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

Northeast Ohio Coalition for the Homeless; Ohio Federation of Teachers; Ohio Alliance for Retired Americans Educational Fund Inc.; Union Veterans Council, and Civic Influencers, Inc.,

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.

Case No. 1:23-cv-00026-DCN

District Judge Donald C. Nugent
Magistrate Judge Jonathan D. Greenberg

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S AND INTERVENOR-DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF THE ARGUMENT[1]

House Bill 458 is a voter suppression bill, plain and simple. Each of the law's provisions independently imposes severe or substantial burdens on Ohioans of all types, and on Black, young, elderly, homeless, and overseas voters in particular. Together, they form a severe obstacle to the franchise and will lead to the disenfranchisement of thousands of eligible voters during the upcoming 2024 elections. The experts say so, the fact witnesses say so, and the documents say so.

In exchange for these burdens, HB 458 offers Ohioans nothing. The law does not and cannot improve election security in Ohio—voter fraud is not an issue in Ohio and, even if it were, none of the challenged provisions would help stamp it out. The law does not and cannot improve election administration in Ohio—Secretary LaRose himself has called Ohio's elections the "gold standard," and HB 458 does not address any of the administrative issues identified by election officials prior to its enactment. And the law does not and cannot improve voter confidence in Ohio—voter confidence, all experts agree, is driven by the outcome of elections, not by the intricacies of a state's voting laws. If anything, HB 458 only *undermines* voter confidence by validating unfounded skepticism around election security. Defendants, in other words, have not identified a single state interest furthered by HB 458 that could justify the burdens the law imposes.

On this record, Defendants' motions for summary judgment must be denied. Defendants cannot prevail as a matter of law, as the record supports but one conclusion: HB 458 imposes unconstitutional burdens, those burdens are not justified by any state interest, and Plaintiffs have standing to challenge them. To the extent that result is in question, resolution of Plaintiffs' claim requires the Court to evaluate and weigh competing expert and fact witness analyses on the relative

[1] Plaintiffs file this joint brief in opposition to both Defendants' respective motions for summary judgment. *See* ECF No. 45.

burdens and benefits of the challenged provisions. Indeed, Defendants' summary judgment motions themselves demonstrate the many, genuine disputes of material fact that can only be resolved at trial. Accordingly, this Court should deny Defendants' motions for summary judgment and set this case for trial so that Plaintiffs may obtain relief in time for the 2024 elections.

STATEMENT OF THE ISSUE

Whether summary judgment in favor of Defendants is available where the evidence overwhelmingly demonstrates that HB 458 imposes severe burdens on Ohioans unjustified by Ohio's purported interests in the law and where there remain several genuine disputes of material fact that can only be resolved at trial.

BACKGROUND

I. Factual Background

A. Ohio passed a voter suppression bill in the wake of two highly successful elections featuring historic levels of voter participation.

In the words of Defendant Secretary Frank LaRose, Ohio's elections are the "gold standard." Ex. 1-A, Press Release (Nov. 15, 2022). Ohio's voter participation shows why. Since 2020, Ohioans have turned out to vote at historic rates. In 2020, nearly *six million* Ohioans—roughly 74% of all registered voters—participated in that year's November election. Ex. 1-B, Voter Turnout in Ohio's General Elections. That turnout broke Ohio's previous voter participation record by 200,000 votes, a remarkable feat given that the election occurred during a once-in-a-century global pandemic. *Id.* Nor was the voter participation in 2020 an outlier in Ohio. During the November 2022 midterm elections, over *four million* votes were cast, Ohio's second highest-ever vote total for a midterm election. *Id.*

The success of these elections was, among other things, due to Ohio's strong election administration and the State's pre-HB 458 "goal of maximizing voter participation in early and

absentee voting." Ex. 1-C, Press Release (Nov. 2, 2022). Over 3.5 million voters in 2020 cast their ballots early in-person, by mail, or using a drop box. *Id.* And on the eve of election day in 2022, 1.6 million voters requested an early in-person or mail ballot, representing an increase of 3.9% over the previous midterm record set in 2018. Ex. 1-D, Press Release (Nov. 7, 2022).

By all accounts, these historic elections took place without incident, without disruption, and without any failures in Ohio's election administration or security. Ex. 2, Perlatti Decl. ¶ 4; Ex. 1-A, Press Release (Nov. 15, 2022); Ex. 3, Titiunik Rep. at 51. In fact, the only problem officials identified in these elections was the long lines to cast in-person ballots on election day, an issue that has plagued Ohio elections for decades, particularly in areas with large Black populations. *See* Ex. 1-A, Press Release (Nov. 15, 2022) (reporting that "no Ohio counties reported any significant problems with the voting process" in 2022, but "a few counties had isolated equipment issues or longer-than-expected wait times"); *Obama for Am. v. Husted*, 697 F.3d 423, 426 (6th Cir. 2012) (recounting that, in the 2004 election, "Ohio voters faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day."); *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (recounting that in 2004, "[v]oters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting machines"). In 2005, the General Assembly amended the election laws to expand access to absentee and early voting to "prevent similar problems from disenfranchising voters in the future and to ease the strain of accommodating all voters on a single day." *Obama for Am.*, 697 F.3d at 426; *see also* Ex. 2, Perlatti Decl. ¶ 3. The new rules, which provided for early in-person voting and no-excuse absentee voting "expanded to all Ohio voters the right to vote absentee and the right to cast that vote in person . . . through the day before Election Day." *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 900 (S.D. Ohio), aff'd, 697 F.3d 423 (6th Cir. 2012); *see also* 2005 Ohio

Laws 40 (Sub. H.B. 234) (amending Ohio Rev. Code §§ 3509.02-3509.04).

B. Secretary LaRose and Ohio lawmakers have consistently and steadfastly defended the security of Ohio's elections.

While voter participation has skyrocketed in Ohio, voter fraud has remained virtually nonexistent. In 2022, just months before enactment of HB 458, Secretary LaRose described voter fraud in Ohio as "exceedingly rare." Ex. 1-E, Press Release (Sept. 7, 2022). The numbers bear this out. From 2000-2022, there were only 25 reports of voter misconduct in Ohio that resulted in convictions or guilty pleas, over a period in which more than 108 million votes were cast in statewide elections. Ex. 4, Mayer Rep. at 19. "In other words, just 0.00002% of votes, or less than 1 in 4 million, in the last 22 years involved possible voter misconduct." *Id*. These data reflect a simple fact: voter fraud in Ohio is vanishingly rare. Ex. 4, Mayer Rep. at 18. And voter impersonation—the only type of fraud addressed by strict voter-ID laws—is rarer still. *Id.* Nationwide research that has found a person is more likely to be struck by lightning than to impersonate another voter at the polls. Ex. 1-F, Brennan Center (Nov. 9, 2007).

So secure and well-administered are Ohio's elections that on election night in 2020, Secretary LaRose, in the midst of the pandemic, called Ohio's election exemplary in its transparency and stated he would defend the system against any accusations of unfairness or manipulation. Ex. 1-G, WCPO (Nov. 3, 2020). Since then, Secretary LaRose has been steadfast in his praise of the security, integrity, and accessibility of the state's elections. Ex. 1-H, Press Release (Nov. 9, 2022) (certifying the results of the 2022 election and remarking that "all 88 counties delivered another inclusive and secure election for the people of Ohio"). Even Ohio legislators who believe that widespread voter fraud tainted the results of the 2020 presidential election have agreed that this was not the case in Ohio. Ex. 1-I, Bloomberg (Nov. 1, 2022) (recounting how now-Senator JD Vance, "who has asserted that the 2020 presidential race was stolen from Donald

Trump, said he trusts the integrity of Ohio elections").

C. Despite holding Ohio out as an exemplar of accurate elections, lawmakers used myths about voter fraud to pass HB 458.

Even as they lauded Ohio's elections as honest and accurate, and in the wake of historic voter turnout, lawmakers sought to capitalize on unfounded election-fraud claims to make it more difficult for Ohioans—particularly young, elderly, homeless, and Black voters, as well as those serving in the military and others living abroad—to participate in future elections. In the spring of 2021, lawmakers introduced House Bill 294, a sweeping voter suppression bill purporting to fix a problem with fraud that legislators acknowledged did not exist. Representative Thomas Hall, a cosponsor of HB 294 and the primary sponsor of HB 458, introduced a resolution just two months earlier praising Ohio's elections. H.R. Con. Res. 5, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) ("In Ohio . . . [v]oter fraud and voter suppression are exceedingly rare" and Ohio is "a national model" in election security). HB 294 eventually stalled in the House; no further action was taken on the bill for more than a year and a half, after another election cycle. Ohio Election Security & Modernization Act, H.B. 294, 134th Gen. Assemb., Reg. Sess. (Ohio 2021).

In December 2022, after yet another election with historic turnout, lawmakers acted with renewed urgency to revive and rush legislation to make it harder to vote. At the tail end of the 134th legislative session, legislators transformed a modest 15-page bill altering the schedule of special elections into a sweeping 147-page omnibus bill that overhauled nearly every aspect of Ohio's electoral system. H.B. 458, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-22). They then rushed the bill through the General Assembly, leaving practically no time for public input. Ohio Leg., House Bill 458 Status, https://www.legislature.ohio.gov/legislation/134/hb458/status (last visited Oct. 20, 2023). HB 458's substantive provisions, in fact, did not receive *a single hearing* in a House Committee. *Id*. Fittingly, HB 458 was passed literally (and figuratively) in the dark of

night. Ex. 1-J, NBC 4 (Dec. 15, 2022). Governor DeWine signed HB 458 into law on January 6, 2023.

HB 458 includes five particularly restrictive provisions that impose new obstacles to casting a ballot:

- **Photo-ID Provision**: Imposes one of the most stringent photo-identification requirements in the country by eliminating Ohioans' existing ability to provide bank statements, utility bills, government checks, paychecks, and other government documents as acceptable forms of identification when voting in person;
- **Cure Restrictions**: Significantly advances the deadline during which voters must provide the documents or information necessary to ensure that their provisional ballots or rejected mail ballots are counted, making it far more likely that lawful voters will have their ballots rejected and not counted in the state's elections;
- **Mail-Ballot Restrictions**: Significantly advances the deadlines by which voters must submit applications for mail ballots and by which mail ballots must be received by the county boards of elections, making it harder for lawful voters to successfully vote by mail;
- **Drop Box Restriction**: Prohibits boards of elections from operating more than one drop box in their entire county; and
- **Monday Voting Prohibition**: Eliminates early voting the day before election day.

II. Procedural History

On the same day Governor DeWine signed HB 458, Plaintiffs Northeast Ohio Coalition for the Homeless ("NEOCH"), Ohio Federation of Teachers ("OFT"), Ohio Alliance for Retired Americans Educational Fund Inc. ("OARA"), Union Veterans Council ("UVC"), and Civic Influencers, Inc. ("Civic Influencers") filed a lawsuit to challenge the five provisions above (the "Challenged Provisions").[2] Plaintiffs' amended complaint alleges that, both independently and

[2] Shortly before signing HB 458, Governor DeWine signed HB 45, which contains provisions superseding HB 458's revisions to two sections of the election code. *See* Sub. H.B. 45, 134th Gen. Assemb. (Ohio 2022) § 735.10 ("The amendments made by this act to sections 3505.183 and 3509.05 of the Revised Code supersede any conflicting provisions of those sections, as amended by H.B. 458 of the 134th General Assembly."). With one exception relating to restrictions on ballot drop boxes, the differences between HB 458 and HB 45's superseding provisions are immaterial to Plaintiffs' claims. For sake of brevity, the body of this brief refers to HB 458 and HB 45's revisions to Ohio's election laws together as "HB 458."

cumulatively, the Challenged Provisions inflict severe or substantial burdens on Ohio voters' fundamental right to vote in violation of the First and Fourteenth Amendments to the U.S. Constitution. Compl. ¶ 138, ECF No. 13.[3] Plaintiffs further allege that the Challenged Provisions, both individually and cumulatively, impose disproportionately severe burdens on young, elderly, homeless, and Black voters in the state, as well as military servicemembers and other Ohioans living abroad, *id.*, and that there are no legitimate state interests that justify these burdens, *id.* ¶ 145.

After Plaintiffs filed their amended complaint, the Ohio Republican Party and two individuals intervened as defendants. Thereafter, the Parties exchanged discovery on an accelerated timeline to ensure any judgment in Plaintiffs' favor can be implemented in advance of the March 19, 2024 primary election. Rule 26(f) Rep. at 2, ECF No. 19.

LEGAL STANDARD

Summary judgment cannot be granted unless "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." Fed. R. Civ. P. 56(a) (emphasis added). "If the court determines that there are genuine disputes over material facts—'facts that might affect the outcome of the suit'—it must deny the motion for summary judgment." *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 542 (6th Cir. 2014) (quoting *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013)). In making that determination, the Court "must view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002).

[3] Plaintiffs filed their complaint on January 6, 2023, ECF No. 1, and subsequently filed an amended complaint, which among other things added Civic Influencers as a plaintiff, on January 27, 2023, ECF No. 13. References to Plaintiffs' "Complaint" herein refer to their amended complaint.

In this case, Plaintiffs' claims are evaluated under the *Anderson-Burdick* legal standard, which is inherently "fact-intensive, requiring the court to evaluate the severity of actual burdens and the importance of actual state interests." *Tennessee State Conf. of N.A.A.C.P. v. Hargett*, 420 F. Supp. 3d 683, 700-01 (M.D. Tenn. 2019). As a result, it is not unusual for cases of this sort to involve competing and genuine factual disputes as to material issues. Courts considering *Anderson-Burdick* challenges therefore often decline to grant summary judgment, recognizing the need to hear and weigh the evidence at trial to conduct the careful and intensive factual balancing that the test requires. *See, e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 710 (S.D. Ohio 2019) (per curiam) (refusing to consider *Anderson-Burdick* analysis before "hearing and weighing the evidence at trial"); *see also Green Party of Tennessee*, 767 F.3d at 548-49 (reversing and remanding grant of summary judgment against plaintiffs in *Anderson-Burdick* challenge "so that the district court may reassess both the extent of the plaintiffs' burden, and the state's asserted interests, on a more thoroughly developed record"); *Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020) (reversing and remanding grant of summary judgment because district court "neglected to perform the fact-intensive analysis required for the *Anderson-Burdick* balancing test" by relying on distinguishable precedent).

ARGUMENT

Defendants' motions for summary judgment should be denied. The Challenged Provisions, individually and collectively, impose severe or substantial burdens on Ohio voters that are unjustified by a sufficiently weighty countervailing state interest. At the very least, viewing the evidence in *any* light, let alone in the light most favorable to Plaintiffs, reveals a record replete with genuine disputes of material fact that cannot be resolved on summary judgment.

I. Plaintiffs have standing to challenge HB 458.

The Secretary, and only the Secretary, argues that Plaintiffs have failed to demonstrate that

they have suffered a concrete and particularized injury sufficient to confer standing. In so doing, the Secretary misstates the law and mischaracterizes the record.

A plaintiff organization has standing when it has suffered a "concrete and demonstrable injury to [its] activities—with the consequent drain on [its] resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see also Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) ("*NEOCH*"). This is a "fairly lenient" standard, *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 293 (6th Cir. 1997), and an organizational plaintiff may make this showing at summary judgment "by affidavit or other evidence [of] specific facts which" when "taken as true" demonstrate injury, *Am. C.L. Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 430 n.2 (6th Cir. 2011) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). There is also no "threshold of 'significance' of the injury to the organization that must be exceeded to render the harm sufficiently concrete under Article III." *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 806-07 (E.D. Mich. 2020) (quoting *Mote v. City of Chelsea*, 284 F. Supp. 3d 863, 887 (E.D. Mich. 2019)). "[E]ven unquantifiable and intangible harms may qualify as injuries in fact, and the impairment of the organizations' operations need only be 'perceptible' to suffice." *Id*; *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (an alleged injury "need not measure more than an identifiable trifle" because "the injury in fact requirement under Article III is qualitative, not quantitative, in nature.") (quotations and citations omitted).

A membership organization also "has standing to sue on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Am. Canoe Ass'n, Inc.*, 389 F.3d at 540 (quotations omitted). An organization need not identify a specific injured member to establish

associational standing. *Democratic Party of Virginia v. Brink*, 599 F. Supp. 3d 346, 355 (E.D. Va. 2022) (citation omitted). Where multiple plaintiffs pursue the same claim, moreover, standing need only be shown as to one of them for the matter to be justiciable. *NEOCH*, 837 F.3d at 623.

Each Plaintiff has standing to pursue their claims against the Challenged Provisions because those provisions frustrate each organization's mission, requiring them to divert resources away from their other activities. Plaintiff OFT also has associational standing on based on HB 458's injuries to its members. *See id.* at 624.

NEOCH: NEOCH's mission is to "eliminate the root causes of homelessness," and "[h]elping homeless people exercise their right to vote is one of NEOCH's top priorities." Ex. 5, Martin Decl. ¶ 3; *see also* Ex. 6, NEOCH Resp. to Interrog. No. 3; Ex. 7, Martin Tr. 15:5-9. The Challenged Provisions are in direct conflict with this mission, and as a result, NEOCH "has divert[ed] time and resources away from" its usual activities "toward educating homeless voters" on the new restrictions. Ex. 6, NEOCH Resp. to Interrog. No. 3; *see also* Ex. 5, Martin Decl. ¶ 3; Ex. 7, Martin Tr. 30:12-15.

The Secretary mischaracterizes the record by asserting that HB 458 has only forced NEOCH to change the content of its existing communications. This is incorrect. In fact, the Challenged Provisions have forced NEOCH to overhaul its efforts to mitigate the law's new "barriers that deter or prevent homeless people from exercising their right to vote." Ex. 6, NEOCH Resp. to Interrog. No. 3; *see also* Ex. 5, Martin Decl. ¶ 3. For instance, before HB 458, NEOCH could help homeless voters get "official correspondence" to satisfy Ohio's voter ID requirement. Ex. 5, Martin Decl. ¶ 4. Now, NEOCH guides homeless voters through the considerably more arduous process of obtaining a driver's license or State ID and NEOCH staff "continue to spend more time . . . coordinating mail delivery to homeless clients as a result of the increased need to

obtain necessary documentation to satisfy the state ID application process." Ex. 4, Martin Decl. ¶ 4; *see also* Ex. 6, NEOCH Resp. to Interrog. No. 3; Ex. 8, NEOCH Email (email from NEOCH staff member with information on obtaining IDs for homeless voters). Additionally, NEOCH must "revamp its previous voter organization efforts," which previously focused on providing homeless voters transportation to the polls on the Monday before election day. Ex. 6, NEOCH Resp. to Interrog. No. 3; *see also* Ex. 7, Martin Tr. 20:15-23. With Monday voting eliminated, NEOCH "has spent staff time identifying additional volunteers who can provide transportations on days other than the Monday before Election Day." Ex. 5, Martin Decl. ¶ 5; *see also* Ex. 6, NEOCH Resp. to Interrog. No. 3. Moreover, "because HB 458 makes it more difficult for its community to vote," Ex. 6, NEOCH Resp. to Interrog. No. 3, NEOCH has created new informational materials in 2023 and "devoted more staff time and trainings" on HB 458 to ensure NEOCH will be able to accurately assist voters. Ex. 5, Martin Decl. ¶ 6; *see also* Ex. 6, NEOCH Resp. to Interrog. No. 3; Ex. 9, Martin Timesheet (timesheet of NEOCH staff member showing hours worked on HB 458-related tasks in April and May 2023). "But for H.B. 458, NEOCH would spend more of its resources helping homeless people register to vote and travel to their board of elections to cast their ballots." Ex. 5, Martin Decl. ¶ 7. This is precisely the kind of "overhaul [to] the get-out-the-vote" strategy the Sixth Circuit recognized as a concrete injury to NEOCH before. *See NEOCH*, 837 F.3d at 624.

OARA: OARA's mission is "to protect the civil rights of retirees and ensure their economic, social, and medical health." Ex. 10, Wernet Decl. ¶ 3; *see also* Ex. 11, OARA Resp. to Interrog. No. 3; Ex. 12, Wernet Tr. 24:1-2. OARA's activities usually include "advocacy related to preserving pensions, developing home- and community-based care, improving quality and safety standards in nursing home care, [and] ensuring the fiscal future of Social Security and

Medicare" and more. Ex. 11, OARA Resp. to Interrog. No. 3; *see also* Ex. 10, Wernet Decl. ¶ 3. But because HB 458 makes it harder for retirees to vote, OARA has "not spent anywhere near the amount of time or energy" on those issues because "voting rights has been a priority, above everything else." Ex. 12, Wernet Tr. 44:12-16; *see also* Ex. 10, Wernet Decl. ¶ 4.

For example, "OARA planned this year to advocate for local ballot initiatives like improving school levies and senior support services." Ex. 10, Wernet Decl. ¶ 5. But because of HB 458, "OARA has been forced to divert time and resources to educating its members about the law's voting restrictions and ensuring that retirees will be equipped to overcome them." *Id.* For instance, OARA is "concerned that H.B. 458's strict voter-ID requirement will lead to longer voting lines for those individuals wishing to vote in person," and "many of OARA's members have health issues that will be exacerbated" by these long lines. As a result, OARA "will need to ensure that its members understand the increased health risks they may face" if they vote in person. *Id*. ¶ 8. To alleviate these health concerns, and because "many of OARA's members are disabled and homebound" and cannot vote in person, OARA leaders encouraged its members to vote by mail. *Id*. To ensure its members understand the shortened deadlines HB 458 imposes on voting by mail, OARA distributed print and email newsletters and offered presentations on mail-in voting. *Id*. OARA has also devoted extra space in eight of its monthly newsletters since January 2023 to explaining the ramifications of the Challenged Provisions. Ex. 10, Wernet Decl. ¶ 6.; *see also* Ex. 12, Wernet Tr. 42: 20-25, 43:1-10; Wernet Decl. ¶ 8. As a result, OARA's newsletters are not "as attentive to the legislative issues" that would normally be a priority. Ex. 12, Wernert Tr. 44:4-11; *see also* Ex. 10, Wernet Decl. ¶ 6. OARA also adopted a resolution in 2023 to support voter education and outreach "about the new strict voter ID law and changes in voting procedures resulting from . . . HB 458." Ex. 13, OARA Res.; *see also* Ex. 10, Wernet Decl. ¶ 9. These costs

will persist: "OARA will need to continue to divert resources—and more of them—to counteract the effects of H.B. 458 in 2024 because it is a presidential election year with higher voter turnout." Ex. 10, Wernet Decl. ¶ 10. OARA operates with a very limited budget and spending resources on these activities comes "at the expense of devoting resources to advocating for legislative advocacy around retirement security." Ex. 10, Wernet Decl. ¶ 10; *see also* Ex. 11, OARA Resp. to Interrog. No. 3.

Defendants' assertion that OARA has not demonstrated standing because it did not develop its educational materials itself is plainly wrong. SOS's Br. at 9. OARA's newsletters—the primary means by which OARA communicates with retiree affiliate leadership—are its own product, Wernet Decl. ¶ 6, and OARA's incorporation of existing materials does not diminish the time and resources it takes to analyze, edit, package, and deliver such information for OARA's unique audience. *See, e.g.*, Ex. 14, OARA Feb. 2023 Newsletter.

Union Veterans Council: UVC's policy priorities include "supporting veterans and working families in achieving economic freedom and security" and "furthering the political engagement of active-duty and retired service members." Ex. 15, UVC Resp. to Interrog. No. 3; *see also* Ex. 16, Attig Decl. ¶ 3. UVC usually works toward these priorities by, for example, disseminating information about healthcare benefits and workforce development programs. Ex. 17, Attig Tr. 14:21-23; Ex. 16, Attig Decl. ¶ 7. Because the Challenged Provisions burden military members' political engagement, however, UVC has been forced to "budget[] additional resources to assist veterans and their families vote in elections in 2024." Attig Decl. ¶ 4.

To counteract HB 458's impact on its community, UVC will need "to prioritize Ohio among the states in which it operates in 2024," "spend more of its resources on voter-protection than it otherwise would," and "divert its resources from other states." Ex. 16, Attig Decl. ¶¶ 7-8.

In particular, UVC will add to its usual activities "a coordinated effort . . . to provide active-duty and retired service members with additional information necessary for them to cast their ballots" in time to be counted. Ex. 16, Attig Decl. ¶ 4, 5; *see also* UVC Resp. to Interrog. No. 3. To ensure its constituents, who are often deployed overseas, are not disenfranchised by HB 458's restrictions, UVC will "need to identify and educate veterans, National Guard members, and their families" about HB 458's restricted mail ballot application and receipt deadlines. Ex. 16, Attig Decl. ¶ 5; *see also* Ex. 15, UVC Resp. to Interrog. No. 3; Ex. 17, Attig Tr. 56:16-23, 57:13-18 (explaining that UVC will "do whatever it takes to make sure [veterans] know how to vote"). Educating its veteran members both at home and abroad will be no small feat and will divert significant resources away from UVC's work ensuring veterans' access to healthcare, retirement benefits, and employment rights. Ex. 16, Attig Decl. ¶ 7.

Ohio Federation of Teachers: OFT's mission is "to advocate for sound, commonsense public education policies." Ex. 18, OFT Resp. to Interrog. No. 3; Ex. 19, Cropper Decl. ¶ 3. The Challenged Provisions make it "more difficult for OFT and its members to associate to effectively further their shared political goals." Ex. 18, OFT Resp. to Interrog. No. 3. As a result, HB 458 has forced OFT "to overhaul its voter-communication activities to ensure that its members understand the changes made by the law and can confidently vote despite the law's restrictions." Ex. 19, Cropper Decl. ¶ 4. Since the law's passage, OFT has hired new staff to handle increased communications around the Challenged Provisions and is spending "more money than [they] have ever spent before" this year on digital communications due to changes made by HB 458. Ex. 10, Cropper Tr. 30:11-33:14; Ex. 19, Cropper Decl. ¶ 4. Due to HB 458's strict Photo ID Provisions, OFT is specifically allocating money for voter identification education this year, which requires shifting resources away from its other priorities and increasing its budget. Ex. 10, Cropper Tr.

27:13-28:11. Because the strict Photo ID Provisions will make voting in person more difficult for OFT's members, for example, OFT now "encourage[s] its members to vote by mail." Ex. 10, Cropper Decl. ¶ 6. And due to HB 458's imposition of shorter deadlines to vote by mail, OFT "has diverted additional resources to follow-up communications with its members . . . to ensure that they submit their absentee ballots on time." Ex. 10, Cropper Decl. ¶ 6. OFT "has also developed new text-messaging programs, created new flyers, hosted increased number of information sessions, and launched a new direct-mail educational program to help its members navigate HB 458's requirements." Ex. 10, Cropper Decl. ¶ 4; *see also* Ex. 18, OFT Resp. to Interrog. No. 3. OFT has already "implemented several of its new programs responsive to H.B. 458" ahead of Ohio's August special election this year, and "will continue to develop these resources in the 2024 election cycle." Ex. 10, Cropper Decl. ¶¶ 4, 7. OFT expects to "divert even more resources in 2024—a presidential election year in which many more of OFT's members will vote" and plans to "ramp up" its new programs "to accommodate the increased voting activity of its members." Ex. 10, Cropper Decl. ¶ 8. Contrary to the Secretary's assertions, these new and additional expenditures are being spent in direct response to HB 458.

OFT also has standing to bring this lawsuit on behalf of its members. OFT's individual members have standing because HB 458 "imped[es]" their "ability to vote." particularly its retiree members who are "are less likely to have a current government-issued ID, and many have health concerns that make it difficult to travel to drop boxes or to polling locations on election day." Ex. 18, OFT Resp. to Interrog. No. 3, 7; *see also* Ex. 19, Cropper Decl. ¶ 9. OFT's interest in reducing barriers to vote is no doubt germane to its mission. OFT relies on its members' ability to vote to advance their shared interest in "sound, commonsense public education policies." Ex. 18, OFT Resp. to Interrog. No. 3; Ex. 19, Cropper Decl. ¶ 3. And there is no need for OFT's members to

separately participate in this suit.

Defendants do not meaningfully dispute OFT's associational standing. The Secretary's single sentence on the matter, suggesting the record lacks evidence to support associational standing, does not address OFT specifically, and is insufficient to rebut the evidence adduced above.

Civic Influencers: Civic Influencers' mission is to "increase youth, immigrant, Black, Indigenous, Hispanic, and disabled civic voting power." Ex. 21, CI Resp. to Interrog. No. 3; *see also* Ex. 22, Thorne Tr. 35: 4-25, 26:1-4; Ex. 23, Thorne Decl. ¶ 3. Civic Influencers' activities typically include "engag[ing] in outreach and survey programs to increase voting participation" and "conducting research on how best to serve its constituents." Ex. 22, CI Resp. to Interrog. No. 3; *see also* Ex. 23, Thorne Decl. ¶ 3 Because HB 458 imposes barriers to the political participation of its community, Civic Influencers has been forced to divert resources away from "conducting research studying the best ways to engage young voters" and pursuing its other mission priorities across the country, Ex. 21, CI Resp. to Interrog. No. 3; *see also* Ex. 23, Thorne Decl. ¶ 3, towards ensuring that young Ohio voters are not disenfranchised by the new law, Ex. 23, Thorne Decl. ¶ 4. "Civic Influencers is a national organization with strategic priorities that, [ahead of] 2023, caused it to reduce its presence in Ohio." Ex. 23, Thorne Decl. ¶ 4; *see also* Ex. 21, CI Resp. to Interrog. No. 3. But HB 458 upset Civic Influencers' priorities, forcing it to "dedicate additional, unplanned resources" to Ohio, diverted away from work in other states, to fund campus representatives, new research on how best to increase youth political participation, and additional full-time staff. Ex. 21, CI Resp. to Interrog. No. 3; *see also* Ex. 23, Thorne Decl. ¶ 4; Ex. 22, Thorne Tr. 53:23-25, 54:1-18 (explaining that Civic Influencers recruited an organizer "to focus on Ohio" in pursuit of "rebuild[ing] an infrastructure that [it] let go because [it] didn't expect HB 458"). These diverted

resources will also support digital and peer-to-peer organizing on campuses and informing marginalized young people in Ohio about HB 458's restrictions. Ex. 23, Thorne Decl. ¶ 4-5. To prevent HB 458 from suppressing youth voter turnout in Ohio, Civic Influencers also spent additional resources to update and accelerate the launch of its Issues and Voting Guides, which reflect its research on voter engagement and the voting process. Ex. 23, Thorne Decl. ¶ 4. Indeed, Civic Influencers produced an Ohio-specific voting guide ahead of this year's voter registration deadline. *Id.*

Civic Influencers is also "concerned that HB 458's strict photo-ID law will make voting more difficult for young voters," many of whom only have a student ID and lack the types of IDs necessary to vote under HB 458 or the documentation required to do obtain them. *Id.* ¶ 7. And HB 458's cure restrictions will affect many college-aged voters who work or have other caretaking responsibilities that limit—or eliminate—the time they have available to cure technical difficulties in their ballots under HB 458. *Id.* ¶ 8. To counteract this effect, Civic Influencers will launch a "cure your ballot" project in 2024 for young people to get emergency help curing ballots. *Id.* ¶ 9. Counteracting HB 458's impact on its community is a "heavy lift" because it is felt most by "lower income young people and people of color, especially those enrolled in community colleges, trade, technical and vocational schools, and four year colleges and universities," who make up Civic Influencers' core constituency. *Id.* Civic Influencers expects that HB 458 "will continue to hijack [its] strategic priorities and planned activities in other states" in the lead-up to the 2024 election, as Civic Influencers "continue[s] to engage in these voter education and mobilization activities, at the expense of its crucial research work." Ex. 23, Thorne Decl. ¶ 8.

Defendants do not contest that Civic Influencers must spend resources in Ohio due to HB 458. Rather, Defendants suggest that these expenditures are simply business as usual. *See* SOS's

Br. at 10-11. But the record tells a very different story. HB 458 has caused Civic Influencers to adopt a radically different strategy than the one it had planned, one that has already required diverting resources from its planned priorities. *See, e.g.*, Ex. 23, Thorne Decl. ¶ 4. On this record, Civic Influencers' standing is exceedingly clear.

* * *

In sum, the record reveals evidence of textbook organizational injuries and leaves no doubt that at least one Plaintiff possesses standing. *See NEOCH*, 837 F.3d at 624 (finding standing by emphasizing that the plaintiffs were challenging a newly enacted law whose changes meant the organization had to overhaul its get-out-the-vote strategies); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (collecting cases holding that an organization has standing when in response to a challenged election statute, it changes its strategy to encourage voting or diverts resources to ensure its constituents can vote).

The Secretary's effort to rebut this conclusion relies on neither fact nor law. *First*, the Secretary bizarrely asserts that Plaintiffs lack standing because they are not paying their litigation fees. But Plaintiffs' basis for standing does not rest on their litigation expenses, nor could it. *See Fair Hous. Council, Inc. v. Vill. Of Olde St. Andrews, Inc.*, 210 Fed. App'x 469, 475 (6th Cir. 2006) (requiring a plaintiff to show some injury that is independent of the costs of litigation). *Second*, the Secretary contends that Plaintiffs are not injured because their efforts to combat HB 458's harmful effects are consistent with their missions. But the Supreme Court rejected this argument in *Havens* where it found an organization whose mission was to ensure housing equality had standing where a law impaired its ability to pursue that very mission. *See Havens Realty Corp.*, 455 U.S. at 379; *see also Common Cause Indiana*, 937 F.3d at 954-55 (rejecting precisely the same argument the Secretary makes here by relying on *Havens*). *Third* and relatedly, the Secretary

appears to suggest that to support standing Plaintiffs must show their diversion of resources itself impairs their mission. Not so. "[A]n organization has direct standing to sue where it establishes that *the defendant's behavior* has frustrated its mission and caused it to divert resources *in response to* that frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) (emphasis added). That is exactly what the record reveals occurred here. *See supra* Part I.

Finally, to the extent the Secretary's interpretation of the record has sowed any doubt as to Plaintiffs' standing, it would create no more than a genuine dispute of material fact, requiring the Court to weigh Plaintiffs' testimony and documentary evidence supporting their injuries, the resolution of which is inappropriate for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are [fact-finder] functions, not those of a judge.").

II. HB 458 imposes severe burdens on Ohio voters in violation of the U.S. Constitution.

"[V]oting is of the most fundamental significance under our constitutional structure," *NEOCH*, 837 F.3d at 630, and HB 458 threatens the right to vote in Ohio by imposing new and significant barriers to accessing the franchise. Restrictive election laws face careful constitutional scrutiny, involving an intensely fact-based analysis. Courts assessing a challenge to a law burdening the right to vote "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

"[T]he level of scrutiny into a challenged election law varies based on the severity of its constraint on voting rights." *NEOCH*, 837 F.3d at 631. Where the record shows that a challenged

provision imposes "[s]evere restriction[s]," the Court must consider whether the challenged provisions are "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). Regulations that pose an intermediate burden on voters require courts to apply the "flexible standard," which entails weighing "the burden on the plaintiffs . . . against the state's asserted interest and chosen means of pursuing it." *NEOCH*, 837 F.3d at 630-31.[4] And "minimally burdensome and nondiscriminatory regulations inevitably result in a less-searching examination." *Id.* at 631 (citation omitted).

The Challenged Provisions of HB 458 individually and collectively impose severe burdens on Ohio voters demanding the most searching constitutional scrutiny. Because HB 458 is not narrowly drawn, and because Ohio's stated interests are neither compelling nor supported by HB 458, Defendants cannot prevail as a matter of law. But even if the burdens HB 458 imposes are intermediate instead of severe, Defendants' failure to identify a legitimate interest supported by HB 458 dooms their motions.

At most, Defendants identify genuine disputes of material fact that cannot be resolved on summary judgment. The Parties' competing fact and expert witnesses, along with the documentary evidence in the record, provide this Court hotly contested accounts of the effects each of the Challenged Provisions will have on Ohio voters and how those provisions combine to raise yet more burdensome obstacles to the polls. And Plaintiffs sharply dispute Defendants' alleged interests in the laws, based in part on evidence adduced from Defendants' own statements and

[4] Intervenor-Defendants seem to suggest the Supreme Court has disavowed an intermediate tier of scrutiny for *Anderson-Burdick* claims. Interv.'s Br. at 28-29. But in *Crawford v. Marion County Election Board*, the Court expressly endorsed "the 'flexible standard' set forth in *Anderson*." 553 U.S. 181, 190 n.8. Intervenor-Defendants also argue that the Court cannot consider the burden HB 458 places on a subset of voters. Interv.'s Br. at 8 & n.6. But once again *Crawford* disavowed that approach by expressly considering whether the challenged law had a disproportionate effect on certain voters in the state. *See* 553 U.S. at 199-201.

witnesses. These disputes are genuine, they are material, and they therefore cannot be decided on summary judgment. Defendants' motions should be denied.

A. Photo ID Provision

HB 458's dramatic changes to Ohio's Photo ID Provision impose a severe burden on Ohio voters and disproportionately burden Ohio's Black, young, elderly, and homeless voters. For over a decade, Ohioans appearing at polling places to vote in-person have been able to vote upon the showing of either: (1) a current and valid photo ID; (2) any form of unexpired military identification, issued by the United States or Ohio, that contained the person's name, address, and photograph; (3) a copy of a current utility bill; (4) a copy of a bank statement; (5) a copy of a government check; or (6) a copy of any other "government document" except for a notice of voter registration mailed by a board of elections. Ohio Rev. Code § 3505.18(A)(1) (2006). The prior law also permitted those who lacked these forms of ID to establish their identification in a provisional ballot by providing the last four digits of their social security number. *See id.* § 3505.183(B)(3)(d) (2016) (instructing boards of elections to count provisional ballots featuring last four digits of voter's social security number).

HB 458 severely limits the ways in which voters can prove their identity at the polls. First, HB 458 amends § 3505.18 to state that the only form of acceptable identification for in-person voting is "photo identification." Second, it amends subsection (A)(1) of § 3501.01 to define "photo identification" as an unexpired Ohio driver's license, state identification card (or interim state identification form), passport, U.S. military card, Ohio national guard identification card, or U.S. Department of Veterans Affairs identification card. If a voter fails to show one of these limited forms of identification, they will be forced to cast a provisional ballot which will not be counted unless the voter returns to the board of elections and provides the required identification. *Id.* § 3505.181(A)(2), (B)(7)(b) (as revised by HB 458).

The Photo ID Provisions will severely burden Ohioans' ability to vote. Plaintiffs' expert Dr. Rocio Titiunik showed that at a *minimum* 180,000 Ohioans lack the necessary ID to vote under HB 458 and will accordingly be disenfranchised unless they incur the substantial costs that accompany obtaining valid ID. Dr. Titiunik is a Professor in the Department of Politics at Princeton University and is an expert in political science, political economy, and applied statistics, with a particular focus on the development and application of quantitative methods to the study of political institutions. Ex. 3, Titiunik Rep. at 4-5. Dr. Titiunik applied her considerable expertise to evaluate the burdens, if any, that HB 458 imposes on Ohioans. She emphatically concluded that it does.

Analyzing data provided by the Ohio Bureau of Motor Vehicles, Dr. Titiunik determined that there are nearly 400,000 eligible voters in Ohio who lack either a driver's license or a State ID required to vote under HB 458. Ex. 24, Titiunik Supp. Rep. at 5-6. To determine how many of those voters lack *any* valid ID under HB 458, Dr. Titiunik then estimated the number of those nearly 400,000 voters who possess neither a passport nor military ID. *Id.* at 6. Using an exceptionally conservative estimate of these figures—one that very likely *undercounts* the number of Ohioans without valid ID—Dr. Titiunik concluded that between *181,004* and *239,586* eligible voters in Ohio lack the necessary ID to vote under HB 458. *Id.* at 7; *see also* Ex. 25, Gordon Decl. ¶ 3 (explaining many veterans, including Mr. Gordon, lack military ID). The numbers speak for themselves. Unless they are able to spend the time and resources required to obtain a valid ID, roughly two hundred thousand voters will be unable to vote in the upcoming 2024 election.

Dr. Titiunik, using two different methodologies, showed that these burdens will fall disproportionately on Black and young Ohioans. In the first methodology, the census tract measure, Dr. Titiunik was able to analyze the race of a voter identified in data received from seven

Ohio counties by using the percentage of the population that identifies as Black in the census tract where the voter lives. Ex. 3, Titiunik Rep. at 16-18. In the second methodology, Dr. Titiunik imputed race to voters identified in the county data using the Bayesian Improved Surname Geocoding ("BISG") method, a peer-reviewed and widely used tool among political scientists and courts to estimate an individual's race. *Id.*; *see, e.g.*, *United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 613 (E.D. Mich. 2019) (denying motion to exclude expert testimony that relied on BISG analysis). Both methodologies led to the same conclusion: Black Ohioans are meaningfully more likely to lack valid ID under HB 458 than white voters.[5] Ex. 3, Titiunik Rep. at 18-23. Dr. Titiunik separately analyzed the association between age and ID possession by identifying the date of birth of individuals in the county data. *Id.* at 23-25. In so doing, Dr. Titiunik concluded that young voters—25 or younger—disproportionately presented now-invalid ID as compared to older eligible voters. *Id.* In other words, Black and young voters are disproportionately likely to fall within the hundreds of thousands of voters in Ohio who do not possess valid ID under HB 458.

Dr. Titiunik's quantitative assessment of the Photo ID Provision is supported by Dr. Kenneth Mayer's qualitative assessment. Dr. Mayer has a Ph.D. in political science from Yale University and has been on the political science faculty at the University of Wisconsin-Madison since 1989, where he has studied and published dozens of articles on election administration. Ex. 4, Mayer Rep. at 3-5. Dr. Mayer measured the burdens HB 458 imposes on eligible voters in Ohio by using a cost-of-voting analysis, a peer reviewed methodology that has been used for over 60 years by social and political scientists to measure the impact of voting laws. *Id.* at 5-7. Based on his decades of experience on election administration and the deep academic literature on photo ID

[5] Dr. Titiunik's statistical analysis on race is supported by self-reporting in the American National Election Studies national survey, which shows that Black Americans are *more than twice* as likely to report having neither a driver's license, state ID, nor a passport. Ex. 3, Titiunik Rep. at 22-23.

laws, Dr. Mayer affirmed Dr. Titiunik's conclusion that HB 458's Photo ID Provision will impose severe burdens on eligible voters in Ohio.

Dr. Mayer explained that strict voter-ID laws, like the one implemented by HB 458, "reduce turnout and have larger effects on identifiable subpopulations, particularly minorities, the elderly, and groups with lower incomes and education." *Id.* at 7. The "immediate consequence of voter-ID laws" like HB 458, Dr. Mayer explained, "is that they prevent otherwise qualified individuals from voting, a conclusion verified by a wide range of research using multiple methodologies." *Id.* at 9. As a result of these burdens, Dr. Mayer concluded that it is all "but certain that the number of provisional ballots cast and rejected for ID-related reasons will increase in" the 2024 elections "because of HB 458, and some additional number of eligible individuals will not even try to vote because they lack a qualifying ID." *Id.* at 12.

It is not enough to assume that voters can simply obtain valid ID ahead of the 2024 elections. As Dr. Mayer explained, obtaining valid ID "presents what could be insurmountable burdens for in-person voting." *Id.* Consider just some of the hurdles a voter must clear. Someone seeking a U.S. Passport will have to pay either $165 (for a passport) or $65 (for a passport card), not including the cost of a passport photo, and may have to wait several months for the passport to arrive. Obtaining a passport itself, moreover, requires proof of identity and citizenship (such as a birth certificate, consular report of birth abroad, and/or one of a limited set of acceptable IDs), documents unlikely to be in the possession of someone who lacks valid ID in the first place, *id.* at 12-14. Someone seeking a driver's license faces many of the same burdens. A license costs between roughly $20 and $48 and requires the applicant to visit a BMV location at least three times, including to take and pass a written test and driving examination (for individuals who have not previously held a license), *id.*; Ex. 26, BMV Tr. 125.9-11.

Ohio's so-called "free" state ID does not resolve these issues. Ohioans cannot obtain that ID without presenting famously difficult documents to obtain: an original or certified birth certificate, a U.S. passport, military identification, certificate of naturalization or citizenship, a consular report of birth abroad, marriage certificate, divorce decree, and/or a court order for someone whose name has changed, Ex. 4, Mayer Rep. at 12-14. Many if not all of these documents require a monetary fee to obtain. In Ohio, for example, a birth certificate costs $21.50. *Id.* Any suggestion that such fees are trivial is belied by the data, which shows that "[e]ven very small increases in direct costs," such as the cost of buying a stamp, "can have huge effects on voter turnout." *Id.* at 13. In this way, HB 458 imposes disproportionate burdens on homeless and low-income Ohioans who may lack the resources to obtain valid ID. *See* Ex. 6, NEOCH Resp. to Interrog. No. 3 ("[H]omelessness poses a severe obstacle to obtaining identification documents, including . . . the supporting documentation required to obtain" the types of ID required by HB 459); Ex. 23, Thorne Decl. 7 (noting that many college-aged voters lack the time or means necessary to obtain a qualifying ID or the types of documentation to do so); Ex. 12, Wernet Tr. 55:19-24 (explaining that many elderly voters have given up their driver's license and thus lack a state-issued photo ID); Ex. 18, OFT Resp. to Interrog. No. 7 (OFT's retired members "are less likely to have a current government-issued ID").

These severe burdens levied by the Photo ID Provision hide indirect though no less severe consequences of the law. Research shows that voter-ID laws like HB 458 create "administrative burdens that are difficult for voters to understand and overcome." Ex. 4, Mayer Rep. at 14. The Photo ID provision is only likely to exacerbate this empirical finding. As Dr. Mayer explains, "HB 458 presents voters with a confusing set of options." *Id.* at 14-15. For instance, while some IDs permitted under HB 458 have addresses, many others do not. *Id.* "Combined, these features are

likely to cause voter confusion and lead to voters presenting now-invalid forms of ID or to wrongly conclude that they lack the necessary ID to vote." *Id.*

Ohio's 2023 August special election, which involved a dramatic increase in the State's rate of rejected provisional ballots, proved Drs. Titiunik and Mayer's conclusions true. In Ohio's 2022 general election, Cuyahoga County rejected 795 of 9,201 (or 8.64%) of provisional ballots. Ex. 2, Perlatti Decl. ¶ 11. In the 2023 August special election, however, Cuyahoga County's rejection rate *more than doubled*. *Id.* Of the 4,449 provisional votes cast, 786 (or 17.67%) were rejected. *Id.* As Director Perlatti explained, the culprit was the Photo ID Provision. Ex. 2, Perlatti Dec. ¶ 16 ("These results indicate to me that the increase in the percentage of provisional ballots rejected for 'missing ID' is connected to HB 458's restrictive voter ID law."). Prior to HB 458, "missing ID" was not a common reason for rejecting a provisional ballot. In the 2023 August special election, however, "missing ID" became *four* times more common, making it the *second* most common reason for rejecting provision ballots. *Id.* at ¶¶ 13-14. Cuyahoga County is not an outlier. Statewide provisional ballot data also shows that the rate of rejected provisional ballots *more than doubled* and "missing ID" became over *three times* more likely to be the reason for a ballot's rejection. *Id.* at ¶ 15. The burdens imposed by the Photo ID Provision are stark. Even in an off-year August special election, *thousands* of voters were likely disenfranchised as a result of HB 458.

Dr. Titiunik's and Dr. Mayer's core conclusions, that the Photo ID Provision will burden Ohio voters, and the lessons of Ohio's 2023 August special election data, were not rebutted by Defendants' experts. Neither Dr. Janet Thornton nor Dr. Karen Owen testified that the Photo ID Provision will not burden Ohioans. In fact, they did not even attempt to analyze that question. *See generally* Ex. 27, Thornton Rep.; Ex. 28, Owen Rep. And Dr. Thornton, Defendants' quantitative expert, neither attacked Dr. Titiunik's methodology for assessing the Photo ID Provision'

disproportionate impact on Black and young voters nor Dr. Titiunik's or Dr. Mayer's ultimate conclusions that those provisions will burden eligible voters in Ohio. Ex. 29, Thornton Tr. 52:3-7 (Q: "In your report do you conclude that HB 458 does not burden voters?"; A: "I'm not making a conclusion.").

If Defendants' experts succeed in anything it is to create genuine disputes of material fact unsuited to resolution at summary judgment. Without doing any affirmative analysis themselves, Dr. Thornton and Dr. Owen, for example, attempt to raise purported concerns with how Dr. Titiunik and Dr. Mayer reached certain conclusions in an attempt to undermine the burdens they found with respect to the Photo ID Provision. *See, e.g.*, Ex. 27, Thornton Rep. at 5; Ex. 28, Owen Rep. at 3. Whether to grant Drs. Thornton's and Owen's anemic expert testimony any weight, and then how much weight, requires this Court to assess the experts' credibility and competing factual claims, methodologies, and ultimate conclusions, a matter that can only be accomplished through trial. *See Hy-Ko Products Co. v. Hillman Grp., Inc.*, No. 5:08 CV 1961, 2012 WL 4461686, at *2 (N.D. Ohio, Eastern Division, Sept. 25, 2012) (holding that "fact disputes and [expert] credibility determinations preclude summary judgment").

Rather than engage with the evidence, Defendants contend that the fact-intensive inquiry required here is essentially foreclosed and preordained by the fact-intensive inquiry of another case about another voter ID law in another state. Defendants rely in the main on *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a case in which the Supreme Court upheld an Indiana voter ID law, for the proposition that HB 458 must be lawful as well. *See, e.g.*, SOS's Br. at 12-13; Interv.' Br. at 9-10. But Defendants cannot short circuit the *Anderson-Burdick* analysis, which requires a fact-intensive appraisal of the specific law at issue and its interactions with the relevant population of eligible voters. *See, e.g., Burdick*, 504 U.S. at 433.

Crawford itself illustrates the point. The record in *Crawford* was devoid of any evidence of "the number of registered voters without photo identification" and any evidence to support the plaintiffs' contention that certain voters in the state were disproportionately affected by the law. *See Crawford*, 553 U.S. at 200-01. The district court in *Crawford* also found "utterly incredible and unreliable" the plaintiffs' expert analysis of the burdens imposed by the law. *Id.* at 187, 200. And the Supreme Court's decision rested in no small part on the fact that "if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted" if the voter "execute[s] [a] required affidavit." *Id.* at 199. The Photo ID Provision here provides no such safety valve, leaving eligible voters without ID no way to cure their ballot with incurring the costs of obtaining a valid ID within the State's now shortened cure period. And Dr. Titiunik's analysis, which relies on well-worn and widely accepted empirical measures, faces no such issues and reliably and conservatively estimates, without meaningful rebuttal, that hundreds of thousands of eligible voters in Ohio lack valid ID under the law, to say nothing of the law's disproportionate impact on Black and young voters. Dr. Mayer further describes, based on decades of empirical research, the costs the Photo ID provision will have on eligible voters in the state. In the face of this distinguishing evidence, *Crawford* is not the magic bullet Defendants hope. Other courts agree. *See, e.g.*, *Fish v. Schwab*, 957 F.3d 1105, 1128 (10th Cir. 2020) (distinguishing *Crawford* and striking down voter ID law because plaintiffs' case did not suffer from the *Crawford* plaintiffs' "scant eviden[tiary]" record). It is no matter, therefore, that other courts in other jurisdictions have upheld other voter ID provisions. The relevant question before the Court is whether *this* Photo ID Provision, in *this* context, weighed against *these* state interests can withstand constitutional scrutiny. The answer is emphatically "no."

In fact, *Crawford* rebuts rather than reinforces Defendants' arguments. Defendants attempt

to minimize the burdens imposed by the law by insisting that most Ohioans already possess valid ID. But the Supreme Court was plain in *Crawford* that "the fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under [the Court's] reasoning." *Crawford*, 553 U.S. at 198. Defendants seek to sidestep the force of Plaintiffs' evidence altogether by asserting that only burdens that affect *registered* voters are relevant for the purposes of *Anderson-Burdick*. Wrong again. The Supreme Court was clear in *Crawford* that "[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of the" law. *Id*. at 198. That is precisely the analysis Plaintiffs' experts performed and which emphasizes the severe burdens the Photo ID Provision will impose on eligible voters in Ohio, and on Black and young voters in particular. And while Defendants try to undermine the burdens caused by the Photo ID Provision by pointing to the prospect of a "free" state ID and other means of casting a ballot without ID, the unrebutted record shows that Ohio's state ID is "free" in name only, *see supra* Part II.A, and as thoroughly explained below, HB 458 also makes it more difficult to vote using alternative mechanisms that do not require ID, *see infra* Part II.B-F.

Finally, Defendants allege that Plaintiffs failed to demonstrate that HB 458 burdens voters because they have not identified a specific voter who has been disenfranchised by the law. *See, e.g.*, SOS's Br. at 20; Interv.'s Br. at 15. But that is not the standard. Indeed, in *Crawford*, the Supreme Court rejected the plaintiffs' challenge not because they failed to identify a specific voter—indeed, the record suggests they hadn't—but because they had failed to provide evidence of the number of Indianans likely to lack ID under the law, a problem Plaintiffs here decidedly do not have. *See Crawford*, 553 U.S. at 200-02. And the Court was clear that it had not developed a "litmus test for measuring the severity of a burden that a state law imposes on . . . an individual

voter, or a discrete class of voters." *Id.* at 191. Nor could Defendants' position be the test—plaintiffs need not wait for a law to strip them of their most fundamental right before challenging an unconstitutional voting law. *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.").[6]

In sum, the record demonstrates that the Photo ID Provision imposes severe burdens on Ohioans. Defendants do not grapple with any of this evidence. Their tact instead is to ignore the fact-intensive inquiry required by *Anderson-Burdick* and to minimize both the unrebutted evidence in the record and the factual disputes among the experts. Neither approach is sufficient to meet the summary judgment standard.

B. Mail Ballot Provisions

HB 458 severely burdens eligible voters in Ohio by sharply restricting access to its widely used mail ballot system. These burdens will fall disproportionately on Black, young, and elderly voters, as well as voters living overseas. Ex. 3, Titiunik Rep. at 29-34, 38-41; Ex. 4, Mayer Rep. at 17.

The Mail Ballot Restrictions dramatically shorten two different deadlines governing the mail-ballot process: (1) the date by which a mail ballot must reach the board of elections (the "Receipt Deadline"), and (2) the deadline to submit an application for a mail ballot (the "Application Deadline").

***Receipt Deadline*:** Prior to HB 458, valid mail ballots could be counted as timely so long as they were postmarked the day before election day and received by the board of elections ten

[6] Defendants make a version of these same arguments throughout their brief in an attempt to minimize the burdens HB 458 imposes on Ohioans. Plaintiffs' responses here apply to each challenged provision.

days after election day. Ohio Rev. Code § 3509.05(B)(1) (2016). The Mail-Ballot Restrictions, however, advance the deadline for boards of elections to receive all mail ballots by *nearly a week*, prohibiting them from counting any mail ballot arriving more than four days after election day. *Id.* § 3509.05(D)(2)(a). That new deadline applies not only to ballots mailed domestically but also to ballots submitted by military service members and other Americans living overseas, *id.* § 3511.11(C)(2), who may sign their ballot as late as the close of polls on election day, *id.* § 3511.09(A).

This restriction will cause thousands of valid mail ballots to be rejected. Dr. Titiunik estimated the effect the Receipt Deadline will have in future elections by analyzing the dates on which mail-in ballots were received during the 2020 election. She concluded that if HB 458 were in place that year, roughly 2,100 mail ballots would have been rejected for arriving between the fifth and tenth day after the election, the period which is now eliminated by HB 458. Ex. 3, Titiunik Rep. at 35. Using the rate at which boards of elections tend to receive ballots on now-invalid dates, Dr. Titiunik further estimated that in 2024, more than 800 voters will mail absentee ballots that will be tossed aside as a result of HB 458. *Id.* at 34.[7] In other words, HB 458's Receipt Deadline change *alone* is likely to disenfranchise nearly a thousand voters during the 2024 election.

These burdens will fall disproportionately on Ohio citizens and military members abroad. Data from the Secretary of State's Centralized Ballot Tracking System ("CBTS") shows that shortening the ballot receipt deadline from ten days to four days after the election substantially increases the number of overseas ballots that arrive too late to be counted. Ex. 30, Baize Decl. ¶ 15. Since 2014, 1.46% of the total overseas ballots cast in primary and general elections were

[7] Contrary to Defendants' assertion, Dr. Titiunik's estimate of burdens HB 458 will cause in 2024 does not rely on data from 2020. As her report notes, she used 2016 data as a baseline for this estimate because "[u]sing the 2020 total would likely overestimate the amount, as the number of absentee ballots in 2020 was abnormally high due to the Covid-19 pandemic." Ex. 3, Titiunik Rep. at 34.

rejected for arriving past the ten-day receipt deadline. *Id.* ¶ 12. Had HB 458's accelerated Receipt Deadline been in effect during these years, the number of rejected overseas ballots would have increased by *over 500%*. *Id.* ¶¶ 12-15. These data support Dr. Mayer's unequivocal conclusion that the Receipt Deadline "will [] result in more rejected ballots." Ex. 4, Mayer Rep. at 17. And these "effects" will likely be "even greater for new voters," Dr. Mayer explained, "or those new to absentee voting, as they must navigate unfamiliar requirements." *Id.* at 18.

Testimony from fact witnesses, including from one of the Defendant-Intervenors herself, aligns with the expert conclusions in this case. Willis Gordon, Chair of the Veterans Committee of the Ohio NAACP, a fact witness identified by Plaintiffs, testified that active military members who are deployed overseas experience significant problems submitting their absentee ballots due to the unreliability of international mail, especially for those stationed in remote locations and hot zones. Ex. 31, Gordon Tr. 33:1-25, 34:1-15, 35: 14-36, 36:1-13; Ex. 25, Gordon Decl. ¶ 5. As Mr. Gordon succinctly explained: "[W]hen it comes to international mail and unreliability, more days good, fewer days bad. You just have more opportunities for things to go wrong with a shorter window." *Id.* 86:23-25, 86:1-2. Intervenor-Defendant Sandra Feix shared the concerns about potential disenfranchisement of overseas voters, testifying that she "definitely" opposes the Receipt Deadline because "you don't know how fast the mail is going to be delivered" to overseas voters, so they need "sufficient time to get that returned back to the Board of Elections so their vote can be counted." Ex. 32, Feix Tr. 15:23-16:19.

The unrebutted record demonstrates that the Receipt Deadline will with certainty disenfranchise Ohio voters and military members and will do so based on factors like mail delays entirely out of their control. Ex. 4, Mayer Rep. at 17. In so doing, the Receipt Deadline imposes a severe burden on the right to vote that cannot pass constitutional muster. *See, e.g.*, *Democratic*

Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 976 (W.D. Wis. 2020) ("[T]he state's general interest in the absentee receipt deadline is not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law."); *New Georgia Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1304 (N.D. Ga. 2020) (in light of a backlog in mailing ballots, Georgia's ballot receipt deadline was "severe"); *Doe v. Walker*, 746 F. Supp. 2d 667, 679-80 (D. Md. 2010) ("By imposing a deadline which does not allow sufficient time for absent uniformed services and overseas voters to receive, fill out, and return their absentee ballots, the state imposes a severe burden on absent uniformed services and overseas voters' fundamental right to vote.").

Defendants' attempt to undermine the burdens imposed by the Receipt Deadline does no more than raise genuine disputes of material fact that must be resolved at trial. Their defense turns on alleged mitigating factors such as that overseas voters may obtain ballots electronically and that HB 458 did not change the date by which a mail ballot may be posted. But Defendants are wrong on the facts—overseas voters must still rely on the mail to submit *completed* ballots, the only type of ballot that matters here, Ohio Rev. Code § 3511.021(A)(4) ("No person shall return by electronic means . . . a completed or voted uniformed services or overseas absent voter's ballot."), and the postage date does not eliminate voters' need to rely on mail service, over which they have no control, to deliver their ballot on time under HB 458's shortened deadlines. But even if they were not wrong, Defendants arguments are factual disputes, the resolution of which is inappropriate at summary judgment.

***Application Deadline*:** While the Receipt Deadline makes it harder for a ballot to be counted, the Application Deadline makes it more difficult to obtain a mail ballot in the first place. HB 458 amends Ohio Rev. Code § 3509.03, which previously allowed voters to submit mail ballot

applications by noon on the third day before election day, to require all mail-ballot applications to reach the board of elections a *week* before election day. This change will severely burden Ohio voters.

Analyzing the dates on which absentee ballot applications were submitted in 2020, Dr. Titiunik concluded that roughly 21,000 Ohioans submitted a mail ballot application between the third and sixth day before an election. Ex. 3, Titiunik Rep. at 28. For the 2024 election, Dr. Titiunik estimated that roughly 8,000 voters will do the same. *Id*. at 34. Dr. Titiunik further demonstrated, using the same methodology in the Photo ID context, that the Application Deadline will disproportionately burden Black and young voters. *Id.* at 29-33. For these voters, HB 458 imposes severe burdens; for many, it will prove an insurmountable obstacle. First, many of these voters will have opted to vote by mail because they lack valid ID to vote in person. Others, such as elderly voters, will not be able to incur the health risks of needing to wait in long lines when voting in person. *See* Ex. 11, OARA Resp. to Interrog. No. 3. For them, missing the Application Deadline will mean they are unable to vote at all. And second, even for those affected Ohioans who do have valid ID and can safely access polling locations, many will not find out their application was rejected until just before election day, when for many it will be too late to develop an alternative plan to vote as a result of personal, professional, or financial obligations that required them to request an absentee ballot in the first place. *See* Ex. 4, Mayer Rep. at 18 (explaining that "a voter who makes a mistake will not be aware until (and unless) an election official notifies them.")

Dr. Titiunik's analysis, and the burdens it anticipates, were borne out just this summer. Tony Perlatti, Director for the Cuyahoga County Board of Elections, testified that in the May 2023 election, over 600 voters *in his county alone* submitted mail-ballot applications that were late under HB 458 but would have been accepted under prior law. Ex. 44, Perlatti Tr. 40:17-23; Ex. 2, Perlatti

Decl. ¶¶ 9-10. In the August special election, that number roughly tripled to almost 1,800 untimely applications. *Id*. As a result, those voters were unable to vote absentee and thus either were unable to vote or were required to bear the costs of voting in person.

Defendants do not contest this evidence. Instead, they blame the voters, suggesting that those burdened by this change "cause their own disenfranchisement," Sec'y's Br. at 32. But the record belies that assertion. As Dr. Mayer explained, "[m]oving the request deadline to a week before the election will affect voters who might not be activated until late in the election calendar." Ex. 4, Mayer Rep. at 17. And many voters who apply for a mail-in ballot do so because they face structural barriers to voting in person that reduce their capacity to plan for an election until the week beforehand. Far from "choosing" not to participate, such voters rely on the ability to apply for a mail ballot within a week of the election to ensure they can vote at all. *See, e.g.*, Ex. 5, Martin Decl. ¶ 6 (explaining that shortening the Application Deadline may impose "insurmountable barriers on the ability of homeless people to vote" because many such voters "endure physical disabilities, mental health issues, and substance abuse issues," which impair their ability to adapt to shortened deadlines); Ex. 10, Wernet Decl. ¶ 8 (expressing concern that OARA's elderly, disabled, and homebound members will be particularly burdened by the shortened deadlines for absentee voting); Ex. 19, Cropper Decl. ¶ 6 (expressing concern that OFT's members—union and public-school educators, higher-education faculty and support staff, and public employees—may be unable to meet the shortened mail ballot deadlines). Defendants' conclusory assertion that this four-day advancement cannot possibly constitute a burden, Interv.'s Br. at 16-17, says more about their engagement with the record in this case than it does about the evidence in it.

C. Cure Deadline Provision

HB 458 dramatically shortens Ohio's system for curing provisional and mail ballots and in so doing severely burdens Ohio voters. Prior to HB 458, voters who were unable to show valid ID

while voting in-person or whose ballots had technical errors had seven days after election day to cure these deficiencies. Ohio Rev. Code § 3505.181(B)(7) (2016). The Cure Provision of HB 458 reduces that period to four days, imposing a severe burden on voters and leaving them without alternative means of exercising their right to vote.

"Shortening the cure period for a provisional ballot," Dr. Mayer explained, "from seven days post-election to four days will inevitably result in ballots from qualified voters being rejected." Ex. 4, Mayer Rep. at 18. That is because the cure process is onerous, "requiring a separate trip" to election offices "that, like a single drop box"—and unlike their local polling place—"may be far from where a voter lives and inaccessible by public transportation." *Id.* As a result, "[g]iving voters less time to cure their ballot means fewer voters who are able to, or who even attempt to, take that step." *Id.* Indeed, county boards are only required to notify voters of deficiencies in their mail ballots by mail, *see* Ohio Rev. Code § 3509.06(D)(3)(b), meaning that a voter whose ballot arrives close to or after election day is highly likely to receive this mailed notice far too late to act on it under Ohio's new cure period.

The effects of these provisions are likely to fall heaviest on Black, young, and low-income Ohioans. A 2021 report by All Voting is Local on Ohio's cure period concluded that "nonwhite, young, and low-income communities cast a disproportionate share of provisional ballots." Ex. 33, All Voting is Local Rep. at 8. The Cure Period Restrictions will exacerbate the effect of these existing disparities in the use of provisional ballots. Low-income and young voters lack the same resources as other voters, thereby making it significantly more likely that the Cure Period Restrictions will impose insurmountable hurdles to their ability to cure the deficiencies necessary to have their ballot counted. *See* Ex. 4, Mayer Rep. at 6 ("Voters with higher income and education levels are also more likely to possess more accurate information about complex administrative

requirements to vote."); Ex. 23, Thorne Decl. ¶ 8 ("Because many college-aged voters work part-time or full-time jobs while attending school—and some are also raising children on top of that—they may not have the time or resources to cure technical deficiencies in their ballots. Such deficiencies are more likely among young voters, who are often first-time or low-information voters.").

The same All Voting is Local report also noted that "county officials have enormous discretion regarding implementation and use of provisional ballots." Ex. 33, All Voting is Local Rep. at 7. For example, Ohio Rev. Code § 3505.181(A)(5) requires voters to cast a provisional ballot if they have been successfully challenged by a precinct election official, effectively funneling voters into the provisional voting process at the official's choosing. This degree of discretion is troubling; Dr. Mayer states that "[u]nequal exercise of discretion by election officials is a well-documented phenomenon" and that "research has consistently found that minority voters are subjected to stricter standards and are more likely to be affected negatively by the unequal application of discretion by election officials and poll workers." Ex. 4, Mayer Rep. at 15. In other words, minority voters are more likely to face the burdens of the Cure Provision.

Evidence from this case substantiates that concern. Intervenor-Defendant Sandra Feix, who has worked in Ohio elections for twenty years, testified at her deposition that she and her fellow election officials once challenged a group of voters, making them cast provisional ballots, because they were "Mexican" and the county officials thought they "did not have that ethnic group in our community." Ex. 32, Feix. Tr. 22:9-12; 23:1-14 ("You recognize who fits and who doesn't fit. And I don't want to type them, but they did not belong in our community."). The documented risk of racial profiling in voter challenges and other areas of election administration puts nonwhite voters at increased risk of disenfranchisement by HB 458's Cure Provision.

Provisional ballot data from Ohio's 2023 elections bears out this evidence. Over 8,864 provisional ballots in the 2023 elections were rejected for missing identification alone. Ex. 2, Perlatti Decl. ¶ 12. This reflects a rejection rate that is nearly twice that seen in Ohio's last general election and serves as strong evidence that HB 458's changes to the cure period will lead to an increase in rejected ballots. *Id.*

Defendants do not meaningfully grapple with this evidence, insisting instead that cure periods "cannot constitute a burden on the right to vote" as a matter of law. Intervenors' Br. at 19. But of course, that is incorrect. The Eleventh Circuit, for example, held that Florida's laws governing ballot cure were unconstitutional. One scheme was found to "disenfranchise[]" eligible voters by setting a cure period, like the one imposed by HB 458, too short to allow voters to cure deficiencies in their ballots. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019); *see also Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1028 (N.D. Fla. 2018) (ordering state to conduct a new cure period to correct deficiencies in provisional ballot system). Nor does the Sixth Circuit's decision in *NEOCH* support entering summary judgment in Defendants' favor in this case. There, the court rejected a challenge to a change in Ohio's cure period because the plaintiffs had entirely failed to proffer evidence of the "magnitude of the burden" the challenged law imposed. *NEOCH*, 837 F.3d at 635 (decrying lack of evidence). The robust record here, replete with fact, expert, and documentary evidence of the Cure Deadline Restriction's burden on Ohioans, distinguishes this case from the deficiencies in *NEOCH*. Indeed, the *NEOCH* court ultimately *granted* plaintiffs summary judgment on their challenge to a different provision where they were able to provide the evidence Plaintiffs provide here. *Id.* at 633 (finding for plaintiffs where "voters may be disenfranchised based only on a technicality").

The record in this case shows that HB 458 doubled the rejection rate for provisional ballots

in Ohio, tripled the number of provisional ballots rejected for missing identification, and made curing ballots undeniably more difficult for voters. Defendants' contrary fact evidence, to the extent any exists, quibbles with the burdens the cure period imposes on voters and in so doing creates genuine disputes of fact that can only be resolved at trial.

D. Monday Voting Prohibition

The Monday Voting Prohibition, which shortens Ohio's widely used early voting period, imposes a substantial burden on the right to vote. Prior to HB 458, Ohio voters were able to vote early the Monday before election day. HB 458 eliminates Monday voting entirely, requiring voters who relied on that early voting day to incur the costs related to voting on election day. *See* Ohio Rev. Stat. § 3509.051(A)(1).

As Dr. Titiunik reports, nearly 50,000 voters cast their ballots on the Monday before the 2020 election. Ex. 3, Titiunik Rep. at 47. And Dr. Mayer reports that in 2022, 1,315 voters in Cuyahoga County voted on that Monday, representing 6.5% of all early in-person votes in the county. Ex. 4, Mayer Rep. at 17. These data align with Mr. Perlatti's testimony that "the Monday before Election Day. . . is the second-most attended day of early in-person voting for residents" and "provides a great opportunity for those individuals to take part in the election process." Ex. 44, Perlatti Tr. 45:14-19. Under HB 458, these voters will be forced to change their behavior to avoid being disenfranchised by the law. For some voters, that will prove impossible. Voting on a different day requires bearing the costs of rearranging personal, professional, and family obligations and the associated monetary costs in lost wages, childcare, and/or transportation that entails. For many, those costs will prove too much. Even voters who can afford to make these arrangements may not be able to incur the time costs or health risks associated with long wait times at polling places on election day, which will be exacerbated by the cumulative effect of the Challenged Provisions. *See infra* Part II.F. As Dr. Mayer and Dr. Titiunik explain, facing these

costs increases the likelihood that a voter will be disenfranchised. Ex. 4, Mayer Rep. at 5-6; Ex. 3, Titiunik Rep. at 6-7.

This burden will fall disproportionately hard on young and Black voters. Dr. Mayer's analysis shows that African American voters in Ohio are disproportionately likely to rely on early in-person voting. Ex. 4, Mayer Rep. at 17. And Dr. Titiunik concluded that "age is very strongly related to being affected by the Monday voting prohibition. . . . Absentee voters who vote in-person on the Monday before Election Day are younger than absentee voters who do not." Ex. 3, Titiunik Rep. at 45-46. Dr. Titiunik's analysis is supported by testimony from Plaintiff Civic Influencer's Chief Executive Officer, Maxim Thorne, that its young constituents who have relied on Monday voting in the past will now have to be educated about the changes in the law so that they are not disenfranchised. Ex. 22, Thorne Tr. 63:8-11.

Defendants' attempts to undermine these burdens fail and certainly do not entitle them to summary judgment. Defendants rely heavily on *Ohio Democratic Party v. Husted*, 834 F.3d 620, 632 (6th Cir. 2016), for the proposition that the Monday Voting Prohibition cannot burden voters as a matter of law. But that case stands for no such thing. The law at issue in *Ohio Democratic Party* eliminated early voting days *nearly a month* before the election. *Id.* at 624. HB 458 by contrast eliminates early voting the day before the election, a critical distinction given that early voting tends to increase as the election approaches. Ex. 4, Mayer Rep. at 17; Ex. 44, Perlatti Tr. 45:14-19 (noting the Monday before election day is the second-most attended early voting day). In fact, upon reviewing similar evidence—including statistical studies estimating the number of Ohio voters who would choose to vote on the eliminated early-voting days and evidence of disproportionate impact—the Sixth Circuit has held that eliminating early voting the three days before election day, which were disproportionately utilized by women and voters with lower

incomes and educational attainment, unconstitutionally *burdens* the right to vote. *Obama for Am.*, 697 F.3d at 426, 431; *see also Obama for Am.*, 888 F. Supp. 2d at 907 (district court issuing preliminary injunction based on evidence that "thousands of voters" who had relied on voting during the three days before election day would be unable to do so under the new law).[8] The record here similarly demonstrates that HB 458's elimination of Monday voting will impact thousands of Ohio voters.

To the extent Defendants rely on any evidence to rebut Plaintiffs' demonstration of burden, they do no more than create a genuine dispute of material fact unsuited to summary judgment. Defendants, for example, argue that Dr. Mayer's references to studies from other states are irrelevant. *See* Interv.'s Br. at 22. Not only do they overlook the logic in using specific examples to illustrate general trends and fail to provide any contrary evidence to undermine Dr. Mayer's conclusions, even if they presented such conflicts, particularly with respect to expert testimony, those would quintessentially be matters to be decided at trial. *See Hy-Ko Products Co.*, 2012 WL 4461686, at *2.

E. Drop Box Restriction

The Drop Box Restriction substantially burdens the right to vote by imposing unjustified limitations on counties' ability to provide drop boxes to which voters can personally deliver their mail ballot. Prior to HB 458's passage, Ohio's election code imposed no restrictions on the use of drop boxes in the State. The Drop Box Restriction amends § 3509.05(C) of Ohio's election code to prohibit each county board of elections from offering more than a single drop box to its voters no matter the county's geographical size or the size of its population.

[8] Defendants' assertion that before 2012 counties had discretion to set in-person absentee voting hours is inapposite. SOS's Br. at 27-28. That fact does nothing to alter that thousands of Ohioans' have for a decade relied on the ability to vote the Monday before election.

This provision discriminates against those who live in the largest (by land area) and most populated counties. Dr. Mayer explains that "Ohio has 88 counties which range in population from fewer than 8,000 registered voters (Noble County) to more than 875,000 registered voters (Franklin County), and in land area from 229 mi^2 (Lake County) to 702 mi^2 (Ashtabula County)." Ex. 4, Mayer Rep. at 16. But the Drop Box Restriction requires Franklin County to have the same number of drop boxes as Noble County, despite the fact that *more than one hundred times* more Ohioans are registered to vote in the former than the latter. Ohio's largest counties are not only more likely to experience long lines at each county's single drop box, but also are the state's most racially diverse, meaning the burden of congestion at a county's limited drop boxes falls unevenly across racial groups. *Id*. These burdens are specifically most likely to fall on Black Ohioans, as research shows "that African American voters are more likely to rely on drop boxes for absentee ballots rather than U.S. mail." *Id.*

These disparities will impose substantial burdens on Ohio voters. As Dr. Titiunik explains, "[c]ompared to a situation where multiple locations are available to drop off absentee ballots, having only one of those locations available [] increase[s] the average distance that" voters who rely on them "must travel[] . . . to drop off their ballots." Ex. 3, Titiunik Rep. at 48; *see also* Ex. 25, Gordon Decl. ¶ 4 (explaining that many Ohio veterans live in rural parts of the State, far from drop box locations). As a result, the Drop Box Provision will have "an observable effect on turnout," and its burden will not be "equally distributed." Ex. 4, Mayer Rep. at 16.

Defendants once again fail to rebut the evidence of the Drop Box Provision's substantial burden on Ohioans. They argue instead that the law imposes no burden as a matter of law because the Secretary's directive prior to the passage of HB 458 already prohibited counties from providing drop boxes anywhere other than board of elections property. But that is not the cure-all Defendants

think. First, the Sixth Circuit's unpublished decision in *A. Philip Randolph Institute v. LaRose*, 831 Fed. App'x 188 (6th Cir. 2020), does not control this case. That decision, which reversed a district court's preliminary injunction of the Secretary's prior drop box directive, was issued in October of an election year, and rested in large part on avoiding late-stage disruption to the electoral process, which was already underway. *See id.* at 190 ("The Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter election rules on the eve of an election"), 192 (finding "efficiency interest is particularly important where, as here, voting is already in progress").

Second, and more importantly, HB 458, unlike the prior directive, limits each county to just a *single* drop box, further deepening the burden the law imposes on Ohio's most populous counties, which are home to most of the state's Black population. As Secretary LaRose's own Chief of Staff explained, under the prior directive, larger county boards of elections "have provided at least two drop boxes on their premises," which "greatly reduced congestion during high-volume turnout times." Ex. 34, Memo from Secretary of State's Office to the Ohio General Assembly. No such option is available under HB 458, increasing the likelihood that Ohioans will be deterred from casting their ballots by long lines at and long distances to the drop box. *See Brunner*, 548 F.3d at 478 (finding plausible Equal Protection violation where "[l]ong wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities" and burdens were unequally distributed across Ohio's counties).

HB 458's Drop Box Provision exacerbates inequalities in Ohio voters' access to the franchise. Its impact falls most heavily on the state's largest and most diverse counties, on communities with empirically lower trust of the postal service, and on voters already marginalized by their geographic distance from state services. These contested factual issues preclude granting

summary judgment for Defendants.

F. The Challenged Provisions combine to reinforce and exacerbate the severe burdens HB 458 imposes on voters.

Each of the Challenged Provisions independently imposes a severe or substantial burden on voters in Ohio. But HB 458's impact on the right to vote in Ohio is even more severe when the Challenged Provisions are considered together. Under *Anderson-Burdick*, this Court must evaluate, in addition to "whether each law individually creates an impermissible burden," whether "the combined effect of the applicable election regulations creates an unconstitutional burden." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006); *see also Graveline v. Benson*, 992 F.3d 524, 542-43 (6th Cir. 2021) (finding that defendants "fail[ed] to heed our precedent" by "analyzing the effect of each of the challenged provisions individually instead of assessing their combined effect as applied"). This is true even if the Court were to find that each of the provisions withstands constitutional scrutiny on its own. *See Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 575 (6th Cir. 2016) (explaining a "very early filing deadline . . . combined with an otherwise reasonable petitioning requirement, can impose a severe burden, especially on independent candidates or minority parties that must gather signatures well before the dominant political parties have declared their nominees"); *see also Esshaki v. Whitmer*, 813 Fed. App'x 170, 171 (6th Cir. 2020) (holding that ordinary ballot-access provisions unconstitutionally burdened First Amendment rights when combined with COVID-19 stay-at-home orders).

Analyzing the challenged provisions together reveals that they combine to form a labyrinth, riddled with traps, designed to fluster even the most determined voter. The Photo ID Provisions are at the root of the problem. The hundreds of thousands of Ohioans who lack valid ID under HB 458 who wish to vote in-person will be forced to vote a provisional ballot. But when they do, they'll find that HB 458 also makes it harder to cure provisional ballots by cutting the State's cure

period nearly in half. Ex. 4, Mayer Rep. at 18. This shortened cure period will prove for many Ohioans to be insufficient time to obtain valid ID or to make it back to their county board of elections to cure their ballot. In the 2023 August special election alone, thousands of Ohioans were unable to cure their ballot. *See supra* Part II.A. Voters without valid ID lucky enough to realize that they cannot vote in-person, and thereby avoid the trap laid by the Cure Provision, may instead opt to vote using Ohio's mail-ballot process, which does not require photo ID. But if they do, they had better come to that realization well in advance of election day, as they will find that HB 458 also makes it harder to vote by mail by shortening both the period to apply for a mail ballot and for that mail ballot to be received to be counted. Indeed, that is even more likely here for, as Dr. Mayer explained, "[a] voter who must switch voting modality—from in-person voting to mail voting—is more likely to make a mistake that results in a rejected ballot." Ex. 4, Mayer Rep. at 18. And unlike "in-person voting, where problems can be identified and corrected on the spot, absentee voting separate these processes, so a voter who makes a mistake will not be aware until (and unless) an election official notifies them." *Id.* Voters who manage to avoid the traps laid by the Cure Period and the Mail Ballot Provisions may nevertheless be tripped up by the Drop Box Provision and Monday Voting Prohibition. Voters who miss the shortened mail ballot Application Deadline or seek to avoid the shortened mail ballot Receipt Deadline by casting their ballot via drop box will find that HB 458 also makes that harder by limiting each county to just a single drop box. And those voters who wish to avoid the mail ballot system altogether because of the changes HB 458 wrought will find that their ability to vote early is now constrained because Ohio has eliminated early voting the Monday before election day. And early voting, in any event, is open only to Ohioans who possess valid ID, starting over again this vicious circle of interlocking burdens.

In this way, HB 458's perverse synergies burden voters no matter who they are, what ID they possess, or how they choose to vote. This constitutes a burden of the severest sort and one that cannot withstand constitutional scrutiny. Defendants respond by quibbling with the burdens each individual provision imposes, never mind the Sixth Circuit's recognition that the sum of a law's burdens may be unconstitutional even if its individual parts are not. *See Blackwell*, 462 F.3d at 586. At most, Defendants' arguments, which rely on competing evidence of burden, demonstrate that genuine disputes of material fact remain to be decided at trial.

III. Ohio's alleged state interests do not justify the severe and substantial burdens the Challenged Provisions impose on Ohio voters.

Ohio's stated interests are insufficient to justify the burdens HB 458 imposes on Ohio voters. *Anderson-Burdick* requires courts to consider the "precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434. This is true no matter how "slight th[e] burden may appear"—any burden imposed on the fundamental right to vote "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191. And the State must make this showing not by "suppositions and speculative interests" or "generalized and hypothetical interests identified in other cases," but with concrete evidence supporting the putative interests the State puts forth. *Libertarian Party of Ohio*, 462 F.3d at 594; *Obama for Am.*, 697 F.3d at 433 (explaining state's interest in "smooth election administration" could not justify early voting restriction without evidence); *NEOCH*, 837 F.3d at 632-33 (remanding consideration of absentee ballot restriction where state's interest in preventing mail-in voting fraud was unsupported by evidence and "overshadow[ed]" by the impact on mail voters"). Defendants have not made that showing here.

Defendants identify three overarching state interests in support of HB 458: preventing voter

fraud, improving election administration, and protecting voter confidence.[9] These interests are no more than post hoc rationalizations with no relationship to the factual reality of elections in Ohio and the burdensome provisions they purportedly justify.

***Voter Fraud*:** Voter fraud is vanishingly rare in Ohio. That is the unanimous conclusion of the Secretary himself, *see* Ex. 1-E, Press Release (Sept. 7, 2022) ("[v]oter fraud is exceedingly rare in Ohio"), his office's representative in this litigation, *see* Ex. 36, SOS Tr. 108:5-8 ("Q: Do you agree that today fraud and suppression continue to be exceedingly rare in Ohio's elections? A: I do."), multiple election administrators, *see* Ex. 37, Matthews Tr. 115:17-18 ("Voter fraud is – to the extent that it is prosecuted is rare, yes"); Ex. 44, Perlatti Tr. 73:4-5 ("I know it's very infrequent"), and the experts in this case, *see* Ex. 3, Titiunik Rep. at 54 ("[T]here is no evidence of material or systemic voter fraud or double voting."); Ex. 4, Mayer Rep. at 19 ("[N]either the Heritage Foundation nor News21 data set identified a single case of voter impersonation at the polls, or indeed of *any type of voter misconduct that would be prevented by the provisions in HB 458*."), even Defendants' experts, *see* Ex. 28, Owen Rep. at 13 (pivoting to discussion of "[s]ymbolism and perceptions" to circumvent the unchallenged assumption that "voter fraud is rare"); *see generally* Ex. 27, Thornton Rep. (not discussing incidence of voter fraud).

In other words, Ohio does not suffer from a voter fraud problem. But even if it did, Defendants have provided no evidence that HB 458 would help address it. The Secretary submits that the State's interest in preventing and deterring fraud is supported by the Photo ID Provision because the voter ID it requires is "more verifiable." SOS's Br. at 22. But that provision can only plausibly affect one form of voter fraud: voter *impersonation*, that is to say, a voter presenting

[9] These three categories encompass six putative and overlapping state interests identified by the State—"preventing voter identification fraud, deterring and detecting voter fraud, safeguarding voter confidence in elections, improving and modernizing election procedures, ensuring orderly election administration, and providing expeditious election results." Ex. 35, SOS Resp. to Interrog. No. 2.

false identification in order to cast a vote in someone else's name (or when they themselves are not qualified). Voter impersonation, however, is an even rarer phenomenon than voter fraud in general. *See* Ex. 2, Perlatti Decl. ¶ 4 ("None of the rare cases of voter fraud that I have seen or heard about in my career as an election administrator would have been handled any differently had the current photo identification requirement been in place"). Indeed, Defendants have been unable to identify a *single case* of voter impersonation in the state's history, let alone an instance of voter impersonation that involves falsified identification documents. *See* Ex. 36, SOS Tr. 116:14-15 ("I am not aware of a report of that nature"), 88:2-4 ("We do not see [a referral for voter impersonation] in a typical election.").

Decreasing the number of permissible forms of identification, meanwhile, has no bearing at all on other possible forms of fraud, such as double voting (when the same voter casts multiple ballots in the same election) or ballot harvesting (when one voter impermissibly returns other voters' mail ballots). Indeed, the vast majority of voter fraud referrals—for double voting—have nothing to do with identification. *See* Ex. 36, SOS Tr. 73:11-24. Most come from the Electronic Registration Information Center ("ERIC"), which compares data from states across the country and has long been the "primary . . . means by which [Ohio] received initial reports of potential double voting across states." *Id.* 94:5-8. These potential instances of double voting, whether through ERIC or through Ohio's internal voter records, use a "voter history file" that contains no record of the type of identification used to vote. *Id.* 95:15-18. Ohio also uses a variety of other tools, also unrelated to identification, to prevent against double voting—namely, "a noncitizen check process" that uses voter history records, registration records, BMV documentation, and voter attestations, as well as reports from county boards of elections. *See id.* 104:5-8 (a county has never flagged voting irregularities to the Secretary of State due to a mismatched photo); *id.* 89:1-2

("House Bill 458 did not change that process" of noncitizen verification). So, despite its ostensible purpose, there is no evidence that the Photo ID requirement has any bearing at all on Ohio's efforts to detect, deter, or prosecute voter fraud.

The legitimacy of Ohio's interest in voter fraud, moreover, is sharply undermined by HB 458's allowance for Ohioans to vote by mail without showing Photo ID and the Secretary's recent decision to withdraw from ERIC—its main tool for combatting voter fraud—without any plan for replicating its services. *See* Ex. 36, SOS Tr. 75:17-24; Ex. 1-K, AP News (March 17, 2023) (describing "conspiracies" underlying states' decisions to withdraw from ERIC); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (holding, in interstate commerce context, that clear contradiction of asserted state interest "tends to undermine appellant's justification for the burdens the statute imposes"). ERIC's importance to Ohio's election integrity efforts cannot be overstated. The state is so dependent on ERIC's data that even after *formally withdrawing* from the organization earlier this year, the Secretary continues to use data derived from the organization as its only way of identifying interstate double voting. *See* Ex. 36, SOS Tr. 95:6-8.

Intervenors assert that the Photo ID Provision does in fact help prevent voter fraud because of new notation that the Ohio BMV is placing on driver's licenses and state IDs to clearly identify noncitizens. Interv.'s Br. at 26. Therefore, the logic goes, requiring Photo ID will allow county boards of directors to more clearly identify ineligible voters. *Id*. This supposition falls flat for several reasons. First, the new notation does not apply retroactively to existing ID cards or driver's licenses, so it will not affect the vast majority of Ohio identifications for many years to come. Second, it does not hold water when considering the full breadth of IDs permitted by HB 458. After all, neither passports nor passport cards indicate the bearer's address, meaning that a poll worker has no way of knowing if a passport voter even resides in Ohio—which, like noncitizen

status, would render them ineligible to vote. So whatever advantage to verifying eligibility the Photo ID Provision adds with one hand, it takes away with the other. And Defendants' strained rationales for how HB 458 affects voter fraud is itself indicative that they have no valid interest to speak of.

In sum, the Photo ID Provision has no relationship to voter fraud. Voter fraud hardly ever occurs in the first place. When it does occur, Ohio has long detected it using a variety of means that have no relationship to Photo ID, especially using voter file data instead of comparing pictures, and will continue to do regardless of HB 458's changes to the law. In some cases, HB 458 makes it *harder* to detect voter fraud by removing the address requirement for qualifying ID, and the Secretary's assertion of voter fraud prevention as an interest rings hollow when compared to his actions elsewhere, which have undisputedly made detecting voter fraud more difficult. This incongruous and internally contradictory interest therefore cannot support *any* burden placed on the right to vote by HB 458's Photo ID Provision. *See NEOCH*, 837 F.3d at 632-33.

***Election Administration*:** Defendants assert that HB 458's burdens on Ohio voters are justified by the State's interests in improving election administration and modernizing election procedures. They argue that the Drop Box Restriction, Mail Ballot Restrictions, Monday Voting Prohibition, and Cure Restrictions all result in better election administration by promoting uniformity. *See* SOS's Br. at 37, Interv.'s Br. at 26. The record does not support this conclusion. To the contrary, they result in uneven and uncertain administration. Indeed, HB 458's tweaks to election administration were opposed by many election officials, including the Secretary himself, and do not address those officials' actual concerns about Ohio's elections. In fact, by causing widespread confusion among election officials, HB 458 creates more problems relating to election administration than it solves.

Claiming that HB 458 answers local election officials' demands for procedural changes, *see* SOS's Br. at 28-29, Interv.'s Br. at 27, at best grossly misrepresents the evidentiary record. To be sure, election officials *did* have concrete demands for how to improve Ohio's election administration. But chief among these was more elections funding, a perennial demand across the state. *See* Ex. 37, Matthews Tr. at 57:7 (resources can "always" be improved upon). In addition, election officials had more specific requests including increased opportunities for voter registration and increased resources for absentee voters. *See* Ex. 38, Letter from Ohio Association of Elected Officials to the Ohio General Assembly ("OAEO Letter") (lamenting "that HB 458 contained neither a provision for a voter verified registration process at the BMV nor the creation of an online absentee ballot portal. Both provisions would have made our elections system substantially more secure and more accessible."). The Secretary ought to be familiar with such requests, given that his office directly recommended them as changes to HB 458. In a letter to Senator Frank Strigari, the Secretary's Chief of Staff requested the addition of several items to HB 458 so that it might actually improve Ohio's election administration—"the creation of a secure, accessible, online method of requesting an absentee ballot" and "the creation of a secure, electronic method of verifying voter registration data" in coordination with the BMV. Ex. 34, Memo from Secretary of State's Office to the Ohio General Assembly. But HB 458 did not implement any of these requested changes that would actually have improved Ohio's election administration.

Instead, HB 458 implemented a bevy of changes with marginal to *negative* impacts on election administration, as even the Secretary observed at the time of its passage. The Secretary's Chief of Staff's letter to Senator Strigari objects to the bill's video surveillance records provision (which would "create unnecessary obstacles to the administration of the elections process") and the Drop Box Restriction (prior policy had "greatly reduced congestion during high-volume

turnout times"). *Id*. Along similar lines, the Ohio Association of Election Officials also objected to much of the bill, stating that HB 458 "will have long term negative consequences for our election system." Ex. 38, OAEO Letter. In particular, the Association decried the lack of funding for implementing HB 458's drastic changes. *Id*; s*ee also* Ex. 2, Perlatti Decl. ¶ 5 ("[a]t the time of HB 458's passage, I opposed the changes it made to Ohio's election deadlines as harmful to voters").

Sure enough, as demonstrated by the evidence in this case, the implementation of HB 458 resulted in widespread confusion in the leadup to 2023's May primary and August special election that is expressly at odds with the stated goal of improving election administration. Minutes from the Secretary's liaison report to county boards specifically tellingly report concerns about HB 458 from "all counties." Ex. 39, Secretary of State's Weekly Liaison Reports. The implementation of HB 458 led election officials from Summit and Defiance counties to contact the Secretary to express their confusion about funding and unforeseen consequences of the bill, such as applying the Photo ID requirement to disabled and confined voters. Ex. 40, Boards of Elections Letters. Nor did this confusion escape notice: All Voting is Local wrote a letter to the Secretary on March 21 documenting that "Boards of Elections (BOE) workers, legislatures, and advocates alike have experienced extreme confusion about how the law will be implemented." Ex. 41, Letter from All Voting is Local to Secretary LaRose. The letter noted, in particular, that "no training or money has been allocated to ensure the Boards and staff are prepared for this next election. From our perspective, the BOEs have been scrambling to implement the new laws but have been unknowingly releasing different information to the public." *Id*.

The record of widespread disapproval, uncertainty, and confusion that accompanied the implementation of HB 458 seriously calls into question the Secretary's assertions that the bill meaningfully serves the state's interest in improving election administration and procedures. To

the extent the law's deadlines may free up election workers to perform other tasks, or provide for "expeditious election results," it is because otherwise valid votes are being arbitrarily thrown out as untimely, which is insufficient to justify the law's burdens on Ohio voters. *See* Ex. 2, Perlatti Tr. 61:5-11 ("Well, if you . . . cut what were once valid post-election ballots out of the process, if you are reducing the number of ballots that you have to scan because you change a deadline, well, just naturally if there's less ballots to… process, it takes less time to do that."), Ex. 2, Perlatti Decl. ¶ 2 (describing how, despite Cuyahoga County being "the county with the highest rate of absentee voting in the state of Ohio for the last decade," the county's "dedicated staff has always been able to meet the prior deadlines for processing both absentee ballot applications and early ballots cast the Monday before election day").

***Voter Confidence*:** Last, Defendants attempt to justify the Challenged Provisions by reference to scattered public opinion polling. They argue, in short, that polls show widespread distrust in American elections, and that other polls indicate that election laws like the Photo ID Provision have popular support. *See* Ex. 28, Owen Rep. at 10-11; Interv.'s Br. at 25-26; SOS's Br. at 20-21. They conclude, therefore, that the Photo ID Provision bolsters confidence in Ohio's elections. But their argument fails to demonstrate any causal link between voter confidence and the specific laws Ohio enacted. Indeed, even when viewed in the light most favorable to Defendants—which is the opposite of the summary judgment standard—the evidence provides no support for the proposition that voter confidence is *in any way related* to election procedures. Instead, all Defendants can argue is that they have identified a problem and, separately, have identified a law that has popular support. Without more, the fact that photo ID laws may be popular in the abstract is simply irrelevant; an unconstitutional law is unconstitutional no matter how popular it may be. *See United States v. Michigan*, 460 F. Supp. 637, 639 (W.D. Mich. 1978) ("[I]t

is the duty of the courts not to respond to popular pressure, but to uphold the Constitution, even as to the actions of the other branches of government.").

Indeed, expert analysis of the voter confidence question suggests that it is unaffected by changes in election law and procedure. As the Secretary's own expert notes, "[d]istrust of government and lack of confidence in U.S. institutions is not new." Ex. 28, Owen Rep. at 13. It is not election rules, she explains, but "rhetoric and allegations" which "decrease confidence in electoral outcomes and undermine election administration." *Id.* at 15. This conclusion is entirely consistent with Dr. Mayer's analysis, which concludes that "[t]o the extent that voters express concerns about election security, research shows it is largely a function of whether a voter's candidate wins, and false claims of fraud are a key causal factor." Ex. 4, Mayer Rep. at 19 (citation omitted); *see also* Ex. 37, Matthews Tr. 74:14-15 ("I think losing candidates have led to distrust in the system. Now, some of their claims may include fraud, but some of them have contained just wild theories on beyond that"). Dr. Owen's report also finds wide variation in partisan belief in voter fraud and election dysfunction over time, based largely on which party's candidate won or lost the relevant election. Ex. 28, Owen Rep. at 17. In short, there is little support for arguing that election laws (rather than election results) can increase voter confidence, less reason still to believe that the Challenged Provisions in particular do so, and no reason at all to find that Defendants have carried their burden of justifying HB 458's burdens on Ohio voters.

If the record shows anything at all with respect to voter confidence, it is that HB 458 has likely undermined confidence in Ohio's elections by confusing the state's electorate and stoking unfounded fears of voter fraud. A group of voting rights organizations, for example, wrote the Secretary in late February about "the potential for voter confusion" arising out of HB 458, and how the Secretary's implementation of the law "could undermine voter confidence in Ohio's

election officials and the integrity of its election system." Ex. 42, Letter from Fair Elections Center et al., to Secretary LaRose. The letter outlines how "[t]he Legislature's enactment of HB 458 has already caused chaos and confusion for voters and administrators by failing to take account of the 2023 election calendar," an issue compounded by further uncertainty regarding how the new provisions would be implemented for the May primary election. *Id*. HB 458 also muddied the waters around voter registration by requiring changes to the State's voter registration and other election forms to accommodate the new deadlines and identification requirements. Common Cause Ohio noted in a March 16 email that "there seems to be inconsistency in information between different Boards of Elections and election officials about voter registration forms. Some election officials are telling voter advocates that they can continue to use older voter registration forms and others specify that only the new ones will be accepted." Ex. 43, Letter from Common Cause Ohio to Secretary of State's Office.

* * *

The record in this case is extensive. Overwhelming fact and expert testimony demonstrate that the Challenged Provisions individually impose severe or substantial burdens on eligible voters in Ohio. And when combined, they impose a formidable of obstacles to the right to vote. These burdens fall disproportionately on Black, young, elderly, homeless, and overseas voters. In the face of this record, Defendants muster no more than mistakes of law and fact, the sum of which is insufficient to show as a matter of law that the Challenged Provisions impose no burden on Ohio voters or that no genuine dispute of material fact remains to be resolved at trial. In fact, if Defendants' motions accomplish anything at all it is to show the opposite, that their defenses fail as a matter of law or that genuine disputes remain that cannot be resolved on summary judgment. This alone dooms their motions.

Nor does HB 458 further the interests cited by Defendants. The law will have no effect on voter fraud, because voter identification fraud *does not exist* and Ohio uses neither photos nor identification documents to investigate the most common types of fraud. Ohio's election administration, which the Secretary described as the "gold standard" before HB 458, was not improved but measurably worsened by the Challenged Provisions and the added burdens they heaped on already overworked and under-resourced county boards of elections. And voter confidence, which likely bears no relationship to election laws in the first place, is not advanced by making the voting process more confusing for all Ohioans. These interests, which rest not on evidence but on Defendants' say-so, are insufficient to justify the severe burdens imposed by the Challenged Provisions, both individually and collectively. They are insufficient to justify even the most modest burdens on Plaintiffs' fundamental right to vote.

Finally, even if Defendants managed to develop any record to support their interests, material questions of fact would remain as to the Challenged Provisions' ability to further them and their ability to justify the burdens HB 458 imposes. The record in this case involves competing fact and expert testimony and a great deal of documentary evidence from which the Parties have reached opposing conclusions. These disputes concern the effects that the Challenged Provisions, individually and cumulatively, impose on Ohio voters and the legitimacy of the State's purported interests in the law, matters at the heart of this case and the *Anderson-Burdick* framework. On this record, and for these reasons, Defendants' motions for summary judgment must be denied.

CONCLUSION

Plaintiffs respectfully request that the Court deny the Defendants' motions for summary judgment and move to trial to ensure that Plaintiffs' may obtain relief in time for the 2024 elections.

Dated: October 20, 2023

Respectfully submitted,

/s/ John Corey Colombo

Donald J. McTigue (0022849)
John Corey Colombo (0072398)
McTIGUE & COLOMBO LLC
545 East Town Street
Columbus, OH 43215
Telephone: (614) 263-7000
dmctigue@electionlawgroup.com

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Ave., Suite 2100
Seattle, WA 98101
Telephone: (206) 656-0177
akhanna@elias.law

Joseph N. Posimato*
Joel J. Ramirez*
Julie Zuckerbrod*
Ian U. Baize*
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001
Telephone: (202) 968-4518
jposimato@elias.law
jramirez@elias.law
jzuckerbrod@elias.law
ibaize@elias.law

*Admitted pro hac vice

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2023, the foregoing was filed electronically with the Clerk of the Court using the Court's electronic case filing system, which will serve such filing on all counsel of record.

/s/ *John Corey Colombo*
John Corey Colombo

CERTIFICATE OF LOCAL RULE 7.1(F) COMPLIANCE

I hereby certify that this case has been assigned to the standard case management track and that the memorandum adheres to the page limitation specifications of the Court's order of October 2, 2023. Dkt. 45.

/s/ *John Corey Colombo*
John Corey Colombo