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

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

DEFENDANT OHIO SECRETARY OF STATE JON HUSTED'S MEMORANDUM IN OPPOSITION OF PLAINTIFFS' MOTION FOR RECONSIDERATION

Defendant Ohio Secretary of State Jon Husted ("the Secretary") opposes Plaintiffs' Motion for Reconsideration, filed pursuant to Fed. R. Civ. P. 54(b). While the Secretary does not dispute that there has been an intervening change in one component of the relevant law, that change only reinforces this Court's well-reasoned decision; it certainly does not warrant reconsideration.

Ohio law requires that all voting equipment – including marking devices – be reviewed and recommended for certification by Ohio's Board of Voting Machine Examiners ("BVME"). Although the previous version of R.C. § 3506.05 required that voting equipment be certified by the federal Elections Assistance Commission ("EAC")[1] as a precondition for BMVE certification, that requirement was just one component of *Ohio's* certification process, which also includes independent review of the equipment by Board members who are experienced with voting and elections systems. Substitute Senate Bill No. 63, effective September 13, 2016, will eliminate the requirement for EAC certification where the EAC does not certify a particular type of voting equipment (such as ballot marking devices), but it does not impact the remainder of

[1] The EAC does not currently certify ballot marking devices.

Ohio's voting equipment certification requirements. With or without EAC certification, the Ohio's BVME must still review and recommend that a ballot marking device be certified for use in Ohio before it can be implemented in an Ohio election.

This Court's May 11, 2016 Opinion and Order, finding that immediate implementation of proposed ballot marketing tools *without first complying with Ohio's certification requirements would fundamentally alter Ohio's voting systems*, did not limit its holding to the EAC certification component of Ohio's certification statutes. Rather, this Court recognized that an attempt to circumvent Ohio's certification process *as a whole* would fundamentally alter Ohio's voting process. In doing so, this Court found that Ohio's certification process, which includes review of equipment by competent and experienced Ohio elections officers, "underscore[s] the legislature's strong desire to avoid hav[ing] a voting machine certified that would not properly serve Ohio's electorate." *Id*.

Even with the EAC certification requirement eliminated, Ohio's interest in implementing only voting equipment best suited to serve Ohio's electorate is still served by Ohio's remaining certification requirements – specifically that the proposed equipment be reviewed and recommended by Ohio's BVME. Yet Plaintiffs continue to seek a legal end-run around these long-established laws.

This Court previously found that "Plaintiffs have not offered any argument or evidence as to why they have not sought to have the proposed ballot marking software *certified*." (Emphasis added.) (Doc. 31, Opinion and Order, Page ID # 1054). And in doing so, this Court declined to "judicially certify an election tool that has never been used in Ohio or even presented to the Ohio Board of Elections for review." (Doc. 31, Opinion and Order, Page ID # 1053). Nothing has changed. Plaintiffs' Motion for Reconsideration should be denied.

A. Background

Plaintiffs' Complaint purports to seek the use of technology that would allow voters with vision and print disabilities to mark absentee ballots electronically – something that no Ohio voter is currently able to do. During the evolution of this case, Plaintiffs have argued that the Maryland Online Ballot Marking Tool ("OBMT"), Prime III Voting System, and Five Cedars Alternate Format Ballot are all "available" at little cost to the State. Though none of these tools have been presented for review by Ohio's BVME (and Plaintiffs fail to offer any reason as to why) and none have been tested in an Ohio election, Plaintiffs seem to be seeking an order bypassing Ohio's important certification process.

Ohio law mandated that county boards of elections may only implement voting systems and voting tools that have been certified by the federal EAC and by the Secretary of State (based on a recommendation from Ohio's BVME). But on June 13, 2016, the Governor of Ohio signed into law Substitute Senate Bill 63, which modifies Ohio Rev. Code § 3506.05(H), in pertinent part:

> (a) Except as otherwise provided in divisions (H)(4)(b) and (c) of this section, any voting machine, marking device, or automatic tabulating equipment used in this state shall meet, as a condition of continued certification and use, the voting system standards adopted by the federal election commission in 2002 or the voluntary system guidelines most recently adopted by the federal election assistance commission. . . (b) Division (H)(4)(a) of this section *does not apply to any voting machine, marking device, or automatic tabulating equipment that the federal election assistance commission does not certify as part of its testing and certification program . . .*

(Emphasis added.) Under this new law, which will take effect ninety days after its passage, certification by the EAC will no longer be an impediment[2] to certification in Ohio for marking devices or other voting equipment the EAC does not certify.

[2] Plaintiffs previously argued that the EAC certification requirement made Ohio certification impossible because the EAC does not certify ballot marking devices (presumably in support of their argument that an accommodation or aid was necessary). With that requirement being modified by Sub. S.B. No. 63, it would seem there is nothing preventing the proposed marking devices from being presented to the Ohio BVME for review. It simply appears Plaintiffs (or the manufacturers of these tools) simply want to bypass this important step.

But Ohio's certification laws go on to 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 requirements simply because they believe their proposed technology "might conflict" with Ohio's certification requirements. *See* Pls' MIO at p. 5.

B. Law and Argument

Fed.R.Civ.P. 54(b) provides in relevant part that any order that adjudicates fewer than all the clams ". . . may be revised at any time . . ." "Traditionally, courts will find justification for

reconsidering interlocutory orders [under Rule 54(b)] when there is: (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Rose v. Davis*, No. C-1-02-271, 2006 WL 1892655, at *2 (S.D. Ohio July 10, 2006) citing *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, No. 02-5601, 2004 WL 237651, at *8 (6th Cir. Feb. 6, 2004).

Plaintiffs argue there has been an intervening change in "controlling law." But Plaintiffs make far too much of the amendment to Ohio Rev. Code § 3506.05(H). When Sub. S.B. No. 63 takes effect, Ohio's voting equipment certification laws will no longer require certification by the EAC only if the equipment is of the type the EAC does not certify in its testing and certification program. But Ohio still requires certification by the state. It is the bypassing of that certification (with or without the EAC component) that this Court correctly found would be a fundamental alteration to Ohio's voting systems.

The ADA does not provide an end-run around valid states laws; particularly where a plaintiff has failed to demonstrate that he or she is not able to comply with the laws. Rather, it requires the State to make *reasonable* accommodations where *necessary*. "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are *necessary* to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). Additionally, "[a] public entity shall furnish appropriate auxiliary aids and services where *necessary* to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 C.F.R. § 35.160(b)(1). And even then, neither an accommodation nor an auxiliary aid may impose a fundamental alteration to the nature of the program. 28 C.F.R. §§ 35.130; 35.164.

Here, the enactment of Sub. S.B. No. 63 makes Plaintiffs' requested accommodation all the more *un*necessary because Plaintiffs cannot now argue that efforts to certify the proposed tools would be futile. At bottom, there is still 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. There is simply no argument that the immediate implementation – in the absence of certification – is necessary.

C. Conclusion

For the foregoing reasons, Plaintiffs' Motion for Reconsideration should be denied.

Respectfully submitted,

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ATTORNEY GENERAL

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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 August 1, 2016, and served upon all parties of record via the court's electronic filing system.

s/ Nicole M. Koppitch
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