No. 17-3207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELBI HINDEL, ET AL.,
Plaintiffs-Appellants,
v.
JON A. HUSTED, Ohio Secretary of State,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio, No. 2:15-cv-03061

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF OHIO, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, THE NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS TENNESSEE, KENTUCKY PROTECTION AND ADVOCACY, AND MICHIGAN PROTECTION & ADVOCACY SERVICE, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, the American Civil Liberties Union, the American Civil Liberties Union of Ohio, the American Civil Liberties Union of Kentucky, the American Civil Liberties Union of Michigan, the American Civil Liberties Union of Tennessee, the National Disability Rights Network, Disability Rights Tennessee, Kentucky Protection and Advocacy ("KP&A"), and Michigan Protection & Advocacy Service, Inc. (collectively, "*Amici Curiae*") respectively state that they are private non-profit organizations (except that KP&A is an independent state agency), that they are not publicly held corporations or other publicly held entities, and that they have no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *Amicus* organization.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici Curiae* further respectively certify that no party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparing or submitting the brief, and that no person other than *Amici Curiae*, their members or their counsel, contributed money intended to fund preparing or submitting this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici Curiae, brief descriptions of which are included in the attached Appendix, are disability rights and civil rights non-profit organizations (except for KP&A, which is an independent state agency) that share a long-standing commitment to the full participation and independence of individuals with disabilities in society. *Amici* also include organizations committed to protecting and defending the right to vote on a non-partisan basis. *Amici* have expertise in the interpretation and application of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2012). They are especially well situated to discuss the impact of an affirmance of the District Court's decision on the ability of people with disabilities to vote privately and independently, and, more generally, on their ability to participate fully in the programs, services, and activities of public entities.

Accordingly, *Amici* submit this brief to urge reversal of the District Court's decision dismissing Appellants' complaint (the "Complaint") on the ground that the requested relief would fundamentally alter Ohio's voting system. Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, *Amici* state that all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises important issues under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2012) ("ADA"), with potentially far-reaching implications for individuals with disabilities, and particularly voters with disabilities. As Congress recognized in enacting the ADA, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C § 12101(a)(7) (2012). Participation in voting is a core interest protected by the ADA as "the 'right to vote freely for the candidate of one's choice is of the essence of a democratic society.'" *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

The ADA requires states and other public entities to give persons with disabilities equal access to all opportunities to exercise their fundamental right to vote, including through the provision of appropriate and necessary auxiliary aids. 42 U.S.C. § 12132 (2012); 28 C.F.R. §§ 35.130(b)(1)(ii) & (iii), 35.130(b)(7), 35.160(b)(2) (2016). Here, the District Court recognized that the current absentee voting system in Ohio does not provide disabled voters with equal access to the benefits of absentee voting. Op., RE 31, Page ID # 1049-1050.

Yet the District Court concluded that Ohio was not required to implement any of several readily available online absentee voting tools that would have

allowed disabled voters to mark absentee ballots in private and independently—just like non-disabled voters—because those tools had not been approved pursuant to Ohio's statutory certification process. In the District Court's view, given the certification requirements, these tools would have "fundamentally altered" Ohio's voting program. *Id.* at 1050-1055.

This finding was contrary to law. By accepting Ohio's fundamental alteration defense at the pleading stage, the District Court failed to conduct the fact-sensitive inquiry that the ADA requires. The District Court's decision conflicts with *National Federation of the Blind v. Lamone*, in which the Fourth Circuit held that the mere existence of state certification requirements for voting tools, without more, is insufficient for a fundamental alteration finding. 813 F.3d 494, 508-10 (4th Cir. 2016) ("*Lamone II*").

In *Lamone*, the district court held a three-day bench trial to evaluate essentially the same claims and fundamental alteration defense asserted here. *See id*. at 500-02, 508-10. Here, too, the District Court should have examined *evidence* in evaluating the fundamental alteration defense—including, for example, whether the proposed voting tools are at odds with the underlying purpose of Ohio's certification requirements, threaten the integrity of Ohio's voting process, or pose security risks. The District Court, however, failed to conduct such a factual analysis. The District Court also should have put the burden on *Defendant* to

adduce that evidence, rather than evaluating Defendant's fundamental alteration defense based on perceived deficiencies in Plaintiffs' Complaint. These errors, on their own, warrant reversal.

The District Court also found that Plaintiffs should have sought to have the proposed online absentee voting tools certified pursuant to Ohio's procedures before requesting relief in federal court. Op., RE 31, Page ID # 1053-1054. The law is clear, however, that an ADA plaintiff has no such obligation and that it is the public entity that has an affirmative obligation to ensure that its programs, services, and activities are accessible to individuals with disabilities. Likewise, the District Court's elevation of Ohio's certification statute over the requirements of the federal ADA disregards the Supremacy Clause of the Constitution, under which inconsistent state laws must yield to federal statutes. These additional legal errors also warrant reversal.

Careful adherence to the requirements of the ADA is particularly important in the circumstances of this case. Individuals with disabilities—who represent nearly 20% of the electorate—have historically faced significant obstacles in exercising their right to vote.[1] For instance, visual and mobility impairments often

[1] *See, e.g.*, Susan Mizner & Eric Smith, ACLU, *Access Denied: Barriers to Online Voter Registration for Citizens with Disabilities*, at 2 (Jan. 2015), *available at* https://www.aclu.org/report/access-denied-barriers-online-voter-registration-citizens-disabilities; Michael Ellement, *Enfranchising Persons with Disabilities: Continuing Problems, an Old Statute, and a New Litigation Strategy*, 39 T.

make it difficult for disabled individuals to vote in person at polling locations.[2] As a result, the ability to vote absentee is particularly important for persons with such disabilities. *See, e.g.*, Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 McGeorge L. Rev. 1015, 1016-17 (2007) (estimating that as many as forty percent of voters with disabilities use absentee ballots and explaining that "[a]bsentee voting is critical to many people with disabilities because it facilitates their participation in elections even if

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Marshall L. Rev. 29, 29 (2013) (2012 study estimated that voter turnout is eleven percent lower for persons with disabilities); Lisa Schur, *Reducing Obstacles to Voting for People with Disabilities*, at 4 (June 22, 2013), *available at* http://vote.caltech.edu/working-papers/116 (nationally representative survey "found that almost one-third (30%) of voters with disabilities reported difficulty in voting at a polling place in 2012"); *see also* 42 U.S.C. § 12101(a)(7) (2006) (Congressional recognition that "individuals with disabilities . . . ha[d] been . . . relegated to a position of political powerlessness in our society"), *amended by* ADA Amendments Act of 2008, Pub. L. 110-325, effective Jan. 1, 2009.

[2] The Help America Vote Act of 2002 required that public entities provide accessible voting equipment at polling places, 52 U.S.C. § 21081(a)(3) (2012), but many barriers for persons with disabilities still remain, including with respect to their ability to vote privately and independently at such locations. *See, e.g.*, Ellement, *supra* note 1, at 38-40 (describing problems with access, including that voting booths often do not accommodate wheelchairs, many voting machines are not accessible to voters with visual impairments, voters often have to rely on the assistance of poll workers or friends, and technology that would allow voters to vote independently is not installed at many locations); *Nat'l Fed'n of the Blind, Inc. v. Lamone*, 2014 WL 4388342, at *11 n.23 (D. Md. Sept. 4, 2014) (recognizing that travel to a polling place is "an aspect of in-person voting that is difficult for some disabled voters"); *id*. at *6 (describing disabled plaintiffs' testimony regarding difficulties with voting machines and with reliance on poll workers).

they cannot secure transportation, enter the polling place, or use voting equipment without assistance"). In fact, as the District Court below and the Fourth Circuit in *Lamone* agreed, access to *absentee* voting specifically must be analyzed separately from access to voting through conventional polling facilities. Op., RE 31, Page ID # 1047-1048; *Lamone II*, 813 F.3d at 503-05.

It is also critical for persons with disabilities to be able to cast their votes in a *private* and *independent* manner—no differently from non-disabled persons, whose ability to cast a secret ballot is taken for granted as a fundamental right. *See, e.g.*, National Council on Disability, *The Impact of the ADA*, at 67 (July 26, 2007), *available at* http://www.ncd.gov/publications/2007/07262007 ("Substantial barriers to independent voting remain for people with vision impairments. Paper ballots require people with vision impairments to rely on third parties for assistance in voting, thus undermining the independence and confidentiality of their votes."); *see also supra* note 2.

Plaintiffs and other voters in Ohio who are blind or have mobility or other disabilities that limit their ability to read text or turn pages (often referred to collectively as persons with "print disabilities") cannot mark their votes on a paper absentee ballot (because they cannot read or manipulate it) without the assistance of a third person. Compl., RE 1, Page ID # 6, ¶ 16. In this day and age, however, individuals with visual impairments commonly use screen access software that

allows them to read text electronically through audio outputs or Braille display pads. *See* Mizner & Smith, *supra* note 1, at 10. Likewise, individuals with certain mobility disabilities may use mouth sticks to control computers or voice recognition software to direct their computers using verbal commands. *Id.* at 12-13; *see also Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 103 (2d. Cir. 2014) (recognizing that disabled persons "whose physical impairments prevent them from turning pages or from holding books . . . may also be able to use assistive devices to view all of the content contained in the image files for a book").[3]

The proposed online absentee voting tools in this case would have enabled Plaintiffs and other individuals with disabilities in Ohio to use their own assistive technology to mark absentee ballots and to do so privately and independently. The Plaintiffs' Complaint identified two such tools: (1) an online ballot marking tool used in Maryland (which was the same tool at issue in *Lamone*), and (2) a voting

[3] Assistive technology and software for individuals with disabilities is dynamic and constantly evolving. As recognized in the ADA's legislative history, public entities are required to keep pace with technological innovations that afford disabled individuals an equal opportunity to fully and independently participate in public life. H.R. Rep. No. 101-485, pt. 2, at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391 ("[A]ccommodation[s] and services provided to individuals with disabilities . . . should keep pace with the rapidly changing technology of the times."); *see also Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1156 (9th Cir. 2011) ("[A]ssistive technology is not frozen in time: as technology advances, testing accommodations should advance as well."); *Ball v. AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 23 (D.D.C. 2003) (referring to "clear congressional intent that the ADA might require new technology be used, as it is developed, to further accommodate disabled individuals").

system called Prime III, which also has been used in other states, including Oregon, Wisconsin, and New Hampshire. Compl., RE 1, Page ID # 6-8, ¶¶ 19-25. In addition, Plaintiffs' memorandum in support of their permanent injunction motion identified a third proposed tool, which has been used in elections in Oregon: the Alternate Format Ballot. Mem. Supp. Pls.' Mot. Perm. Inj., RE 25, Page ID # 364-369. All three of these tools would have allowed blind and other print-disabled individuals to read and mark their ballots electronically using their screen readers or other assistive technology. *Id.* at 364.

The District Court's decision rejecting the proposed online absentee voting tools threatens to deny voting opportunities and benefits to the individual Plaintiffs in this case and to many other disabled Americans. It should be reversed.

ARGUMENT

I. THE DISTRICT COURT'S APPLICATION OF THE "FUNDAMENTAL ALTERATION" DEFENSE, PARTICULARLY AT THE PLEADING STAGE, WAS CONTRARY TO LAW

By dismissing Plaintiffs' claim at the pleading stage, based in large part on perceived deficiencies in the Complaint, the District Court ignored that ADA claims and the fundamental alteration defense require *fact-sensitive* analyses and that the burden was on Defendant to prove his fundamental alteration defense. Rather than accepting, on its face, Defendant's assertion that the proposed online absentee voting tools would fundamentally alter Ohio's voting program simply

because they had not been certified pursuant to Ohio's statutes, the District Court should have required Defendant to adduce *facts* and *evidence* supporting his defense—for example, evidence relating to the underlying purpose of the statute, whether use of the proposed voting tools without certification would degrade the integrity of Ohio's voting process, and whether the proposed tools would pose security risks. Defendant made no such evidentiary showing, which alone requires reversal of the decision below.

It is particularly important for courts to evaluate all facts and circumstances in disability-rights cases. Otherwise, the disabled plaintiff can be vulnerable to a court's inadvertent acceptance of the kind of hasty judgments that individuals with disabilities have to contend with in everyday life. *See, e.g.*, *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284-85 (1987) ("The [Rehabilitation] Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . . ."); [4] *Hall v. U.S. Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988) (a court must "scrutinize the evidence before determining whether the defendant's justifications [for denying employment to a disabled plaintiff] reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they

[4] The analysis of Title II of the ADA and Section 504 of the Rehabilitation Act is substantially similar. *See, e.g.*, *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 908 (6th Cir. 2004).

are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice") (citation omitted).[5]

The Supreme Court explained in *PGA Tour, Inc. v. Martin* that "an *individualized inquiry* must be made to determine whether a specific modification" to accommodate a particular person's disability would or would not "work a fundamental alteration." 532 U.S. 661, 688 (2001) (emphasis added). And, the decision below notwithstanding, courts in this Circuit generally recognize the need for evidence-driven, individualized inquiries under the ADA. *R.K. ex rel. J.K. v. Bd. of Educ. of Scott Cty.*, 494 F. App'x 589, 597 (6th Cir. 2012) (resolution of an ADA claim requires "complicated, fact-intensive inquiries"); *Martin v. Taft*, 222 F. Supp. 2d 940, 974 (S.D. Ohio 2002) ("Ultimately, whether expansion of a program in this case constitutes a fundamental alteration is a matter that can be resolved only by a careful examination of all of the facts and circumstances in this case, and not on the basis of pleadings or assumptions."); *Michelle P. ex rel. Deisenroth v. Holsinger*, 356 F. Supp. 2d 763, 770 (E.D. Ky. 2005) (declining to consider a

[5] As a remedial statute, the ADA should be construed broadly, and exceptions to its requirements, like the fundamental alteration defense, should be construed narrowly. *See, e.g., Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 160 (2d Cir. 2013) ("As a remedial statute, the ADA must be broadly construed to effectuate its purpose . . . ."); *Holmes v. Godinez*, 311 F.R.D. 177, 225 (N.D. Ill. 2015) (describing fundamental alteration defense as a "*narrow limit[]*" on public entities' obligations under the ADA) (emphasis added).

fundamental alteration defense at the motion to dismiss stage because defense requires examination of the facts and circumstances).

In addition, the burden of establishing a fundamental alteration defense is on the entity asserting it. *See* 28 C.F.R. § 35.130(b)(7)(i) (2016) ("A public entity shall make reasonable modifications . . . *unless the public entity can demonstrate* that making the modifications would fundamentally alter the nature of the service, program, or activity.") (emphasis added). Thus, as the Fourth Circuit explained, it is the state that "bear[s] the burden of proving that [a] requested modification would be a fundamental alteration to the [state's absentee voting] program." *Lamone II*, 813 F.3d at 508.

Here, rather than conducting a fact-driven analysis based on *evidence* proffered by *Defendant*, the District Court placed the burden on *Plaintiffs* to demonstrate *in their Complaint* that the proposed voting tool would not fundamentally alter the State's voting program in light of the State's certification requirements.[6] Indeed, the District Court repeatedly ruled that Plaintiffs' "allegations" were insufficient:

[6] The District Court paid lip service to the relevant principles (*see* Op., RE 31, Page ID # 1051 (referring to Defendant's "burden of *proving*" the fundamental alteration defense) (emphasis added); *id.* at 1053 ("the Court recognizes that the fundamental alteration analysis is normally a fact-sensitive inquiry")), but inexplicably failed to apply them.

- "[In *Lamone*, the voting tool] had previously been certified as safe twice and had already been used in prior elections. However, those are not facts alleged in this case." Op., RE 31, Page ID # 1052-1053.
- "[T]here are no allegations before this Court like the factual findings in *Lamone*." *Id.* at 1053.
- "Certainly, this case would be different if any of these systems had been tested through the certification process in Ohio or if any of the systems had been used in an Ohio election. But, again, those are not the allegations in this case." *Id.* at 1054.
- "Plaintiffs have not offered any . . . evidence as to why they have not sought to have the proposed ballot marking software certified." *Id.*

The District Court's resolution of the fundamental alteration defense based on perceived deficiencies in the Complaint, rather than specific evidence proffered by Defendant, was improper as a matter of law. *See, e.g.*, *Martin*, 222 F. Supp. 2d at 972 ("Of course, whether requested relief would entail a fundamental alteration is a question that cannot be answered in the context of a motion to dismiss . . . ."); *Cal. Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1240 (N.D. Cal. 2013) ("Defendants do not argue that providing a functional, accessible voting machine at every polling site on Election Day will be an undue burden or fundamental alteration. Nor should they on a motion to dismiss, in light of the fact they bear the burden of proof on this point.").

The District Court should have required Defendant to prove his defense based on specific facts and evidence relating to Ohio's certification statutes and the proposed voting tools at issue. For example, important factual inquiries warranting

evidence include: What is the underlying purpose of Ohio's certification regime and how, if at all, are the tools Plaintiffs proposed in this case at odds with that purpose? How do each of Ohio's certification requirements apply to each of the proposed voting tools in this case? What are the characteristics of voting tools that previously have been certified pursuant to Ohio's process? How do Plaintiffs' proposed tools compare to those tools? What are the barriers to implementing Plaintiffs' proposed tools in upcoming elections? And most importantly, what steps, if any, has the State of Ohio taken to eliminate these barriers? In short, merely citing a state-law certification requirement, without more, cannot satisfy the fundamental alteration defense.

The *Lamone* case is instructive. There, the Fourth Circuit held that Maryland's absentee voting program violated Title II of the ADA because, like Ohio's program, it effectively required disabled voters to rely on the assistance of third parties to vote absentee. *Lamone II*, 813 F.3d at 506-07. The Fourth Circuit rejected the defendants' fundamental alteration defense. The *Lamone* defendants had argued (as Defendant does here) that they were not required to implement the plaintiffs' proposed online absentee voting tool—which is one of the same tools at issue here—because the tool had not yet been approved pursuant to Maryland's certification statutes. *Id*. at 508-10. In particular, the *Lamone* defendants argued that "certification of voting systems . . . is fundamental to Maryland's voting

program" and that "requiring [defendants] to make the online ballot marking tool available for plaintiffs' use, where that tool has not yet received the statutorily required supermajority vote, works a fundamental alteration to Maryland's voting program." *Id*. at 508.

The Fourth Circuit disagreed. It recognized that "[c]ertain requirements of state law could in fact be fundamental to a public program in a way that might resist reasonable modification." *Id*. at 509. But critically, the Fourth Circuit made clear that any such determination was "fact specific" and that "[t]he relevant inquiry . . . is not whether *certification qua certification* is fundamental to Maryland's voting program, but whether use of the tool without certification would be so at odds with the purpose of certification that such use would be unreasonable." *Id.* (emphasis added). The Fourth Circuit then cited the district court's factual findings that the proposed voting tool was "reasonably secure, safeguards disabled voters' privacy, and (in earlier versions at least) ha[d] been used in prior elections without apparent incident." *Id.* The Fourth Circuit ultimately held that "*[o]n the record as a whole*," use of the tool was not "so at odds with the purposes of certification" as to be "unreasonable." *Id* at 509-10 (emphasis added); *see also id.* at 509 ("*[O]n the record before us* defendants simply have not established . . . that use of the online ballot marking tool degrades the integrity of Maryland's voting processes.") (emphasis added). The same sort

of fact-driven inquiry should have been, but was not, conducted by the District Court here.

The Fourth Circuit also expressly rejected the "strong form" of the defendants' fundamental alteration argument, which was that "the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination." *Id.* at 508; *see also id*. at 509 n.12 ("It would be difficult for a government entity to resist installation of, for example, wheelchair ramps for a new courthouse, solely by enacting a law requiring that ramps be certified and then declining to certify any ramps.").

This holding was in accord with Supreme Court and Sixth Circuit decisions that recognize that the mere existence of a statute or rule is insufficient to establish a fundamental alteration defense. For example, in *PGA Tour*, the Supreme Court held that allowing golf players with disabilities to use golf carts would not fundamentally alter PGA Tour's high level golf tournaments, even though PGA Tour had a rule that required players to walk between holes. 532 U.S. at 683. Rather than accepting that the use of golf carts would fundamentally alter the tournaments merely because a rule was in place, the Court carefully examined the facts, including the reasons for the walking rule, whether other golf tournaments had allowed the use of golf carts, and whether riding in a golf cart would unfairly advantage the player with a disability. *Id*. at 684-87; *see also Mary Jo C.*, 707 F.3d

at 159 (explaining that rather than "simply deferring to the entity providing the service in question" and "deeming the rules as set by that entity as 'sacrosanct,'" the Supreme Court in *PGA Tour* "undertook an independent analysis of the importance of a rule for the service in light of the service's purpose to determine whether a requested modification would fundamentally alter its nature").

Likewise, in *Anderson v. City of Blue Ash*, this Court acknowledged that a fundamental alteration defense cannot be established merely by pointing to a conflicting statute and, instead, requires a fact-sensitive inquiry. 798 F.3d 338 (6th Cir. 2015). In *Anderson*, the plaintiff alleged that the City had violated the ADA and the Fair Housing Amendments Act ("FHAA")[7] by refusing to allow her to keep a miniature horse at her property as a service animal for her disabled minor daughter. *Id.* at 345-46. In analyzing the City's fundamental alteration argument, this Court explained:

> [W]e have long . . . rejected the notion that making an exception to a zoning scheme to permit something that would normally be forbidden [under applicable law[8]] automatically amounts to a fundamental

[7] Similar to the ADA, the FHAA makes it unlawful to "discriminate against any person in the terms, conditions, or privilege of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap," including by failing to make reasonable modifications. *Anderson*, 798 F.3d at 360 (quoting 42 U.S.C § 3604(f)(2) (2012)).

[8] Although *Anderson* analyzed the fundamental alteration argument under the FHAA, instead of the ADA, the analysis under the two statutes is substantially similar. *See, e.g.*, *Astralis Condo. Ass'n v. Sec'y, U.S. Dep't of Hous. & Urban Dev.*, 620 F.3d 62, 66 (1st Cir. 2010) (explaining that the FHAA is interpreted "in tandem" with the ADA) (citation omitted); *Oconomowoc Residential Programs v.*

> alteration . . . . Requiring public entities to make exceptions to their rules and zoning polices is exactly what the FHAA does. The fact that the City banned horses from residential property does not mean that any modification permitting a horse necessarily amounts to a fundamental alteration.

Id. at 363. This Court ultimately concluded that *factual* issues relating to the City's fundamental alteration defense precluded summary judgment. *Id.*

Similarly, the District Court here should have looked beyond Ohio's certification statute and required Defendant to prove his defense based on facts and evidence, as the *Lamone* district court did through a trial that featured expert testimony. *See Lamone II*, 813 F.3d at 501-02, 508-10. For example, the District Court should have evaluated evidence relating to the underlying purpose of Ohio's certification statute, the nature of the proposed voting tools, whether use of the tools would have been at odds with or degrade the integrity of Ohio's voting systems, whether the proposed tools threatened public confidence in voting, and whether the tools posed any security risks. *Id.* By crediting Defendant's defense without evaluating evidence bearing on any of these issues, the District Court effectively accepted the "strong form" argument that *Lamone II* expressly rejected—namely, that the mere existence of state-level certification requirements establishes the fundamental alteration defense. *Id.* at 508.

City of Milwaukee, 300 F.3d 775, 783 (7th Cir. 2002) ("The requirements for reasonable accommodation under the ADA are the same as those under the FHAA.").

The District Court's failure to look beyond Ohio's certification requirement—and to place the burden on Defendant to adduce facts and evidence in support of his defense—was incorrect as a matter of law and warrants reversal.

II. THE DISTRICT COURT INCORRECTLY PLACED THE BURDEN ON VOTERS WITH DISABILITIES TO OBTAIN STATE APPROVAL OF AUXILIARY AIDS WHEN IT IS THE STATE THAT HAS AN AFFIRMATIVE OBLIGATION TO COMPLY WITH THE ADA

In addition to failing to conduct the requisite factual analysis and improperly resolving Plaintiffs' claim at the pleading stage, the District Court erred in another way: It held that Plaintiffs (or perhaps the makers of the systems) should have sought approval of the proposed online voting tools pursuant to Ohio's statutory certification process prior to seeking relief before the Court. In concluding its May 11, 2016 Opinion, the District Court summed up by noting that "the only thing standing in the way . . . is certification," and that "Plaintiffs have not offered any argument or evidence as to why they have not sought to have the proposed ballot marking software certified." Op., RE 31, Page ID # 1054; *see also id*. ("[N]either Plaintiffs nor the makers of any of the proposed systems have even attempted to have the systems certified."). And in denying reconsideration, the Court took comfort that, with a federal certification requirement eliminated, "there is nothing stopping Plaintiffs from pursuing certification." Op., RE 44, Page ID # 1100.

Title II of the ADA, however, makes public entities—and not individuals with disabilities (let alone manufacturers of aids)—responsible for ensuring equal access to rights and benefits.[9] As the Supreme Court has explained, in enacting Title II of the ADA, "Congress *required the States* to take reasonable measures to remove architectural and other barriers to accessibility." *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004) (emphasis added) (citing 42 U.S.C. § 12131(2)). Likewise, as this Circuit has recognized, "Title II [of the ADA] demands that, in certain instances, public entities take affirmative actions to provide qualified disabled individuals with access to public services." *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004); *see also Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 200-01 (2d Cir. 2014) ("DOJ's regulations make clear that the inaccessibility of existing facilities is not an excuse, but rather, a circumstance that requires a public entity to take reasonable *active steps* to ensure compliance with its obligations under . . . Title II.") (emphasis added).

[9] Even if Plaintiffs did have some burden to seek approval of the proposed tools (and they did not), Plaintiffs' allegations note that the National Federation of the Blind, Inc. (one of the Plaintiffs) in fact had asked the State to implement an accessible absentee voting system, such as the online ballot marking tool used in Maryland, and that the State had refused. Compl., RE 1, Page ID # 8, ¶ 27. The State should have given primary consideration to Plaintiffs' request. *See* 28 C.F.R. § 35.160(b)(2) (2016) (requiring that public entities "give primary consideration to the requests of individuals with disabilities" in determining what types of auxiliary aids are necessary).

The defense of fundamental alteration requires a showing that the proposed modification is "so at odds" with the underlying purposes of a program that it would be "unreasonable" to require a public entity to implement it. *Lamone II*, 813 F.3d at 509. The defense cannot rest on the very barriers that the public entity has an obligation to remove. *Cf. Steimel v. Wernert*, 823 F.3d 902, 916 (7th Cir. 2016) ("[T]he state's logic is circular. After all, the state creates the waiver programs, and therefore those programs' eligibility criteria. If the state's own criteria could prevent the enforcement of the integration mandate [of the ADA], the mandate would be meaningless. . . . It cannot avoid the integration mandate by binding its hands in its own red tape.").[10]

Disregarding the Defendant's affirmative obligations, the District Court in effect proceeded as though a disabled plaintiff is required to exhaust other potential remedies before seeking federal judicial relief under the ADA. But that is not the law. Title II of the ADA, which incorporates the remedies and procedures of the

[10] *See also* U.S. Dep't of Justice, *The ADA Title II Technical Assistance Manual*, at II-5.1000, https://www.ada.gov/taman2.html (last accessed Apr. 13, 2017) ("Are there any limitations on the program accessibility requirement? Yes. A public entity does not have to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program . . . . This determination can only be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. . . . If an action would result in such an alteration . . . , the public entity must take any other action that would not result in such an alteration . . . but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.").

Rehabilitation Act of 1973 (*see* 42 U.S.C. § 12133 (2012)), imposes no exhaustion requirement. *See Tuck v. HCA Health Servs. of Tenn., Inc.*, 7 F.3d 465, 471 (6th Cir. 1993) ("[E]xhaustion is not a prerequisite to private enforcement of section 504.") (citation omitted); *Bennett v. Bd. of Educ. of Wash. Cty. Joint Vocational Sch. Dist.*, 2010 WL 3910364, at *3 (S.D. Ohio Oct. 4, 2010) (Title II does "not require claimants to exhaust their administrative remedies prior to initiating litigation"). This was another error requiring reversal.

III. THE DISTRICT COURT IMPROPERLY ELEVATED STATE-LEVEL REQUIREMENTS OVER THE REQUIREMENTS OF THE FEDERAL ADA

The District Court's acceptance of Defendant's fundamental alteration defense based on the mere existence of Ohio's certification statute effectively elevated state-level requirements over the requirements of the federal ADA. This, too, independently requires reversal.

Under the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI, cl. 2, state laws must yield to the extent they stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). Accordingly, the ADA may preempt inconsistent state laws, or require modification to or exemption from such laws, where necessary to effectuate

Congress's purposes of rooting out discrimination and enabling disabled persons to participate equally in public programs and services.

Indeed, many Courts of Appeals have found that the failure of a proposed auxiliary aid or reasonable modification to comply with state law does not, in and of itself, excuse a state or locality from providing that aid or modification if it is otherwise required by the ADA. *See, e.g.*, *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (holding, in an ADA case involving a state law aimed at preventing the spread of rabies, that although "courts will not second-guess the public health and safety decisions of state legislatures, . . . when Congress has passed antidiscrimination laws such as the ADA which require reasonable modifications to public health and safety policies, it is incumbent upon the courts to ensure that the mandate of federal law is achieved"); *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) ("[The city defendant] believes that it is compelled to follow the directive from the state, but the Supremacy Clause of the Constitution requires a different order of priority. A discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law.").[11]

[11] District courts within this Circuit also have required state law requirements to yield to the ADA. *See, e.g.*, *Ray v. Franklin Cty. Bd. of Elections*, 2008 WL 4966759, at *6 (S.D. Ohio 2008) (ordering Secretary of State and county board of elections to modify their policies to allow disabled, homebound voter to correct deficiencies in her absentee ballot without appearing in person at the board's

As the Fourth Circuit explained in *Lamone*, the suggestion that "the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination . . . cannot be correct. . . . The Supreme Court has held that the ADA's Title II . . . trumps state regulations that conflict with its requirements." 813 F.3d at 508 (citing *Lane*, 541 U.S. at 533-34).

Likewise, as the Second Circuit explained in *Mary Jo C.*:

> If all state laws were insulated from Title II's reasonable modification requirement solely because they were state laws . . . the ADA would be powerless to work any reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and no matter how minimal the costs of doing so. . . . [T]he ADA's reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision.

707 F.3d at 163. Turning this preemption law on its head, the District Court elevated Ohio's certification requirements for voting systems over the ADA's requirement that necessary and appropriate auxiliary aids be provided for voters with disabilities. Specifically, by accepting Defendant's fundamental alteration defense on the face of the pleadings, the District Court effectively permitted Ohio to insulate itself from the requirements of the ADA merely by enacting a statute

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office); *Mooneyhan v. Husted*, 2012 WL 5834232, at *6 (S.D. Ohio 2012) (ordering Secretary of State and county board of elections to count the ballot of voter with disability whose ballot was postmarked after the statutory deadline because defendants had failed to make reasonable modification to their policies).

that required state-level review and approval of auxiliary aids. This result was contrary to law.

CONCLUSION

For the reasons set forth above, *Amici Curiae* respectfully submit that the judgment below should be reversed and the case should be remanded for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE REGARDING LENGTH OF BRIEF

Pursuant to Rules 29(a)(4)(G) and 32(g)(1) of the Federal Rules of Appellate Procedure ("Fed. R. App. P."), the undersigned hereby certifies that this document complies with Fed. R. App. P. 29(a)(5) and is no more than one-half of the type-volume limitations for a principal brief set forth in Fed. R. App. P. 32(a)(7)(B).

This document has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. Exclusive of the exempted portions of the brief set forth in Fed. R. App. P. 32(f), and in accordance with the letter from the Clerk of this Court to counsel for the parties, dated March 1, 2017 (ECF No. 3), the undersigned hereby certifies that this document contains 6,136 words, as determined by a word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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APPENDIX: *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of more than 1.2 million members, nearly 300 staff attorneys, thousands of volunteer attorneys, and offices throughout the nation. The ACLU is dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since 1965, the ACLU has litigated more than 300 voting rights cases and has worked to ensure that all Americans can participate equally in the political process. The ACLU also works to ensure that individuals with disabilities are able to vote without barriers as envisioned by the Americans with Disabilities Act and other federal laws. The ACLU has a significant interest in cases across the country concerning the requirements of federal civil rights laws such as the ADA in the context of voting, particularly in the face of less protective state laws and regulations.

The American Civil Liberties Union of Ohio ("ACLU Ohio") is the Ohio affiliate of the national ACLU. Having nearly 75,000 members and supporters in Ohio, ACLU Ohio appears routinely in state and federal courts both as *amicus* and direct counsel to protect and to defend—without bias or political partisanship—the right to vote. In addition, ACLU Ohio appears regularly in federal courts to uphold the rights of people with disabilities to personal autonomy and to freedom from discrimination.

The American Civil Liberties Union of Kentucky ("ACLU Kentucky") is the Kentucky affiliate of the national ACLU. With approximately 3,000 members, ACLU Kentucky has a long history of advocating for the civil rights and civil liberties of Kentuckians in both state and federal courts.

The American Civil Liberties Union of Michigan ("ACLU Michigan") is the Michigan affiliate of the national ACLU and has nearly 40,000 members. ACLU Michigan regularly litigates cases to advance the constitutional and civil rights of individuals within Michigan, including disability rights cases and voting rights cases.

The American Civil Liberties Union of Tennessee ("ACLU Tennessee") is the Tennessee affiliate of the ACLU with over 11,000 members throughout Tennessee. ACLU Tennessee is dedicated to the principles of liberty and equality embodied in the United States and Tennessee Constitutions. ACLU Tennessee regularly participates in cases in state and federal court involving constitutional and civil rights questions, as counsel and *amicus curiae*.

The National Disability Rights Network is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral,

and education. There are P&As and CAPs in all 50 states (and an additional one that services the Native American nations of the Four Corners region), the District of Columbia, Puerto Rico, and the U.S. Territories. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Michigan Protection & Advocacy Service, Inc. ("MPAS") is the independent, private, non-profit organization designated by the governor of Michigan to advocate for and protect the legal rights of people with disabilities in Michigan. MPAS services include information and referral, short-term assistance, selected individual and legal representation, systemic advocacy, monitoring, and training. MPAS works towards systemic changes that advance the rights of all people with disabilities, and advocates for individual rights through litigation. MPAS has a specific interest in ensuring that all individuals with disabilities are able to vote, with or without a reasonable accommodation.

Kentucky Protection and Advocacy ("KP&A") is the federally mandated protection and advocacy system for the Commonwealth of Kentucky. Working together with those who have disabilities, KP&A uses legally based individual and systemic advocacy to promote and protect the rights of individuals with disabilities, including individuals who are blind. KP&A is a grant recipient under the Help America Vote Act of 2002 ("HAVA"). HAVA requires KP&A to ensure

full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote, and accessing polling places. KP&A provides voter education and training to Kentuckians about the state's voting systems and technologies. In addition, KP&A under HAVA has the ability to demonstrate and evaluate the use of such systems and technologies by blind and other disabled individuals in order to assess the availability and efficacy of such systems and technologies.

Disability Rights Tennessee ("DRT") is Tennessee's Protection & Advocacy System and has represented—at no cost—more than 40,000 clients with disabilities. Its mission is to protect the rights of Tennesseans with disabilities. DRT provides services to people with disabilities across Tennessee with numerous issues, including employment discrimination, safety in schools, abuse and neglect, and access to community resources and services.