

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

SHELBI HINDEL, et. al,	:
	:
<i>Plaintiffs,</i>	: Case No. 2:15cv03061
	:
v.	: Judge George C. Smith
	:
SECRETARY OF STATE JON HUSTED,	: Magistrate Judge Elizabeth
	: Preston Deavers
<i>Defendant.</i>	:

**DEFENDANT OHIO SECRETARY OF STATE JON HUSTED'S MEMORANDUM IN
OPPOSITION OF PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION**

Respectfully submitted,

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INTRODUCTION

It is important to Ohio Secretary of State Jon Husted that all Ohio voters have access to cast their vote in Ohio –and they do. Plaintiffs, as with all Ohio voters, have a variety of options for doing so either on or prior to Election Day. Such options include absentee (both mail-in and early in person voting) as well as Election Day access to voting. In light of Ohio’s existing voting scheme, Plaintiffs’ requested injunctive relief is unnecessary and unwarranted.

Despite Plaintiffs’ claims, the Secretary has not refused to make certain voting technology available to Plaintiffs, nor is it the case that the Secretary is simply resistant to change. Rather, Ohio law prohibits the use of untested and uncertified voting tools, which are the very tools Plaintiffs seek to use. In short, Plaintiffs seek the use of evolving technology that has never been used or tested in *any* Ohio election; technology that would allow voters with vision and print disabilities to both receive and mark absentee ballots electronically –something that no other Ohio voter is currently able to do.

But Ohio’s testing and certification requirements serve a valuable purpose and should not be cast aside. Those requirements ensure that equipment used for generating ballots, casting votes, or tabulating ballots will be accurate. These requirements are vital to ensure that Ohio elections are secure and successful year after year; and to ensure that effective equipment is being used. Perhaps most importantly, they serve to instill a confidence in the electorate that each vote will be cast and counted correctly.

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. But 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' request for implementation of evolving online ballot marking technology is not a facially reasonable accommodation.

The reality is Plaintiffs have presented an aspiration for what *could* be a future absentee voting feature in Ohio as voting technology and certification requirements develop. But they have provided no real way to get there. A broad order like the one sought by Plaintiffs requiring the immediate¹ implementation of *untested* and uncertified tools –one that would disregard each and every one of Ohio's certification and testing requirements for Ohio voting equipment –is simply not a solution. If Plaintiffs want to bypass Ohio's voting equipment testing and certification laws, what they need is legislative action; not a court order. And after that, vendors interest in selling online ballot marking technology would present test results from federally-accredited, independent testing labs to the Ohio Board of Voting Machine Examiners (OBVM) for certification before any county board of elections could chose to purchase and implement a system.

Because Plaintiffs cannot succeed on the merits of their ADA claim, Plaintiffs' request for a permanent injunction ordering the immediate implementation of online ballot marking tools must be denied.

Further, the Secretary takes seriously Plaintiffs' request for improvements to the office's website. In that regard, the Secretary has and is taking significant steps to remediate the office's website, which will assuage the concerns set forth by the Plaintiffs. Prior to this lawsuit, the

¹ Plaintiffs request the implementation of ballot marking tools for Ohio's 2016 General Election (PI's Motion for PI, *passim*). Because the November 2016 General Election is the next statewide election and any ballot marking tool would need to be in place by September 2016 for use during early voting, any order mandating the use of marking tools during the 2016 General Election would necessarily require immediate implementation.

Secretary's office had already contracted with a vendor to assess the voting and elections portions of its website to conform with the Web Content Accessibility Guidelines Level 2.0 A Success Criteria ("WCAG 2.0 A"). The Secretary's office subsequently contracted with that vendor to remediate its website based on that assessment. The Secretary's office also took internal steps to achieve conformity with WCAG 2.0 A. Recognizing that further steps would ensure that the office's complete, comprehensive website is more accessible to a broader range of persons with visual disabilities and those using electronic screen reading devices, the Secretary's office has further set in motion steps to remediate its website to conform with WCAG Level 2.0 A and AA Success Criteria. As such, Plaintiffs' requested injunction, as it relates to the Secretary's website accessibility, is unnecessary.

BACKGROUND

A. Ohio Elections

1. Voting Accessibility in Ohio²

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. 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. §

² Defendant herein incorporates Section A(1) of his Motion for Judgment on the Pleadings, which more fully sets forth options for Ohio voters.

3501.31. 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. A violation of that duty is also a misdemeanor of the first degree. O.R.C. § 3599.32.

Ohio also provides early, in person voting beginning the day after the close of voter registration before the election. 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 complete and mail-in an absentee ballot prior to Election Day. O.R.C. § 3509.05. 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. If an Ohio voter requiring assistance is out-of-state during the absentee voting period, he or she may still request the assistance of a third-party of his or her choosing to assist with marking the ballot. *See* Deposition of Matthew Damschroder, taken March 23, 2016, at p. 49. Currently in Ohio, absentee ballots are not delivered, marked, or returned electronically.³

2. Voting Equipment in Ohio

The secretary of state shall appoint a board of voting machine examiners ("BVME") which is a bipartisan, four-member panel, to examine and approve equipment and its related

³ There is a limited exception under federal law for uniformed service and overseas voters to request *delivery* of their ballots electronically. *See* O.R.C. §§ 3509.10; 3511.021; 52 U.S.C.A. § 20302(A)(6). However, even these voters must first print the ballot and then mark manually before subsequently returning it by mail. O.R.C. § 3511.021(A)(4).

manuals. O.R.C. § 3506.05(B). A vendor⁴ 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). The vendor must also submit a fee of \$2,400.00 and a detailed explanation of the construction and method of operation of the equipment. *Id.* at (C)(1). 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). And a voting machine⁵ cannot be connected to the internet. O.R.C. § 3506.23. In any case of a tie vote or disagreement in the board with respect to certifying machines, the Secretary of State shall summarily decide the question and that decision shall be final. O.R.C. § 3506.05(B).

Before any voting machine is purchased or otherwise acquired, the person or corporation owning or manufacturing that machine shall “give an adequate guarantee in writing and post a bond in an amount sufficient to cover the cost of any recount or new election resulting from or directly related to the use or malfunction of the equipment, accompanied by satisfactory surety, all as determined by the secretary of state, with the board of county commissioners, guaranteeing

⁴ A “vendor” is defined as the person that owns, manufactures, distributes, or has the legal right to control the use of equipment, or the person’s agent. O.R.C. § 3506.05(A)(3).

⁵ “Voting machine” is defined as “mechanical or electronic equipment for the direct *recording* and tabulation of votes. O.R.C. § 3506.01(E).

and securing that those machines . . . will correctly, accurately, and continuously register and record every vote cast . . .” O.R.C. § 3506.10.

3. Administration of Elections in Ohio

Further, 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. Each county BOE is responsible for generating and delivering ballots to voters.⁶ O.R.C. § 3501.11(H). In order to do so, county BOEs are responsible for entering voter data upon receipt of a voter’s paper-based registration. Damschroder Depo. at p. 33. Each BOE then receives and tabulates marked ballots from its local electors. O.R.C. § 3501.11(L).

Each BOE also provides suitable voting machines, marking devices, automatic tabulating equipment, 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)⁷.

⁶ This includes in person, early in person, and absentee ballots.

⁷ A variation of Ohio’s certification requirements first took effect on July 22, 1994.

Currently, there are four different voting system vendors used in Ohio. Damschroder Depo. at p. 57. Of those vendors, counties also use different versions of voting systems within a particular vendor. *Id.*

B. Plaintiffs' Proposed Ballot Marking Accommodation

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 Online Ballot Marking Tool (“OBMT”), the Prime III voting system, and the Five Cedars Alternate Format Ballot (“AFB”) exist, which would allow voters who are blind or have other print disabilities to mark their absentee ballots privately and independently. Pl’s Motion for PI at p. 3. But in such cases, voters would still require assistance, because the ballots would still need to be printed, the return envelope would need to be signed, and the ballot and envelope need to be returned to the voter’s local board of elections. Damschroder Depo. at p. 72; *see also* Deposition of Shelbi Hindel, taken on March 8, 2016 at p. 35.

More significantly, none of these proposed voting tools has ever been used, tested, or certified for use in an Ohio election; nor have these tools ever been presented to the Ohio BVME or the EAC for testing or certification. Deposition of Juan Gilbert, taken on March 3, 2016 at 87-88; Deposition of John Schmitt, taken on March 17, 2016 at p. 63; *see also National Federation of the Blind, Inc. v. Lamone*, Case No. RDB-14-1638, 2014 WL 4388342 (Md.D. 2014). Further, if implemented it is unclear, at least with respect to the Maryland OBMT and Prime III, whether a “vendor” would be available to provide any necessary support during implementation and subsequent elections, or to provide the necessary guaranty and bond required by O.R.C. § 3506.10.

1. Prime III

The Prime III voting system was first introduced in 2003. Gilbert Depo. at p. 26. Since that time, it has been “constantly modified.” *Id.* at p. 29. Generally, Prime III is voting software that can be run on computers or tablets at voting locations to generate, mark and cast ballots. Gilbert Depo. at pp. 29-30. Around 2004 or 2005, Prime III was modified to be “absentee compatible” meaning that it can be accessed through a web browser to mark and print a ballot. *Id.* at p. 31. The Prime III software does not include any training materials for users or for boards of elections staff. *Id.* at pp. 54-56.

In order to implement Prime III, the software would either need to be (1) posted on a website, (2) emailed to a voter, (3) or mailed to a voter on a jump drive (or something similar). *Id.* at p. 32. Prime III developer Dr. Juan Gilbert recommends that a jurisdiction “provide a website. . . whereby [a voter] just enter an address and it provides you with the appropriate ballot.” *Id.* at p. 34. In doing so, a jurisdiction would need to test and validate the accuracy of addresses inputted into the software. *Id.*

In order to generate the voter’s ballot from Prime III, a ballot style (linked to a voter’s address) must be entered into the Prime III software. *Id.* at p. 38. This can be done through data entry or by using translating software that is compatible with the jurisdiction’s ballot data. While Dr. Gilbert testified that translation software could be developed fairly quickly, the time frame in which a jurisdiction could provide the ballot definitions in a workable form is yet unknown. For example, in New Hampshire (the only state currently using Prime III) “[t]here was a discussion about format and [the State] had to go talk to their vendor. And stuff happened on their end; that took some time.” *Id.* at p. 74. According to Dr. Gilbert, if voter data is stored by a vendor (as opposed to by a state or county), it is more difficult to translate the data to Prime III, because vendors generally maintain data in a proprietary format and don’t always “play nice.” Gilbert

Depo. at p. 105. In Ohio, there are at least four vendors providing different voting equipment across the eighty-eight counties. Damschroder Depo. at 57.

Prime III is not certified by the EAC or the State of Ohio. Dr. Gilbert, as the developer of Prime III, has no intention of presenting Prime III for testing or certification with the EAC or otherwise. Gilbert Depo. at p. 88. However, Dr. Gilbert does acknowledge that “there needs to be some testing” of Prime III prior to use. *Id.* p. 101. Any testing parameters should be set by the jurisdiction, not by Prime III. *Id.* at pp. 99-100 (states “do their own testing to their own liking, whatever that means for them.”). Any “assurance that it will work would have to be calibrated with the individual state, by their own rules or laws.” *Id.* at p. 100.

While Prime III has been used in a limited capacity in Oregon and Wisconsin (and neither state adopted Prime III) and is currently being used in New Hampshire, the specific absentee component of Prime III has never been used or tested in any statewide election. *Id.* at pp. 60-62; 65; 68-69. Yet that is the very piece of the Prime III software that Plaintiffs ask Ohio BOE’s to adopt. And, to-date, no component of Prime III has ever been used in a presidential general election. *Id.* at p. 83.

2. The Five Cedars Alternate Format Ballot

In addition to Prime III, Plaintiffs argue that the AFB, a similar standalone software that allows for electronic ballot marking, could be implemented by Ohio BOEs. As with Prime III, the AFB does not just deliver a ballot for marking, but it generates the voter’s ballot. Schmitt Depo. at p. 80. The AFB requires that a state or county using the AFB maintain a “My Vote” site where voters could then logon to access their ballots. *Id.* at p. 22.

The AFB has only been used in Oregon, which maintains a centralized voter registration system. Schmitt Depo. at p. 12. Prior to its implementation in Oregon, Five Cedars (the software developer) “ran a lot of tests . . .” *Id.* at p. 27. But no such tests have been run in Ohio.

With respect to implementation of the AFB, John Schmitt, the developer of the AFB, has recommended to start with a smaller sample size rather than rolling the product out statewide. *Id.* at p. 70. Yet the Plaintiffs here want immediate and statewide implementation of this tool in a presidential general election.

3. The Maryland Online Ballot Marking Tool

Finally, Plaintiffs have also offered the Maryland OBMT, also standalone software that generates a ballot and allows the voter to mark the ballot electronically, as a potential tool to be used for ballot marking in Ohio. Unlike Prime III or the AFB, the Maryland OMBT relies on an active server to generate a voter's marked ballot. Schmitt Depo. at p. 66. Five Cedars did not consider using an active server for the AFB because of "the whole security issue . . ." *Id.* at p. 67. Additionally, the Maryland OBMT was developed specifically for Maryland, which utilizes a uniform, statewide voting system and voter registration system to conduct statewide elections, and by Maryland. *See National Federation of the Blind, Inc. v. Lamone.*

Further, the parties have stipulated that Maryland's OBMT was first available to voters during the 2012 primary election. Unlike Ohio, the Maryland State Board of Elections has direct oversight responsibilities for the State's voting equipment, including selection of voting systems in all polling places in the State, and Maryland allows voters requesting an absentee ballot to receive an absentee ballot either by fax, mail, or by online electronic delivery.

None of the tools proposed by Plaintiffs are compliant with Ohio's valid, facially-neutral laws regulating the acquisition, certification, and use of voting equipment. None of these tools has even been tested in Ohio.

C. The Secretary of State's Website

The Secretary of State's office maintains a comprehensive website at <http://www.sos.state.ohio.us>. The website contains hundreds of forms and documents addressing issues ranging from election and voter information to business filing information.

On October 6, 2015 (prior to the filing of this lawsuit) the Secretary's office contracted with Unicon (aka Lochbridge), a web services vendor, to conduct an ADA compliance assessment of the voting and elections portions of the office's website, which Lochbridge completed on November 16, 2015. *See* Lochbridge's ADA Compliance Results and Findings, attached hereto as Exhibit A. That assessment was based upon the WCAG Level 2.0 A Success Criteria and the total for that assessment was not to exceed \$28,743.00. On December 15, 2015 the Secretary entered into a Statement of Work to undergo an ADA compliance remediation to the voting and elections portions of the website. *See* Lochbridge's ADA Compliance Remediation Statement of Work, attached as Exhibit B. The initial cost for this remediation was \$53,556.00.

On April 18, 2016, the Secretary's office took further steps to remediate its complete website by issuing a Request for Proposals ("RFP") through the State of Ohio's procurement process in order to solicit bids for an independent consultant with expertise concerning ADA-accessible web development to provide an assessment and outline for remediation of the Secretary's complete website to meet the WCAG Level 2.0 AA Success Criteria. Affidavit of Matthew M. Damschroder at ¶ 7, attached as Exhibit C.

Under the terms of the RFP, the selected independent consultant must provide a written assessment of the office's website by September, 2016. *Id.* at ¶ 8. That assessment must include the corrective actions necessary to satisfy the WCAG 2.0 AA Success Criteria. *Id.* As soon as practical after receipt of the assessment, the Secretary's office will retain an independent

consultant with experience related to accessible website development to incorporate the recommendations into the Secretary's website.⁸ *Id.* at ¶ 9.

Around the time development of the website begins, the Secretary's office will also hire and designate an employee to serve as the Web Accessibility Coordinator. *Id.* at ¶ 10. This employee shall have knowledge about the WCAG 2.0 AA Success Criteria standards and will be responsible for overseeing, managing, and coordinating the Secretary's implementation of the recommendations set forth in the Assessment. *Id.* This employee will also provide mandatory web accessibility training to all employees involved in the development, programming, coding, or content publishing phases of the Secretary's website. *Id.*

ARGUMENT

A. Standard of Review

In order to succeed on their motion for permanent injunction, Plaintiffs must succeed on the merits of their claim. *Am. Civil Liberties Union of Kentucky v. McCreary Cty., Ky.*, 607 F.3d 439, 445 (6th Cir. 2010). Plaintiffs must also establish that (1) they have suffered an irreparable injury; (2) the remedies available at law are inadequate; (3) when considering the balance of hardships between the Plaintiffs and Defendant, a remedy in equity is warranted; and (4) the public interest will not be disserved by a permanent injunction. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). However, based upon undisputed evidence, Plaintiffs cannot prevail on the merits of their claim.

Plaintiffs' request for injunctive relief stems from their 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

⁸ This will include issuing a subsequent RFP and undertaking the State's procurement process to appropriately secure the correct independent consultant or vendor. *Damschroder Aff.* at ¶ 9.

system (Compl. at ¶ 41) and (2) the Secretary has failed to provide all voters with equal access to the office's website.

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). The Secretary does not dispute that the individual Plaintiffs⁹ 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.

B. As a Matter of Law, Plaintiffs are Not Entitled to an Order Requiring the Secretary of State to Direct the Immediate Implementation of Untested and Uncertified Voting Tools for Use in Ohio Elections.

1. Plaintiffs have meaningful access to absentee voting.

Plaintiffs' complaint with respect to Ohio's absentee voting is that it does not allow voters with vision impairments to cast their ballots privately and independently. Compl. at ¶ 17. However, Plaintiffs' proposed accommodations (implementation of the Maryland OBMT, Prime III, or the AFB) do not provide for the complete independence Plaintiffs desire. Compl. at ¶ 21; 23; *see also* Damschroder Depo. at p. 72 (Voters must still print, sign the return envelope, and

⁹ The National Federation of the Blind alleges to bring claims on behalf of unidentified members who are purportedly registered to vote in Ohio. Comp. at ¶

mail back their marked ballots); *see also* Hindel Depo. at p. 35 (Ms. Hindel would require assistance marking a printed document).

Although Plaintiffs have isolated mail-in absentee voting as an independent program, Ohio allows voters to cast an absentee ballot in one of two ways. A voter may cast an absentee ballot, in person, anytime during Ohio's early voting period, including the two Saturdays and Sundays immediately preceding a presidential general election. *See generally* O.R.C. § 3509.01; *NAACP v. Husted*, Case No. 2:14-404. During that time, voters have access to Ohio's accessible voting equipment. O.R.C. §§ 3506.19; 3501.11(Z). Alternatively, voters may request and return an absentee ballot by mail. O.R.C. §§ 3509.01(B); 3509.02(B). If a voter chooses to request and return an absentee ballot by mail, any an individual requiring assistance may request that two board employees deliver a ballot, in person, to the voter's home. O.R.C. § 3509.08.

Plaintiffs have offered no reason as to why early in person absentee voting should be isolated from Ohio's absentee voting program in its entirety; particularly where many of the proffered benefits of absentee voting are equally applicable to early in person voting and mail in voting. For example, because Ohio offers early voting during the early in person voting period prior to the election, Plaintiffs' articulated concerns about availability on Election Day are alleviated by Ohio's absentee voting program whether a voter mails back an absentee ballot or casts his or her ballot in person on a day other than Election Day. Either way, Ohio's absentee voting laws give all voters the flexibility to vote at a time that is convenient. Viewing Ohio's absentee voting program in its entirety, as this Court should, it is clear that Plaintiffs are afforded the opportunity to cast a ballot that is equal to that of persons without visual impairments. Therefore, Plaintiffs cannot succeed on the merits of their ADA claim seeking online ballot marking and their Motion for Permanent Injunction must be denied.

2. Neither the Maryland OBMT nor Prime III, nor the Five Cedars Alternate Format Ballot is a facially reasonable accommodation.

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; *see also* Pl’s Motion for PI at pp. 16-17. But the undisputed evidence demonstrates that the proffered voting tools are not “readily available” in Ohio, and are not reasonable in light of Ohio’s voting equipment laws. In fact, the proposed voting tools have *never* been used, or even tested, in an Ohio election.

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. At least one important limit to the reach of Title II is that Title II only requires *reasonable* accommodation. *Johnson v. City of Saline*, 151 F.3d 564, 571 (6th Cir. 1998). And 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 and immediate implementation of the Maryland OBMT, Prime III, or the AFB, without consideration of Ohio’s various voting equipment regulations –is not reasonable on its face. None of these tools has even been presented for testing in Ohio.

Contrary to Plaintiffs' contention, *National Federation of the Blind, Inc. v. Lamone*, Case No. RDB-14-1638, 2014 WL 4388342 (Md.D. 2014) is not dispositive of the reasonableness of using these ballot marking tools in an *Ohio* election. In *Lamone*, the Maryland Board of Elections had already developed the Maryland OBMT at issue, which was used by voters during Maryland's 2012 primary election and by some overseas voters during the 2012 general election. *Lamone* at *1. After the tool, which was specifically designed and tested for Maryland elections had been used in a Maryland election, the Maryland general assembly had the afterthought to pass a statute requiring that the tool be certified by the Maryland Board of Elections before it could be used in future elections. *Id.* at *2. The Board did not certify the tool prior to the 2014 election and plaintiffs brought a suit seeking injunctive relief requiring the State to make the OBMT available. *Id.* In holding that the Maryland OBMT was a reasonable accommodation *in Maryland*, the district court made much of the fact that a version of the OBMT had already been made available to Maryland voters 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. None of the proffered tools have been used, tested, or certified in Ohio and none of the tools were specifically developed for Ohio elections (as is the case in Maryland for the OBMT and in Oregon for the AFB).

Plaintiffs are asking for the implementation of never-before-used, uncertified online ballot marking equipment to be rolled out during a presidential general election – when national

attention is focused on which candidate wins Ohio and its large number of presidential electors. Because Plaintiffs have not alleged that use of the requested tools could meet any of the criteria for certification in Ohio, and because the tools have never been used in an Ohio election, the requested aid or accommodation is facially unreasonable and Plaintiffs' request for the use of technology to the contrary should be denied.

3. 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.

In addition to the Secretary's argument that mandated implementation would necessarily alter a county's ability to make an unimpeded determination related to the voting equipment is the most appropriate and cost-effective for a particular county's needs (fully set forth in Defendant's Motion for Judgment on the Pleadings at pp. 18-20 and incorporated herein), mandated implementation could also alter the process for procuring such equipment. Under current Ohio laws, a county not only selects the certified equipment it will use, but it also independently finances the purchase of such equipment. As Plaintiffs have acknowledged, the AFB is offered at a cost, which includes an initial start-up cost and then a recurring fee for each election. While Prime III and the Maryland OBMT are described as open sources, Plaintiffs' demand presents the need for each individual BOE to download and modify the software to interact with the county's existing equipment. It is likely a county would need to incur expenses for the staffing necessary to implement those modifications. If a particular county cannot currently afford the costs associate with the immediate implementation of one of these tools,

Plaintiffs' demand calls into question how the county would finance the mandatory implementation of such equipment, and whether the Secretary would be required to foot the bill.

But even more, Ohio law not only contemplates, but necessarily requires that a *vendor* both submit and guaranty voting equipment that is used in Ohio –including the posting of a bond. O.R.C. § 3506.10. Here, with the exception of perhaps the AFB, there is no such vendor to present the equipment for testing, inspection, and implementation. And even with the AFB, the Plaintiffs have presented no evidence that either they, or a third-party, is willing to guaranty and bond the proposed tools. Mr. Schmitt himself has acknowledged that Five Cedars does not have readily available staff in Ohio. Schmitt Depo. at pp. 62-63.

Ohio's voting equipment guaranty and bonding requirements are important to ensure that someone is responsible in the event the equipment fails. While the Secretary anticipates that Plaintiffs will argue that Ohio's guaranty and bonding requirement carries more impact as it relates to equipment used for tabulating votes, these requirements are still important for equipment, such as the Maryland OBMT, Prime III, and the AFB, which are used to both generate and mark a ballot. There are certainly scenarios where malfunctioning software could result in the generation of an improper ballot. And if Plaintiffs are relying on online ballot marking and the software fails, who is responsible if there is no vendor? Plaintiffs' request asks for the either the Secretary or the county BOEs to wear the hat of *both* the vendor and the purchaser, which is undoubtedly a significant deviation from current Ohio law.

And Plaintiffs' proposal does more than just ask that Ohio's BOEs simply implement a ready-to-use tool. It asks these BOEs to proactively procure, modify, and then implement untested and uncertified software in the next major election in Ohio. And in doing so, the BOEs will also be left with the task of developing and implementing any training or educational

materials necessary to inform voters of this equipment, because no such information currently exists. Gilbert Depo. at pp. 54-56; Schmitt Depo. at p. 58-59.

These monumental tasks are a far cry from the situation presented in *Lamone* wherein the State Board of Elections was responsible for creating the tool being used. Requiring the Secretary to mandate the use of one of three untested and uncertified ballot marking tools undoubtedly would alter the county boards implement voting equipment –and it does so unreasonably and unnecessarily. Plaintiffs’ Motion for Permanent Injunction should be denied.

4. Plaintiffs’ request of injunctive relief is overly broad and premature.

Even if this Court were swayed that the proposed ballot marking tools should eventually be implemented, Plaintiffs’ request for the immediate implementation of these tools is overly broad and premature.¹⁰

The ordinary practice is to vacate an injunction insofar as it is too broad. *See e.g. Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 516-17 (6th Cir. 2006); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382–83, 112 S.Ct. 2031 (1992) (vacating in part an injunction prohibiting state officers from enforcing state law; *PACCAR Inc. v. TeleScan Techs., L.L.C.*, 319 F.3d 243, 258 (6th Cir.2003) (affirming in part and vacating in part a preliminary injunction where “the scope of the injunction [was] too broad”); *Michigan State AFL–CIO v. Miller*, 103 F.3d 1240, 1244, 1253 (6th Cir.1997) (vacating a preliminary injunction prohibiting enforcement of three statutory sections “insofar as it applie[d] to” one section). Here, by requesting the immediate implementation of ballot marking tools for Ohio’s 2016 General Election, the Plaintiffs ask this Court to disregarding all of Ohio’s testing and certification law

¹⁰ In addition to Plaintiffs’ request for injunctive relief being overly broad and premature, the Secretary also incorporates those arguments set forth in his Reply in Support of Motion for Judgment on the Pleadings, Section A, asserting that there is no direct conflict between the ADA and Ohio’s testing and certification laws.

set forth in O.R.C. Chapters 3505 and 3506 *et seq.* without demonstrating that Plaintiffs could not otherwise comply with those requirements.

These requirements set forth comprehensive and substantive criteria voting equipment 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 and 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)). Read together, these requirements establish a series of guidelines for not only the implementation, but also the operation and use of voting equipment in Ohio. These requirements are more than just procedural regulations to be cast aside *ad hoc*.

Plaintiffs have not presented these tools for review or analysis under any of these laws. Instead, Plaintiffs ask this Court to overlook each and every one of Ohio’s testing and

certification requirements and instead mandate the immediate implementation of these tools in time for the November 2016 General Election. Even Plaintiffs' own experts acknowledge that testing within a jurisdiction is appropriate prior to implementation, and with respect to the Prime III and AFB, implementation started with a sample size –not statewide implementation during a Presidential Election. But Plaintiffs request provides no opportunity for review and no plan for review. If the requested relief is ordered, it leaves both the Secretary and the individual BOEs with approximately four months to develop and carry out a plan for both testing and implementation –something that the individual BOEs would ordinary have the benefit of a “vendor” to assist with.

Plaintiffs' Motion for Permanent Injunction should be denied as it is overly broad and premature. Plaintiffs have not and cannot demonstrate that any efforts have been made to test¹¹ the proffered equipment in or even under similar conditions to an Ohio election.

C. Plaintiffs Request for Injunctive Relief Requiring the Secretary to Provide an “Accessible” Website is Unnecessary

Plaintiffs' requested injunctive relief related to the accessibility of the Secretary's website is unnecessary because the Secretary's office has committed to undertaking the steps necessary to conform with the WCAG 2.0 A and AA Success Criteria for website accessibility. As such, there is no justiciable controversy between the parties.

A moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894 (1953). A case becomes moot when subsequent events make it

¹¹ Even if certification is futile, as Plaintiffs suggest, there is no indication that testing in an Ohio election (or with Ohio equipment) could not have been conducted prior to a request for implementation.

absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur. *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530–31 (6th Cir.2001); *see also Zeune v. Mohr*, No. 2:14-CV-153, 2015 WL 3544662, at *3 (S.D. Ohio June 4, 2015) (Intervening release of prison inmate rendered claims for injunctive relief moot). And the “reasonably expected to reoccur” exception to the mootness doctrine only applies where there is a reasonable expectation of the recurrence of the wrong with respect to the same complaining party. *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982).

In *Bruder v. Smith*, 215 F. App'x 412 (6th Cir. 2007), the Sixth Circuit held that an appeal from a preliminary injunction in a civil rights case, which required a county and its prosecutor to reinstate an assistant county prosecutor who had allegedly been terminated without due process, was rendered moot when county granted her a new hearing on her termination that included all of the procedural attributes outlined in the governing collective bargaining agreement. Similarly here, the Secretary’s office was already in the process of updating its website prior to this lawsuit and has committed to continue doing so.

Prior to this lawsuit, the Secretary’s office had already put into motion significant steps to update the voting and elections portions of its website to conform with the WCAG 2.0 A Success Criteria. These steps included obtaining a third-party assessment for conformance with the Success Criteria and subsequently contracting with the vendor to undertake necessary tasks to achieve conformity.¹² The Secretary’s office has now also set into motion steps to further update its entire website to conform with both WCAG 2.0 A and AA Success Criteria –the very relief Plaintiff is seeking. Pls’ Motion for PI at p. 10 (WCAG guidelines are the “de facto accepted industry standard for web accessibility.”).

¹² The Secretary’s office also undertook internal steps to achieve conformance.

Recognizing that the WCAG Level 2.0 AA Success Criteria are becoming the more commonly accepted standards for website accessibility, the Secretary's office is committed to remediating its website to meet the WCAG Level 2.0 AA Success Criteria. *See, Damschroder Aff., passim.* In order to do so, Secretary's office has begun the critical steps necessary to employ the appropriate vendors to complete this work. Pursuant to the State of Ohio's procurement process, the Secretary's office first issued an RFP to solicit bids for an independent consultant or vendor to provide the necessary assessment and outline for remediation of the Secretary's complete website to meet the WCAG Level 2.0 AA success criteria. *Damschroder Aff. at ¶¶ 6- 7.* This process can be a lengthy process as first Ohio's Department of Administrative Services must review and approve the RFP before posting. *Id. at ¶ 6.* Once posted, a competitive bidding process begins in order to identify the appropriate vendor. *Id.* And once selected, the Secretary's office must negotiate a mutually agreed upon statement of work and issue a purchase order so that the vendor can commence work. *Id.* Once a vendor is selected to provide the necessary assessment, the Secretary's office will have to undergo the procurement process a second time in order to select a vendor to complete the recommended work. *Id. at ¶ 9.* Although this process will take time, Matthew Damschroder, Assistant Secretary of State and Chief of Staff for the Ohio Secretary of State, has provided sworn testimony that the Secretary's office is committed to redeveloping its complete website to satisfy the WCAG 2.0 A and AA Success Criteria.

And Plaintiffs cannot reasonably argue that the complained of conduct is capable of repetition because the Secretary's office has also committed to hiring and designating an employee to serve as its Web Accessibility Coordinator. *Damschroder Aff. at ¶ 10.* This employee will be responsible for overseeing and managing implementation of any work

necessary to conform the Secretary's website to WCAG 2.0 A and AA Success Criteria and will provide mandatory training to employees involved in the development, programing, coding, or content publishing phases of the Secretary's website regarding the same. *Id.* Further, the Secretary's office has committed to ensuring that all future contractors and vendors are familiar with the WCAG 2.0 A and AA Success Criteria to the extent necessary to perform work on the Secretary's website. *Id.* at ¶ 11.

The Secretary's office is committed to and in the process of providing the web accessibility Plaintiffs' seek. As such, Plaintiffs' demand for injunctive relief is unnecessary and moot. *See e.g. Sharpe v. Cureton*, 319 F.3d 259, 273-74 (6th Cir. 2003) (reversing injunction issued by the district court as overly broad and unnecessary). Accordingly, Plaintiffs' Motion for Permanent Injunction should be denied as a matter of law.

D. Plaintiffs Cannot Satisfy the Other Elements Necessary for A Permanent Injunction

As demonstrated above, Plaintiffs cannot provide irreparable harm as it relates to their request for online ballot marking because they have meaningful access to absentee voting. Ohio offers absentee voting during the twenty-eight days prior to an election. During that time, Plaintiffs may vote in-person, using a variety of adaptable voting equipment, or they may return a mail-in ballot (in which case they are guaranteed third-party assistance, if needed).

With respect to the office's website, the Secretary's office has committed to and is currently undertaking steps necessary to remediate its website to conform with WCAG 2.0 A and AA Success Criteria –the very standard Plaintiff alleges achieves appropriate website accessibility. To the extent the Plaintiffs may argue that the timing of the website updates is insufficient to achieve compliance prior to the WCAG 2.0 A and AA Success Criteria, it is important to note that while the Secretary's office is currently engaging in the steps necessary to

remediate its website, the timing for doing so is based upon the State's procurement process. Plaintiffs have not and cannot establish a basis for circumventing that process.

CONCLUSION

For the reasons explained above, there are no material facts in dispute that support Plaintiffs' claim for injunctive relief. This Court should deny Plaintiffs' Motion for Permanent Injunction and dismiss Plaintiffs' Complaint.

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 April 25, 2016, and served upon all parties of record via the court's electronic filing system.

s/ Nicole M. Koppitch

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