

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO (COLUMBUS)**

**SHELBI HINDEL**, et. al,

*Plaintiffs,*

v.

**SECRETARY OF STATE JON HUSTED**,

*Defendant.*

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:  
: Case No. 2:15cv03061  
:  
: Judge George C. Smith  
:  
: Magistrate Judge Elizabeth  
: Preston Deavers  
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**DEFENDANT OHIO SECRETARY OF STATE JON HUSTED'S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

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Pursuant to Fed. R. Civ. P. 12(c), Defendant Ohio Secretary of State Jon Husted, respectfully moves this Court for judgment on the pleadings as to those claims in Count I of Plaintiffs' Complaint related to the Secretary's inability to implement an allegedly available and accessible absentee voting system for failure to state a claim upon which relief may be granted. A memorandum in support of this motion is attached.

Respectfully moved,

MIKE DEWINE  
ATTORNEY GENERAL

*s/ Nicole M. Koppitch*

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## **MEMORANDUM IN SUPPORT**

### **INTRODUCTION**

To be certain, Ohio Secretary of State Husted has not refused to make certain voting technology available to Plaintiffs. Rather, it is impossible for him to do so in light of Ohio's valid and legitimate certification requirements for voting equipment. Those requirements ensure that the equipment used for generating ballots, casting votes, and tabulating ballots will be effective. In this instance, Plaintiffs have not presented a legally viable accommodation to meet their purported needs because Plaintiffs have not identified a *certified* voting system or voting tool that provides the online ballot marking feature they desire. Nor have Plaintiffs alleged that certification of a voting system, such as the Prime III voting system, would be impossible.

It is important to the Secretary that all Ohio voters have access to cast their vote in Ohio. Plaintiffs, as with all Ohio voters, have a variety of options for doing so either on or prior to Election Day. Such options include both absentee and Election Day access to voting. Ohio polling locations are required to be accessible, as set forth in the Americans with Disabilities Act. And for those locations that are exempt from accessibility requirements, a voter may request curbside delivery of his or her ballot. Polling locations are also required to provide voting machines that offer a variety of accommodations for persons with sight or dexterity disabilities such as audio ballots at every polling place, tilt screens, and text magnification. Ohio also offers absentee voting, during which time a voter may request delivery of and assistance with marking an absentee ballot, if needed.

Plaintiffs seek the use of evolving technology that would allow voters with vision and print disabilities to mark absentee ballots electronically –something that no Ohio voter is currently able to do. However, at this stage, there are two significant barriers to Plaintiffs'

request: First, Ohio law does not permit –in fact it specifically prohibits –the Secretary of State from unilaterally directing Ohio’s eighty-eight county boards of elections to implement untested, uncertified voting systems or ballot marking software. Rather, Ohio law mandates that county boards of elections may only implement voting systems and voting tools that have first been certified by the federal Elections Assistance Commission (“EAC”) and then certified by the Secretary of State (following a recommendation from Ohio’s Board of Voting Machine Examiners (“BVME”). Neither of the tools proffered by Plaintiffs (the Maryland online ballot marking tool and the Prime III voting system) have been certified by the EAC. And, to-date, Plaintiffs have not identified any EAC-certified voting system that would allow for online ballot marking in Ohio.

Second, even if Plaintiffs could identify an EAC certified voting system that meets their demands, under Ohio law, it is the county boards of elections that select the voting systems used in each of the eighty-eight counties, not the Secretary of State. A mandate from the Secretary directing all eighty-eight counties to adopt a particular voting system would fundamentally change established Ohio law.

In order to succeed on their claim that the Secretary’s inability to provide online ballot marking violates Title II of the Americans with Disabilities Act (“ADA”), the plaintiffs must demonstrate that they have a disability; are otherwise qualified; and are being denied the benefits of voting in Ohio solely because of their disabilities. Viewing the allegations in the Complaint as true (as is required on a motion to dismiss), the Secretary does not dispute that the named Plaintiffs either have a recognized disability, or, in the case of the National Federation of the Blind, are acting on behalf of persons with recognized disabilities. Nor does the Secretary currently contest the Plaintiffs’ eligibility to cast a vote in Ohio. However, it is clear from the

four corners of the Complaint that Plaintiffs *are not* being excluded from participation or being discriminated against solely because of their disability because Plaintiffs do indeed have meaningful access to cast their votes, either by absentee ballot or in person and Plaintiffs have not requested a facially reasonable accommodation beyond those accommodations already afforded to them.

In their Complaint, Plaintiffs attempt to improperly isolate Ohio's absentee voting as a program separate and distinct from Ohio's general voting program. But it is not. As with in person voting, absentee voting is just one way an Ohio voter may achieve his or her ultimate goal of casting a ballot in Ohio.

Even if this Court were to analyze absentee voting as a service separate and distinct from in person Election Day voting, Plaintiffs have meaningful access to absentee voting. Should Plaintiffs choose to vote absentee, they may request the assistance of either a person of their own choosing or may request that their local board of elections send two qualified election officials (one from each of Ohio's major political parties) to assist them in casting their vote. Though Plaintiffs protest that such process deprives them of the ability to vote privately, Plaintiffs actually are ensured the secrecy of their absentee ballot. Whether an elector opts for assistance from a person of their own choosing or requests assistance from qualified election officials, those individuals are bound by Ohio law to maintain the secrecy of the elector's ballot. Failure to uphold that duty is subject to criminal penalties. Thus, with or without assistance, an elector can cast an absentee vote with the confidence that their vote will remain private.

To the extent Plaintiffs remain unsatisfied with their options for voting in Ohio, they have failed to present a facially reasonable accommodation. For good reason, Ohio law requires that voting equipment implemented for use during elections in Ohio be certified by both the EAC and

the Secretary of State before it may be implemented.<sup>1</sup> In this case, neither the Maryland online ballot marking tool (“OBMT”) nor the Prime III voting system (“Prime III”) have been certified by either the EAC or the Secretary of State. And Plaintiffs have presented no alternatives that satisfy these certification requirements.

Ohio’s certification requirements are not mere formalities; Ohio’s long standing certification requirements are vital to ensure that Ohio elections are secure and successful year after year. These 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 securely.

Moreover, because Ohio elections are executed through each of the eighty-eight county boards of elections, and because it is well-established that each board shall be permitted to select the appropriate *certified* voting equipment of its choice, based upon the needs and resources of the particular county, if this Court were to disregard Ohio’s voting laws, it would completely change Ohio’s voting laws related to the role of county boards because counties would no longer have the autonomy to select individual voting tools. And that autonomy is intended by Ohio’s existing voting laws to best suit the needs of the county BOEs that are imparted with the responsibility to manage elections across the State.

The reality is Plaintiffs have presented an aspiration for what *could* be a future absentee voting feature in Ohio as voting technology develops, but, given Ohio’s valid certification requirements and the apparent failure of the OBMT or Prime III to comply with those requirements, Plaintiffs have not presented a plausible or genuine accommodation at this time. If Plaintiffs want to bypass Ohio’s voting equipment certifications laws, what they need is legislative action; not a court order.

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<sup>1</sup> The *Board* may grant temporary approval for the purpose of allowing experimental use of equipment but a vendor cannot bypass the initial requirement for EAC certification. *See* O.R.C. § 3506.05(D)

## BACKGROUND

### A. Ohio Elections

#### 1. Voting Accessibility in Ohio

Ohio offers its voters a wide variety of ways to cast a ballot. On Election Day, voters can vote in person 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. Those election officials are bound by oath to keep confidential any selections revealed to them in the process of assisting a voter. O.R.C. § 3501.31 (Election officials shall subscribe to a statement which includes confirmation that he or she "will not disclose any information as to how any elector voted which is gained [] in the discharge of [] official duties."). A violation of that oath is a misdemeanor of the first degree. O.R.C. § 3599.19. Other persons providing assistance are also required by law to maintain the secrecy of the elector's ballot. O.R.C. § 3505.24 ("Any person providing assistance in the marking of an elector's ballot under this section shall thereafter provide no information in regard to the marking of that ballot."). A violation of that duty is also a misdemeanor of the first degree. O.R.C. § 3599.32 ("No official upon whom a duty is imposed by an election law for the violation of which no penalty is otherwise provided shall knowingly disobey such election law. Whoever violates this section is guilty of a misdemeanor of the first degree.").

Ohio voting locations must be accessible for people with disabilities. O.R.C. § 3501.29(B)(1). However, any voter that requires assistance at any polling location that is exempt from accessibility requirements may request curbside (or front door delivery) of his or her ballot. *Id.* at (B)(2); O.R.C. § 3501.29(C). Further, Ohio provides early, in person voting beginning twenty-eight days before the election and an early voting location is open on the Saturday and Sunday immediately prior to the election. *See generally* O.R.C. § 3509.01; *NAACP v. Husted*, Case No. 2:14-404). Early voting locations are similarly equipped with programmable voting machines to allow for non-visual access. O.R.C. § 3506.19; 3501.11(Z).

Ohio also allows any voter to vote absentee by requesting an absentee ballot, which are available beginning the day after the close of voter registration before each election. O.R.C. §§ 3509.01(B); 3509.02(B); Compl. at ¶ 13. Absentee ballots are mailed by the requesting voter's local board of elections. O.R.C. §§ 3509.01(A); 3509.04(B). And absentee ballots must be completed and mailed back to the voter's local board of elections. O.R.C. § 3509.05. Again, a person requiring assistance in this process may identify a person of his or her choosing to assist or may request that two election officials, one from each party, (subject to the same confidentiality requirements set forth in O.R.C. § 3501.31; 3505.24) 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") voters may request and receive their ballots electronically. *See* O.R.C. §§ 3509.10; 3511.021; 52 U.S.C.A. § 20302(A)(6). However, even UOCAVA voters must return their marked ballots by mail. O.R.C. § 3511.021(A)(4).

## **2. Ohio's County Boards of Elections**

In Ohio, eighty-eight separate county 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. *Id.* at (A). Each county BOE is responsible for generating and delivering ballots.<sup>2</sup> *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).

Under Ohio law, 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. *Id.* at § 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 . . . *Id.* at § 3506.05(B)<sup>3</sup>.

## **3. Certification of Equipment**

The secretary of state shall appoint a board of voting machine examiners which is a bipartisan, four-member panel, to examine and approve equipment and its related manuals. *Id.* A vendor who desires equipment certification must submit the equipment, along with all current

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<sup>2</sup> This includes in person, early in person, and absentee ballots.

<sup>3</sup> A variation of Ohio’s certification requirements first took effect on July 22, 1994.

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). A recommendation to certify the equipment must set forth that the equipment can be “safely used by voters at elections;” “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.* Further, any “voting machine, marking device, or automatic tabulating equipment initially certified or acquired on or after December 1, 2008, shall have the most recent federal certification number issued by the election assistance commission.” O.R.C. § 3506.05(H)(4)(a).

Equipment that has not been certified by the EAC does not meet the criteria for certification in Ohio. *Id.* The primary purpose of the EAC’s Voting System Testing and Certification Program Manual is to provide clear procedures to manufacturers for the testing and certification of voting systems to specified federal standards consistent with the requirements of the Help America Vote Act.<sup>4</sup> EAC certification also serves to support state certification programs and increase voter confidence in the use of voting systems. Currently, fifteen voting system manufacturers are registered with the EAC. Of those fifteen manufactures, it appears at least eight separate voting systems<sup>5</sup> are currently certified by the EAC.<sup>6</sup> Plaintiffs’ Complaint lacks any allegations that Prime III is one of them or that Prime is in the process of being tested. Compl. *in passim*. Additionally, because the EAC certifies voting systems, it has not certified

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<sup>4</sup> The Help America Vote Act (“HAVA”) requires voting systems to be accessible to voters with disabilities. 52 U.S.C. § 21081(a)(3). To comply, a voting system must be certified by the EAC. *See id.* at § 20922.

<sup>5</sup> The phrase “voting system” means the total combination of mechanical, electromechanical, and electronic equipment used to define ballots; cast and count votes; report or display election results; connect voting system to voter registration system; and maintain and produce any audit trail information.

<sup>6</sup> EAC certification information is publically available at: [http://www.eac.gov/testing\\_and\\_certification/manufacturers\\_registration](http://www.eac.gov/testing_and_certification/manufacturers_registration).

the Maryland OBMT, which is an independent marking tool not part of any particular voting system.

**B. The Lawsuit**

In this lawsuit, Plaintiffs allege that in order 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 for them. Such assistance strips the individual Plaintiffs of the secrecy of their ballots.” Compl. at ¶ 16. Plaintiffs further allege that the Maryland OBMT or the Prime III voting system exist, which would allow voters who are blind or have other print disabilities to mark their absentee ballots privately and independently. *Id.* at ¶¶ 19-21; 23. In such cases, voters would still require assistance, because the ballots would still need to be printed, signed, and returned to the voter’s local board of elections. The Maryland OBMT and Prime III system only allow the voter to mark his or her ballot electronically and then print the signature page separately from the ballot so as not to reveal his or her selection. *Id.* at ¶ 21. So even with the aid of these tools, the voter may still require the assistance of a third-party. However, Plaintiffs have not alleged that either the Maryland OBMT or the Prime III voting system have been certified by the EAC or the Ohio Secretary of State. Compl. *in passim*. Nor have they made any allegations that efforts have been or are being made to certify such equipment. *Id.* Neither proposed accommodation is compliant with Ohio’s valid, facially-neutral, certification law and, therefore, Plaintiffs have failed to identify a facially reasonable accommodation.

**ARGUMENT**

**A. Standard of review**

Pursuant to Fed.R.Civ.P 12(c) and (h)(2), after an answer is filed a defendant may move for judgment on the pleading where plaintiff’s claims fail to state a claim upon which relief can

be granted. A court reviews motions to dismiss under Fed.R.Civ.P. 12(b)(6) and motions for judgment on the pleadings under Fed.R.Civ.P. 12(c) in the same manner. *Blake v. Wells Fargo Bank, NA*, 916F.Supp.2d 839, 841 (S.D. Ohio 2013). To survive either motion, a complaint must set forth sufficient factual allegations suggesting that the plaintiff is entitled to relief under those claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A court must construe the complaint in the light most favorable to the plaintiff and treat all well-pleaded allegations contained therein as true. *Id.* at 555–56. The defendant bears the burden of demonstrating that the plaintiff has failed to state a claim for relief. *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir.2007). 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)).

Plaintiffs bring a claim for violations of Title II of the Americans with Disabilities Act (42 U.S.C. § 12132 *et seq.*). Plaintiffs’ claim is based upon two distinct alleged violations: (1) the Secretary has failed to implement an accessible voting system (Compl. at ¶ 41) and (2) the Secretary has failed to provide all voters with equal access to his website. However, Plaintiffs can prove no set of facts in support of their first complaint that an “available and accessible” voting system exists such that the Secretary has denied Plaintiffs a reasonable accommodation with respect to absentee voting. Rather, Plaintiffs’ only proposed accommodations are not legally viable and are facially unreasonable.

**B. Defendant’s legal inability to implement a statewide ballot marking tool does not violate Title II of the Americans with Disabilities Act.**

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). For purposes of this Motion, the Secretary does not dispute that the individual Plaintiffs have alleged they have a recognized disability and are otherwise qualified to vote in Ohio. However, as a matter of law, Plaintiffs have not been excluded from participation in Ohio’s voting program solely because of their disability.

**1. Ohio’s voting program provides Plaintiffs with meaningful access to both in person and absentee voting in Ohio.**

When analyzing a Title II claim, the Court must view Ohio’s voting program in its entirety. 28 C.F.R. § 35.150(a) (“A public entity shall operate each service, program or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.”); *see also Pasciutti v. New York Yankees*, 87 F.Supp.2d 221, 223 (S.D.N.Y. 1999) (Because 28 C.F.R. § 35.150(a) requires that a service, program, or activity be viewed in its entirety, the court was required to look at the accessibility of a stadium as whole, not at individual elements of the stadium).<sup>7</sup> This includes all current voting options for

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<sup>7</sup> Defendants anticipate that Plaintiffs will argue that 28 C.F.R. § 35.150(a) is inapplicable because the regulation is entitled “Existing Facilities.” However, despite its title, the regulation

an elector, including Election Day in person voting, early in person voting, and absentee voting. *See Kerrigan v. Philadelphia Bd. of Election*, 2008 WL 3562521, \*13 (E.D. Pa. 2008) (“We find that Philadelphia’s program of voting comprises its entire voting program . . . as well as its alternative and absentee ballot programs.”); *see also Westchester Disabled on the Move v. County of Westchester*, 346 F.Supp.2d 473, 477-78 (S.D.N.Y. 2004) (Court considering evidence of inaccessible polling places analyzed the plaintiff’s ADA claim in light of *all* voting options for disabled voters –including alternative voting locations and absentee ballots).

That any voter may choose to vote absentee is not dispositive to this analysis. The purpose of voting is to cast a vote. Voting is the program and absentee voting is just one way of many ways an Ohio voter may participate. In other words, absentee voting is not a standalone service. Although Plaintiffs attempt to divorce Ohio’s absentee voting from Ohio’s voting program as a whole, this Court’s analysis should consider Ohio’s complete voting program, which provides voters with a variety of options to cast their votes. When viewed in the appropriate context, Plaintiffs have failed to allege that they are denied a meaningful opportunity to cast their votes.

## **2. Plaintiffs have meaningful access to absentee voting.**

Even if this Court were to view absentee voting in isolation –and it should not– Plaintiffs have meaningful access to absentee voting. As described in detail above, should Plaintiffs choose to cast an absentee ballot, assistance is available. And, contrary to Plaintiffs’ contentions, that assistance is not meaningless.

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is contained in a larger Subpart titled “Program Accessibility” and goes on to provide that *services, programs, and activities* (not facilities) be viewed in their entirety. Moreover, “facilities” is defined as “all or any portion of . . . equipment . . .” 28 C.F.R. 35.104. Ultimately, the very thing complained of here is Ohio’s voting equipment (or lack thereof). So even if one were to apply a rigid reading of the regulation, it is applicable to the analysis in this case.

Plaintiffs' complaint with respect to Ohio's absentee voting is that it does not allow voters with various vision or dexterity impairments to cast their ballot privately and independently. Compl. at ¶ 17. At the outset, it is important to note that Plaintiffs' proposed accommodations (implementation of either the Maryland OBMT or Prime III) do not provide for complete independence. Compl. at ¶ 21; 23 (Voters must still print, sign, and mail back their marked ballots). So instead, the analysis turns on whether these voters must be afforded the opportunity to privately cast an absentee ballot.

Congress never specified that individuals with disabilities face discrimination with regard to voting *privately and independently*.<sup>8</sup> See generally *California Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1237-38 (N.D. Cal. 2013) citing *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 1997). Nevertheless, Plaintiffs may still cast an absentee ballot in Ohio with confidence in the secrecy of their selections because Ohio law mandates that those imparted with the duty to aid an elector requiring assistance in casting a ballot *must* maintain the privacy of that voter's selections. O.R.C. §§ 3501.31; 3505.24. Voters requiring third-party assistance are not merely relying on the happenstance that others are available to help, as was the case in *Disabled in Action v. Board of Elections in City of New York*, 752 F.3d 189, 199 (2d Cir. 2014) (a case involving accessibility to polling places). In Ohio, voters requiring assistance are legally guaranteed both that assistance will be provided and that it will be confidential.

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<sup>8</sup> The Secretary anticipates that Plaintiffs will propose that 28 C.F.R. § 35.160(b)(2) grants a right to vote *privately*. However, 28 C.F.R. § 35.160(b)(2) –in the context of “communications” – provides that “the service necessary to ensure effective communication will vary . . . in order to be effective, auxiliary aids and services must be provided . . . in such a way as to *protect* the privacy and independence of the individual with a disability.” (Emphasis added). Even assuming § 35.160(b)(2) is applicable here, Ohio's current absentee voting system *protects the voter's privacy* by ensuring that any person providing necessary assistance to an elector is bound by a duty to keep the elector's voting selection private and confidential. See O.R.C. §§ 3501.31; 3505.24; 3599.32.

The Sixth Circuit has generally reviewed the issue of whether third-party assistance extinguishes the secrecy of an elector's ballot. In *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999), the Sixth Circuit reviewed a Title II challenge asserting (among other things) that because Michigan's Secretary of State refused a request to implement a system by which blind voters could vote without third-party assistance of their choosing, they were denied the benefit of complete secrecy of the ballot. *Id.* at 649. The Michigan Constitution provides that the legislature shall enact laws to "preserve the secrecy of the ballot." *Id.* But, a state law, similar to Ohio's law, provides that when an elector cannot mark his or her ballot, the elector shall be assisted by two inspectors of election. *Id.* The plaintiffs argued that the language of the Constitution created a constitutional right to secrecy of the ballot that was not protected by Michigan's third-party accommodation. However, the Sixth Circuit disagreed, concluding that the plaintiffs "were not being denied their state constitutional right to 'secrecy of the ballot' . . ." because it did not appear the state legislature intended to violate the State's Constitutional mandate of secrecy by enacting Michigan's law allowing for voter assistance under limited circumstances. *Id.* at 653. The discussion in *Nelson* is instructive –third-party assistance, be it a party selected by the elector or persons designated by the voting authority, does not necessarily diminish the secrecy of one's ballot.

The facts here weigh more heavily in favor of the conclusion that limited third-party assistance in casting a ballot does not deprive an elector of his or her privacy. Ohio's Constitution contains no "secrecy" requirement, and Ohio law allows a voter needing assistance to receive assistance from *either* a third-party of his or her own selection, or from designated election officials. O.R.C. § 3505.24. Further, Ohio law also specifically contemplates that third-party assistance does not alter the secrecy of one's ballot. For example, O.R.C. § 3506.10(A)

provides that voting machines approved for certification “shall permit and require voting in absolute secrecy, and shall be so constructed that no person can see or know for whom any other elector has voted or is voting, except an elector who is assisting a voter . . . .”

Under Ohio law, those providing assistance are merely acting as an arm of the elector – any disclosure of a voter’s selections is expressly prohibited. Given the relationship between the voter and those persons providing assistance this Court should conclude that Plaintiffs’ expectation of privacy in absentee voting as part of Ohio’s current voting program is both protected (as contemplated by 28 C.F.R. § 35.160(b)(2)) and maintained.

**3. Neither the Maryland OBMT nor Prime III is a facially reasonable accommodation.**

The ADA prohibits discrimination because of disability against “a qualified individual with a disability,” 42 U.S.C. § 12112(a), and defines “discrimination” to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” *id.* § 12112(b)(5)(A). *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007). Here, the Plaintiffs allege that Secretary Husted has failed to make a reasonable accommodation by failing to “implement a readily available, accessible absentee voting system.” Compl. at ¶ 41.

To establish that a state must provide a reasonable accommodation or modification, a plaintiff must show that the state has excluded the plaintiff from, or denied the plaintiff, meaningful access to that program. *See Alexander v. Choate*, 469 U.S. 287, 301-02 (1985). This meaningful access standard is “responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep [the Acts] within manageable bounds.” *Id.* at 299.

To ensure meaningful access, “reasonable accommodations in the grantee’s program ... may have to be made.” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003). Of course, 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, 124 S.Ct. 1978 (2004). Instead, the Acts “require[ ] 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, 124 S.Ct. 1978; *see also Henrietta D.*, 331 F.3d at 281. So at least one important limit to the reach of Title II remains: Title II only requires *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. Linn*, 527 U.S. 581, 603 (1999).

Here, the proffered accommodation –mandatory implementation of either the Maryland OBMT or the Prime III voting system –is not reasonable on its face. In fact, directing the Secretary to disregard an important and established Ohio certification law is patently unreasonable. Courts have recognized that requests to modify certification requirements 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)).

The Secretary anticipates that the Plaintiffs will rely heavily on a decision of the Maryland District Court to argue that this Court should disregard Ohio's certification law. That case, *National Federation of the Blind, Inc. v. Lamone*, Case No. RDB-14-1638, 2014 WL 4388342 (Md.D. 2014) is non-binding and readily distinguishable. In *Lamone*, the Maryland Board of Elections had already developed an online ballot marking tool, which was made available to voters during Maryland's 2012 primary election and to some overseas voters during the 2012 general election. *Lamone* at \*1. The defendants did not present any evidence of security breaches or any other issues with the OBMT during the 2012 elections. *Id.* However, in 2013, the Maryland general assembly passed a statute requiring that the tool be certified by the Maryland Board of Elections before it could be used in further elections. *Id.* at \*2. The Board did not certify the tool prior to the 2014 election. *Id.* Prior to the election, plaintiffs brought a suit for violation of Title II of the ADA and Section 504 of the Rehabilitation Act of 1973 seeking injunctive relief requiring the State to make the OBMT available. *Id.* In holding that the Maryland OBMT was a reasonable accommodation, *in Maryland*, that must be made available to Maryland voters, the district court recognized that a version of the OBMT was already available in Maryland in 2012, *before* Maryland enacted its certification law. *Id.* at \*13. Specifically, the District Court held that Maryland's "after-the-fact creation of the certification requirement for the online ballot marking tool" did not make the requested accommodation any less reasonable. *Id.* The court further noted "[w]hile perhaps the analysis would be different if Plaintiffs sought to gain access to an uncertified tool that had never been used in a real-world situation, those are not the precise facts of [the Maryland] case." *Id.* But those are the precise facts of *this* case.

Plaintiffs have not alleged that the OBMT or Prime III are certified by the EAC or the Secretary of State, and thus eligible to be used under Ohio law. Compl. *in passim*. And

Plaintiffs have made no allegations that they have even attempted to seek certification of this equipment or that there is any impediment to certification.<sup>9</sup> *Id.* Ohio's certification laws are well founded and outdate Plaintiffs' request to implement the OBMT or Prime III. Further, Plaintiffs have not alleged that the OBMT or Prime III have ever been tested in an Ohio election or with existing voting equipment. *Id.* Still, Plaintiffs demand that Ohio's neutral certification requirements, including the prerequisite for federal certification, be circumvented, to mandate the use of uncertified equipment, for the first time, in the 2016 presidential general election. While all elections are important, it is hard to imagine a more critical election in which thorough testing of the compatibility of these products in concert with the various equipment currently used across Ohio's eighty-eight counties is crucial.<sup>10</sup>

**4. If the Secretary were ordered to mandate the use of specific voting equipment, such order would fundamentally alter the structure of Ohio's voting laws.**

A proposed modification is unreasonable, and a defendant need not undertake the action, if "it can demonstrate [that the modification] would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164.

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

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<sup>9</sup> To the extent Plaintiffs will argue that the ADA preempts Ohio's voting equipment certification laws, Plaintiffs have made no allegations that these laws cannot coexist. Rather, Plaintiffs are merely trying to leapfrog Ohio's neutral certification laws.

<sup>10</sup> It is also worth mentioning that Maryland, unlike Ohio, is a single-voting system state. So, the OBMT only needed to interface with one voting system. And the OBMT was developed specifically for Maryland (*Lamone* at \*1) –not the case for Ohio. In Ohio, there are more than eight different combinations of voting systems provided by multiple vendors. Information regarding county voting systems is publically available at [www.sos.oh.us/elections/electionofficials/CountyVotingEquipment.aspx](http://www.sos.oh.us/elections/electionofficials/CountyVotingEquipment.aspx)

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. In other words, rather than one universal voting system in use across Ohio, more than eight combinations of *certified* voting systems have been implemented throughout Ohio, depending upon a county's needs. If the Secretary were required to mandate the use of a specific voting system, voting in Ohio would be significantly and fundamentally altered. 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.<sup>11</sup>

In *Jones v. City of Monroe, Michigan*, 341 F.3d 474 (2003) (overrule on other grounds), the Sixth Circuit considered a "reasonable modification" claim where the modification would fundamentally alter a city's free parking program. In *Jones*, 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, Monroe also supplied free, all-day parking a block or two away, again with both reserved and standard spaces. *Id.* *Jones*, 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 Monroe's parking system to continue, stating that "[i]n 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

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<sup>11</sup> Additionally, Ohio law does not allow for any voter, other than a UOCAVA (overseas or military voter), to receive his or her ballot electronically. Should the Secretary be required to mandate the use of the Maryland OBMT or Prime III voting system, such decision would fundamentally alter Ohio's ballot delivery system and the laws regulating the same.

that it would be a fundamental and unreasonable change.’ ” *Id.* (citing *Dadian v. Village of Wilmette*, 269 F.3d 831, 838-39 (7th Cir.2001)).

Similarly here, the requested modification –implementation of a mandated, *uncertified*, voting tool –is at odds with the purpose of both Ohio’s certification and voting system selection laws (which delegate to counties the duty to select voting systems for their needs). Thus, Plaintiffs’ claim related to the implementation of one or more uncertified, untested voting tools should be dismissed.

**5. Plaintiffs’ proposed accommodations are neither appropriate nor necessary auxiliary aids.**

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). As already discussed above, the Maryland OBMT and Prime III voting are not appropriate auxiliary aids because they do not currently comply with valid and compelling State certification laws. Additionally, implementation of these tools is not *necessary* because Plaintiffs have a variety of ways that they can meaningfully and effectively cast their votes.

Even under the seemingly more lax standard set forth in 28 C.F.R. § 35.160(b)(1), Plaintiffs have failed to allege the existence of a viable remedy and their claim must be dismissed.

**CONCLUSION**

For the reasons explained above, this Court should dismiss those claims in Plaintiffs’ Complaint related to the Secretary’s inability to implement uncertified, untested voting equipment as such a request is facially unreasonable and fails to state a claim for which relief can be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on February 5, 2016, and served upon all parties of record via the court's electronic filing system.

*s/ Nicole M. Koppitch*

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