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

NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*, *Plaintiffs*, v. **FRANK LAROSE,** in his official capacity as Ohio Secretary of State, *Defendant*, and **OHIO REPUBLICAN PARTY, SANDRA FEIX, AND MICHELE LAMBO,** *Intervenor-Defendants*.	Civil Action No. 1:23-cv-26 Judge Donald C. Nugent Magistrate Judge Jonathan D. Greenberg

REPLY MEMORANDUM IN SUPPORT OF
INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' Opposition only confirms that the Court should grant summary judgment to Defendant and Intervenor-Defendants and uphold HB 458's commonsense and constitutional tweaks to Ohio's election code. Even on the most favorable view, Plaintiffs' own evidence underscores that HB 458 has no effect on the overwhelming majority of Ohio voters—and imposes nothing more than the "usual burdens of voting," if any burdens, on the tiny remainder. *Crawford v. Marion Cnty. Bd. of Elecs.*, 553 U.S. 181, 198 (2008) (lead opinion of Stevens, J.); *id.* at 205-09 (Scalia, J., concurring in judgment). Plaintiffs still have not identified even a single voter who is prevented from, or even faces an unconstitutional burden to, voting due to HB 458.

Instead, Plaintiffs take aim at the "withdrawal or contraction" of voting "conveniences" that affect few voters. *Ohio Dem. Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016). They hyperbolically equate changes in voting conveniences with "disenfranchise[ment]." Summary Judgment Opposition ("Opp."), ECF No. 62 at 45. They also suggest that every voter who in the past used a method of voting that HB 458 alters (such as ID requirements for in-person voting, hours for early voting, or deadlines for absentee voting by mail) necessarily faces a "severe" and unconstitutional burden from HB 458. *E.g.*, *id.* at 39. Plaintiffs' overheated theory of the case is "astonishing" and wrong: "Adopting plaintiffs' theory of disenfranchisement would create a 'one-way ratchet' that would discourage states from ever increasing . . . voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures." *Ohio Dem. Party*, 834 F.3d at 623; *see also Crawford*, 553 U.S. at 198-204; *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (application of neutral state-law voting requirement does not "disenfranchise" voters).

Moreover, Plaintiffs' various attempts to manufacture a dispute of material fact requiring the time and expense of a trial uniformly fail: Plaintiffs misstate the governing law, mischaracterize the record, and even ignore testimony from their own witnesses and putative experts contradicting

their allegations against HB 458. At bottom, this case is indistinguishable from others that have, at the summary-judgment stage, upheld voting laws against *Anderson-Burdick* challenges even when those laws take away some conveniences voters previously had. *See, e.g.*, *Crawford*, 553 U.S. at 187-89 (upholding a materially identical photo-ID law); *Mays v. LaRose*, 951 F.3d 775, 794 (6th Cir. 2020). This Court should follow the same course here and grant summary judgment upholding HB 458.

ARGUMENT

I. SUMMARY JUDGMENT IS WARRANTED BECAUSE THE CHALLENGED PROVISIONS ARE CONSTITUTIONAL.

Plaintiffs claim that HB 458 "is a voter suppression bill." Opp. at 6. If that were so, it is a remarkably ineffective one. Plaintiffs' continued failure to locate *a single voter* who has been or will be impeded in voting by HB 458, let alone who has been or will be entirely unable to vote due to it, gives the lie to Plaintiffs' overwrought claims of severe burdens and ominous consequences. If the supposed burdens imposed by HB 458 were as severe and widespread as Plaintiffs say, then surely they could identify at least one voter who has been or will be unable to vote because of HB 458. *See Crawford*, 553 U.S. at 201-02. But no: The "burdens" from HB 458 are as modest as they come—no different from any patently constitutional change in any election law.

Plaintiffs' misclassification of "ordinary and widespread burdens" as "severe" contravenes the governing law and threatens to "subject virtually every electoral regulation to strict scrutiny" and "hamper the ability of States to run efficient and equitable elections." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). And their diminishment of the State's interests would force federal courts to become "entangled, as overseers and micromanagers, in the minutiae of state election processes." *Ohio Dem. Party*, 834 F.3d at 622. Summary judgment is proper, despite Plaintiffs' view that it is rarely appropriate in *Anderson-Burdick* cases. *See, e.g.*, *Crawford*, 553 U.S. at 187-

89; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 351, 369–70 (1997); *Anderson v. Celebrezze*, 460 U.S. 780, 785, 806 (1983); *Mays*, 951 F.3d at 794; *Graveline v. Benson*, 992 F.3d 524, 529 (6th Cir. 2021); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 698 (6th Cir. 2015).

A. HB 458's burdens are at most minimal, meaning rational-basis review applies.

This is a quintessential "minimal burden" case to which rational-basis review applies. HB 458 passes that deferential review with flying colors. *See* Intervenor-Defendants' Mem. in Support of Motion for Summary Judgment ("MSJ"), ECF No. 46 at 7-29. Plaintiffs' contrary arguments do not withstand even minimal scrutiny.[1]

Changes to ID requirements for in-person voting. On Plaintiffs' own record, HB 458's photo-ID requirement for in-person voting is indistinguishable from the Indiana photo-ID law upheld on summary judgment in *Crawford*, as well as photo-ID laws upheld in other States. MSJ at 9-14; Defendant's Motion for Summary Judgment ("Ohio MSJ"), ECF No. 48 at 12. Plaintiffs do not dispute that HB 458's photo-ID requirement is inapplicable to absentee voting by mail and, thus, that any voter can easily avoid the requirement. *See* MSJ at 11. Plaintiffs also concede that the number of voting-age Ohio citizens with an unexpired driver's license or state ID as of July 14, 2023 (8,664,522) exceeds *by more than 700,000 individuals* the number of Ohio registered voters as of the same date (7,929,151). *See id.* at 10; Titiunik Dep., ECF No. 47-12 at 114:19-22.

It is therefore unsurprising that Plaintiffs have failed to identify *even a single registered*

[1] Plaintiffs misapprehend Intervenor-Defendants' view of the Sixth Circuit's mistake in the *Anderson-Burdick* framework. Correctly understood, the framework requires deferential review of all regulations other than those that impose a severe burden on voting. *See Crawford*, 553 U.S. at 205 (opinion of Scalia, J.) ("Since *Burdick*, we have repeatedly reaffirmed the primacy of its two-track approach."); *Timmons*, 520 U.S. at 358; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The Sixth Circuit mistakenly created a third, intermediate tier of scrutiny applicable to laws with more than a slight burden but less than a severe burden. *See Mays*, 951 F.3d at 783-84 n.4. The circuit should eliminate that made-up third tier in a case that presents more than minimal burdens.

voter who lacks an acceptable photo ID—let alone who faces a severe burden to obtaining one. *See* MSJ at 10. Plaintiffs nonetheless offer six arguments in an effort to manufacture a dispute of material fact. Each fails both to create an issue for trial and to distinguish *Crawford*.

First, Plaintiffs point to Dr. Titiunik's statewide estimates of the number of voting-age Ohioans who are allegedly "affected" by HB 458 because they lack a photo ID. Opp. at 27. But Dr. Titiunik agreed that her estimates do not demonstrate a burden on any voter: She sought only to estimate "how many voters . . . might be affected by the new photo ID requirement imposed by HB 458," and never examined the "cost[] of obtaining a photo ID." Titiunik Dep. 33:25-38:11. Her estimates are therefore beside the point. What matters under the *Anderson-Burdick* framework is not how many individuals are "affected" by the challenged provision but instead the cost and hardship of complying with it. *See* MSJ at 5, 12; *Ohio Dem. Party*, 834 F.3d at 627, 631 (reversing a district court for conflating effects and burdens in *Anderson-Burdick* analysis where there was no evidence that the challenged law "*actually makes voting harder*" and plaintiffs failed to identify "any individual who . . . will be precluded from voting").

Moreover, Dr. Titiunik's estimates of "affected" voters are overinclusive. In particular, she defines "affected" as any voter who "in the past" used a method of voting that HB 458 now alters. Titiunik Dep. 34:24-35:4. Her estimates, however, include non-voters and individuals who are not even registered to vote—but those individuals did not use *any* method of voting in the past, will not change their voting behavior due to HB 458, and, thus, are *un*affected by HB 458. *See* Titiunik Dep. 23:10-14, 25:15-20, 26:14-27:9; Titiunik Rep., ECF No. 46-22 at 7-10; Titiunik Supp. Rep., ECF No. 46-23 at 3-8; MSJ at 13. Accordingly, as in *Crawford*, the record here contains—and Dr. Titiunik provides—no evidence of "the number of *registered* voters without photo identification." 553 U.S. at 200 (lead opinion of Stevens, J.) (emphasis added).

In all events, Dr. Titiunik's estimates underscore that even the number of potentially "affected" voters is far too miniscule to demonstrate a facial constitutional flaw in HB 458. Plaintiffs nowhere mention, *see* Opp. at 27-28, that according to Dr. Titiunik's calculations, *only 0.72% of all in-person election day voters* (of all races and ages) are even *potentially* affected by HB 458's photo-ID requirement, Titiunik Rep. 14; MSJ at 12-13.

Second, Plaintiffs point to Dr. Titiunik's subgroup estimates of the number of allegedly affected "Black and young Ohioans." Opp. at 27. Her subgroup estimates of "affected" voters suffer the same flaws as her statewide estimates of "affected" voters discussed above—and more. For one thing, controlling precedent forecloses Plaintiffs' proposed subgroup analysis as a matter of law. *See NEOCH v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016); *see also* MSJ at 8 & n.6. For another, Plaintiffs again fail to mention that even on Dr. Titiunik's subgroup estimates, less than 1% of Black in-person voters and less than one-half of 1% of in-person voters under age 25 are even *potentially* affected by HB 458's photo-ID requirement. *See* Titiunik Rep. 19-26; Titiunik Dep. 104:7-25, 106:17-108:1. Plaintiffs' attempt to inflate the share of potentially affected Black and young voters compared to other categories of voters, *see, e.g.*, Opp. at 28; Titiunik Rep. 13-26, rests on a "highly misleading" "dividing [of] one [small] percentage by another," *Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2345 (2021); Titiunik Dep. 101:25-102:25, 145:15-21.

If more were somehow needed, Plaintiffs mischaracterize Dr. Titiunik's subgroup estimates, which are "incredible and unreliable," *Crawford*, 553 U.S. at 187, 200, and fall far short of showing that HB 458 will "disproportionately" affect "Black and young Ohioans," Opp. at 27. In the first place, Dr. Titiunik's subgroup estimates did not even examine whether any individual "lack[s] valid ID under HB 458." *Id.* at 28. Instead, Dr. Titiunik's subgroup estimates analyzed check-in lists of Election Day voters in only 7 of Ohio's 88 counties from some elections between

2016 and 2022. *See* Titiunik Rep. 13-23. As Dr. Titiunik admitted, the check-in lists *do not* and *cannot* establish that anyone lacked an HB 458-compliant photo ID at the time, lacks such an ID now, or faces an unconstitutional burden to obtaining one. *See* Titiunik Dep. 45:14-47:18, 56:17-21. Rather, they establish only that a tiny fraction of in-person Election Day voters *presented* a non-photo ID to satisfy Ohio's pre-HB 458 ID requirement. *See id.* at 45:14-24; MSJ at 12-13. But, of course, all such voters may in fact have possessed a photo ID at the time, or may now possess one, as Dr. Titiunik also conceded. *See* Titiunik Dep. 45:22-46:2, 56:17-21; MSJ at 12-13.

Moreover, the check-in lists were limited to 7 counties and in-person voters on Election Day in some elections under pre-HB 458 law. *See* Titiunik Dep. at 46:4-47:18. Dr. Titiunik did nothing to control for whether those 7 counties or elections are representative of Ohio as a whole, or to examine check-in lists of in-person voters during Ohio's generous early-voting period. *Id.*

Plus, contrary to Plaintiffs' suggestion, Dr. Titiunik's subgroup estimates did *not* discern or "analyze the race of" any voter. Opp. at 27. Dr. Titiunik's first method for introducing race into the check-in lists examined the racial demographics of the voters' *census tract*, *not* the race of any voter. *Id.* at 27-28; Titiunik Rep. 19-20. Her second method carries margins of error and relies on cut-off thresholds to "estimate" race. *See* Opp. at 28; Titiunik Rep. 20-23; Titiunik Dep. 84:6-87:6, 92:2-94:15. Dr. Titiunik's subgroup estimates do not show that *actual* "Black Ohioans are meaningfully more likely to lack valid ID under HB 458 than white voters." Opp. at 28.

Third, Plaintiffs point to Dr. Mayer's "qualitative assessment" of photo ID laws. Opp. at 28-29. But Dr. Mayer offered no analysis or evidence regarding HB 458 or any Ohio ID law or election. *See* Mayer Dep., ECF No. 47-11 at 12:11-13:15, 29:15-18, 49:12-20, 51:14-19, 71:25-72:25. Rather, his opinion rests solely on the *ipse dixit* of "his decades of experience on election administration" and the "academic literature on photo ID laws," Opp. at 28-29, that did not

examine HB 458 or any Ohio election, *see* Mayer Dep. 12:11-13:15, 29:15-18, 49:12-20, 51:14-19, 71:25-72:25. Thus, Dr. Mayer does not establish any burden from HB 458. *See* MSJ at 10-12.

Fourth, Plaintiffs point to documents and information regarding the August 2023 special election, including a declaration from Anthony Perlatti, Director of the Cuyahoga County Board of Elections. *See* Opp. at 31. These documents and this information were produced long after the discovery deadline Plaintiffs insisted upon and should be stricken. *See* Mot. To Strike, ECF No. 69-1 at 9, 11-12. Moreover, Plaintiffs' suggestion that Defendant's experts did not "rebut[]," and Defendant's and Intervenor-Defendants' motions do not "contest," this belatedly disclosed "evidence," Opp. at 31, 40, is at best misleading since this "evidence" *did not even exist* when Defendant served his experts' reports or Defendant and Intervenor-Defendants filed their motions.

In all events, Plaintiffs mischaracterize the documents and information. *See id.* at 31. The increase in Cuyahoga County's rejection rate for provisional ballots from 8.64% in the 2022 general election to 17.67% in the August 2023 special election reflected *all* bases for rejecting such ballots, not merely "missing ID." Perlatti Decl., ECF No. 63, Ex. 2, ¶ 11. Director Perlatti therefore did not "explain[]" that the alleged "culprit" for this increase was HB 458's "Photo ID provision." Opp. at 31 (citing Perlatti Decl. ¶ 11). Rather, Director Perlatti (mis)characterized a different fact: the number of provisional ballots rejected for "missing ID" in Cuyahoga County was 24 in the 2022 election and 137 in the 2023 election. Perlatti Decl. ¶¶ 13-14, 16.

Moreover, Director Perlatti's figures regarding the number of provisional ballots rejected in Cuyahoga County or statewide for "missing ID" in August 2023, Perlatti Decl. ¶¶ 13-16, do not show that any voter is unconstitutionally *burdened* by HB 458, *see* MSJ at 12. In fact, those figures do not even shed light on whether any individual was *affected* by HB 458: Director Perlatti does not specify whether these individuals were "missing ID" because they presented a non-photo ID

accepted under pre-HB 458 law, a form of ID that was not accepted either before or after HB 458, or no ID at all. Opp. at 31; Perlatti Decl. ¶¶ 13-16.

Fifth, when Plaintiffs finally do try to establish a burden from the photo-ID requirement, they identify precisely the same burdens and costs that the Supreme Court upheld as minimally burdensome and constitutional in *Crawford*. *See* MSJ at 11-12. Plaintiffs concede that Ohio law, like the Indiana law at issue in *Crawford*, provides free state IDs to every eligible voter and is inapplicable to absentee voting by mail. Opp. at 30. The other "costs" of obtaining a photo ID that Plaintiffs bemoan—such as "administrative burdens," fees for birth certificates, and fees for individuals who choose a form of ID other than the free state ID Ohio generously provides, *id.* at 29-30—are no more than the "usual burdens of voting" that were present and upheld on summary judgment in *Crawford*, 553 U.S. at 198 (lead opinion of Stevens, J.); MSJ at 11-12.

Plaintiffs further mischaracterize the record on these alleged costs. They cite to Dr. Mayer's report regarding academic literature on alleged voter "confus[ion]" occasioned by new photo ID laws in other States, Opp. at 30-31, but omit any mention of Dr. Mayer's concession that he is not aware of any evidence that voters in Ohio are confused by HB 458's photo-ID requirement, *see* Mayer Dep. 71:25-72:25. Plaintiffs also suggest that HB 458 imposes "disproportionate burdens on homeless and low-income Ohioans," Opp. at 30, but this is yet another effort at a legally invalid subgroup analysis, *see NEOCH*, 837 F.3d at 631; *see also* MSJ at 8 & n.6. In any event, none of the documents Plaintiffs cite identifies any individual "express[ing] a personal inability to vote under" HB 458's photo-ID requirement. *Crawford*, 553 U.S. at 201. Nearly identical evidence was available in *Crawford* and did not create an issue of material fact. *See Ind. Dem. Party v. Rokita*, 458 F. Supp. 2d 775, 794-95, 800-01, 822-25 (2006), *aff'd*, *Crawford*, 553 U.S. at 199-203. And, in any event, Plaintiffs miscite their own evidence: At least one page says nothing about "elderly"

or homeless voters at all. *See* Wernet Dep., ECF No. 47-5 at 55:19-24 (cited at Opp. at 30).

Finally, Plaintiffs mischaracterize the caselaw, which underscores that the Court should grant summary judgment upholding HB 458. Plaintiffs are wrong that *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020), involved a "voter ID law." Opp. at 33. *Fish* struck down a law requiring documentary proof of citizenship to register to vote that had in fact prevented 31,089 applicants from registering and voting. *See* 957 F.3d at 1127-28. Thus, it was a far cry from *Crawford*, where the "scant evidence" contained no "'evidence of a single, individual Indiana resident who w[ould] be unable to vote' as a result of the [Indiana photo-ID] law." *Id.* at 1128 (quoting *Crawford*, 553 U.S. at 187). *Fish* also has no bearing on this case, where Plaintiffs, like the *Crawford* plaintiffs, have failed to identify any individual even burdened by, much less unable to vote under, HB 458's photo-ID requirement—let alone an appreciable number of such individuals. *See* MSJ at 11-12.

Plaintiffs' various efforts to distinguish *Crawford*, *see* Opp. at 33-35, are even less persuasive. Plaintiffs nowhere acknowledge that *Crawford* was resolved on summary judgment. *Compare id.*, *with Crawford*, 553 U.S. at 187. Thus, the district court's and the Supreme Court's rejection of the *Crawford* plaintiffs' expert testimony as "utterly incredible and unreliable" rested on the summary judgment record, *see* 553 U.S. at 187, 200, not, as Plaintiffs imply, on some credibility determination at a trial that never occurred, *see Hy-Ko Products Co. v. Hillman Grp., Inc.*, No. 5:08 CV 1961, 2012 WL 4461686, at *2 (N.D. Ohio, Sept. 25, 2012) (cited at Opp. at 32). Here as well, Dr. Titiunik's and Dr. Mayer's analyses do not establish a severe burden on any voter, so there is no need for a trial. *See Crawford*, 553 U.S. at 187.

Plaintiffs' recognition that the Indiana photo-ID law at issue in *Crawford* provided an "affidavit" alternative, Opp. at 33, is a distinction without a difference. That alternative was available only to in-person voters who were indigent or had a religious objection to being

photographed. *See Crawford*, 553 U.S. at 186. HB 458 fully accommodates such voters by providing free IDs and exempting religious objectors. *See* MSJ at 3, 9. In fact, Ohio's law is *more generous* in this respect, since *any* voter can cast and cure a provisional ballot. Plus, the Indiana cure-by-affidavit option resembles Ohio's cure option—which, recall, Plaintiffs argue is itself unconstitutional because it requires a separate trip to the board of elections. Opp. at 41 (describing separate trip to board of elections as "onerous"). Plaintiffs have no theory for why a cure provision that helped insulate Indiana's photo ID law should both doom Ohio's law and be struck down.

Plaintiffs' complaint that HB 458 makes absentee voting by mail "more difficult," Opp. at 34, is both wrong, *see infra* pp. 12-14, and no basis to distinguish *Crawford*. Plaintiffs make no showing that absentee voting by mail under HB 458 is more burdensome than absentee voting by mail in Indiana was at the time of *Crawford*. *Compare* Ind. Code § 3-11-10-24 (clarifying that absentee voting by mail is not available to all Indiana voters). The Court should adhere to *Crawford* and grant summary judgment upholding HB 458's photo-ID requirement for in-person voting.

Redistributing Monday voting hours to other days in the early-voting period. The rest of Plaintiffs' challenges are to voting "conveniences" that Ohio generously provides. *Ohio Dem. Party*, 834 F.3d at 628. Take first Plaintiffs' challenge to the provision redistributing early-voting hours. This challenge fails because Plaintiffs have produced no evidence that any voter is burdened at all by having the same number of early-voting hours to vote across a nearly four-week period. In fact, as with the photo ID requirement, Plaintiffs never even attempt to calculate the costs and burdens of compliance. *See* MSJ at 14-16; Mayer Dep. 93:6-11 (admitting that he did not "quantify th[e] burden" any voter will face). And Ohio's early-voting calendar, including when early voting ends, is well within the mainstream across other States. *See* MSJ at 14.

Instead, Plaintiffs try to calculate the number of voters who voted on the Monday before

Election Day prior to HB 458. Opp. at 44. That figure is only "1.43% of the total absentee votes" cast in the 2020 general election. Titiunik Rep. 42. This past behavior, moreover, says nothing about whether voters will be burdened by redistribution of early voting hours, or whether voters will instead be able to readily change their behavior. Plaintiffs' bare assertion here—that "[f]or many, th[e] costs [of voting on a different day] will prove too much," *id.*—cannot pass for evidence. Nor does this assertion make any sense. If a voter can vote the Monday before Election Day, that voter can find a way to vote on Election Day; on the Monday a week before Election Day; by mail; or on some other day in Ohio's four weeks of early in-person voting.

Plaintiffs again pivot to arguing about subgroups (at 45), but that again is irrelevant. *See supra* p. 5. Plus, Plaintiffs again argue only that subgroups will be *affected* by HB 458, not that any subgroups will be particularly *burdened* by HB 458. *See supra* p. 4. Moreover, Plaintiffs never mention that their own putative expert's analysis *contradicts* their racial subgroup allegation: Dr. Titiunik concluded that redistributing early-voting hours would *not* disproportionately affect Black voters. *Compare* Opp. at 45 (making this allegation), *with* Titiunik Rep. at 43 (concluding that "[t]he positive association between race and being affected by a restriction that was seen in prior sections is not present for the Monday prohibition"). Dr. Mayer, moreover, merely reviewed academic literature suggesting that Black voters were more likely to vote early in elections between 2008 and 2014, Mayer Rep., ECF No. 46-20 at 17, and admitted that he knows nothing about Black voters' turnout on the day before Election Day in any election, Mayer Dep. 89:5-90:6. And according to Dr. Titiunik, "young" voters under the age of 25 made up only a small fraction of in-person voters on the Monday before Election Day. *See* Titiunik Rep. 46; Titiunik Dep. 159:7-15.

Plaintiffs' case citations only prove that their arguments do not pass muster. They cite *Obama for America* (at 45-46), for example, even though that case involved an equal-protection

claim, not an undue-burden claim as here. And even then, the law established more generous early-voting hours for military voters than for other voters, whereas HB 458 is facially neutral. 697 F.3d 423, 427, 431 n.4 (6th Cir. 2012). Moreover, the law in *Obama for America* eliminated "*all* evening and weekend voting hours prior to the final weekend" of early voting, *id.* at 431 (emphasis added), whereas HB 458 *increases* the evening and weekend voting hours in the early voting period. And the *Obama for America* plaintiffs "introduced extensive evidence that a significant number of Ohio voters [would] in fact be precluded from voting without the additional three days of in-person early voting," whereas Plaintiffs here merely make an unsupported assertion to that effect. *Id.* To the extent *Obama for America* is relevant, it favors summary judgment *against* Plaintiffs.

Advancing mail-ballot deadlines. HB 458's tweaks to deadlines for voters to apply for, and election officials to receive, absentee ballots by mail preserve Ohio's generous ten-month period for domestic absentee voting and the 46-day return period for military and overseas ballots. *See* MSJ at 16-19; Ohio Rev. Code § 3509.01(B)(1); Ohio Const. Art. 5, § 1. Ohio's long absentee-voting period meets or exceeds the period in other States. *See* MSJ at 16-17. Minor tweaks in this scheme—which is not even constitutionally required—impose nothing more than the most trivial burdens of complying on voters, not "disenfranchisement." *Id.* at 16-19; *Rosario*, 410 U.S. at 757. Indeed, if HB 458's deadlines were "sharp[] restrict[ions]" and "severe" burdens that "disenfranchise[]" voters, Opp. at 35, every voting rule would be.

Plaintiffs do not dispute that, in the 2020 general election, only 0.65% of absentee applications and 0.067% of absentee ballots were received on dates HB 458 now deems untimely. MSJ at 18. Nor could they, since those vanishingly small figures come from Dr. Titiunik. *See id.*

Plaintiffs offer no evidence that these voters—or any other voters—face any burden in complying with HB 458's new deadlines. *See* MSJ at 10-11. Instead, Plaintiffs primarily respond

with two inapposite assertions: that individuals are allegedly "affected" because, in prior elections, they submitted applications or ballots after the new HB 458 deadlines, *see* Opp. 36, 39, and that the Court should engage in a subgroup analysis, *see, e.g.*, *id.* at 35. Those points fail here for the same reasons they fail to support Plaintiffs' other challenges to HB 458. *See supra* pp. 4-5.[2] Plaintiffs, moreover, misstate the record on at least one point: Far from showing that Black voters will be disproportionately affected by the changes in deadlines, Opp. at 35, Dr. Titiunik concluded that Black voters are *not* affected the change in the receipt deadline, *see* Titiunik Rep. 36-37. And Plaintiffs' attempt to create an appearance of a larger effect again employs the "highly misleading" and inappropriate "statistical manipulation" of "dividing one percentage by another." *Brnovich*, 141 S. Ct. at 2344-45; *see* Opp. at 36-37; Baize Decl., ECF No. 63, Ex. 30 at 2-3.

Plaintiffs' counsel's declaration and post-discovery evidence regarding the May 2023 and August 2023 elections, *see* Opp. at 36-40, are improper and untimely and should be stricken, *see* Mot. To Strike at 9-11. They are also unprobative: They show only that a tiny share of voters miss the deadlines for requesting and returning their absentee ballots—which would happen with any deadline of any sort, including the pre-HB 458 deadlines. If Plaintiffs were right that the rejection of some ballots due to deadlines imposed a severe burden, then all deadlines would be unconstitutional. But, of course, Plaintiffs are not right: What matters is not whether voters are *affected* by a deadline, but instead whether they are *burdened* by it. *See* MSJ at 5, 12; *supra* p. 4.

[2] Plaintiffs falsely claim that Dr. Titiunik did not use data from the 2020 election, in which absentee voting behavior was highly unusual, to estimate the rate at which voters will request absentee ballots between the seventh and fourth days before election day if they behave in the same way as before. *Compare* Opp. at 36 n.7 ("Dr. Titiunik's estimate of burdens HB 458 will cause in 2024 does not rely on data from 2020."), *with* Titiunik Rep. 34 ("In 2020, about 0.65% . . . of the mail absentee ballots in our dataset were ballots that were requested on a date that is now invalid. . . . [T]his implies that approximately 7,959 voters (0.65% of 1,224,543, as shown in Table 2) may submit an absentee ballot application after the allowed deadline in 2024.").

Plaintiffs' brief reference to Intervenor-Defendant Sandra Feix's views on the importance of providing time for overseas voters to return their ballots, *see* Opp. at 37, is irrelevant and misplaced. Ms. Feix made clear that the key point was that overseas voters should have the same amount of time to return their ballots under HB 458 as they had under pre-HB 458 law. Feix Dep., ECF No. 63, Ex. 32 at 115:6-116:16. HB 458 did just that, preserving the 46-day return time for military and other overseas ballots. *See* Ohio Rev. Code § 3509.01(B)(1); Ohio Const. Art. 5, § 1.

Nor do Plaintiffs' legal citations help them. All three cases they cite involved problems with election officials timely *delivering* absentee ballots to voters, not voters failing to request or return them by neutral deadlines. *See Doe v. Walker*, 746 F. Supp. 2d 667, 677-78 (D. Md. 2010); *Dem. Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 957 (W.D. Wis. 2020) (involving COVID-19 pandemic); *New Georgia Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1281, 1304 (N.D. Ga. 2020) (same). Moreover, each case turned on the risk that voters would receive their absentee ballots too late to return them before the deadline—a risk HB 458 *mitigated* by advancing the deadline for requesting absentee ballots while keeping the postmark deadline the same. And the risk of late delivery of absentee ballots to Ohio's overseas voters is mitigated by the widespread use of email transmission of ballots. Thornton Rep., ECF No. 46-26 at ¶¶ 63-64.

There is nothing even comparable to severe burdens here. The Court should reject Plaintiffs' challenge to HB 458's absentee application and ballot-receipt deadlines.

Reduction of cure period. Plaintiffs' challenge to HB 458's change to the cure period fails for essentially the same reasons. Shortening the cure period (which the Constitution does not require) by three days imposes at most "a trivial burden" on voters. *NEOCH*, 837 F.3d at 635. The record confirms what the caselaw holds: Few if any voters use the existing cure period, and none can be said to be "burdened" by having to cure their ballots in a slightly shorter period. MSJ at 19-

20; Ohio MSJ at 35; *see Ohio Dem. Party*, 834 F.3d at 628. Indeed, even Director Perlatti, whose testimony Plaintiffs elsewhere herald, is not aware of any Cuyahoga County voter ever using the post-election day cure period. *See* Perlatti Dep., ECF No. 47-10 at 55:19-20, 56:7-9; 57:9-12.

Plaintiffs once again fail to provide any evidence supporting their allegations that HB 458's cure-period provision is burdensome. They again present arguments based on subgroups (at 41-42), which are out of bounds for the reasons already explained. *See supra* p. 5. And they again fail to quantify the costs or burdens of complying with HB 458's neutral deadline adjustment.

Tellingly, Plaintiffs do not even attempt to identify the number of voters *affected* by the change in the cure period. They instead offer a supposition that fails to distinguish HB 458 from any reduction in any deadline—that HB 458's reduction *must* mean that fewer voters will attempt to or be able to cure their ballots. Opp. at 41-42. This argument, though, once again proves too much. It would make law reducing a cure period from (say) 45 days to 40 days unconstitutional as well. Fewer votes under a new law does not equate to a severe burden.

Plaintiffs also cite evidence that more provisional ballots were rejected for lack of photo ID in one election conducted under HB 458 than in one previous election. *Id.* at 43. But even if the Court were to consider this evidence, *see* Mot. To Strike, it does not create a genuine dispute of material fact. Plaintiffs offer no evidence that the voters required to cast a provisional ballot provided a form of ID that would have been accepted under pre-HB 458 law, or that any such voter would have cured their ballot on one of the extra days provided by pre-HB 458 law. *See* Opp. at 43. Without either key logical link, evidence regarding provisional ballot rates is irrelevant.

Plaintiffs rely on one case with two opinions from outside this circuit, *see id.*, but again that case undermines Plaintiffs' claims. There, the cure period was burdensome because "Florida required a cure to be submitted by 5 p.m. on the day *before* the election—meaning that the deadline

to cure a rejected ballot came before the deadline for the supervisor to receive the ballot in the first place." *Dem. Exec. Comm. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019). Much to the contrary here, Ohio's change to the cure period serves to eliminate any mismatch. *See* MSJ at 21-22.

Finally, Plaintiffs raise concerns about how the photo-ID requirement might be administered in practice. Opp. at 42. But that has nothing to do with the length of the cure period. Plaintiffs also mischaracterize the deposition testimony they cite regarding an interaction between Ms. Feix and a group of voters. Ms. Feix made clear that she instructed the voters in question to cast provisional ballots not because of their race, but rather because they were not local residents and provided a fraudulent address. *See* Feix Dep. at 22:13-24, 23:6-14, 24:9-13, 26:1-18. And the discretion Plaintiffs purport to identify in the photo-ID requirement is illusory because HB 458 requires *every* voter to show a photo ID. Ohio Rev. Code § 3505.18(A)(1) ("When an elector appears in a polling place to vote, the elector shall . . . provide photo identification.").

Improving ballot drop-box security for mail ballots. Plaintiffs' last challenge fares no better. HB 458 effectively codifies the status quo by permitting boards of elections to maintain one drop box at their office. *See* MSJ at 22-23. At most, HB 458 required a handful of counties to shift from two or three drop boxes at one location to a single drop box at that same location. *Id.* HB 458 thus did not increase any voter's distance to any drop box—as Dr. Titiunik acknowledged. *See* Titiunik Dep. 160:10-24. Plaintiffs again have presented no evidence whatsoever showing the costs or burdens associated with complying the drop-box provision—again, even assuming a "burden" for this voting convenience could make the law unconstitutional. Because there is no evidence of burdens, the Court should reject Plaintiffs' challenge to this provision.

Plaintiffs deceptively claim that "[p]rior to HB 458's passage, Ohio's election code imposed no restrictions on the use of drop boxes in the State." Opp. at 46. In fact, prior to HB 458,

the Ohio Revised Code did not permit drop boxes at all. Rather, drop boxes were governed by the Secretary of State's directive—which was previously upheld against an *Anderson-Burdick* challenge by the Sixth Circuit. *See A. Philip Randolph Inst. v. LaRose*, 831 F. App'x 188, 190-92 (6th Cir. 2020). HB 458 expressly permits drop boxes for the first time—*broadening* the right to vote—and effectively codifies Ohio's previously upheld directive. The Court should reject Plaintiffs' do-over of the challenge the Sixth Circuit has already rejected.

The best Plaintiffs can do is to argue that HB 458 will result in longer lines for drop boxes in the handful of counties that had more than one drop box during the highly unusual 2020 election. Opp. at 48. But Director Perlatti's county, Cuyahoga, is one of Ohio's most populous and has never had more than one drop box, evidently without concerns about long lines. Perlatti Dep. at 50:13-22. And there is nothing in the record explaining how a line *at a drop box* could somehow severely burden the right to vote. Plaintiffs' challenge fails here as well.

Cumulative effect. Plaintiffs cannot save their case with a fallback argument that HB 458 cumulatively imposes more than trivial burdens. To the contrary, when this Court steps back to view Ohio's scheme as a whole, "[t]he undisputed factual record shows that it's easy to vote in Ohio. Very easy, actually." *Ohio Dem. Party*, 834 F.3d at 628.

- Voters may vote in person on Election Day or during the generous early-voting period using any of six forms of ID. Ohio Rev. Code § 3501.01(AA)(1). Plaintiffs make no showing that any voter lacks such an ID. In any event, any voter who does lack a photo ID can obtain one for free, with minimal burdens. *See Crawford*, 553 U.S. at 198.
- The early-voting period includes five days with early-morning or evening hours and two weekend days—more evening and weekend hours than before HB 458. *See* Directive 2023-03, ECF No. 46-2 at 8; Election Official Manual, ECF No. 46-3 at 201.
- Even a voter who fails to obtain a free ID by Election Day has another chance to vote in person: The voter may vote a provisional ballot, obtain a photo ID immediately for free, and return to show the ID and cure the ballot within four days after election day. King Dep., ECF No. 46-16 at 46:7-16; Ohio Rev. Code §§ 3505.181(B)(7)-(8), 3509.06(D)(3)(b).
- Any Ohio voter may vote by absentee ballot without a photo ID. Ohio Rev. Code § 3509.05(B).

- These absentee voters may request a ballot at any time for months in advance of an election, with no excuse required. Ohio Rev. Code § 3509.03(D). And the voters may return their ballots for 29 days before the election and with the same deadline as before HB 458. Ohio Rev. Code § 3509.01(B)(2); Ohio Const. Art. 5, § 1. Overseas voters may request ballots on the same timeline, receive ballots via email, and return them within 46 days before the election. Ohio Rev. Code § 3509.01(B)(1); Thornton Rep. ¶¶ 63-64.
- Finally, newly because of HB 458, voters may now also choose to return their ballots to a drop box or have a close family member do so. *See* Mayer Dep. at 83:12-84:1; Ohio Rev. Code § 3509.05(C).

It may be that some people still fail to vote under this incredibly generous regime—one of the most generous in the Nation—but that is not because of a burden on the right to vote. Instead, any "inability to vote" amounts to a "choice to not participate in the opportunities Ohio provides to vote." *Mays*, 951 F.3d at 786. "[T]he State cannot be faulted for [a] voter['s] choice to not take advantage of the . . . avenues available to [him] to cast [his] ballot." *A. Philip Randolph Inst.*, 831 F. App'x at 191. The Court should grant summary judgment.

B. Ohio's state interests far outweigh HB 458's trivial burdens.

HB 458 serves Ohio's strong interests in preventing and identifying voter fraud, promoting uniformity, promptly certifying election results, and enhancing public confidence in election integrity. *See* MSJ at 23-27. These interests are more than sufficient to justify the nonexistent or trivial burdens imposed by HB 458 under any level of scrutiny. *See id.*

Plaintiffs make no showing otherwise. They contend that "[v]oter fraud is vanishingly rare in Ohio," but their own facts show it exists. Opp. at 52. In any event, "a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct. at 2348. Plaintiffs' companion contention that "Defendants have been unable to identify a *single case* of voter impersonation in the state's history," Opp. at 53, overlooks that there also was no such evidence in *Crawford*, 553 U.S. at 194 (opinion of Stevens, J.) ("no evidence of . . . in-person voter impersonation at polling places . . . actually occurring in Indiana

at any time in its history"). And Plaintiffs' complaint that HB 458's photo-ID requirement does not apply to absentee voting, Opp. at 54, similarly disregards that the Indiana law upheld in *Crawford* was inapplicable to absentee voting, *see Crawford*, 553 U.S. at 195-96, 201. Yet the Supreme Court did not hesitate to recognize and uphold the State's interest in enacting a photo ID law to prevent voter fraud. *Id.* at 194-96.

Plaintiffs' remaining complaints do not undercut Ohio's strong interest in preventing fraud. Plaintiffs argue that Ohio's interest in preventing voting by ineligible noncitizens is insignificant because it will take some time before all driver's licenses and state IDs bear the new citizenship notation. Opp. at 54. But a law does not have to achieve its purposes *instantaneously* to be constitutional. *See, e.g.*, 42 U.S.C. § 12186 (Americans with Disabilities Act, providing a year for promulgation of regulations and 2 years thereafter to take effect). As Ohioans obtain or renew their IDs in the coming years, the "noncitizen" notation will appear on every relevant ID.

Plaintiffs likewise point out that passports need not reflect a voter's current address. *See* Opp. at 54-55. But before and after HB 458, IDs were not required to include the voter's current address. *See* Election Official Manual, p. 268 ("An Ohio driver license or state identification card with an old or former address IS ACCEPTABLE as a valid form of identification necessary to cast a regular ballot when the voter's current address is printed in the pollbook."). That makes sense because IDs are used to confirm a voter's *identity* at the polls, not the voter's residence or address.

Plaintiffs' attempt to undermine the State's interest in efficient and uniform election administration, *see* Opp. at 55-58, fares no better. It is Plaintiffs who "grossly misrepresent[] the evidentiary record." *Id.* at 56. In fact, several individuals and an organization whose statements they cite *supported* much or all of HB 458. Plaintiffs cite the deposition of Jeffrey Matthews, Director of the Stark County Board of Elections, but he supports statewide consistency in election

procedures, HB 458's photo-ID requirement, eliminating early voting on the Monday before Election Day, and HB 458's drop-box rules and absentee deadlines. *See* Matthews Dep., ECF No. 47-9 at 62:17-72:16. They also cite a letter from the Ohio Association of Election Officials, which *supported* HB 458. *See* ECF No. 63, Ex. 38. And they cite an email from the Secretary of State's office, which also supported HB 458 and made suggestions for strengthening it. *See id.* Ex. 34.

Plaintiffs also cite no evidence that counties have been unable to administer HB 458—only that election officials have asked questions about implementing the new law. *See* Opp. at 57. Such routine questions about a new law do not undermine HB 458's constitutionality. And Plaintiffs' citation to Director Perlatti's deposition, *see id.* at 58, ignores his testimony that elections directors in other counties supported HB 458, *see* Perlatti Dep. 46.

Finally, Plaintiffs do not contest that photo-ID laws and other reforms are tremendously popular with, and boost confidence in elections among, voters across the political spectrum. *See* Opp. at 58-60. They instead appear to argue that voter confidence turns only on election outcomes. *See id.* at 59. The record demonstrates otherwise, and shows that laws like HB 458 increase voter confidence in election integrity, *see* MSJ at 23-27, even though such a record showing is unnecessary, *Crawford*, 553 U.S. at 197 (lead opinion of Stevens, J.) (recognizing State interest in increasing public confidence in elections despite lack of record evidence). And statements from HB 458's opponents, *see* Opp. 59-60, "are no authoritative guide" to the State's interests, *NLRB v. Fruit & Vegetable Packers & Warehousemen, Loc. 760*, 377 U.S. 58, 66 (1964), and do nothing to undermine the Legislature's reasonable conclusion that popular election reforms boost voter confidence in elections, *see* MSJ at 23-27.

CONCLUSION

The Court should enter summary judgment and uphold HB 458's neutral, commonsense changes to Ohio's election laws.

Dated: November 3, 2023

Respectfully submitted,

/s/ John M. Gore

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CERTIFICATE OF SERVICE

I certify that on November 3, 2023, a copy of the foregoing Reply Memorandum in Support of Intervenor-Defendants' Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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LOCAL RULE 7.1(F) CERTIFICATION

Intervenor-Defendants certify that this case has been assigned to the standard case management track and that the memorandum adheres to the page limitation specifications of Local Rule 7.1(f).

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