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

LEAGUE OF WOMEN VOTERS OF OHIO AND JENNIFER KUCERA, Plaintiffs, v. FRANK LAROSE, in his official capacity as Ohio Secretary of State, *et al.*, Defendants.	Civil Action No. 1:23-cv-02414 Judge Bridget Meehan Brennan

INTERVENORS' OPPOSITION
TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Ohio's restrictions on who may possess or return another person's mail ballot ("the Ballot Harvesting Rules" or "the Rules") help to secure the integrity of Ohio's elections and comport with federal law and the Constitution. Plaintiffs nonetheless ask the Court to enjoin the Ballot Harvesting Rules for *all* voters with disabilities statewide—but their own evidence forecloses any injunction, let alone that sweeping demand. Plaintiffs have not been able to identify even a single voter who is unable to vote due to the Ballot Harvesting Rules. Indeed, Plaintiffs' putative expert *admitted* that most voters with disabilities vote without *any* assistance—and that he could not identify any voters, or even estimate the number of voters, who choose to vote by mail, need assistance to return their mail ballot, and cannot obtain such assistance from a close family member, postal worker, or election official. Moreover, the lone individual plaintiff, Jennifer Kucera, has been able to obtain assistance in past elections and has never requested the State's generous accommodation of in-home assistance from election officials.

In fact, Plaintiffs acknowledge that this suit boils down to their "prefer[ence]" that voters with disabilities be permitted to use other individuals to return their mail ballots. Pltf. Mot., R.42-1 at 3. But such a preference fails to show any cognizable violation of federal law. It also fails to justify a statewide injunction against the State's election integrity laws in the middle of a hotly contested Presidential election year. To the contrary, the undisputed evidence shows that Ohioans can, should, and *do* have elections that are both reliable and accessible—and that this Court should reject Plaintiffs' invitation to make a false choice between reliable elections or accessible elections. The Court should deny Plaintiffs' motion for partial summary judgment.

STATEMENT OF ISSUES

1. Whether the League of Women Voters of Ohio (LWVO) lacks Article III standing.
2. Whether Plaintiffs have failed to prove a violation of the Americans with Disabilities Act

(ADA) or Section 504 of the Rehabilitation Act because they have not identified anyone unable to meaningfully participate in voting and have not demonstrated intentional discrimination or a failure to accommodate.

3. Whether the Voting Rights Act (VRA) preempts Ohio's Ballot Harvesting Rules.

BACKGROUND

A. Voting in Ohio. Ohio offers "generous, reasonable, and accessible voting options to all," including "many conveniences that have generously facilitated voting participation." *Ohio Dem. Party v. Husted*, 834 F.3d 620, 623, 628 (6th Cir. 2016). As a result, "it's easy to vote in Ohio. Very easy, actually." *Id.* at 628.

Ohio offers nearly a month of in-person voting, including five days with evening hours and two weekend days. Directive 2023-03, R.44-3 at 8. Before each election, county boards of elections must verify and attest that each polling place complies with Ohio and federal accessibility requirements through an extensive compliance review, and must train precinct election officials on the rights of voters with disabilities and how to assist and communicate effectively with voters with disabilities. *Election Official Manual* (*EOM*), R.44-4 at 170-72; R.C. § 3501.29(E); Form 16, R.44-5; Form 17, R.44-6.

Inside the polling place, a voter with a disability may receive any assistance in voting she needs from a bipartisan team of election workers or from "any person of [her] choice, other than [her] employer, an agent of [her] employer, or an officer or agent of [her] union." R.C. § 3505.24. In-person voters who cannot enter a polling place can take advantage of curbside voting with assistance from a bipartisan team of election workers. *Id.* § 3501.29(C); *EOM*, R.44-4 at 210-12.

Ohio also offers generous absentee voting options. Any Ohio voter may vote absentee by requesting an absentee ballot as long as ten months or as short as a week before an election. R.C. §§ 3509.02, 3509.03(D). Voters with disabilities may request an absentee ballot via a paper form or an electronic form that can be completed with assistive technology. Form 11-A, R.44-7; Kucera

Tr., R.44-8 at 71:23-72:21. Voters with disabilities may also request an electronically delivered ballot that can be marked electronically, then printed and returned. *See EOM*, R.44-4 at 203-06; Form 11-G, R.44-9; Accessible Absentee Voting in Ohio, R.44-10. Voters with disabilities have the option to mark ballots and sign ballot envelopes with "assistive technology or an augmentative device such as a signature stamp" or to designate an "attorney in fact" to assist with marking and signing. R.C. § 3501.382; Form 10-F, R.44-11; Form 10-G, R.44-12; *EOM*, R.44-4 at 260 n.4. Attorneys in fact must be identified and registered before assisting a voter, creating a chain of custody for the ballot. *See* R.C. § 3501.382; Form 10-F, R.44-11; Form 10-G, R.44-12.

Ohio voters may return absentee ballots by mail, at a board of elections office, or to a secure drop box, either on their own or through any of a litany of close family members. R.C. § 3509.05(C)(1). Moreover, if a voter cannot leave her home, she can request that USPS pick up and deliver her mail at her door. USPS Door Delivery, R.44-16. Such a voter may also request that a bipartisan team of election workers bring a ballot to her home, assist with marking it if needed, and return the ballot for the voter. R.C. § 3509.08(A); *EOM*, R.44-4, at 213; Form 11-F, R.44-13; Form 12-C, R.44-14; Stevens Tr., R.44-15 at 178:10-22, 181:25-182:9. Under this accommodation, the election workers must fill out a form identifying themselves, again creating a chain of custody for the ballot. R.C. § 3509.08(A); Form 12-C, R.44-14.

Cuyahoga County, where Kucera lives, regularly implements this accommodation for individuals with disabilities who reside in private homes. Gweon Decl., R.42-22 ¶¶ 38-42; *id.* at PageID# 106, 108. There is no record evidence that any voter—including any voter residing in a private home—has ever been refused this accommodation when requested. *See* Perlatti Decl., R.43-3 ¶¶ 17, 20 ("In my experience … , the [Cuyahoga County] Board of Elections has never mailed a ballot to a voter with an illness, physical disability, or infirmity who requested hand

delivery of a ballot by a bipartisan team of Board of Elections staff."); Herron Decl., R.43-4 ¶¶ 11-12 (similar, for Delaware County).

B. The Ballot Harvesting Rules. Like dozens of other States, Ohio restricts who may possess or return another person's absentee ballot. These restrictions facilitate mail voting, protect against voter fraud, safeguard voter confidence in valid elections, and protect vulnerable voters from "intimidation or malfeasance." Strach Rep., R.44-17 ¶¶ 82, 84, 88, 95; *see* NCSL, Summary, *Ballot Collection Laws*, R.44-18. Such restrictions accomplish these objectives by regulating "ballot harvesting," which refers to third parties collecting and returning other individuals' completed absentee ballots. *See, e.g.*, *Ariz. Dem. Party v. Ariz. Republican Party*, 2016 WL 8669978, at *6 (D. Ariz. Nov. 4, 2016); *In re Ga. Senate Bill 202*, 2023 WL 5334615, at *3 (N.D. Ga. Aug. 18, 2023). Ballot harvesting presents an obvious risk of third parties exercising undue influence over voters' votes or even committing outright fraud by intercepting or altering mail ballots. Strach Rep., R.44-17 (documenting fraud associated with ballot harvesting in North Carolina); Carter-Baker Rep., R.44-19, § 5.2 ("Absentee ballots remain the largest source of potential voter fraud. … Citizens who vote at home, [or] at nursing homes … are more susceptible to pressure, … or to intimidation."). In 2005, a bipartisan commission chaired by former President Jimmy Carter and former Secretary of State James Baker recommended that States combat these risks by limiting who may possess an absentee ballot to "the voter, an acknowledged family member," postal workers, and election officials. Carter-Baker Rep., R.44-19, § 5.2.1.

Ohio—like other States including Michigan, Massachusetts, and North Carolina—has done precisely that. *See* NCSL, Summary, *Ballot Collection Laws*, R.44-18; *see generally* State *Amici* Br., R.46-1 (collecting States' ballot-harvesting restrictions). Specifically, Ohio law provides that an absentee ballot may be mailed or returned to the board of elections by various

family members, but "shall be returned by no other person, … except as otherwise provided in section 3509.08," which creates the accommodation of in-home delivery, assistance, and return by election workers. R.C. § 3509.05(C)(1). This rule, including the list of family members who may return another person's absentee ballot, has been in place since 2013. *Id.* § 3509.05(A) (2013).

Another provision, § 3599.21(A)(9)-(10), prescribes criminal penalties for individuals who unlawfully possess or return another person's mail ballot. Subsection (A)(10) has been in place since 2006; HB 458 only renumbered it to account for the insertion of subsection (A)(9). *See id.* § 3599.21(A)(9) (2006). Ohio has never prosecuted a violation of either subsection. Kollar Tr., R.44-20 at 129:4-15. Together, Sections 3509.05(C)(1) and 3599.21(A)(9)-(10) constitute the Ballot Harvesting Rules.

C. Factual Background. Plaintiffs filed this suit challenging the Ballot Harvesting Rules, as amended by HB 458, in December 2023, just before the State prevailed against a different challenge to HB 458. Compl., Dkt. 1; *see Ne. Ohio Coal. for the Homeless v. LaRose*, 2024 WL 83036 (N.D. Ohio Jan. 8, 2024). Kucera has muscular dystrophy, Compl. ¶ 12, and receives assistance from two at-home caregivers, Kucera Tr., R.44-8 at 23:15-42:5. She has voted absentee in many elections in compliance with the Rules. *See id.* at 52:6-21 (March 2024), 66:13-20 (August 2023), 70:19-71:6g (November 2020); Kucera Voting History, R.44-21. In each of those elections, she has requested and received Ohio's remote ballot marking accommodation: she received an emailed, electronic ballot that can be marked with assistive technology, then printed and returned. Kucera Decl., R.42-3 ¶¶ 18-19; *see EOM*, R.44-4 at 203-06; Form 11-G, R.44-9; Accessible Absentee Voting in Ohio, R.44-10. Kucera's mother, who lives nearby, has assisted her with printing and returning her ballot in each of those elections. Kucera Decl., R.42-3 ¶¶ 18-19. In addition to her mother, Kucera's father and two of her sisters also live nearby. Kucera Tr., R.44-8

at 90:22-95:12. Kucera has never asked them for assistance in voting. *Id.* Kucera's three young nieces and nephews also live nearby. *Id.* at 98:23-99:22.

Plaintiff LWVO alleges that its members include "voters with disabilities" but has not identified any specific members—and has disavowed reliance on any member's past injuries caused by the Ballot Harvesting Rules. Compl. ¶ 8; Miller Tr., R.44-22 at 23:19-25:18; 4/8/24 Charlton Email, R.44-23; Rule 30(b)(6) Notice Responses, R.44-24. Plaintiffs therefore have not identified even a single voter who has been unable to vote due to the Rules, including in the March and August 2023 elections and the March 2024 election conducted since HB 458's enactment.

ARGUMENT

I. LWVO Lacks Standing.

The Court should deny summary judgment to LWVO and dismiss it from the case because LWVO lacks Article III standing. "[O]rganizations must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals." *FDA v. All. for Hippocratic Medicine*, 602 U.S. -- (June 13, 2024) (slip op. at 21). "Like an individual, an organization may not establish standing simply based on the 'intensity of [its] interest' or because of strong opposition to the government's conduct." *Id.* (citation omitted). And like an individual, "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *Id.* (slip op. at 22). Accordingly, an organization cannot "manufacture its own standing" by "expend[ing] considerable time, energy, and resources" opposing the challenged government action or engaging in "advocacy" regarding it. *Id.*

Thus, an organization cannot establish standing through evidence that it has "divert[ed] its resources" to advocacy activities "in response to a defendant's actions." *Id.* "[T]hat theory would mean that all the organizations in [Ohio] would have standing to challenge almost every [state]

policy that they dislike, provided they spend a single dollar opposing those policies." *Id.* Article III "does not support such an expansive theory of standing." *Id.*

Just like the *Alliance for Hippocratic Medicine* organizational plaintiffs, LWVO has sought to "manufacture its own standing" to challenge rules it opposes by spending money to "gather" and distribute "information" about them. *Id.* It submitted a declaration claiming that because of HB 458, "LWVO employees and volunteers have been forced to spend significant time and resources" responding to HB 458, including by "tak[ing] away from other types of programming and education." Miller Decl., R.42-5 ¶¶ 9-12. But that is precisely the theory that the Supreme Court has unanimously rejected—so LWVO lacks organizational standing.

To the extent LWVO tries to salvage its standing by arguing that it represents its injured members, an LWVO member's thwarted desire to assist voters with disabilities is not a concrete injury-in-fact sufficient to support standing. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 440 (2021) (holding that concreteness requires "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts"). Moreover, LWVO has disavowed reliance on any past injuries to its members as a basis for its standing—and, in any event, has not provided enough information about any members with disabilities to establish that any member has suffered a concrete injury-in-fact that is traceable to any defendant's action rather than to the member's own preferences. *See, e.g.*, *Hardwick v. 3M Co.*, 87 F.4th 315, 320-21 (6th Cir. 2023); *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866-67 (6th Cir. 2020) ("A self-inflicted injury, by definition, is not traceable to anyone but the plaintiff.").

II. Plaintiffs Have Failed To Prove A Violation Of The ADA Or Section 504.

Plaintiffs argue that they are entitled to a statewide injunction against enforcement of the Ballot Harvesting Rules under the ADA and Section 504 on the theories that Ohio has failed to reasonably accommodate voters with disabilities and that the Rules deny voters with disabilities

equal access to absentee voting. Both theories fail.

A. Plaintiffs have failed to prove a failure-to-accommodate claim.

Plaintiffs argue that Ohio has failed to reasonably accommodate voters with disabilities because it has "not offered a reasonable modification in the administration of Ohio's absentee-voting laws that remedies discrimination against voters with disabilities." Pltf. Mot., R.42-1 at 18. That argument fails for four main reasons. *See* Int. Mot., R.44-1 at 6-13.

First, Plaintiffs' complaint that Ohio has not *offered* an accommodation, *see* Pltf. Mot., R.42-1 at 18, falls flat because they have never *requested* an accommodation. Intervenors adopt the argument from their motion for summary judgment on this point. Int. Mot., R.44-1 at 7-8. Moreover, Plaintiffs are simply wrong on the facts. The undisputed evidence shows that the State and election officials *do* provide accommodations, including in-home delivery and return of mail ballots by election officials. *See supra* pp. 2-4. Plaintiffs, however, identify no voter who has sought, but been denied, any of those accommodations. *See* Pltf. Mot., R.42-1 at 18-19.

Second, Plaintiffs cannot carry their burden to make the required "individualized" showings that their proposed accommodation "would be reasonable under the circumstances," as well as "necessary," for any individual with a disability. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). Instead of even attempting to engage in that fact-specific, individualized inquiry, Plaintiffs demand the same accommodation for every voter with a disability statewide. That failure alone merits summary judgment against Plaintiffs. *See Bennett v. Hurley Med. Ctr.*, 86 F.4th 314, 326 (6th Cir. 2023) (Determining "what constitutes a reasonable accommodation is highly fact-specific, requiring case-by-case inquiry." (cleaned up)).

Even worse for Plaintiffs, their own evidence eliminates any possibility that the uniform accommodation they request could be necessary, or even reasonable, for every Ohio voter with a

disability. Plaintiffs' putative expert, Dr. Kruse, estimates that about 90% of Ohio voters with disabilities who voted by mail ballot did not need *any* assistance to do so, let alone someone else to possess or return their ballot. Kruse Rep., R.44-26 ¶ 17. Within the subset of voters with disabilities who vote by mail and need assistance, Kruse provides no analysis, estimate, or evidence of the number who need someone else to possess or return their ballot. *See id.* ¶¶ 11-21, 55-73; Kruse Tr., R.44-25 at 48:18-50:18, 57:4-58:24, 60:20-24, 61:25-62:5, 131:7-133:24. And within *that* subset of (a subset of) voters, he provides no analysis, estimate, or evidence of the number of such Ohio voters who cannot use a close family member, postal worker, or election official to return their ballot. *See* Kruse Rep., R.44-26 ¶ 11-21, 55-73; Kruse Tr., R.44-25 at 131:7-133:24. So the record is devoid of evidence that Plaintiffs' proposed accommodation is reasonable and necessary for Ohio voters as a whole or for any individual. *PGA Tour, Inc.*, 532 U.S. at 688.

To be sure, Plaintiffs point out that in other states, some voters with disabilities have received assistance with their absentee ballots from non-family members. Pltf. Mot., R.42-1 at 2. But that says nothing about whether those voters *could have* received that assistance from close family members, postal workers, or election officials. *See* Kruse Tr., R.44-25 at 131:10-133:24. This point, therefore, also does not establish that Plaintiffs' proposed accommodation is "reasonable" and "necessary" for any Ohio voter. *See PGA Tour*, 532 U.S. at 688.

Third, even if Plaintiffs could show that their requested accommodation is reasonable, their claims still would fail because they cannot show that Ohio's existing accommodations are *not* reasonable. *See Knox Cnty. v. M.Q.*, 62 F.4th 978, 1000 (6th Cir. 2023); *Bennett*, 86 F.4th at 326. To the contrary, the record evidence shows that Ohio's accommodations are more than generous and reasonable. Everyone agrees that Ohio is statutorily required to send a bipartisan team of election workers to assist Ohio's institutionalized or homebound voters with absentee voting upon

request. *See* Pltf. Mot., R.42-1 at 6. And Plaintiffs' evidence about the use of the mechanism for voters in private homes—including evidence from Cuyahoga County, where Kucera lives—is consistent with the State's evidence from two counties that they have provided the service whenever requested. Gweon Decl., R.42-22 ¶¶ 38-42; *id.* at PageID#106, 108; *See* Perlatti Decl., R.43-3 ¶¶ 17, 20; Herron Decl., R.43-4 ¶¶ 11-12. Plaintiffs have provided no evidence of any voter who has ever requested, but been denied, this accommodation. *See* Pltf. Mot., R.42-1 at 18-19.

Plaintiffs instead attempt to argue that Kucera is not eligible for this accommodation because she can leave her home, but only with great effort or expense. But that argument only underscores the problems with attempting to adjudicate the reasonableness of an accommodation that has never been requested. *See* Int. Mot., R.44-1 at 7-8. Because Kucera has never requested this accommodation, she has never been denied it and, thus, cannot make out a failure-to-accommodate claim. *See Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 870 (6th Cir. 2007); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046-47 (6th Cir. 1998); *Marble v. Tennessee*, 767 F. App'x 647, 652 (6th Cir. 2019).

And while Ohio courts have yet to determine what it means for a voter with a disability to be "unable" to leave her home for purposes of this accommodation, the existing practices in the State, including Cuyahoga County, demonstrate that Kucera would receive this accommodation if she requested it. So, too, does the case law in analogous contexts, which indicates that the operative term "unable" refers to a significant hardship, not a literal impossibility. *See, e.g.*, *State ex rel. Jeld-Wen, Inc. v. Indus. Comm'n of Ohio*, 2023-Ohio-2593 ¶¶ 4, 8-9 (Ohio Ct. App. 2023) (R.C. § 4123.56(F)'s entitlement to disability payments if employee is "unable to work" satisfied where work would be possible but would be painful or interfere with employee's recovery); *State v. Williamson*, 2024-Ohio-1599 ¶¶ 45-46 (Ohio Ct. App. Apr. 25, 2024) (R.C. § 2929.19(B)(1)'s

exemption from mandatory criminal fines for offenders "unable to pay" entails a flexible inquiry into the offender's financial situation, not literal inability to pay); *State v. Sullens*, 2022-Ohio-3050 ¶ 25 (Ohio Ct. App. Sept. 1, 2022) (same); *State v. Moore*, 2021-Ohio-1379 ¶¶ 105-06 (Ohio Ct. App. Apr. 20, 2021) (prospective juror is "unable to perform duties" under R.C. § 2945.29 where she has a scheduling conflict, even if jury service would still be possible, although inconvenient). Kucera's representation that voting in person would be "a tremendous burden" for her thus is an adequate good-faith basis for representing on the form that she qualifies for this accommodation. Kucera Decl., R.42-3 ¶¶ 9-13; *cf.* R.C. § 3599.36 (offense of election falsification applies to "*knowingly* stat[ing] a falsehood" (emphasis added)). And to the extent Plaintiffs' putative expert disagreed, *see* Pltf. Mot., R.42-1 at 7, he admitted that he was not offering a legal opinion on the Election Code's meaning and is not qualified to do so. Kruse Tr., R.44-25 at 141:22-144:24.

Thus, all that remains is that Kucera would "prefer" to vote with the assistance of "her caregivers." Pltf. Mot., R.42-1 at 3. That preference is irrelevant: a public entity "must provide *reasonable* accommodations" when requested, "not the *best* accommodations or [the plaintiff's] *preferred* accommodations." *Knox Cnty.*, 62 F.4th at 1001. "Title II does not require a plaintiff to receive her 'preferred' accommodation, but merely a reasonable one that provides 'meaningful access' to the public entity." *Bennett*, 86 F.4th at 326 (citation omitted). Kucera's preference cannot overcome Plaintiffs' failures of proof, much less justify enjoining Ohio's election laws.

Fourth, Plaintiffs' claim fails because they seek a fundamental alteration, not a reasonable accommodation, of the Ballot Harvesting Rules. *See* Int. Mot., R.44-1 at 10-13. Invalidating the Rules for all voters with a disability is irreconcilable with the Rules' basic purpose, would transform the State's policy for safeguarding elections by controlling the custody of completed mail ballots into something else entirely, and would interfere with third-party rights. *See id.*

B. Plaintiffs' novel "denial of equal access" claim lacks a legal and factual basis.

Plaintiffs also assert that failing to provide disabled voters with "equal access" to absentee voting is a freestanding violation of the ADA. Pltf. Mot., R.42-1 at 15-16. They cite the Department of Justice's ADA regulation as the purported source of this "equal access" guarantee, *see id.*, but the regulation *never uses that phrase*. That is because neither the ADA nor Section 504 guarantees "equal access." Indeed, the law and facts foreclose any such claim here for at least three reasons.

First, neither the ADA nor Section 504 creates an equal-access claim. Rather, as the Sixth Circuit has made clear, a plaintiff can prove an ADA or Section 504 claim only "under two available theories: intentional discrimination and failure to reasonably accommodate." *Knox Cnty.*, 62 F.4th at 1000; *see Jones v. City of Detroit*, 20 F.4th 1117, 1119 (6th Cir. 2021) ("A Title II plaintiff may bring a claim for intentional discrimination or for failure to provide a reasonable accommodation."); *Roell v. Hamilton Cnty.*, 870 F.3d 471, 488 (6th Cir. 2017) ("Two types of claims are cognizable under Title II: claims for intentional discrimination and claims for a reasonable accommodation."). The Sixth Circuit has rebuffed previous attempts to add new categories of ADA claims "in addition to traditional intentional discrimination and failure-to-accommodate theories." *Knox Cnty.*, 62 F.4th at 1001.

These holdings flow from the plain statutory text: the statutes (and regulations) ask whether an individual with a disability is "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" any program or activity offered by the defendant. 42 U.S.C. § 12132 (ADA); 29 U.S.C. § 794(a) (Rehabilitation Act); 28 C.F.R. § 35.130(b) (ADA implementing regulation). Contrary to Plaintiffs' view, "Title II … requires that public entities make reasonable accommodations for disabled individuals so as not to deprive them of *meaningful access*"—not necessarily perfectly equal access—"to the benefits of the services such entities

provide." *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004) (emphasis added); *see Alexander v. Choate*, 469 U.S. 287, 301 (1985) ("The [Rehabilitation Act] requires … *meaningful access* to the benefit." (emphasis added)).

Nor could an equal-access claim exist. Such a claim would swallow the existing modes of proving ADA and Section 504 violations, convert those statutes into strict liability regimes, and impose inordinate burdens on state and local government entities. No plaintiff would *ever* try to prove intentional discrimination or failure to accommodate if plaintiffs were entitled to relief merely upon a showing of lack of "equal access." And providing perfectly equal access frequently would require fundamental alterations to government programs, services, or activities—which the ADA and Section 504 categorically do not mandate. *See PGA Tour*, 532 U.S. at 688.

Plaintiffs reach for this novel equal-access claim only because they cannot prove either of the claims available under the ADA and Section 504. As explained, Plaintiffs cannot show a failure to accommodate. *See supra* pp. 8-11. Plaintiffs, moreover, have not argued that the Ballot Harvesting Rules spring from *intentional discrimination* against voters with disabilities—nor could they, in the face of Ohio's assiduous efforts to accommodate voters. An intentional-discrimination claim requires proof of a discriminatory motive—as the but-for cause for an ADA claim, and as the sole cause for a Section 504 claim. *See Finley v. Huss*, 102 F.4th 789, 823 (6th Cir. 2024). That is a high bar. For example, a town ordinance banning farm animals on residential properties that was prompted by the presence of a service animal on a residential property was not intentionally discriminatory where the town was motivated by the resulting unsanitary conditions rather than discriminatory animus. *See Anderson v. City of Blue Ash*, 798 F.3d 338, 356-60 (6th Cir. 2015). There is no support whatsoever for such a claim in the record.

Second, independently, Plaintiffs are wrong to frame the question as whether voters with

disabilities have been excluded from *absentee* voting rather than Ohio's entire suite of voting options. The correct analytical unit is Ohio's program of voting as a whole, since voting options are closely interrelated and work together as a whole. *See Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107 (11th Cir. 2011) (proper analytical frame was "County's voting program"); *Kerrigan v. Phila. Bd. of Election*, 2008 WL 3562521, at *13 (E.D. Pa. Aug. 14, 2008) (assessing city's "entire voting program, encompassing all of its polling locations throughout the City, as well as its alternative and absentee ballot programs"); 28 C.F.R. § 35.150(a) (requiring public entity to "operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities") (emphasis added); *cf. Tennessee v. Lane*, 541 U.S. 509, 524-25 (2004) (Title II enacted to ensure access to "public services, programs, and activities, including ... voting"). Plaintiffs cite a Sixth Circuit case that they say is relevant to this issue, but the question "merely lurk[ed] in the record" in that case. *Galeana v. Garland*, 94 F.4th 555, 560 (6th Cir. 2024) (citation omitted); *see* Pltf. Mot., R.42-1 at 15. Properly viewed, Ohio's voting program offers abundant opportunities to vote and is replete with accommodations for voters with disabilities. *See supra* pp. 2-4.

Third, regardless, Plaintiffs' equal-access theory fails on its own terms. As Intervenors have explained, Int. Mot., R.44-1 at 6-7, the only possible conclusion from the record—which reflects that Kucera has consistently been able to vote and is devoid of any evidence that the Ballot Harvesting Rules have prevented any voter with a disability from voting—is that Plaintiffs have failed to prove a lack of equal access. Plaintiffs have not even mustered any evidence that the Rules place increased burdens on access to absentee voting by voters with disabilities; their lone expert, Dr. Kruse, could not identify any voters affected by the Rules and conducted no analysis of the post-HB 458 elections. Kruse Tr., R.44-25 at 22:7-27:6, 35:11-36:4, 132:7-21, 133:18-24, 155:17-

156:18. At most, Plaintiffs have shown that Kucera would prefer to receive assistance from non-family members. Pltf. Mot., R.42-1 at 3 ("Ms. Kucera would prefer to rely on her caregivers."). But the same could be true of voters without disabilities, who likewise cannot have their absentee ballots returned by non-family members. So that preference does not prove a denial of equal access to absentee voting, even if Plaintiffs' equal-access theory were legally viable in the first place.[1]

III. Section 208 Does Not Preempt The Ballot Harvesting Rules.

Plaintiffs also seek summary judgment on their claim that Section 208 of the VRA preempts the Ballot Harvesting Rules. As Intervenors have explained, *see* Int. Mot., R.44-1 at 13-16, text, context, and statutory purpose demonstrate that Section 208 leaves room for reasonable State rules on voter assistance that do not unduly burden voters, *see also* S. Rep. No. 97-417, at 63 (1982), 1982 WL 25033 (acknowledging that Section 208 leaves States free to "establish necessary election procedures" so long as they are "designed to protect the rights of voters" and do not "unduly burden" the right to vote). That reading is faithful to the text and properly keyed to the concerns animating Section 208—ensuring that voters with disabilities are able to receive non-coercive assistance "in[] the voting booth" while permitting States to enact voter-protective rules that do not "unduly burden" the right to vote. *See id.* at 62.

The text, context, and statutory purpose also show that Section 208 has the least forceful, if any, application to state laws regulating absentee voting. As Congress made clear when adopting Section 208, "State provisions" were to be "preempted only to the extent that they unduly burden"

[1] In a single sentence, Plaintiffs hint at another novel theory—that the ADA and Section 504 function through obstacle preemption of entire state laws. *See* Pltf. Mot., R.42-1 at 14. Again, the well-settled framework for analyzing claims under both laws leaves no room for that theory, which would obliterate the existing individually tailored analysis for ADA and Section 504 claims. Regardless, Plaintiffs fail to develop this argument, so the Court need not address it. *See, e.g.*, *Novak v. City of Parma*, 33 F.4th 296, 312 (6th Cir. 2022).

the right to vote, "with that determination being a practical one dependent upon the facts." S. Rep. No. 97-417, at 63. Moreover, absentee voting is not part of the constitutional or statutory "right to vote," Int. Mot., R.44-1 at 15 (collecting cases), and Congress intended Section 208 "to permit [covered voters] *to bring into the voting booth* a person whom the voter trusts and who cannot intimidate him," S. Rep. No. 97-417, at 62. (Plaintiffs quote part of this sentence, but misleadingly omit the italicized portion. Pltf. Mot., R.42-1 at 12.)

Plaintiffs' contrary argument rests on a flawed textual premise: that the word "a" in Section 208's phrase "a person of the voter's choice" entitles the voter to choose "any" assistor. Pltf. Mot., R.42-1 at 11. But the statute says "a," not "any." *See Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 619 (E.D. Mich. 2020), *rev'd in part on other grounds*, 860 F. App'x 419 (6th Cir. 2001).

So Plaintiffs try to argue—from one concurring opinion and one out-of-circuit opinion—that "a" always means "any," but that is incorrect. *See McFadden v. United States*, 576 U.S. 186, 191 (2015) ("When used as an indefinite article, 'a' means '[s]ome undetermined or unspecified particular.'" (quoting *Webster's New International Dictionary* 1 (2d ed. 1954)); *see also Niz-Chavez v. Garland*, 593 U.S. 155, 160-61 (2021) (acknowledging that judges must "exhaust 'all the textual and structural clues' bearing on [a statute's] meaning," and reasoning that "'a' notice would seem to suggest just that: 'a' single document"); *United States v. Soto*, 794 F.3d 635, 653 (6th Cir. 2015) (concluding that "a court" refers only to *district* courts after consulting textual and contextual signals); *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72-73 (1st Cir. 2006) ("'an' means 'one,'" in "accord[] with one of the [statute's] central purposes"), *aff'd*, 552 U.S. 364 (2008); *Foo v. Tillerson*, 244 F. Supp. 3d 17, 23 (D.D.C. 2017) (rejecting argument that "the term 'an individual'" was "so broad as to include *any* individual or entity," based on statutory context).

The two cases Plaintiffs cite to support their construction do not suggest otherwise. The

concurring opinion they cite merely concludes that text and context, including the presumption against retroactivity, there supported the narrow conclusion that "'a sentence' *as used in § 403(b)* means any kind of sentence, not just a valid or non-vacated one." *United States v. Carpenter*, 80 F.4th 790, 791 (6th Cir. 2023) (Kethledge, J., concurring in denial of rehearing en banc) (emphasis added). And Plaintiffs claim that the Eleventh Circuit collected cases supporting their view that "a" always means "any," but that opinion said the opposite, concluding that "a" has "more restrictive" meanings, too—such as "one"—depending on the plain terms, context, and purpose of the statute at issue. *United States v. Alabama*, 778 F.3d 926, 932 (11th Cir. 2015).

Plaintiffs' smattering of other cases construing Section 208 lend no more persuasive support to their proposed construction. For example, *Carey v. Wisconsin Elections Commission* had no occasion to address whether Section 208's use of "a" means "any" because the state law challenged there prohibited *every* third party from returning another person's ballot. *See* 624 F. Supp. 3d 1020, 1024 (W.D. Wis. 2022) (cited at Pltf. Mot., R.42-1 at 10.). The unpublished decision in *Disability Rights N.C. v. N.C. State Board of Elections*, 2022 WL 2678884 (E.D.N.C. July 11, 2022) (cited at Pltf. Mot., R.42-1 at 11) overlooked Section 208's plain text, legislative history, and statutory purpose. Other cases involved individual relief, not statewide relief, for individuals who had been unable to vote due to the challenged rules and the COVID-19 pandemic, *see, e.g.*, *Democracy N.C. v. N.C. State Bd. of Elecs.*, 476 F. Supp. 3d 158, 239-40 (M.D.N.C. 2020) (cited at Pltf. Mot., R.42-1 at 13), or did not involve absentee voting at all, *see OCA-Greater Hous. v. Texas*, 867 F.3d 604 (5th Cir. 2017) (cited at Pltf. Mot., R.42-1 at 13); *Ark. United v. Thurston*, 626 F. Supp. 3d 1064 (W.D. Ark. 2022) (cited at Pltf. Mot., R.42-1 at 13).

In fact, the brief submitted by Plaintiffs' *amici* shows that the *majority* of state laws regulating ballot harvesting would be preempted under Plaintiffs' overly expansive reading of

Section 208. *See* State *Amici* Br., R.46-1 at 6-14. That includes the laws in *two of the amici States* themselves. After all, if voters with disabilities are entitled to assistance in returning their ballot from *any* individual of their choosing (other than their employer or an officer or agent of their employer or union), then they are entitled to such assistance from "a candidate" for office on that ballot, someone younger than "18 years old," and someone who has not "executed an affidavit." *See id.* at 7-8. But *amicus* Maryland prohibits such individuals from returning someone else's ballot. *See* Md. Code. Ann., Elec. Law § 9-307. So, too, would such a voter be entitled to assistance from someone who has already returned a total of "five ballots" for other individuals, *see* State Amici Br., R.46-1 at 8, which *amicus* New Jersey prohibits, *see* N.J. Stat. Ann. § 19:63-16(d).

Notably, Plaintiffs do not argue that Ohio's Ballot Harvesting Rules unduly burden anyone's right to vote—which is the correct test for Section 208 preemption, as several other courts (not just one as Plaintiffs claim, *contra* Pltf. Mot., R.42-1 at 13) have recognized. Int. Mot., R.44-1 at 15 (collecting cases). Nor could they, since they have not identified anyone who has been unable to vote—or even anyone who has been unable to vote absentee. Again, Plaintiffs' own evidence shows that most voters with disabilities can vote absentee without assistance, and that most voters who need assistance with daily activities already receive that assistance from family. *See supra* pp. 8-9. And they have no evidence at all that *any* voters would be unduly burdened by complying with the Ballot Harvesting Rules.

Finally, Intervenors incorporate their argument that Plaintiffs lack a cause of action to enforce Section 208 in the first place. Int. Mot., R.44-1 at 16-17.

IV. Plaintiffs Are Not Entitled To An Injunction.

Even if Plaintiffs' claims could survive summary judgment, the Court still should deny their requested injunctive relief for at least three reasons. *First*, the public interest in promoting voter confidence and avoiding voter confusion forecloses granting Plaintiffs relief shortly before

a hotly contested Presidential election. It is simply too late now for this Court to order changes to the Ballot Harvesting Rules for the upcoming 2024 general election in which millions of Ohioans will cast their ballots. Federal court orders changing voting and election rules on the eve of an election harm voter "[c]onfidence in the integrity of our electoral processes" so "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Such orders create an unwarranted risk of "voter confusion and consequent incentive to remain away from the polls," thus eroding public trust in elections and undermining participatory democracy. *Id.* at 4-5; *see also Dem. Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring) ("Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence.").

These "considerations specific to election cases" warrant denial of an injunction related to the Ballot Harvesting Rules ahead of the 2024 general election. *Purcell*, 549 U.S. at 4. Absentee voting by mail for military and overseas voters begins on September 20, barely more than three months from today—and absentee ballots must be prepared, approved, printed, and mailed to voters in advance of that date. *See* Ohio Sec'y of State, https://www.ohiosos.gov/elections/voters/current-voting-schedule/2024-schedule/ (last visited June 10, 2024). Even absentee voting by mail for domestic voters in Ohio begins on October 8, 2024, less than four months from today. *See id*. That is simply too short a period for the Court to invalidate the Ballot Harvesting Rules now. *See, e.g.*, *Purcell*, 549 U.S. at 4-5. To change the rules governing absentee ballot collection and return mid-election year engenders a particularly acute risk of voter confusion and erosion of voter confidence. *See, e.g.*, *id.* And the Court has no basis to do so on this record, where Plaintiffs have failed to identify even a single voter who has been unable to vote due to the Rules.

Second, any harm to Plaintiffs from denying the injunction is outweighed by the harm to Ohio, Intervenors, and Ohio voters from granting one. Invalidating a State's duly enacted law "clearly inflicts irreparable harm," *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018), and does irreparable "damage … to the authority of" the Ohio Legislature, *Dem. Nat'l Comm.*, 141 S. Ct. at 30 (Gorsuch, J., concurring). Enjoining the Ballot Harvesting Rules would also irreparably harm Intervenors by eroding Republican voters' confidence in the State's elections, threatening to reduce Republican voter turnout, and exposing Intervenors to new illegitimate competitive tactics in the middle of an election year that could change the outcome of one or more elections in November. *See* Sagester Decl., Ex. A; Latcham Decl., Ex. B.

Finally, in all events, the Court should deny Plaintiffs' overbroad statewide injunction seeking to invalidate the Ballot Harvesting Rules for all Ohio voters with disabilities. "[T]he nature and scope of the remedy are to be determined by the violation" and "federal-court decrees must directly address and relate to the … violation itself." *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977); *see Arizona v. Biden*, 40 F.4th 375, 395-96 (6th Cir. 2022) (Sutton, C.J., concurring). Here, the Court cannot order injunctive relief based upon any claims or evidence proffered by LWVO because LWVO lacks standing. *See supra* Part I. In any event, even on their own theories, Plaintiffs' evidence shows that the Ballot Harvesting Rules do not violate *any* rights of the vast majority of Ohio voters with disabilities, who vote without any assistance (let alone assistance in returning mail ballots). *See supra* p. 9. At most, any injunction must be tailored to individual voters whom the record shows suffered a "violation" of their federally protected rights and may not sweep in voters who have suffered no such violation. *Milliken*, 433 U.S. at 281-82; *see also Democracy N.C.*, 476 F. Supp. 3d at 239-40 (cited at Pltf. Mot., R.42-1 at 13).

CONCLUSION

The Court should deny Plaintiffs' motion for partial summary judgment.

Dated: June 14, 2024

Respectfully submitted,

/s/ John M. Gore

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CERTIFICATE OF SERVICE

I certify that on June 14, 2024, a copy of the foregoing Opposition to Plaintiffs' Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ John M. Gore
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LOCAL RULE 7.1(F) CERTIFICATION

Intervenor-Defendants certify that this case has been assigned to the expedited case management track and that this memorandum adheres to the page limitations specified in the Court's order of May 7, 2024.

/s/ John M. Gore
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