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

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

MEMORANDUM IN OPPOSITION TO
STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF ISSUES

1. Whether State Defendants[1] have failed to meet their burden to show entitlement to judgment as a matter of law regarding Plaintiffs' Voting Rights Act claim and Plaintiffs' Americans with Disabilities Act and Rehabilitation Act claims.

2. Whether State Defendants have failed to meet their burden to show entitlement to judgment as a matter of law and that there are no genuine disputes of material fact regarding Plaintiffs' claim that the Challenged Provisions are unconstitutionally vague.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State has failed to demonstrate that there is no genuine dispute as to any material fact and that they are entitled to judgment as a matter of law. To the contrary, as Plaintiffs establish in their Memorandum in Support of Motion for Partial Summary Judgment (Pl. Br.), and as the State fails to refute, the State's enforcement of Ohio's criminal restrictions on who may return an absentee ballot, R.C. 3599.21(A)(9),(10), 3509.05(C)(1) (Challenged Provisions), with respect to voters with disabilities violates Section 208 of the Voting Rights Act (VRA), Title II of the Americans with Disabilities Act (ADA), and the Rehabilitation Act (RA). In addition, the State fails to refute Plaintiffs' vagueness claim, offering a *less* clear interpretation of the vague terms "possess" and "return" than before, and asserting, contrary to undisputed evidence, that the Challenged Provisions have never been enforced. At a minimum, genuine issues of material fact preclude summary judgment for State Defendants. The Court should deny their motion.

ARGUMENT

I. Section 208 of the VRA Preempts the Challenged Provisions' Limits on Who Can Assist Voters with Disabilities.

The Challenged Provisions cannot be squared with Section 208's plain text. *See* Pl. Br. 11-13. While Section 208 allows covered voters to choose almost anyone to help them with voting,

[1] "State Defendants" or "the State" are Ohio Secretary of State Frank LaRose (SOS) and Ohio Attorney General Dave Yost (AG).

Ohio's laws do the opposite, criminalizing almost all assistance to absentee voters with disabilities. Under a straightforward application of conflict preemption, the state statutes thus "must yield to the law of Congress." *Gibbons v. Ogden*, 22 U.S. 1, 210 (1824). None of the State's arguments compels a contrary conclusion. The Court should deny the State's motion and grant Plaintiffs judgment as a matter of law.

A. The State distorts Section 208's plain text.

Ignoring the mounting federal-court consensus that Section 208 guarantees covered voters an assistor of their choosing, *see* Pl. Br. 13, State Defendants attempt to rewrite the text of Section 208 to include a vague exception for states to impose additional limitations, *see* State Defs.' Mem. in Support of Mot. for Summ. J. (St. Br.) 12. The State's tortured reading not only swallows Section 208 whole but creates untenable ambiguity any time a federal statute uses the indefinite article "a." This Court should not sanction such a result.

1. Section 208's unambiguous command centers the voter's choice, not the State's.

Section 208's text is clear: covered voters must be allowed assistance from "a person of the voter's choice," except those associated with the voter's employer or union. 52 U.S.C. 10508. Subject to these two narrow exceptions, qualified voters may pick anyone to assist them. Because the Challenged Provisions "impose[] a limitation on voter choice unsupported by, and therefore in conflict with, Section 208," they are preempted. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017).

No voter seeing the phrase "a person of the voter's choice" would intuit that virtually all persons other than certain relatives could be excluded, as the Challenged Provisions require. Rather, ordinary language dictates that a household member, caregiver, grandchild, or other trusted individual should each be considered "a person." And because Congress made only two

exceptions, both employment-related, the textual canon of *expressio unius* applies. When Congress "explicitly enumerates certain exceptions to a general [rule], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013). Here, "if Congress intended to exclude more categories, or to allow states to exclude more categories, it could have said so." *Disability Rts. N.C. v. N.C. State Bd. of Elections* (*DRNC I*), 602 F. Supp. 3d 872, 878 (E.D.N.C. 2022). Congress did not, and State Defendants present no evidence to the contrary.

In a last-ditch effort to elude preemption, the State presents a parade of horrible assistors, contending that Congress could not have intended to allow those "convicted of voter fraud" or currently "incarcerated" to assist voters with disabilities in voting. St. Br. 13. But Ohio cannot substitute its unfounded policy concerns for Congress's considered judgment—the only judgment relevant to the preemption inquiry. *See Arizona v. United States*, 567 U.S. 387, 399 (2012). In any event, as written, the Challenged Provisions do not target these boogeymen. No characteristic other than familial relation matters. They *permit* any of these purported bad actors to assist any absent voter, so long as they are an enumerated relative. And they *prohibit* anyone from helping disabled voters transmit absentee ballots except for a few enumerated relatives. The Challenged Provisions thus obstruct Congress's purpose, as manifest in Section 208's plain language, and are preempted.

2. Dictionaries, precedent, and other statutes confirm "a" means "any."

Congress's use of the indefinite article "a" in the phrase "a person of the voter's choice" indicates its intent to allow the voter to choose *any* assistor. Around Section 208's enactment and since, dictionaries have listed "any" as a synonym for "a." *See, e.g.*, *A*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983). And courts "have repeatedly . . . found" them synonymous. *United States v. Alabama*, 778 F.3d 926, 932-33 (11th Cir. 2015) ("The plain meaning of the term 'an election' is 'any election.'") (collecting cases); *see Lee v. Weisman*, 505 U.S. 577,

614 n.2 (1992) (Souter, J., concurring) ("[T]he indefinite article before the word 'establishment' is better seen as evidence that the [Establishment] Clause forbids any kind of establishment . . . ."); *United States v. Deuman*, 568 F. App'x 414, 421 (6th Cir. 2014) (the relevant rule's "use[of] the indefinite article 'an' . . . [b]y its terms, [means it] applies to *any* witness"). The presumption that "a" means "any" is so strong that even when Congress amends a statute to change "an" to "any," it does not alter the law's scope. *Garcia v. Sessions*, 856 F.3d 27, 36-37 (1st Cir. 2017) ("'[A]ny' is not clearly more sweeping than . . . 'an.'"). Put simply, the State's focus on "a" versus "any" is a distinction in search of a difference.

State Defendants omit any reference to the many recent federal cases confirming Plaintiffs' view of Section 208. *Compare* St. Br. 11-12, *with* Pl. Br. 13. Their contrary argument hinges on a single, wrongly decided case with materially different facts. *Compare* Pl. Br. 13, *with* St. Br. 11-12 (citing *Priorities USA v. Nessel* (*Priorities I*), 487 F. Supp. 3d 599 (E.D. Mich. 2020); *Priorities USA v. Nessel* (*Priorities II*), 628 F. Supp. 3d 716 (E.D. Mich. 2022)). *Priorities II* also overlooked the basic principle that "a" is generally synonymous with "any"; it is thus of no persuasive value on this point and should not be followed. 628 F. Supp. 3d at 732-33. *Priorities II* discussed the separate concept that "the indefinite article 'a' . . . is non-specific and non-limiting, [and] the definite article 'the,'. . . is specific and limiting." 628 F. Supp. 3d at 732-33. The lack of specificity imposed on the referent, here "person," has no bearing on whether "a" means "any."

No other federal court reviewing Section 208 has interpreted "a person" the way the State suggests. *See, e.g.*, *Ark. United v. Thurston (Ark. United II)*, 626 F. Supp. 3d 1064, 1085 (W.D. Ark. 2022) (holding that Section 208 "allow[s] voters to choose any assistor they want" other than their employer or union); *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1032 (W.D. Wis. 2022) (similar); *DRNC I*, 602 F. Supp. 3d at 877 (similar); *United States v. Berks Cnty.*, 277 F.

Supp. 2d 570, 580, 584 (E.D. Pa. 2003) (similar). And to the extent there is any marginal difference between the use of "a" and "any," it cannot bear the immense weight that the State places on it. Federal courts have rejected this very argument as to Section 208: "The use of the indefinite article 'a' does not show intent by Congress to allow states to restrict a federally created right, for Congress does not 'hide elephants in mouseholes.'" *DRNC I*, 602 F. Supp. 3d at 878 (quoting *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001)).

Moreover, if adopted, the State's approach could trigger a cascading effect, undermining rights conferred by Congress in other statutes and, untenably, inviting states to rewrite federal legislation whenever Congress refers to "a person," as it often does.[2] Indeed, despite Congress's frequent references to "a person," the State has not identified another instance of Congress using an indefinite article to impliedly delegate authority to each state to define the universe of applicable persons, and thus to narrow the scope of federal law.

B. Section 208 contains neither a reasonableness nor an undue-burden test.

State Defendants insist that the Challenged Provisions comply with Section 208 because it allows states to "set some limits" or adopt "reasonable limitation[s]" on the right to assistance. St. Br. 12-13. Not so. The State's view would swallow Section 208, only preventing states from banning *all* assistance to voters with disabilities, and allowing states to impose virtually any limitation in the name of "election integrity." St. Br. 13, 15. State Defendants thus turn the preemption inquiry on its head, interpreting Section 208 in reverse: to affirm *states'* authority to regulate voters' ability to seek assistance, even though the statute is designed to protect *voters'*

[2] For example, the Religious Land Use and Institutionalized Persons Act (RLUIPA) forbids imposing a "substantial burden" on the religious exercise of "a person" residing in an institution, except when the burden is the least restrictive means of furthering a compelling government interest. 42 U.S.C. 2000cc-1. Under State Defendants' interpretation of "a person," states could identify disfavored religious groups—just as the Challenged Provisions disfavor a voter's caregivers from handling ballots—and carve them out of RLUIPA's free-exercise protections, all because of a single letter. That cannot be the result Congress intended.

rights from state interference. *See DRNC I*, 602 F. Supp. 3d at 880 ("Congress' intent in enacting Section 208 was to protect the choice of vulnerable citizens and give them meaningful access to the vote. This does not support defendants' contention that states may further limit voters' choice of assistant and burden their access to the voting process.").

State Defendants decry the "absurdity" of prohibiting states "from enacting almost any reasonable limitation whatsoever" on the federal right to assistance. St. Br. 12-13. But that is precisely how conflict preemption works: states cannot condition federal rights. *See Alabama*, 778 F.3d at 934. Properly understood, Section 208 proscribes any state regulation that impedes the federal mandate that disabled voters be allowed an assistor they choose; such regulations cannot be considered "reasonable" or permissible. *See* Pl. Br. 11-12.

Unable to muster support for the Challenged Provisions in Section 208's text, the State turns to the legislative history to graft an undue-burden test onto the federal statute. "But legislative history is not the law," *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018), and it cannot be used to displace the clear statutory text that "alone . . . resolve[s] this case." *Pereira v. Sessions*, 585 U.S. 198, 209 (2018); *see Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[Courts] do not resort to legislative history to cloud a statutory text that is clear."). The State's selective cites to a portion of the Senate Judiciary Committee's Report, St. Br. 13-14, are unavailing. Indeed, "there is *nothing* in the statutory language to suggest that a state may burden, unduly or otherwise, the right [to choose an assistor] articulated in § 208." *DRNC I*, 602 F. Supp. 3d at 877 (cleaned up, emphasis added) (quoting *Ark. United v. Thurston (Ark. United I)*, 2020 WL 6472651, at *4 (W.D. Ark. Nov. 3, 2020)); *see also Carey*, 624 F. Supp. 3d at 1033. Congress can create, and has created, burden-based tests, *see, e.g.*, 42 U.S.C. 2000cc-1 (RLUIPA); it did not here.

Even if undue burden were a proper consideration, which it is not, the Challenged

Provisions *do* unduly burden disabled voters' right to an assistor of their choosing. State Defendants' argument that the Challenged Provisions do not impose an undue burden because they permit "no fewer than 19 different individuals" to assist voters fails. St. Br. 13. The issue is preserving voters' choice, not the raw number of permitted assistors.[3] *See OCA*, 867 F.3d at 615 (holding preempted law limiting universe of assistors to all registered voters in same county). Voters like Ms. Kucera lack any choice at all. She can only rely, at best, on one person on the list of 19, because her mother "is the only relative who is able and willing to help [her] send [her] absentee ballot." ECF 42-3 (Kucera Dec.) ¶16; ECF 43-5 (Kucera Dep.) 90:13-99:22. Requiring her to rely on her ailing mother when her caregivers stand ready to assist her, *see* ECF 42-4 (Mann Dec.) ¶¶3, 9-10, unduly burdens Ms. Kucera's right to assistance of her choice. Worse, the State ignores that the Challenged Provisions disenfranchise absentee voters lacking any available enumerated relatives. Pl. Br. 5-7, 18-19.

Even if the Court were inclined to look beyond the text, Section 208's legislative history only reaffirms that "the one thing states cannot do is disallow voters the assistor of their choice." *Ark. United II*, 626 F. Supp. 3d at 1087; *see* Pl. Br. 12-13. It is this purpose of Congress, not Ohio's policy interests, that drives the preemption inquiry. *See Arizona*, 567 U.S. at 399. The Supremacy Clause precludes Ohio from second-guessing Congress's calculus and "narrow[ing] the right guaranteed by Section 208." *OCA*, 867 F.3d at 615.

C. The State's anticommandeering argument is meritless.

The Court should reject State Defendants' nonsensical argument that confuses the distinct concepts of federal preemption and commandeering. The Supreme Court has long held that "*all*

[3] State Defendants ask the Court to ignore the logical result of their interpretation of Section 208. *See* St. Br. 13. But if the right to assistance from "a person of the voter's choice" is satisfied simply because the voter ostensibly has a choice when the state limits the list of who can be chosen, the State *could* limit the list to all but two people and allow the voter to pick between them. Validating this illusion of choice would render Section 208 a dead letter.

state officials" owe a duty "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality [is] that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid." *Printz v. United States*, 521 U.S. 898, 913 (1997). A federal law crosses the line into unconstitutional commandeering only if it issues "a direct command to the States," *Murphy v. NCAA*, 584 U.S. 453, 480 (2018), by, for example, "requir[ing] the [State] Legislature to enact any laws or regulations," *Reno v. Condon*, 528 U.S. 141, 151 (2000). But a federal law that "confer[s] . . . rights on private actors," as Section 208 does, is "just like any other federal law with preemptive effect." *Murphy*, 584 U.S. at 478-80.

Section 208 provides no command, direct or otherwise, to states or their legislatures or officers; rather, it extends covered voters, private actors, a federal right to choose who will assist them in casting their ballot. Thus, the federal statute preempts but does not commandeer. Section 208 does not "force[Ohio] to enact *new* statutes," St. Br. 15, even if existing state laws are invalidated in full—which is not what Plaintiffs seek. Should the Court enjoin the Challenged Provisions, Ohio still may enforce the provisions with respect to most voters, just not disabled voters and their chosen assistors on whom their ability to vote depends. And State Defendants will remain free to enforce Ohio's host of other laws that seek to preserve election integrity.

Ohio may *choose* to enact new laws, as is its prerogative, but aside from vague generalizations, the State does not explain what laws Section 208 purportedly requires Ohio to enact. Nor could they. Nothing in Section 208 compels passage of *any* law. State Defendants' novel theory of commandeering would render the conflict-preemption doctrine a nullity and has not been embraced by any court. This Court should not be the first to do so.

II. The State is Not Entitled to Summary Judgment on the ADA and RA claims.

The State principally argues that because some voters have "alternative, feasible methods of returning absentee ballots," St. Br. 4, the State is complying with the ADA and RA. The State

is mistaken.[4] For those whose disabilities necessitate assistance with voting absentee, these methods provide, at best, unreliable access, and at worst, no access at all. To avoid discrimination against disabled voters, Plaintiffs propose a reasonable modification: that the State allow absentee voters with disabilities to choose a person to assist them. The State has not and cannot show that doing so would fundamentally alter Ohio's absentee-voting program. Accordingly, the Court should deny State Defendants' motion for summary judgment and grant Plaintiffs' motion instead.

A. No alternative voting method provides voters with disabilities meaningful access to Ohio's absentee-voting program.

This case is not about a "mere preference for one method of absentee voting over another" because none of the "alternative[s]" the State identifies, *see* St. Br. 4-7, reliably helps disabled voters return their ballots. *See* Pl. Br. 5-8, 18-19; 28 C.F.R. 35.130(b)(1)(i)-(iii).

1. *Family assistance* (R.C. 3509.05(C)(1)). Family assistance is no alternative for voters who have no enumerated relatives on whom they can rely for assistance. Although Ms. Kucera has been able to vote using this method in the past, this method is not reliable, as it depends on her elderly mother, who lives far away, has mobility issues, and is not always available. Pl. Br. 2-3, 17-18. And no other permitted relative is an available alternative. *See supra* at 7.

2. *Remote ballot marking* (ECF 42-10 (Form 11-G)). Electronically filling out a ballot does not assist a disabled voter in printing or folding it, sealing its envelope, or delivering it to the BOE, and is irrelevant to the Challenged Provisions' restrictions on who can return a ballot.

3. *Attorney-in-fact* (R.C. 3501.382(A)(1)). Having another person sign their ballot does not assist disabled voters in folding it, sealing its envelope, or delivering it to the BOE. State

[4] The State claims that a Title II plaintiff must prove discrimination occurred "solely by reason of disability." St. Br. 3. As the case the State relies on explains, that is the standard for the *RA*, "whereas the ADA requires that [discrimination] occur 'because of' the plaintiff's disability," which is a "less stringent" standard. *Bennett v. Hurley Med. Ctr.*, 86 F.4th 314, 324 (6th Cir. 2023).

Defendants also concede that Ms. Kucera is "ineligible" for this option. St. Br. 8 n.6.

4. *BOE assistance for "Disabled and confined absent voter's ballots"* (R.C. 3509.08(A)). Assistance to voters who are confined "in a jail or workhouse" or "unable to travel" does not accommodate voters whose disabilities do not prevent them from traveling but necessitate other assistance, including folding the ballot, sealing its envelope, and delivering it to the BOE.[5]

The State urges the Court to accept this last option as a panacea for all voters with disabilities, but they do not and cannot dispute the evidence that this option provides no access for voters like Ms. Kucera. Defendants misidentify the problem: even if Ms. Kucera can "physically perform all the steps necessary to request" this assistance, St. Br. 8, she can only do so by "affirming, that [she] is unable to travel," St. Br. 6, under penalty of felony "election falsification," ECF 42-11 (Form 11-F). Because Ms. Kucera *is able* to travel, albeit with extreme difficulty and expense, such an affirmation would be untrue. *See* Kucera Dec. ¶¶10-12. Unless the State is suggesting that she lie on the form, she is ineligible for this program too.[6]

The State's cited cases only support Plaintiffs' position that these failures deprive disabled voters of meaningful access to Ohio's absentee-voting program.[7] The State concedes that if a voter has "no practical means of exercising the right to vote by absentee ballot, the voter lacks meaningful access to absentee voting." St. Br. 5 (citing *Democracy N.C. v. N.C. State Bd. of*

[5] The State also disregards the Election Code's inconsistencies about BOE members' authorization to return another's absentee ballot. R.C. 3599.21(A)(9) only permits a postal carrier or "a relative" authorized under R.C. 3509.05(C)(1) to do so. Although R.C. 3509(C)(1) cross-references R.C. 3509.08, which includes BOE officials, it does not transform BOE officials into relatives. The record also shows further confusion: at least one county BOE believed it illegal for BOE employees to return a non-relative's ballot from their private home. ECF 42-22 (Gweon Dec.) ¶33, Seneca-1.

[6] The BOE delivery procedure is an insufficient alternative for many voters with disabilities. *See* Pl. Br. 6-7, 18-19. In addition, Form 11-F's requirement that individuals disclose their disability in a public record may disincentivize use of this service because of stigma associated with disability status. Gweon Dec. ¶¶38-39; ECF 42-2 (Kruse Rpt.) ¶76 f.

[7] There is at least a genuine dispute of material fact as to whether a disabled voter "was excluded from absentee voting." St. Br. 4. During the August 2022 Special Election, 16 ballots were not counted because a nursing home employee delivered them to the BOE. Ex. 1, 2d Zuberi Dec. Ex. 1-A (Waszkiewicz Tr.) 6:1-6. At least one of those ballots was cast by a nursing-care patient, *id.* 9:7-10:24, who likely has a condition covered by 42 U.S.C. 12102(1)(A).

Elections, 476 F. Supp. 3d 158, 229-33 (M.D.N.C. 2020)). And the State agrees Title II violations occur when disabled absentee voters are "*required* to use the state's traveling board for assistance." St. Br. 5 (citing *Am. Council of Blind of Ind. v. Ind. Election Comm'n*, 2022 WL 702257, at *7-8 (S.D. Ind. Mar. 9, 2022)). Yet that is just what Ohio *requires* of disabled voters who lack enumerated relatives and cannot return their ballots themselves—that is, *if* they even qualify; otherwise, they cannot vote absentee at all.

B. The State cannot prove that Plaintiffs' proposed reasonable modification fundamentally alters Ohio's absentee-voting program.

Because Ohio's absentee-voting program does not provide meaningful access, Plaintiffs proposed a modification: to allow a disabled voter who needs assistance to be assisted by a person of their choice. That modification is reasonable because, first, Congress, having considered all the competing concerns, determined that this very approach was appropriate when it passed Section 208 of the VRA. Section I.B, *supra*; Pl. Br. 16 n.7; ECF 42-18 (U.S. DOJ Report on Voters with Disabilities) (agency that implements ADA regulations has endorsed similar logic). Second, it provides a clear standard that will enable a disabled person to seek or receive assistance without confusion or fear of violating the law. Third, the modification is appropriately circumscribed as it only applies to people with disabilities and the individuals they choose to assist them. Fourth, other courts, including one the State cites, have suggested or imposed similar modifications. St. Br. 5, 7 (citing *Am. Council of Blind*, 2022 WL 702257, at *8 ("Defendants have failed to provide a reasonable accommodation, such as permitting print disabled voters to complete and return their absentee ballots with assistance from an individual of their choice.")).

The State bears the burden to prove that the proposed reasonable modification would fundamentally alter the absentee-voting program. 28 C.F.R. 35.130(b)(7)(i). Allegations that the modification would change existing policy cannot establish an affirmative defense of fundamental

alteration because "[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does." *Hindel v. Husted*, 875 F.3d 344, 348-49 (6th Cir. 2017) (quotation omitted). State Defendants must prove that the proposed modification "would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change." *Id.* The State fails to meet this standard.

The State's fundamental-alteration claim relies on the contention that Plaintiffs' proposed modification would "upend[]" the "access-security balance" in Ohio's election laws. St. Br. 10. In support, the State provides only bald assumptions about the effects of enjoining the Challenged Provisions as to disabled voters. *Id.* Those, in turn, are based in part on the opinion of Kimberly Strach—a former North Carolina election official whose opinions rest on her experience investigating violations of North Carolina law, including a similar assistance restriction. *Id.*; ECF 48-1 (Strach Dep.) 250:4-9. Ms. Strach, however, was unaware that two federal courts had enjoined that North Carolina restriction as to disabled voters under Section 208. Strach Dep. 93:22-95:23, 253:12-16; *see Disability Rts. N.C. v. N.C. State Bd. of Elections* (*DRNC II*), 2022 WL 2678884, *4-7 (E.D.N.C. July 11, 2022); *Democracy N.C.*, 476 F. Supp. 3d at 238-40. She makes conclusory statements that the Challenged Provisions "protect[] the integrity of the vote," are "designed to prevent manipulation," and "prevent undue influence on election outcomes," ECF 43-1 (Strach Rpt.) ¶¶47, 89, 92, 95, without supporting data, legislative history, or input from election officials about the laws' enforcement. Strach Dep. 76:23-79:9, 85:3-5, 163:8-12, 170:4-174:14. She concludes family members are preferable assistors based on "just sort of a general thought." *Id.* 87:2-10. In sum, as detailed in Plaintiffs' Motion to Exclude Opinion of Kimberly Strach, ECF 48, her opinion is not based on sufficient facts and data, and is inadmissible under Federal Rule of Evidence 702(b).

State Defendants also suggest that assistance restrictions are a ballot-security measure implemented "[p]er the recommendation of the Carter-Baker Commission on Federal Election Reform," St. Br. 9. That privately commissioned report is hearsay to which no exception applies, so it is inadmissible. Fed. R. Evid. 802, 803. Even if it were admissible, it does not find that an exception to allow disabled voters assistors of their choice would fundamentally alter election security. Rather, its recommendation's express purpose is to stop "allowing candidates or party workers to pick up and deliver absentee ballots." ECF 44-19 (Carter-Baker Comm'n Rpt.) 47.

Further, the Challenged Provisions do not address State Defendants' stated security concerns. The State laments that, if disabled voters were allowed the assistor of their choice, BOEs would have "no record of the assistors" or of "who may have come into contact with the disabled voter's absentee ballot," and "assistors would not be able to point to any documents authorizing their assistance." St. Br. 10, 15. But neither the State nor its purported expert attempts to explain how assistance *restrictions* enable assistor *identification*. The State also claims that, under Plaintiffs' proposed modification, an assistor would not need to affirm "that they did not influence the voter" or "their duty to preserve the secrecy of the voter's ballot." St. Br. 10. But, even under the Challenged Provisions, an enumerated assistor need not do this either. These concerns are already addressed by *other* Ohio laws, which impose criminal liability for obtaining ballots by improper means, marking a ballot contrary to a voter's intent, impersonating a voter, delaying or hindering the delivery of a ballot, and voter intimidation. *See, e.g.*, R.C. 3599.24(A)(1), 3599.26, 3599.12(A)(3), 3599.21(5)-(6), 3599.01(A)(2).

In sum, State Defendants have offered no evidence that election security would be harmed if disabled voters were allowed assistance from someone they choose based on their own knowledge and trust. The State has failed to meet its burden to prove a fundamental alteration.

III. Material Factual Disputes Regarding the Challenged Provisions' Vagueness As Applied to LWVO Preclude Summary Judgment.

The State fails to acknowledge the record on the Challenged Provisions' vagueness, instead attacking Plaintiffs' as-applied vagueness challenge solely on the ground that the Challenged Provisions "have not been applied to them" or "applied at all." St. Br. 18. Their arguments fail as a matter of law and fact. As a threshold matter, LWVO's challenge is justified by League members' credible fear of prosecution, based on undisputed evidence that the Challenged Provisions have in fact been enforced, and that the State threatens to enforce them against *anyone* who violates them. And summary judgment on the vagueness claim is not warranted here, where the record is replete with disputed facts. The Court should deny the State summary judgment on this claim.

A. Plaintiffs' credible fear of prosecution justifies their vagueness claim.

The State asserts Plaintiffs cannot bring an "as-applied" vagueness claim unless the Challenged Provisions "have . . . been applied to them." St. Br. 18. This position is riddled with legal and factual errors. A plaintiff is not "required to await and undergo a criminal prosecution as the sole means of seeking relief." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014) (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 15-16 (2010) (permitting pre-enforcement, as-applied vagueness challenge to criminal statute)). Instead, plaintiffs may bring a pre-enforcement challenge so long as they face a "credible threat" of enforcement for actions they intend to take. *See, e.g.*, *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1022-23, 1026 (6th Cir. 2024) (finding a credible threat where defendants "refused to disavow" a voting provision, made statements about the provision, and enforced the provision on at least one occasion).

The same factors that persuaded the Sixth Circuit to reverse summary judgment in *Kareem* are present here. Plaintiffs have demonstrated their intent to assist voters with disabilities but for their fear of being prosecuted. *See, e.g.*, ECF 42-6 (Patterson Dec.) ¶¶8-10. State Defendants refuse

to disavow enforcement of the Challenged Provisions and have repeatedly affirmed that violating them is illegal and subject to criminal penalty. *See, e.g.*, ECF 42-23 (Kollar Dep.) 97:21-23 ("There are no sections of the Ohio Revised Code that we would refuse to prosecute."); ECF 42-17 (Yost Video Tr.) ("[P]ossessing somebody else's ballot unless you're one of these close family members is a felony and you can be prosecuted for it."); Ex. 1-B (Ohio SOS Press Release) ("Ballot Harvesting is against the law in Ohio, and potential violations are investigated.").

Contrary to the State's representation that the Challenged Provisions "have not been applied at all" and enforcement concerns are "simply speculation," St. Br. 18, the Summit County Prosecutor's Office is actively prosecuting an individual for alleged violations of the Challenged Provisions. *Compare* St. Br. 19 ("Nor has a case been brought to prosecution.") *with* ECF 43-2 (Stevens Dec.) ¶24 ("[T]he prosecution is ongoing."); Stevens Ex. J. The State also ignores three other investigations into alleged violations, two of which were referred to county prosecutors for further action. *See* Kollar Dep. 50:5-17, 154:23-159:15, 162:18-169:22, Ex. 16; Ex. 1-C (Stephens Investigative Rpt.); ECF 42-21 (Stevens Dep.) 103:17-110:3; Waszkiewicz Tr. 17:22-18:6.

In addition to botching the facts, the State misapprehends the law. State Defendants cherry-pick from *Speech First, Inc. v. Schlissel* the statement that "there must be 'some evidence that the rule would be applied to the plaintiff in order for that plaintiff to bring an as-applied challenge.'" St. Br. 18 (quoting 939 F.3d 756, 766 (6th Cir. 2019)). But they omit the necessary context that the court was explaining why a pre-enforcement challenge was denied in another case where the challenged rule was *no longer in effect*. *See Speech First*, 939 F.3d at 766. Here, the Challenged Provisions are still Ohio law, and the State refuses to disavow their enforcement, so Plaintiffs' fear of enforcement is not "imaginary." *See Kareem*, 95 F.4th at 1023. Plaintiffs have thus established a credible fear of prosecution sufficient to maintain an as-applied vagueness claim.

B. Genuine disputes of fact exist as to whether the Challenged Provisions are vague.

Vague criminal laws like the Challenged Provisions are subject to "particular scrutiny." *United States v. Caseer*, 399 F.3d 828, 835 (6th Cir. 2005). A statute is impermissibly vague if it "(1) fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits or (2) authorizes or encourages arbitrary and discriminatory enforcement." *Id.* at 836 (quotation omitted). Material factual disputes preclude summary judgment under either theory.

1. Factual disputes remain about whether the Challenged Provisions provide adequate notice of what conduct they prohibit.

State Defendants' arguments and witnesses' testimony confirm that genuine disputes of fact remain as to whether the Challenged Provisions are unconstitutionally vague because they fail to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

As an initial matter, the Challenged Provisions do not define whether an "absent voter's ballot" includes both marked and unmarked ballots, making uncertain whether otherwise innocent conduct such as retrieving a roommate's unmarked ballot from the mailbox for her is a felony. Kollar Dep. 114:22-120:2; Stevens Dep. 56:14-57:21. The State does not address whether the statute applies only to marked ballots, and how an ordinary person would know one way or another.

More to the point, the Challenged Provisions do not define the conduct prohibited, including what it means to "possess" or "return" an absent voter's ballot. And while "mathematical certainty in statutory drafting" is not required, even the State admits "open questions" remain as to what conduct the Challenged Provisions proscribe. St. Br. 16.

Not a single witness—ranging from LWVO members to the State's representatives—has been able to guess at the law's contours. Before this litigation, when asked for clarification of the law, the SOS did not answer and instead demurred to the discretion of county prosecutors. ECF

42-16 (SOS Letter to ACLU). In discovery, State Defendants could not say whether any conduct—including whether a grandmother placing a grandchild's ballot in a drop box, or even "a voter plac[ing] their [own] absentee ballot in a return envelope and mail[ing] it"—would be subject to investigation or potential prosecution, claiming they would need more facts to know whether a violation had occurred. *See* Kollar Dep. 73:14-75:7, 109:23-110:22, 120:23-122:6; Stevens Dep. 76:21-86:5; *see also* Ex. 2 (AG Resp. to RFA) 1-11 (denying all requests); Ex. 3 (SOS Resp. to RFA) 2-12 (same); Ex. 4 (CCPO Resp. to RFA) 1-11 (same).

Now, in its summary-judgment brief, the State asserts for the first time that illegally possessing a ballot "necessitates showing that the person exercised some ownership or control over the absentee ballot *without the voter's permission*." St. Br. 17 (emphasis added). There is no support for this purported consent requirement in the definition in the text, in the dictionaries the State cites, *id*., or elsewhere.[8] State Defendants conjure the consent requirement out of whole cloth. Their own prior statements contradict this interpretation and make no mention of a consent exception to the Challenged Provisions. *See, e.g.*, Yost Video Tr.; Ex. 1-D (Ohio SOS Week in Review); Stevens Dep. 66:2-67:2; SOS Letter to ACLU. This eleventh-hour invention of a consent-driven meaning of "possess," wholly divorced from the statutory text, further muddles the issue, making it impossible for any Ohioan to "ascertain by examining the language . . . alone whether criminal sanctions will result." *Belle Maer Harbor v. Harrison,* 170 F.3d 553, 559 (6th Cir. 1999).

The State also overlooks a basic rule of statutory interpretation: "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Parker*

[8] The State also suggests that Ohioans turn to drug and firearm laws to better understand the term "possess," St. Br. 17, which likewise raises new questions about what the statue prohibits. For example, does "constructive possession" from drug and firearm jurisprudence also apply to R.C. 3599.21(A)(10), such that driving a friend and their ballot to a drop box would be a felony? *See, e.g.*, *State v. McClain*, 153 N.E.3d 854, 864 (Ohio 3d Ct. App. 2020) (constructive possession occurs when a person is conscious of an object's presence and able to exercise control over it).

Drilling Mgmt. Servs. v. Newton, 139 S. Ct. 1881, 1888 (2019) (quotation omitted), "particularly" where the terms at issue "are susceptible of interpretations that would deprive one term or the other of meaning." *Id.*; *see also King v. Burwell*, 576 U.S. 473, 486 (2015). "[T]he meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Here, context amplifies the confusion. Before HB 458, R.C. 3599.21(A) already prohibited the "possess[ion]" of another's absentee ballot. The ordinary meaning of "possess" would subsume any conduct captured by "return," so the later-in-time addition of a separate prohibition that criminalizes ballot "return" unsettles any ordinary understanding of "possess." *See, e.g.*, Kollar Dep. 64:19-21 ("I can't think of a specific scenario where you would return without at some point also possessing."). In other words, giving "possess" its ordinary meaning would render the "return" provision "meaningless or inoperative," contrary to Ohio's rules of statutory interpretation. *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448, 451-52 (Ohio 2010).

But if possess does *not* encompass return, what else is outside possession's scope? Retrieving your roommate's ballot from your shared mailbox? Folding your grandparent's ballot and stuffing and sealing it into its envelope? And if the new prohibition covers only "[r]eturn[ing] the absent voter's ballot of another *to the office of a board of elections*," R.C. 3599.21(A)(9), then is return to a mailbox or drop box permitted, or is that prohibited by the distinct ban on possession? ECF 42-14 (SOS Election Official Manual) 202, 205-06, 210, 214 (discussing prohibition on non-enumerated relatives' in "Return by Personal Delivery" but not "Return by Mail"). Without clarity on these open questions, the Challenged Provisions "threaten[] to ensnare individuals engaged in apparently innocent conduct" that has legitimate purposes, like bringing a neighbor their mail or dropping off a roommate's outgoing mail. *Caseer*, 399 F.3d at 837 (quotation omitted).

2. Factual disputes remain as to whether the Challenged Provisions authorize arbitrary enforcement.

Even if the Challenged Provisions provided Ohioans adequate notice of prohibited conduct, they still fail "the more important aspect of vagueness doctrine" by lacking "minimal guidelines to govern law enforcement" and permitting "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 357-58 (quotations omitted). A law fails to provide sufficient guidance for enforcement if it "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quotation omitted).

As discussed in Section III.B.1, *supra*, State Defendants during discovery refused to provide even a basic description of what conduct fell within the scope of the Challenged Provisions. Instead, they admit that the responsibility of interpreting what conduct violates the laws is left to each individual prosecutor. *See* SOS Letter to ACLU; Kollar Dep. 59:17-22, 61:14-18, 67:22-68:7. Worse, neither the SOS nor the AG has provided any guidance to assist county prosecutors in determining how the Challenged Provisions are interpreted or enforced. *Compare* St. Br. 19 ("State Defendants . . . implement and enforce [the Challenged Provisions]."), *with* Stevens Dep. 26:10-14, 26:25-27:5; Kollar Dep. 48:25-49:12. Nor does the AG do *anything* to ensure that they are enforced consistently, Kollar Dep. 60:2-11; 61:19-24, unlike the AG's treatment of other election laws, *id.* 34:17-35:24. Instead, the AG leaves it to each prosecutor to interpret the Challenged Provisions how they see fit and leaves it to the courts to decide what conduct violates them. *See, e.g.*, Kollar Dep. 56:13-57:3, 59:17-22, 121:21-122:6. The State does not dispute these facts. At a minimum, such testimony creates a genuine dispute of material fact as to whether the Challenged Provisions impermissibly "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained,"

Morales, 527 U.S. at 60 (quotation omitted), precluding summary judgment.

C. The Court should not delay resolution of Plaintiffs' claims.

Plaintiffs agree with State Defendants that resolution in Plaintiffs' favor on either statutory claim would render a ruling on their vagueness claim unnecessary, so long as the remedy applies to all absentee voters with disabilities requiring assistance and their assistors. *See* St. Br. 19. As for the State's suggestion that the Court should certify interpretative questions to the Ohio Supreme Court, Plaintiffs believe certification is unnecessary. Federal courts are perfectly capable of resolving questions of vagueness without state-court guidance. *See, e.g.*, *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 875 (W.D. Tenn. 2023). Moreover, Plaintiffs are concerned that this procedural step would delay relief until after the upcoming election.[9] *See Am. Broad. Co. v. Blackwell*, 479 F. Supp. 2d 719, 732 (S.D. Ohio 2006) ("The Court finds that plaintiffs are entitled to a final decision before the mid-term elections. Certification of a question to the Ohio Supreme would undoubtedly delay a final decision until after the November mid-term elections."). Accordingly, should the Court conclude that the vagueness question merits certification, Plaintiffs ask that the Court resolve Plaintiffs' two federal statutory claims and enter judgment under Rule 54(b) regardless of the certification timeline.[10]

CONCLUSION

For all the foregoing reasons, the Court should deny State Defendants' Motion for Summary Judgment, grant Plaintiffs' Motion for Partial Summary Judgment, and issue the requested declaration and permanent injunction.

[9] If the State is construed to be seeking abstention, Plaintiffs incorporate their arguments in opposition to Intervenors' brief. *See* Pls.' Mem. in Opposition to Intervenors' Mot. for Summ. J. Sec. III.A.

[10] Plaintiffs also reserve the right to propose an alternative framing of the certified questions after having an opportunity to meet and confer with State Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Suzan F. Charlton, an attorney admitted to practice pro hac vice before this court, hereby certify that on June 14, 2024, the foregoing Memorandum in Opposition to State Defendants' Motion for Summary Judgment was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. The parties may access this filing through the Court's electronic filing system.

/s/ Suzan F. Charlton
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CERTIFICATE OF COMPLIANCE

Under Northern District of Ohio Local Civil Rule 7.1(f), I hereby certify that this case has been assigned to the Expedited Track. Scheduling Order, ECF 31. I also certify that this memorandum does not exceed the 20-page limitation ordered by the Court. Order (May 7, 2024), ECF 39.

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