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

MEMORANDUM IN SUPPORT OF
INTERVENOR-DEFENDANTS' AND THE SECRETARY'S MOTION TO STRIKE
PLAINTIFFS' IMPROPER, UNTIMELY, AND LATE-FILED EVIDENCE

As the Secretary's and Intervenor-Defendants' motions for summary judgment explained, Plaintiffs' record fails to establish a genuine issue of material fact warranting a trial on their meritless challenges to the Ohio General Assembly's constitutional and commonsense HB 458. *See* ECF Nos. 46, 48. Now—nearly three *months* after the discovery deadline Plaintiffs insisted upon and agreed to, *weeks* after the Secretary and Intervenor-Defendants filed their motions, and in one instance even one week after Plaintiffs filed their oppositions to those motions—Plaintiffs have attempted to backfill their inadequate record with voluminous documents and information never previously disclosed in this case. Plaintiffs were aware for weeks that they were collecting at least some of this evidence—yet they *never* disclosed that fact to the Secretary or Intervenor-Defendants, much less the Court. Instead, they continued to insist on enforcing and even expediting case-management deadlines for other parties, only to spring this belated evidence on the case well

after the fact.

When a party lacks facts necessary for it to oppose a summary judgment motion, the proper recourse is to move for relief under Rule 56(d), specifically explaining by affidavit the missing facts, why they are material, and why the party was unable to obtain them previously. *See* Fed. R. Civ. P. 56(d); *Scadden v. Werner*, 677 F. App'x 996, 999–1000 (6th Cir. 2017). Plaintiffs wholly failed to do that here. Instead, Plaintiffs opted to wait until their summary judgment opposition—and beyond—to introduce voluminous new evidence, thereby depriving the Secretary and Intervenor-Defendants of the opportunity to take discovery regarding that evidence. "The need to comply with Rule 56(d) 'cannot be overemphasized,'" and Plaintiffs' failure to comply cannot be excused. *Id.* at 999 (quoting *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000)).

To the contrary, Plaintiffs' belated effort to reopen the record violates the rules, the agreed-upon case-management schedule, Plaintiffs' discovery obligations, and even Plaintiffs' obligation to meet and confer with opposing counsel. It also includes at least one improper declaration that turns Plaintiffs' attorney into a putative expert witness in violation of the witness-advocate rule and Plaintiffs' agreed-upon deadlines for expert disclosures.

Plaintiffs nonetheless attempt to fault the Secretary and Intervenor-Defendants for not "contest[ing]" this newly disclosed evidence in their motions for summary judgment. Plaintiffs' Opposition to Motions for Summary Judgment, ECF No. 62, at 40. This argument is misleading: the Secretary and Intervenor-Defendants could not have "contested" evidence that *did not exist* at the time they filed their motions. Moreover, this evidence does not save Plaintiffs' claims from summary judgment, as the Secretary and Intervenor-Defendants explain in their summary judgment replies filed today.

In all events, the Court cannot deny the Secretary's and Intervenor-Defendants' motions

for summary judgment based upon this untimely and improper evidence. After all, the Secretary and Intervenor-Defendants have had no opportunity to conduct depositions regarding, or to otherwise probe, this evidence. Allowing Plaintiffs to introduce this evidence now unfairly tips the scales and prejudices the Secretary's and Intervenor-Defendants' ability to seek summary judgment and to prepare for any trial in this matter, particularly on the expedited schedule Plaintiffs have insisted that other parties (but not themselves) adhere to.

The Court should put a stop to Plaintiffs' gamesmanship and enforce the deadlines Plaintiffs insisted upon. Accordingly, as explained more fully below, the Court should strike the belated evidence Plaintiffs purported to add to the case in Plaintiffs' Motion for Leave to Supplement Summary Judgment Appendix, ECF No. 64, and in the appendix accompanying Plaintiffs' response in opposition to summary judgment, ECF No. 62, 63.[1]

BACKGROUND

The parties' agreed-upon schedule set a June 30 deadline for non-expert discovery and a September 1 deadline for expert discovery. *See* Rule 26(f) Rep., ECF No. 19, at 3. The parties later agreed to extend those deadlines solely for the purpose of conducting depositions of previously disclosed witnesses. *See* ECF Nos. 34, 38. Even under those modest extensions, fact discovery closed on July 31, and expert discovery closed on September 8. *See* ECF Nos. 34, 38.

Plaintiffs insisted upon strict adherence to this case-management schedule. *E.g.*, ECF No. 24 at 1, 5 (opposing intervention in light of the case's "tight schedule" lest Intervenor-Defendants

[1] Plaintiffs filed their motion for leave to supplement at 9:27 p.m. on Friday, October 27, one week after the deadline—which they voluntarily advanced—to file their summary judgment opposition. Plaintiffs did not meet and confer with any opposing counsel before filing their motion, and did not recite any opposing party's position on the motion. ECF No. 64; *but see* Local Rule 37.1. The Court granted Plaintiffs' motion at 1:01 p.m. on Monday, October 30, more than eleven days before the deadline for the Secretary and Intervenor-Defendants to respond to the motion. *See* Local R. 7.1(d). Intervenor-Defendants were then preparing their opposition to Plaintiffs' motion.

disrupt the "specialized" and "carefully-negotiated" discovery order). Intervenor-Defendants agreed to abide by this schedule as a condition of their intervention. ECF No. 26 at 5.

The parties' agreed-upon case-management schedule also set deadlines for summary judgment briefing. *See* ECF No. 19 at 3. Despite their insistence on adhering to the case-management schedule, Plaintiffs sought to change those deadlines. *See* ECF No. 44 at 1–2. Moreover, while Plaintiffs *never* raised the prospect of a trial date in the case-management report, *see* ECF No. 19 at 3, they later asked the Court to set the case for trial "starting the first week of December," ECF No. 44 at 2, in order to avoid an alleged "delay" entirely of their own making, *id.* at 5. The Court set the case for a "tentative" trial date of January 10, 2024. *See* ECF No. 45.

The Secretary and Intervenor-Defendants moved for summary judgment on October 6. ECF No. 46, 48. According to the schedule negotiated by the parties, Plaintiffs' opposition was due on November 3, and reply briefs were due on November 13. *See* ECF No. 19 at 3. But on October 20, Plaintiffs represented that they were prepared to file their opposition early and convinced the Court (over the Secretary's and Intervenor-Defendants' objections and at the inconvenience of their counsel, *see* ECF No. 44 at 3–4) to advance the deadline for submission of their opposition brief and the Secretary's and Intervenor-Defendants' reply briefs. ECF No. 60, 61.

Plaintiffs never raised with the Secretary's or Intervenor-Defendants' counsel their intention to reopen the record and to introduce new evidence never previously disclosed in the case. Nonetheless, Plaintiffs attached a group of new declarations in the summary judgment appendix they filed on October 20, and another tranche of new information through their motion to supplement filed a week later on October 27. Plaintiffs did not provide an affidavit explaining

why reopening discovery was proper or otherwise comply with Rule 56(d). *See* Fed. R. Civ. P. 56(d); *Cacevic*, 226 F.3d at 488; *Scadden*, 677 F. App'x at 999.

Motion to Supplement. Plaintiffs moved to supplement the record on October 27, nearly three months after the close of non-expert fact discovery, three weeks after the summary judgment deadline, a week after the opposition deadline Plaintiffs requested and obtained, and only one week before the Secretary's and Intervenor-Defendants' deadline to file their reply briefs. ECF No. 64. That evidence all relates to the August 2023 special election, *see id.*, which itself took place after the close of fact discovery, *see* ECF No. 34. Plaintiffs represented that they requested information regarding the August 2023 special election from county boards of elections, but have not disclosed the date on which they did so. *See* ECF No. 64. They also never informed counsel for the Secretary or Intervenor-Defendants, much less the Court, that they would attempt to introduce the responses into the record months after the close of discovery. *See id.*

Other New Evidence. Likewise, Plaintiffs introduced voluminous new evidence in their response in opposition to summary judgment, including:

- A declaration from Plaintiffs' counsel, Ian Baize. ECF No. 63 at 1276–82. In the declaration, Mr. Baize explains his own analysis of and conclusions from certain election-related data. That declaration is as untimely as the rest of Plaintiffs' belatedly disclosed evidence. It also violates the witness-advocate rule and is an apparent attempt to circumvent the deadline for disclosing expert witnesses.
- A declaration from Anthony Perlatti regarding the August 2023 election, which took place after Mr. Perlatti was deposed and after the close of fact discovery. *Id.* at 92–97.

The Secretary and Intervenor-Defendants had no opportunity to conduct depositions regarding, or otherwise probe, these newly disclosed documents and information. Plaintiffs nonetheless fault the Secretary and Intervenor-Defendants for not "contest[ing]" this evidence in their motions for summary judgment filed before Plaintiffs produced it. ECF No. 62 at 40.

ARGUMENT

The Court should strike the improper and untimely evidence Plaintiffs purported to add to the case in Plaintiffs' Motion for Leave to Supplement Summary Judgment Appendix, ECF No. 64, including the supplemental USB drive noted in ECF No. 67, and in Plaintiffs' response in opposition to summary judgment, ECF No. 62, 63.

I. The Court Should Strike All Evidence Presented In Plaintiffs' Motion To Supplement

The Court should strike all of the evidence presented in Plaintiffs' motion to supplement for at least six reasons. *First*, Plaintiffs' counsel never even *attempted* to meet and confer with opposing counsel before filing that motion. Under Local Rule 37, that failure alone warranted denying their motion to supplement. *See* Local R. 37; *Branning v. Romeo's Pizza, Inc.*, 594 F. Supp. 3d 927, 933 (N.D. Ohio 2022); *Kohn v. Glenmede Trust Co., N.A*, No. 1:19-cv-1352, 2019 WL 7372320, at *7 (N.D. Ohio Dec. 31, 2019). It now justifies striking the evidence added in that motion.

Second, Plaintiffs provided no affidavit to support their alleged need to supplement the summary judgment record. That failure, too, warrants striking their evidence. *See* Fed. R. Civ. P. 56(d); *Cacevic*, 226 F.3d at 488; *Scadden*, 677 F. App'x at 999.

Third, even in their motion, Plaintiffs identify no sufficient cause for reopening the record months after the discovery deadlines they agreed to and insisted upon. *See* Fed. R. Civ. P. 56(d); *Cacevic*, 226 F.3d at 488; *Scadden*, 677 F. App'x at 999. Indeed, Plaintiffs have been on notice since May 10 that Ohio would hold an August 2023 special election and that non-expert fact discovery would close before that election took place. *See* 135th G.A. Am. Sub. S.J.R. No. 2 (May 10, 2023) (setting the August 8, 2023 special election). Accordingly, Plaintiffs had months to ask the Court to extend the fact discovery deadline to properly submit this supposedly "highly

relevant" evidence from the August election. ECF No. 64 at 1. But they failed to do so. Instead, they insisted on adhering to an aggressive case-management schedule and even sought to *expedite* proceedings in this case. *See* ECF No. 44 at 1–2. Plaintiffs thus have now run headlong into deadline issues of their own making, which are the antithesis of a proper basis for reopening discovery now. *See* Fed. R. Civ. P. 56(d); *Cacevic*, 226 F.3d at 488; *Scadden*, 677 F. App'x at 999; *cf. PNC Bank, N.A. v. Goyette Mech. Co.*, 140 F. Supp. 3d 623, 633 (E.D. Mich. 2015) (at summary judgment stage, denying motion to amend pleadings, which would have required reopening discovery, potential new expert discovery, and potential new motion practice, when moving party "ha[d] not begun to supply a plausible answer" for its belated change of position).

Fourth, Plaintiffs' attempt to supply a basis for reopening discovery only makes matters worse. Plaintiffs note that they requested information regarding the August 2023 election from county boards of elections and received "the most recent response" on October 20, 2023. ECF No. 64-3, Posimato Declaration at 2. Plaintiffs, however, do not disclose the dates on which they received responses from other counties. *See id.* Moreover, Plaintiffs never disclose the date on which they served their requests on counties—which presumably was well before October 20, 2023. *See id.* And prior to their motion, they *never* informed the Secretary or Intervenor-Defendants—much less the Court—that they requested information regarding the August 2023 election from counties or would seek to reopen the record to include counties' responses months after the discovery deadline. *See id.*; *compare* Fed. R. Civ. P. 45(a)(4) (requiring "notice and a copy" of any third-party subpoena to "be served on each party"). Instead, they insisted on enforcing and even expediting the agreed-upon deadlines for everyone else in the case. *See supra* p. 4.

Plaintiffs' failure to disclose their intentions and their "good-for-me-but-not-for-thee" approach to case management are precisely the kind of gamesmanship the federal rules exist to

foreclose and this Court should not countenance. *See* Fed. R. Civ. P. 56(d); *Cacevic*, 226 F.3d at 488; *Scadden*, 677 F. App'x at 999. The Court certainly should not *reward* Plaintiffs' sandbagging by denying the Secretary's and Intervenor-Defendants' motions for summary judgment based upon the belatedly disclosed evidence that Plaintiffs have been compiling for months, particularly when the Secretary and Intervenor-Defendants have had no opportunity to probe or "contest" that evidence through discovery. ECF No. 62 at 40.

Fifth, Plaintiffs argue that this post-discovery evidence came "at least in part" from the Secretary of State. ECF No. 64 at 1. But the remainder did not come from the Secretary of State—and *none* it of came from Intervenor-Defendants. Plaintiffs also say that data from the August special election is crucial because it was "the only election since HB 458's enactment." ECF No. 64 at 1. But Ohio also held a May 2023 primary election and will hold additional elections next week on November 7. It is obviously prejudicial to the Secretary's and Intervenor-Defendants' ability to litigate summary judgment and even to prepare for trial if Plaintiffs can spring new evidence on the parties and the Court months after the discovery deadline they insisted on enforcing against everyone else.

Finally, Plaintiffs rely on *Thomas v. Harvey*, 381 F. App'x 542 (6th Cir. 2010), to support their late-breaking request to expand the record. But *Thomas* was nothing like this case. There, no party sought to introduce at summary judgment evidence never disclosed in discovery. *See id.* at 546. Instead, a party sought—and the district court granted—leave to file an amended motion for summary judgment. *See id.* That case has no bearing here, where Plaintiffs missed the fact discovery deadline by nearly *three months* and waited until after the Secretary and Intervenor-Defendants filed their motions for summary judgment to disclose the evidence they had spent months collecting. The Court should strike the evidence in Plaintiffs' supplement.

II. The Court Should Strike Two New Declarations Filed with Plaintiffs' Summary Judgment Opposition

The Court also should strike improper evidence Plaintiffs introduced for the first time in their brief opposing summary judgment: declarations from Ian Baize and Anthony Perlatti. *See* ECF No. 63.

The Court should strike this evidence for many of the same reasons it should strike the evidence in Plaintiffs' motion to supplement—and more. For one thing, Plaintiffs never conferred with opposing counsel regarding reopening the record to include this evidence. *See* Local R. 37; *Branning*, 594 F. Supp. 3d at 933; *Kohn*, 2019 WL 7372320, at *7. For another, Plaintiffs never submitted an affidavit explaining their need to introduce this evidence. *See* Fed. R. Civ. P. 56(d); *Cacevic*, 226 F.3d at 488; *Scadden*, 677 Fed. App'x at 999.

And for yet another, Plaintiffs never even *attempted* to show sufficient cause to excuse their belated disclosure of this evidence. *See* ECF No. 63. Nor could they have done so, had they tried. These declarations come their own counsel and a witness they previously disclosed. *See* Plaintiffs' Amended Initial Disclosures (Ex. A). Plaintiffs therefore should have (and may have) compiled this evidence before the end of the discovery period. Their failure timely to disclose this evidence should run against them, not against the Secretary's and Intervenor-Defendants' motions for summary judgment.

Moreover, the Court should also strike each of the newly introduced declarations for additional reasons.

Baize Declaration. The Court should strike the declaration submitted by Mr. Baize, Plaintiffs' counsel, describing his data manipulation, analysis, and conclusions regarding a new dataset. ECF No. 63 at 1276–82. Mr. Baize purports to offer analysis and opinions regarding the State's Centralized Ballot Tracking System (CBTS) and a spreadsheet of data from past elections

that the Secretary of State produced in discovery. *See id.* For example, while the Secretary of State's Office "did not verify the accuracy of the data entered into CBTS by county boards of elections," Mr. Baize opines that "there is ample reason to believe that the data are substantially accurate." *Id.* at 1278. Mr. Baize then offers his "deduc[tions]" and "analy[ses]" of the spreadsheet, including "calculat[ions]" of the data. *Id.* at 1279-81. He also describes "several steps to verify the accuracy of [his] findings," including by having an unnamed colleague "replicate[] [his] findings" and by not "correct[ing] even obvious mistakes in the data." *Id.* at 1281. Mr. Baize offers the ultimate opinion that HB 458's change to the absentee ballot-receipt deadline "substantially increases the number of UOCAVA ballots that arrive too late to be counted." *Id.* at 1282.

This is improper testimony from an attorney, plain and simple. Only an expert should have performed that data analysis and drawn those conclusions. *See Stephenson v. Family Sols. of Ohio, Inc.*, 645 F. Supp. 3d 755, 778–79 (N.D. Ohio 2022) (testimony was expert testimony, even though it relied on "relatively basic calculations," because it required "statistical experience . . . to evaluate the data," including by applying "conservative assumptions"); ECF No. 63 at 1281 (relating steps taken to ensure accuracy and a "conservative estimate"). But Plaintiffs' expert disclosures were due on July 14, 2023, *see* ECF No. 19 at 3, and Plaintiffs never disclosed Mr. Baize or any other individual as an expert to perform this analysis. Instead, Mr. Baize's declaration is an attempt to circumvent the very expert disclosure deadline Plaintiffs insisted upon and agreed to. And, of course, the Secretary and Intervenor-Defendants have had no opportunity to depose Mr. Baize regarding his untimely analysis and opinions.

As if these serious problems were not enough, Mr. Baize's declaration also runs afoul of the witness-advocate rule, with potentially serious consequences for his and his firm's ability to continue to participate in the case. "Th[e] practice of acting as both advocate and witness has been

consistently frowned upon and discouraged by the legal profession." *Lavin v. Civil Serv. Comm'n*, 310 N.E.2d 858, 865 (Ill. App. Ct. 1974). "It is elementary that counsel may not participate both as an advocate and as a witness, absent special circumstances." *Spivey v. United States*, 912 F.2d 80, 84–85 (4th Cir. 1990) (reversing district court for considering attorney's affidavit "offer[ed] on a factual issue"). That rule reflects the commonsense reality that it is "an unnatural, if not virtually impossible, task for counsel, in his own case, to drop his garments of advocacy and take on the somber garb of an objective fact-stater." *Inglett & Co. v. Everglades Fertilizer Co.*, 255 F.2d 342, 349 (5th Cir. 1958).

Mr. Baize's attempt to fulfill a dual role as witness and advocate also raises thorny ethical issues that the Court may be able to avoid by striking his declaration. *See* Ohio R. Prof'l Cond. 3.7; D.C. R. Prof'l Cond. 3.7; *see, e.g.*, *Playa Shirley, LLC v. Badeaux*, 640 B.R. 665, 678 (Bankr. E.D. La. 2022) (rejecting attorney declaration at summary judgment). The consequences of permitting Mr. Baize to act as a witness in this trial could be serious. "Courts have held that, when one lawyer is disqualified under [Ohio's witness-advocate rule] because he will testify as a witness, his entire law firm and all other lawyers in it must also be disqualified." *Reed Elsevier, Inc. v. THELAW.net Corp.*, 197 F. Supp. 2d 1025, 1027 (S.D. Ohio 2002). Either Mr. Baize's declaration or his entire law firm must exit this case.

Perlatti Declaration. The Court should also strike the newly introduced declaration of Anthony Perlatti, Director of the Cuyahoga County Board of Elections. Mr. Perlatti's declaration seeks to introduce information regarding the August 2023 election in Cuyahoga County and statewide, *see* ECF No. 63 at 92–97, which took place after the close of fact discovery on July 31, 2023. Mr. Perlatti's July 14, 2023 deposition, moreover, did not address the August 2023 special election, much less probe Mr. Perlatti's (then-nonexistent) sources and knowledge regarding that

election. No further deposition of Mr. Perlatti has taken place. The Court should not permit Plaintiffs to circumvent the discovery cutoff and prejudice the Secretary and Intervenor-Defendants by allowing Plaintiffs to introduce this information regarding the post-discovery August 2023 election, through Mr. Perlatti or otherwise.

CONCLUSION

The Court should strike all new evidence introduced by Plaintiffs' motion to supplement their summary judgment appendix (ECF No. 64), including the supplemental USB drive (ECF No. 67), and the Baize and Perlatti declarations in Plaintiffs' response in opposition to summary judgment (ECF No. 62). Even if the Court excuses Plaintiffs' late filings, it should strike the Baize declaration and exhibits from the record, or in the alternative, disqualify Mr. Baize's law firm from further participation in the case.

Dated: November 3, 2023

Respectfully submitted,

/s/ Andrew D. McCartney
ANDREW D. McCARTNEY (0099853)*
**Counsel of Record*
JULIE M. PFEIFFER (0069762)
HEATHER L. BUCHANAN (0083032)
ANN YACKSHAW (0090623)
MICHAEL A. WALTON (0092201)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872 | Fax: 614-728-7592
Andrew.McCartney@OhioAGO.gov
Julie.Pfeiffer@OhioAGO.gov
Heather.Buchanan@OhioAGO.gov
Ann.Yackshaw@OhioAGO.gov
Michael.Walton@OhioAGO.gov

Counsel for Defendant Secretary of State Frank LaRose

/s/ John M. Gore
John M. Gore (*pro hac vice*)
E-mail: jmgore@jonesday.com
E. Stewart Crosland (*pro hac vice*)
E-mail: scrosland@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

James R. Saywell (92174)
E-mail: jsaywell@jonesday.com
Sarah E. Welch (99171)
E-mail: swelch@jonesday.com
Jesse T. Wynn (101239)
E-mail: jwynn@jonesday.com
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Attorneys for Intervenor-Defendants