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## MEMORANDUM IN SUPPORT

The Court should grant Rule 54(b) certification of Plaintiffs' claim regarding private and independent absentee voting because the Court's dismissal ultimately disposes of the claim, and granting certification does not hamper judicial economy. Since Plaintiffs' claims regarding absentee voting and website accessibility are based on separate and distinct operative facts and seek unrelated equitable relief, this case does not present circumstances in which ruling on one claim could potentially result in repetition or inconsistencies with the other claim. Granting Rule 54(b) certification will serve to avoid injustice against Plaintiffs as they currently continue to be denied meaningful access to Ohio's absentee voting process.

### I. LEGAL STANDARD

Fed. R. Civ. P. 54(b) permits immediate review of certain district court orders prior to the ultimate disposition of a case. "The rule attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties." *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 60 (6th Cir. 1986). The questions under Rule 54(b) are whether the Court has made "a decision upon a cognizable claim for relief" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action," and whether there is any "just reason for delay" of an appeal from the decision. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7-8 (1980).

In order to certify an order under Rule 54(b), the district court must make two independent findings. The court must expressly: (1) direct the entry of final judgment as to one or more but fewer than all of the claims or parties, and (2) determine that there is no just reason to delay appellate review. *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1026 (6th Cir.1994). The finding that there is no just reason for delay "requires the district court to balance the needs of the parties against the interests of efficient case management." *Id* at 1027. To that

end, the Sixth Circuit has articulated a non-exhaustive list of factors for district courts to consider when making a Rule 54(b) determination:

(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

*Id.* at 1030, citing *Corrosioneering, Inc. v. Thyssen Environmental Systems, Inc.*, 807 F.2d 1279, 1283 (6th Cir. 1986). A “claim” under Rule 54(b) denotes “the aggregate of operative facts which give rise to a right enforceable in the courts.” *McIntyre v. First Nat. Bank of Cincinnati*, 585 F.2d 190, 192 (6th Cir.1978). Simply seeking recovery of different types of damages does not convert a single claim into multiple claims. *Gen. Acquisition, Inc.* at 129, citing *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 n. 4 (1976). Similarly, only one claim exists where a claimant “presents a number of legal theories, but will be permitted to recover only on one of them.” *Gen. Acquisition, Inc.* at 129, citing 10 Mary Kay Kane, Fed. Prac. & Proc. Civ. § 2657 (3d ed.).

## II. ARGUMENT

### A. **Plaintiffs’ dismissed claim for private and independent mail-in absentee voting is distinct and separable from Plaintiffs’ unadjudicated claim.**

Final disposition of Plaintiffs’ website accessibility claim will have no impact on the analysis of the claim regarding absentee voting. Plaintiffs allege two different discriminatory acts under Title II of the Americans with Disabilities Act (“ADA”): denying individuals with disabilities an equal opportunity to 1) vote absentee privately and independently and 2) access its voter services website (Doc. 1, ¶ 1). While both claims are brought under the same law and

involve the same parties, that is where the two claims' similarity ends.

The manner in which the Court and the parties have dealt with these discrete claims is particularly instructive in distinguishing the two claims. Defendant did not request judgment on the pleadings regarding website accessibility, and acknowledged that "Plaintiffs' claim is based upon two distinct alleged violations" (Doc. 20, p. 11). In granting Defendant judgment on the pleadings, the Court specifically ruled only on the absentee voting issue and explained that "[t]here still remains the issue of Plaintiffs' access to Defendant's voter services website" (Doc. 31, p. 18). This treatment shows that the operative facts regarding these claims give rise to separate enforceable rights: the right to an accessible voting website, and the right to private and independent accessible absentee voting.

Because Plaintiffs' two claims are unrelated, there is no possibility that the reviewing court could be obligated to consider Plaintiffs' absentee voting claim a second time. Indeed, there is no possibility that the need for review would be mooted by future developments in the district court. Likewise, because the claims do not seek damages, there is no risk of set-off against judgment on the absentee voting claim. As a result, there should be no concern that granting Rule 54(b) certification will negatively affect judicial economy.

**B. The Court's decision on Plaintiffs' claim for private and independent mail-in absentee voting constitutes an ultimate disposition of that claim.**

By granting judgment on the pleadings, the Court has ordered the ultimate disposal of Plaintiffs' claim for a private and independent means of absentee voting. "A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause save superintend, ministerially, the execution of the decree." *Novacor Chemicals Inc. v. GAF Corp.*, 164 F.R.D. 640, 645 (E.D.Tenn.,1996), citing *City of Louisa v. Levi*, 140 F.2d 512,

514 (6th Cir.1944); *In re Sun Valley Foods Co.*, 801 F.2d 186, 189 (6th Cir.1986).

Here, the Court found that the addition of a remote ballot marking tool to Ohio's current absentee voting system without certification would be a fundamental alteration to Ohio's voting program (Doc. 31, p. 17). Thus, Plaintiffs' claim for relief with regard to absentee voting has been dismissed, and Plaintiffs can take no further action on the absentee voting claim until the website accessibility claim is resolved either by order or settlement. As such, the Court's order granting judgment on the pleadings should be treated as a final decision on a cognizable claim for relief for purposes of Rule 54(b) certification.

**C. There is no just reason to delay appeal of Plaintiffs' absentee voting claim.**

The basic purpose of Rule 54(b) is to avoid injustice of a delay in entering judgment on a distinctly separate claim until the final adjudication of the entire case by making an immediate appeal available. 10 Mary Kay Kane, *Fed. Prac. & Proc. Civ.* § 2654 (3d ed.); *See also Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 440 (1956) (concurrency). A delay in the right to privately and independently vote absentee is indeed a significant injustice to Plaintiffs. As the Sixth Circuit has observed:

[T]he public has a strong interest in exercising the fundamental political right to vote. That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful. The public interest therefore favors permitting as many qualified voters to vote as possible.

*Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012) (internal quotation marks and citations omitted). The Court here specifically found that "Plaintiffs have been denied meaningful access to Ohio's absentee voting process" (Doc. 31, p. 17). However, the dismissal granting judgment on the pleadings hinged on the Court's conclusion that implementation cannot reasonably be accomplished in time for the upcoming November election. While Plaintiffs' meaningful access to absentee voting will be denied this election cycle, Rule 54(b) certification

can help ensure that this important right is not denied for future elections.

Defendant claims that in order for the State to certify and implement an absentee ballot marking tool, the tool must first be certified by the Elections Assistance Commission. Ohio Rev. Code § 3506.05(H)(4)(a) (Doc. 20, p. 8). However, there currently is no process for the Elections Assistance Commission to certify the absentee ballot marking tool Plaintiffs request because it is not part of a traditional voting system (Doc. 20, pp. 8-9). Consequently, absent legislative change, Plaintiffs have no recourse until they can effectuate appeal in this case. Defendant and the legislature have expressed no intention to change Ohio's certification process or implement the absentee voting accommodation sought by Plaintiffs.

With the trial of the website claim indefinitely postponed while the parties explore settlement, the potential for delay in determining Plaintiffs' right to equal access to absentee voting is significant. Plaintiffs' meaningful access to absentee voting will continue to be denied—perhaps for several election cycles—until Plaintiffs can appeal the dismissal. Thus, Rule 54(b) certification of final judgment is necessary to avoid this legal limbo and allow Plaintiffs to pursue their claim for accessible absentee voting while they continue attempting to resolve the unrelated website claim.

### **III. CONCLUSION**

Plaintiffs' claim regarding private and independent absentee voting is ripe and appropriate for certification under Rule 54(b). For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Certification of Judgment as Final and Appealable, direct the entry of final judgment as to Plaintiffs' absentee voting claim, and issue specific findings and analysis determining that there is no just reason to delay appellate review.

Respectfully submitted,

/s/ Jason C. Boylan

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Counsel for Plaintiffs

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8th day of June, 2016, a copy of the foregoing Plaintiffs' Motion for Certification of Judgement as Final and Appealable was served on all counsel of record via the Court's electronic filing system.

/s/ Jason C. Boylan  
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Trial Attorney