IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF OHIO, et al.,	:	
Plaintiffs,	:	Case No. 1:23-cv-2414
v.	:	JUDGE BRIDGET M. BRENNAN
FRANK LAROSE, et al.,	:	
Defendants,	:	
and	:	
REPUBLICAN NATIONAL COMMITTEE and OHIO REPUBLICAN PARTY,	:	
Intervenor-Defendants.	:	

OHIO SECRETARY OF STATE AND OHIO ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT

Now come Defendants Ohio Secretary of State Frank LaRose and Ohio Attorney General Dave Yost (the State Defendants) and hereby move this Court to grant summary judgment to them pursuant to Federal Rule of Civil Procedure 56. The reasons for this motion are set forth in the attached memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

ISSUES TO BE DECIDED

Whether Ohio's ballot-harvesting laws violate the Americans with Disabilities Act, the Voting Rights Act, or are unconstitutionally vague when the laws promote election integrity while providing multiple alternative ways for disabled voters to vote by absentee ballot.

INTRODUCTION

Ohio has long restricted who may deliver an absentee ballot to a county board of elections. Other than the voter herself, only authorized family members,[1] elections officials, or postal workers may return a voter's absentee ballot to the board of elections. Ohio Rev. Code §§ 3509.05(C)(1), 3599.21(A)(9). This prevents ballot harvesting, *i.e.*, the collection of absentee ballots by third parties for delivery to the board of elections. Left unchecked, ballot harvesting can undermine entire elections. Indeed, in North Carolina's 9th congressional district, a large-scale ballot-harvesting operation called into question so many ballots that an election could not be certified. Ex. 1, Expert Report of Kimberly Westbrook Strach at 17.

To be sure, Ohio has thus far avoided widespread fraud. But ballot harvesting persists. The State Defendants have referred multiple cases of suspected ballot harvesting to county prosecutors. Ex. 2, Declaration of Shawn Stevens at ¶¶ 22-24 & Exs. H-J. In one case, a candidate for public office solicited the return of absentee ballots directly to herself. *Id*. In another, an employee of a nursing home collected and returned numerous ballots from nursing home residents. *Id*. Ohio administers a special process for voters confined in nursing homes in which bipartisan teams of trained board of elections employees hand deliver absentee ballots, ensuring privacy and ballot

[1] Authorized family members are the voter's spouse, father, mother, father-in-law, mother-in-law, grandfather, grandmother, brother, or sister of the whole or half blood, son, daughter, adopting parent, adopted child, stepparent, stepchild, uncle, aunt, nephew, or niece. Ohio Rev. Code § 3509.05(C)(1).

integrity. This employee bypassed the special process, depriving a group of vulnerable voters of election officials' protection.

Plaintiffs want to weaken Ohio's protections for absentee ballots. Plaintiffs claim that Ohio must give third parties unrestricted and untraceable access to disabled voters' ballots, but they cannot show that any disabled voter has been excluded from absentee voting under Ohio's current ballot-harvesting laws. Further, none of the claims Plaintiffs advance—the Americans with Disabilities Act, the Rehabilitation Act, the Voting Rights Act, or unconstitutional vagueness—demand that Ohio jettison its protections for disabled voters' absentee ballots. Plaintiffs' claims fail as a matter of law, and the State Defendants are entitled to summary judgment.

BACKGROUND

In December 2022, Ohio's General Assembly enacted common-sense election-law provisions in H.B. 458 relating to photo identification, deadlines for absentee ballots, and other election-administration issues. Stevens Decl. at ¶ 17 & Ex. G. The bill left unchanged the list of persons authorized to deliver the absentee ballot of another to the office of the board of elections. *Id.* at ¶ 19 & Ex. G; Ohio Rev. Code § 3509.05(C)(1). Also undisturbed by H.B. 458 was Ohio's longstanding prohibition on the knowing "possess[ion]" of another's absentee ballot unless authorized by law. Stevens Decl. ¶ 18 & Ex. G; Ohio Rev. Code § 3599.21(A)(10). H.B. 458 added a prohibition on the knowing "return [of] the absent voter's ballot of another to the office of a board of election" unless authorized by Ohio Rev. Code § 3509.05(C)(1) or by a postal worker. Stevens Decl. ¶ 20 & Ex. G; Ohio Rev. Code § 3599.21(A)(9). This memorandum refers to these three statutes collectively as the ballot-harvesting statutes. Nearly a year after H.B. 458's passage, Plaintiffs challenged these three statutes under the ADA and VRA and as unconstitutionally vague. An expedited discovery period having closed, the State Defendants now move for summary judgment.

LEGAL STANDARD

Summary judgment must be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Anderson v. Kent State Univ.*, 804 F. Supp. 2d 575, 581 (N.D. Ohio 2011) (quoting Fed. R. Civ. P. 56(a)). "A fact is 'material' only if its resolution will affect the outcome of the lawsuit." *Id.* at 582. "Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Id.* "The non-moving party is under an affirmative duty to point out specific facts in the record . . . which create a genuine issue of material fact." *Id.*

ARGUMENT

I. Because Plaintiffs heave meaningful access to absentee voting, they cannot establish a violation of the Americans with Disabilities Act.

A. If absentee voting is readily accessible to voters with disabilities, there is no Title II violation.

Under Title II of the ADA,[2] "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A plaintiff claiming that a public entity's program or service violates Title II must establish (1) that the plaintiff has a disability, (2) that plaintiff is "otherwise qualified" for participation in the program or service,[3] and (3) that the plaintiff is being excluded from participation in, or being denied the benefits of, or being subjected to discrimination solely by reason of disability. *Bennett v. Hurley Med. Ctr.*, 86 F.4th 314, 325 (6th Cir. 2023).

[2] In the Sixth Circuit, claims under Title II of the ADA and the Rehabilitation Act can be analyzed together. *Bennett v. Hurley Med. Ctr.*, 86 F.4th 314, 323 (6th Cir. 2023).

[3] The State Defendants do not dispute that Plaintiff Kucera has a disability and is qualified to vote by absentee ballot.

A plaintiff can establish this third prong, the discrimination prong, under two theories: intentional discrimination[4] and failure to reasonably accommodate. *Knox Cnty. v. M.Q.*, 62 F.4th 978, 1000 (6th Cir. 2023). In a failure-to-accommodate claim, a plaintiff must show that the defendants reasonably could have accommodated her disability but refused to do so *and* that this failure impeded her ability to participate in the subject program. *Id*. Stated differently, a plaintiff must show (1) the accommodation offered by defendants was not reasonable and (2) the plaintiff's preferred accommodation was reasonable. *Id*. The accommodation offered by defendants may not be the best accommodation; it may not be plaintiffs' preferred accommodation; it may, in fact, be *worse* than the accommodation the plaintiff seeks. *Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, 58 F. App'x 162, 166 (6th Cir. 2003). But so long as the existing accommodations provide "meaningful access" to a service or program, there is no Title II violation. *Bennett*, 86 F.4th at 326.

In the context of absentee voting, a state affords meaningful access to disabled voters when "alternative, feasible methods of returning absentee ballots" exist. *In re Ga. Senate Bill 202 Sixth Dist. of the African Methodist Episcopal Church v. Kemp*, No. 1:21-mi-55555, 2023 U.S. Dist. LEXIS 144917, at *55 (N.D. Ga. Aug. 18, 2023). In Georgia, for example, plaintiffs could return absentee ballots by mail, by drop box, or by authorized individuals. These multiple methods afforded disabled voters meaningful access to absentee voting, even though some voters would have preferred alternative methods of absentee-ballot return. "A mere preference for one method of absentee voting over another is not enough to show a denial of meaningful access to absentee voting." *Id*. at *56. Importantly, the plaintiffs failed to show that any disabled voter was excluded from absentee voting. *Id*. at *55-57.

[4] Plaintiffs' complaint does not include a claim based on intentional discrimination.

In contrast, meaningful access to absentee voting does not exist where disabled voters are unable to cast private and independent absentee ballots. *See, e.g.*, *Nat'l Fed. of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016) (finding a Title II violation when Maryland provided private and independent absentee voting to non-disabled voters while denying that benefit to disabled voters); *Am. Council of the Blind v. Ind. Election Comm'n*, No. 1:20-cv-3118, 2022 U.S. Dist. LEXIS 41558, at *26-27 (S.D. Ind. Mar. 9, 2022) (finding likelihood of Title II violation where disabled absentee voters who could not independently mark their ballots were *required* to use the state's traveling board for assistance). And of course, if a disabled voter has no practical means of exercising the right to vote by absentee ballot, the voter lacks meaningful access to absentee voting. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 229-33 (M.D.N.C. 2020) (finding Title II violation where blind voter confined in nursing home with no-visitors policy could not seek assistance from nursing-home staff under North Carolina law). As described below, unlike the cited cases, Ohio law provides several methods of returning absentee ballots that provide voters with meaningful access to absentee ballots.

B. Ohio offers multiple methods for disabled voters to receive and return absentee ballots, and Plaintiffs have not shown that these methods are inaccessible to them.

Ohio offers multiple ways for disabled voters to cast an absentee ballot, which, when combined, offer disabled voters meaningful access to absentee voting. First, any registered voter, including a voter with a disability, can cast a regular absentee ballot. Ohio Rev. Code § 3509.02(A). The voter may return the ballot by mail, directly to the board of elections, or if available, a secure receptacle located outside the board of elections' office, commonly known as a drop box. Ohio Rev. Code § 3509.05; Ex. 3, Declaration of Anthony Perlatti at ¶ 6. An authorized

family member may also return the ballot directly to the board of elections or drop box. Ohio Rev. Code § 3509.05(C)(1); Stevens Decl. ¶ 11.

Second, Ohio offers voters with disabilities an absentee ballot with remote ballot marking capabilities. Perlatti Decl. ¶¶ 9-12 & Ex. A. The voter can access the ballot online via an emailed link and use adaptive tools on their personal devices to mark the ballot and print it. *Id*. at ¶ 11. This option allows voters who cannot physically complete a regular absentee ballot to mark their ballots privately and independently. The voter can return the ballot in each of the ways that a voter can return a regular mailed absentee ballot. *Id*.

Third, Ohio entitles any voter who cannot vote in person due to the voter's "own personal illness, physical disability, or infirmity" to hand delivery of an absentee ballot by a bipartisan team of board of elections staff. Ohio Rev. Code § 3509.08(A); Perlatti Decl. ¶¶ 14-26 & Ex. B; Ex. 4, Declaration of Karla Herron at ¶¶ 7-17. A voter must complete an application affirming that the voter is unable to travel to the polls because of illness, disability, or infirmity and request that the board of elections deliver the ballot via board of elections staff.[5] *Id*. The bipartisan team brings the ballot to the voter's place of residence, assists the voter in marking their ballot, if requested, and takes the ballot back to the board of elections. Perlatti Decl. at ¶¶ 22-25; Herron Decl. at ¶¶ 15-17.

[5] Ohio Revised Code § 3509.08(A) also permits the board of elections to mail an absentee ballot to a voter who cannot vote in person due to disability. Of course, any voter in Ohio may vote by mailed absentee ballot under Ohio Rev. Code § 3509.02(A), making § 3509.08(A)'s mail provision superfluous. Section 3509.08 dates back to 1929, with the choice of mail delivery or hand delivery first appearing in the statute in 1953. Ex. 8, 1929 Ohio Laws 113 v 307 § 4785-140 eff. Jan. 1, 1930; Ex. 9, 1953 Ohio Laws 125 v. 713 § 3509.08, eff. Jan. 1, 1954. No-fault mailed absentee voting did not exist in Ohio in 1953, so § 3509.08's mail-delivery provision made sense at the time. Now, after the adoption of no-fault absentee voting, § 3509.08's choice of mail or hand delivery simply reflects the statute's advanced age. The Secretary's Office does not instruct boards to ignore the voter's preferred method of delivery under § 3509.08(A), and in practice, boards of elections honor the voter's preference. Perlatti Decl. ¶ 20; Herron Decl. ¶ 11.

Fourth and finally, Ohio permits disabled voters who are physically unable to sign an absentee ballot to designate an attorney-in-fact to sign the voter's name at the voter's direction and in the voter's presence. Ohio Rev. Code § 3501.382(A)(1)(a); Stevens Decl. ¶ 16 & Exs. E-F; Herron Decl. ¶¶ 18-19. The voter must submit either a notarized designation of an attorney-in-fact or a designation of an attorney-in-fact accompanied by a physician's statement to the board of elections before using this process. *Id*.

Ohio provides robust access to absentee voting for disabled voters. Ohio does not deny private and independent voting to disabled voters while offering it to non-disabled voters. *Compare Lamone*, 813 F.3d at 507, *with* Perlatti Decl. Ex. A. Ohio does not force disabled voters to accept assistance or to use a particular absentee-voting method. *See generally* Perlatti Decl., Herron Decl. Voters wishing to vote privately and independently may use a remote ballot marking system. Perlatti Decl. ¶¶ 9-12. Voters wishing to vote with assistance may either seek the assistance of an authorized person or bipartisan staff members of the board of elections, whichever best suits their needs. *Contra Am. Council of the Blind,* 2022 U.S. Dist. LEXIS 41558, at *26-27. And that choice may change from election to election as the voters' needs and preferences change.

That Ohio provides meaningful access to absentee voting is best exemplified by Plaintiff Jennifer Kucera's demonstrated ability to vote through the methods described above. In the past four years, Ms. Kucera has voted by absentee ballot three times. Ex. 5, Deposition of Jennifer Kucera 52:10-14, 54:16-60:5 (describing voting in the 2024 primary election by remote ballot marking system); 66:14-69:17 (describing voting in the August 2023 special election by remote ballot marking system); 70:25-74:10 (describing voting in the 2020 general election); Perlatti Decl. ¶¶ 29-31 & Exs. D-F; Steves Decl. Ex. K. On each occasion, an authorized family member—Ms. Kucera's mother—returned her ballot to the Cuyahoga County Board of Elections. *See id*. Seven

additional authorized family members live in Cuyahoga or Summit County should Ms. Kucera's mother become unable to assist. Kucera Dep. 90:22-25, 93:16-23, 95:21-24; 98:23-99:5. But even if an authorized family member were not available, Ms. Kucera could physically perform all the steps necessary to request hand delivery of an absentee ballot under Ohio Rev. Code § 3509.08(A), although this would not be her preference. Kucera Dep. 86:25-87:21, 113:9-115:16.[6] And as to the organizational plaintiff, the League cannot identify any voter with a disability who was unable to vote in 2023 or 2024 by absentee ballot. Ex. 6, LWV's Answers to Interrogatories at 15; Ex. 7, Deposition of Jennifer Miller 55:22-25, 102:1-22.

Plaintiffs' claim that Ohio's absentee-voting program runs afoul of Title II simply boils down to a matter of preference. Plaintiffs would *prefer* to ask unrelated third parties to return absentee ballots. But Plaintiffs have meaningful access to absentee voting with the accommodations that Ohio currently provides. Because Ohio's existing accommodations for absentee voting are therefore reasonable, Plaintiffs' ADA claim fails as a matter of law.

C. Plaintiffs' requested accommodation would fundamentally alter Ohio's access-security balance for absentee voting.

But even if Plaintiffs could show that Ohio's absentee-voting accommodations are insufficient, their proposed accommodation—allowing third parties to assist disabled voters "in receiving and returning their absentee ballots"—is unreasonable as a matter of law. Compl. at Prayer for Relief 2(A), Doc. 1 at PageID 39.

Although Title II requires a public entity to make reasonable accommodations when necessary to avoid discrimination on the basis of disability, a public entity need not make any accommodation that would fundamentally alter the nature of the entity's service, program, or

[6] Ms. Kucera can sign her name, rendering her ineligible for the attorney-in-fact option. But if she loses this ability in the future, she may designate someone to sign her absentee ballot on her behalf. Ohio Rev. Code § 3501.382(A)(1)(a).

activity. 28 C.F.R. § 35.130(b)(7)(i). That is, a state need not waive a generally applicable rule when "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." *Hindel v. Husted*, 875 F.3d 344, 348 (6th Cir. 2017).

Ohio's absentee-voting system balances voter access and ballot security. On the access side, Ohio offers no-fault absentee voting, remote ballot marking systems, hand delivery of ballots to confined voters, and attorney-in-fact authorization. *See* Part I.B. *supra*. On the security side, Ohio strictly limits the persons who may return or possess another person's absentee ballot. Ohio Rev. Code § 3509.05(C)(1), 3599.21(A)(9)-(10). Per the recommendation of the Carter-Baker Commission on Federal Election Reform, Ohio only permits voters, authorized family members, postal workers, and elections officials to return absentee ballots. Strach Report at 23-24.

Additional security measures exist for voters who need assistance with absentee ballots. For example, board of elections staff who mark ballots for confined voters under Ohio Rev. Code § 3509.08(A) must file a form identifying themselves and affirming under penalty of election falsification that they did not influence the voter. Perlatti Decl. ¶ 25 & Ex. C; Herron Decl. ¶ 15. Similarly, an attorney-in-fact authorized to sign a ballot on a disabled voter's behalf must first register with the county board of elections. Stevens Decl. ¶ 16 & Exs. E-F; Herron Decl. ¶ 18. These safeguards protect both voters and assistors. They allow boards of elections to identify anyone authorized—or *not* authorized—to assist with or return a disabled voter's ballot. Strach Report at 18. And should any questions about ballot-security arise, the assistors can rely on these documents to show that their assistance was authorized by law and permitted by the voter. Herron Decl. ¶ 20.

Plaintiffs propose upending this access-security balance by allowing *anyone* to assist disabled voters with their absentee ballots and return them the boards of elections. Boards of elections would have no record of the assistors. Assistors would not need to affirm under penalty of election falsification that they did not influence the voter. *See* Perlatti Decl. Ex. C. Assistors would not need to affirm their duty to preserve the secrecy of the voter's ballot. *Id*. Should any questions arise as to the validity of the disabled voter's ballot, elections officials would have fewer tools to identify the persons who may have come into contact with the disabled voter's absentee ballot. Strach Report at 24-28. And assistors would not be able to point to any documents authorizing their assistance. Herron Decl. ¶ 20. Plaintiffs' proposed accommodation would fundamentally and unreasonably alter Ohio's access-security balance for absentee ballots.

Because the accommodations offered by Defendants afford meaningful access to absentee voting while the accommodation requested by Plaintiffs would fundamentally alter Ohio's access-security balance for absentee ballots, Plaintiffs' ADA claim fails as a matter of law.

II. Plaintiffs' VRA Section 208 claim fails as a matter of law because Section 208 does not preempt Ohio's ballot-harvesting laws.

A. Because compliance with Ohio's ballot-harvesting laws and Section 208 of the VRA is possible, there is no conflict preemption.

Section 208 of the Voting Rights Act does not preempt Ohio's ballot-harvesting laws. Preemption is a purely legal issue. *Priorities USA v. Nessel*, 628 F. Supp. 3d 716, 732 (E.D. Mich. 2022) ("[W]hether Section 208 of the VRA preempts the absentee-ballot law is a pure legal question."). "The preemption of state laws represents 'a serious intrusion into state sovereignty.'" *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1904 (2019) (plurality op.) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996)). The Supreme Court's more recent cases "confirm the propriety of restraint in this area." *Id.* at 1905.

The Supreme Court has identified three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption. Conflict preemption, the only applicable category of preemption here, exists where "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quotation marks omitted); *see also Priorities USA*, 628 F. Supp. 3d at 732 (determining that only conflict preemption is relevant to whether Section 208 preempts state law). "[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993). "Thus, preemption will not lie unless it is the clear and manifest purpose of Congress," which must be contained in "the text and structure of the statute at issue." *Id.* (quotation marks omitted).

The text of Section 208—in its entirety—is as follows:

> Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

52 U.S.C. § 10508.

Based on its plain text and structure, Section 208 does not preempt Ohio's ballot-harvesting laws. The court's analyses in *Priorities USA* (holding that Section 208 does not preempt Michigan's absentee-ballot law), and *Priorities United States v. Nessel*, 487 F. Supp. 3d 599, 617-20 (E.D. Mich. 2020), *vacated on other grounds*, are particularly instructive.[7] Plaintiffs here, like the plaintiffs in Michigan, "read the VRA too broadly." *Priorities USA*, 628 F. Supp. 3d at 732.

[7] The Sixth Circuit later reversed a separate portion of the district court's decision addressing Michigan's voter-transportation law. *Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021); *Priorities USA v. Nessel*, 978 F.3d 976, 985 (6th Cir. 2020).

"Section 208 allows certain voters who need help voting to select '*a* person of the voter's choice'—not 'any person,' not *'the* person.'" *Id.* (emphasis added) (quoting 52 U.S.C. § 10508). As the Michigan court incisively put it:

> The wording matters. An indefinite article ("a") "is non-specific and nonlimiting, as opposed to the definite article" ("the"), which "is specific and limiting." *Priorities USA*, 487 F. Supp. 3d at 619 (dictionary citations omitted). Thus, when Congress "has declined to use a definite article, its language suggests that some state law limitations on the identity of persons who may assist voters is permissible." *Id.* In other words, a State law that limits a voter's choice does not automatically flout Section 208.

Id. at 732-33 (footnote omitted). "Congress agreed to use an indefinite article, meaning that the persons identified in Section 208 do not constitute an exhaustive or exclusionary list." *Id.* at 733. "At its core, Section 208's natural effect allows some wiggle room: a voter may select 'a person' to assist them, but not *the* person of their choice." *Id.* (quoting 52 U.S.C. § 10508). Ohio's ballot-harvesting laws permit a wide array of individuals—no fewer than 19 different persons—to assist voters with returning their absentee ballots. *See* Ohio Rev. Code § 3509.05(C)(1). Importantly, Ohio's ballot-harvesting laws apply only to absentee ballots. "Thus, the two laws are harmonious and the VRA does not preempt the absentee-ballot law." *Priorities USA*, 628 F. Supp. 3d at 733.

The "textual consequences" of Plaintiffs' contrary interpretation further underscore that Section 208 does not preempt Ohio's ballot-harvesting laws. Importantly, even under a strict textualist approach, "[s]ome outcome-pertinent consequences—what might be called textual consequences—are relevant to a sound textual decision . . . ." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 352 (2012); *see, e.g.*, *Va. Uranium*, 139 S. Ct. at 1903 (plurality op.) ("Just consider what would follow from Virginia Uranium's interpretation."). Plaintiffs read "a person" in Section 208 to mean "anyone unrelated to [the voter's] employer or union." Compl. ¶ 162, Doc. 1 at PageID 32. This careless reading would prohibit States from enacting almost any

reasonable limitation whatsoever. A voter with disabilities could, for example, select an incarcerated person to assist them with voting, or a person who had been convicted of voter fraud. Such absurdity highlights why Plaintiffs' interpretation is wrong. *See* Scalia & Garner at 234. To be sure, Section 208 would easily preempt a state law prohibiting voters from having *anyone* assist them with voting. And it would preempt a state law allowing voters to request assistance solely from the voter's employer or union. But the opposite extreme does not follow. Under the best interpretation of Section 208, States are allowed to set some limits on the total list of persons who may assist voters with voting absentee.

Nor does the Court need to decide the outer bounds of a proper interpretation. For example, the Court need not decide whether a state law allowing only two individuals to assist a voter with absentee voting would conflict with Section 208. As noted above, Ohio's ballot-harvesting laws allow no fewer than 19 different individuals to assist. The only question for the Court is whether *that* state law impermissibly conflicts with Section 208. Particularly in light of the presumption *against* preemption, the answer to that limited question is easy: Ohio's reasonable ballot-harvesting laws do not conflict with Section 208 and are not preempted.

Even if the Court is inclined to consider Section 208's legislative history, that too supports the State's position. The Senate Judiciary Committee recommending Section 208's language stated that Section 208 would preempt state laws "only to the extent that they unduly burden the right recognized in [Section 208], with that determination being a practical one dependent upon the facts." S. Rep. No. 97-417, at 63 (1982); *see also Priorities United States*, 487 F. Supp. 3d at 619-20. The Committee clarified that Section 208 "does not create a new right of the specified class of voters to receive assistance; rather it implements an existing right by prescribing minimal requirements as to the manner in which voters may choose to receive assistance." S. Rep. No. 97-

417, at 63. Fundamentally, the Committee "recognize[d] the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to protect the rights of voters." *Id.* And as set forth above, Ohio's ballot-harvesting laws do not "unduly burden" the right to vote of persons with disabilities. *See* S. Rep. No. 97-417, at 63.

B. Reading Section 208 to preempt Ohio's ballot-harvesting laws renders Section 208 unconstitutional under the anticommandeering doctrine.

Plaintiffs' sweeping interpretation of Section 208 fails for an additional, independent reason: if it were correct, Section 208 would violate the anticommandeering doctrine. If Section 208 prohibits state ballot-harvesting laws related to persons with disabilities, it violates the anticommandeering doctrine by prohibiting States from effectively regulating ballot harvesting.

Under the anticommandeering rule, Congress cannot simply issue "a direct command to the States" by statute. *Murphy v. NCAA*, 584 U.S. 453, 480 (2018). "The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Id.* at 470. "The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms." *Id.* at 471. "And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Id.* The anticommandeering doctrine serves several key purposes. It "serves as one of the Constitution's structural protections of liberty." *Id.* at 473 (internal quotation marks omitted). It "promotes political accountability." *Id.* This is because "[w]hen Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent." *Id.* But "if a State imposes regulations

only because it has been commanded to do so by Congress, responsibility is blurred." *Id.* at 473-74. Finally, it "prevents Congress from shifting the costs of regulation to the States." *Id.* at 474.

Plaintiffs read Section 208 to "unequivocally dictate[] what a state legislature may and may not do." *Murphy*, 584 U.S. at 474; *see, e.g.*, Compl. ¶ 162. But if Section 208 dictates that Ohio may not set limits on the persons who may possess or return a voter's absentee ballot, then Section 208 fundamentally alters Ohio's absentee-ballot safeguards. As the expert report of Kim Strach makes clear, the challenged laws serve as Ohio's backstop to ballot-harvesting issues. Ohio lacks the provisions that other States have to address ballot-harvesting issues. Strach Report at 26. Thus, Ohio relies on the ballot-harvesting laws to ensure its election integrity. *Id.* at 26-28. If Section 208 meant that Ohio's ballot-harvesting laws are invalid, Ohio would be forced to enact *new* statutes to ensure the same level of election integrity. And dismantling a key component of a State's election system—and thus forcing the State to enact new laws to fill the void—is a perfect example of what the anticommandeering doctrine forbids. *Murphy*, 584 U.S. at 480.

Thus, Plaintiffs' reading of Section 208 is wrong for another reason: it would make Section 208 violate the anticommandeering doctrine. The Court should reject Plaintiffs' sweeping interpretation. As the court in *Nessel* concluded, a proper reading of Section 208 shows that the federal statute does not preempt Ohio's ballot-harvesting laws.

III. Plaintiffs' vagueness claim fails as a matter of law because Plaintiffs have not shown that the ballot-harvesting laws are unconstitutionally vague on their face or as-applied to the League.

A. Plaintiffs have not shown that the ballot-harvesting laws are facially vague.

A statute survives a vagueness challenge if it "provide[s] people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," and does not "authorize[] or even encourage[] arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Establishing that a statute is facially vague is a high bar. A statute is facially vague only if

a plaintiff demonstrates that the law "is impermissibly vague in *all* of its applications." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc*., 455 U.S. 489, 497 (1982) (emphasis added). A plaintiff meets this standard only if he or she can show that the law "implicates no constitutionally protected conduct." *Id*. at 494-95. Plaintiffs do not meet that standard here.

The crux of Plaintiffs' vagueness challenge is that because Ohio's Election Code does not define what it means to "possess" or "return" the absent voter's ballot of another, "these terms are likely to result in arbitrary and/or discriminatory enforcement because the Ohio Code fails to set clear boundaries on what law enforcement or prosecutorial authorities can and cannot charge or prosecute." Compl. ¶ 187, Doc. No. 1 at PageID 36. Plaintiffs pose various hypothetical scenarios about what the ballot harvesting laws might proscribe, e.g., can a roommate or in-home caregiver retrieve an unmarked ballot from a mailbox, is an unauthorized person prohibited from possessing an unmarked ballot or only a voted ballot, can an unauthorized person return a completed, sealed absentee ballot to a mailbox or drop box at the voter's request.

These open questions do not doom the ballot-harvesting laws. While there may be many ways to violate a statute, the legislature is not required to list each possibility in the statute. Nor could it. The list of potential violations could be long. Any minor change in a fact pattern could change the analysis or determine whether the ballot-harvesting statutes apply. Indeed, "[m]any statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.'" *Robinson v. United States*, 324 U.S. 282, 286 (1945). And mathematical certainty in statutory drafting is not required. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

Nor are the ballot-harvesting laws necessarily vague because "possess" and "return" are undefined. *See United States v. Namey*, 364 F.3d 843, 844-45 (6th Cir. 2004) ("When the common meaning of a word provides adequate notice of the prohibited conduct, the statute's failure to

define the term will not render the statute void for vagueness."). In a vagueness challenge a court may consider many factors, including how the terms in question are defined in dictionaries or elsewhere, and the broader statutory context. *See, e.g., Priorities USA*, 628 F. Supp. 3d at 734.

Several sources provide clarity on what it means to knowingly "possess the absent voter's ballot of another" under Ohio Revised Code § 3599.21(A)(10). First, Ohio criminal law. As applied to drug offenses, "possession" means "having control over a thing or substance," which "may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." Ohio Rev. Code § 2925.01(K). Similarly, establishing possession of a firearm "requires ownership or physical control." *See, e.g., State v. Simpson*, 7th Dist. Columbiana No. 01 CO 13, 2002-Ohio-1565, ¶ 53.

Dictionary definitions provide additional guidance. Black's Law Dictionary defines "possess" as "[t]o occupy in person; to have in one's actual and physical control; to have the exclusive detention and control of it; to have and hold as property; to have a just right to; to be master of; to own or be entitled to." Black's Law Dictionary (6th ed. 1991). "Possess" is also defined as "to have and hold as property" or "to seize and take control of." *See* Possess, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/possess (last accessed May 24, 2024).

The common threads of these definitions are the elements of ownership and control. Thus, showing that a person knowingly possessed the absent voter's ballot of another necessitates showing that the person exercised some ownership or control over the absentee ballot without the voter's permission. This definition does not apply to innocent or "ordinary conduct" such as picking up mail that happens to include a blank absentee ballot. The conduct proscribed in Revised Code § 3599.21(A)(10) does not reach such inadvertent actions.

Plaintiffs cannot plausibly claim that "return" of the absent voter's ballot under Ohio Revised Code § 3599.21(A)(9) is vague. Plaintiffs state that it is unclear if this provision prohibits "[c]ollection of a sealed absentee ballot envelope from a voter and placing it in a Board of Elections ballot drop box," or "[c]ollection of a sealed absentee ballot envelope from a voter and delivering it to the Board of Elections." Compl. ¶ 70, Doc. No. 1 at PageID 35. These questions are answered in Ohio Revised Code § 3509.05(C)(1): a voter, or person authorized under Ohio Rev. Code § 3509.05(C)(1), may return an absentee ballot by delivering the voted ballot to the board of elections or by placing the voted ballot in a drop box. "The return envelope shall be returned by no other person, in no other manner, and to no other location, except as otherwise provided in section 3509.08 of the Revised Code." Ohio Revised Code § 3509.05(C)(1). Plaintiffs may disagree with who is included in the class of authorized persons, but this disagreement does not make this provision vague. Plaintiffs cannot show that this provision is impermissibly vague in all applications.

B. Plaintiffs have not shown that the ballot-harvesting laws are vague as-applied to the League.

Plaintiffs' as-applied challenge to the ballot-harvesting laws also fails. Plaintiffs cannot show that the laws are unconstitutionally vague as applied to the League defendants because the laws have not been applied to them. Miller Dep. 110:16-111:10. Indeed, the laws have not been applied at all. Stevens Decl. ¶ 22. Plaintiffs worry that the ballot-harvesting laws *may* be applied to them based on hypothetical scenarios, but this is simply speculation. Stated differently, Plaintiffs are asking the Court to strike down the ballot-harvesting laws based on an application of the law that has not and may not occur. To succeed in an as-applied challenge there must be "some evidence that the rule would be applied to the plaintiff." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019). No such evidence exists here, and Plaintiffs' claim fails.

C. Under the principle of constitutional avoidance, the Court may decline to adjudicate Plaintiffs' vagueness challenge.

Plaintiffs' claims under the ADA and VRA Section 208 should fail for the reasons stated above. However, should the Court disagree and hold that the ballot-harvesting laws violate either the ADA or Section 208, the Court should decline to reach Plaintiffs' vagueness challenges. Finding that Plaintiffs have the right to third-party assistance with their absentee ballots under either statute resolves this matter. Adjudicating whether the ballot-harvesting laws are also unconstitutionally vague would be unnecessary. The Court has the discretion to decline to rule on the vagueness challenges, and to do so is consistent with the principle that courts should "'avoi[d] the premature adjudication of constitutional questions'" and "'ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Matal v. Tam*, 582 U.S. 218, 230-231 (2017) (citing *Clinton v. Jones*, 520 U.S. 681, 690 (1997)).

D. Alternatively, the Court should certify the unsettled questions of Ohio law to the Supreme Court of Ohio.

Although Defendants believe that Ohio law is clear on the ballot-harvesting laws' reach, Plaintiffs think differently. But no controlling precedent addresses Ohio Rev. Code § 3599.21(A)(9)-(10), and no Ohio court has construed them. Nor has a case been brought to prosecution. Stevens Decl. ¶ 22. Accordingly, should the Court be inclined to disagree with the interpretation of the State Defendants—the officials authorized to implement and enforce state election law—and interpret the statutes broadly, this Court should first certify these questions to the Supreme Court of Ohio.

The Supreme Court of Ohio has the discretion to answer questions of Ohio law certified to it by a federal court. S.Ct.Prac.R. 9.01(A). The federal court must first determine that "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of [the] Supreme Court." *Id.* A federal court may employ

certification if an unconstrued state statute is "susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976).

In vagueness challenges to state statutes, certification to a state supreme court is often warranted. *See, e.g.*, *Am. Booksellers Found. For Free Expression v. Strickland*, 560 F.3d 443, 446-47 (6th Cir. 2009). This makes sense. A void-for-vagueness claim asserts that a state statute fails to notify ordinary people of prohibited conduct. *Hill*, 530 U.S. at 732. In construing a state statute on a certified question, a state's highest court can precisely—and authoritatively—define the statute. *See Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir. 2008) And a precise definition, in turn, often resolves the vagueness claim. *Id*. at 411.

Here, because there is no controlling precedent addressing the ballot-harvesting laws and no Ohio court has construed either challenged subsection, certification is warranted. Accordingly, before declaring the ballot-harvesting laws unconstitutionally vague, this Court should first certify the following questions to the Supreme Court of Ohio:

> (1) Does Ohio Rev. Code § 3599.21(A)(9) prevent a person who is not an authorized person under Ohio Rev. Code § 3509.05(C)(1), but who is acting with the voter's consent, from returning the absent voter's ballot by placing the ballot in the mail, or by personally delivering the ballot to the board of elections or placing it in a drop box?
>
> (2) Does Ohio Rev. Code § 3599.21(A)(10) prevent a person who is not an authorized person under Ohio Rev. Code § 3509.05(C)(1), but who is acting with the voter's consent, from handling the ballot in any way?

CONCLUSION

For these reasons, the Court should grant Secretary LaRose and Attorney General Yost's motion for summary judgment. In the alternative, the Court should certify the questions in Section III.D. *supra* to the Supreme Court of Ohio.

Respectfully submitted,

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/s/ Ann Yackshaw

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2024, the foregoing Motion for Summary Judgment was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

/s/ Ann Yackshaw
ANN YACKSHAW (0090623)
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Ohio Local Civil Rule 7.1(f), I hereby certify that this case has been assigned to the Expedited Track. *See* Doc. No. 31. I also certify that the page limitations have been modified by order of the Court, which permitted the parties leave to file an opening summary-judgment brief of up to 20 pages. *See* May 7 non-document order. This memorandum complies with that modification.

/s/ Ann Yackshaw
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Assistant Attorney General