Case 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 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO; CASE NO. 2:15-CV-0361

BRIEF OF APPELLEE

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee, Ohio Secretary of State Jon Husted, does not believe that oral argument is necessary for adjudication of the issue this case presents.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because Plaintiffs' Complaint alleged a federal cause of action against Defendant pursuant to 42 U.S.C. § 12131 *et seq*. (the Americans with Disabilities Act). The District Court granted Defendant's motion for judgment on the pleadings as to Plaintiffs' first claim on May 11, 2016 (5/11/16 Order, R. 31, Page ID # 1038-1055) and then entered a final judgment as to Plaintiffs' remaining claim on February 1, 2017 (2/1/17 Judgment Entry, R. 51, Page ID # 1247), thereby terminating the case.

Plaintiffs-Appellants have now appealed the District Court's May 11, 2016 Order on Defendant's motion for judgment on the pleadings and this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court properly granted Defendant-Appellee Secretary of State Jon Husted's Motion for Judgment on the Pleadings (5/11/16 Order, R. 31, Page ID # 1038-1055)?

STATEMENT OF THE CASE

I. Procedural Background

On December 7, 2015, Plaintiffs filed their Complaint alleging violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165 ("ADA"). Compl., R. 1, Page ID # 1-13. Plaintiffs' claims are based on two distinct alleged violations: (1) the Secretary has failed to implement an accessible absentee voting system (Compl. at ¶ 41, Page ID # 11); and (2) the Secretary has failed to provide all voters with equal access to his website. Plaintiffs' appeal involves only their allegations related to the accessibility of Ohio's absentee voting system (*Id*. at ¶ 42).

Plaintiffs attack the accessibility of Ohio's absentee voting system arguing that they do not have equal access to absentee voting because "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 for them" and therefore cannot vote privately and independently. *Id.* at ¶ 16, Page ID # 6. Plaintiffs urge the Secretary to ignore Ohio law and adopt certain tools that, Plaintiffs contend, would allow voters who are blind or have other print disabilities to mark their absentee ballots privately and independently through the use of screen reader technology. *Id*. at ¶¶ 19-21; 23, Page ID # 7. As Plaintiffs know, however, none of their proposed "solutions," including the Maryland Online Ballot Marking Tool ("OBMT") and the Prime III voting system, has

been used, certified, or presented to be certified for use in the state of Ohio, as is required by law. *See id.*, throughout, Page ID # 1-13.

On February 5, 2016, the Secretary moved for judgment on the pleadings as to Plaintiffs' allegations related to the accessibility of Ohio's absentee voting system. Mtn. for JOTP, R. 20, Page ID # 292-313. The Secretary demonstrated that Plaintiffs' request for the immediate implementation and use of uncertified voting equipment in Ohio's elections is both facially unreasonable and unnecessary, and that it would fundamentally alter Ohio's voting scheme because it would require the Secretary to override Ohio's voting equipment certification laws (set forth in O.R.C. § 3506.05). *Id*. On May 11, 2016 the District Court agreed with the Secretary and dismissed Plaintiffs claims related to absentee voting. 5/11/16 Order, R. 31, Page ID # 1038-1055. In doing so, the District Court held that immediate implementation of the proposed ballot marketing tools *without first complying with Ohio's certification requirements* would fundamentally alter Ohio's election system, and, accordingly, that Plaintiffs' "proposed ballot marking software accommodations are unreasonable." *Id*. The District Court declined to "judicially certify an election tool that has never been used in Ohio or even presented to the [Ohio Board of Voting Machine Examiners] for review." *Id.* at pp. 16-18, Page ID # 1053-1055. Plaintiffs did not immediately appeal that Order.

On June 13, 2016, the Governor of Ohio signed into law Substitute Senate Bill 63, which modified Ohio's certification requirements. S.B. 63, 131st Gen. Assem., Reg. Sess. (Oh. 2016). Under the new law, certification by the federal Election Assistance Commission ("EAC") is no longer a requirement for voting equipment to be certified in Ohio. *Id*.; *see also* O.R.C. § 3506.05(H). Based on this change in law, Plaintiffs asked the District Court to revisit its May 11, 2016 Order. Mtn. for Recon., R. 34, Page ID # 1066-1071.

In their motion for reconsideration, Plaintiffs incorrectly argued that the prior EAC certification requirement was the sole basis for the District Court's May 11, 2016 decision that Plaintiffs' requested relief would constitute a fundamental alteration of Ohio's election system. *Id*. With S.B. 63 removing the prerequisite of EAC certification, Plaintiffs' asked the District Court to reverse its decision, deny the Secretary's Motion for Judgment on the Pleadings, and enter judgment in their favor. *Id*. at p. 1, Page ID # 1066. The District Court denied Plaintiffs' Motion explaining that the "Court did not—as Plaintiffs contend—base its opinion on the theory that the EAC does not certify ballot marking tools such as Plaintiffs' proposed accommodations, thereby rendering certification impossible… Instead, this Court took a much more general approach to the certification process that Plaintiffs were attempting to skirt…this Court identified the importance of the [Board of Voting Machine Examiner]'s role in certifying election equipment,

particularly in light of the various voting systems employed by Ohio's eighty-eight counties." 11/14/16 Order at p. 6, R. 44, Page ID # 1099. "With the federal certification component now eliminated for ballot markings tools, there is nothing stopping Plaintiffs from pursuing certification in accordance with Ohio Revised Code § 3506 *et seq*." *Id*. at p. 7, Page ID # 1100. At no time since the District Court's November 14, 2016 reconsideration decision have Plaintiffs amended their Complaint to allege any certification efforts.

On February 1, 2017, the District Court disposed of Plaintiffs' claim related to website accessibility. 2/1/17 Judgment Entry, R. 51, Page ID # 1247. As a result, Plaintiffs now appeal the District Court's May 11, 2016 Order granting Secretary Husted judgment on the pleadings and its November 14, 2016 decision denying Plaintiffs' request to reconsider that Order.

II. Factual Background

A. Ohio Elections

1. Voting Accessibility in Ohio

Ohio offers its voters a wide variety of ways to cast a ballot –both in person and by mail. On Election Day, voters can vote in person from 6:30a.m. to 7:30p.m. at their assigned voting precinct. There, voters have a number of options depending upon need. Voting machines can be programed for non-visual access by means of an audio ballot; voting machines are available that offer large print and zoom features; and voting

machines are available that have tilt and height adjustment capabilities. *See e.g.* O.R.C. §§ 3506.01(H); 3506.19. A person requiring assistance in casting his or her vote may identify a person of his or her choosing to assist in the voting process or request that two election officials, one associated with each of Ohio's major political parties, provide assistance. O.R.C. § 3505.24.

Ohio also provides absentee voting, both in person and by mail. Absentee in person voting begins the day after the close of voter registration (usually twenty-eight days before the election). *See generally* O.R.C. § 3509.01. In-person absentee voting locations are similarly equipped with programmable voting machines to allow for non-visual access. O.R.C. § 3506.19; 3501.11(Z).

Likewise, Ohio's system of absentee voting by mail grants extensive opportunities to Ohio voters. For example, voters may request an absentee ballot beginning ninety days before the election or January 1st of the year in which the election is held, whichever is earlier. O.R.C. § 3509.03(B). Absentee ballots are mailed by the requesting voter's local board of elections beginning the day after the close of voter registration. O.R.C. § 3509.01(B). Absentee ballots may be completed and mailed back to the voter's local board of elections. O.R.C. § 3509.05. Absentee ballots may also be returned in person to the voter's local board of elections either by the voter or a voter's family member. *Id*. A person requiring assistance in casting an absentee ballot may identify a person of his or

her choosing to assist or may request that two election officials, one from each party, deliver an absentee ballot to the voter's home and assist with completion. O.R.C. §§ 3509.08; 3599.32.

Currently in Ohio, ballots are not delivered or returned electronically, with the limited exception that Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") allows voters the option to request and receive their ballots via fax or e-mail. *See* O.R.C. §§ 3509.10; 3511.021; 52 U.S.C.A. § 20302(A)(6). However, even UOCAVA voters must print and hand-mark their ballots and then return them by mail to the appropriate board of elections. O.R.C. § 3511.021(A)(4).

2. Ohio's County Boards of Elections

In Ohio, eighty-eight separate boards of elections ("BOEs"), one representing each of Ohio's counties, are responsible for administering Ohio's elections. *See* O.R.C. §§ 3501.06; 3501.11. That is, each BOE establishes the election precincts for its county. O.R.C. § 3501.11(A). Each county BOE is responsible for generating and delivering ballots (including Election Day, in-person absentee, and absentee by mail ballots). *Id.* at (H). Each BOE receives and tabulates ballots from its local electors. *Id*. at (L). And each BOE provides suitable voting machines, marking devices, automatic tabulating equipment, stalls, and other required supplies at each of its polling places. *Id*. at (I).

Each county board must select the voting equipment it believes is best suited to assist in fulfilling its duties. Voting machines, marking devices, and automatic tabulating equipment may be adopted for use in elections in any county by either the BOE; the board of county commissioners on the recommendation of the BOE; or by the affirmative vote of a majority of the electors of the county. O.R.C. § 3506.02. Upon the adoption of specific voting equipment, a county board of commissioners may purchase or lease the equipment. O.R.C. § 3506.03. However, "[n]o voting machine, marking device, automatic tabulating equipment, or software for the purpose of casting or tabulating votes or for communications among systems involved in the tabulation, storage, or casting of votes . . . shall be purchased, leased, put in use . . . unless it . . . ha[s] been certified by the secretary of state . . . " O.R.C. § 3506.05(B).

3. Certification of Equipment

The responsibility to approve and certify voting equipment in Ohio does not unilaterally reside with the secretary of state. Instead, the secretary of state and two legislative leaders (one Republican and one Democrat) each appoint members to a four person a board of voting machine examiners ("BVME"). *Id*. Before the secretary of state is permitted to "certify" any piece of voting equipment, the BVME must examine and approve equipment and its related manuals. *Id*. A vendor who desires equipment certification must submit the equipment, along with

all current procedural manuals, to the BVME for examination, testing, and approval. *Id*. at (C). Not more than ninety days after submission of the equipment, the BVME must examine the equipment and file a report and recommendation with the secretary of state. *Id*. at (D). In order for the BVME to approve equipment, it must determine that the equipment can be "safely used by voters at elections under the conditions prescribed in Title XXXV of the Revised Code;" "can be depended upon to record and count accurately and continuously the votes of electors;" and "has the capacity to be warranted, maintained, and serviced." *Id*.

Ohio's thoughtfully-crafted certification laws set forth the substantive criteria voting equipment (including ballot marking tools) must meet before being implemented for use during an Ohio election. For example:

> A vendor who desires to have the secretary of state certify equipment shall first submit the equipment, all current related procedural manuals, and a current description of all related support arrangements to the board of voting machine examiners for examination, testing, and approval. The submission shall be accompanied by . . . a detailed explanation of the construction and method of operation of the equipment, a full statement of its advantages, and a list of the patents and copyrights used in operations essential to the processes of vote recording and tabulating, vote storage, system security, pollbook storage and security, and other crucial operations of the equipment as may be determined by the board."

O.R.C. § 3506.05(C)(1). A board of elections seeking to use any voting machine, marking device, automatic tabulating equipment, or software must assure that a demonstration of the equipment has been made available to all interested electors.

O.R.C. § 3506.05(B). Vendors or computer software developers must place a copy of all source code and related documentation, together with periodic updates as they become known or available into escrow. The secretary of state shall require that the documentation include a system configuration and that the source code include all relevant program statements in low- or high-level languages. O.R.C. § 3506.05(H)(1).

Ohio law also mandates that county boards of elections may only implement voting systems and voting tools that have first been certified by the EAC, unless the EAC does not certify the voting machine, marking device, or automatic tabulating equipment at issue. O.R.C. § 3506.05(H). Thus, even though the EAC does not currently certify ballot marking tools, the enactment of S.B. 63 provided a method and means for which the important certification process can still be achieved for ballot marking tools presented to Ohio's BVME.

The requirements of O.R.C. Chapter 3506 read together, establish a comprehensive, intentional series of guidelines for not only the implementation, but also the operation and use of voting equipment in Ohio.

4. The Proposed Ballot Marking Tools Must Be Certified for Use in Ohio

"No . . . marking device . . . shall be . . . put in use . . . unless it . . . ha[s] been certified by the secretary of state . . ." O.R.C. § 3506.05(B). A marking device "means an apparatus operated by a voter to record the voter's choices

through . . . marking of ballots enabling them to be examined and counted by automatic tabulating equipment." O.R.C. § 3506.01(A).

Plaintiffs have identified two ballot marking devices that they allege would allow them to "view and mark" their absentee ballots on electronic devices. One is the Maryland OBMT, which was created and implemented for use in the state of Maryland. Compl. at ¶¶ 19-21, R. 1, Page ID # 7. The other is the Prime III, which has been used in Oregon, Wisconsin, and New Hampshire. *Id.* at ¶¶ 23-24. These tools, which are used by the voter to electronically capture his or her ballot selections, satisfy the definition of marking devices. As with any marking device, these tools must first be reviewed by the BVME and certified by the Secretary of State before they can be used in any Ohio election. O.R.C. § 3506.05(B).

SUMMARY OF ARGUMENT

Under the guise of an "appropriate auxiliary aid" request, Plaintiffs broadly ask the Secretary to ignore the law and order all eighty-eight of Ohio's county BOE's to implement *uncertified* electronic ballot marking tools for immediate use in Ohio's elections. The District Court correctly concluded that such a request, on its face, would fundamentally alter Ohio's election system and, therefore, does not sufficiently raise a claim under Title II of the Americans with Disabilities Act.

Plaintiffs' request is facially unreasonable and contradicts the intent of O.R.C. § 3506.06 (Ohio's voting equipment certification requirements) because,

without reason, Plaintiffs seek to entirely avoid all of Ohio's certification requirements. While the ADA provides a mandate for the elimination of discrimination against individuals with disabilities, it only requires a public entity to make *reasonable* accommodations where *necessary*. And it does not provide an end-run around valid state laws.

With good reason, Ohio requires that all voting equipment –including ballot marking tools– must be certified before it may be used in any election. Until voting equipment has been certified for use in Ohio, it is not *available* for use in Ohio. *See generally* O.R.C. §§ 3506.02; 3506.05 (No voting equipment may be put into use unless it has been examined by Ohio's BMVE and certified by the secretary of state). Plaintiffs seek a blanket waiver of these certification requirements, but such a broad waiver is unreasonable and would fundamentally alter Ohio's election system. Ohio's certification requirements are intended to ensure not only that Ohio elections are secure and successful year after year, but also that there is consistency and accountability for any voting equipment used in Ohio elections. The certification requirements ensure that effective equipment is being used, and they serve to instill a confidence in the electorate that each vote will be cast properly. Plaintiffs have entirely failed to allege that their proposed ballot marking tools would otherwise satisfy these requirements and have, therefore, failed to demonstrate they are entitled to any relief.

First, on its face, Plaintiffs' request for the immediate implementation of uncertified voting equipment would fundamentally alter Ohio's election system. Permitting the Plaintiffs to select a ballot marking tool, and then ordering the immediate implementation of that tool before it is presented to Ohio's BVME (unlike any other piece of voting equipment) disrupts and defeats Ohio's intent to ensure that voting equipment is consistently and securely implemented across Ohio's eighty-eight counties, and that those most familiar with such equipment can be held accountable for its the successful and effective implementation. *See Jones v. City of Monroe, Michigan*, 341 F.3d 474, 480 (6th 2003) abrogated on other grounds by *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015) (If waiver of a rule would be so at odds with the purposes behind, such waiver would be a fundamental and unreasonable change in the program at issue.)

Second, Plaintiffs have not adequately alleged that the proposed ballot marking tools are an appropriate and feasible auxiliary aid or accommodation. Plaintiffs have not alleged, nor are they able to allege, that these tools are or can be certified for use in Ohio. Although Plaintiffs allege these tools have been used in other states, Plaintiffs have not alleged that the tools have been adapted for use in Ohio and Plaintiffs have failed to allege that these tools do or can meet Ohio's certification requirements.

Finally, Plaintiffs have wholly failed to demonstrate that Ohio's facially neutral certification law conflicts with, and is therefore pre-empted by, the ADA. They cannot argue that efforts to certify the proposed tools cannot succeed –they simply have not tried. There is no allegation that Ohio's state laws "stand[] as an obstacle" to, or are contrary to, application of the ADA. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

There is simply no argument that immediate implementation– in the absence of certification– is necessary or required. The District Court properly granted judgment on the pleadings in favor of the Secretary because Plaintiffs failed to adequately state a claim for relief by failing to allege an aid or accommodation that does not result in a fundamental alteration to Ohio's absentee voting system. As a result, the Secretary is entitled to judgment as a matter of law with respect to Plaintiffs' claims related to the accessibility of Ohio's voting system. For these reasons, the Court should affirm the District Court's decision granting judgment on the pleadings in favor of Secretary Husted.

ARGUMENT

A. Standard of Review

This Court reviews a district court's decision granting judgment on the pleadings *de novo*. *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008). Pursuant to Fed.R.Civ.P 12(c) and (h)(2), after an answer is filed a defendant may move for judgment on the pleadings where plaintiff's claims fail to state a claim upon which relief can be granted. A motion brought pursuant to Fed. R. Civ. P. 12(c) is appropriately granted "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir.2007) (internal citation and quotation marks omitted). If there is an absence of law to support the type of claim made, or if the facts alleged are insufficient to state a valid claim, or if on the face of the complaint there is an insurmountable bar to relief, dismissal of the action is proper. *Little v. UNUMProvident Corp.*, 196 F.Supp.2d 659, 662 (S.D.Ohio 2002) (citing *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir.1978)).

B. The District Court Properly Granted the Secretary's Motion for Judgment on the Pleadings.

Title II of the Americans with Disabilities Act ("ADA") provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such

entity." 42 U.S.C. § 12132. In order to establish a claim under the ADA, the Plaintiffs must show that they (1) have a disability, (2) are otherwise qualified, and (3) are "being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of their disability." *See Kaltenberger v. Ohio College of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998). As an initial matter, the District Court found that Plaintiffs have sufficiently alleged each of these elements. 5/11/16 Order, R. 31, Page # 1044-1050.

However, a public entity need not implement an accommodation (or auxiliary aid) if the requested accommodation would fundamentally alter the nature of the program or activity at issue. *See* 28 C.F.R. §§ 35.130; 35.164. The District Court correctly held that Plaintiffs' failed to adequately state a claim for relief because their proposed accommodation –the immediate implementation of uncertified ballot marking tools– was unreasonable because it would fundamentally alter Ohio's election system by entirely circumventing Ohio's valid certification requirements for voting equipment. 5/11/16 Order, R. 31, Page ID # 1054. For this, and the additional reason that Plaintiffs' requested accommodation (or auxiliary aid) is facially unfeasible, this Court should affirm the District Court's decision.

1. Plaintiffs' Request to Mandate the Use of Specific, Uncertified Voting Equipment Would Fundamentally Alter the Structure of Ohio's Election System.

The mandatory implementation of uncertified voting equipment would, on its face, fundamentally alter Ohio's election system, and is an unreasonable solution. The Secretary does not dispute that he has the burden to demonstrate Plaintiffs' proposed accommodation would fundamentally alter Ohio's election systems. *Popovich v. Court of Common Pleas Domestic Relations Div.*, 227 F.3d 627, 639 (6th Cir. 2000) *rev'd on other grounds*, 276 F.3d 808 (6th Cir. 2002) (en banc). But the Secretary easily satisfied this burden because there is no material factual dispute and the Secretary is entitled judgment as a matter of law.

A public entity does not need to "employ any and all means to make" services accessible. *Tennessee v. Lane,* 541 U.S. 509, 531–32 (2004). Instead, the ADA "requires only reasonable modifications that would not fundamentally alter the nature of the service provided," or "impose an undue financial or administrative burden." *Id.*, at 532; *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 281 (2d Cir. 2003). Similarly, a public entity need not provide an auxiliary aid where it "would result in a fundamental alteration in the nature of the service, program or activity . . ." 28 C.F.R. § 35.164.

"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*[1] change.'" (Emphasis added.) *Jones*, 341 F.3d at 480 (quoting *Dadian v. Village of Wilmette*, 269 F.3d 831, 838-39 (7th Cir. 2001). While a modification that provides an exception to a peripheral rule, without impairing its purpose, cannot be said to fundamentally alter a program, the waiver of an essential rule for anyone would fundamentally alter a program. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (Allowing a golfer to use a golf cart would not fundamentally alter the nature of a golf tournament where the purpose of the tournament's walking rule is to subject players to fatigue, and the plaintiff demonstrated that he easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.); *but c.f. Jones* 341 F.3d at 480-481 (Waiver of one-hour parking limitation is at odds with the fundamental purpose of the rule because the benefit of one-hour free parking cannot be altered to permit disabled individual to park all day without jeopardizing the availability of spaces to other individuals).

[1] Plaintiffs seem to argue that the District Court's reference to a reasonableness analysis is inappropriate. However, as set forth in *Jones*, whether the waiver of a particular rule constitutes a fundamental alteration requires a court to consider whether the waiver would create an unreasonable change in the underlying rule or process. Thus, the District Court could correctly conclude both that Plaintiffs' proposed accommodation would fundamentally alter Ohio's election system and that it was unreasonable.

In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the plaintiff, who suffers from a hearing disability and must rely on lip-reading as a form of communication, was denied admission to Southeastern Community College's nursing program because her disability made it unsafe for her to practice as a nurse. As a result, she brought a claim against the college under § 504 of the Rehabilitation Act[2] for its failure to accommodate her disability. *Id*.

It was undisputed that the ability to understand speech without reliance on lip-reading is necessary for patient safety during the clinical phase of the college's nursing program. *Id.*, at 408. But the plaintiff argued that § 504 nevertheless compelled the college to undertake affirmative action that would dispense with the need for effective oral communication suggesting that the college could provide supervision to plaintiff when she interacts with students or dispense with certain course requirements. *Id*., at 408-409. The Court held that the college was not required to admit the plaintiff under this conditions because among other reasons, the plaintiff's proposed modifications –full-time, personal supervision whenever she attended patients and elimination of all clinical courses– would have compromised the essential nature of the college's nursing program (which was to train persons who could serve the nursing profession in all customary ways). *Id.* at

[2] The analysis under Title II of the ADA and Section 504 of the Rehabilitation Act is substantially similar. *See Ability Ctr. Of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 908 (6th Cir. 2004).

413-414. Such a fundamental alteration to the nature of a program was far more than the reasonable modifications the ADA requires. *Id.* at 410. *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones. *See Alexander v. Choate*, 469 U.S. 287, 300 (1985).

In *Jones*, 341 F.3d 474, the City of Monroe supplied free, one-hour parking spaces, including spots reserved for disabled parkers, for shoppers in the downtown district. *Id.* at 475. For employees who worked downtown, the city also supplied free, all-day parking a block or two away, again with both reserved and standard spaces. *Id.* Plaintiff, a downtown employee, parked her car on numerous occasions in the one-hour space next to her office, and left it there for the entire work day. *Id.* She was ticketed, and subsequently brought suit. *Id.* The Sixth Circuit allowed the city's parking system to continue, finding that the purpose of the one-hour limitation was to encourage patrons to shop at downtown businesses. *Id*. at 480.

Waiver of the ordinance limiting parking to one hour in the business district would be "at odds" with the fundamental purpose of the rule. *Id*. By its very nature, the benefit of one-hour free public parking cannot be altered to permit

disabled individuals to park all day without jeopardizing the availability of spaces to other disabled and nondisabled individuals. *Id*. Such a waiver would also require the city to cease enforcement of an otherwise valid ordinance, which by its very nature requires a fundamental alteration of the rule itself. *Id*.

Similar to *Davis* and *Jones*, the requested modification –implementation of a mandated, *uncertified*, voting tool– is at odds with the purpose of Ohio's certification and voting system selection laws. Ohio's certification laws are more than just procedural laws; these requirements set forth the substantive criteria voting equipment must meet before being implemented for use during an Ohio election. O.R.C. Chapter 3506 *et seq*. Plaintiffs should not be permitted to circumvent each and every one of these requirements.

Plaintiffs' proposed accommodation, on its face, is at odds with the purpose of Ohio's certification requirements. Evidence need not be adduced to confirm that Ohio's certification requirements are intended to provide a uniform process to ensure that equipment can be safely used by the voters at elections under the conditions set forth throughout O.R.C. Title XXXV (Elections) and the equipment has the capacity to be warranted, maintained, and serviced. *See* O.R.C. §3506.05(D). These requirements provide consistency and accountability for the equipment being used in Ohio elections.

As set forth above, the certification requirements require a vendor to submit the proposed equipment for testing. O.R.C. § 3506.05(C). Vendors must place a copy of all source code and related documentation, together with periodic updates as they become known or available into escrow. *Id.* at (H)(1). And a vendor must also submit a submission fee. *Id.* at (C)(1). After equipment has been certified, a vendor maintains an obligation to notify the BVME of any significant enhancements or adjustments to the equipment. *Id.* at (E).

To waive the entirety of these requirements undercuts the certification process itself. Though Plaintiffs argue that they would have offered evidence related to the cost and logistics of implementing the proposed ballot marking tools (*see* Pls' Brief at p. 11), this evidence does not create a genuine issue of material fact because, even assuming the proposed ballot marking tools could be implemented cheaply and with relevant ease, on its face, Plaintiffs proposed implementation of uncertified voting equipment is at odds with Ohio's election structure.

First, Plaintiffs' proposal would require either the Court or the Plaintiffs to hand select a particular ballot marking tool (such as the Maryland OBMT or Prime III). As the District Court concluded, "the court would be forced into the position of determining which systems will work most effectively with each of Ohio's various voting systems" without the intended benefit of review by Ohio's BVME. 5/11/16 Order, R. 31, Page ID # 1053. In doing so, the selected tool would evade

the accountability provided by Ohio's certification requirements while vendors of other ballot marking tools would still be bound by Ohio's certification process. Alternatively, if a court does not select a specific tool, Plaintiffs' proposal could have the effect of allowing any vendor of any electronic ballot marking tool to circumvent Ohio's certification process in the name of the ADA.

Second, the proposed ballot marking tools would be the only voting equipment (as defined in O.R.C. Chapter 3506) used in Ohio that would not be required to undergo Ohio's certification process. *See* O.R.C. § 3506.05(B). Despite the intent to provide uniform guidelines and review of potential voting equipment, ballot marking tools (or certain ballot marking tools) would be entirely exempt from this process.

Finally, Plaintiffs' proposal fails to address who would be accountable for the selected tool(s). Ohio's certification requirements call for the vendor (or manufacturer) of proposed voting equipment to present the equipment for review. This makes sense. The vendor is in the best position to provide all relevant information necessary to ensure the equipment will function as intended. And the vendor has a vested interest in ensuring that the equipment does function as intended. If it does not, the vendor is held accountable. But under Plaintiffs' scenario, there is no vendor. Plaintiffs are instead asking the Secretary to assume the role of the vendor. Neither Ohio's elections laws, nor the ADA intend such a broad

result. *See e.g. Stern v. Sony Corp*., No. CV 09-7710 PA, 2010 WL 8022226, at *4 (C.D. Cal. Feb. 8, 2010), aff'd sub nom. *Stern v. Sony Corp. of Am*., 459 F. App'x 609 (9th Cir. 2011) (The court found that plaintiff failed to state a claim under Title III of the ADA against a videogame manufacturer where plaintiff's requested auxiliary aid would create the potential for overly broad liability beyond the plaintiff's purported needs).

Additionally, Plaintiffs' proposed accommodation is at odds with how voting equipment is currently selected in Ohio. Ohio's eighty-eight county BOEs are responsible for administering Ohio's elections across the state. *See* O.R.C. § 3501.11. In doing so, each BOE is instructed to provide suitable voting machines, marking devices, automatic tabulating equipment, stalls, and other required supplies at each of its polling places. *Id*. at (I). Because decisions such as the selection and purchase of voting equipment are delegated to the counties, Ohio is a multi-voting system state. As opposed to one universal voting system used across Ohio, a variety of *certified* voting systems and equipment are implemented depending upon a particular county's needs. If the Secretary were required to mandate the use of specific voting equipment, Ohio county BOEs, board of county commissioners, and even the voters of that county would no longer enjoy their lawfully bestowed authority to select voting equipment that best suits their needs and resources. Such a

stark change in procedures is certainly not negligible, particularly because it is the counties, not the State, that would purchase this equipment.

The District Court's determination was properly made on the pleadings because the purpose of Ohio's certification requirements is clear and the immediate implementation of one or more ballot marking tools is fundamentally at odds with that purpose. The District Court correctly dismissed Plaintiffs' claim related to the implementation of one or more uncertified, untested voting tools at the judgment on the pleadings stage.

2. Plaintiffs have Failed to Adequately Allege a Reasonable Accommodation, or Alternatively, the Existence of Available Auxiliary Aids in Ohio.

The ADA requires reasonable modifications to accommodate qualified individuals with disabilities unless the public entity can demonstrate that such an accommodation would fundamentally alter the nature of the service, program, or activity at issue. 28 C.F.R. §§ 35.130(b)(7). Title II of the ADA only requires a public entity to make a *reasonable* accommodation. *Johnson v. City of Saline*, 151 F.3d 564, 571 (6th Cir. 1998). The requested accommodation or modification must be "facially reasonable, effective, and feasible." *American Council of the Blind v. Paulson*, 525 F.3d 1256, 1265 (D.C. Cir. 2008) citing *Tao v. French*, 27 F.3d 635, 638 (D.C. Cir. 1994). Only if a plaintiff identifies a reasonable modification in the

first place, does the burden then shift to the defendant to show the proffered modification is unreasonable. *Olmstead v. Zirming*, 527 U.S. 581, 603 (1999).

Plaintiffs' proffered accommodation from Ohio's certification laws – mandatory implementation of uncertified voting equipment –is not reasonable on its face because it is not feasible. As the District Court correctly found, directing the Secretary to disregard an important and established Ohio certification law is patently unreasonable. *See*, 5/11/16 Order, R.31, Page ID # 1053-1054 (Ohio's certification process, which includes review of equipment by competent and experienced Ohio elections officers, "underscore[s] the legislature's strong desire to avoid hav[ing] a voting machine certified that would not properly serve Ohio's electorate."). Other courts have also recognized that requests to modify *elections* standards are facially *unreasonable*. *See e.g. Weber v. Shelley*, 347 F.3d 1101, 1104 (9th Cir. 2003) (It is "clear that states are entitled to broad leeway in enacting reasonable, even-handed legislation to ensure that elections are carried out in a fair and orderly manner." *Id.* citing *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) ([A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest . . .").

To avoid addressing the unreasonableness of their request, Plaintiffs allege that the proposed ballot marking tools are auxiliary aids not required to undergo

the reasonableness analysis set forth in *Johnson*.[3] In the absence of Ohio's certification and selection laws (or in the event Plaintiffs' proposed tools satisfied those requirements), the Secretary would likely not dispute the use of ballot marking tools. But Ohio does set forth specific certification requirements and the proposed tools do not satisfy those requirements. What is really at issue here is whether Plaintiffs are entitled to an accommodation from those requirements.

Nevertheless, even applying the analysis for an auxiliary aid, Plaintiffs have failed to adequately allege that these ballot marking tools are appropriate and available. Under the ADA, a public entity must provide "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." 28 C.F.R. § 35.160(b)(1). "The ADA's 'reasonable modification' principle, however, does not require a public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities, but only to make 'reasonable modifications' that would not fundamentally alter the nature of the service or activity of the public entity or impose an undue burden." *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1082–83 (11th Cir. 2007) citing *Lane*, 541 U.S. at 531–32.

[3] For purposes of considering the Secretary's Motion for Judgment on the Pleadings, the District Court did not analyze whether the proposed ballot marking tools satisfy the requirements of 28 C.F.R. § 35.160 so as to be defined as "auxiliary aids" rather than an accommodation.

Plaintiffs' proposed ballot marking tools are neither appropriate nor available in Ohio because they have not been tested or certified for use in Ohio, nor have they been adapted for use in Ohio. Although Plaintiffs allege these tools have been used in other states, Plaintiffs have not alleged that the tools have been adapted for use in Ohio. Compl., throughout, R.1, Page ID # 1-13.

Plaintiffs now attempt to characterize these ballot marking tools as "plug and play" type equipment that can easily be adapted from one election to the next, but these tools indisputably involve vastly evolving technology required to work within a variety of unique voting systems, of which Ohio has no less than nine. *See e.g.* O.R.C. 3506.03. Nowhere in Plaintiffs' Complaint do they allege that the proposed ballot marking tools are ready for immediate implementation in Ohio or with Ohio's existing voting equipment. At best, Plaintiffs alleged that certain ballot marking tools are "available." Compl. at ¶ 41, Page ID # 11. But allegations that these tools exist is not enough. Further, that these tools might work with another state's voting system, or that they can be provided (as-is) to Ohio, is in no way dispositive that they work in Ohio. Under 28 C.F.R. § 35.160(b)(1) auxiliary aids must be appropriate and, in Ohio, that means they must be certified. O.R.C. § 3506.05(B).

For these reasons, the Court should affirm the District Court's decision.

3. The Supremacy Clause of the United States Constitution is Inapplicable Here, Where Plaintiffs Have Not Alleged the ADA and Ohio's Certification Laws Conflict.

Plaintiffs' reliance on the Supremacy Clause is inappropriate because Ohio's certification requirements do not conflict with the ADA. The Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824). State law is nullified to the extent that it *actually conflicts* with federal law. *See Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 51, 67 (1941); *see also Crosby*, 530 U.S. at 373 (2000).

The Supremacy Clause does not provide an end-run around compliance with valid, neutral state laws that do not conflict with federal laws. *See e.g. Hillsborough Cty., Fla.*, 471 U.S. at 722 (Federal regulations governing collection of blood plasma from paid donors did not preempt the local ordinances in part because even if a county's ordinances had reduced the supply of plasma in that county, it would not necessarily follow that they interfere with the federal goal of

maintaining an adequate supply of plasma). The cases cited by Plaintiffs further demonstrate that an actual conflict must exist. *Barber v. Colorado Dep't of Revenue*, 562 F.3d 122, 233 (10th Cir. 2009) ("The Supremacy Clause does not govern the outcome of this case; there was no conflict . . . "); *Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 280 (7th 1995) ("All we need hold is that the [state pension plan] conflicts with the ADEA, and under the Supremacy Clause neither [the city] nor any other governmental body may follow it."). And in *Mary Jo. C. v. New York State and Local Ret. Sys.*, 707 F.3d 144 (2d Cir. 2013), a conflict between a state filing requirement and the ADA was demonstrated only after the Plaintiff had *applied for* and was denied disability benefits because she missed the filing deadline.

Plaintiffs also rely heavily on the Fourth Circuit's decision in *National Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016), to argue that the mere fact of a state statutory requirement does not insulate a public entity from making an otherwise reasonable accommodation. Pls' Br. at p. 20. But the Secretary is not arguing the "mere fact" of a state statutory requirement to avoid making an accommodation. The Secretary has demonstrated that Plaintiffs' proposed accommodation is not reasonable and would fundamentally alter the election system in Ohio. *Lamone* is readily distinguishable from this case.

In *Lamone*, the state of Maryland developed an online ballot marking tool for use in its elections. *Id*. *After* the tool was successfully used in a statewide election, the State enacted certification laws specifically directed at the OBMT. These laws, which included a requirement that ballot marking tools be certified by a "supermajority" vote of the Maryland Board of Elections, ultimately prevented further use of the ballot marking tool, which the Board failed to certify. The plaintiffs in *Lamone* were able to demonstrate that application of Maryland's certification requirements made it impossible to implement a ballot marking tool. *Id*. The Fourth Circuit demonstrated by analogy that a government entity could not prevent the installation of a wheelchair by requiring certification of ramps and then refuse to actually certify any ramps. *Id.* at fn. 12

Unlike Maryland's certification requirements, Ohio's certification requirements are not a mere afterthought. They far predate Plaintiffs proposed ballot marking tools. And unlike the plaintiffs in *Lamone*, Plaintiffs have not alleged that Ohio's certification requirements actually impose a barrier to the implementation of ballot marking tools. Instead, Plaintiffs are asking the Court to conveniently ignore the certification requirements. Unlike the analogy used by the court in *Lamone*, the Secretary has not *refused* to certify ballot marking tools – none have been presented for certification.

The District Court did not err in granting judgment on the pleadings in favor of the Secretary because there are no factual issues to be resolved regarding the application of Ohio's certification laws. Plaintiffs have not (and cannot) alleged that Ohio's certification requirements stand as an obstacle to the ADA because, inexplicably, the ballot marking tools have never been offered for certification. Plaintiffs have made no allegations that they (or anyone else) have attempted to seek certification of this equipment or that there is any current impediment to certification, such that an accommodation from Ohio's certification requirements is actually necessary. Compl., throughout, R. 1, Page ID # 1-13.

That Plaintiffs now argue that it is the Secretary that must offer these tools for certification also flies in the face of Ohio's elections laws, which require the vendor to present its equipment for certification.[4] While the ADA requires a public entity to "take appropriate steps" to ensure effective communications with members of the public with disabilities (28 C.F.R. § 35.160(a)(1)) it cannot be read so broadly as to require the Secretary to stand in the shoes of a vendor. It is one thing to require a public entity to purchase a viable aid or accommodation; it is wholly another to require it to adapt, develop, or insure a proposed aid or accommodation.

[4] A vendor is defined as a person that "owns, manufactures, distributes, or has the legal right to control the use of equipment –which the Secretary undisputedly is not. O.R.C. § 3506.05.

Because Plaintiffs have not alleged a conflict with Ohio's certification requirement, the proposed accommodation from these requirements is facially unnecessary and, therefore, unreasonable. Plaintiffs have failed to allege a viable cause of action under the ADA and their claim was properly dismissed.

CONCLUSION

For all of these reasons, this Court should affirm the District Court's grant of judgment on the pleadings in favor of Ohio Secretary of State Jon Husted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,614 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also 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 (Times New Roman 14-point type) using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2017, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. I further certify that a copy of the foregoing has been served by first class mail upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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DESIGNATION OF THE DISTRICT COURT RECORD

Defendant-Appellee, pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic records:

Date Filed	Doc.No.; PageID#	Document Description
12/07/2015	R. 1, Page ID # 1-13	Complaint
12/07/2015	R. 1, Page ID # 7	Complaint
02/05/2016	R. 20, Page ID # 292-313	Motion for Judgment on the Pleadings
05/11/2016	R. 31, Page ID # 1038-1055	Order
05/11/2016	R. 31, Page # 1044-1050	Order
05/11/2016	R. 31, Page ID # 1053	Order
05/11/2016	R. 31, Page ID # 1054	Order
05/11/2016	R.31, Page ID # 1053-1054	Order
07/07/2016	R. 34, Page ID # 1066-1071	Motion for Reconsideration
11/14/2016	R. 44, Page ID # 1099	Order
02/01/2017	R. . 51, Page ID # 1247	Judgment Entry

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