No. 17-3207

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELBI HINDEL, *et al.*,

Plaintiffs-Appellants,

v.

JON A. HUSTED,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio

CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS

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April 12, 2017

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Plaintiffs-Appellants certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome.

CITATION FORMS

RE	Record Entry Number from the District Court Docket No. 2:15-cv-03061-GCS-KAJ
Compl.	Complaint for Declaratory and Injunctive Relief and Attorneys' Fees, Dec. 7, 2015
1/12/16 Sched. Order	Scheduling Order, Jan. 12, 2016
Answer	Defendant Ohio Secretary of State Jon Husted's Answer to Plaintiffs' Complaint, Feb. 5, 2016
Mot. for J. on the Pleadings	Defendant Ohio Secretary of State Jon Husted's Motion for Judgment on the Pleadings, Feb. 5, 2016
Pls.' Opp'n to Mot. for J. on the Pleadings	Plaintiffs' Opposition to Defendant Ohio Secretary of State Jon Husted's Motion for Judgment on the Pleadings, Feb. 29, 2016
Am. Sched. Order	Amended Scheduling Order, April 8, 2016
4/8/16 Perm. Inj. Mot.	Motion for Permanent Injunction, April 8, 2016
5/11/16 Order	Opinion and Order, May 11, 2016
Mot. for Reconsideration	Plaintiffs' Motion for Reconsideration of Order Granting Defendant's Motion for Judgment on the Pleadings, July 7, 2016
11/11/16 Order	Opinion and Order, Nov. 11, 2016
11/16/16 Perm. Inj. Mot.	Motion for Permanent Injunction, Nov. 16, 2016
2/1/17 Order	Opinion and Order, Feb. 1, 2017
J. in a Civil Case	Judgment in a Civil Case, Feb. 1, 2017
NOA	Plaintiffs' Notice of Appeal, Feb. 24, 2017

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 34(a), Plaintiffs-Appellants hereby respectfully request oral argument on the present appeal. This appeal raises important issues relating to the Plaintiffs-Appellants' federal civil rights under the Americans with Disabilities Act—namely, their right to vote absentee privately and independently on an equal basis with other absentee voters. Despite finding that the Defendant, Ohio Secretary of State Jon A. Husted, is violating the Plaintiffs-Appellants' rights and acknowledging that the fundamental alteration analysis is a fact-based inquiry, the district court dismissed the Plaintiffs-Appellants' claim on the pleadings, holding as a matter of law that the alternatives proposed by Plaintiffs-Appellants would constitute a fundamental alteration of Ohio's voting system. Oral argument will assist this Court in addressing questions about the standard applied by the district court and the interplay between the Americans with Disabilities Act and state law.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343 because Plaintiffs' claims arise under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the final judgment of the district court entered on February 1, 2017, including the district court's Order and Opinion filed on May 11, 2016, and the court's Order and Opinion filed on November 11, 2016, regarding Plaintiffs' right to an accessible private and independent method of absentee voting. (J. in a Civil Case, RE 51, PAGE ID # 1247; 5/11/16 Order, RE 31, PAGE ID ## 1038-1055; 11/11/16 Order, RE 44, PAGE ID ## 1094-1100.) Plaintiffs timely filed their Notice of Appeal on February 24, 2017. (NOA, RE 52, PAGE ID ## 1248-1249.)

STATEMENT OF THE ISSUE

Whether, after correctly deciding that Ohio violates Plaintiffs' rights under the Americans with Disabilities Act by denying Plaintiffs an equal opportunity to vote absentee privately and independently, the district court erred by: (1) concluding that a remedy that would require a modification of state law constitutes, as a matter of law, a fundamental alteration to Ohio's voting program; and (2) reaching this conclusion without affording Plaintiffs an opportunity to present evidence on how their proposed relief could be implemented without great difficulty or enhanced risk to Ohio's voting program.

STATEMENT OF THE CASE

Shelbi Hindel, Barbara Pierce, Marianne Denning, and the National Federation of the Blind, Inc. ("NFB") (collectively "Plaintiffs") brought this lawsuit against Jon A. Husted, in his official capacity as Ohio Secretary of State, to enjoin Secretary Husted to provide Plaintiffs an equal opportunity to review and mark their absentee ballots privately and independently and to access his office's website, in accordance with Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12165.

On February 5, 2016, Secretary Husted moved for judgment on the pleadings with respect to Plaintiffs' claim for an accessible absentee voting option. (Mot. for J. on the Pleadings, RE 20, PAGE ID ## 292-314.) Plaintiffs opposed

the motion, noting that a reasonable modification of state law can be necessary to meet the commands of the ADA and that there was no evidence to support the Secretary's claim that the proposed remedy would be unreasonable or constitute a fundamental alteration of Ohio's voting program. Pursuant to the district court's January 12, 2016, Scheduling Order and because the district court had not yet ruled on Secretary Husted's motion, Plaintiffs filed their Motion for Permanent Injunction on April 8, 2016. (4/8/16 Perm. Inj. Mot., RE 25, PAGE ID ## 355-391; 1/12/16 Sched. Order, RE 16, PAGE ID ## 271-272.) Plaintiffs' memorandum in support of their motion set forth the specific evidence they would present at trial to prove their claims. (4/8/16 Perm. Inj. Mot., RE 25, PAGE ID ## 363-369.) The district court had originally scheduled trial for April 25, but, on April 8, moved the trial date to June. (4/8/16 Am. Sched. Order, RE 24, PAGE ID # 354.)

On May 11, 2016, the district court granted Secretary Husted's Motion for Judgment on the Pleadings and vacated the June trial date, leaving only Plaintiffs' accessible website claim remaining in the case. (5/11/16 Order, RE 31, PAGE ID ## 1038-1055.) The court ruled that although Plaintiffs were qualified individuals with disabilities and that they were denied meaningful access to absentee voting, their proposed modifications or auxiliary aids would fundamentally alter Ohio's election system and would therefore be unreasonable. (*Id.* at 1044-1054.) The

district court based this conclusion on: (1) the fact that Plaintiffs' proposed auxiliary aids had never before been used in an Ohio election (even though Plaintiffs alleged they had been used successfully in other states); (2) the fact that the proposed aids had never "been tested through the certification process in Ohio" (even though it was undisputed that seeking certification from the federal Election Assistance Commission ("EAC") would have been futile because the EAC does not certify ballot marking tools); and (3) the court's belief that the proposed aids "may or may not be compatible with all of the different voting systems currently being used in Ohio's eighty-eight counties" (even though Plaintiffs had set forth in their permanent injunction motion the specific evidence of compatibility they intended to offer at trial). (*Id.* at 1051-1054; 4/8/16 Perm. Inj. Mot., RE 25, PAGE ID ## 364-369.)

On June 13, 2016, Ohio law changed such that, effective September 2016, ballot marking tools no longer needed to receive EAC certification before they could be certified in Ohio. *See* S.B. 63, 131st Gen. Assemb., Reg. Sess. (Ohio 2016). Given this change in state law, Plaintiffs moved for reconsideration of the district court's May 11 Order on July 7, 2016. (Mot. for Reconsideration, RE 34, PAGE ID ## 1066-1071.) The district court denied Plaintiffs' Motion for Reconsideration on November 14, 2016, explaining that its prior ruling was based not on the proposed auxiliary aids' inability to obtain federal EAC certification, but

on the fact that the aids had not been subject to review pursuant to the state's certification process. (11/14/16 Order, RE 44, PAGE ID ## 1099-1100.)

Plaintiffs moved again for a permanent injunction with respect to their claim regarding access to Secretary Husted's website on November 16, 2016. (11/16/16 Perm. Inj. Mot., RE 47, PAGE ID ## 1106-1137.) On February 1, 2017, the district court granted Plaintiffs' motion in part, held Plaintiffs' earlier permanent injunction motion filed on April 8, 2016 to be moot, and ordered the Clerk to enter final judgment in favor of Plaintiffs. (2/1/17 Order, RE 50, PAGE ID ##1232-1246.) Plaintiffs now appeal the district court's May 11, 2016 ruling dismissing Plaintiffs' claim for an equal opportunity to vote absentee and the court's November 14, 2016 order denying reconsideration of its May ruling.

STATEMENT OF FACTS

A. Plaintiffs seek an equal opportunity to vote absentee.

Ms. Hindel, Ms. Pierce, Ms. Denning, and other NFB members are blind and registered to vote in Ohio. (Compl. ¶¶ 7-10; RE 1, PAGE ID ## 3-4.) They seek the same convenient method of voting offered to all other Ohio voters: the opportunity to vote privately and independently at the time and place of one's choosing by absentee ballot. (*Id.*) Ms. Hindel wants to vote absentee because she finds it difficult to reach her distant polling location. (*Id.* ¶ 7 at p. 3.) Ms. Denning has also had difficulty arranging for transportation to her polling location and has

sometimes missed voting in past elections when her husband, her primary source of transportation, has been away. (*Id.* ¶ 9 at pp. 3-4.) Ms. Pierce would like the option of voting absentee in case she is ill or out-of-town during an election. (*Id.* ¶ 8 at p. 3.)

Ohio offers all registered voters the convenience of voting absentee[1] without the need to offer a reason or excuse. *See* Ohio Rev. Code § 3509.02(A). Voters who wish to vote absentee, and who are not uniformed military personnel or overseas civilians, receive paper absentee ballots by mail, which they must mark by hand and return in the mail or in person. (Compl. ¶ 15; RE 1, PAGE ID # 6); *see Absentee Voting*, Jon Husted, Ohio Secretary of State, https://www.sos.state.oh.us/SOS/elections/Voters/absenteeVoting.aspx#byMail (last visited Mar. 28, 2017). For voters covered under the Uniformed and Overseas Civilian Absentee Voting Act of 1986 ("UOCAVA"), 42 U.S.C. §§ 1973ff-1973ff-6, Ohio offers the option of receiving their absentee ballots through e-mail, as well as by regular mail or facsimile. (Compl. ¶ 15; RE 1, PAGE ID # 6); *Military & Overseas Voters*, Jon Husted, Ohio Secretary of State,

[1] Secretary Husted's office refers to both voting by mail and in-person early voting as absentee voting. *See Absentee Voting*, Jon Husted, Ohio Secretary of State, https://www.sos.state.oh.us/sos/elections/Voters/absenteeVoting.aspx (last visited Mar. 28, 2017). Throughout this brief, Plaintiffs use the term "absentee voting" to refer only to absentee voting by mail.

https://www.sos.state.oh.us/SOS/agency/initiatives/omv/faqs.aspx#receive (last visited Mar. 28, 2017).

Plaintiffs and other Ohio voters who are blind or have other print disabilities cannot independently read the text or mark their votes on a paper absentee ballot. (Compl. ¶ 16; RE 1, PAGE ID # 6.) Thus, to vote absentee, the individual Plaintiffs and other blind and print-disabled Ohio voters must rely on the assistance of another person to read and mark their paper absentee ballots. (*Id.*) Such assistance strips the individual Plaintiffs of the secrecy of their ballots. (*Id.*) Although Secretary Husted offers nondisabled voters the opportunity to cast their absentee votes privately and independently, by offering only paper absentee ballots to voters who are not in the military or overseas, he deprives the individual Plaintiffs of an equal opportunity to do the same. (*Id.*)

B. Auxiliary aids allow for accessible absentee voting.

Plaintiffs need not be deprived an equal opportunity to vote absentee. Technological innovations have made absentee voting accessible to blind individuals, affording them the opportunity to vote absentee privately and independently. (*Id.* ¶¶ 18-26, pp. 6-8.) There are several available auxiliary aids that allow blind voters to review and mark their absentee ballots electronically using their own screen access software. (*Id.*) Ms. Hindel, Ms. Pierce, and Ms. Denning all use screen access software, which allows them to access textual

information on a computer, tablet, or smartphone screen through an audio output or refreshable Braille display pad. (*Id.* ¶¶ 7-9 at p. 3.)

In their Complaint, Plaintiffs identified two auxiliary aids, the Maryland online ballot marking tool and Prime III, that would allow them to view and mark their absentee ballots on an electronic device. (*Id.* ¶¶ 19-25 at pp. 7-8.) Both aids have been used successfully in previous elections in other states and can be licensed at no cost. (*Id.* ¶¶ 20, 22, 24, 25 at pp. 7-8.) These aids do not permit voters to cast their ballots electronically; rather, they simply allow blind voters to read and mark their ballots on their computers. (*Id.* ¶¶ 21, 23 at p. 7.) Voters must print and return their electronically-marked paper absentee ballots to their local boards of elections like all other absentee voters to have their votes counted. (*Id.*) Plaintiffs further alleged that other states use electronic absentee voting systems that could also be made accessible to blind voters. (*Id.* ¶ 26 at p. 8.)

Plaintiffs' memorandum in support of their permanent injunction motion offered additional information about these available auxiliary aids and identified a third option used in Oregon's elections: the Alternate Format Ballot. (4/8/16 Perm. Inj. Mot., RE 25, PAGE ID ## 364-369.) In their memorandum, Plaintiffs described in great detail the witnesses and evidence they would offer at trial to explain how these aids worked and how they could be implemented throughout Ohio without great cost, difficulty, or potential for increased security risk. (*Id.*)

Yet the district court declined to hear or consider this evidence before ruling for Secretary Husted on Plaintiffs' absentee voting claim based solely on the pleadings.

SUMMARY OF THE ARGUMENT

The district court correctly held that Ohio denies Plaintiffs an equal opportunity to vote absentee privately and independently, in violation of Title II of the ADA. Yet the court wrongly concluded that requiring Ohio to implement one of Plaintiffs' proposed auxiliary aids would fundamentally alter Ohio's election system. The district court erred in holding that the defense of fundamental alteration can curtail a federal civil right whenever there is a state law that would have the effect of limiting the exercise of that right.

Plaintiffs' federally-guaranteed civil rights do not yield to state law. Pursuant to the Supremacy Clause, state laws may not create a barrier to the implementation of federal laws; here, the state certification law can only stand as a barrier if the ADA's fundamental alteration test is otherwise met. Although courts can examine the underlying purpose of a state law to determine whether adoption of a proposed auxiliary aid or modification would alter something so essential to the state's program as to fundamentally change it, the district court did not engage in this nuanced, fact-intensive analysis here. Instead, it held, as a matter of law,

that ordering implementation of an auxiliary aid that had not first been certified by the State would constitute a fundamental alteration.

The court also ignored that the fundamental alteration defense is a fact-intensive affirmative defense that defendants bear the burden of proving. Yet the district court determined that Plaintiffs' proposed auxiliary aids constitute a fundamental alteration as a matter of law without supportive evidence from Secretary Husted and without offering Plaintiffs an opportunity to present any evidence on the issue.

The court erred in exceeding the scope of review that is permissible on a motion for judgment on the pleadings. The court essentially converted the motion for judgment on the pleadings to a motion for summary judgment without giving the parties notice or an opportunity to present evidence, then failed to acknowledge the genuine dispute of material fact regarding the feasibility of implementing Plaintiffs' proposed auxiliary aids without disrupting Ohio's voting process.

Secretary Husted bore the burden of proving the affirmative defense of fundamental alteration; Plaintiffs did not bear the burden of anticipatorily disproving the defense in their complaint. The Secretary's conclusory invocation of the defense in his answer was a far cry from making the factual showing necessary to prove the fundamental alteration defense. Furthermore, the fundamental alteration inquiry cannot be made in an evidentiary vacuum; courts

must weigh the evidence to determine how and whether a proposed auxiliary aid or modification could fundamentally alter a state's program. Plaintiffs proffered to the court with great specificity the evidence they would present at trial to prove that their proposed aids could be implemented throughout Ohio without great difficulty or enhanced security risk, thus rebutting the Secretary's fundamental alteration defense. Nevertheless, the court wrongly accepted the defense based on its assumptions about what implementation would entail, rather than on any evidence from the parties.

The district court's misapplication of the ADA has deprived Plaintiffs of their right to an equal opportunity to vote absentee privately and independently, and must be reversed.

STANDARD OF REVIEW

This Court reviews the district court's decision granting Secretary Husted's Motion for Judgment on the Pleadings de novo. *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008). The Court must "take as true all well-pleaded material allegations in the opposing party's pleadings, and affirm the district court's grant of the motion only if the moving party is entitled to judgment as a matter of law." *Florida Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 999–1000 (6th Cir. 2015).

ARGUMENT

Title II of the ADA requires a public entity to provide persons with disabilities an equal opportunity to participate in and benefit from the entity's programs and activities and to afford communication that is equally as effective as that afforded to those without disabilities. This requirement is excused when it would fundamentally alter the nature of the program or activity. *See* 28 C.F.R. §§ 35.130, 35.160, 35.164. To prove a violation of the ADA, plaintiffs must establish that: (1) they have disabilities; (2) they are otherwise qualified to receive the benefits of the public service, program, or activity at issue; and (3) they were excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disabilities. *Jones v. City of Monroe, MI*, 341 F.3d 474, 477 (6th Cir. 2003). The district court correctly found that Plaintiffs met each of these elements. (*See* 5/11/16 Order, RE 31, PAGE ID ## 1044-1050); *see also Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016) (holding that Maryland violated the ADA by failing to offer plaintiffs who were blind and had other print disabilities the same opportunity to vote privately and independently by absentee ballot it offered all other voters).

Once Plaintiffs plausibly alleged a violation of the ADA and suggested adoption of an accessible absentee ballot marking tool as either an auxiliary aid that would provide them with equally effective communication or a modification to

Ohio's election policies and procedures, the burden shifted to Secretary Husted to assert and prove as an affirmative defense that making an accessible ballot marking tool available to Plaintiffs would either "fundamentally alter" Ohio's voting program or, in the case of an auxiliary aid, "would result in undue financial and administrative burdens." 28 C.F.R. §§ 35.130, 35.164; *see Jones*, 341 F.3d at 480 (explaining that the public entity bears the burden of proving the fundamental alteration defense).

As the district court noted, while a proposed modification must be reasonable, no such reasonableness standard applies to auxiliary aids. (5/11/16 Order, RE 31, PAGE ID # 1051); 28 C.F.R. § 35.160(b)(1); *Jones*, 341 F.3d at 480. Nevertheless, in analyzing Secretary Husted's fundamental alteration defense, the court referred to the fundamental alteration and reasonableness analyses interchangeably, ultimately concluding that a finding of unreasonableness flowed from a finding of fundamental alteration. (5/11/16 Order, RE 31, PAGE ID ## 1050-1054.)

Because the proposed tools are auxiliary aids[2] and the district court's

[2] Regulations promulgated under Title II of the ADA define "auxiliary aids and services" to include, among other non-exhaustive examples, "accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision," as well as "other similar services and actions." 28 C.F.R. § 35.104. Because the proposed absentee ballot marking tools would assist blind voters in communicating

conclusion as to reasonableness was based entirely on its finding that the proposed aids would constitute fundamental alterations, the heart of the court's decision to grant Secretary Husted's motion was its fundamental alteration analysis. (*Id.* at 1054 ("Accordingly, the Court declines to disregard Ohio's certification requirement by making a fundamental alteration to the Ohio election system. *As such*, Plaintiffs' proposed ballot marking software accommodations are unreasonable.") (emphasis added); *see* 11/14/16 Order, RE 44, PAGE ID # 1098 (explaining that the court previously granted Secretary Husted's motion for judgment on the pleadings because it "found that mandatory implementation of Plaintiffs' proffered accommodations would constitute a fundamental alteration to the Ohio election system").)

Although the district court correctly concluded that Secretary Husted denies Plaintiffs an equal opportunity to vote by absentee ballot, it erred in holding that adopting any of Plaintiffs' proposed auxiliary aids would fundamentally alter voting in Ohio. The court's conclusion was wrong for three distinct reasons, each of which provides an independent basis for reversal: (1) the existence of a state certification procedure may not block enforcement of Plaintiffs' federal civil rights under the ADA; (2) the court improperly analyzed the affirmative defense of fundamental alteration defense at the pleadings stage, when Secretary Husted,

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their selections to the government by enabling them to independently mark their ballots, they qualify as auxiliary aids or services.

rather than Plaintiffs, bore the burden of proof; and (3) factual issues regarding whether implementing Plaintiffs' proposed auxiliary aids would fundamentally alter Ohio's elections, including the feasibility and any potential dangers of implementation, cannot be determined as a matter of law without consideration of relevant evidence.

A. The district court improperly held that the mere existence of a state certification process could curtail enforcement of Plaintiffs' federal civil rights.

The district court held that adopting Plaintiffs' proposed auxiliary aids would fundamentally alter voting in Ohio largely because the aids' adoption would contravene the state's requirement that voting technology like the proposed ballot marking devices be certified by the BVME before being used in state elections. (5/11/16 Order, RE 31, PAGE ID # 1054 (citing Ohio Rev. Code § 3506.05 and reasoning that "[t]he certification law has been in existence and it should not be disregarded" and that "the only thing standing in the way of an alternative voting system is certification").) Yet enforcement of Plaintiffs' federal civil rights cannot be held captive by the mere existence of a state certification requirement that has not been met. *See Lamone*, 813 F.3d at 508.

Making the exercise of rights granted by the ADA subject to a state certification requirement violates the Supremacy Clause and severely undermines the ADA's goal of creating a national mandate against discrimination, particularly

where Plaintiffs lack the power either to order vendors of the proposed auxiliary aids to apply for certification or to require the BVME or the Secretary to certify the aids.[3]

The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. As the Supreme Court has held, "Congress has the power to preempt state law" and state law must yield when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal quotation marks omitted).

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Thus, when a conflict arises between a state law and the ADA's mandate of reasonable modifications to create equal opportunity, the state law must yield to the ADA's federally-mandated rights unless the entity can prove the fundamental alteration affirmative defense. *See Lamone*, 813 F.3d at 508-509.

In the similar *Lamone* case, the Fourth Circuit rejected the Maryland Board of Elections' argument that implementing a ballot marking tool that allowed

[3] Indeed, at the time the district court granted the Secretary's motion, it was undisputed that applying for certification would be futile since Ohio law required EAC certification, but the EAC does not certify ballot marking tools. (Mot. for J. on the Pleadings, RE 20, PAGE ID ## 300-301.)

individuals with disabilities to vote absentee privately and independently would fundamentally alter Maryland's election system simply because the tool had not been certified as required by state law. *Id.* at 508-510. The Fourth Circuit observed that because of the Supremacy Clause, the state's argument that "the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination—cannot be correct." *Id.* at 508. The court noted by analogy that a government entity could not prevent the installation of wheelchair ramps by requiring certification of ramps and then refusing to actually certify any ramps. *Id.* at n.12.

The holding in *Lamone* is consistent with the holdings in other circuits that have considered the interplay between federal anti-discrimination statutes like the ADA and state laws that stand as barriers to their full effectiveness. *See, e.g.*, *Mary Jo C. v. New York State and Local Ret. Sys.*, 707 F.3d 144, 162-163 (2d Cir. 2013) (holding that New York's filing deadline for disability retirement benefits could be altered as a reasonable modification under Title II of the ADA because "nothing in the statutory phrase 'reasonable modification' . . . suggest[ed] that Congress intended to exclude modifications that require violation or waiver of mandatory state statutes in some circumstances"); *Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1232-33 (10th Cir. 2009) (noting that although there was no conflict between state law and Section 504 in the case at hand, because

"[r]eliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause," the district court was incorrect in assuming that a modification requiring defendants to ignore or violate state law was *per se* unreasonable); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (holding, in an ADA case involving a state law aimed at preventing the spread of rabies, that although "courts will not second-guess the public health and safety decisions of state legislatures, . . . when Congress has passed antidiscrimination laws such as the ADA which require reasonable modifications to public health and safety policies, it is incumbent upon the courts to insure that the mandate of federal law is achieved"); *Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995) ("[The defendant] believes that it is compelled to follow the directive from the state, but the Supremacy Clause of the Constitution requires a different order of priority. A discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law.") (emphasis in original).

Instead of finding that a modification or auxiliary aid constitutes a fundamental alteration whenever its implementation would run contrary to a state law, courts must analyze the evidence to determine if implementation would fundamentally alter the program at issue by contravening the purpose of the state law given the particular facts of the case. *See Jones*, 341 F.3d at 480 ("In cases

involving waiver of applicable rules and regulations, the overall focus should be on whether waiver of the rule in the particular case would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.") (internal quotation marks omitted). If implementing a plaintiff's proposed relief would undermine the very purpose of the state law, then it is likely that the relief would change something essential to the program at issue in the case, thus constituting a fundamental alteration. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-83 (2001) (explaining that, under Title III of the ADA, for a modification to constitute a fundamental alteration, it must change something considered "essential" to the program at issue). 532 U.S. at 682-83.

The district court erred by presuming that deviation from the state law constituted a fundamental alteration on its face. Rather than look past the mere existence of the certification requirement to determine if implementing any of Plaintiffs' proposed auxiliary aids would truly be at odds with the purpose of the requirement, however, the district court simply noted that certification provided for a "detailed process" or "particularized review." (11/14/16 Order, RE 44, PAGE ID # 1100.) Yet the purpose of the certification requirement is not simply to have a process for process's sake. As the district court itself recognized, the purpose of the process is to avoid using election technology "that would not properly serve Ohio's electorate." (5/11/16 Order, RE 31, PAGE ID # 1054.) Plaintiffs'

proposed auxiliary aids, therefore, would only constitute a fundamental alteration if Secretary Husted could establish that they would not properly serve Ohio's electorate in some manner.

Secretary Husted has offered no such evidence. He did not establish that allowing certain voters with disabilities to receive and mark their absentee ballots on their computers, instead of receiving them by mail and marking them by hand, would fail to properly serve Ohio's electorate or otherwise change anything essential to Ohio's voting program. Indeed, Ohio already sends UOCAVA voters their absentee ballots by e-mail upon request. (Compl. ¶ 15; RE 1, PAGE ID # 6); *Military & Overseas Voters*, Jon Husted, Ohio Secretary of State, https://www.sos.state.oh.us/SOS/agency/initiatives/omv/faqs.aspx#receive (last visited Mar. 28, 2017). The Secretary has never tried to argue that marking an electronically-received ballot on a computer, instead of by hand, before mailing the printed paper ballot back to the local board of elections changes anything fundamental about voting in Ohio.

The district court, therefore, improperly held that implementing Plaintiffs' proposed relief would fundamentally alter Ohio's elections simply because it would constitute an exception to Ohio's certification statute—not because it would change anything essential to Ohio's voting program or otherwise be at odds with the purpose of the certification law. This reasoning incorrectly elevates state law

superior to federal law.

Furthermore, the district court erred in faulting Plaintiffs for not seeking state certification of their proposed auxiliary aids. (*See* 5/11/16 Order, RE 31, PAGE ID # 1054 ("Plaintiffs have not offered any argument or evidence as to why they have not sought to have the proposed ballot marking software certified.").) Of course, since the court dismissed Plaintiffs' absentee voting claim at the pleadings stage, Plaintiffs had no opportunity to offer evidence on this or any other issue. It was also undisputed that pre-litigation attempts at certification would have been futile since no ballot marking tool could obtain the EAC certification that Ohio law, until September 2016, required. (Mot. for J. on the Pleadings, RE 20, PAGE ID ## 300-301.)

More fundamentally, however, by faulting Plaintiffs for not seeking certification, the court imposed an additional hurdle not required under the ADA: that to vindicate their federal civil rights, Plaintiffs had to somehow force the hand of ballot marking tool vendors to apply for certification. According to the district court, to obtain the equal opportunity to vote absentee to which they are entitled, Plaintiffs had to undertake the burdensome task of applying for state certification of ballot making tools. Voters without disabilities need not seek certification on behalf of voting technology vendors to vote and neither should voters with disabilities.

This is particularly so where the ADA requires the state, not individuals with disabilities, to ensure that the state's communications and programs are accessible. *See* 28 C.F.R. § 35.160(a)(1) ("*A public entity shall* take appropriate steps to ensure that communications with . . . members of the public . . . with disabilities are as effective as communications with others.") (emphasis added); § 35.160(b)(1) ("*A public entity shall* furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.") (emphasis added); § 35.130(b) ("*A public entity, in providing any aid, benefit, or service, may not*, directly or through contractual, licensing, or other arrangements, on the basis of disability . . . (ii) [a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.") (emphasis added). Thus, the ADA holds Secretary Husted, not Plaintiffs, responsible for taking all steps necessary to provide Plaintiffs with an equal opportunity to vote absentee.

The district court wrongly held that an unmet state certification requirement could prevent Plaintiffs from exercising their federal civil right to an equal opportunity to vote absentee. In so holding, the court misapplied the ADA, ran afoul of the Supremacy Clause, and severely undermined the efficacy of federal civil rights law. This Court should reverse the district court's decision to make

clear that the equal rights guaranteed under the ADA do not disappear when confronted with an unmet or contrary requirement of state law.

B. Because Secretary Husted, not Plaintiffs, bore the burden of proof with regard to the affirmative defense of fundamental alteration, the district court incorrectly analyzed the defense at the pleadings stage.

Although the district court acknowledged that Secretary Husted bore the burden of proving that adopting one of Plaintiffs' proposed aids would fundamentally alter voting in Ohio (5/11/16 Order, RE 31, PAGE ID # 1051), it nonetheless granted the Secretary's motion for judgment on the pleadings based only on the naked assertion in his answer that Plaintiffs' proposed relief "would fundamentally alter Ohio laws and the programs offered by Defendant." (Answer ¶ 54, RE 19, PAGE ID # 290.) Such a conclusory claim, without factual allegations or evidence in support, hardly met the Secretary's burden of proof, and could not support the dismissal of Plaintiffs' claim at the pleadings stage.

Yet rather than require the Secretary to meet his burden for proving the affirmative defense of fundamental alteration, the district court wrongly shifted the burden to Plaintiffs to allege specific facts in their complaint to rebut, on an anticipatory basis, this non-specific invocation of the fundamental alteration defense. (*See* 5/11/16 Order, RE 31, PAGE ID # 1053 (faulting Plaintiffs for failing to assert factual allegations in their complaint that would have rendered the

case more factually similar to *National Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016)).)

Plaintiffs alleged facts about cost in anticipation of an undue burden defense (Compl. ¶¶ 22, 25, RE 1, PAGE ID ## 7-8) and alleged, to establish reasonableness, that the proposed ballot marking tools were already in existence, allowed blind individuals to review and mark absentee ballots privately and independently, and had already been used in other states' elections (Compl. ¶¶ 18-25, RE 1, PAGE ID ## 6-8). They did not, however, anticipate in their complaint that Secretary Husted would later argue in his motion for judgment on the pleadings that adopting a ballot marking tool would fundamentally alter Ohio's elections simply because the proposed tools had never before been used in an Ohio election or been subject to Ohio's certification process.

Yet Plaintiffs were under no obligation to do so. Because fundamental alteration is an affirmative defense, courts may not rule against plaintiffs at the pleadings stage on the basis of this defense unless plaintiffs "anticipated the defense and explicitly addressed it in the pleadings." *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 599 (6th Cir. 2012),[4] *abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *see Lockhart v. Holiday*

[4] Although *Pfeil* involved a motion to dismiss, this Court has made clear that district courts review motions to dismiss and motions for judgment on the pleadings under the same standard. *E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001).

Inn Exp. Southwind, 531 F. App'x 544, 547 (6th Cir. 2013) (noting that this Court is "reluctant to dismiss complaints based on affirmative defenses at the pleading stage and before any discovery has been conducted").

There is good reason for this rule: it is a defendant's obligation to raise and prove an affirmative defense. Only once a defendant has made the necessary factual showing to establish an affirmative defense does the burden shift to the plaintiff to offer evidence to rebut it. *See Veney v. Hogan*, 70 F.3d 917, 921 (6th Cir.1995), *abrogated in part on other grounds by Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002), (explaining that "the plaintiff need not fully anticipate the [affirmative] defense in the complaint" and, once the affirmative defense has been asserted, "is entitled to the opportunity to come forward with additional facts or allegations" to rebut it).

Rather than give Plaintiffs an opportunity to offer evidence to rebut Secretary Husted's claim that adoption of one of the proposed auxiliary aids would fundamentally alter voting in Ohio, however, the district court granted the Secretary's motion for judgment on the pleadings based only on the Secretary's conclusory assertion of the fundamental alteration defense in his answer. In their memorandum opposing the motion for judgment on the pleadings, Plaintiffs attempted to highlight that the Secretary had failed to "offer[] any evidence to support his claim" related to the "feasibility of implementing an accessible

absentee voting system across Ohio's various counties." (Pls.' Opp'n to Mot. for J. on the Pleadings, RE 22, PAGE ID # 339 n.5.) Plaintiffs further explained to the district court that because "Plaintiffs intend to present expert testimony to address this issue, the factual issue of implementation is disputed and should not be ruled upon based only on the pleadings." (*Id.*) Nevertheless, the district court erroneously analyzed this fact-based affirmative defense at the pleadings stage and shifted the burden of proof to Plaintiffs, without even offering Plaintiffs an opportunity to present evidence to meet the improperly assigned burden. This error provides an independent basis for reversing the district court's decision.

C. The district court incorrectly decided the highly factual fundamental alteration analysis as a matter of law.

In accepting Secretary Husted's fundamental alteration defense at the pleadings stage, the district court improperly decided a highly fact-based question without the benefit of evidence. Essentially, the district court converted the motion for judgment on the pleadings to a motion for summary judgment, then disregarded the Plaintiffs' proffer of evidence that, if admitted, would have established at least a genuine dispute of material fact, if not the basis for judgment in favor of the Plaintiffs. The district court correctly explained that "the fundamental alteration analysis is normally a fact-intensive inquiry." (5/11/16 Order, RE 31, PAGE ID # 1053); *see Mary Jo C.*, 707 F.3d at 153 ("It is a factual issue whether [a] plaintiff['s] proposed modifications . . . amount to reasonable modifications which

should be implemented, or fundamental alterations, which the state may reject.") (internal quotation marks omitted); *cf. Anderson v. City of Blue Ash*, 798 F.3d 338, 356 (6th Cir. 2015) (noting "the highly fact-specific nature of the reasonableness inquiry" in determining the reasonableness of a proposed modification under Title II of the ADA) (internal quotation marks omitted). Nevertheless, the court proceeded to analyze the defense in an evidentiary vacuum.

Specifically, the court reasoned that because there were no allegations that Plaintiffs' proposed auxiliary aids had previously been used in an Ohio election or had been presented to Ohio's Board of Voting Machine Examiners ("BVME") for certification, implementing an accessible method of absentee voting would fundamentally alter voting in Ohio as a matter of law. (*Id*.) The ADA, however, does not require plaintiffs to prove that their proposed modification or auxiliary aid has been implemented previously in the same exact context at issue in the case. Indeed, the district court cited no statutory or regulatory text or case law in support of this circular requirement. Imposing such a requirement would mean that a wheelchair ramp would per se fundamentally alter a building unless it had been previously installed in the particular building at issue or that providing a sign language interpreter for a college course would fundamentally alter the course as a matter of law unless that interpreter had previously interpreted in that same course before. Of course no such requirement is necessary.

Indeed, in *PGA Tour, Inc. v. Martin*, the fact that certain high level golf tournaments had never previously allowed competitors to use golf carts to move between holes during competitions did not stop the Supreme Court from holding that allowing players with disabilities to use golf carts—a modification to the rule requiring players to walk between holes—would not fundamentally alter these high level tournaments. 532 U.S. at 683 (applying the same fundamental alteration analysis in Title III of the ADA). Instead, to analyze whether the proposed modification in *Martin* would fundamentally alter the game of golf, the Court carefully reviewed the evidence: What were the reasons for the walking rule? Had other golf tournaments allowed competitors to use golf carts? Did walking cause substantially more fatigue such that riding in a golf cart would unfairly advantage the player with a disability? *Id.* at 684-87.

The newness of a proposed modification or auxiliary aid does not in and of itself render it a fundamental alteration. Instead, courts must dig in and weigh the evidence to determine how the program, activity, or service would be affected by the proposed modification or aid and whether any changes would rise to the level of a fundamental alteration.

This fact-intensive inquiry cannot be completed at the pleadings stage. By engaging in this fact-based analysis, the court essentially converted the motion for judgment on the pleadings to a motion for summary judgment without notifying

the parties or providing an opportunity to present all pertinent evidence. *See Max Arnold & Sons, LLC v. W.L. Hailey & Co., Inc.*, 452 F.3d 494, 504 (6th Cir. 2006) (citing Fed. R. Civ. P. 12(c)). Compounding its error, the district court failed to identify the genuine issue of material fact that was apparent from the record. *See* Fed. R. Civ. P. 56(a).

Notably, the district court acknowledged that it did not have the evidence before it to engage in the nuanced fundamental alteration evaluation: "[A]t this time there is no evidence before the Court regarding whether the proposed ballot marking software could be implemented in Ohio or whether it is compatible with Ohio's current voting system." (5/11/16 Order, RE 31, PAGE ID # 1041 n.3.) As discussed earlier, however, Plaintiffs explained in their memorandum opposing the motion for judgment on the pleadings that although the Secretary had failed to offer evidence in support of his "concerns about the feasibility of implementing an accessible absentee voting system across Ohio's various counties," Plaintiffs "intend[ed] to present expert testimony to address this issue" and thus "the factual issue of implementation is disputed and should not be ruled upon based only on the pleadings." (Pls.' Opp'n to Mot. for J. on the Pleadings, RE 22, PAGE ID # 339 n.5.) Thus Plaintiffs proffered that they would present evidence on precisely the issue on which the court lamented a lack of evidence.

Furthermore, Plaintiffs had moved for a permanent injunction before the court granted defendant's motion. (4/8/16 Perm. Inj. Mot., RE 25, PAGE ID ## 355-391.) In their permanent injunction motion, Plaintiffs laid out in great detail the witnesses and evidence they would present at trial to prove that the proposed auxiliary aids could be implemented across the state without great difficulty or enhanced security risk. (*Id.* at 364-369.) Nevertheless, the court granted the Secretary's motion without the benefit of necessary, but absent, evidence. The court was content to surmise that Plaintiffs' proposed auxiliary aids "may or may not be compatible with all of the different voting systems currently being used in Ohio's eighty-eight counties." (5/11/16 Order, RE 31, PAGE ID # 1052.)

Even more troubling, in denying Plaintiffs' motion for reconsideration, the district court explained in a conclusory manner:

> That Maryland, Oregon, Wisconsin, New Hampshire, and/or other states were able to implement one of Plaintiffs' proposed accommodations in their elections without incident is inconsequential here. Ohio is a diverse state and its counties' resources vary greatly. Ohio's counties currently use at least four different voting system vendors and each vendor offers multiple systems. (Doc. 28-1, Damschroder Dep. at 57).

(11/14/16 Order, RE 44, PAGE ID ## 1099-1100.) Notably, the district court cited an exhibit Secretary Husted had submitted in opposing Plaintiffs' permanent injunction motion to support its assumption that Ohio's election system was so radically different from other states' systems that Plaintiffs could never prove that

their proposed auxiliary aids could be successfully implemented in Ohio. The court's willingness to pick one piece of evidence submitted by the Secretary, but ignore Plaintiffs' robust proffer of evidence[5] it intended to present on the issue,

[5] Specifically, Plaintiffs set forth in their permanent injunction motion exactly how they would prove at trial that the proposed auxiliary aids could be implemented with any of the various voting systems used across Ohio's eighty-eight counties:

> Dr. [Juan E.] Gilbert will also testify that it is feasible to implement any of Plaintiffs' proposed systems throughout all of Ohio's counties in time for the November 2016 election. He will explain that although different counties use different voting systems to operate their elections, counties will not need to change their existing voting systems to implement any of the proposed accessible absentee voting tools. Because all of Ohio's counties use modern election software systems, the information needed to generate absentee ballots (*e.g.*, candidate names, ballot questions, and ballot formatting and design information) is maintained electronically. Depending on how each county's election software system organizes and formats this ballot-generating information, the data can either be imported directly into the Maryland tool, Prime III, or the AFB, it can be converted into a format that is usable by these systems, or the information can be manually entered into the absentee voting tool. Once the absentee voting tool has the necessary ballot-generating data, it can automatically produce any number of ballot styles for each county. As the creator of Prime III, Dr. Gilbert will provide additional detail about how Prime III could be implemented statewide within a matter of weeks. He will testify that he has done similar work converting ballot-populating data formats in other states.
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> Plaintiffs will also call John Schmitt, the creator of the AFB, to testify. . . . He will also offer information about how the AFB . . . could be modified without great difficulty to accept ballot-generating data from Ohio's various election systems.

further illustrates the court's flawed and assumption-based approach to analyzing the Secretary's fundamental alteration defense.

As the Supreme Court made clear in *Martin*, courts must analyze the fundamental alteration defense on the basis of facts and evidence, not assumptions. 532 U.S. at 684-87. Thus, it was inappropriate for the district court to analyze the defense on a motion for judgment on the pleadings or as a motion for summary judgment without allowing Plaintiffs to present all of their evidence. The district court committed reversible error by deciding as a matter of law the factual questions inherent in Secretary Husted's fundamental alteration defense, and relying on assumptions instead of waiting until there was an evidentiary record to consider.

> With respect to Maryland's tool, the parties have stipulated that voters with disabilities used Maryland's uncertified tool in the November 2014 general election without incident. The Maryland Board of Elections received no formal complaints about the tool during the election and the absentee ballots marked and printed using the tool were included in the election results. The Premier AccuVote TS election system was in use when Maryland employed the tool in November 2014. Plaintiffs will establish at trial that 40 of Ohio's 88 counties currently use this same vendor's election system.

(Perm. Inj. Mot., RE 25, PAGE ID ## 365-66.)

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the district court dismissing Plaintiffs' accessible absentee voting claim and remand this case for appropriate further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief contains 7,589 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.
3. In making this certification, I have relied on the word count feature of the word-processing program used to prepare this brief.

/s/ Jessica P. Weber
Jessica P. Weber

CERTIFICATE OF SERVICE

I hereby certify this 12th day of April 2017, the foregoing Corrected Brief of Appellants was served on all counsel by the Court's electronic filing system.

/s/ Jessica P. Weber
Jessica P. Weber

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Date	Description	PAGE ID #
1	12/7/15	Complaint for Declaratory and Injunctive Relief and Attorneys' Fees	1-13
16	1/12/16	Scheduling Order	271-272
19	2/5/16	Defendant Ohio Secretary of State Jon Husted's Answer to Plaintiffs' Complaint	285-291
20	2/5/16	Defendant Ohio Secretary of State Jon Husted's Motion Pleadings for Judgment on the Pleadings	292-314
22	2/29/16	Plaintiffs' Opposition to Defendant Ohio Secretary of State Jon Husted's Motion for Judgment on the Pleadings	324-344
24	4/8/16	Amended Scheduling Order	354
25	4/8/16	Motion for Permanent Injunction	355-391
31	5/11/16	Opinion and Order	1038-1055
34	7/7/16	Plaintiffs' Motion for Reconsideration of Order Granting Reconsideration Defendant's Motion for Judgment on the Pleadings	1066-1071
44	11/11/16	Opinion and Order	1094-1100

Record Entry	Date	Description	PAGE ID #
47	11/16/16	Motion for Permanent Injunction	1106-1137
50	2/1/17	Opinion and Order	1232-1246
51	2/1/17	Judgment in a Civil Case	1247
52	2/24/17	Plaintiffs' Notice of Appeal	1248-1249