

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

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

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**DEFENDANT OHIO SECRETARY OF STATE JON HUSTED’S REPLY  
MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS**

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Whether the Court analyzes Plaintiffs’ proposed methods for absentee ballot marking as auxiliary aids under 28 C.F.R. § 35.130 or general accommodations, the issue of whether Plaintiffs have proffered a facially viable option for implementation of a ballot marking tool in Ohio can easily be resolved at this stage –they have not.

Plaintiffs ask this Court to order the immediate implementation of at least one online ballot marking tool in each of Ohio’s eighty-eight counties. But because no online ballot marking tool has been tested in an Ohio election and the Plaintiffs have not proffered any tool that has been certified (or even attempted to be certified) by either Ohio or the U.S. Elections Assistance Commission (“EAC”), Plaintiffs can offer no assurances that these tools will properly and accurately function during Ohio’s 2016 presidential general election. This broad request, on its face, is facially unreasonable and must be dismissed.

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

There are no factual issues to be resolved regarding the application of Ohio’s certification laws set forth in O.R.C. § 3506.05 (“certification requirements”), because Plaintiffs have not alleged that each of their proposed online voting tools and/or systems can satisfy any or some of Ohio’s voting equipment certification requirements. Plaintiffs simply want to skip this step. Forced implementation of the online ballot marking tools requested by Plaintiffs would not merely present an exception to Ohio’s laws requiring voting equipment testing and certification; it would allow Plaintiffs (and arguably the creators of those tools) to entirely evade all of Ohio’s testing and certification requirements.

At bottom, there is no allegation that Ohio’s state laws “stand[] as an obstacle” to, or are contrary to, application of the ADA. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000), Art. VI, U.S. Const. While Plaintiffs rely heavily on the Fourth Circuit’s decision in *National Federation of the Blind v. Lamone*, --F.3d --, No. 14-2001, 2016 WL 497187 (4th Cir. 2016), which held that Maryland must reinstitute the use of an online ballot marking tool created specifically for the State of Maryland, a key distinction from *Lamone* is that the Maryland Board of Elections discontinued use of the Maryland Online Ballot Marking Tool only after the tool failed to be certified by the required “supermajority” vote of the Board. In *Lamone*, the applicable certification laws were enacted *after* the tool had already been used in an election and directly prevented further implementation of the ballot marking tool.

Here, because Plaintiffs have not alleged a conflict between the proposed online voting tools and Ohio’s certification laws, the Secretary asserts that the proposed aids or accommodations are facially unreasonable and that Plaintiffs have failed to allege a viable cause of action under the ADA. Reasonableness is determined using a commonsense approach that

“balances the needs of the parties involved.” *See Vance v. City of Maumee, Ohio*, 960 F. Supp. 2d 720, 729 (N.D. Ohio 2013) citing *United States v. Village of Palatine, Illinois*, 37 F.3d 1230, 1234 (7th Cir.1994). Certainly, the need to ensure that online voting equipment will function properly and accurately during a significant statewide, presidential election is a valid and compelling interest. And though Plaintiffs have alleged a counter interest in voting privately and independently, they have not alleged that any efforts have been made to reconcile Ohio’s certification requirements with implementation of the proposed online voting tools.

The ADA is not intended as an end-run around compliance with valid, neutral state laws. Even the cases cited by Plaintiffs acknowledge a true conflict between the state and federal laws must exist before the ADA will “trump” a valid state law. *See, e.g. Mary Jo. C. v. New York State and Local Ret. Sys.*, 707 F.3d 144 (2d Cir. 2013) (Plaintiff seeking exception to state filing deadline had *applied for* and was denied disability benefits because she missed the filing deadline). Similarly, Plaintiffs’ reliance on this Court’s decisions in *Ray v. Franklin County Bd. of Elections*, 2008 WL 4966759 (S.D. Ohio 2008) and *Mooneyhan v. Husted*, 2012 WL 5834232 (S.D. Ohio 2012) is misplaced. Both of these cases dealt with direct conflict between a particular voter’s unique, isolated incident and a specific state law. However, the Plaintiffs’ claims here are not isolated; rather, they are asking the Secretary of State to disregard a body of law fundamental to elections administration—guidelines to ensure the security and integrity of components that will record, translate, and tabulate voters’ choices. Certification laws are the foundation of election administration and serve a concrete and important purpose, particularly where these certification laws are facially neutral and non-discriminatory. And again, Plaintiffs have not demonstrated a conflict between the state law and the ADA.

Further, Ohio’s certification laws are more than just procedural regulations; these requirements set forth the substantive criteria voting equipment must meet before being implemented for use during an Ohio election. *See, e.g.* O.R.C. § 3506.05(C)(1) (“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(B) (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; *see also*, O.R.C. § 3506.05(H)(1) (Vendors or computer software developers must place a copy of all source code and related documentation, together with periodic updates as they become known or available into escrow. The secretary of state shall require that the documentation include a system configuration and that the source code include all relevant program statements in low- or high-level languages). 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. Plaintiffs should not be permitted to circumvent each and every one of these statutory requirements simply because they believe their proposed technology “might conflict” with Ohio’s certification requirements. *See* Pls’ MIO at p. 5.

Plaintiffs are asking for the implementation of never-before-used, uncertified online ballot marking equipment to be rolled out during a presidential 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 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 this Court should not require the use of novel, untested technology in a statewide, presidential general election in Ohio.<sup>1</sup>

**B. Plaintiffs have meaningful access to absentee voting.**

Whether this Court analyzes Plaintiffs claims solely in the context of absentee voting in Ohio or voting in Ohio in its entirety, the outcome is the same: Plaintiffs' options for casting an absentee ballot are neither meaningless nor inferior. To be clear, the Secretary is not asking this Court to analyze whether Plaintiffs have a standalone right to vote privately. Rather, when analyzing Plaintiffs' Title II claim in the context of whether a voter with visual impairments may currently cast an absentee ballot privately, the answer is yes. 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* O.R.C. § 3509.01. During that time, voters have access to Ohio's

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<sup>1</sup> For example, to minimize potential technical problems, Directive 2016-04 (dealing with electronic pollbooks) instructs boards of election to not implement electronic pollbooks for the first time in the 2016 presidential general election. And unlike the online ballot marking tool(s) advanced by Plaintiffs, the electronic pollbooks have been tested, certified, and already implemented in other counties.

accessible voting equipment.<sup>2</sup> 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). Moreover, 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.

Even if the focus is directed at mail-in absentee voting, the assistance provided under Ohio law is not meaningless. The holding in *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999), cannot be ignored. In *Nelson*, the Sixth Circuit's conclusion that third-party assistance does not diminish the secrecy of one's ballot is instructive because, as the Secretary has argued, Plaintiffs' current ability to vote with assured confidentiality, while perhaps not perfect, is not meaningless. Though in the context of correcting a deficient ballot, in *Ray*, this Court also found that dispatching two employees of the Board of Elections (one Republican and one Democrat) to go to the homes of voters with disabilities in order to provide them with their absentee ballot is "[o]ne example of a reasonable accommodation." *Ray*, 2008 WL 4966759 at \*6.

Under Ohio's current absentee voting structure, Plaintiffs are not merely *relying* on the accuracy and honesty of third-parties to assist them in casting their ballots, they are *guaranteed* that, if requested, third-parties certified to assist them in marking their ballots will do so accurately, honestly, and confidentially. O.R.C. §§ 3501.31; 3505.24. And if Plaintiffs do not wish to request this assistance, they may also cast an absentee ballot by using the accessible voting equipment available at their local boards of elections during Ohio's early voting period (which begins twenty-eight days prior to the election).

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<sup>2</sup> Plaintiffs have not alleged that they are not afforded the ability to vote privately and independently during Ohio's early in person voting.

Additionally, Plaintiffs have not offered a more perfect solution. Although Plaintiffs emphasize the need for an equal opportunity to vote absentee, the reality is that the complete equality Plaintiffs desire does not currently exist. Plaintiffs admit that the proposed online voting “tools” do not provide them with the complete independence they desire. *See* Pl’s MIO at p. 3 (“Although Plaintiff may need assistance with signing or mailing their completed ballots . . .”). Plaintiffs instead argue that these tools are more desirable than the current conditions. But Plaintiffs also fail to consider who would provide the assistance with signing and mailing completed ballots. And would such person still be subject to the same confidentiality requirements and potential criminal penalties currently set forth in the Ohio Revised Code? Although a ballot that is electronically marked may offer some new level of privacy, complete privacy is still not guaranteed. For example, Plaintiffs acknowledge that when a person uses the Maryland OBMT, the voter’s selection is protected only by a blank page between the signature page and the completed ballot. Compl. at ¶ 21. So a voter must still rely on the person providing assistance to respect that blank page and not flip the page to the completed ballot. While the current voting options for Plaintiffs may not be perfect, they have been fully tested in accordance with the laws of Ohio ensuring they are completely capable of supporting the administration of an election, whereas Plaintiffs proposed alternatives have not.

In sum, it is neither reasonable nor practical to demand the statewide use of proposed voting tools that remain uncertified and untested in Ohio –especially for the first time during a major election.

### **CONCLUSION**

For the reasons explained in Defendant Ohio Secretary of State Jon Husted’s Motion for Judgment on the Pleadings and for the additional 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,

MIKE DEWINE  
ATTORNEY GENERAL

*s/ Nicole M. Koppitch*

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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 March 14, 2016, and served upon all parties of record via the court's electronic filing system.

*s/ Nicole M. Koppitch*

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