

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. RECONSIDERATION OF PRIOR ORDER

The Ohio General Assembly's passage of S.B. 63, 131st Gen. Assem., Reg. Sess. (Ohio 2016) has critically impacted this case by removing the certification requirement that this Court found to be a barrier to Plaintiffs' claim. This Court based its Order granting Defendant's Motion for Judgment on the Pleadings (Doc. 31) as to Plaintiffs' request for an accessible absentee ballot marking tool on a determination that implementing the tool before conducting the then-statutorily-required state certification process constituted a fundamental alteration of the voting process. The state certification process required that a ballot marking tool first be federally certified prior to the state process going forward—even though the federal certifying body does not certify these types of ballot marking tools—so state certification could not proceed. However, shortly after this Court's order was entered, the Ohio General Assembly passed Senate Bill 63 to remove the state's federal certification requirement; the bill was signed by Governor Kasich on June 13, 2016. Accordingly, Plaintiffs request that the Court exercise its discretion under Fed. R. Civ. Proc. 54(b) to reconsider its Order granting Defendant's Motion for Judgment on the Pleadings (Doc. 31).

Fed. R. Civ. Proc. 54(b) provides that any order or decision that adjudicates fewer than all the claims may be revised at any time before the entry of a judgment adjudicating all the claims. District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment. *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 Fed. Appx. 949, 959 (6th Cir. 2004). This authority allows district courts to afford such relief from interlocutory orders as justice requires. *Id.* Under the "as justice requires" standard, a motion to reconsider a previous order is warranted where there is: (1) an intervening change in controlling law; (2) new evidence available; or (3) a

need to correct a clear error or prevent manifest injustice. *Northeast Ohio Coalition for Homeless v. Brunner*, 652 F.Supp.2d 871, 877 (S.D. Ohio 2009).

The enactment of Senate Bill 63 constitutes an intervening change in controlling law that justifies reconsideration of this Court's prior order. In granting Defendant judgment on the pleadings regarding Plaintiffs' absentee ballot claim, this Court found that without an accessible absentee ballot marking tool, Plaintiffs were being denied equal access to the absentee ballot marking program, but that circumventing the review conducted by the Ohio Board of Voting Machine Examiners ("BVME") would constitute a fundamental alteration of Ohio's voting system. At the time of this Court's order, BVME certification was impossible because the U.S. Election Assistance Commission ("EAC") does not certify these ballot marking tools, yet EAC certification was a prerequisite to BVME certification. However, Senate Bill 63 lifted the federal certification requirement such that Plaintiffs' requested accommodation no longer conflicts with state law. This intervening change in the precise law that this Court relied on for its decision justifies reconsideration of that decision.

In its prior order, this Court held that the "inability of disabled voters to vote absentee in a private and independent manner evidences that these voters do not have the same meaningful access to mail-in absentee voting that non-disabled voters enjoy" (Doc. 31, p. 13). This holding justifies the entry of judgment in Plaintiffs' favor pursuant to Plaintiffs' pending Motion for Permanent Injunction that was fully briefed prior to the Court's order (Doc. 25). Therefore, Plaintiffs request that this Court reconsider its prior order, deny Defendant's Motion for Judgment on the Pleadings (Doc. 20), and enter judgment for the Plaintiffs.

II. REQUESTED REMEDIES

Plaintiffs acknowledge that at this late date, it is unlikely that an accessible ballot marking tool could be implemented in time for the upcoming November election. Therefore,

Plaintiffs request the opportunity to re-brief the remedy they seek addressing future elections. Accordingly, if this Court grants Plaintiffs' Motion for Reconsideration, then Plaintiffs request that the Court enter judgment in their favor on their claim and set a schedule for the parties to brief the appropriate remedy to redress Defendant's violations of the Americans with Disabilities Act.

III. CONCLUSION

For these reasons, Plaintiffs request that the Court reconsider its prior order and deny Defendant's Motion for Judgment on the Pleadings (Doc. 20), enter a declaratory judgment for Plaintiffs on their claim that Defendant is violating the ADA in his operation of an inaccessible absentee voting system, and order additional briefing with regard to remedies.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of July, 2016, a copy of the foregoing Plaintiffs' Motion for Reconsideration of Order Granting Defendant's Motion for Judgment on the Pleadings was served on all counsel of record via the Court's electronic filing system.

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