

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

**NORTHEAST OHIO COALITION FOR  
THE HOMELESS, *et al.*,**

*Plaintiffs,*

v.

**FRANK LAROSE, in his official capacity as  
Ohio Secretary of State,**

*Defendant,*

and

**OHIO REPUBLICAN PARTY, SANDRA  
FEIX, AND MICHELE LAMBO,**

*Intervenor-Defendants.*

Civil Action No. 1:23-cv-26

Judge Donald C. Nugent  
Magistrate Judge Jonathan D. Greenberg

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

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## INTRODUCTION AND SUMMARY OF ARGUMENT

House Bill 458 makes minor changes to Ohio’s election code both to ensure that it remains very “easy to vote in Ohio,” *Ohio Dem. Party v. Husted*, 834 F.3d 620, 628 (2016), and to serve other interests of the highest order: safeguarding Ohio’s elections, preventing fraud, and enhancing confidence in election integrity across the political spectrum. Defendant and Intervenor-Defendants are entitled to summary judgment because Plaintiffs have mustered no evidence that HB 458 imposes anything more than the “usual burdens of voting.” *Crawford v. Marion Cnty. Bd. of Elections*, 553 U.S. 181, 198 (2008) (lead opinion of Stevens, J.); *id.* at 205–09 (Scalia, J., concurring in the judgment). In fact, even on the most favorable view of Plaintiffs’ evidence, HB 458’s tweaks to Ohio’s generous election laws have no effect on the overwhelming majority of Ohio voters—and impose no more than minimal burdens, if any, on the tiny remainder. Plaintiffs cannot, therefore, meet their demanding burden to show that the Ohio General Assembly’s duly enacted HB 458 is unconstitutional.

Plaintiffs’ lawsuit is the latest in a long series of lawsuits challenging common-sense and neutral voting laws like HB 458. The Supreme Court and Sixth Circuit have repeatedly rejected these challenges. The Supreme Court, for example, did not hesitate to uphold a photo ID requirement indistinguishable from HB 458’s requirement. *Crawford*, 553 U.S. at 197–200, 204 (lead opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring in the judgment). And the Sixth Circuit has already soundly rejected challenges to modifying Ohio’s early voting schedule, *Ohio Dem. Party*, 834 F.3d at 635–36; to adjusting its cure period, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 618, 635 (6th Cir. 2016); and to its drop-box requirements, *A. Philip Randolph Inst. v. LaRose*, 831 F. App’x 188, 192 (6th Cir. 2020).

Plaintiffs’ rinse-and-repeat challenge to HB 458’s provisions addressing these same election-law practices and procedures fails under these binding precedents. HB 458 imposes at

most minimal, reasonable, and neutral burdens on voting, meaning it receives rational-basis review under the *Anderson-Burdick* framework. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The law is amply justified under that deferential standard of review: Ohio has indisputably important interests in election integrity, preventing voter fraud, ensuring public confidence in elections, and promptly certifying election results. Indeed, HB 458 is constitutional under any level of scrutiny because those interests outweigh any of the conceivable burdens suggested by the summary-judgment record even under a heightened standard of review. This Court should grant summary judgment against Plaintiffs.

### **STATEMENT OF ISSUE**

Whether HB 458's neutral, commonsense, modest changes to Ohio's generous voting laws are constitutional.

### **BACKGROUND**

"[I]t's easy to vote in Ohio. Very easy, actually." *Ohio Dem. Party*, 834 F.3d at 628. The Constitution does not require Ohio to provide any method of voting other than in-person voting on election day. But Ohio goes above and beyond the constitutional minimum and, in fact, is a national leader in election accessibility. In addition to election-day voting, Ohio offers in-person early voting for several weeks leading up to election day, as well as no-excuse mail absentee voting for up to 46 days for military and overseas voters and up to 29 days for domestic voters. See Office of the Ohio Secretary of State, Directive 2023-03 (Ex. 1) at 8 (Feb. 7, 2023); Ohio Rev. Code § 3509.01(B)(1); Ohio Const. Art. 5, § 1.

HB 458 preserves all of these methods of voting and Ohio's generous accommodation of each method. Start with in-person voting. Ohio law previously permitted voters to use a variety of forms of acceptable identification when voting in person, including non-photo IDs. HB 458 now requires voters to present a photo ID but expands the list of acceptable photo IDs to include



passports and passport cards as well as interim IDs issued by the Ohio Bureau of Motor Vehicles (BMV). *See* Directive 2023-03 (Ex. 1) at 1–3. HB 458 also newly guarantees that any voter may obtain a photo ID for free. *See id.* at 1. Moreover, even though Ohio has no constitutional obligation to permit ballot curing, it does so: a voter lacking a photo ID on election day may cast a provisional ballot, obtain or retrieve a photo ID, and cure her ballot by presenting a photo ID up to four days after election day. *Id.* at 4–5. HB 458 also exempts in-person voters with religious objections from the photo ID requirement. *See id.* at 5. HB 458’s photo ID requirement is inapplicable to all voters who vote absentee by mail. *See id.*

HB 458 also maintains a long calendar for early in-person voting. The law redistributes the early in-person voting hours that previously were available on the day before election day to other days within the early voting period. Early voting is still available for at least four weeks. *Id.* at 8. Ohio’s early voting period has the same total number of voting hours before and after the law. *Compare id.* at 8, with *Election Official Manual* 201 (Ex. 2), Ohio Secretary of State (Feb. 2, 2022).

No-excuse absentee voting also remains available to all Ohio voters after HB 458. All Ohio voters may vote absentee for any reason or no reason at all. Ohio voters who prefer not to obtain or use the free photo ID to vote in person, moreover, do not need one to vote absentee; they can vote absentee simply by providing the last four digits of their social security number. *See* Directive 2023-03 (Ex. 1) at 4. Further, HB 458 effectively ratifies the status quo by permitting each county to have a single drop-box at its board of elections office, allowing voters to return ballots 24/7. Prior to HB 458, Secretary LaRose allowed boards to have drop-boxes only at board of elections offices. In 77 of Ohio’s 88 counties, HB 458 makes no change to the number or availability of drop-boxes, and it made no change to the location of drop-boxes in the remaining counties. Thornton Report (Ex. 25) ¶¶ 51, 53; Mayer Dep. (Ex. 20) at 25:24–26:14, 83:12–84:1, 85:21–86:6.

Absentee ballots alternatively can be returned to the county board of elections in person, Ohio Rev. Code § 3509.05(C)(1) (effective April 7, 2023), or by mail, Directive 2023-03 (Ex. 1) at 6.

HB 458 also preserves lengthy periods for voters to request, receive, and return absentee ballots. As was the case before HB 458, voters can still begin requesting absentee ballots starting more than ten months before election day. HB 458 modestly changes the deadlines for voters to request and for election officials to receive absentee ballots. Prior to HB 458, Ohio law permitted voters to request absentee ballots until three days before election day and election officials to receive them until ten days after election day; HB 458 modifies those deadlines to one week before election day and four days after election day, respectively. *See id.* at 5–6.

All of this means that Ohio remains a national leader in election accessibility. For example, more than a dozen states require a specific reason to vote by absentee ballot, but Ohio offers no-excuse absentee voting.<sup>1</sup> Most states do not accept any absentee ballots received after election day, but Ohio continues to accept them for four days after the election.<sup>2</sup> The plurality of states, including Ohio, require voters to request absentee ballots by mail a week or more before an election.<sup>3</sup> Over a dozen states offer early voting only 15 or fewer days before an election, but Ohio offers early voting starting 29 days before an election.<sup>4</sup> And most states require identification to vote, with around 20 states, including Ohio, requiring photo identification.<sup>5</sup>

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<sup>1</sup> *See* Summary, *Table 2: Excuses to Vote Absentee*, Nat’l Conf. of State Legislatures (updated July 12, 2022) (Ex. 6).

<sup>2</sup> *See* Summary, *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, Nat’l Conf. of State Legislatures (updated July 12, 2022) (Ex. 7).

<sup>3</sup> *See* Summary, *Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives*, Nat’l Conf. of State Legislatures (updated July 12, 2022) (Ex. 8).

<sup>4</sup> *See* Brief, *Early In-Person Voting*, Nat’l Conf. of State Legislatures (updated June 13, 2023) (Ex. 9).

<sup>5</sup> *See* Report, *Voter ID Laws*, Nat’l Conf. of State Legislatures (updated March 9, 2023) (Ex. 10).

Ohio has conducted two elections, on May 2, 2023 and August 8, 2023, under HB 458. *See* 2023 Elections Calendar, Ohio Secretary of State (Ex. 3). Plaintiffs have failed to identify even a single voter who was prevented from—or even impeded in—voting in either of these elections due to any provision of HB 458. In fact, Plaintiffs have largely ignored the relevant question: they have sidestepped any attempt to demonstrate the burden of *complying* with HB 458’s requirements, much less to show that any such burdens are unconstitutional. Instead, they offer putative expert estimates of the number of voters who may have to modify their voting behavior in future elections and thus, in Plaintiffs’ view, are “affected” by HB 458. But the burden prong of the *Anderson-Burdick* framework examines the cost of complying with the challenged rule, not the number of voters who must comply. *See Crawford*, 553 U.S. at 199–200 (lead opinion of Stevens, J.); *id.* at 205–09 (Scalia, J., concurring in the judgment) (*Anderson-Burdick* framework examines “burdens” of challenged law, not its “impact[.]”). And even on Plaintiffs’ evidence, HB 458 at most requires only a tiny fraction of Ohio voters to modify their voting behavior—and imposes nothing more than minimal burdens to do so.

In stark contrast to the lack of evidence of burdens in the record, the record is replete with evidence of Ohio’s substantial interests in modifying its election laws: HB 458’s changes promote election integrity, smooth and prompt election administration, and public confidence in election results. *See infra* pp. 23–27. Specifically, HB 458 enables Ohio to certify election results earlier by advancing the mail-in ballot deadline and shortening the period during which voters can cure their provisional ballots, by a few days each. It promotes election integrity and public confidence in election results through tweaks to Ohio’s preexisting voter-identification requirement, which target the most common form of voter fraud, and through its requirement that counties increase the security of unattended ballot drop-boxes. And it streamlines the myriad tasks local election officials must complete in preparation for election-day voting—such as ensuring that each precinct

has a long list of statutorily required supplies—by redistributing the early voting hours on the day before election day throughout the week before the election. *See* Ohio Rev. Code § 3501.30; Press Release, *LaRose Implementing New Election Reforms That Will Boost Confidence in Our Elections and Increase Their Accessibility*, Ohio Secretary of State (Feb. 7, 2023) (Ex. 4).

### **LEGAL STANDARD**

Summary judgment is warranted when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is “material” when its resolution will affect the outcome of the lawsuit, and a dispute is “genuine” when there is enough evidence, under applicable evidentiary standards, for a reasonable jury to find for either party. *See Miller v. City of Shaker Heights*, 438 F. Supp. 3d 829, 835 (N.D. Ohio 2020). Judgment as a matter of law is warranted when the party with the burden of proof at trial does not establish an essential element of its case. *Id.* Here, Plaintiffs bear the burden of proof. *See Ohio Dem. Party*, 834 F.3d at 627; *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 548 (6th Cir. 2014).

### **ARGUMENT**

“States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Anderson*, 460 U.S. at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The General Assembly has enacted such regulations in HB 458. HB 458 modestly tweaks Ohio’s generous voting laws to ensure smooth, prompt administration of elections, election security, and public confidence in election results—while keeping it “[v]ery easy” to vote. *Ohio Dem. Party*, 834 F.3d at 628. Ohio’s interests animating HB 458 are interests of the highest order, and they more than justify HB 458’s modest changes to Ohio’s convenient,

accessible voting process. This Court should grant summary judgment and uphold the General Assembly's common-sense, constitutional law.

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

Because any burdens imposed by HB 458 (if there are any burdens at all) are at most minimal, deferential rational-basis review applies. And the law easily passes that review, because the challenged provisions serve Ohio's important interests in smooth election administration; uniform, efficient election rules; election integrity; and public confidence in the election process. Indeed, the close fit between the challenged provisions and the important state interests they serve means that the law would pass any level of scrutiny. In fact, if Ohio's benign changes to its election laws could not survive the *Anderson-Burdick* framework as interpreted by the Sixth Circuit, none could. And that would signal a serious problem with the framework, not with Ohio's law.

**A. The Challenged Provisions Easily Survive *Anderson-Burdick* Review.**

The Sixth Circuit applies the *Anderson-Burdick* framework to decide undue-burden claims like this one. *See, e.g., NEOCH*, 837 F.3d at 618, 631. Under this framework, courts first determine the burden on the right to vote imposed by a challenged law. *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020). Then, based on the extent of the burden, courts determine the level of scrutiny the law receives and whether the law survives that scrutiny. *Id.*

The Sixth Circuit applies three different forms of scrutiny depending on the law's level of burden. At one pole, if the law is a "reasonable nondiscriminatory restriction[]," rational-basis review applies, and the law passes muster if it advances the State's "important regulatory interests." *Id.* (internal quotation marks omitted). At the other pole, if the law imposes "severe restrictions" on the right to vote, "such as poll taxes," strict scrutiny applies. *Id.* When the burden is "moderate" and between these poles, as when the State "facially discriminates between two

classes of electors,” courts in the Sixth Circuit “depart[] from the traditional tiers of scrutiny” and apply *Anderson-Burdick*’s “flexible” standard. *Id.* at 784, 786. That flexible standard requires courts to weigh the law’s burdens on the right to vote 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.” *Id.* at 784 (internal quotation marks omitted). A plaintiff mounting a facial *Anderson-Burdick* challenge to a statute “bear[s] a heavy burden of persuasion.” *Ohio Dem. Party*, 834 F.3d at 627 (internal quotation marks omitted).

To determine a law’s burden, the Sixth Circuit considers “the burden that the provisions place on all Ohio voters,” because “[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.” *NEOCH*, 837 F.3d at 631; *see also Crawford*, 553 U.S. at 199–200 (lead opinion of Stevens, J.); *id.* at 207 (Scalia, J., concurring in the judgment).<sup>6</sup>

**1. HB 458’s burdens are at most minimal, meaning rational-basis review applies.**

This is a quintessential “minimal burden” case to which rational-basis review applies. The challenged provisions of HB 458 impose at most a negligible and nondiscriminatory burden on prospective voters, especially when considered, as they must be, “as one component of Ohio’s

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<sup>6</sup> To be sure, the Sixth Circuit has also said that, in certain cases, courts must evaluate a law’s burdens from the perspective of the affected voters. *See Mays*, 951 F.3d at 784–85. But that rule applies only in cases where courts are evaluating a non-uniform rule that effects “disparate treatment” on various classes of voters. *Id.* *NEOCH* and *Mays* are consistent because they apply in different circumstances: *NEOCH* bars courts from considering the effects on subgroups of a uniform rule. *See* 837 F.3d at 631. Accordingly, *NEOCH*, not *Mays*, controls the analysis of the uniform, facially neutral HB 458. Moreover, this conclusion is consistent with the analysis in Justice Scalia’s opinion in *Crawford*, which correctly assessed and applied the Supreme Court’s precedents and provided the crucial votes to form a judgment in that decision. 553 U.S. at 205–09. Any attempts to focus on the effects of HB 458’s uniform rules on particular subgroups are thus irrelevant.

progressive voting system” and “the many options that remain open to Ohio voters.” *Ohio Dem. Party*, 834 F.3d at 628; *see Mays*, 951 F.3d at 786 (courts must “consider[] all voting opportunities that the Plaintiffs *could have* taken advantage of, even if they were no longer a possibility” at a given point). In fact, this case is controlled by the proposition that the mere “withdrawal or contraction of just one of many conveniences that have generously facilitated voting participation in Ohio” is no more than a minimal burden. *Ohio Dem. Party*, 834 F.3d at 628.

To see why, consider the challenged provisions one by one, and then in combination.

***Changes to ID requirements for in-person voting.*** Plaintiffs first challenge HB 458’s minor changes to ID requirements for in-person voting. *See* Am. Compl. ¶ 139. Prior to HB 458, voters could use some documents without photos, such as a utility bill or bank statement, but curiously could not use passports. Ohio Rev. Code § 3505.18(A)(1) (2022). HB 458 removes the non-photo ID options and now allows voters to display a variety of forms of photo ID, including an Ohio driver’s license or state ID with the voter’s name and current or former address, an interim state ID form, a variety of military IDs, and a U.S. passport. Ohio Rev. Code § 3501.01(AA)(1) (effective April 7, 2023). The law also makes state IDs free to obtain. *See* Ohio Rev. Code §§ 4507.233(A), 4507.50(A)(1)(a) (effective April 7, 2023). And it allows individuals with a religious objection to being photographed to vote in person without showing a photo ID. Ohio Rev. Code § 3505.19 (effective April 7, 2023).

It is inconceivable that this imposes anything more than a minimal burden on voters. In fact, the Supreme Court has already held as much in the course of upholding an Indiana photo ID law. *See Crawford*, 553 U.S. at 197–200, 204 (lead opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring in the judgment). “A photo identification requirement imposes some burdens on voters that other methods of identification do not share,” but those burdens “are neither so serious nor so frequent as to raise any question about the constitutionality of” a photo ID requirement. *Id.* at 197

(opinion of Stevens, J.); *see id.* at 209 (opinion of Scalia, J.). Even for any voters who may not yet possess an acceptable form of photo ID, “the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Id.* at 198 (opinion of Stevens, J.). And even if it were relevant that a photo ID requirement might place “a somewhat heavier burden . . . on a limited number of persons,” including “elderly persons” and “homeless persons,” any such burden is fully “mitigated” by the fact that all voters can still cast a no-excuse absentee ballot without photo ID, using only the last four digits of their Social Security numbers. *Id.* at 199; *see* Ohio Rev. Code § 3509.03(B)(5)(b) (effective April 7, 2023). Thus, “even [if] the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish [a] right to . . . relief” via a facial challenge to a photo ID requirement, as here. *Crawford*, 553 U.S. at 199–200 (opinion of Stevens, J.) (footnote omitted).

The record confirms that, like Indiana’s, Ohio’s photo ID requirement imposes no more than a minimal burden. To state the obvious, the requirement imposes no burden on voters who already possess a qualifying ID—which on the record offered by Plaintiffs may be *every registered Ohio voter*. Plaintiffs have failed to establish that *anyone* who is registered to vote in Ohio actually lacks an acceptable photo ID. In fact, the record shows that the number of voting-age Ohio citizens who possess an unexpired driver’s license or state ID as of July 14, 2023 (8,664,522) exceeds by more than 700,000 individuals the number of Ohio registered voters as of the same date (7,929,151). Thornton Report (Ex. 25) ¶¶ 44-45. Those numbers, moreover, do not account for registered Ohio voters who possess another form of acceptable photo ID, such as a passport, passport card, or military ID. *See* Ohio Rev. Code § 3501.01(AA)(1) (effective April 7, 2023). Consistent with the possibility that all Ohio registered voters already possess a qualifying photo ID, Plaintiffs have failed to identify *anyone* who was actually prevented from voting, or even



impeded in voting, by the photo ID requirement in either of the two elections conducted under HB 458. *See* Attig Dep. (Ex. 11) at 55:13–17; Gordon Dep. (Ex. 13) at 68:15–21; Perlatti Dep. (Ex. 16) at 70:8-25; Sagester Dep. (Ex. 17) at 71:12–21.

Plaintiffs’ attempt to fill this evidentiary chasm fails. Plaintiffs’ putative expert Dr. Mayer recites the burdens of obtaining a photo ID on individuals who do not already possess one, such as presenting required documents at the BMV and paying fees if the individual opts for a form of ID other than the free state ID card. *See* Mayer Report (Ex. 19) at 12–13. But such burdens are the burdens the Supreme Court upheld as minimal and constitutional in *Crawford*. *Compare id.*, with *Crawford*, 553 U.S. at 197–200, 204 (lead opinion of Stevens, J.); *id.* at 204, 209 (Scalia, J., concurring in the judgment). Moreover, as with the Indiana photo-ID regime upheld in *Crawford*, HB 458’s photo ID requirement for in-person voting can be satisfied with a free state ID and is inapplicable to absentee voting by mail. *See* 553 U.S. at 185–86 (lead opinion of Stevens, J.); *see also Mays*, 951 F.3d at 786 (burden analysis considers alternative means of voting). In other words, any voter can relieve herself of whatever minimal burden the photo ID places on her simply by voting absentee by mail. Plaintiffs’ own recitation of the burdens proves that HB 458’s photo ID requirement is constitutional. *See, e.g., Crawford*, 553 U.S. at 197–200, 204 (lead opinion of Stevens, J.); *id.* at 204, 209 (Scalia, J., concurring in the judgment); *see also, e.g., Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (upholding Virginia photo ID requirement); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (upholding Wisconsin photo ID requirement); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009) (upholding Georgia photo ID requirement).

If more were somehow needed, Ohio has minimized the burdens of obtaining a photo ID. Thanks to HB 458, Ohio does not charge a fee for state IDs for individuals 17 or older. Ohio Rev. Code § 4507.50(A)(1)(a) (effective April 7, 2023). BMV offices, where licenses and IDs are issued, are located throughout the state, and average wait times at BMV offices are 8 to 10 minutes.

King Dep. (Ex. 15) at 46:7–16. A voter receives an interim ID, which is an acceptable form of ID under HB 458, immediately at the BMV. *Id.* at 64:15–65:9, 123:11–18. And even if a voter lacks some documents needed to obtain an ID or driver’s license, the BMV can make exceptions to the document requirements. *Id.* at 109:8–110:7. In short, obtaining a photo ID in Ohio (which is not a requirement to vote absentee) presents at most a minimal burden to voters who choose to vote in person, not an unconstitutional burden on the right to vote. *See Crawford*, 553 U.S. at 197–200, 204 (lead opinion of Stevens, J.); *id.* at 204, 209 (Scalia, J., concurring in the judgment).

Unsurprisingly, Plaintiffs attempt to change the subject. In particular, Plaintiffs offer two putative expert estimates of the number of Ohioans who do not possess an acceptable photo ID and, thus, are “affected” by HB 458’s photo ID requirement. But the mere fact that individuals are “affected” by a challenged rule does not show that they—or anyone else—face a *burden* under the *Anderson-Burdick* framework. After all, *all* voters are required to comply with uniform voting rules—and *every* new voting rule necessarily requires some voters to modify their voting behavior. Accordingly, the burden component of the *Anderson-Burdick* framework examines not whether some individuals are “affected” by the challenged rule, but instead the cost and hardship of complying with it. *See, e.g., Crawford*, 553 U.S. at 197–200, 204 (lead opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring in the judgment); *Mays*, 951 F.3d at 785–86; *Ohio Dem. Party*, 834 F.3d at 630–32; *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012).

Plaintiffs’ putative expert estimates, therefore, are irrelevant. In any event, those estimates at most suggest that a fraction of Ohio’s voters are even potentially “affected” by the photo-ID requirement. The estimates therefore allay, rather than raise, any concerns about the requirement.

*First*, Plaintiffs’ putative expert Dr. Titunik reported that, in various past elections across seven of Ohio’s 88 counties, less than three-quarters of one percent of in-person voters presented forms of ID that are now invalid under HB 458. Titunik Report (Ex. 21) at 13–14. That means

that *more than 99%* of in-person voters in the elections Dr. Titiunik examined presented an HB 458-compliant photo ID. *See id.* Moreover, as Dr. Titiunik admitted, that a voter presented a non-photo ID in a past election does not mean that she lacks a form of photo ID accepted under HB 458. *See* Titiunik Dep. (Ex. 23) at 56:17–21. After all, that voters exercised the *option* to present a non-photo ID does not mean they did not at the time, or do not now, possess a photo ID. *See id.* In fact, nearly half of those voters voted in person in close-in-time elections using HB 458-compliant photo IDs. Thornton Report (Ex. 25) ¶ 39. And Ohio’s expert determined that at least a third of that already tiny fraction of voters, and perhaps many more, currently possess an unexpired state ID or driver’s license. *Id.* ¶ 42. Past use of non-photo IDs such as utility bills or pay stubs may reflect Ohio law’s treatment of interim IDs prior to HB 458. A voter receives an interim ID immediately at the BMV pending production and mailing of a permanent ID. *See* King Dep. (Ex. 15) at 64:15–65:9, 123:11–18. Prior to HB 458, interim IDs were not acceptable forms of identification for in-person voting. *See* Ohio Rev. Code § 3501.01(AA) (2022). HB 458, however, now deems an interim ID acceptable for in-person voting. *See* Ohio Rev. Code § 3501.01(AA)(1)(a) (effective April 7, 2023).

*Second*, Dr. Titiunik predicted that a fraction of voting-eligible Ohio residents lack an acceptable photo ID by combining estimates of the rate of possession of various forms of ID and estimates of the size of Ohio’s voting-eligible population. Titiunik Supp. Report (Ex. 22) at 8. Dr. Titiunik’s methodology vastly overstates the number of allegedly “affected” voters. For example, Dr. Titiunik examined Ohio’s entire estimated voting-eligible population, not the population of registered voters, *see id.*; *see* Thornton Report (Ex. 25) at 7, even though non-registrants may not vote regardless of HB 458 or the photo-ID requirement, *see* Ohio Rev. Code § 3503.06(A). Moreover, Dr. Titiunik’s estimate is further inflated because it did not account for the portion of the individuals who lack photo ID because of religious objections to being photographed and, thus,

are exempt from the photo ID requirement. *See* Ohio Rev. Code § 3505.19 (effective April 7, 2023). And her estimates on estimates suffer from other serious methodological flaws as well. *See* Thornton Report (Ex. 25) at 7–8; Titiunik Dep. (Ex. 23) at 109:18–114:10 (comparing June 2022 age data to July 2023 BMV photo ID data, resulting in 130,682-person exaggeration of total voting-eligible Ohioans without photo ID); *id.* at 121:16–125:22 (assuming that only military members may have military IDs, despite spouses and dependents also being eligible); Titiunik Supp. Rep. (Ex. 22) at 6–7 (same); *id.* at 7 (assuming without foundation that 10% of Ohio military members possess only a military ID for photo ID). Defendant and Intervenor-Defendants are entitled to summary judgment, since Plaintiffs’ evidence fails to establish any constitutional infirmity in HB 458’s photo ID requirement.

***Redistributing Monday voting hours to other days in the early-voting period.*** Early voting is not required by the Constitution, but Ohio provides it anyway. Plaintiffs challenge HB 458’s redistribution of early-voting hours during Ohio’s four-week early-voting period. *See* Am. Compl. ¶ 144. Specifically, HB 458 maintains the same number of early-voting hours but redistributes them from the Monday before election day throughout the early-voting period—including after normal work hours throughout the week and weekend before election day. *See* Directive 2023-03 (Ex. 1) at 8. This schedule leaves Ohio in the mainstream of regimes for early voting. Not all states even allow no-excuse early voting. *See Early In-Person Voting*, Nat’l Conf. of State Legislatures (Ex. 9). Other states stop early voting on the Sunday before the election (such as Delaware), four days before the election (such as Massachusetts), or even a week before the election (such as Louisiana). Del. Code Ann. tit. 15, § 5402; Mass. Gen. Laws ch. 54, § 25B(b)(2); La. Stat. § 18:1309(A)(1)(a)(i). The Sixth Circuit has held that another change to Ohio’s early-voting schedule, eliminating the so-called “Golden Week” when voters could register and vote on the same day, was merely “a withdrawal or contraction of” the “conveniences” that Ohio afforded to

voters, and could “hardly be deemed to impose a true ‘burden’” at all. *Ohio Dem. Party*, 834 F.3d at 628. No doubt, if entirely eliminating a full *week* of early voting could “hardly” count as a burden, merely reallocating only six hours of early-voting time so election officials can make final preparations for election day cannot either. If anything, keeping polls open later on various other days during the early-voting period could *positively* affect voter turnout. *See Owen Report* (Ex. 24) at 30.

Plaintiffs have again produced no evidence to support a contrary conclusion. They have not identified anyone who was actually prevented from voting, or even impeded in voting, by the revised early-voting period in either of the two elections conducted under HB 458 to date. *See Cropper Dep.* (Ex. 12) at 49:20–51:19; *Gordon Dep.* (Ex. 13) at 61:11–18, 62:4–15; *Perlatti Dep.* (Ex. 16) at 71:1–6; *Wernet Dep.* (Ex. 18) at 61:3–15; *Sagester Dep.* (Ex. 17) at 114:9–12. They also have presented no evidence that the revised early-voting period reduced turnout in either election conducted under HB 458. *Mayer Dep.* (Ex. 20) at 12:11–13; *Titunik Dep.* (Ex. 23) at 43:17–45:9.

Instead, Dr. Mayer cited studies concluding that eliminating a day of early voting reduced turnout in some past elections. *Mayer Report* (Ex. 19) at 17. That is irrelevant under the Sixth Circuit’s decision in *Ohio Democratic Party*. *See* 834 F.3d at 630–32. And that binding precedent aside, HB 458 did not eliminate any early voting time; it merely redistributed the same number of hours. And Plaintiffs’ experts present no studies about the likely effects of redistributing early-voting time—which could *positively* affect voter turnout. *See Owen Report* (Ex. 24) at 30. Nor did Plaintiffs’ experts examine the effects of *this* law in either of the elections conducted under it so far, evaluate whether voters would vote on other days or through other methods, or analyze how easy or difficult it would be for voters to work around this time shift. These glaring factual deficiencies would be fatal to any case, and certainly provide no basis for avoiding binding

precedent: Plaintiffs have failed to carry their heavy burden to show that HB 458’s revision to the early-voting schedule is burdensome in light of all of the voluminous other options to vote Ohio makes available. *Mays*, 951 F.3d at 786. Indeed, the lack of any evidence of burden compels summary judgment.

***Advancing mail-ballot deadlines.*** “[T]here is no constitutional right to an absentee ballot,” and states have no obligation to permit voters to vote absentee or by mail. *Mays*, 951 F.3d at 792; *see also McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807–09 (1969). Moreover, “[t]here is no dispute that Ohio is generous when it comes to absentee voting—especially when compared to other states.” *Mays*, 951 F.3d at 779–80. HB 458 advances the deadlines for requesting an absentee ballot and for when the absentee ballot must be received—two small tweaks to a type of voting that is not even constitutionally required. *Id.* at 792; *see Ohio Dem. Party*, 834 F.3d at 628. Neither imposes anything more than a minimal burden.

Start with the deadline for requesting an absentee ballot. Ohio voters generally can begin requesting ballots as early as “the first day of January of the year of the elections for which the absent voter’s ballots are requested or not earlier than ninety days before the day of the election at which the ballots are to be voted, whichever is earlier.” Ohio Rev. Code § 3509.03(D) (effective April 7, 2023); *see also Mays*, 951 F.3d at 792 (“Ohio law provides electors over ten months to request an absentee ballot.”). HB 458 changed the end date of the period for requesting absentee ballots from three days before election day to a week before election day. Ohio Rev. Code § 3509.03(D) (effective April 7, 2023). Ohio’s period of up to more than ten months to request an absentee ballot is extremely generous. Moreover, even on its own, the new deadline places Ohio comfortably in the plurality of states—around 23 in all—that require voters to request absentee ballots by mail a week or more before an election. *See Table 5: Applying for an Absentee Ballot*, Nat’l Conf. of State Legislatures (Ex. 8). If it is not a burden to request an absentee ballot three

days before election day—and it is undisputedly not—then neither is it a burden to request one a week before election day, which still provides up to ten months total to do so.

As for returning an absentee ballot, HB 458 did not change the deadline for placing an absentee ballot in the mail. Both before and after HB 458, Ohio law requires absentee ballots to be postmarked no later than the day before election day. Ohio Rev. Code § 3509.05(D)(2)(a) (effective April 7, 2023); § 3509.05(B)(2)(a) (2022). HB 458 instead advanced the deadline for boards of elections to receive mail-in ballots from ten days after election day to four days after election day. Ohio Rev. Code § 3509.05(D)(2)(a) (effective April 7, 2023). With this change, Ohio continues to be *more generous* than 30 states, which do not accept *any* absentee ballots received after election day. *See Table 11: Receipt and Postmark Deadlines*, Nat’l Conf. of State Legislatures (Ex. 7). It is unlikely, to say the least, that the majority of states have unconstitutional mail-in ballot deadlines. Indeed, it is not at all clear that any such deadlines could possibly violate the Constitution, not least because states are not required to provide absentee voting in the first place. *Mays*, 951 F.3d at 792.

Plaintiffs unsurprisingly fail to establish that the new deadlines are burdensome to voters, let alone that compliance with these deadlines is somehow more burdensome than compliance with the pre-HB 458 deadlines. Plaintiffs do not describe or quantify the burden of complying with these new deadlines—and there is no evidence to suggest that any such burden even exists, much less is anything more than minimal. Mayer Dep. (Ex. 20) at 27:4–25, 82:5–23, 96:21–98:25. In fact, it is not clear how the new receipt deadline for absentee ballots would impose a burden, since HB 458 did not change the deadline for placing ballots in the mail.

Indeed, once again, Plaintiffs do not identify anyone who was inhibited in, let alone prevented from, voting in either 2023 election due to HB 458’s changes to absentee deadlines. *See Cropper Dep.* (Ex. 12) at 49:20–51:19; *Gordon Dep.* (Ex. 13) at 61:11–18, 63:7–22, 67:2–68:4;

Perlatti Dep. (Ex. 16) at 71:1–6; Wernet Dep. (Ex. 18) at 61:3–11. Plaintiffs present no data from the two elections conducted under HB 458. Mayer Dep. (Ex. 20) at 12:19–23. Instead, (once again) Plaintiffs attempt to sidestep the burden inquiry by pointing to numbers of voters allegedly “affected” by HB 458’s changes. In particular, Dr. Titunik calculated that “approximately 0.65%” of applications for absentee ballots in the 2020 general election were received “between the third and the sixth day before the election.” Titunik Report (Ex. 21) at 28. She also calculated that “0.067% of” absentee ballots returned in the 2020 general election “arrived between the fifth and the tenth day after the election.” *Id.* at 35. Thus, even on Dr. Titunik’s calculations, the number of potentially “affected” voters is vanishingly small. *See id.* at 28, 35. In fact, *more than 99% of absentee voters* (and 100% of in-person voters) are unaffected by HB 458’s changes to the absentee application and ballot receipt deadlines. *See id.* And nothing in Plaintiffs’ record offers any reason to believe that any voters would have any trouble adapting to the new deadlines—or be harmed in any way by the need to do so.

Dr. Titunik’s numbers, moreover, are not probative for several reasons. *First*, they come from the unprecedented 2020 general election. Even Dr. Titunik admitted that election was unusual in absentee voting trends due to the COVID-19 pandemic, Titunik Dep. (Ex. 23) at 139:7–17, and it therefore does not provide a meaningful baseline for conclusions about voter behavior or burdens under HB 458. *Second*, the numbers fail to address whether “affected” voters will change their behavior and simply place their applications or ballots in the mail earlier than they did during the pre-HB 458 era. *Third*, a voter who fails to request or return an absentee ballot on time can still vote via other methods—early in person or on election day. *Fourth*, with respect to overseas voters specifically, fewer than 100 overseas voters’ ballots were rejected as untimely in the 2020 and 2022 elections, and nearly 80% of overseas voters’ ballots are transmitted via email, without the risk of mail delays. Thornton Report (Ex. 25) ¶¶ 63–64. Complying with such



reasonable deadlines is a minimal burden at the very most. *Finally*, both of these changes to a method of voting more generous than the Constitution requires are less burdensome than obtaining a state identification card—a burden that the Supreme Court held was slight and constitutional. *Crawford*, 553 U.S. at 197–200, 204 (opinion of Stevens, J.), 209 (opinion of Scalia, J.). Plaintiffs’ evidence fails to show a burden, let alone an unconstitutional burden, as a matter of law. *See supra* pp. 5–9.

***Reduction of cure period.*** HB 458 shortens by three days the period for curing a defect in an absentee ballot, or for curing a provisional ballot cast in person by showing proper identification at the voter’s local board of elections. Ohio Rev. Code §§ 3505.181(B)(7)–(8) (effective April 7, 2023), 3509.06(D)(3)(b) (effective April 7, 2023). Because the Constitution does not require a cure period, any reduction in the cure period cannot constitute a burden on the right to vote, as a matter of law. *See, e.g., Ohio Dem. Party*, 834 F.3d at 628. For this reason, the Sixth Circuit has already concluded that a three-day reduction of Ohio’s cure period imposes “a trivial burden” on voters. *NEOCH*, 837 F.3d at 635. This change is no different.

Plaintiffs again fail to substantiate their allegations that the cure period change is burdensome. They do not quantify the burdens of curing a ballot during the HB 458 cure period rather than the pre-HB 458 period. They again fail to present evidence that even a single person who attempted to vote in 2023 was unable to cure a ballot because of HB 458’s new deadline (and even that evidence would be only the first step toward showing a burden). This time around, Plaintiffs also fail to identify the number of potentially “affected” voters from past elections: They present no evidence of the number of individuals who attempted to cure provisional ballots between the fifth and tenth days after election day in the pre-HB 458 regime.

In fact, the number of provisional ballots rejected for failure to provide an ID is consistently just one or two hundredths of a percent of votes cast in a given election. Thornton Report (Ex. 25)

at 10. Consistent with that low number, Plaintiffs’ fact witness regarding local elections, the director of the Cuyahoga County Board of Elections, testified that to his knowledge, during his years in that position, *no* Cuyahoga County voter had ever attempted to cure a provisional ballot post-election. Perlatti Dep. (Ex. 16) at 55:18–21, 57:5–12. And under HB 458, approximately three Cuyahoga County voters voted provisional ballots that could have been cured in the May 2023 primary, but none of them even attempted to cure their ballots. *Id.* at 56:4-9. Eliminating days that went unused anyway does not burden voters.

The same goes for absentee ballots. The rejection rate for absentee ballots has been in decline for several years and is consistently very low—typically less than 1%, and as low as 0.3% in 2022. Thornton Report (Ex. 25) at 8. Plaintiffs present no evidence on how often voters cure their absentee ballots, when they do so, or whether changing the cure deadline would be burdensome.

Nor is there any other reason to think the changes are burdensome to voters. Ohio law permits absentee ballots to be sent to overseas and military voters 46 days before election day and to domestic voters 29 days before election day. Ohio Rev. Code §§ 3509.01(B)(1) (effective April 7, 2023). When combined with Ohio’s generous period of up to more than ten months to request an absentee ballot, *see id.* § 3509.03(D) (effective April 7, 2023), Ohio voters have more than enough time to request, receive, complete, and return their absentee ballots before expiration of the cure period. Individuals who choose to take advantage of Ohio’s generous absentee regime and vote absentee need not wait until the last minute to return their absentee ballots; they can do so well in advance of election day and thereby eliminate any risk of receiving untimely notice of any defect. And there is little reason for concern about overseas voters’ ballots specifically. The vast majority—nearly 80%—are transmitted via email, without the risk of mail delays, meaning that those voters can also receive timely notice of any defects. Thornton Report (Ex. 25) ¶¶ 63–64.

Plaintiffs' concern about absentee voters receiving untimely notice of a defect is further misplaced for at least three more reasons. *First*, the cure period represents “just one of many conveniences” offered to Ohio voters, so shortening it “can hardly be deemed to impose a true ‘burden’” on the right to vote. *Ohio Dem. Party*, 834 F.3d at 628. The *Anderson-Burdick* framework is not a “one-way ratchet” that freezes in place prior voting laws and prohibits states “from later modifying their election procedures in response to changing circumstances.” *Id.* at 623, 635.

*Second*, and similarly, Ohio need not offer *any* cure period; indeed, some states (including Connecticut and Alaska) do not. And other states (including Virginia and Florida) have shorter cure periods than Ohio. *See id.* at 629 (considering comparisons to other states' voting laws); Va. Code § 24.2-709.1(C) (absentee ballots; noon on the third day after the election); Fla. Stat. § 101.048(1) (provisional ballots; second day after the election).

*Third*, and at any rate, HB 458 actually *reduces* the risk of untimely notice compared to pre-HB 458 law in at least two ways. In the first place, HB 458 lengthens by one day the amount of time between the absentee ballot application deadline and the cure deadline. Prior to HB 458, those deadlines were three days before election day and seven days after election day, respectively, a total period of 11 days. Under HB 458, those deadlines are now seven days before election day and four days after election day, respectively, for a total period of 12 days. *See Directive 2023-03* (Ex. 1) at 5–6. Thus, under HB 458, voters now have one more day between those deadlines to receive notice and to cure any ballot defects. *See id.* HB 458 further reduces the risk of untimely notice because it eliminates the mismatch between the absentee ballot deadline and the end of the cure period. Before HB 458, Ohio accepted absentee ballots until ten days after the election, but the cure period ended seven days after the election, so an absentee ballot might not even *arrive* before the end of the cure period. Ohio Rev. Code §§ 3509.05(B)(1) (2022), 3509.06(D)(3)(b)

(2022). HB 458 eliminates this possibility and, thus, reduces any risk of untimely notice to individuals who return their absentee ballots late in the election calendar.

The Sixth Circuit did not hesitate to uphold Ohio’s previous adjustment to the cure period, *NEOCH*, 837 F.3d at 635, and this Court should not hesitate to uphold this adjustment either.

***Improving ballot drop-box security for mail ballots.*** HB 458 expressly *adds* an additional way for voters to securely return their absentee ballots, at any time of the day or night. Specifically, HB 458 provides that each county may maintain one drop-box for collection of absentee ballots. Ohio Rev. Code § 3509.05(C)(2)–(3). Ballot drop-boxes must now be available 24/7 during the absentee-voting period, and they must be continually monitored by video. Plaintiffs’ challenge to this provision thus makes little sense. Making it *easier* to vote cannot impose a burden on voters. Understandably, when the Sixth Circuit recently upheld an Ohio rule barring counties from maintaining more than one drop-box location, it concluded that the rule was “reasonable and non-discriminatory and thus subject to rational basis review.” *A. Philip Randolph Inst.*, 831 F. App’x at 191–92. The same is true here too.

Plaintiffs have identified no individual who has been inhibited in, much less prohibited from, voting due to HB 458’s drop-box rules. *See* Cropper Dep. (Ex. 12) at 49:20–51:13; Gordon Dep. (Ex. 13) 58:10–14; Perlatti Dep. (Ex. 16) at 71:1–6; Wernet Dep. (Ex. 18) at 61:16–18. Plaintiffs’ experts, moreover, provided no analysis of how HB 458’s drop-box rules operated, much less affected any voters, in the two elections conducted under HB 458. Instead, Dr. Mayer cites a study finding that decreasing distances to drop-boxes increased voter turnout in a different state. *See* Mayer Report (Ex. 19) at 16. But that is irrelevant. HB 458’s drop-box provisions effectively maintain the status quo. HB 458 does not increase the distance from *any* voter to *any* drop-box; both pre- and post-HB 458, drop-boxes must be located at the office of the county board of elections. *See* Mayer Dep. (Ex. 20) at 83:12–84:1. The sum total of HB 458’s effect on drop-

boxes is that the few county boards that had more than one drop-box at their office may now provide only one drop-box at that same location. Thornton Report (Ex. 25) ¶ 53. Plaintiffs fail to show any burden stemming from that insignificant change. *See* Mayer Dep. (Ex. 20) at 82:5–85:11; Titunik Dep. (Ex. 23) 159:19–23, 162:2–15.

***Cumulative effect.*** Plaintiffs cannot save their case with a fallback argument that HB 458 is burdensome because of its cumulative effects. As demonstrated above, nearly all of HB 458’s tweaks are to regimes that Ohio generously offers high above the constitutional floor for voting. Therefore, while they address voting, they are entirely distinct from the content and contours of the “right to vote” that is protected by the Constitution. And what is more, both before and after HB 458, Ohio affords voters a variety of accessible, convenient ways to vote. *See supra* pp. 2–5. Ohioans can vote absentee by mail or via drop-box, with no excuse required to obtain an absentee ballot and no photo ID required to submit such a ballot. Or they can vote early in person, at any point over several weeks, including five days with hours after 5 p.m. and two weekend days, with a variety of acceptable forms of photo ID. Or they can vote on election day, with the same variety of photo ID options. To reiterate, in the two elections conducted under HB 458 thus far, Plaintiffs have not identified a single voter who has been adversely affected by the provisions they challenge. Voting remains “[v]ery easy” in Ohio, *Ohio Dem. Party*, 834 F.3d at 628, and the cumulative “burden” imposed by HB 458, if any, is thus negligible.

## **2. Ohio’s state interests far outweigh HB 458’s trivial burdens.**

When a law is minimally burdensome, it receives deferential rational-basis review. *Mays*, 951 F.3d at 784. Any “important regulatory interests” justify minimal burdens. *Id.* Here, HB 458 modestly tweaks Ohio’s generous voting laws to help ensure and promote smooth, prompt administration of elections, election security, and public confidence in election results—while keeping it “[v]ery easy” to vote. *Ohio Dem. Party*, 834 F.3d at 628. Ohio’s interests animating HB

458 are interests of the highest order, and they more than justify HB 458’s modest changes to Ohio’s convenient, accessible voting process.

The State may assert its interests at any point. *See Mays*, 951 F.3d at 789. In this litigation, Ohio asserts that HB 458 supports its interests in “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.” SOS First Interrogatory Responses (Ex. 5) at 3. But even if only the originally stated justifications were acceptable, the legislative record amply bears out those same interests. *See* Floor Statement of Rep. Bill Seitz (Dec. 14, 2022), <https://www.ohiochannel.org/video/ohio-house-of-representatives-12-14-2022-part-3> at 6:04–6:26, 7:00–10:12, 29:30–29:43 (discussing importance of shoring up public confidence in counting of absentee ballots; explaining that boards of elections have advocated for elimination of Monday early voting for over a decade in light of the administrative problems it creates; explaining that cure and ballot receipt deadline changes were geared toward allowing speedier determination of election results; identifying importance of photo ID as a “secure form of identification”); Floor Statement of Senator Theresa Gavarone (Dec. 13, 2022), <https://ohiosenate.gov/session/video/ohio-senate-12-13-2022-186122>, at 1:32:14–1:32:51, 1:33:19–1:33:26 (“And I also want to improve the perception, confidence, and integrity of our elections by simply requiring voters to prove that they are who they say they are. . . . We have a trust deficit in our elections right now. . . . But it’s imperative that we give people doubting the results of our elections reason to participate in them.”); Floor Statement of Senator Niraj Antani (Dec. 13, 2022), <https://ohiosenate.gov/session/video/ohio-senate-12-13-2022-186122>, at 1:47:19–1:47:40 (“[W]ithout election integrity, nothing else we do matters. If the voters do not believe, or if they know, that our elections are not . . . secure, the confidence in what we do is undermined.”); Testimony of Beau Euton before Ohio Senate Local Gov’t & Elections Comm.

(Dec. 7, 2022) (Ex. 26) (“Ohio citizens want to know that when they vote, they’re doing so in free, fair, and valid elections. These commonsense reforms will increase election security and voter confidence.”); *cf.* Statement of Senator Theresa Gavarone (May 24, 2022) (Ex. 27) (identifying purposes of predecessor legislation as “reducing the possibility of election fraud in Ohio” and “better ensur[ing] confidence in our elections”).

These interests are critical. “[P]reserving the integrity” of elections is “indisputably . . . a compelling interest.” *Eu v. San Francisco Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989). And maintaining “[c]onfidence in the integrity of our electoral processes,” or shoring it up when needed, “is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). For those reasons, the Supreme Court and other courts have already approved of photo ID laws under the *Anderson-Burdick* framework. *Crawford*, 553 U.S. at 204 (opinion of Stevens, J.); *id.* at 209 (opinion of Scalia, J.); *see also Lee*, 843 F.3d 592; *Frank*, 768 F.3d 744; *Common Cause/Georgia*, 554 F.3d 1340.

These are not merely theoretical concerns. Experts on both sides agree that substantial proportions of the public lack confidence in election integrity. Owen Report (Ex. 24) at 8–13; Mayer Dep. (Ex. 20) at 107:8–108:18. To give just one example out of many cited by the State’s expert, a 2016 poll found that only about 4 in 10 Americans had a “high” degree of confidence that the 2016 election would be counted correctly, and a third of Americans thought there was “a great deal” of fraud in American elections. Owen Report (Ex. 24) at 11 (citation omitted). HB 458 sensibly responds to that distrust. Yet Plaintiff’s experts did not evaluate HB 458’s effects on public confidence in elections. Titunik Dep. (Ex. 23) at 167:10–19; Mayer Dep. (Ex. 20) at 106:10–13. And despite Plaintiffs’ concerns, HB 458 may in fact *increase* voter participation, as raising confidence in elections enhances voter participation. Owen Report (Ex. 24) at 29. The State’s expert also relates a study in which two-thirds of respondents thought that a photo ID

requirement would build trust in the electoral system. *Id.* at 10. HB 458 serves the crucial interest in protecting and building public confidence in election integrity.

In addition, HB 458 furthers the state interest in deterring, preventing, and identifying voter fraud. Substantiated voter fraud is and remains rare in Ohio. But it is not nonexistent. The most common form occurs when a noncitizen casts a ballot despite being ineligible to vote. Hobday Dep. (Ex. 14) at 88:14–20. Each year, Ohio refers 10 or more instances of that form of voter fraud for prosecution. *Id.* HB 458 directly combats that most-common form of voter fraud by requiring driver’s licenses and state IDs to carry “a notation designating that the licensee is a noncitizen.” Ohio Rev. Code §§ 4507.52(A)(2) (effective April 7, 2023), 4506.11(A)(13) (effective April 7, 2023). The vast majority of Ohioans used one of those two forms of photo ID to vote even prior to HB 458. *See* Titunik Report (Ex. 21) at 14; Titunik Supp. Report (Ex. 22) at 6–7 (estimating that less than a million Ohioans hold a military ID); *Certificates of Non Citizen Nationality*, U.S. Dep’t of State (Ex. 28); USA.gov, *Apply for a New Adult Passport* (Ex. 29) (U.S. passports are held almost exclusively by U.S. citizens). The notation, in combination with the requirement to show the ID carrying it, thus makes it much easier for election workers to identify and prevent the most common form of voter fraud. And what is more, states are not required to wait for voter fraud—and ensuing damage to public confidence in the electoral process—before protecting their elections. They are instead permitted to regulate prophylactically to *prevent* voter fraud before public confidence is irreparably damaged. *Brnovich v. Dem. Nat’l Comm.*, 141 S. Ct. 2321, 2347–48 (2021); *Timmons*, 520 U.S. at 364.

As for the drop-box rules, they promote the important state interests of “uniformity, which in turn promotes the fair administration of elections,” “efficiency . . . in administering elections,” and “the accuracy of the election.” *A. Philip Randolph Inst.*, 831 F. App’x at 192. Accordingly, a



materially identical version of the drop-box rules “easily pass[ed] constitutional muster” in the Sixth Circuit just a few years ago. *Id.*

The remaining challenged provisions—the mail-in ballot deadlines, cure period, and early-voting schedule change—all support the state’s strong interests in smooth, prompt election administration and promoting public confidence in elections. *See Crawford*, 553 U.S. at 196–97 (opinion of Stevens, J.); *id.* at 209 (opinion of Scalia, J.); *Timmons*, 520 U.S. at 364–65; *Common Cause Ind. v. Lawson*, 977 F.3d 663, 665 (7th Cir. 2020); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *Ariz. Dem. Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020); *Mays*, 951 F.3d at 787. Local election officials in Ohio have pressed for the early voting calendar change for over a decade to allow them to better manage their responsibilities in the immediate runup to elections. Statement of Rep. Bill Seitz at 6:04–6:26, 7:00–10:12; *see LaRose Implementing New Election Reforms*, Ohio Secretary of State (Ex. 4); *Mays*, 951 F.3d at 787. Completing the task of sending out absentee ballots earlier means that local election officials can transition earlier to other time-sensitive tasks. And completing the cure period and receipt of absentee ballots earlier allows them to transition to other election-certification tasks earlier, enabling certainty and finality in election results and promoting public confidence in the process. *See Common Cause Ind.*, 977 F.3d at 665; *New Ga. Project*, 976 F.3d at 1282; *Ariz. Dem. Party*, 976 F.3d at 1085; *Mays*, 951 F.3d at 787. Those interests, and their hand-in-glove fit with the challenged provisions of HB 458, would suffice for any level of scrutiny. HB 458 is constitutional.

**B. No Arguments Plaintiffs May Make To The Contrary Could Change This Conclusion.**

Plaintiffs likely will attempt to avoid this conclusion by insisting on a higher level of judicial scrutiny of HB 458’s commonsense and constitutional changes to Ohio’s election laws. But given binding precedent and this record, their arguments will be unavailing.

The Amended Complaint asserts, for example, that the burdens imposed by the challenged provisions are *severe*, Am. Compl. ¶¶ 74, 138, implicitly equating HB 458’s minor and modest changes to “poll taxes” and the like, *Mays*, 951 F.3d at 784. But that is not just hyperbolic; it is insulting. There is not a shred of evidence in the record suggesting that HB 458 imposes severe burdens: No one is “totally denied a chance to vote” because of HB 458, meaning “strict scrutiny is inappropriate.” *Id.* at 787. Rational basis is the only conceivable standard of review for this case. Nor could it be any other way. If HB 458’s tweaks to an already generous voting system imposed severe burdens, then *every* voting law imposes severe burdens. That, of course, is not the law, as the Supreme Court has made clear. *See, e.g., Burdick*, 504 U.S. at 433; *Crawford*, 553 U.S. at 197 (opinion of Stevens, J.); *id.* at 209 (opinion of Scalia, J.). And it would be inconsistent with the Constitution, which vests the States—not the federal government and especially not the federal courts—with primary responsibility to regulate the “Times, Places and Manner” of even federal elections. U.S. Const. Art. I, § 4, cl. 1; *see Burdick*, 504 U.S. at 433.

Plaintiffs may argue in the alternative that the challenged provisions are at least moderately burdensome. But as explained above, they are not—under controlling precedent (*see, e.g., Crawford*, 553 U.S. at 197–200 (opinion of Stevens, J.); *NEOCH*, 837 F.3d at 635), common sense, and this record. If imposing some incidental and neutral burdens on constitutionally required *election-day voting* is not enough “to raise any question about the constitutionality of” a law, *Crawford*, 553 U.S. at 197 (opinion of Stevens, J.), then neither can it raise any question when a law incidentally and neutrally imposes some burdens on *voting conveniences* that are not even constitutionally required, *Ohio Dem. Party*, 834 F.3d at 628. And, what is more, even assuming a moderate burden, HB 458’s tweaks would still survive “flexible review” for the reasons stated.

If this Court were to conclude otherwise, that would only go to show that there is something wrong with the Sixth Circuit’s framework for analyzing *Anderson-Burdick* claims, not with Ohio’s

law. *See, e.g., Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 561–62 (6th Cir. 2021) (Readler, J., concurring) (collecting cases criticizing the Sixth Circuit’s decisions applying *Anderson-Burdick*). As the Sixth Circuit and its judges have acknowledged, a three-tiered approach to *Anderson-Burdick* is out of step with Supreme Court and other Circuits’ precedent. *See id.; Mays*, 951 F.3d at 783–84 n.4. The Supreme Court prescribes only two tiers of review: strict scrutiny for severely burdensome restrictions, and deferential review for all other kinds of voting laws (including this one). *Mays*, 951 F.3d at 783–84 n.4; *see Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 434. The Sixth Circuit has erroneously added a third kind of scrutiny for a third category of regulations, and its precedents to that effect should be overruled—if the right case ever arose. This, however, need not be that case—both because HB 458 imposes minimal burdens at most and because the law easily survives even the more rigorous interpretation of the *Anderson-Burdick* framework. *See, e.g., Memphis APRI*, 2 F.4th at 561 (Readler, J., concurring).

### CONCLUSION

This lawsuit represents yet another instance in which some organizations seek to entangle the federal courts in the minutiae of local election administration and to “disregard the Constitution’s clear mandate” that “the states (and not the courts) establish election protocols.” *Ohio Dem. Party*, 834 F.3d at 629. As the Supreme Court, Sixth Circuit, and district courts have done before, this Court should reject this challenge, enter summary judgment against the Plaintiffs, and uphold the General Assembly’s common-sense, constitutional, and duly enacted HB 458.

Dated: October 6, 2023

Respectfully submitted,

*/s/ John M. Gore*

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2. Excerpt from *Election Official Manual 201*, Ohio Secretary of State (Feb. 2, 2022).
3. Ohio Secretary of State, 2023 Elections Calendar, <https://www.ohiosos.gov/publications/2023-elections-calendar>.
4. Press Release, *LaRose Implementing New Election Reforms That Will Boost Confidence in Our Elections and Increase Their Accessibility*, Ohio Secretary of State (Feb. 7, 2023), <https://www.ohiosos.gov/media-center/press-releases/2023/2023-02-08/>.
5. First Interrogatory Responses of Secretary of State Frank LaRose
6. Summary, *Table 2: Excuses to Vote Absentee*, Nat'l Conf. of State Legislatures (updated July 12, 2022), <https://www.ncsl.org/elections-and-campaigns/table-2-excuses-to-vote-absentee>.
7. Summary, *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, Nat'l Conf. of State Legislatures (updated July 12, 2022), <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots>.
8. Summary, *Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives*, Nat'l Conf. of State Legislatures (updated July 12, 2022), <https://www.ncsl.org/elections-and-campaigns/table-5-applying-for-an-absentee-ballot>.
9. Brief, *Early In-Person Voting*, Nat'l Conf. of State Legislatures (updated Aug. 30, 2022), <https://www.ncsl.org/elections-and-campaigns/early-in-person-voting>.
10. Report, *Voter ID Laws*, Nat'l Conf. of State Legislatures (updated March 9, 2023), <https://www.ncsl.org/elections-and-campaigns/voter-id>.
11. Excerpts from Deposition of William Attig
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