

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

NORTHEAST OHIO COALITION FOR	:	
THE HOMELESS, et al.,	:	
<i>Plaintiffs,</i>	:	Case No. 1:23-CV-26-DCN
	:	
v.	:	JUDGE DONALD C. NUGENT
	:	
OHIO SECRETARY OF STATE	:	Magistrate Judge Jonathan D. Greenberg
FRANK LaROSE,	:	
<i>Defendant,</i>	:	
	:	
and	:	
	:	
OHIO REPUBLICAN PARTY, SANDRA	:	
FEIX, AND MICHELE LAMBO,	:	
<i>Intervenor-Defendants.</i>	:	

**OHIO SECRETARY OF STATE’S REPLY IN SUPPORT OF HIS MOTION FOR
SUMMARY JUDGMENT**

Respectfully submitted,

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ISSUES TO BE DECIDED

The Secretary of State incorporates by reference his statement of the issues to be decided in his summary-judgment motion. Sec’y MSJ at 1, Doc. 48 at PageID 2763.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs make several key legal mistakes in their effort to survive summary judgment. These mistakes underscore why summary judgment is warranted here.

First, Plaintiffs contend there are “factual disputes.” Opp.35, Doc. 62. True, but irrelevant. “Not just any alleged factual dispute between the parties will defeat an otherwise properly supported motion for summary judgment; the dispute must present a *genuine* issue of *material* fact.” *Walker v. Ohio Dep’t of Rehab. & Corr.*, 241 F. App’x 261, 265 (6th Cir. 2007). “The purpose of summary judgment is to eliminate a trial where it would be unnecessary and result in mere delay and expense[.]” *Nat’l Bank of Detroit v. Sheldon*, 730 F.2d 421, 435 (6th Cir. 1984); see *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 553, 566 (6th Cir. 2007) (summary judgment warranted because “[a]lthough there is a genuine issue of fact, there is no genuine issue of *material* fact.”). Here, none of the alleged fact disputes are material—that is, none would change the outcome of the case—so Plaintiffs cannot justify the burden and expense of trial.

Second, Plaintiffs act as if the Court must decide this case without reference to controlling precedent—including multiple *Anderson-Burdick* cases decided on summary judgment. The Court need not proceed in the dark. The four key cases are (1) *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (upholding photo ID law on summary judgment); (2) *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014) (holding on summary judgment that organizational plaintiff lacked standing); (3) *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016) (*ODP*) (upholding Ohio law eliminating five days of absentee voting); and (4) *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020) (upholding Ohio’s absentee ballot application period on summary judgment).

Third, controlling authority contradicts Plaintiffs’ convenient assertion (at 34) that they can survive summary judgment without identifying voters who are unable to vote because of the challenged provisions. *See, e.g., Crawford*, 553 U.S. at 201 (Stevens, J., op.) (no evidence of a “burden imposed on voters” where “none of [the deposed individuals] expressed a personal inability to vote under [the photo ID law]”); *ODP*, 834 F.3d at 631 (“Plaintiffs do not point to any individual who, post-S.B. 238, will be precluded from voting.”).

Fourth—and relatedly—Plaintiffs equate voter *mistakes* with disenfranchisement by statute. But if that were so, every election law would be unconstitutional. That some voters may present improper ID at the polls or miss deadlines is not an unconstitutional “burden” on voting. *See, e.g., Mays*, 951 F.3d at 792 (Ohio’s registration cutoff imposed “only a minimal burden” on voting even if it “eliminate[d] opportunities to vote for electors who fail to register before the deadline”); *see also Frank v. Walker*, 768 F.3d 744, 749 (7th Cir. 2014) (“[A]ny procedural step filters out some potential voters. No one calls this effect disenfranchisement . . .”).

Fifth—undermining their entire analysis—Plaintiffs’ treatment of *Anderson-Burdick* ignores years of Sixth Circuit precedent. Plaintiffs fail to assess alleged burdens in light of all the voting opportunities Ohio provides. *See, e.g., Mays*, 951 F.3d at 785 (“we must evaluate the burden . . . considering all available opportunities to vote”); *ODP*, 834 F.3d at 630 (law was constitutional “[c]onsider[ing] the numerous options available to all Ohio voters”). And Plaintiffs compound this error by failing to “identify and evaluate the precise interests put forward by the State” as justifications for the burdens each challenged law allegedly imposes. *ODP*, 834 F.3d at 626. Instead, Plaintiffs silo the State’s interests from the challenged provisions and fail to perform the statute-specific burden-to-justification weighing that *Anderson-Burdick* requires.

Based on binding precedent and the facts *not* in dispute, summary judgment is warranted.

ARGUMENT

I. Plaintiffs Lack Standing.

A. Plaintiffs have not established a cognizable diversion of resources.

Fair Elections—which Plaintiffs fail to address at all—is dispositive. Sec’y MSJ at 2, 7. In holding on summary judgment that the organizational plaintiff lacked standing, the Sixth Circuit made clear that merely shifting resources from one existing organizational activity to another is not a concrete injury. *See* 770 F.3d at 459-60 (“it is not an injury to instruct election volunteers about absentee voting procedures when the volunteers are being trained in voting procedures already”).¹ Separately, the Court concluded that the organizational plaintiff faced a redressability problem: “any likely redress by this court would simply substitute a different procedure, which [the organizational plaintiff] must teach its volunteers instead.” *Id.* at 460.

Plaintiffs face both problems. Plaintiffs cannot establish standing by asserting (at 15-23) that H.B. 458 caused them to spend more resources on one preexisting activity and less on another.² *Fair Elections*, 770 F.3d at 459-60. And separately, these alleged injuries are not redressable because enjoining H.B. 458 would “simply substitute a different procedure”—that is, Plaintiffs would have to shift resources from helping voters comply with H.B. 458 to educating voters about different voting requirements now that the law is enjoined. *Id.* at 460. Plaintiffs admitted this in their depositions.³ As in *Fair Elections*, Plaintiffs cannot establish standing

¹ *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (*NEOCH*), further underscores Plaintiffs’ lack of standing. The plaintiff in *NEOCH* demonstrated an “overhaul” of its get-out-the-vote efforts that constituted a complete about-face in the organization’s central missional strategy. *Id.* at 624. Plaintiffs here have provided no “specific facts” demonstrating any such missional overhaul. *Fair Elections*, 770 F.3d at 460.

² Indeed, that was the *dissent’s* position in *Fair Elections*. *See* 770 F.3d at 461-62 (Cole, C.J., dissenting) (arguing that the organization suffered a cognizable injury because it “diverted its limited resources from its canvassing efforts towards providing additional training to its volunteers and to inform its members about the risks of being arrested”).

³ Pls. App’x (Doc. 63) at 270-71 (*NEOCH* Dep.), 389-90 (*OARA* Dep.), 511-12 (*Union Veterans* Dep.), 615-16 (*OFT* Dep.), and 743-45 (*Civic Influencers* Dep.).

“merely by virtue of [their] efforts and expense to advise others how to comport with the law, or by virtue of [their] efforts and expense to change the law.” *Id.* Plaintiffs’ declarations, like their deposition testimony, “demonstrate[] no more than this.” *Id.*

First, as to *actual* resource diversions, Plaintiffs’ declarations are conclusory: they repeat the magic words “divert resources” without showing their work. This is insufficient to overcome summary judgment. *See Fair Elections*, 770 F.3d at 460 (rejecting, on summary judgment, plaintiff’s attempt to establish resource diversions by assertion rather than “specific facts”).

Second, the assertions that are specific are not legally relevant. For example, “spend[ing] more time” helping voters obtain required voting documentation (which NEOCH did previously) simply continues NEOCH’s “efforts and expense to advise others how to comport with the law.” *Fair Elections*, 770 F.3d at 460; Pls. App’x (Doc. 63) at 212-13. Similarly, consistent with what the organization historically has done, OARA is “making sure that retirees understand the new restrictions.” Pls. App’x at 312. So also with Union Veterans, which “[p]rior to H.B. 458” had “create[d] educational materials,” and now must provide voters “additional information.” *Id.* at 448. But providing “additional information” is not a concrete injury under Sixth Circuit precedent. This goes for OFT’s asserted voter-education activities, as well. *Id.* at 561. As for Civic Influencers, “[t]he alleged diversionary actions—spending money . . . to address the voting inequities and irregularities throughout the county”—which is at most all Civic Influencers shows—“do[es] not divert resources from its mission. That is its mission.” *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020) (citation and quotations omitted); *see also Fair Elections*, 770 F.3d at 461 (organization’s “abstract social interest in maximizing voter turnout” was insufficient for standing); *see, e.g.*, Pls. App’x at 791 (stating that Civic Influencers has had to “revamp” modules “educating young voters about the voting process”).

B. Regardless, Plaintiffs lack standing because they have failed to show any diversion of resources that impairs their missions.

Plaintiffs' response to the Secretary's second, independent argument for why they lack standing is to point (without analysis) to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Opp.23-24; see Sec'y MSJ at 11-12. But *Havens* supports the Secretary, not Plaintiffs. "[I]n *Havens*, the plaintiff organization sought damages," which are "a classic basis for standing." *Fair Elections*, 770 F.3d at 460 n.1. Moreover, the injury in *Havens* was "a distinct and palpable injury" to plaintiff's enforceable statutory right under the Fair Housing Act. *Id.* Tellingly, Plaintiffs (at 23-24) quickly move to citing other circuits, rather than address Sixth Circuit precedent. But while other circuits may have more lenient requirements, in the Sixth Circuit, Plaintiffs "must establish that [their] ability to further [their] goals has been 'perceptively impaired' so as to 'constitute[] far more than simply a setback to the organization's abstract social interests.'" *Greater Cincinnati Coal. for the Homeless v. Cincinnati*, 56 F.3d 710, 716-17 (6th Cir. 1995) (quoting *Havens*, 455 U.S. at 379). Plaintiffs do not even argue that they make this showing; they simply contend they do not have to. Opp.23-24. For this additional reason, Plaintiffs lack standing.

C. Plaintiffs lack associational standing.

Plaintiffs concede (at 15) that their only possible route to associational standing is through OFT. Establishing associational standing is Plaintiffs' affirmative burden. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs fail to meet their burden. First, the Sixth Circuit has recently expressed deep skepticism about associational standing. See *Ass'n of Am. Physicians & Surgs v. United States FDA*, 13 F.4th 531, 542 (6th Cir. 2021) ("In sum, it is hard to see how the Supreme Court's more recent caselaw on standing has not undercut its associational-standing test."). Regardless, an organizational plaintiff must establish three separate elements to have associational standing. *Id.* at 537. Plaintiffs fail at the outset. To satisfy the first element of

associational standing, “an organization must do more than identify a likelihood that the defendant’s conduct will harm an unknown member in light of the organization’s extensive size or membership base.” *Id.* at 543. “The organization must instead *identify a member* who has suffered (or is about to suffer) a concrete and particularized injury from the defendant’s conduct.” *Id.* (emphasis added). OFT has identified no such member. Opp.20-21. This is fatal.⁴

II. As a Matter of Law, Ohio’s Photo ID Provision Is Constitutional.

The U.S. Supreme Court’s decision in *Crawford* upholding Indiana’s photo ID law is dispositive here. *Crawford* upheld Indiana’s law on summary judgment. 553 U.S. at 187 (Stevens, J., op.). As here, “[a]n extensive record was compiled in *Crawford* . . .” *Frank*, 768 F.3d at 748. *Crawford*’s controlling opinion upheld the photo ID law for two key reasons: “First, the evidence in the record d[id] not provide [the Court] with the number of *registered* voters without photo identification . . .” 553 U.S. at 200 (Stevens, J., op.) (emphasis added). Second, the “evidence presented in the District Court d[id] not provide any concrete evidence of the burden imposed on voters who currently lack photo identification.” *Id.* at 201. The same is true here. Thus, the Court should grant summary judgment to Defendants, as the district court did in *Crawford*.

A. Plaintiffs have failed to identify any burdened voters.

1. Plaintiffs have failed to identify “the number of registered voters without photo identification.”

The Court has two independent paths to granting summary judgment. Either suffices. First, Plaintiffs have failed to identify any *registered* voters who lack photo ID. Neither side’s experts dispute that the number of voting-age Ohioans with acceptable photo ID exceeds the number of

⁴ OFT also fails to meet the other two associational-standing elements. A general challenge to Ohio’s electoral reforms is not “germane” to OFT’s purpose as a federation of teachers. *Ass’n of Am. Physicians*, 13 F.4th at 537; Pls. App’x at 561. As for the third element, Plaintiffs provide no evidence at all, but simply assert (without citation) that “there is no need for OFT’s members to separately participate in this suit.” Opp.20-21.

registered voters by at least half a million. Sec’y MSJ at 16. Plaintiffs do not contest this. And under *Crawford*, the voter-registered population is the relevant one. This is a legal, not a factual, question. *Crawford* evaluated whether the photo ID law imposed a burden on “registered” voters—not non-registered potential voters. 553 U.S. at 200 (Stevens, J., op.). Plaintiffs (at 34) quote language in *Crawford* referring to “eligible” voters to contend that the relevant population is non-registered but otherwise eligible voters. But *Crawford* consistently uses “eligible” to vote to mean “registered” to vote, so Plaintiffs’ point is a distinction without a difference. *See, e.g.*, 553 U.S. at 197 (Stevens, J., op.) (“States employ different methods of identifying eligible voters at the polls. Some merely check off the names of registered voters who identify themselves[.]”); *id.* at 196 (referring to “the State’s interest in counting only the votes of eligible voters”). In following *Crawford*, other circuits have also recognized registered voters as the relevant population for assessing a photo ID law’s alleged burdens. *See, e.g., Frank*, 768 F.3d at 748-49 (analyzing the burden only with respect to registered voters); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354-55 (11th Cir. 2009) (same).

In addition, Ohio’s electoral system confirms that registered voters are the relevant population here. H.B. 458’s Photo ID Provision affects only registered voters. Ohio Rev. Code § 3505.18. Moreover, Ohio’s separate voter-registration laws (not challenged here) require photo ID or a social-security number, just like the challenged Photo ID Provision. Ohio Rev. Code § 3503.14. And the list of acceptable photo IDs to register to vote is *more* restrictive than the list of acceptable photo IDs for voting. *Compare* Ohio Rev. Code § 3501.01(AA)(1), *with* Ohio Rev. Code § 3503.14(A). Thus, any burden on the *non-registered* from having to acquire proper photo ID is antecedent to H.B. 458—not caused by it. Put another way, some non-registered persons may have difficulty obtaining photo ID to register to vote. But that difficulty is not caused by the

provision challenged here, which applies to the in-person voting of *already registered voters*.⁵

Plaintiffs have failed to identify any registered voters who lack photo ID. This is fatal. *See Crawford*, 553 U.S. at 200 (Stevens, J., op.) (affirming summary judgment where “the evidence in the record does not provide us with the number of registered voters without photo identification”).

2. Plaintiffs have failed to provide “any concrete evidence of the burden imposed on voters who currently lack photo identification.”

Second, Plaintiffs have failed to provide concrete evidence of any burden on voters who lack photo ID. In an eight-page supplemental report, Plaintiffs’ quantitative expert “estimate[d] that there are approximately 181,000 to 240,000 adult citizens who reside in Ohio and have no valid form of photo identification[.]” Pls. App’x at 803. To be clear, the actual number of voting-age Ohioans who lack photo ID (if any) is one of the “quantities that remain[s] unknown.” *Id.* As Plaintiffs’ expert made clear in her deposition, the percentage she used to estimate the number of adult citizens who lack photo ID is a “guess.” Doc. 47-12 at PageID 2636.⁶ In fact, this estimate is based on not one, but several, “guesses.” *See id.*; *id.* at PageID 2633-34; *see also* Pls. App’x at 802-03.

No matter. Even if Plaintiffs could create a genuine fact dispute by guessing, this fact dispute is not *material*. That is, Plaintiffs’ case fails even if they could prove that 181,000 to 240,000 “adult citizens” lack photo ID. Under *Crawford*, establishing that there are *registered voters* who lack photo ID is Step One. Plaintiffs fail that hands down. But Step Two is providing “concrete evidence of the burden imposed on [these] voters.” 553 U.S. at 201 (Stevens, J., op.).

⁵ Moreover, Ohioans who successfully register to vote without photo ID using the last four digits of their social-security number can do the same to vote. Ohio Rev. Code § 3509.05(B).

⁶ Even as to the number of Ohioans who have a military ID as their only acceptable form of photo ID, Plaintiffs’ expert acknowledged, “[t]he fundamental point is, we don’t know this quantity.” Doc. 47-12 at PageID 2634.

Plaintiffs have no concrete evidence. Plaintiffs assert that the adult citizens who may lack photo ID will be “unable to vote” “[u]nless they are able to spend the time and resources required to obtain a valid ID.” Opp.27 (emphasis added). **First**, this is incorrect because Ohio voters have several alternative ways to vote by mail ballot without needing photo ID. Sec’y MSJ at 14-15. **Second**, “the ‘inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not . . . even represent a significant increase over the usual burdens of voting,’ *even though* ‘a somewhat heavier burden may be placed on a limited number of persons’ including the elderly, the economically disadvantaged, and the homeless[.]” ODP, 834 F.3d at 631 (quoting *Crawford*, 553 U.S. at 198-99 (Stevens, J., op.)). **Third**, “[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.” *NEOCH*, 837 F.3d at 631.

Neither of Plaintiffs’ experts provides concrete evidence of burdens on adult Ohioans who may lack photo ID. Plaintiffs’ quantitative expert admitted she did not. *See* Doc. 47-12 at PageID 2548 (Q. “Did you figure out what the cost[s] of obtaining a photo ID are in Ohio?” A. “No.”). And Plaintiffs’ qualitative expert’s summary of some academic literature on the effect of photo ID laws in *other States* is not concrete evidence of any burden on *Ohio* voters.⁷ *See* Pls. App’x at 177-80. Dr. Mayer acknowledges Ohio’s free state ID card but notes that the cost of obtaining birth certificates in Ohio is \$21.50 for those who lack them. *Id.* at 181. But this did not change the sufficiency of the free state ID card in *Crawford*, where “Indiana, like most States, charge[d] a fee for obtaining a copy of one’s birth certificate,” and obtaining Indiana’s free ID card required “a

⁷ The Court need only review pages 5-7 of Dr. Mayer’s expert report to see that Dr. Mayer did *not* “measure[] the burdens HB 458 imposes on eligible voters in Ohio.” Opp.28. Dr. Mayer summarized academic literature on the calculus of voting, an academic model of voter turnout postulating that “the probability that an individual votes rises as the utility of voting goes up.” Pls. App’x at 173. Academic models not specific to Ohio are no substitute for “concrete evidence” of actual burdens imposed on specific Ohio voters who lack photo ID. *See Crawford*, 553 U.S. at 201 (Stevens, J., op.).

birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.” 553 U.S. at 198 n.17 (Stevens, J., op.). Regardless, Dr. Mayer’s report lacks any concrete evidence of the number (if any) of voting-age Ohioans who would need to obtain a birth certificate before acquiring the State’s free ID card.

Under *Crawford*, this lack of concrete evidence is fatal to Plaintiffs’ case. The plaintiffs in *Crawford* urged the Court to consider the burden imposed on voters who allegedly could not “afford or obtain a birth certificate.” 553 U.S. at 200 (Stevens, J., op.). But *Crawford* found no concrete evidence that the photo ID law *burdened* these individuals even though the plaintiffs had identified specific voters who lacked both photo ID and birth certificates—which Plaintiffs here have not even done. *Crawford* focused on the fact that “none of [the deposed individuals] expressed a personal *inability* to vote.” *Id.* (emphasis added). And as for the named plaintiffs who needed birth certificates to obtain the State’s free photo ID, these individuals “ha[d] not indicated how difficult it would be for them to obtain a birth certificate.” *Id.* Thus, the plaintiffs failed to “quantify” the “magnitude” of any burden on voters who lacked photo ID. *Id.*; *see also* *NEOCH*, 837 F.3d at 635 (rejecting a challenge to Ohio’s cure period because plaintiffs failed to provide evidence of the “magnitude of the burden”). The same is true here.⁸

This Court would not be treading new ground in following *Crawford* to uphold a state photo ID law.⁹ The Seventh, Fourth, and Eleventh Circuits have done exactly this. In *Frank*, the Seventh Circuit accepted the factual finding that “300,000 registered voters lack acceptable photo

⁸ Moreover, the fact that some voters make mistakes when voting (which is always the case) does not make a law unconstitutional. *Supra* p. 2. Thus, the fact that some voters may arrive at the polls without proper ID (Opp.31) is not evidence that these voters (a) did not have or could not have obtained proper ID prior to voting or (b) could not have voted by mail ballot without photo ID.

⁹ Plaintiffs fail to distinguish *Crawford*. Opp.33. A simple reading of the Court’s controlling opinion shows that the analysis does not rest on Indiana’s provisional-ballot process. 553 U.S. at 197-202 (Stevens, J., op.); *see also id.* at 209 (Scalia, J., concurring in the judgment) (“That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative . . .”).

ID” (about 9% of the State’s registered voters). 768 F.3d at 748. But the Court held that this factual finding lacked “legal significance” because the plaintiffs failed to provide concrete evidence of an actual burden on these voters. *Id.* Without more, the Court reasoned that “all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time.”¹⁰ *Id.* Similarly, the Eleventh Circuit upheld a state photo ID law because the plaintiffs “failed to identify a single individual who would be unable to vote because of the Georgia statute or who would face an undue burden to obtain a free voter identification card.” *Common Cause/Georgia*, 554 F.3d at 1354; *see also Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 606-07 (4th Cir. 2016) (applying *Crawford* to uphold Virginia’s photo ID law).¹¹

B. Plaintiffs ignore that Ohio voters have other ways to vote that do not require photo ID.

Tellingly, Plaintiffs are silent regarding the Secretary’s second key argument: Ohio’s Photo ID Provision is easily constitutional because the State provides multiple alternative ways to vote that do not require photo ID. Sec’y MSJ at 14-16. Plaintiffs appear to think the Photo ID Provision should be analyzed in a vacuum. But Sixth Circuit precedent forecloses such an approach. The Sixth Circuit has repeatedly held that a challenged election provision must be analyzed in the context of the electoral system as a whole—not in isolation. *Supra* p. 2. Plaintiffs have failed to identify any voters who lack photo ID, would be burdened in obtaining photo ID, and who also cannot vote by mail, drop box, or by returning (or having a close family member return) their mail

¹⁰ Importantly, the evidence in *Frank* was much stronger than Plaintiffs’ here—but still insufficient under *Crawford*. In addition to evidence of *registered* voters lacking photo ID (which Plaintiffs here lack), the district court in *Frank* “estimated that 4.5% of blacks and 5.9% of Latinos lack both” a valid photo ID and the “documentation needed to get one.” 768 F.3d at 749. Here, Plaintiffs have provided *no* evidence of any Ohio voters who lack *both* a valid photo ID and the documentation needed to obtain one.

¹¹ Plaintiffs’ citation (at 33) to *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020), is irrelevant. *Fish* did not involve a state photo ID law. It involved a Kansas statute requiring documentary proof of citizenship for voter registration, which the district court found prevented thousands of applicants from registering to vote. *Id.* at 1110, 1127-28.

ballot to the board of elections. Thus, Plaintiffs have failed to demonstrate any burden at all.

C. The State’s important interests easily justify the Photo ID Provision.

Once again, Plaintiffs disregard Sixth Circuit analytical standards. The Sixth Circuit “weigh[s] the burden on the plaintiffs against the state’s asserted interest.” *ODP*, 834 F.3d at 627 (quotations omitted). Plaintiffs load only one side of the scale—discussing only the alleged burdens that they believe render each provision unconstitutional and then including (as if an afterthought) a generic state-interest section at the very end of their brief. Opp.51-61.

But state interests are not an afterthought. The same state interests that justified Indiana’s photo ID law in *Crawford* easily justify Ohio’s Photo ID Provision. As in *Crawford*, rational-basis review applies because Plaintiffs have not established that the Photo ID Provision imposes any burden (let alone a “limited” one). *See Crawford*, 553 U.S. at 202-03 (Stevens, J., op.) (“consider[ing] only the statute’s broad application to all Indiana voters we conclude that it imposes only a limited burden” (quotations omitted)). “The precise interests advanced by the State are therefore sufficient to defeat” Plaintiffs’ challenge. *Id.* at 203 (quotations omitted).¹²

1. Safeguarding and increasing public confidence in elections. *See* Sec’y MSJ at 20-21. The Secretary submitted uncontroverted expert testimony that Ohio’s Photo ID Provision safeguards and improves public confidence in elections. *See generally* Doc. 48-3. To be sure, other factors, like the “winner’s effect” (Sec’y MSJ at 21) can also increase confidence *among members of the winning party*. But Ohio’s Photo ID Provision is aimed at increasing *public* confidence in elections—regardless of partisan affiliation. Plaintiffs cite no evidence for their hypothesis that *only* “election results” can improve voter confidence, not state laws aimed at improving election

¹² The same is true under the Sixth Circuit’s “flexible” *Anderson-Burdick* standard, which applies to laws that create “more than a ‘minimal’ burden” on voting, and which is only “slightly less deferential” than rational-basis review. *ODP*, 834 F.3d at 630, 632; *see* Sec’y MSJ at 19-24.

security and integrity. Opp.59. And controlling precedent forecloses Plaintiffs’ unsupported hypothesis. *Crawford*, 553 U.S. at 197 (Stevens, J., op.); *ODP*, 834 F.3d at 635.

2. Detecting and deterring voter fraud and preventing voter identification fraud. *See* Sec’y MSJ at 21-23. Plaintiffs’ approach to voter fraud (at 52-55) is counter to *Crawford*’s as well as the Sixth Circuit’s. The Sixth Circuit “do[es] not require elaborate, empirical verification of the weightiness of the State’s asserted justifications.” *ODP*, 834 F.3d at 633 (quotations omitted). And Plaintiffs’ view is “totally irreconcilable with *Crawford*,” which upheld Indiana’s interest in preventing voter fraud “even where the ‘record contain[ed] no evidence of [voter-impersonation] fraud actually occurring in Indiana.’” *Id.* (quoting *Crawford*, 553 U.S. at 194 (Stevens, J., op.)).

3. Improving and modernizing election procedures. *See* Sec’y MSJ at 23. Plaintiffs fail to address the Secretary’s separate argument that the Photo ID Provision also improves and modernizes election procedures. Opp.55-58. In sum, this Court should follow *Crawford* and uphold the State’s Photo ID Provision—as the U.S. Supreme Court did—on summary judgment.

III. Ohio’s Drop Box Provision Is Constitutional as a Matter of Law.

A. Philip Randolph Institute of Ohio v. LaRose, 831 F. App’x 188 (6th Cir. 2020), an on-point Sixth Circuit decision on Ohio drop boxes, is dispositive here. Plaintiffs gloss over this case, claiming it was decided primarily based on a “late-stage disruption to the electoral process.” Opp.48. Not so. *See* 831 F. App’x at 190, 192. Plaintiffs conveniently omit that the Sixth Circuit performed a full *Anderson-Burdick* analysis of the challenged drop box regulation and upheld it as constitutional. *Id.* at 191-92. Nor is it legally relevant that the directive in *Philip Randolph* was not completely identical to the drop box provision here. “[A] limitation on drop boxes poses at most an inconvenience to a subset of voters,” *id.* at 191, and providing that counties may have one drop box simply codifies preexisting practice. Sec’y MSJ at 24-25.

Under *Philip Randolph*, Ohio’s Drop Box Provision is subject to rational-basis review. 831 F. App’x at 191-92 (citing *Mays*, 951 F.3d at 791-92). This is largely because Ohio offers numerous voting opportunities, of which voting absentee by drop box is only one. *Id.* at 191. Plaintiffs would like the Court to ignore this undisputed fact. But the Sixth Circuit did not, *see id.*, and neither should this Court. Ohio’s “important state interests” easily justify any burden that the Drop Box Provision “places on this one method of voting in Ohio.” *Id.* at 192.

IV. The Early Voting Hours Provision Is Easily Constitutional.

Plaintiffs’ complaint about the Early Voting Hours Provision boils down to these points: (1) some voters may have to change their previous practice of voting on the Monday before Election Day, and (2) this change may create some hardship or inconvenience. Sixth Circuit precedent holds that neither of these factors imposes a substantial burden on voting.

The Sixth Circuit rejected Plaintiffs’ first point. *ODP*, 834 F.3d at 630 (rejecting “a broad rule that any expansion of voting rights must remain on the books forever” as “incompatible with the ‘flexible’ *Anderson-Burdick* framework”). Plaintiffs place much weight on how many people previously voted on the Monday before Election Day, but this point is irrelevant to whether the Early Voting Hours provision is constitutional. Instead, the Sixth Circuit has made clear that any alleged burden on voting must be considered along with all other voting opportunities. *ODP*, 834 F.3d at 631; *Mays*, 951 F.3d at 785. Voting opportunities abound in Ohio. Plaintiffs cannot dispute this. They warn that because Monday voting is unavailable, some voters will be “required” to vote on Election Day and will be unable to do so. Opp.44. Absent here are reasons why these voters are prevented from voting during the four weeks of no-excuse, in-person absentee voting—or by mail.

Plaintiffs ignore controlling Sixth Circuit precedent. Plaintiffs omit *Mays* entirely. And they gloss over the import of *ODP*, arguing that it is distinguishable because the early-voting days at issue were at the beginning of the early-voting period, not at the end. This is irrelevant. The

Sixth Circuit held that eliminating approximately 30 hours of early voting did not impose an undue burden on voters. *ODP*, 834 F.3d at 640. The Early Voting Hours Provision eliminates *no* hours. Regardless, the binding principles of *ODP* remain the same.

At bottom, Plaintiffs' complaint is about preference. To be sure, there are voters who prefer to vote the Monday before Election Day. And there are likely voters for whom this is the most convenient day out of all the other 28 days in which early voting is available. But all voters want to vote when it is most convenient for them. Reducing the convenience of some can "hardly be deemed to impose a true 'burden.'" *ODP*, 834 F.3d at 628. The same is true even if certain groups of voters prefer to vote on the Monday before Election Day and "rely" on it. *Opp.*44-45. The Early Voting Hours Provision will inevitably create inconveniences for some voters, or difficulties related to work schedules and childcare. But the law imposes no more burden on young voters or African American voters than it does on anyone else. All voters have the same opportunities to vote early, and all voters risk being denied the ability to vote on Election Day if they fail to take advantage of these opportunities.

Plaintiffs do not challenge the State's interests specific to the Early Voting Hours Provision. The Secretary's Motion for Summary Judgment identified several interests that support the provision, including the State's interest in smooth election administration. *Sec'y MSJ* at 28-29. Because the Early Voting Hours Provision is minimally burdensome and nondiscriminatory, these interests easily justify the law.

V. The Absentee Ballot Application Deadline Is Constitutional.

Plaintiffs do not engage with the Sixth Circuit's recent opinion upholding Ohio's deadline for absentee-ballot applications, *Mays*, 951 F.3d 775. It comes as no surprise that Plaintiffs prefer to ignore *Mays* because it shows that the Secretary is entitled to judgment as a matter of law. In *Mays*, the Sixth Circuit held that Ohio's former deadline for absentee-ballot applications "imposes

only a minimal burden on the right to vote,” considering the 10-month application period. *Id.* at 792. Plaintiffs do not dispute that the application period for absentee ballots remains around 10 months for general elections. *See* Ohio Rev. Code § 3509.05. And they offer no reason to depart from *Mays*’s conclusion that a 10-month application period for absentee ballots imposes only a minimal burden on the right to vote.¹³

Instead, Plaintiffs conjure up scenarios in which voters who allow the application deadline to lapse will be prevented from voting on Election Day because they lack photo ID, cannot stand in Election Day lines, or find out too late that their applications did not arrive timely. Opp.39. These voters, Plaintiffs argue, will be severely burdened by the application deadline. But the plaintiffs in *Mays* presented the same scenario: they let the application deadline lapse and were arrested and unable to vote on Election Day. The Sixth Circuit refused to find even a moderate burden under such circumstances. “Ohio law provides electors over ten months to request an absentee ballot. So electors who fail to vote early cannot blame Ohio law for their inability to vote; they must blame their own failure to take timely steps to effect their enrollment.” *Mays*, 951 F.3d at 792 (citations and quotations omitted). Plaintiffs have not even argued—let alone shown—that *Mays* does not apply here.

¹³ Plaintiffs present evidence that voters in 2023 submitted applications that would have been timely under prior law but were not accepted under the new deadline in H.B. 458. Opp.39-40; Doc. 64-4. The Court should strike all the evidence in Doc. 64 as improper, untimely, and late-filed. *See* Doc. 68-1. And for several independent reasons, this evidence does not establish a burden on voting. First, voters who submitted untimely applications for absentee ballots could still vote in person at the boards of elections or on Election Day. Second, federal courts have routinely held that generally applicable election deadlines, like a deadline to request absentee ballots, do not burden the right to vote even though some voters may miss the deadlines. *Mays*, 951 F.3d at 792; *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (finding that States may require voters to “act in a timely fashion if they wish to express their views in the voting booth”); *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (finding that any burden resulting from a generally applicable registration deadline was caused by the plaintiffs’ failure to “take timely steps to effect their enrollment”). And third, Plaintiffs’ argument that H.B. 458 imposes an undue burden because it excludes applications that would have been accepted under prior law reiterates the one-way-ratchet theory soundly rejected by the Sixth Circuit. *ODP*, 834 F.3d at 623 (refusing to accept plaintiffs’ argument that Ohio’s prior early-voting laws established a “federal floor that Ohio may add to but never subtract from”). And for the same three reasons, the number of voters who may miss the application deadline in future elections is not a *material* fact in dispute. A generally applicable application deadline is not a severe burden on voting as a matter of law, even if the number of voters who will miss it is disputed.

Even assuming Plaintiffs could distinguish *Mays* and establish a moderate burden on voting, the State’s justifications for the application deadline outweigh the burden. Indeed, the Sixth Circuit found that Ohio’s interests in orderly election administration justify a generally applicable application deadline as a matter of law. 951 F.3d at 792. And here, the State’s interests are even stronger. Elections officials agreed that Ohio’s former noon-Saturday deadline did not give voters enough time to receive and return an absentee ballot.¹⁴ Sec’y MSJ at 32-33; Pls. App’x at 1967.

Controlling precedent holds that a 10-month application period for absentee ballots is constitutional as a matter of law. Because Plaintiffs fail to distinguish this precedent in any way, their challenge to the application deadline fails.

VI. The Post-Election Deadlines Are Constitutional.

Plaintiffs’ challenges to three post-election deadlines—the deadline to correct errors on identification envelopes for absentee ballots, the deadline to provide additional information for a provisional ballot, and the deadline to receive absentee ballots—all fail.

As a general matter, the Secretary does not dispute that some voters may miss one or more of these post-election deadlines. Indeed, the existence of a deadline means that someone will end up on the wrong side of it. But the fact that some voters will miss a deadline does not make the deadline a severe burden on voting. *Supra* p. 2; *see also, e.g., Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring) (“[T]he right to vote is not substantially burdened by a requirement that voters act in a timely fashion if they wish to cast an absentee ballot.”). Severe burdens occur when “the State totally denied the electoral franchise to a

¹⁴ Cuyahoga County Board of Elections Director Anthony Perlatti stated that the “dedicated staff” of the Cuyahoga County Board “has always been able to meet the prior deadlines for processing . . . absentee ballot applications.” Pls. App’x at 94. The Secretary does not doubt that the boards of elections promptly sent absentee ballots to voters who applied near the former Saturday-noon deadline. But whether those voters *received* their ballots with enough time to meet the Monday postmark deadline is an entirely different question.

particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote.” *Mays*, 951 F.3d at 786 (quotations omitted). Plaintiffs simply have not shown that the post-election deadlines totally deny the franchise in light of all the opportunities to vote in Ohio. At most, Plaintiffs have shown that some voters may miss the new deadlines. *See, e.g.*, Doc. 64-2 (tabulating absentee ballots received after the deadline). While unfortunate, that is simply not a severe burden on voting under binding precedent.¹⁵ *Mays*, 951 F.3d at 792; *Burdick*, 504 U.S. at 438; *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973).

Moving to Plaintiffs’ provision-specific arguments, Plaintiffs claim that the Election-Day-plus-four deadline for correcting absentee ballots imposes a burden because boards may notify voters of errors by mail only. Opp.41. Although the relevant statute requires mail notification, Ohio Rev. Code § 3509.06(D)(3)(b), the Secretary instructs boards to call and email voters to give them enough time to correct errors. Doc. 47-7 at PageID 1965. Plaintiffs’ scant evidence does not establish any burden arising from the deadline to correct absentee-ballot identification envelopes.

As to the deadline for curing provisional ballots, Plaintiffs offer evidence that the rate of provisional ballots and the rate of provisional ballots rejected for failure to provide identification increased in 2023. Opp.43; Doc. 64-1. But these facts do not tell us anything about Plaintiffs’ cause of action. Plaintiffs do not challenge the *eligibility* requirements for provisional ballots; rather, Plaintiffs challenge the four-day period during which provisional voters may “cure” their ballots by providing additional information. *See* Ohio Rev. Code § 3505.181(B)(7)-(8). For purposes of Plaintiffs’ challenge, the total number of provisional ballots is all but irrelevant. All that matters is whether provisional voters had sufficient time to supply additional information to the boards. Sixth

¹⁵ Again, the number of voters who may miss a post-election deadline is not a material fact. *Supra* n.13. The Court does not need to determine, for example, how many voters’ absentee ballots will arrive too late to count to conclude that a generally applicable receipt deadline is constitutional. Under binding precedent, generally applicable election-related deadlines do not impose severe burdens as a matter of law. *Mays*, 951 F.3d at 792.

Circuit precedent helpfully illustrates what kind of evidence establishes this fact: whether, in practice, voters need more days to cure their provisional ballots than the law offers. Accordingly, when Ohio supplied evidence that voters did not use the 10-day cure period, the court could conclude that a 7-day cure period was constitutional. *See NEOCH*, 837 F.3d at 628. Here, the evidence echoes the evidence in *NEOCH*. The Secretary offered evidence that voters do not use the cure period, *see* Sec’y MSJ at 35, and Plaintiffs failed to counter with any evidence that voters who attempted to cure provisional ballots were unable to do so in the time allotted.

As to the receipt deadline for absentee ballots, Plaintiffs argue that overseas and military voters will be severely burdened by the Election-Day-plus-four deadline. Opp.36-38. But Plaintiffs ignore a key component of Sixth Circuit precedent: a court must evaluate the burden on voting in light of *all* the voting opportunities that Ohio provides. *Mays*, 951 F.3d at 786. This means that Plaintiffs must consider overseas voters’ ability to use one application for all elections in a given year, Ohio Rev. Code § 3511.02(A)(2); to apply for and receive ballots online, Ohio Rev. Code §§ 3511.02(A)(1), 3511.021(A)(1)-(2), 3511.04(B); and the extended absentee-voting period for overseas and military voters, Ohio Rev. Code § 3511.04(B).¹⁶ Plaintiffs do not mention these extra voting opportunities and do not analyze the receipt deadline’s alleged burden on voting in light of these opportunities, as Sixth Circuit precedent requires. With a long application period, multiple ways to return an absentee ballot, and a receipt deadline more generous than the majority of other States, Ohio’s generally applicable receipt deadline for absentee ballots imposes little burden on voting. *See Mays*, 951 F.3d at 792 (“Even though this law may eliminate opportunities to vote for

¹⁶ Ohio’s deadline for mailing overseas and military ballots essentially implements federal law, which requires States to send absentee ballots to overseas and military voters at least 45 days before federal elections. Ohio Rev. Code § 3511.04(B); 52 U.S.C. § 20302(a)(8). Considering that the majority of States impose Election Day deadlines for the return of absentee ballots, Sec’y MSJ at 36 n.12, it would be odd indeed if the federal 45-day absentee-voting period for overseas and military voters unconstitutionally burdened voting. But that is exactly Plaintiffs’ argument here.

electors who fail to register before the deadline, a state’s generally applicable registration cutoff imposes only a minimal burden on the right to vote.”¹⁷

Plaintiffs ignore the State’s interests in the post-election deadlines, but those interests easily justify any burden on voting. *See* Sec’y MSJ at 37-39. Federal courts recognize the State’s interests in orderly election administration, standardizing deadlines, and expeditious election results. *See Mays*, 951 F.3d at 792 (orderly election administration), *Philip Randolph*, 831 F. App’x at 192 (uniformity in election law); *Democratic Nat’l Comm.*, 141 S. Ct. at 33-34 (Kavanaugh, J., concurring) (expeditious election results). Just one of these interests—orderly election administration—justifies a moderate burden on voting as a matter of law. *Mays*, 951 F.3d at 792 (finding that “Ohio’s interest in orderly election administration is weighty enough to justify the moderate burden” on the right to vote). Together, the three interests more than suffice.

CONCLUSION

For all these reasons, Defendant Ohio Secretary of State’s Motion for Summary Judgment should be granted.

Respectfully submitted,

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¹⁷ Other federal courts routinely uphold less generous deadlines for the receipt of absentee ballots. For example, the Seventh Circuit reinstated Wisconsin’s Election Day deadline for receiving absentee ballots after a Covid-related injunction, and the U.S. Supreme Court refused to vacate that decision. *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020), *application to vacate denied by* 141 S. Ct. 28 (2020); *see also New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (reinstating Georgia’s Election Day deadline for absentee ballots); *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1087 (9th Cir. 2020) (reinstating Arizona’s Election Day deadline for absentee ballots); *Thomas v. Andino*, 613 F. Supp. 3d 926, 958 (D.S.C. 2020) (rejecting constitutional challenge to South Carolina’s Election Day deadline for absentee ballots); *DCCC v. Ziriox*, 487 F. Supp. 3d 1207, 1222 (N.D. Okla. 2020) (rejecting constitutional challenge to Oklahoma’s Election Day deadline for absentee ballots).

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CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Ohio Local Civil Rule 7.1(f), I hereby certify that this case has been assigned to the Standard Track. *See* Doc. 23. I also certify that this memorandum adheres to the page limitations for Standard Track memoranda relating to dispositive motions set forth in Local Civil Rule 7.1(f).

/s/ Andrew D. McCartney

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, the foregoing Reply in Support of Motion for Summary Judgment was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

/s/ Andrew D. McCartney

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