuals erroneously rejected genuine signatures in over 26% of cases," a rate purportedly "more than 3.5 times the error rate of trained forensic document examiners." *Id.* at 9–10 (citing Mohammed Decl. ¶ 33, R.24-6, PageID#368). Of course, that statistic has nothing to do with Plaintiffs' challenges to § 3509.06(D)(3)(b) because Plaintiffs challenge only the cure period, not the signature matching, for absentee ballots. *See, e.g.*, *id.* at 38.

Moreover, that statistic is misleading and bears no relationship to the facts on the ground in Ohio. In the first place, the study Plaintiffs' putative expert cites involved only "six (6) specimen signatures," hardly a statistically significant sample. Mohammed Decl. ¶ 33, R.24-6, PageID#368. Furthermore, Plaintiffs make no attempt to square their proffered statistic with Ohio's miniscule signature-mismatch rejection rate. As Plaintiffs themselves acknowledge, "approximately 1.2 million voters" cast absentee ballots in the 2016 General Election, but only "324 absentee ballots"—approximately 0.027% of all absentee ballots cast—were rejected for a signature mismatch. Pls.' Mem. 5, 17; *see also* Street Report, Table A1, R.24-8, PageID#479–81; 2016 EAVS Report at 24. The numbers are even more stark for the 2018 General Election, when 941,447 mail-in absentee ballots were cast, *see* 2018 EAVS Report at 30, but only "225 ballots"—or approximately 0.024% of all such ballots—"were rejected for signature mismatch," Pls.' Mem. 17; *see also* Street Report, Table A2, R.24-8, PageID#482–84.

Plaintiffs' assertion that "[b]oards of elections across Ohio . . . have rejected more than 10,000 absentee ballot applications for 'signature issues' since the 2016 General Election," Pls.'

Mem. 24, suffers from similar flaws. Plaintiffs' putative expert acknowledges that the "signature issues" category is overbroad, capturing applications rejected due to signature mismatches *or* "missing signatures," which Plaintiffs have not challenged. Street Report ¶ 15 n.6, R.24-8, PageID#455. Moreover, Plaintiffs do not quantify the number of voters whose applications were rejected for signature mismatches—or, more importantly, the number of such voters who faced an unconstitutional burden to curing the mismatch or to voting. *See* Pls.' Mem. 24. In fact, once again Plaintiffs have not identified even "a single, individual [Ohio] resident who" has been or will be "unable to vote" due to Ohio's application signature matching. *Crawford*, 553 U.S. at 187. This failure dooms their claim. *See id.* at 200, 202; *NEOCH*, 837 F.3d at 631.

Third, Plaintiffs suggest that "no state laws or regulations . . . require that counties inform voters whose applications are rejected on account of signature mismatch" or delineate the scope of any cure opportunity. Pls.' Mem. 23. Ohio law, however, requires that whenever an absentee-ballot application "does not contain all of the required information," the board of elections "promptly shall notify the applicant of the additional information required to be provided by the applicant to complete that application." Ohio Rev. Code § 3509.04(A). The Secretary's Directive 2020-11 reiterates this obligation and directs that boards "must utilize telephone numbers and email addresses to complete this process as quickly as possible." Directive 2020-11 at 12. This prompt notification requirement and Directive 2020-11's electronic notice mandate apply to applications with mismatched signatures: such an application "does not contain . . . the required information," Ohio Rev. Code § 3509.04(A), of "[t]he elector's signature," *id.* § 3509.03(B)(2).

Moreover, the only voter who Plaintiffs identify whose application was rejected due to a mismatching signature, Plaintiff Campbell, *did* receive notice and cured the mismatch. Campbell Decl. ¶ 3, R.24-4, PageID#351. Plaintiffs thus have failed to identify even "a single, individual [Ohio] resident who" has not received notice and a cure opportunity with respect to a signature

mismatch on an absentee ballot application. *Crawford*, 553 U.S. at 187. Plaintiffs therefore have not, and cannot, show that boards of elections are failing to provide the notice and cure opportunity that Plaintiffs seek. *See id.* at 187, 200, 202; *NEOCH*, 837 F.3d at 631.

Fourth, Plaintiffs express concern that the seven-day deadline is inadequate for voters who wait until the final days of the election to cast their ballots and, thus, whose ballots might be received at the end of or even after the cure period. *See* Pls.' Mem. 22–23. But as the U.S. Supreme Court and the Sixth Circuit have made clear, deadlines are part and parcel of a constitutional election scheme. *See Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *Mays*, 951 F.3d at 787. Moreover, any "interest . . . in making a late rather than an early decision" to request or complete a ballot is slight at best, and is outweighed by the State's interests advanced by the seven-day deadline. *Storer*, 415 U.S. at 736; *see Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *NEOCH*, 837 F.3d at 635. Given Ohio's generous absentee-voting scheme, any voter's inability to cast a timely ballot by the end of the cure period is "not caused by" the seven-day deadline but instead "by their own failure to take timely steps to effect" completion and return of their ballot. *Rosario*, 410 U.S. at 758; *see Mays*, 951 F.3d at 786–87.

Fifth, Plaintiffs argue that Ohio's use of "the U.S. Postal Service" to provide notice to voters means that "the cure period is inadequate for many Ohio absentee voters." Pls.' Mem. 22. As Plaintiffs elsewhere recount, however, Directive 2020-11 mandates that boards "utilize telephone numbers and email addresses . . . to notify voters that have a deficiency on their ID envelope as quickly as possible." Directive 2020-11 at 13; *see also id.* at 12 (requiring notice of deficient absentee-ballot applications to "utilize telephone numbers and email addresses to complete this process as quickly as possible"). Thus, "Ohio relies" exclusively "on the U.S. Postal Service" to send notice of errors on absentee ballots only to the subset of voters who lack telephone numbers and email addresses. Pls.' Mem. 22. Plaintiffs, however, offer no explanation as to how

else the State is supposed to notify such voters. *See id.* And Plaintiffs nowhere argue that notice by telephone number or email address to voters who have them is somehow inadequate. *See id.*

Sixth, Plaintiffs concede that "whether or not Ohio has a legitimate interest in conducting signature matching in general . . . is not the subject of this litigation and not before this Court." *Id.* at 26. Plaintiffs also "acknowledge that the State has an interest in verifying voters' [identities] in order to combat voter fraud." *Id.* at 25. They nonetheless contend that Ohio has "no interest" in an application signature-matching regime "that lacks adequate notice and an opportunity to cure." *Id.* Of course, the premise of this argument is incorrect: Ohio's application signature-matching regime *does* provide notice and an opportunity to cure, *see* Ohio Rev. Code § 3509.04(A); Directive 2020-11 at 12, as Plaintiffs' own evidence confirms, *see* Campbell Decl. ¶ 7, R.24-4, PageID#352.

Moreover, even if Plaintiffs were correct that "absentee voter fraud . . . is exceptionally rare in practice," Pls.' Mem. 25, that would not undermine the State's interest in adopting application signature matching to prevent it. Plaintiffs make no effort to reconcile this argument with *Crawford*: there, the U.S. Supreme Court upheld a photo ID law for in-person voting on an anti-fraud rationale even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford*, 553 U.S. at 194. After all, "a state certainly need not wait for an election issue to arise before enacting provisions to avoid it." *NEOCH*, 837 F.3d at 635; *see Voting for Am. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013) (a legislature need not "show specific local evidence of fraud in order to justify preventive measures"); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986). And a paucity of voter fraud cases reflects that voter fraud is notoriously "difficult to detect and prosecute," *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 396 (5th Cir. 2020), and that anti-fraud measures like Ohio's signature-matching regime are effective, not unjustified.

Finally, Plaintiffs assert that Ohio has "no legitimate interest in providing voters only seven days after an election to cure mismatched signatures on absentee ballots . . . when ballots can be received up to ten days after the election and Ohio [law] does not require boards of elections to complete their canvasses until twenty-one days after the election." Pls.' Mem. 26. Of course, the Sixth Circuit held otherwise in the binding case that Plaintiffs nowhere cite. *See NEOCH*, 837 F.3d at 635. Plaintiffs have failed to establish a strong likelihood of success on their unconstitutional burden claims, and the Court should deny the Motion.

B. The Governing Law Forecloses Plaintiffs' Procedural Due Process Claim.

Plaintiffs' due process claim suffers from the same fatal flaw as their other claims: binding precedent forecloses it. The Sixth Circuit does not allow Plaintiffs to use procedural due process claims to challenge election laws. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008). Even if it did, Plaintiffs fail to show that Ohio's current absentee-voting scheme poses any risk of erroneous deprivation, much less a risk that outweighs Ohio's substantial administrative interest in the current scheme. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. Sixth Circuit Precedent Forecloses Procedural Due Process Challenges To Election Laws.

The Sixth Circuit recognizes that the "Due Process Clause protects against extraordinary voting restrictions that render the voting system 'fundamentally unfair.'" *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (per curiam). What the Sixth Circuit does not recognize, however, is a procedural due process challenge styled under *Mathews*, 424 U.S. at 335, as Plaintiffs try to raise here. *League of Women Voters*, 548 F.3d at 479. Whether "Ohio's voting system impinges on the fundamental right to vote does not, however, implicate procedural due process." *Id.* The Sixth Circuit has not yet recognized the right to vote (let alone vote

absentee) as a cognizable "liberty" or "property" interest for purposes of procedural due process, so this Court should not do so either.

To be sure, the right to vote is a fundamental right. That this right can support a substantive due process claim, however, does not automatically mean it also supports a procedural due process claim. *Memphis A. Phillip Randolph Inst. v. Hargett*, 2020 WL 5095459, at *9–11 (M.D. Tenn. Aug. 28, 2020). Rather, the *Anderson-Burdick* framework "applies to all First and Fourteenth Amendment challenges to state election regulations." *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 949 (7th Cir. 2019). Accordingly, Plaintiffs' Fourteenth Amendment challenge is more properly analyzed under the *Anderson-Burdick* framework and fails for the reasons discussed above. *See* Section II.A.

2. Even If A Procedural Due Process Claim Were Available, Plaintiffs Have Failed To Show A Strong Likelihood Of Success On It.

Even if the Sixth Circuit recognized *Mathews* challenges to election laws, Plaintiffs have failed to show a strong likelihood of success on that theory. In a procedural due process analysis, courts consider the following factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews*, 424 U.S. at 335. These factors weigh heavily in favor of upholding Ohio's current absentee-voting scheme.

First, start with the interest in absentee voting. Even the out-of-circuit district courts that have allowed a procedural due process challenge to an election law recognized that absentee voting "is not constitutionally on par with the fundamental right to vote." *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018). While a state that creates an absentee-voting regime cannot violate

the Constitution in administering it, *id*., *Anderson-Burdick* is the means by which plaintiffs can raise those constitutional issues in the Sixth Circuit, *League of Women Voters*, 548 F.3d at 479.

Second, Plaintiffs have not proven any "risk of an erroneous deprivation of such interest through the procedures used" or that the "additional or substitute procedural safeguards" they seek would provide any "probable value" to voters. *Mathews*, 424 U.S. at 335. Plaintiffs' contention that Ohio "does not provide adequate notice and opportunity to cure purported signature mismatches on absentee ballot applications and absentee ballots," Pls.' Mem. 30, is belied by their failure to identify *even a single voter* who has been erroneously deprived of the right to vote due to an inadequate cure opportunity. This failure is unsurprising given the procedural safeguards already in place. Ohio already provides notice and an opportunity to cure signature mismatches, *e.g.*, Ohio Rev. Code. § 3509.06(D)(3)(b); Directive 2020-11 at 12, and the seven-day deadline is a closed issue in the Sixth Circuit, *NEOCH*, 837 F.3d at 635–37. By contrast, almost all of the out-of-circuit cases that Plaintiffs cite involved no cure period whatsoever. *See Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 2020 WL 4484063, at *15, 54 (M.D.N.C. Aug. 4, 2020); *Jaeger*, 2020 WL 2951012, at *9; *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 206 (D.N.H. 2018).

Plaintiffs' alternative argument that "election officials conduct signature matching without any guidance or uniform procedures promulgated under state law or regulation, without any technical training on how to analyze handwriting or compare signatures, and without decisions being subject to an internal review process," Pls.' Mem. 30–31, likewise fails to satisfy the second *Mathews* prong. No court has ever found that these factors violate procedural due process; instead, courts have mentioned them only in cases where state law provided no notice and cure opportunity. *See Lee*, 915 F.3d at 1320; *Saucedo*, 335 F. Supp. 3d at 217–18. And, again, Plaintiffs fail to

identify even a single signature-mismatch case in Ohio where the additional procedures they seek would have prevented an "erroneous deprivation" of a person's vote. *Mathews*, 424 U.S. at 335.

Finally, Ohio's interests and "the fiscal and administrative burdens" that Plaintiffs' proposed remedies would entail further foreclose Plaintiffs' request for a facial preliminary injunction. *Id.* The Sixth Circuit has already found that Ohio has a substantial administrative interest in maintaining a seven-day cure period. *NEOCH*, 837 F.3d at 635. Moreover, the State has an interest in cost-effective and timely administration of application signature matching. *See id.*; *Mays*, 951 F.3d at 787. Dr. Mohammed states that "a minimum of two hours is required to conduct a signature comparison" for complex signatures. (Mohammed Decl., R.24-6, #366). Spending that much time on each signature would create an insurmountable time strain on election officials, especially in light of the increase in the number of absentee ballots Plaintiffs predict. And, of course, the "technical training" and "internal review process" Plaintiffs seek, Pls.' Mem. 30–31, would only compound the cost to the State—mere weeks before the election—in overhauling a longstanding signature-matching regime that invalidates only a miniscule percentage of absentee ballots and that Plaintiffs have not shown has "erroneously depriv[ed]" anyone of the right to vote, *Mathews*, 424 U.S. at 335. *Cf. Thompson*, 959 F.3d at 813. Plaintiffs' due process claim fails.

C. Plaintiffs Have Failed To Show A Strong Likelihood Of Success On Their Equal Protection Claim.

Plaintiffs' final claim posits that "[t]he *ad hoc* procedures adopted by county boards of elections for signature matching on absentee ballot applications and absentee ballots, a result of the State's failure to impose uniform standards, violate the equal protection rights of Plaintiffs and Ohio voters." Pls.' Mem. 32. Once again, this claim contravenes the Sixth Circuit's binding holding in *NEOCH*. There, the Sixth Circuit explained that the mere fact that the practices of

county boards of elections "vary, and sometimes considerably," does not establish an equal protection violation. *NEOCH*, 837 F.3d at 635. Rather, "the central question in a lack-of-uniform-standards claim" is "whether Ohio lacks 'adequate statewide standards for determining what is a legal vote.'" *Id.* (quoting *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam)).

"Arguable differences in how elections boards apply" state law requirements, "although perhaps unfortunate, are to be expected." *Id.* at 636. "In fact, that flexibility is part and parcel of the right of 'local entities, in the exercise of their expertise, [to] develop different systems for implementing elections.'" *Id.* (quoting *Bush*, 531 U.S. at 109).

Plaintiffs allege an absence of uniform statewide standards in Ohio's signature-matching regime, *see* Pls.' Mem. 32–33, but that allegation is irreconcilable with the uniform statewide seven-day cure period created by state law, *see* Ohio Rev. Code. § 3509.06(D)(3)(b); Directive 2020-11 at 13. It also ignores Ohio's uniform directions for application signature mismatch notice procedures. *See, e.g.*, Ohio Rev. Code § 3509.04(A); Directive 2020-11 at 12. Thus, Ohio's signature-matching regime comports with equal protection because election boards that administer it "are guided by clear prescriptive statewide rules that apply equally to all voters," and there is no "indication that certain categories" of ballots or voters receive "preferential treatment." *NEOCH*, 837 F.3d at 636(citation omitted).

The cases Plaintiffs cite are inapposite because all involved a lack of statewide standards. *E.g.*, *Bush*, 531 U.S. at 106–07; *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011); *League of Women Voters*, 548 F.3d at 477; *id.* at 478 (noting that the error in provisional balloting caused 22% of provisional ballots not to be counted, "with the percentage ranging from 1.5% to 39.5% from county to county"). Plaintiffs' equal protection claim fails.

III. THE BALANCE OF EQUITIES WEIGHS HEAVILY IN FAVOR OF DENYING AN INJUNCTION

The Court also should deny Plaintiffs' Motion because the equities weigh heavily against issuing a facial preliminary injunction in this eleventh-hour challenge to longstanding Ohio election-administration rules. *First*, an injunction barring the State "from conducting this year's elections pursuant to . . . statute[s] enacted by the Legislature"—where no party has shown those statutes to be unconstitutional—"would seriously and irreparably harm the State" and its voters. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see also id*. at 2324 n. 17 ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State."); *Thompson*, 959 F.3d at 812 (holding that enjoining election statute would seriously and irreparably harm state "[u]nless the statute is unconstitutional").

Second, "giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest." *Thompson*, 959 F.3d at 812. Thus, enjoining § 3509.06(D)(3)(b)'s seven-day deadline and application signature-matching requirement would contravene the public interest because it would undermine the General Assembly's reasoned policy judgment regarding how best to protect the integrity of Ohio's elections.

That is especially true here. "Plaintiffs acknowledge that the State has an interest in verifying voters' identity in order to combat voter fraud." Pls.' Mem. 25. But enjoining the State's seven-day deadline and application signature matching in the run-up to the imminent General Election could increase the exposure of the State and its voters to the "real" "risk of voter fraud," which "could affect the outcome of a close election." *Crawford*, 553 U.S. at 196.

Third, Plaintiffs have been dilatory in filling suit and seeking a facial preliminary injunction—and they have no one but themselves to blame for their delay. On Plaintiffs' own version of events, § 3509.06(D)(3)(b)'s seven-day deadline and the application signature-matching

requirement have been fixtures of Ohio's election-administration scheme for years. *See* Pls.' Mem. 17 (recounting signature-matching figures in "the 2016 General Election"); *id*. at 24 (discussing rejected applications "since the 2016 General Election"). Yet Plaintiffs did not file suit until July 31, 2020, and did not move for a preliminary injunction until six weeks before the commencement of the absentee-voting period for the 2020 General Election in which millions of Ohioans will cast their votes for President, U.S. Representative, State Senator, and State Representative. Plaintiffs have offered no explanation why they delayed bringing suit for years, much less how their delay does not counsel against issuing a preliminary injunction.

Fourth, in fact, the United States Supreme Court has repeatedly warned that courts should not make last-minute changes to election-administration rules and has described changes "weeks" before an election as too late. *See Purcell*, 549 U.S. at 4–5; *see also North Carolina v. League of Women Voters of N. Carolina*, 574 U.S. 927 (2014) (mem.); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (mem.); *Thompson*, 959 F.3d at 813. Such last-minute changes by court order can engender widespread "voter confusion" and erode the "[c]onfidence in the integrity of our electoral processes" that "is essential to the functioning of participatory democracy." *Purcell*, 549 U.S. at 4–5. Granting the injunction Plaintiffs request so "close[]" to an election therefore would disserve the public interest and the goal of maximizing voter participation because it could create an "incentive to remain away from the polls." *Id*. at 5.

Plaintiffs' balancing of the equities assumes that they have shown a likelihood of success on the merits. *See, e.g.*, Pls.' Mem. 34–36. Indeed, Plaintiffs' claim of irreparable injury and invocation of the "public interest" both presuppose that they have shown a violation of "the fundamental right to vote." *Id*. at 34, 36. Thus, because Plaintiffs lack standing and have failed to show a strong likelihood of success on the merits, *see supra* Parts I–II, their weighing of the equities likewise fails. That is particularly true here, where Plaintiffs—without explanation—have

waited until just weeks before the commencement of the General Election to bring their challenges to longstanding Ohio election rules, including the seven-day deadline that already has been upheld in a binding decision of the Sixth Circuit. *NEOCH*, 837 F.3d at 635; *see Purcell*, 549 U.S. at 4–5; *see also North Carolina*, 574 U.S. 927; *Husted*, 573 U.S. 988; *Thompson*, 959 F.3d at 813.

CONCLUSION

Intervenor-Defendants respectfully ask the Court to deny Plaintiffs' motion.

September 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to all counsel of record.

/s/ M. Ryan Harmanis
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