

No. 17-3207

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SHELBI HINDEL, *et al.*,

Plaintiffs-Appellants,

v.

JON A. HUSTED,

Defendant-Appellee.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

The district court held that Plaintiffs-Appellants and other blind Ohio voters “do not have the same meaningful access to mail-in absentee voting that non-disabled voters enjoy.” (5/11/16 Order, RE 31, PAGE ID # 1050.) This unequal access violates the Americans with Disabilities Act (“ADA”), and Defendant-Appellee Ohio Secretary of State Husted has not contested this holding. Yet the Secretary is content to operate a discriminatory absentee voting system, even though readily available auxiliary aids would allow blind voters to vote absentee privately and independently.

The Secretary claims state election technology certification laws excuse this continuing discrimination, declining to consider whether the available auxiliary aids meet the purpose of those laws. He further fails to recognize his affirmative duty to comply with the ADA. The district court similarly erred, dismissing Plaintiffs’ claim at the pleadings stage despite the fact-intensive nature of the fundamental alteration defense.

This Court should uphold the rights of blind voters by reversing the judgment of the district court and remanding the case for further proceedings.

ARGUMENT

Title II of the ADA requires the Secretary to adopt the auxiliary aids necessary to offer Plaintiffs an equal opportunity to review and mark their absentee

ballots privately and independently. The Secretary argues, however, that doing so would violate state law and thus constitute a fundamental alteration per se. But this Court's precedent confirms that the appropriate analysis is whether compliance with federal law would impede the *purposes* of the state law. Plaintiffs have proffered evidence that the purposes of Ohio's voting system certification laws can be met through implementation of readily available accessible ballot marking tools. The Supremacy Clause of the U.S. Constitution, therefore, requires that Plaintiffs' federal civil rights take precedence over the state's certification process. Furthermore, the Secretary's affirmative duty to comply with the ADA cannot be deferred while he waits for third-party vendors to submit, if they do, to the certification process. Thus, the district court erred in dismissing Plaintiffs' claim at the pleadings stage in light of the Secretary's burden to both plead and prove his affirmative defense that the proffered tools would fundamentally alter Ohio's voting system.

A. Mere deviation from a state law requirement does not constitute a fundamental alteration.

According to the Secretary, the district court properly concluded that Plaintiff's request for an auxiliary aid would "*on its face*" fundamentally alter Ohio's elections because the aid is not certified pursuant to state law. Appellee's Br. at 17 (emphasis added). Yet the case law is clear that modification of a state statutory requirement does not, *on its face*, constitute a fundamental alteration. In

Jones v. City of Monroe, MI, for example, this Court did not hold that the plaintiff's requested relief would constitute a fundamental alteration simply because a local rule would have to be modified. 341 F.3d 474, 480 (6th Cir. 2003). Instead, it explained that "the overall focus should be on whether waiver of the rule in the particular case would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change." *Id.* (internal quotation marks omitted). Thus, rather than find waiver of an applicable rule a fundamental alteration "on its face," the Court engaged in a careful analysis to determine if waiver in that case would thwart the purpose of the rule.

Similarly, appellate courts throughout the country have held that modification of a state statute or rule does not per se constitute a fundamental alteration. *See, e.g., Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016); *Mary Jo C. v. New York State and Local Ret. Sys.*, 707 F.3d 144, 162-163 (2d Cir. 2013); *Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1232-33 (10th Cir. 2009); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996); *Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995).

The cases on which the Secretary relies only further expose the district court's erroneous analysis here. The Court in *PGA Tour, Inc. v. Martin* looked to whether the proposed modification would be at odds with the purpose of the rule to be waived; it did not hold that waiver of the rule alone constituted a fundamental

alteration. 532 U.S. 661, 682-83 (2001). In *Southeastern Community College v. Davis*, the Court based its holding that the college need not modify its policies to admit a deaf student not on the mere existence of the college's admission rules, but on the district court's factual findings following a bench trial as to how the plaintiff would be able to perform at the school. 442 U.S. 397, 403 (1979). The Secretary fails to identify a single case holding that deviation from a state law requirement, on its face, constitutes a fundamental alteration under Title II of the ADA or under any similar federal statute.

There is good reason for this. States cannot escape their federal civil rights obligations merely by enacting procedural requirements. Taking the Secretary's argument to its logical conclusion, a state law could require that all voters have a driver's license to vote, supposedly for the purpose of proving residency.

Although such a requirement would prevent blind individuals from voting, no modification could be made to this state law to allow blind individuals to vote using other forms of government-issued identification because waiving the state law would constitute a *per se* fundamental alteration of Ohio's elections.

Instead, as this Court has explained, it is necessary to examine the "purposes behind the rule" to determine whether modification would constitute a fundamental alteration. *Jones*, 341 F.3d at 480. If the purpose of the hypothetical driver's identification rule were to prove residency, a court would likely hold that there are

effective ways for blind voters to prove their residency other than through presentation of a driver's license. Thus, as long as blind voters could establish their residency through other means, waiving the driver's license requirement would not fundamentally alter Ohio's elections.

Here, the district court held that the purpose of Ohio's certification requirements is to avoid using election technology "that would not properly serve Ohio's electorate." (5/11/16 Order, RE 31, PAGE ID # 1054.) Thus the fundamental alteration analysis should have centered on whether Plaintiffs' proposed relief would properly serve Ohio's electorate. In support of his fundamental alteration defense,¹ the Secretary has made no allegations, nor has he offered any evidence, demonstrating that implementing any of Plaintiffs' proposed ballot marking tools would fail to serve Ohio's electorate. (Answer ¶ 54, RE 19, PAGE ID # 290.) To the contrary, in their memorandum in support of permanent injunction, Plaintiffs proffered the evidence they planned to offer at trial demonstrating that any of their proposed auxiliary aids could be implemented without great difficulty or enhanced security risk throughout Ohio's eighty-eight counties. (4/8/16 Perm. Inj. Mot., RE 25, PAGE ID ## 364-369.) The district court erroneously held at the pleadings stage that the Secretary proved his defense

¹ The Secretary concedes that it is his burden to demonstrate that Plaintiffs' proposed relief would fundamentally alter Ohio's election systems. Appellee's Br. at 17.

of fundamental alteration on the basis of the mere existence of state certification requirements, without engaging in the required analysis into the purpose of the certification requirement.

B. Because Ohio’s certification process stands as an obstacle to the Secretary’s fulfillment of his obligations under federal law, the Supremacy Clause requires state law to yield in this case.

The Secretary argues that the Supremacy Clause does not require a modification to Ohio’s certification law to ensure compliance with the ADA because there is simply no conflict between the ADA and state law in this case. Appellee’s Br. at 29-33. Yet on earlier pages of the very same brief, the Secretary argues that it cannot implement Plaintiffs’ proposed relief—an accessible method of absentee voting²—because requiring counties to use an uncertified ballot marking tool would violate Ohio election law requiring that election technology be certified before use. Appellee’s Br. at 12 (“Until voting equipment has been certified for use in Ohio, it is not available for use in Ohio.”); *see id.* at 10-11 (explaining that Ohio law prohibits the use of Plaintiffs’ proposed ballot marking devices in Ohio elections unless they have been certified pursuant to state law). The Secretary’s excuse for failing to require use of an accessible ballot marking

² Although the Secretary’s brief includes information about opportunities for non-absentee voting and for obtaining assistance that does not preserve the privacy of the voter’s ballot, the district court correctly narrowed the inquiry to private and independent mail-in absentee voting, and the Secretary does not challenge that holding. (5/11/16 Order, RE 31, PAGE ID # 1050.)

tool derives entirely from the conflict with state law that would arise as a result. Indeed, the Secretary has raised no other obstacle to implementing accessible absentee voting statewide aside from the state's certification requirements. The conflict between state and federal law is clear here.

Because Ohio law changed in September 2016, making it possible for an accessible ballot marking tool to receive certification pursuant to state law, the Secretary contends that Ohio law no longer presents a conflict. Of course, Ohio law did not allow for certification of a ballot marking tool at the time the district court granted judgment for the Secretary on this claim, on May 11, 2016. (Mot. for J. on the Pleadings, RE 20, PAGE ID ## 300-301.) But as long as the Secretary refuses to implement a method of accessible absentee voting because of the certification process, it remains an obstacle to affording Plaintiffs an equal opportunity to vote absentee and must yield to federal law pursuant to the Supremacy Clause.

C. The Secretary has an affirmative duty to comply with the ADA.

The Secretary asserts that he is not required to “assume the role of a vendor” under state law by implementing an accessible ballot marking tool even though a vendor has not completed the state's certification process. Appellee's Br. at 23. But under the ADA, the duty of a public entity to operate non-discriminatorily is not contingent on the actions of third parties. Plaintiffs have enforceable civil

rights that do not hinge on whether election software vendors apply for state certification of their software, whether the state ultimately chooses to certify any accessible absentee voting system, or whether counties voluntarily adopt these accessible systems. Instead, under Title II of the ADA, the Secretary is affirmatively obligated to ensure that Plaintiffs have an equal opportunity to vote absentee. *See Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 910-13 (6th Cir. 2004) (“Title II demands that, in certain instances, public entities take *affirmative actions* to provide qualified disabled individuals with access to public services.”) (emphasis added); *see also* 28 C.F.R. § 35.160(a)(1), (b)(1); 28 C.F.R. § 35.130(b) (placing the obligation on the public entity to comply with Title II of the ADA).

If no options for accessible absentee voting existed, then the Secretary could argue that providing Plaintiffs with an accessible way to vote absentee would be impossible and thus an unreasonable request. But that is not the case. Plaintiffs identified three accessible alternatives in this case. (Compl. ¶¶ 19-25; RE 1, PAGE ID ## 7-8; 4/8/16 Perm. Inj. Mot., RE 25, PAGE ID ## 364-369.) If these systems have security vulnerabilities or other flaws that could jeopardize the integrity of the election process in Ohio—and Plaintiffs maintain they do not—the Secretary would have been free to offer such evidence to prove his fundamental alteration defense. But in the absence of any evidence that the proposed systems would

fundamentally change the way elections are conducted in Ohio for the worse, the Secretary cannot simply ignore the ADA and claim that he need not take affirmative steps to implement accessible absentee voting technology because no third party has come forward to seek certification. Title II of the ADA requires the Secretary to do what is necessary to ensure that Plaintiffs' civil rights are honored, even when it means making an exception to state law.

D. The Secretary's implementation concerns reflect a misunderstanding of Plaintiffs' requested relief and the balancing of interests required under a permanent injunction analysis.

The Secretary raises a number of other concerns about a court ordering the implementation of Plaintiffs' proposed ballot marking tools. These concerns demonstrate precisely why the district court should have held an evidentiary hearing to determine how the proposed tools could be implemented in a way that balances Plaintiffs' civil rights and any valid concerns established by the Secretary through evidence, not mere speculation.

Plaintiffs request that the Secretary offer blind voters "a private and independent method of absentee voting." (Compl.; RE 1, PAGE ID # 13.) It would be entirely up to the Secretary whether he chooses one or several accessible voting systems to make available, whether his office establishes one system to be used by all counties statewide or instead requires each county to establish its own accessible absentee voting system, and whether the State will cover expenses

associated with implementing an accessible absentee voting system or instead require the counties to pay all expenses. The court need not decide the mechanics of implementation; they could be left to the discretion of the Secretary. What cannot be left to the Secretary's discretion is Plaintiffs' right to an equal opportunity to vote absentee privately and independently.

The Secretary raises other concerns with implementing a court order requiring adoption of an accessible ballot marking tool, such as the need for compatibility with each county's voting system and the role of vendor accountability in the certification process. Appellee's Br. at 22-24. But district courts routinely balance competing interests when ordering injunctive relief for civil rights violations; before a permanent injunction can be issued, this Court requires findings "that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted" and "that the public interest would not be disserved by a permanent injunction." *United Steel, Paper & Forestry v. Kelsey-Hayes Co.*, 750 F.3d 546, 559 (6th Cir. 2014), *reh'g granted and opinion vacated on different grounds*, 795 F.3d 525 (6th Cir. 2015) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). The district court erred in adopting the Secretary's speculative concerns and dismissing Plaintiffs' claim at the pleadings stage instead of engaging in this analysis after allowing the parties to

present evidence to support Plaintiffs' claim and the Secretary's affirmative defense.

E. The Secretary does not dispute Plaintiffs' procedural arguments.

In their opening brief, Plaintiffs argued that dismissal of their claim at the pleadings stage was improper because the Secretary had the burden to plead and prove his fundamental alteration defense. Appellants' Br. at 26-35. The Secretary concedes that he bore this burden. Appellee's Br. at 17. And he offers no argument or authority to rebut the case law establishing that courts should not accept the fundamental alteration defense at the pleadings stage because Plaintiffs should have "the opportunity to come forward with additional facts or allegations" to rebut it. *See Veney v. Hogan*, 70 F.3d 917, 921 (6th Cir. 1995), *abrogated in part on other grounds by Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002). Indeed, the district court noted that "the fundamental alteration analysis is normally a fact-intensive inquiry" yet proceeded to dismiss Plaintiffs' claim even after finding the Secretary in violation of the ADA. (5/11/16 Order, RE 31, PAGE ID # 1053.) The Secretary offers not a single justification for this critical procedural error, which provides an independent ground for reversal.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief contains 2,626 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. In making this certification, I have relied on the word count feature of the word-processing program used to prepare this brief.

/s/ Jessica P. Weber
Jessica P. Weber

CERTIFICATE OF SERVICE

I hereby certify this 24th day of May 2017, the foregoing Reply Brief of Appellants was served on all counsel by the Court’s electronic filing system.

/s/ Jessica P. Weber
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