

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

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

OHIO SECRETARY OF STATE’S MOTION FOR SUMMARY JUDGMENT

Now comes Defendant Ohio Secretary of State Frank LaRose (the Secretary) and hereby moves this Court to grant summary judgment to the Secretary pursuant to Federal Rule of Civil Procedure 56. The reasons for this motion are set forth in the attached memorandum.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Andrew D. McCartney
ANDREW D. McCARTNEY (0099853)*
**Counsel of Record*
JULIE M. PFEIFFER (0069762)
HEATHER L. BUCHANAN (0083032)
ANN YACKSHAW (0090623)
MICHAEL A. WALTON (0092201)

Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872 | Fax: 614-728-7592
Andrew.McCartney@OhioAGO.gov
Julie.Pfeiffer@OhioAGO.gov
Heather.Buchanan@OhioAGO.gov
Ann.Yackshaw@OhioAGO.gov
Michael.Walton@OhioAGO.gov

*Counsel for Defendant Secretary of State
Frank LaRose*

TABLE OF CONTENTS

Table of Contents.....	iii
Table of Authorities	v
Memorandum in Support	1
Issues To Be Decided.....	1
Introduction.....	1
Background.....	3
Legal Standard	4
Summary of the Argument.....	5
Argument	7
I. This Court Lacks Subject-Matter Jurisdiction Because Plaintiffs Lack Standing	7
A. Plaintiffs lack standing because they have not established a diversion of resources....	7
B. Regardless, Plaintiffs lack standing because they have failed to show any diversion of resources that impairs their missions.	11
II. The Photo ID Provision Is Easily Constitutional.....	12
A. Ohio’s Photo ID Provision is nondiscriminatory and does not burden any voters at all.....	14
1. Ohio provides multiple alternative ways to vote that do not require photo ID.....	14
2. As a matter of law based on undisputed facts, Plaintiffs cannot show that the Photo ID Provision burdens any Ohio voters.	16
a. Undisputed evidence shows that more voting-age Ohioans have photo ID than are registered to vote.	16
b. Regardless, Plaintiffs have failed to establish any cost-related burden of obtaining a photo ID to vote in Ohio.	17
B. The Photo ID Provision is also easily constitutional under <i>Anderson-Burdick’s</i> flexible review.	19
1. Ohio has at least an important interest in safeguarding and increasing public confidence in elections.....	20
2. Ohio has at least an important interest in detecting and deterring voter fraud and preventing voter identification fraud.	21
3. Ohio has an important interest in improving and modernizing election procedures through its Photo ID Provision.	23
III. The Drop Box Provision Is Constitutional as a Matter of Law Because the Sixth Circuit Already Upheld a Similar Drop Box Provision.	24
IV. The Early Voting Hours Provision Is Constitutional.....	26

- A. The Early Voting Hours Provision easily passes the rational-basis test. 26
- B. The Early Voting Hours Provision also easily survives *Anderson-Burdick*'s flexible review..... 28
- V. The Absentee Ballot Application Deadline Is Constitutional..... 29
 - A. Under rational-basis review, the new application deadline is constitutional..... 30
 - B. The application deadline also survives *Anderson-Burdick*'s flexible review. 31
- VI. The Post-Election Deadlines Are Constitutional. 34
 - A. Rational-basis review applies, and the laws survive..... 35
 - B. The Post-Election Deadlines are constitutional even if *Anderson-Burdick*'s flexible review applies. 37
- Conclusion 39

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A. Philip Randolph Inst. Of Ohio v. LaRose,</i> No. 1:20-cv-01908, Notice, Doc. No. 96 (N.D. Ohio Oct. 23, 2020).....	23
<i>A. Philip Randolph Institute of Ohio v. LaRose,</i> 831 F. App’x 188 (6th Cir. 2020)	<i>passim</i>
<i>Anderson v. Kent State Univ.,</i> 804 F. Supp. 2d 575 (N.D. Ohio 2011).....	3, 4
<i>Common Cause/Ga. v. Billups,</i> 554 F.3d 1340 (11th Cir. 2009)	12
<i>Crawford v. Marion Cty. Election Bd.,</i> 553 U.S. 181 (2008) (Stevens, J., op.)	<i>passim</i>
<i>Fair Elections Ohio v. Husted,</i> 770 F.3d 456 (6th Cir.2014)	7
<i>Frank v. Walker,</i> 768 F.3d 744 (7th Cir. 2014)	11
<i>Greater Cincinnati Coal. for the Homeless v. City of Cincinnati,</i> 56 F.3d 710 (6th Cir. 1995)	10
<i>La. Fair Hous. Action Ctr., Inc. v. Azalea Garden Props., L.L.C.,</i> No. 22-30609, 2023 U.S. App. LEXIS 24436 (5th Cir. Sept. 14, 2023).....	11
<i>League of Women Voters v. LaRose,</i> 489 F. Supp. 3d 719 (S.D. Ohio 2020)	36
<i>Lee v. Va. State Bd. of Elections,</i> 843 F.3d 592 (4th Cir. 2016)	11
<i>Lujan v. Defs. of Wildlife,</i> 504 U.S. 555 (1992).....	7
<i>Mays v. LaRose,</i> 951 F.3d 775 (6th Cir. 2020)	<i>passim</i>
<i>Memphis A. Philip Randolph Inst. v. Hargett,</i> 978 F.3d 378 (6th Cir. 2020)	5, 7, 11, 34
<i>Morrison v. Bd. of Edn.,</i> 521 F.3d 602 (6th Cir. 2008)	6

Ne. Ohio Coal. for the Homeless v. Husted,
837 F.3d 612 (6th Cir. 2016)4, 34, 36

Ohio Democratic Party v. Husted,
834 F.3d 620 (6th Cir. 2016) *passim*

Shelby Advocates for Valid Elections v. Hargett,
947 F.3d 977 (6th Cir. 2020)10

Timmons v. Twin Cities Area New Party,
520 U.S. 35136, 37

Statutes

A.R.S. 16-54835

C.R.S. § 1-7.5-10735

26 Okla. Stat. Ann. § 14-10435

25 P.S. § 3146.835

I.C. § 34-100535

A.C.A. § 7-5-41135

Ala. Code § 17-9-30.....22

Ala. Code § 17-11-18.....35

Ark. Code Ann. § 7-1-101(40).....22

Conn. Gen. Stat. 45-9-140b35

Del. Code Ann. tit. 15, § 550835

F.S.A. § 101.6735

Fla. Stat. § 101.04322

Ga. Code Ann. § 21-2-386.....35

Ga. Code Ann. § 21-2-41722

HRS § 11-10435

Idaho Code § 34-1106(2)22

Ind. Code §§ 3-11.5-4-3, 3-11.5-4-10.....35

Ind. Code § 3-5-2-40.5.....	22
Iowa Code § 53.17(2)	35
Kan. Stat. Ann. § 25-2908(h).....	22
Ky. Rev. Stat. 117.086.....	35
Ky. Rev. Stat. § 117.085.....	29
Ky. Rev. Stat. § 117.087.....	34
La. Stat. Ann. § 18:562.....	22
Me. Rev. Stat. Ann. 21-A § 755	35
Mich. Comp. Laws 168.764a.....	35
Mich. Comp. Laws § 168.759.....	29
Mich. Comp. Laws §§ 168.766a, 168.766b.....	34
Minn. Stat. 203B.08.....	35
Miss. Code Ann. § 23-15-563.....	22
Mo. Rev. Stat. 115.293	35
Mo. Rev. Stat. § 115.427	22
Mont. Code Ann. 13-13-232.....	35
Mont. Code Ann. § 13-13-114.....	22
N.M. Stat. Ann. 1-6-10(B).....	35
Neb. Rev. Stat. § 32-950.....	35
NH Rev. Stat. § 657:22.....	35
Ohio Rev. Code § 3501.01(AA)(1).....	12, 13
Ohio Rev. Code § 3501.32(A).....	32
Ohio Rev. Code § 3503.14.....	16
Ohio Rev. Code § 3505.18.....	12, 16
Ohio Rev. Code § 3505.18(A)(1)	13

Ohio Rev. Code § 3505.18(A)(2)	12, 14
Ohio Rev. Code § 3505.181.....	6, 33
Ohio Rev. Code § 3505.181(7)(a).....	14
Ohio Rev. Code § 3505.181(B)(7)(a)	13
Ohio Rev. Code § 3509.01(C)(2).....	35
Ohio Rev. Code § 3509.03(D)	29, 34
Ohio Rev. Code § 3509.05(B)	12, 13, 14, 19
Ohio Rev. Code § 3509.05(C)(1).....	13, 14, 19
Ohio Rev. Code § 3509.05(C)(3).....	14
Ohio Rev. Code § 3509.05(C)(3)(a)	23, 24
Ohio Rev. Code § 3509.06.....	6
Ohio Rev. Code § 3509.06(3).....	6, 33
Ohio Rev. Code § 3509.08.....	29
Ohio Rev. Code § 3509.09(A)	28
Ohio Rev. Code § 3513.22(A)	37
Ohio Rev. Code § 4507.50(A)(1)	12, 17
R.I. Gen. Laws § 17-19-24.2.....	22
R.I. Gen. Laws § 17-20-8.....	35
S.C. Code Ann. § 7-13-710.....	22
S.D. Codified Laws § 12-19-12	35
S.D. Codified Laws § 12-18-6.1	22
S.C. Code § 7-15-420.....	35
Tenn. Code Ann. § 2-6-202	29
Tenn. Code Ann. § 2-6-304	35
Tenn. Code Ann. § 2-7-112(c).....	22

Tenn. Rev. Code § 2-6-204(b)	34
Tex. Elec. Code Ann. § 63.001(b), (i)	22
Vt. Stat. Ann., Tit. 17, § 2543	35
Wis. Stat. § 6.87(6)	35
Wis. Stat. § 5.02(6m)	22
Wy. Stat. § 22-9-119	35

MEMORANDUM IN SUPPORT

ISSUES TO BE DECIDED

1. Whether Plaintiffs have standing.
2. Whether Ohio's **Photo ID Provision** is constitutional when not all methods of voting in Ohio require a photo ID and Plaintiffs have failed to establish that any voter is burdened by the provision.
3. Whether Ohio's **Drop Box Provision** is constitutional when the Sixth Circuit already held that a prior non-statutory drop box provision easily passes constitutional muster.
4. Whether Ohio's **Early Voting Hours Provision** is constitutional when the provision merely reallocates six hours of in-person absentee voting across an already generous early voting schedule.
5. Whether Ohio's **Absentee Ballot Application Provision** is constitutional when that provision ensures that voters and boards of elections have sufficient time to complete the absentee-ballot process.
6. Whether Ohio's **Post-Election Deadlines** are constitutional when they correct the mismatch between the cure-period deadline and the deadline for receiving absentee ballots and are far more generous than the post-election deadlines offered by other States.

INTRODUCTION

To strengthen public confidence in Ohio's elections, the General Assembly enacted House Bill 458 (H.B. 458) and House Bill 45 (H.B. 45). These laws implement common-sense and strongly supported changes to Ohio election law, including a new photo identification provision for in-person voting. Identification of some sort has always been required for in-person voting, but the new law added a layer of election security by requiring government-issued photo ID for in-

person voting. However, this Photo ID Provision does not change prior law that allows for mail absentee voting *without* photo ID using simply the last four digits of a voter's social-security number. On top of that, the new law guarantees every Ohioan a free photo ID from the Bureau of Motor Vehicles. So the Photo ID Provision does not sacrifice access for security or security for access.

In addition to the Photo ID Provision, H.B. 458 implemented various minor, technical changes to election deadlines and procedures. These changes (which include new hours for in-person absentee voting and new deadlines for absentee-ballot applications, the return of absentee ballots, and corrections to absentee and provisional ballots) allow the State to smoothly administer its elections and release quick results without compromising access to the polls.

Finally, H.B. 458 codified temporary regulations regarding drop boxes—the secure receptacles for absentee ballots at the offices of the boards of elections. Until H.B. 458, the Ohio Revised Code was silent on drop boxes, a vacuum that led to competing interpretations and multiple lawsuits. H.B. 458's codification of drop-box requirements provides one set of clear instructions for boards to follow.

Plaintiffs challenge these provisions of H.B. 458 as imposing an undue burden on the right to vote. Secretary of State LaRose moves for summary judgment because Plaintiffs lack standing, and because the challenged provisions easily survive constitutional review. Plaintiffs will likely resist summary judgment by asserting standing and contending that certain facts remain unestablished and so the case must proceed to a bench trial.

But the Court need not resolve any material fact issue to grant the Secretary's summary-judgment motion. To begin with, Plaintiffs lack standing under the Sixth Circuit's decision in *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014). Plaintiffs may dislike the new law, but

they are not harmed by it. And on the merits, even assuming that Plaintiffs can show some more-than-minimal burden on some voters—which they cannot do on the current record—the Court is left with a purely legal question it can and should resolve on summary judgment: do the State’s important interests in the new election provisions justify the burden on those voters?

As a matter of law, the answer is yes. As detailed more fully below, the State’s interests in voter confidence, election security, election administration, and expeditious election results justify even a moderate burden on voting. And the Court need not await a bench trial to conclude as much. Sixth Circuit precedent provides that summary judgment is warranted if the Court determines, as a matter of law, that the State’s interest in an elections provision justifies that provision’s burden on voters. *Mays v. LaRose*, 951 F.3d 775, 791-93 (6th Cir. 2020).

BACKGROUND

In December 2022, Ohio’s General Assembly enacted common-sense election-law provisions in H.B. 458 and H.B. 45. In late January 2023, Plaintiffs—five national or state-based organizations—filed an amended complaint challenging six different provisions of H.B. 458 and H.B. 45. Am. Compl. ¶ 4. The parties conducted discovery beginning in March, focused primarily on Ohio’s Photo ID Provision. Both Plaintiffs and the Secretary of State submitted expert reports from two experts. After Plaintiffs subpoenaed the Ohio Bureau of Motor Vehicles (BMV) for data on the number of voting-age Ohioans possessing either unexpired Ohio driver’s licenses or state ID cards, both sides’ experts addressed this data. Based on that data, it is undisputed that more voting-age Ohioans have an unexpired Ohio driver’s license or state ID card than are registered to vote. Deposition of Plaintiffs’ Expert Dr. Rocío Titunik (Titunik Dep.) at 114:19-22; Expert Report of Dr. Janet Thornton (Thornton Report) ¶ 35. Discovery having closed, the Secretary now moves for summary judgment.

LEGAL STANDARD

Summary-judgment standard. Summary judgment must be granted when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Anderson v. Kent State Univ.*, 804 F. Supp. 2d 575, 581 (N.D. Ohio 2011) (quoting Fed. R. Civ. P. 56(a)). “A fact is ‘material’ only if its resolution will affect the outcome of the lawsuit.” *Id.* “Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial.” *Id.* “The non-moving party is under an affirmative duty to point out specific facts in the record . . . which create a genuine issue of material fact.” *Id.* at 582.

Anderson-Burdick standard. “[T]he right to vote in any manner is not absolute[.]” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626 (6th Cir. 2016) (citation and quotation marks omitted) (citing U.S. Const. Art. I, § 4, cl. 1). “Federal law thus generally defers to the states’ authority to regulate the right to vote.” *Id.* (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (Stevens, J., op.)). Moreover, “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

Under the applicable *Anderson-Burdick* framework, “minimally burdensome and nondiscriminatory regulations” receive review akin to rational-basis review. *Ohio Democratic Party*, 834 F.3d at 627 (quotations omitted). “Regulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a flexible analysis, weighing the burden on the plaintiffs against the state’s asserted interest and chosen means of pursuing it.” *Id.* (quotations omitted). In determining the burden, the Sixth Circuit

considers “the burden that the provisions place on all Ohio voters,” as “[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.” *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016).

SUMMARY OF THE ARGUMENT

Standing. Plaintiffs lack standing, so this Court lacks subject-matter jurisdiction. None of the plaintiffs have demonstrated an actual diversion of resources to counteract any provision of H.B. 458. Regardless, Plaintiffs have failed to show any diversion of resources that impairs their missions. And while Plaintiffs generally allege representational standing, they have failed to establish this either. Because Plaintiffs “have not demonstrated an injury in fact, they cannot show either direct organizational standing or representative standing on behalf of their members.” *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 389 (6th Cir. 2020).

Photo ID Provision. First, not all methods of voting in Ohio require a photo ID. The State did not change the ID requirements for mail absentee voting, which a voter can complete via regular mail, drop box, or by returning (or having a close family member return) the voter’s mail ballot to the county board of elections. All this may be done without photo ID using simply the last four digits of the voter’s social-security number.

Second, Plaintiffs have not and cannot establish that Ohio’s Photo ID Provision imposes any burden at all—let alone a burden that outweighs Ohio’s important state interests, particularly safeguarding public confidence in elections. To establish a burden, Plaintiffs needed to identify voters who (1) lack a social-security number—or have one but lack access to the postal system *and* transportation *and* a close family member who could deliver the voter’s ballot on the voter’s behalf; (2) lack all six types of permissible photo ID; and (3) would be burdened by having to

obtain Ohio's free state ID card. Discovery has closed, and Plaintiffs have failed to show that there are any such voters. The Secretary is entitled to summary judgment as a matter of law.

Drop Box Provision. Plaintiffs' challenge to the Drop Box Provision, which allows the county boards of elections to maintain one drop box at their offices, is particularly odd. The Sixth Circuit already upheld a similar provision in *A. Philip Randolph Institute of Ohio v. LaRose*, 831 F. App'x 188, 191 (6th Cir. 2020). And before H.B. 458, Ohio statutes did not provide for *any* drop boxes.

Reallocation of Early Voting Hours. Plaintiffs' challenge to the Early Voting Hours Provision also falls flat. Plaintiffs have no evidence that any voter is burdened by this shift of six hours. Nor could they: there is no right to vote in-person absentee and certainly no right to vote in-person absentee on any day or time preferable. There is thus no right to burden. The provision is facially nondiscriminatory and easily supported by Ohio's interests in smooth election administration.

Absentee Ballot Application Period. Plaintiffs' challenge to the deadline for absentee-ballot applications also fails. The deadline, which falls seven days before Election Day, easily survives review because it strikes a balance between offering a generous application period and still ensuring that voters and boards of elections have sufficient time to complete the absentee-ballot process.

Post-Election Deadlines. H.B. 458 standardized three post-election deadlines, all of which Plaintiffs challenge here: (1) the deadline for receiving absentee ballots, Ohio Rev. Code § 3509.05, (2) the deadline for curing absentee-ballot errors, Ohio Rev. Code § 3509.06, and (3) the deadline for curing provisional ballots, Ohio Rev. Code § 3505.181. H.B. 458 set all three deadlines on the same day, four days after Election Day, thereby minimizing voter confusion,

promoting uniformity in election law, and encouraging quicker election results. Plaintiffs’ challenge to these post-election deadlines falls short because Plaintiffs cannot establish that these deadlines—which are far more generous than those offered by other States—burden voting at all.

ARGUMENT

I. This Court Lacks Subject-Matter Jurisdiction Because Plaintiffs Lack Standing.

“That a litigant must establish standing is a fundamental element in determining federal jurisdiction over a ‘case’ or ‘controversy’ as set forth in Article III of the Constitution.” *Morrison v. Bd. of Edn.*, 521 F.3d 602, 608 (6th Cir. 2008). “To establish standing, a plaintiff must show [1] an injury in fact that is [2] fairly traceable to the defendant’s conduct and is [3] likely to be redressed by a favorable judicial decision.” *Memphis A. Philip Randolph Inst.*, 978 F.3d at 386. “The party invoking federal jurisdiction bears the burden of establishing these elements.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To win declaratory or injunctive relief, a plaintiff “must show actual present harm or a significant possibility of future harm.” *Memphis A. Philip Randolph Inst.*, 978 F.3d at 386.

A. Plaintiffs lack standing because they have not established a diversion of resources.

Plaintiffs cannot establish standing merely by asserting that they have expended resources to combat H.B. 458’s election laws. And the record is devoid of evidence that would establish representational standing. Under Sixth Circuit precedent, Plaintiffs cannot “be deemed to have Article III standing 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.” *Fair Elections Ohio*, 770 F.3d at 460 (plaintiffs lacked organizational standing). As in *Fair Elections*, “Plaintiffs in this case have demonstrated no more than this.”

First, none of the plaintiffs are paying their own litigation expenses. *See* Deposition of Molly Martin, Fed. R. Civ. P. 30(b)(6) witness for Plaintiff Northeast Ohio Coalition for the Homeless (NEOCH Dep.) at 27:12, 19; Deposition of William Attig, Fed. R. Civ. P. 30(b)(6) witness for Plaintiff Union Veterans Council (Union Veterans Council Dep.) at 37:18, 38:2; Deposition of Norman Wernet, Fed. R. Civ. P. 30(b)(6) witness for Plaintiff Ohio Alliance for Retired Americans Educational Fund (OARA Dep.) at 48:7, 14; Deposition of Melissa Cropper, Fed. R. Civ. P. 30(b)(6) witness for Plaintiff Ohio Federation of Teachers (OFT Dep.) at 29:10, 13; Deposition of Maxim Thorne, Fed. R. Civ. P. 30(b)(6) witness for Plaintiff Civic Influencers (Civic Influencers Dep.) at 56:20, 57:11. Rather, the Democracy Docket, an information source with a weekly podcast co-hosted by Marc Elias (founder of the lead firm representing Plaintiffs), is paying at least some of those expenses. Civic Influencers Dep. at 56:23-57:3.¹

Second, two of the plaintiffs—Union Veterans Council and OARA—have not even established that they have spent any additional resources to combat H.B. 458’s election-law provisions.

Union Veterans Council. Union Veterans Council is resting on the belief that the Elias Law Group’s lawsuit will result in Ohio’s election provisions being quickly enjoined. *See* Union Veterans Council Dep. at 25:25-26:2 (“our belief, [is that] this is an unconstitutional bill and we won’t have to educate people on this bill”); *see id.* at 33:12-15 (“hopefully, we don’t have to spend any because hopefully this law is . . . going to be deemed unconstitutional”). At points, Union Veterans Council’s representative appeared unaware that H.B. 458 is now law (and has been since January 2023). *See id.* at 51:22 (testifying on July 25, 2023 that “the bill isn’t passed right now.”).

¹ *See* <https://www.democracymocket.com/about-us/> (last accessed Sept. 19, 2023); <https://www.elias.law/about> (last accessed Sept. 21, 2023).

OARA. Similar to Union Veterans Council, OARA has not even developed its own materials to help Ohio voters navigate the changes that H.B. 458 brings to voting. OARA Dep. at 60:13-18. Instead, OARA has simply flagged some of H.B. 458’s changes as part of its regularly scheduled informational updates. *See, e.g., id.* at 40:18-41:9, 42:5-15 (describing how two unpaid speakers discussed H.B. 458 at one of OARA’s regularly scheduled semiannual conventions at which the state budget was “primarily . . . the focus of the panel”). This is no surprise, given that OARA’s mission is “directed at retirement security.” *Id.* at 24:7-8.

NEOCH. NEOCH fares no better. NEOCH has simply updated its target audience on H.B. 458’s changes at its regular monthly homeless congress meetings. NEOCH Dep. at 39:2-17. Even prior to 2023, NEOCH offered training or informational materials on voter-identification requirements in Ohio. *Id.* at 40:16-41:6. And NEOCH’s communication practices have not changed since the start of 2023. *Id.* at 35:1-4. NEOCH’s 30(b)(6) representative, when pressed as to whether any new staff member positions were created to address H.B. 458, testified, “I’m not sure.” *Id.* at 30:16-18. Despite being the 30(b)(6) witness for the lead plaintiff, NEOCH’s representative repeatedly failed to identify any specific diversion of resources caused by H.B. 458. *See, e.g., id.; id.* at 19:22-24 (testifying “I don’t know specifically” when asked how much of NEOCH’s budget is allocated for various services); *id.* at 23:10-12 (“Over the last four years, our budget has increased. I don’t remember the specific amount.”).

Ohio Federation of Teachers. The remaining two plaintiffs’ assertions regarding additional expenditures are conclusory at best, with no accompanying financial or other specifics demonstrating a diversion of money or human resources caused by H.B. 458. For example, the president of the Ohio Federation of Teachers testified vaguely that the organization is spending

more money in 2023 on “member education” than in years past. OFT Dep. at 28:1-2.² But OFT failed to establish any causal link between these alleged additional expenditures and H.B. 458. Instead, it quickly became apparent that OFT’s member education (including the planned hiring of a digital communications coordinator) cannot be divorced from its challenge to Issue 1 (the sole ballot issue in the August 2023 Special Election). *Id.* at 30:17-24, 36:22-37:8, 38:24-39:3, 45:24-46:1; *see also id.* at 26:14-15 (“[T]his year on Issue 1, we will be doing get-out-the-vote efforts.”). This near exclusive focus on Issue 1 makes sense because OFT primarily represents K-12 teachers, and its mission is to “improve the lives of our members and the children that we work with.” *Id.* at 16:17, 21:13-14. Tellingly, OFT’s president was not even sure if *any* communication was sent to update OFT members about H.B. 458. *Id.* at 30:1-5.

Civic Influencers. Similarly, Civic Influencers’ alleged new expenditures are not a cognizable diversion of resources. Civic Influencers is a national organization. Civic Influencers Dep. at 16:5. The CEO of Civic Influencers testified that that the organization’s mission is “growing young people’s civic power and voting rights” across the country. *Id.* at 36:3-4. This means that Civic Influencers must educate its target audience any time a State changes its voting laws. *See id.* at 36. Thus, Civic Influencers is involved in States that, according to Civic Influencers, raise barriers to voting. *Id.* at 36:9-20 (discussing Civic Influencers’ involvement in Tennessee, Texas, Florida, and Wisconsin). But Civic Influencers is also involved in States where the alleged voting barriers are low. *Id.* at 36:21-25 (explaining Civic Influencers’ presence in Michigan even though Michigan’s “voting rights regime is probably the best in the country”). Civic Influencers has historically had both a statewide organizer for Ohio and Ohio “fellows”

² OFT’s president also testified that “[o]ur budget is not broken down into services,” so she could not even estimate the money spent on “member education.” OFT Dep. at 24:17-18.

(college campus representatives). *Id.* at 21:15-25; 23:12-15; *id.* at 30:15-31:14. The fact that Civic Influencers is expending resources in Ohio after H.B. 458’s voting-related changes is no diversion. This is what Civic Influencers does as an organization. Put another way, “[t]he alleged diversionary actions—spending money . . . to address the voting inequities and irregularities throughout the county—do 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) (internal citation and quotation marks omitted) (organizational plaintiff failed to demonstrate an injury in fact).

Plaintiffs have failed to establish any injury in fact. They have not even established a diversion of resources. Thus, they lack standing, and this Court lacks subject-matter jurisdiction.

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

Even assuming for the sake of argument that one or more of the plaintiffs have shown a diversion of resources (they have not), Plaintiffs still fail to establish standing. This is because none of the alleged resource diversions *impair* their missions. 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. City of Cincinnati*, 56 F.3d 710, 716-17 (6th Cir. 1995) (internal quotation marks omitted) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)) (coalition for the homeless lacked standing). Put differently, “the ‘perceptible impair[ment]’ to an organization’s ability to carry out its mission, not the ‘drain on the organization’s resources,’ is the ‘concrete and demonstrable injury’ for organizational standing.” *La. Fair Hous. Action Ctr., Inc. v. Azalea Garden Props., L.L.C.*, No. 22-30609, 2023 U.S. App. LEXIS 24436, at *13 (5th Cir. Sept. 14, 2023) (quoting *Havens*, 455 U.S. at 379).

As discussed above, Plaintiffs have failed to establish a diversion of resources caused by H.B. 458. But even if they could, this would not be enough for Article III standing. Plaintiffs must further demonstrate that they have suffered (or are about to suffer) a diversion of resources that impairs their missions. And they fall far short of demonstrating impairment. As discussed above, three of the five plaintiffs have failed to even establish additional expenditures caused by H.B. 458, let alone a true diversion of resources. *Supra* pp. 8-9. And the remaining two plaintiffs have merely asserted additional expenditures that are either (1) not caused by H.B. 458 or (2) are consistent with—not an impairment to—the organization’s historic practice and core mission. *Supra* pp. 9-11. Because Plaintiffs “have not demonstrated an injury in fact, they cannot show either direct organizational standing or representative standing on behalf of their members.” *Memphis A. Philip Randolph Inst.*, 978 F.3d at 389.

II. The Photo ID Provision Is Easily Constitutional.

Plaintiffs’ challenge to Ohio’s Photo ID Provision fails as a matter of law. The U.S. Supreme Court’s decision in *Crawford v. Marion County Election Board* upholding Indiana’s materially identical photo ID law is dispositive here. And persuasive authority abounds. *See e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 606 (4th Cir. 2016) (upholding Virginia’s photo ID provision and concluding that “[t]he *Crawford* Court’s application of the *Anderson-Burdick* analysis to Indiana’s [photo ID] law controls our resolution of the issue here”); *Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014) (determining that “*Crawford* requires us to reject a constitutional challenge to Wisconsin’s [photo ID provision]”); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009) (upholding Georgia’s photo ID provision and concluding “based on [*Crawford*], which upheld a similar law in Indiana, that the burden imposed by the requirement of photo identification is outweighed by the interests of Georgia in safeguarding the right to vote”).

Moreover, at least 18 States, including Ohio, now generally require photo ID for in-person voting. *See infra* p. 23 n.6.

Ohio's Photo ID Provision is more than reasonable—it strikes a generous balance between providing multiple alternatives that do *not* require photo ID and improving public confidence in elections by generally requiring photo ID for in-person voting. Ohio Rev. Code §§ 3505.18; 3509.051(B). Importantly, the Photo ID Provision does not change the prior ID requirements for mail absentee voting, which can be done without photo ID using the last four digits of a voter's social-security number. Ohio Rev. Code § 3509.05(B); Declaration of Jeff Hobday (Hobday Decl.) ¶¶ 33-34. While no longer allowing some forms of ID, such as utility bills, the Photo ID Provision *expands* the permissible forms of government-issued ID by allowing voters to use a U.S. passport or passport card. Ohio Rev. Code § 3501.01(AA)(1); Hobday Decl. ¶ 7.

Voters may use six different types of photo ID to vote in person, including an Ohio driver's license, state ID card, U.S. passport, U.S. military ID card, Ohio national guard ID card, or U.S. Department of Veterans Affairs ID card. Ohio Rev. Code § 3501.01(AA)(1); Hobday Decl. ¶ 7. Moreover, Ohio offers a free state ID card. Ohio Rev. Code § 4507.50(A)(1). Voters who cannot provide photo ID on Election Day may cast provisional ballots, after which they must appear at the board of elections up to four days after Election Day to provide proper photo ID. Ohio Rev. Code §§ 3505.18(A)(2); 3505.181(B)(7)(b); Hobday Decl. ¶ 5. For voters who object to being photographed, the Photo ID Provision contains a religious exemption that allows for in-person voting without a photo ID. Ohio Rev. Code § 3505.181(B)(7)(a); Hobday Decl. ¶ 6.

A. Ohio’s Photo ID Provision is nondiscriminatory and does not burden any voters at all.

First, Ohio’s Photo ID Provision is nondiscriminatory as a matter of law. It applies to every registered voter in Ohio. Ohio Rev. Code § 3505.18(A)(1); *see Ohio Democratic Party*, 834 F.3d at 623 (“The law is facially neutral; it offers early voting to everyone.”).

Second, as a matter of law, Ohio’s Photo ID Provision imposes no burden for two key reasons: **One**, not all methods of voting in Ohio require a photo ID. Ohio Rev. Code § 3509.05(B). **Two**, Plaintiffs have failed to establish that there are any voters who (1) lack a social-security number—or have one but lack access to the postal system *and* transportation *and* a close family member who could deliver the voter’s mail ballot on the voter’s behalf, Ohio Rev. Code § 3509.05(B), (C)(1); (2) lack all six types of permissible photo ID, Ohio Rev. Code § 3501.01(AA)(1); and (3) would be burdened more than “the usual burdens of voting,” *Crawford*, 553 U.S. at 198 (Stevens, J., *op.*), by having to obtain Ohio’s free state ID card.

1. Ohio provides multiple alternative ways to vote that do not require photo ID.

Not all methods of voting in Ohio require photo ID. This is undisputed. *See, e.g.*, Deposition of Plaintiffs’ Expert Dr. Kenneth Mayer (Mayer Dep.) at 28:25-29:3; Titiunik Dep. at 108:24-109:2. H.B. 458 did not change the mail absentee ballot provisions allowing for mail absentee voting using the last four digits of the voter’s social-security number. Ohio Rev. Code § 3509.05(B). Ohio’s Photo ID Provision is easily constitutional—even if Ohio did not provide the many alternative options for voting besides in-person voting with photo ID. But Ohio does, and “in light of Ohio’s generous absentee voting system, a system which provides extensive opportunities for all voters,” the Photo ID Provision passes with flying colors. *Ohio Democratic Party*, 834 F.3d at 631-32.

First, Ohio voters—without needing to offer any reason at all—can vote by mail without photo ID using the last four digits of their social-security number. Ohio Rev. Code § 3509.05(B); *see also Ohio Democratic Party*, 834 F.3d at 624 (“Ohio residents enjoy[] the freedom of this ‘no-fault’ or ‘no-excuse’ system” whereby they can “vote absentee by mail . . . at their convenience.”). Notably, uncontroverted expert testimony indicates that mail absentee voting in Ohio has been increasing since 2016. Thornton Report ¶¶ 22-26. And “the more populous counties”—which also have the highest percentage of African Americans among those age 18 and older—“utilize absentee voting to cast ballots at a higher rate.” *Id.* ¶ 25. **Second**, voters can submit their mail absentee ballots by drop box using the last four digits of their social-security number. Ohio Rev. Code § 3509.05(C)(3). **Third**, voters—or certain family members of those voters—can return their mail absentee ballots in person to the county boards of elections, again using simply the last four digits of their social-security number. Ohio Rev. Code § 3509.05(C)(1). **Fourth**, the Photo ID Provision contains a religious exemption that allows for in-person voting without a photo ID. Ohio Rev. Code § 3505.181(7)(a). **Fifth**, voters who cannot provide photo ID on Election Day may cast provisional ballots, after which they have up to four days to provide proper photo ID. Ohio Rev. Code §§ 3505.18(A)(2); 3505.181(B)(7)(b).

“Consider[ing] the numerous options available to all Ohio voters . . . to conveniently cast a ballot before Election Day,” Ohio’s Photo ID Provision is even more clearly constitutional. *Ohio Democratic Party*, 834 F.3d at 630. “[B]roadly applicable and non-discriminatory laws are presumed to pass constitutional muster[.]” *Id.* at 631. Because the Photo ID Provision is nondiscriminatory and not even “minimally burdensome,” rational-basis review applies, and “Ohio need only advance ‘important regulatory interests’” to satisfy *Anderson-Burdick*. *Id.* at 632 (quoting *Burdick*, 504 U.S. at 434).

Here, Ohio advances three primary, important regulatory interests (discussed more fully below) that amply justify its Photo ID Provision: (1) safeguarding and increasing public confidence in elections; (2) detecting and deterring voter fraud, including preventing voter identification fraud; and (3) participating in a nationwide effort to improve and modernize election procedures. Hobday Decl. ¶¶ 8-9, 14. The Sixth Circuit has already held that “Ohio’s proffered interests of preventing voter fraud [and] increasing voter confidence by eliminating appearances of voter fraud, . . . are undoubtedly ‘important regulatory interests[.]’” *Ohio Democratic Party*, 834 F.3d at 635 (citing *Crawford*, 553 U.S. at 194-96 (Stevens, J., op.)). And “[t]he State has a valid interest in participating in a nationwide effort to improve and modernize election procedures” by enacting a photo ID provision. *Crawford*, 553 U.S. at 191 (Stevens, J., op.). “The State’s interests thus provide ample justification.” *Ohio Democratic Party*, 834 F.3d at 635. Plaintiffs have “failed to establish their ‘heavy constitutional burden’ of demonstrating that [the Photo ID Provision] is unconstitutional.” *Id.* (quoting *Ohio Council 8 Am. Fed’n of State v. Husted*, 814 F.3d 329, 338 (6th Cir. 2016)).

2. As a matter of law based on undisputed facts, Plaintiffs cannot show that the Photo ID Provision burdens any Ohio voters.

a. Undisputed evidence shows that more voting-age Ohioans have photo ID than are registered to vote.

Based on undisputed data Plaintiffs obtained from the Ohio BMV, the number of voting-age Ohioans with unexpired Ohio driver’s licenses or state ID cards—not even including those with other forms of acceptable ID—*exceeds* the number of registered Ohio voters by at least half a million. *See* Titiunik Dep. at 114:19-22 (Q. “And so you agree that, according to the BMV data, more Ohioans have a photo ID than are registered to vote. Correct?” A. “Yeah, well, that’s a fact.”); Thornton Report ¶ 35. In addition, Plaintiffs’ statistical expert admitted that “there is no list

available of people who don't have an ID and are *not* registered to vote.” Titunik Dep. at 37:21-22 (emphasis added).

Thus, Plaintiffs cannot demonstrate that Ohio's Photo ID Provision burdens any voters at all.³ The U.S. Supreme Court's decision in *Crawford* upholding Indiana's materially identical photo ID law makes this abundantly clear. In reaching its holding, the controlling opinion in *Crawford* reasoned that “the evidence in the record does not provide us with the number of registered voters without photo identification[.]” 553 U.S. at 200 (Stevens, J., op.). Ohio's record is far stronger than Indiana's. Whereas in Indiana, the plaintiffs failed to establish the number of registered voters *without* photo ID, here the undisputed evidence shows that the number of voting-age Ohioans with photo ID *exceeds* the number of registered voters by at least half a million. Titunik Dep. at 114:19-22; Thornton Report ¶ 35.⁴

b. Regardless, Plaintiffs have failed to establish any cost-related burden of obtaining a photo ID to vote in Ohio.

Even assuming that some *non-registered* voting-age Ohioans lack all six types of acceptable photo ID, Plaintiffs have failed to demonstrate that any voters will be burdened by having to obtain a compliant photo ID. When the State offers a free ID, the “inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely

³ Moreover, to the extent Plaintiffs are attempting to bring disparate-burden or disparate-impact theories, those theories fail as a matter of law because Plaintiffs have not brought either an equal-protection or a Section 2 Voting Rights Act claim. Am. Compl. ¶¶ 134-45; *see Ohio Democratic Party*, 834 F.3d at 627 (considering “disparate burden” because plaintiffs brought an equal-protection claim); *id.* at 637 (considering “disparate impact” because plaintiffs brought a Section 2 Voting Rights Act claim). In any event, Plaintiffs have failed to demonstrate any disparate impact or disparate burden because they have failed to demonstrate any burden at all. *Infra* pp. 17-20.

⁴ Because Plaintiffs' registered-voter data alone defeats their challenge to the Photo ID Provision, Plaintiffs will likely contend that the Court must focus on non-registered voters. Any such attempt fails to create a genuine, material fact dispute. First, as a matter of law, the relevant population is registered voters. *See Crawford*, 553 U.S. at 200 (Stevens, J., op.). Indeed, H.B. 458's Photo ID Provision affects only registered voters. Ohio Rev. Code § 3505.18. Second, because H.B. 458's Photo ID Provision applies only to registered voters and because Ohio's separate voter-registration laws (not challenged here) require photo ID or a social-security number, any burden on non-registered voters would be antecedent to H.B. 458—not caused by it. Ohio Rev. Code § 3503.14. However, even if the Court were to hold as a matter of law that the relevant population is non-registered voters, summary judgment would still be warranted because Plaintiffs have failed to establish that obtaining a photo ID in Ohio costs voters anything. *Infra* pp. 17-20.

does not . . . even represent a significant increase over the usual burdens of voting[.]” *Id.* And that is true “*even though* ‘a somewhat heavier burden may be placed on a limited number of persons’ including the elderly, the economically disadvantaged, and the homeless[.]” *Ohio Democratic Party*, 834 F.3d at 631 (quoting *Crawford*, 553 U.S. at 199 (Stevens, J., op.)).

Here, neither of Plaintiffs’ experts provides evidence of any time, distance, or other costs experienced by Ohio voters in obtaining photo IDs to vote. *See* Titunik Dep. at 36:5-7 (Q. “Did you figure out what the cost[s] of obtaining a photo ID are in Ohio?” A. “No.”); Mayer Dep. at 29:7-18. Like Indiana in *Crawford*, Ohio offers a free state ID card. Ohio Rev. Code § 4507.50(A)(1); Deposition of Sydney King, Fed. R. Civ. P. 30(b)(6) witness for Ohio BMV (BMV Dep.) at 59:7-12, 69:18-19; *see Crawford*, 553 U.S. at 198 (Stevens, J., op.). Moreover, “[a]ll 88 Ohio counties have a BMV deputy registrar licensing agency at which an individual may obtain a free state ID card.” Thornton Report ¶ 28; *see* BMV Dep. at 33:22-34:1. In fact, Ohio has “179 locations throughout the state” at which individuals can obtain free ID cards. BMV Dep. at 33:8-12. These 179 locations are “distributed equally throughout the state,” with “[s]ome counties hav[ing] more than others,” typically based on county population. *Id.* at 33:20-34:3. Thus, any eligible voter, including a homeless Ohioan, can obtain a free state ID card. *See id.* at 128:1-3.

Fundamentally, “Plaintiffs do not point to any individual who, post-[H.B. 458], will be precluded from voting.” *Ohio Democratic Party*, 834 F.3d at 631. None of the plaintiffs could identify any Ohio voters in their target audiences or membership who were unable to vote in the May 2023 Primary Election because they lacked photo ID. Union Veterans Council Dep. at 61:4-12; OARA Dep. at 61:8-11; OFT Dep. at 50:8-16; Civic Influencers Dep. at 17:3-7; NEOCH Dep.

at 32:5-9.⁵ Nor could Plaintiffs' other fact witnesses. Both the veterans chair of the Ohio NAACP and the director of the Cuyahoga County Board of Elections admitted that they were not aware of anyone who was unable to vote in the May 2023 Primary Election because they lacked photo ID. Deposition of Willis Gordon (Gordon Dep.) at 68:15-19; Deposition of Anthony Perlatti (Perlatti Dep.) at 68:24-69:19. Plaintiffs have not and cannot establish that any voters are burdened by Ohio's reasonable and nondiscriminatory Photo ID Provision.

B. The Photo ID Provision is also easily constitutional under *Anderson-Burdick's* flexible review.

Even assuming for the sake of argument that the Photo ID Provision creates more than minimal burdens (it does not), it would still pass constitutional muster. The "flexible" *Anderson-Burdick* standard, which applies to laws that create "more than a 'minimal' burden" on voting, is only "slightly less deferential" than rational-basis review. *Ohio Democratic Party*, 834 F.3d at 630, 632. Ohio's Photo ID Provision easily succeeds under this flexible standard, as well.

First, even if Plaintiffs could establish some burden (they cannot), they have at a minimum failed to "quantify" either the "magnitude" of the alleged burden or "the portion of the burden . . . that is fully justified." *Crawford*, 553 U.S. at 200 (Stevens, J., op.). As discussed above, the number of voting-age Ohioans who have an unexpired Ohio driver's license or state ID card—not even including those with other forms of acceptable ID—exceeds the number of registered Ohio voters by at least half a million. Titiunik Dep. at 114:19-115:7; Thornton Report ¶ 35. And Plaintiffs' statistical expert admitted that "there is no list available of people who don't have an ID and are *not* registered to vote." Titiunik Dep. at 37:21-22 (emphasis added).

⁵ NEOCH's 30(b)(6) representative was not even aware that there was a May 2023 Primary Election in Cuyahoga County. NEOCH Dep. at 32:5-9.

Second, even if Plaintiffs could quantify the number of Ohio voters who currently lack all six types of acceptable photo ID, the “evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification.” *Crawford*, 553 U.S. at 201 (Stevens, J., op.). Plaintiffs have failed to demonstrate that any voters will be burdened by having to obtain a compliant photo ID. *Supra* pp. 17-19. And they have not identified any voters who both lack photo ID and are unable to vote by mail absentee ballot, which can be done by regular mail, drop box, or by returning (or having a close family member return) the voter’s mail ballot to the county board of elections. Ohio Rev. Code § 3509.05(B), (C)(1).

Third, Ohio’s “important regulatory interests” in (1) safeguarding and increasing public confidence in elections; (2) detecting and deterring voter fraud (including preventing voter identification fraud); and (3) improving and modernizing election procedures remain “sufficiently weighty” regardless. *Ohio Democratic Party*, 834 F.3d at 632. “Each is unquestionably relevant to the State’s interest in protecting the integrity and reliability of the electoral process.” *Crawford* 553 U.S. at 191 (Stevens, J., op.).

1. Ohio has at least an important interest in safeguarding and increasing public confidence in elections.

The Sixth Circuit has already recognized “increasing voter confidence” as an important regulatory interest. *Ohio Democratic Party*, 834 F.3d at 635. “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Crawford* 553 U.S. at 197 (Stevens, J., op.). It is the Secretary’s position that Ohio’s Photo ID law “safeguards” and “increase[s] the confidence of voters and the general public as to the security and integrity of Ohio’s electoral system.” Hobday Decl. ¶ 8. In addition, the expert report of Dr. Karen Owen, a political scientist specializing in American Politics, Methodology, and Public Administration, concludes that “the State of Ohio had

compelling governmental interests in enacting electoral reforms, including a voter photo identification law[.]” Expert Report of Dr. Karen Owen (Owen Report) at 6. Dr. Owen finds that “Ohio’s elected officials were attentive to concerns about election integrity and acted to bolster greater confidence in the State’s elections.” *Id.*

“[A] significant majority of voters (nearly 80%), including members of each political party, support voters presenting a photo identification when casting ballots in person at polling locations.” Owen Report at 33. Moreover, survey data show that “all ethnic groups strongly support photo ID laws, including 62% of African American registered voters.” *Id.* at 23. This is because, regardless of the frequency of detected voter fraud, perception of fraud among voters is high. *Id.* at 10. “Distrust of government and lack of confidence in U.S. institutions is not new.” *Id.* at 13. Rather, “[s]eeds that undermine electoral security and confidence in the system and outcomes have been planted well over the last 20 years”—and by both parties. *Id.* at 14. “By 2016, both major presidential candidates were raising electoral security concerns.” *Id.* Concern about election integrity is endemic in part because of the “‘winner’s effect’ whereby voters respond more favorably regarding confidence in their votes and the system when their political party’s candidate(s) wins an election versus those whose partisan candidate loses.” *Id.* at 16-17. Dr. Owen finds that “Ohio’s state officials responded to constituents’ concerns and perceptions about electoral security,” and thus “enacted new reforms, including the voter photo ID law to deter fraud, protect votes, and encourage greater confidence in the election system” and in “election results.” *Id.* at 17, 33; *see also id.* at 23.

2. Ohio has at least an important interest in detecting and deterring voter fraud and preventing voter identification fraud.

“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.” *Crawford* 553 U.S. at 196 (Stevens, J., op.). For that reason, the

Sixth Circuit has already held that detecting and preventing voter fraud, as well as “Ohio’s goal of reducing potential voter fraud” are “important regulatory interest[s].” *Ohio Democratic Party*, 834 F.3d at 634; *see also id.* at 635.

“There are many potential forms of voter fraud, including but not limited to voting more than once, impersonating another person, ballot harvesting, or voting without the qualifications of an elector (for example, attempting to vote as a non-citizen or as a minor).” Hobday Decl. ¶ 10. The Secretary of State has referred at least 630 cases of alleged voter fraud in Ohio elections to the Ohio Attorney General and county prosecutors. *Id.* ¶ 11. These voter-fraud referrals include “non-citizen individuals who registered to vote and/or voted illegally, individuals who voted twice, as well as individuals who voted on behalf of a deceased individual.” *Id.* ¶ 12. “Because county boards of elections may independently refer suspected voter fraud to their prosecutors for investigation, the Secretary of State’s 630 referrals are not a comprehensive count of all instances of voter fraud in Ohio over the last four years.” *Id.* “In part for this reason, the Secretary of State’s Office created the Public Integrity Division to increase the effectiveness and efficiency of voter-fraud investigations.” *Id.* ¶ 13.

Ohio’s Photo ID Provision helps deter voter fraud, particularly voter identification fraud, because photo ID is more verifiable than other forms of ID. Hobday Decl. ¶ 9; *see also* Declaration of Jeffrey A. Matthews, Stark County Board of Elections Director (Matthews Decl.) ¶ 10. This is true both because the poll worker can compare the photo of the voter to the voter herself but also because the ID is government-issued, whereas some forms of ID that were acceptable before H.B. 458 (such as a utility bill or paycheck) were not from a governmental entity. Hobday Decl. ¶ 9. Dr. Owen’s expert report finds that in supporting Ohio’s Photo ID Provision, “Ohio legislators, Governor Mike DeWine, and Secretary of State Frank LaRose emphasized the importance of

preserving the integrity of elections and ensuring that standards were in place to prevent voter fraud.” Owen Report at 8. Those who sponsored H.B. 458 “cited concerns of voter fraud as a reason to enact photo identification requirements for in-person voting.” *Id.* Indeed, “Ohio’s elected officials were attentive specifically to perceptions of voter fraud, seeing across the nation that almost half of American voters say voter fraud occurs very or somewhat often.” *Id.* at 33.

3. Ohio has an important interest in improving and modernizing election procedures through its Photo ID Provision.

Even 15 years ago, the U.S. Supreme Court held that “[t]he State has a valid interest in participating in a nationwide effort to improve and modernize election procedures” by enacting a photo ID provision. *Crawford*, 553 U.S. at 191 (Stevens, J., op.). That is even more true today. Today, at least 18 States, including Ohio, generally require photo ID for in-person voting.⁶ Multiple federal courts of appeals have upheld state photo ID laws. *Supra* p. 12. In upholding Indiana’s photo ID requirement, the U.S. Supreme Court noted that while federal statutes of course do not require a State to enact a photo ID law, “they do indicate that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology.” *Crawford*, 553 U.S. at 193 (Stevens, J., op.). On this point, Ohio agrees with Congress (as well as with many other States). Ohio’s Photo ID Provision “is part of a nationwide effort to improve election procedures by ensuring superior verification of voters through government-issued photo identification.” Hobday Decl. ¶ 14. As such, the Photo ID Provision is at least a modest “improve[ment] and moderniz[ation]” of the State’s election procedures. *Crawford*, 553 U.S. at 191 (Stevens, J., op.).

⁶ See Ala. Code § 17-9-30; Ark. Code Ann. § 7-1-101(40); Fla. Stat. § 101.043; Ga. Code Ann. § 21-2-417; Idaho Code § 34-1106(2); Ind. Code § 3-5-2-40.5; Kan. Stat. Ann. § 25-2908(h); La. Stat. Ann. § 18:562; Miss. Code Ann. § 23-15-563; Mont. Code Ann. § 13-13-114; Mo. Rev. Stat. § 115.427; R.I. Gen. Laws § 17-19-24.2; S.C. Code Ann. § 7-13-710; S.D. Codified Laws § 12-18-6.1; Tenn. Code Ann. § 2-7-112(c); Tex. Elec. Code Ann. § 63.001(b), (i); Wis. Stat. § 5.02(6m).

For all these reasons, Ohio's Photo ID Provision is easily constitutional under any applicable *Anderson-Burdick* framework.

III. Ohio's Drop Box Provision Is Constitutional as a Matter of Law Because the Sixth Circuit Already Upheld a Similar Drop Box Provision.

Plaintiffs' challenge to the Drop Box Provision is groundless. The Drop Box Provision allows Ohio's 88 county boards of elections to place not more than "one secure receptacle outside the office of the board, on the property on which the office of the board is located, for the purpose of receiving absent voter's ballots[.]" Ohio Rev. Code § 3509.05(C)(3)(a). Before H.B. 458, the Ohio Revised Code did not provide for *any* drop boxes. Hobday Decl. ¶¶ 43-46. Instead, temporary directives issued by Secretary LaRose instructed boards of elections to maintain a secure drop box outside the board of elections' office and at no other location. *Id.* ¶ 45. The Sixth Circuit upheld one of these temporary directives. *A. Philip Randolph Inst.*, 831 F. App'x at 191. The Court held that the Secretary's drop box provision "easily pass[es] constitutional muster" regardless of whether rational-basis or *Anderson-Burdick*'s flexible review applied. *Id.* at 191-92.⁷

The Drop Box Provision changes nothing material from the temporary directive upheld by the Sixth Circuit. Indeed, the provision is simply a codification of existing practice, with some enhanced surveillance and security requirements. Before H.B. 458, "all [drop boxes] were placed at each county's Board of Elections office[.]" Thornton Report at p. 8; *see* Mayer Dep. at 83:21-84:1. And after H.B. 458, all drop boxes must be placed at the offices of the boards of elections. Ohio Rev. Code § 3509.05(C)(3)(a); Hobday Decl. ¶ 46. Thus, H.B. 458's Drop Box Provision "does not change the impact on voters with regards to placement of the drop boxes." Thornton

⁷ After the Sixth Circuit granted a stay of the district court's injunction, the parties stipulated to a dismissal of the case. *A. Philip Randolph Inst. Of Ohio v. LaRose*, No. 1:20-cv-01908, Notice, Doc. No. 96 (N.D. Ohio Oct. 23, 2020).

Report at p. 8. In other words, it was not the case that, before the law was enacted, drop boxes were distributed throughout a county as Plaintiffs seem to suggest. Am. Compl. ¶¶ 119-25.

Plaintiffs have provided almost no evidence regarding the Drop Box Provision—let alone any evidence that the Drop Box Provision unconstitutionally burdens voters. *See, e.g.*, Titiunik Dep. at 159:20-23 (Q. “And you don’t present any quantitative analysis on drop boxes. Correct?” A. “I don’t.”). Uncontroverted expert testimony establishes that prior to H.B. 458 (in the 2022 General Election), “nearly all” counties had only one drop box anyway—which is exactly what H.B. 458 allows. Thornton Report at p. 8; *see id.* ¶ 52 (“In 2022, the average number of drop boxes at each county office was 1.15[.]”). In fact, Plaintiffs’ board of elections witness testified that Cuyahoga County—despite having the largest population of registered voters in the State (as of 2022)—has “been using one [drop box] for over 10 years.” Perlatti Dep. at 50:15-16, 22; *see* Thornton Report ¶ 52, App. C, Table 3. The Sixth Circuit has already held that “limiting drop boxes to one location per county promotes the accuracy of the election,” crediting the rationale that “voters who return a ballot to the wrong drop box run the risk of having their ballot rejected.” *A. Philip Randolph Inst.*, 831 Fed. Appx. at 192. “[A] limitation on drop boxes poses at most an inconvenience to a subset of voters (those who choose to vote absentee *and* physically drop-off their absentee ballot).” *Id.* at 191.

In any event, “there is no constitutional right to an absentee ballot”—whether one returns it by drop box or otherwise. *A. Philip Randolph Inst.*, 831 Fed. Appx. at 191 (quoting *Mays*, 951 F.3d at 792). Ohio voters have many other options for voting. *Id.* As in *A. Philip Randolph Institute*, regardless of whether rational-basis or *Anderson-Burdick*’s flexible review applies, multiple important state interests easily justify Ohio’s Drop Box Provision. *See id.* at 192 (holding that the Secretary’s drop box provision (1) “promotes uniformity”; (2) “promotes the state’s

efficiency interests in administering elections”; (3) “promotes the accuracy of the election”; and (4) “promotes the security of the election.”).

IV. The Early Voting Hours Provision Is Constitutional.

A. The Early Voting Hours Provision easily passes the rational-basis test.

The Early Voting Hours Provision does not reduce the total number of hours for in-person absentee voting. The provision shifts the six hours that were previously allotted to the Monday before Election Day and reallocates those hours to other in-person absentee voting days. Plaintiffs have not shown how this shift burdens the right to vote.

If there is no constitutional right to an absentee ballot, there is no right to vote absentee on any day and at any time a voter prefers. This is true even if the preference is shared by certain groups of voters, or voters who live in a certain area. *Ohio Democratic Party*, 834 F.3d at 630 (even if voting “preferences are shown to be shared in higher numbers by members of certain identifiable segments of the voting public,” a law’s “‘burden’ clearly results more from a ‘matter of choice rather than a state-created obstacle’”) (citing *Frank*, 768 F.3d at 749). In *Ohio Democratic Party*, the Sixth Circuit upheld a change that eliminated five days of in-person absentee voting. The Court said this was a convenience to voters that could “hardly be deemed to impose a true ‘burden.’” *Id.* at 628. If five days of early voting is a convenience and not a burden, reallocating *six hours* of in-person absentee voting easily clears this hurdle.

Plaintiffs cannot identify a single person who is disenfranchised because six hours of in-person absentee voting time has shifted. This is not a surprise. Given the numerous voting options in Ohio—including four weeks of no-excuse, in-person absentee voting—identifying such a person would be a difficult task. Plaintiffs claim that voters may be disenfranchised if they try to vote on Monday and are thereafter unable to vote on Election Day. Am. Compl. ¶ 133. Plaintiffs

fail to explain why these same voters cannot vote absentee by mail or in-person absentee on the other four weeks it is available. Voters who choose not to take advantage of Ohio’s many early-voting opportunities run the risk that something will keep them from the polls on Election Day. *See Mays*, 951 F.3d at 786. Though unfortunate, this is not unconstitutional.

Pointing to the number of voters who previously voted on the Monday before Election Day does not help Plaintiffs. This litigation tactic—comparing current election law to prior law, noting that the prior law provided a voting opportunity that no longer exists, and concluding that the current law therefore unconstitutionally burdens voting—has been tried before. The Sixth Circuit soundly rejected it. *See Ohio Democratic Party*, 834 F.3d at 623. Election law is not a “one-way ratchet” in which a State can never subtract voting hours or shorten a deadline. *Id.* In other words, courts should not ask whether some voters took advantage of the former law or whether some voters would benefit from the former law’s restoration. *Id.* Rather, courts must consider whether the challenged law, “as one component of Ohio’s progressive voting system, and considering the many options that remain available to Ohio voters,” burdens the right to vote. *Id.* at 628. Former Monday voters can still vote any other time or in any other way that is available. A voter’s chosen way to vote in one year means just that: the voter chose to vote that way at least one time. This choice does not mean that all other options are completely foreclosed.

The Early Voting Hours Provision is facially nondiscriminatory. It applies to all voters, regardless of race, gender, or age. Importantly, the provision applies statewide to all counties, which was not true for the first few years of in-person absentee voting. Until 2012, each board of election had the discretion to set the hours and days of in-person absentee voting. *See Ohio Democratic Party*, 834 F.3d at 625; *see also* Declaration of Shanda Behrens (Behrens Decl.) Ex. C (Directive 2012-35). Thus, a voter in one county may have had more chances to vote in-person

absentee than a voter in a neighboring county. Plaintiffs' claim that people have been "voting the day before election day for nearly two decades" (Am. Compl. ¶ 133) may be true for some voters depending on where they lived, but that was not the case for all voters.⁸ The Early Voting Hours Provision ensures that all voters, no matter what county they live in, have the same options.

B. The Early Voting Hours Provision also easily survives *Anderson-Burdick's* flexible review.

As a nondiscriminatory law that imposes, at most, minimal burdens, rational-basis review applies and Ohio "need only advance 'important regulatory interests' to satisfy *Anderson-Burdick*." *Ohio Democratic Party*, 834 F.3d at 632. But even if the Court finds more than a minimal burden, weighed against Ohio's strong interests in smooth election administration, the Early Voting Hours Provision still survives *Anderson-Burdick* review.

The Ohio Association of Election Officials (OAE0) has supported eliminating Monday in-person absentee voting for over a decade. In 2013, the OAE0, through a bipartisan task force, recommended ending in-person absentee voting at 5 p.m. on the Sunday before an election, the precise change H.B. 458 implements. *See* Behrens Decl. Ex. K (2013 OAE0 report). Before the General Assembly passed H.B. 458, the OAE0 again expressed support for eliminating Monday in-person absentee voting. *See* Behrens Decl. Ex. L (Dec. 12, 2022 email attaching OAE0 letter). The OAE0 further recommended that those hours be reallocated across other in-person absentee voting days. *Id.* H.B. 458 follows this recommendation.

This change eases the administrative burdens of boards of elections in the busy weeks leading up to an election, and particularly on the eve of an election. *See* Matthews Decl. ¶¶ 19-29. Boards can now reallocate staff and resources to cover the many other tasks required of them that

⁸ Plaintiffs' own expert confirms this point. One of the studies on which Dr. Mayer relies compares early voting in pre-2011 elections based on the varying days in-person absentee voting was available county-to-county. Mayer Dep. at 91.

day. *Id.* ¶¶ 27-29. Without the duty of overseeing in-person absentee voting, boards can reallocate staff and resources to last-minute issues and needs, or to unforeseen changes. *Id.* The Early Voting Hours Provision ensures standardized hours of early in-person voting from county to county, which has not always been the case. *See Ohio Democratic Party*, 834 F.3d at 625.

The Early Voting Hours Provision also helps boards with the duties they cannot start until in-person absentee voting is completed. For example, boards must provide registration lists to each precinct before the opening of the polls on the day of an election. Matthews Decl. ¶ 28. The list must identify each registered elector who “cast absent voter’s ballots in person.” Ohio Rev. Code § 3509.09(A). Boards thus cannot compile a complete list until early voting is over. When in-person absentee voting is available through 2:00 p.m. on the Monday before an election, boards are pressed to timely complete this task. *See* Matthews Decl. ¶¶ 27-29. This is particularly true for boards that must deliver paper copies of poll lists. *Id.* ¶ 28.

The Early Voting Hours Provision supports the State’s strong interests in smooth election administration. These interests greatly outweigh any of the unsubstantiated burdens Plaintiffs claim they will suffer by the Early Voting Hours Provision.

V. The Absentee Ballot Application Deadline Is Constitutional.

Three years ago, the Sixth Circuit rejected a constitutional attack on Ohio’s former deadline for requesting absentee ballots, which fell on noon the Saturday before Election Day. *See Mays*, 951 F.3d at 791-93. The Court easily concluded that the request deadline imposed a reasonable, nondiscriminatory restriction upon the right to vote. *Id.* at 791. “Standing alone, Ohio’s deadline of noon, three days before Election Day is nondiscriminatory,” and the long, ten-month period in which voters could request absentee ballots was reasonable. *Id.* at 792. Accordingly, rational-basis review applied, and Ohio’s interest in orderly election administration justified any minimal burden

on the right to vote. *Id.* H.B. 458 set the deadline for requesting absentee ballots four days earlier than the law evaluated in *Mays*. So the Court now must determine whether a four-day adjustment requires the invalidation of a statute easily upheld under rational-basis review less than four years ago. The answer is easy: Ohio’s deadline for absentee-ballot applications survives constitutional review.

A. Under rational-basis review, the new application deadline is constitutional.

Ohio’s deadline of seven days before Election Day for absentee-ballot applications does not burden the right to vote. The deadline is nondiscriminatory: it applies to every voter who wishes to cast an absentee ballot.⁹ And it is also reasonable. As in *Mays*, voters may apply for absentee ballots beginning January 1 of an election year and may continue to do so until seven days before Election Day. Ohio Rev. Code § 3509.03(D). For general elections, Ohio’s deadline gives voters around 10 months to apply for absentee ballots. *Mays*, 951 F.3d at 792.¹⁰ That is already exceedingly generous without accounting for the in-person voting opportunities Ohio provides both before and on Election Day. With the benefit of a months-long absentee-application period, a month of early in-person voting, and a full day of Election Day voting, voters “who fail to vote early cannot blame Ohio law for their inability to vote; they must blame ‘their own failure

⁹ The seven-day deadline applies to all voters other than unexpectedly hospitalized voters. Ohio Rev. Code § 3509.08. Plaintiffs’ amended complaint does not challenge the disparate treatment between hospitalized voters and all other voters; rather, it challenges the seven-day deadline as an undue burden.

¹⁰ Ohio’s new deadline for absentee-ballot applications places it squarely in the middle of its fellow States in the Sixth Circuit. Kentucky’s deadline lands a full 14 days before Election Day, Ky. Rev. Stat. § 117.085, Michigan’s deadline for mailed absentee-ballot applications falls on the Friday before Election Day, Mich. Comp. Laws § 168.759, and Tennessee joins Ohio in the middle at seven days before Election Day, Tenn. Code Ann. § 2-6-202. But only Ohio offers a 10-month application period for general elections. *See* Ky. Rev. Stat. § 117.085 (prohibiting applications until 45 days before Election Day); Tenn. Code Ann. § 2-6-202 (prohibiting applications until 90 days before Election Day); Mich. Comp. Laws § 168.759 (prohibiting applications until 75 days before Election Day). Viewing the full picture, Ohio’ deadline for requesting absentee ballots imposes no burden at all on voting.

to take timely steps to effect their enrollment.”” *Mays*, 951 F.3d at 792 (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758, (1973)).

Because there is no burden on voting, the State need only satisfy rational-basis review. *See Mays*, 951 F.3d at 792. And it does so easily. A deadline of seven days before Election Day gives voters a great deal of time to seek an absentee ballot, but requires them to do so before the boards’ election duties kick into high gear the week before Election Day. As the Sixth Circuit recognized in *Mays*, “Ohio’s important regulatory interest in the orderly administration of elections outweighs the minimal burden that the State’s absentee ballot request deadline places on Plaintiffs’ right to vote.” 951 F.3d at 792-93.

B. The application deadline also survives *Anderson-Burdick*’s flexible review.

Plaintiffs offer several reasons why they believe the application deadline imposes a burden on voting. Plaintiffs’ expert notes that there are voters who applied for absentee ballots between the Wednesday and Saturday before Election Day under prior law. Titunik Dep. at 44:4-6, 147:1-6. Because those voters will not be able to repeat that behavior under H.B. 458, Plaintiffs believe that the new application deadline burdens their right to vote. Am. Compl. ¶ 108. This is simply another iteration of the disfavored one-way-ratchet theory: because Ohio once offered a longer application period, it may never subtract from it. *Ohio Democratic Party*, 834 F.3d at 623. Instead, the Court must consider whether the application deadline burdens the right to vote in light of all the voting opportunities Ohio provides. And here, the months-long period to apply for absentee ballots, as one component of Ohio’s “generous” early-voting regime, *id.*, does not burden the right to vote. Indeed, Plaintiffs cannot identify any particular individual who will be prevented from voting because of the application deadline.

Plaintiffs' expert also points out that voters who let the application deadline lapse will have no alternative but to vote in person, and in-person voting now requires a compliant photo ID. Mayer Dep. at 29:21-25, 30:1-11. According to Plaintiffs, this could result in disenfranchisement for those voters who lack photo ID. Am. Compl. ¶ 109. The Secretary already explained in Section II above that the Photo ID Provision does not burden the right to vote. But even if this were not so, voters who wish to vote by absentee ballot but procrastinate past the application deadline cause their own disenfranchisement. As the Sixth Circuit held in *Mays*, voters who "cho[se] to not participate in the opportunities Ohio provides to vote," and later found themselves on the wrong side of an election deadline caused their own inability to vote. 951 F.3d at 786.

But even accepting Plaintiffs' contention that the new deadline for absentee-ballot applications burdens voting because some voters will miss the deadline, Ohio's important regulatory interests more than justify any burden. First, the new deadline for absentee-ballot applications advances the State's interests in ensuring that voters who meet election deadlines have their votes counted. Under prior law, voters had until noon on the Saturday before Election Day to request absentee ballots. Boards had to process the application, put together the absentee packet, and mail the packet to the voter. The voter, in turn, had to postmark the ballot no later than Monday. And both boards and voters had to rely on the U.S. Postal Service to deliver the absentee-ballot packet to the voter on time. Deposition of Jeffrey A. Matthews (Matthews Dep.) at 53:14-23, 54:8-15. At times, the tight turnaround left the boards or the voter without adequate time to complete the absentee-voting process. Perlatti Dep. at 42:2-9; Matthews Dep. at 53:14-23, 83:8-17. As one election official testified, "you can't expect a ballot to be mailed out the Saturday before an election and have time for the person to, one, receive it, and two, return it." Matthews Dep. at 54:5-7. Elections officials accordingly advocated for an earlier application deadline and ultimately

supported the deadline set by H.B. 458. Perlatti Dep. at 38:6-16; Deposition of Jeff Hobday (Hobday Dep.) at 177:13-16. Under H.B. 458, boards and voters will have adequate time to complete the absentee-ballot process.

Second, the deadline advances the State's interests in orderly election administration, particularly the preparation for and execution of a smooth Election Day. The boards' to-do list for the week prior to Election Day is long and demanding, and H.B. 458 allows boards to turn from absentee-ballot applications and attend to their many other tasks.

Boards must offer in-person absentee voting the week before Election Day, devoting staffing resources to managing crowds, assisting voters, and monitoring election activities. Matthews Decl. ¶ 21. During that same week, bipartisan teams of board employees travel to hospitals, jails, nursing homes, assisted living facilities, and other confined voters to deliver and collect absentee ballots. *Id.* at ¶ 22. Boards also receive and process mailed absentee ballots the week before Election Day and notify voters of any deficiencies. *Id.* ¶ 31.

The week before Election Day, boards continue to recruit and train many poll workers. Matthews Decl. ¶ 23. While large counties demand the hiring and training of thousands of poll workers, even mid-size counties like Stark County must find, hire, and train over 1,000 poll workers. *Id.* As temporary workers, poll workers require assistance and support from the Boards. Stark County, for example, has Election Day technicians travel between polling locations to resolve issues at polling places and answer poll workers' questions and also fields poll workers' questions by phone. *Id.* ¶ 24.

Then comes Election Day itself. The boards must ensure that each polling location is prepared to open at 6:30 a.m. Ohio Rev. Code § 3501.32(A). Accordingly, the weekend before Election Day, each county must coordinate the delivery of voting machines, supplies, and eligible-

voter lists to each polling location in the county. Stark County, for example, has over 100 polling locations with 1,400 voting machines, each of which must be tested on arrival. Matthews Decl. ¶ 25.

The list of election-week tasks is long, and the boards must complete them all flawlessly. Ohio's new Absentee Ballot Application Deadline eases the burdens on boards by removing an entire category of duties during the busy week leading up to Election Day. Even without processing absentee-ballot applications, the boards are extremely busy preparing for and executing a successful Election Day.

Ohio's Tuesday absentee ballot application deadline burdens the right to vote no more than necessary to ensure that voters receive their ballots on time. At the same time, boards of elections' heavily burdened staff need not divert resources away from other election-related tasks to process absentee ballots that may ultimately reach the voter too late to count. The new deadline strikes a balance between a long application period and sufficient time to complete the voting process in light of the boards' many duties. And even if some voters ultimately find themselves on the wrong side of the new deadline, the resulting burden is not unconstitutional. A generally applicable deadline for absentee-ballot applications survives *Anderson-Burdick* review even if it results in a subset of voters missing the deadline. *Mays*, 951 F.3d at 792-93.

VI. The Post-Election Deadlines Are Constitutional.

H.B. 458 standardized three post-election deadlines: (1) the deadline for the boards to receive absentee ballots with a timely postmark, Ohio Rev. Code § 3509.05; (2) the deadline for voters to correct absentee-ballot errors, Ohio Rev. Code § 3509.06; and (3) the deadline for voters to provide additional information for a provisional ballot, Ohio Rev. Code § 3505.181. Under prior law, these deadlines varied. Boards had to accept absentee ballots arriving up to 10 days after

Election Day but could not accept any corrections to absentee ballots or additional information for provisional ballots beginning on the eighth day after Election Day. Under current law, all provisional and absentee ballots must be received and finalized no later than four days after Election Day. Plaintiffs challenge all three deadlines as imposing an undue burden on the right to vote, but the ballot-finalization laws survive constitutional review.

A. Rational-basis review applies, and the laws survive.

The new deadlines for ballot finalization do not burden voting. As to the deadlines for curing ballots, elections officials agree: voters do not use the post-election period to cure their deficient ballots. *See* Perlatti Dep. at 55:19-20, 56:7-9, 57:9-12 (“[A]s director and deputy director, I’m not aware of an individual coming to cure a provisional ballot post election.”); Matthews Dep. 56:4 (“[T]here’s not a lot of participation in the cure period.”). Shortening the cure period therefore will have little effect on voting. Indeed, similar testimony led the Sixth Circuit to conclude that a three-day reduction in the cure period imposed a “trivial burden on Ohio voters.” *NEOCH*, 837 F.3d at 635. The same conclusion follows here.¹¹

Likewise, the new deadline for the receipt of absentee ballots imposes no burden at all on voting. There is no constitutional right to an absentee ballot and certainly no right to return an absentee ballot after Election Day. *Mays*, 951 F.3d at 792. Plaintiffs do not establish that any voter will be unable to request and return an absentee ballot on time given the long application period, Ohio Rev. Code § 3509.03(D), the mailing of absentee ballots to voters the day after voter registration closes, Ohio Rev. Code § 3509.01(C)(2), and the availability of drop boxes to avoid

¹¹ Ohio’s cure provisions for absentee ballots are among the most generous in the Sixth Circuit. A new Michigan law will, when effective, permit voters to cure absentee ballots until the fourth day following Election Day. Mich. Comp. Laws §§ 168.766a, 168.766b. But neither Kentucky nor Tennessee allows voters to cure absentee ballots after Election Day. In Kentucky, voters must cure any signature mismatches on absentee ballots before the polls close. Ky. Rev. Stat. § 117.087. And in Tennessee, elections officials must notify voters if their absentee ballots are rejected. Tenn. Rev. Code § 2-6-204(b). Voters may thereafter submit another absentee ballot, but they must still meet the Election Day deadline for returning absentee ballots. *Memphis A. Philip Randolph Inst.*, 978 F.3d at 383.

any mail delays, Ohio Rev. Code § 3509.05(C)(3). Ohio goes further than most other States by offering multiple ways for voters to return absentee ballots and by extending the receipt deadline past Election Day. In fact, a majority of States enforce an Election Day deadline for the receipt of absentee ballots.¹² So unless Plaintiffs contend that the majority of States unconstitutionally burden voting, their only path to establishing a burden here is the one-way-ratchet theory. That is, Ohio's former deadline was a floor from which Ohio can never move. As explained above, the Sixth Circuit thoroughly repudiated that theory. It cannot be used to establish a burden on voting here.¹³

Because the ballot-finalization deadlines impose no more than a trivial burden on voting, rational-basis review applies and is easily satisfied. Through H.B. 458, Ohio now has one easy-to-administer deadline for finalizing ballots that allows boards to focus on their post-election duties.

¹² See Ala. Code § 17-11-18 (noon on Election Day); A.R.S. 16-548 (7:00 p.m. on Election Day); A.C.A. § 7-5-411 (7:30 p.m. on Election Day); C.R.S. § 1-7.5-107 (7:00 p.m. on Election Day); Conn. Gen. Stat. 45-9-140b (close of polls on Election Day); Del. Code Ann. tit. 15, § 5508 (close of polls on Election Day); F.S.A. § 101.67 (7:00 p.m. on Election Day); Ga. Code Ann. § 21-2-386 (close of polls on Election Day); HRS § 11-104 (close of polls on Election Day); I.C. § 34-1005 (8:00 p.m. on Election Day); Ind. Code 3-11.5-4-3, 3-11.5-4-10 (noon on Election Day); Iowa Code § 53.17(2) (close of polls on Election Day); Ky. Rev. Stat. 117.086 (close of polls on Election Day); Me. Rev. Stat. Ann. 21-A § 755 (close of polls on Election Day); Mich. Comp. Laws 168.764a (close of polls on Election Day); Minn. Stat. 203B.08 (close of polls on Election Day); Mo. Rev. Stat. 115.293 (close of polls on Election Day); Mont. Code Ann. 13-13-232 (close of polls on Election Day); Neb. Rev. Stat. § 32-950 (close of polls on Election Day); NH Rev. Stat. § 657:22 (5:00 p.m. on Election Day); N.M. Stat. Ann. 1-6-10(B) (7:00 p.m. on Election Day); 26 Okla. Stat. Ann. § 14-104 (7:00 p.m. on Election Day); 25 P.S. § 3146.8 (8:00 p.m. on Election Day); RI Gen. Laws § 17-20-8 (8:00 p.m. on Election Day); SC Code § 7-15-420 (close of polls on Election Day); S.D. Codified Laws 12-19-12 (close of polls on Election Day); Tenn. Code Ann. § 2-6-304 (close of polls on Election Day); Vt. Stat. Ann., Tit. 17, § 2543 (close of polls on Election Day); Wis. Stat. 6.87(6) (8:00 p.m. on Election Day); Wy. Stat. 22-9-119 (close of polls on Election Day).

¹³ In any event, Plaintiffs' theories about voting burdens are incoherent. Plaintiffs' contention that the receipt deadline unconstitutionally burdens voting fundamentally conflicts with their argument that the State must restore the Saturday-noon deadline for absentee-ballot applications. It cannot be the case that two days (between the Saturday-noon application deadline and the Monday postmark deadline) allow sufficient time for boards to mail absentee ballots to voters, but five days (between the Monday postmark deadline and the Saturday receipt deadline) do not offer enough time for voters to mail ballots back to the boards. Compare former Ohio Rev. Code § 3509.03, with Ohio Rev. Code § 3509.05. With the passage of H.B. 458, no such tension exists in Ohio law any longer. H.B. 458 recognizes that mailing a ballot to a voter takes about the same time as mailing a ballot to the boards.

See infra. These regulatory interests easily outweigh the “trivial” burden on voting. *NEOCH*, 837 F.3d at 635.

B. The Post-Election Deadlines are constitutional even if *Anderson-Burdick*'s flexible review applies.

Even assuming a moderate burden on the right to vote because some voters will inevitably miss the new deadlines, the ballot-finalization deadlines still survive *Anderson-Burdick* review. The State's important interests in orderly election administration and expeditious election results justify any burden on voting.

As to election administration, the State standardized three formerly disparate deadlines into one deadline for finalizing *all* ballots. Under H.B. 458, no ballot—whether absentee or provisional—may be received, corrected, or supplemented after the fourth day following Election Day. This promotes uniformity in election law and minimizes voter confusion about which deadlines apply. *See A. Philip Randolph Inst.*, 831 F. App'x at 192 (noting that uniformity in election law promotes the fair administration of elections); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364-65 (recognizing a State's interest in minimizing voter confusion). Standardizing the ballot-finalization deadlines also eliminates the mismatch between the receipt and cure deadlines for absentee ballots, which prompted lawsuits against the State on multiple occasions. *See generally*, *NEOCH*, 837 F.3d 612; *League of Women Voters v. LaRose*, 489 F. Supp. 3d 719 (S.D. Ohio 2020).

Next, the Election-Day-plus-four deadlines for ballot finalization also reduce some of the heavy post-election burdens on the boards. Boards can redistribute the resources devoted to late-arriving absentee ballots and ballot curing to the review of provisional ballots and the preparation for the official canvass, the final tally of all ballots cast in an election. Both are onerous tasks. To count provisional ballots, boards must individually review provisional-ballot affirmation

statements, any additional information submitted by provisional voters, and must determine on a case-by-case basis if the provisional voter is registered to vote in Ohio. Even medium-size counties have thousands of provisional ballots to review. *See* Behrens Decl. Ex. N (Provisional Supplemental Report). As to the official canvass, boards must have accurate and complete absentee ballots, provisional ballots, and Election Day ballots to complete the official canvass. This means that any errors or discrepancies must be resolved and the board must have a final set of ballots to tabulate.

Finally, the Election-Day-plus-four deadline for ballot finalization advances the State's interests in expeditious election results. With all ballots now received and finalized no later than four days after Election Day, boards can move to the official canvass of election results more quickly than under prior law. Under H.B. 458, as further modified by House Bill 33 (the budget bill for the 2023-2024 biennium), boards may now begin the official canvass five days after Election Day—that is, the first day following the date for finalizing all ballots. Ohio Rev. Code § 3513.22(A). Under prior law, because absentee ballots could arrive up to 10 days following Election Day, the official canvass could not begin until 11 days following Election Day. But now, counties can begin their official canvass as soon as all ballots are finalized, and in turn, they will be able to announce their official results more quickly.

States must have deadlines for receiving and finalizing ballots to avoid electoral chaos. *Timmons*, 520 U.S. at 358. And generally applicable deadlines survive *Anderson-Burdick* review even though the deadlines may result in some voters missing them. *Mays*, 951 F.3d at 792. Indeed, as long as these deadlines are reasonable, voters bear the responsibility to meet them. Here, Ohio gives voters over a month to complete the absentee-voting process, which includes ample time to correct errors. Likewise, provisional voters are immediately informed that they have four days to

provide additional information to accompany their provisional ballots, and they are responsible for meeting this deadline. The ballot-finalization deadlines are consistent, reasonable, and enable quick election results. As such, they easily survive any applicable *Anderson-Burdick* review.

CONCLUSION

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

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Andrew D. McCartney

ANDREW D. McCARTNEY (0099853)*

**Counsel of Record*

JULIE M. PFEIFFER (0069762)

HEATHER L. BUCHANAN (0083032)

ANN YACKSHAW (0090623)

MICHAEL A. WALTON (0092201)

Assistant Attorneys General

Constitutional Offices Section

30 E. Broad Street, 16th Floor

Columbus, Ohio 43215

Tel: 614-466-2872 | Fax: 614-728-7592

Andrew.McCartney@OhioAGO.gov

Julie.Pfeiffer@OhioAGO.gov

Heather.Buchanan@OhioAGO.gov

Ann.Yackshaw@OhioAGO.gov

Michael.Walton@OhioAGO.gov

*Counsel for Defendant Secretary of State
Frank LaRose*

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, the foregoing 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
ANDREW D. McCARTNEY (0099853)
Assistant Attorney General

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. No. 23. I also certify that the page limitations have been modified by order of the Court, which granted Defendant's and Intervenor-Defendants' joint motion for leave to file an opening summary-judgment brief of up to 40 pages. *See* Doc. No. 45. This memorandum complies with that modification.

/s/ Andrew D. McCartney
ANDREW D. McCARTNEY (0099853)
Assistant Attorney General