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

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

OHIO SECRETARY OF STATE AND OHIO ATTORNEY GENERAL'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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I. Ohio's ballot-harvesting laws do not conflict with, and are not preempted by, the Voting Rights Act.

Plaintiffs' opposition to the State Defendants' motion for summary judgment on the VRA Section 208 claim fundamentally misunderstands preemption. A state statute survives a preemption analysis if compliance with both the state statute and the federal statute is possible, and the state law does not impede the "accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015). Restraint, reluctance, and a presumption against preemption must inform any interpretation of VRA Section 208 and the ballot-harvesting laws. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1904-05 (2019) (plurality op.); *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993); *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 618-20 (E.D. Mich. 2020). These principles favor statutory interpretations that allow the Court to avoid preemption, which is exactly what the State Defendants have offered here. Plaintiffs, by contrast, heed neither reluctance nor restraint and make no effort to harmonize federal and state law.

Take, for example, Plaintiffs' insistence that "a person" in VRA Section 208 should be read as "any person." The State Defendants do not dispute that "a" can certainly mean "any" depending on the facts and circumstances. *See, e.g.*, *United States v. Alabama*, 778 F.3d 926, 932-33 (11th Cir. 2015). But not always.[1] Indeed, the principal case that Plaintiffs cite recognizes that "a" can also mean "one." *Id*. at 932 ("In common terms, when 'a' or 'an' is followed by a restrictive clause or modifier, this typically signals that the article is being used as a synonym for *either* "any" *or* "one." (emphasis added)); *see also* Doc. 55 at PageID 4505 (recognizing that "a" "can

[1] Plaintiffs worry that the State Defendants' approach could trigger a cascading effect of courts refusing to interpret "a person" as "any person" in federal legislation. Doc. 51 at PageID 4322. But the State Defendants agree that "a person" *can* mean "any person" when called for by the text, context, and statutory purpose of legislation. That simply isn't the case under VRA Section 208.

reasonably mean 'one' or 'any'"). And "a" as in one non-specific person is the better reading here. *Priorities USA*, 487 F. Supp. 3d at 619.

First, the legislative history does not favor reading "a person" as "any person." When the Senate Judiciary Committee referred to a person offering a disabled voter assistance, the Committee referred to a non-specific *singular* person:

- Specifically, it is only natural that many such voters may feel apprehensive about casting a ballot in the presence of, or may be misled by, someone other than *a person* of their own choice.

- To limit the risks of discrimination against voters in these specified groups and avoid denial or infringement of their right to vote, the Committee has concluded that they must be permitted to have the assistance of *a person* of their own choice.

- The Committee has concluded that the only kind of assistance that will make fully 'meaningful' the vote of the blind, disabled, or those who are unable to read or write, is to permit them to bring into the voting booth *a person* whom the voter trusts and who cannot intimidate him.

- The Committee has simply concluded that, at the least, members of each group are entitled to assistance from *a person* of their own choice.

- [T]he Committee recognizes that a voter's choice of *a fellow corporation member* to assist in the voting booth may give the appearance of a technical violation of the employer bar.

- In either case, however, the committee concludes that the burden on the individual's right to choose *a trustworthy assistant* would be too great to justify application of the bar on employer assistance.

S. Rep. No. 97-417, at 62-64 (1982), 1982 WL 25033 (emphases added). And against these numerous references to "a" non-specific singular person, there is not one reference to "any person." This makes sense. After all, the Committee report focuses on in-person voting at a polling place, where crowd-control concerns support limiting the number of assistors to just one non-specific person. *See id*. at 62 (noting that effective assistance allows disabled voters to bring a person "into the voting booth"), 64 (allowing "a fellow corporation member to assist in the voting booth"); *see* *also State ex rel. Maras v. LaRose*, 170 Ohio St.3d 374, 380 (2022) (recognizing Ohio's interest in preventing "disruptions" at the polls caused by the presence of too many non-voters).

Second, the State Defendants' interpretation of "a person" allows the federal statute and the state statutes to coexist. As explained in the State Defendants' motion for summary judgment and memorandum in opposition, the State Defendants' interpretation makes compliance with state and federal law possible because a disabled voter may select *a* person of their choosing from among the list of authorized individuals in Ohio's ballot-harvesting statutes. Restraint and reluctance to find preemption favor the State Defendants' interpretation.[2]

Plaintiffs next accuse the State Defendants of grafting an improper undue-burden test onto VRA Section 208. Doc. 51 at PageID 4323. But in fact, the State Defendants simply performed the second half of the conflict-preemption analysis: inquiring whether Ohio's ballot-harvesting laws obstruct Congress' objectives. *Oneok,* 575 U.S. at 377. Helpfully, the Senate Judiciary Committee chose to explain exactly what kinds of laws would transgress its objectives: those that "unduly burden the right recognized in [Section 208]." S. Rep. No. 97-417, at 63. Inquiring into undue burden is not some extra-textual flight of fancy; it is exactly how Congress instructed us to determine whether state laws obstruct the VRA's congressional purpose. And of course, no undue burden exists here. Plaintiffs' only argument to the contrary is to point to Ms. Kucera's successful voting record with the assistance of a person of her choice. Doc. 51 at PageID 4324. Plaintiffs do not explain how being able to vote establishes an undue burden on voting.

[2] Plaintiffs argue that the textual canon of *expressio unius* applies. Doc. 51 at PageID 4320. But that canon *permits* additional exceptions when so indicated by legislative intent. Here, Congress made space for States to establish "necessary election procedures" and signaled that such laws would not conflict with VRA Section 208 unless they unduly burden the right to vote. S. Rep. No. 97-417 at 63. This congressional intent, coupled with the presumption against preemption, favors a statutory interpretation that harmonizes state and federal law.

Preemption is—and should be—a high bar. And Plaintiffs cannot meet it as a matter of law. The State Defendants have offered an interpretation of VRA Section 208 that (1) allows disabled voters to comply with both Section 208 and Ohio's ballot-harvesting statutes and (2) does not obstruct the objectives of Congress by unduly burdening the right to vote. Plaintiffs therefore cannot establish either form of conflict preemption, and their VRA claim fails as a matter of law.[3]

II. Because the State Defendants reasonably accommodate disabled voters, Plaintiffs' ADA and Rehabilitation Act claims fail as a matter of law.

A. Plaintiffs have come forward with no facts showing they lack meaningful access to absentee voting.

Ohio offers numerous options to assist disabled voters with requesting, accessing, and casting absentee ballots. Collectively, these options provide disabled voters with meaningful access[4] to absentee voting. This alone defeats any question that Plaintiffs' ADA claim can succeed.

Plaintiffs maintain that *none* of these methods provide voters with disabilities meaningful access to absentee voting. But their own evidence shows otherwise. Ms. Kucera has successfully used two of the many absentee voting options: returning the absentee ballot with the assistance of her mother, an authorized family member, and using the remote ballot marking tools. Doc. 43-5, Kucera Dep. 54:16-60:5, 66:14-69:17, 70:25-74:10. That Plaintiffs themselves have repeatedly accessed absentee voting using these accommodations dooms their ADA claim.[5]

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[3] The State Defendants reincorporate their argument that Plaintiffs' construction of VRA Section 208 violates the anticommandeering doctrine. Doc. 43 at PageID 2188-89.

[4] Sixth Circuit courts use the term "meaningful access" to describe the legal standard under Title II of the ADA. *See, e.g., Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 909 (6th Cir. 2004); *Knox Cty. v. M.Q.*, 62 F.4th 978, 999 (6th Cir. 2023); *Bennett v. Hurley Med. Ctr.*, 86 F.4th 314, 326 (6th Cir. 2023).

[5] Because they cannot show that Ms. Kucera lacks meaningful access to absentee voting, Plaintiffs point to a nursing home employee's unsuccessful attempt to return 16 absentee ballots to the Summit County BOE. *See generally* Doc. 51-2. But the transcript does not say one way or the other whether the 16 nursing home residents were disabled.

Plaintiffs counter that some of Ohio's options are unreliable. Authorized family members are not always available, and Ms. Kucera fears that her mother may not be able to assist her in the future. Doc. 51 at PageID 4326-27. Ms. Kucera would thus "prefer to rely on her caregivers to assist her in voting absentee." Doc. 42-1 at PageID 453. To be sure, no absentee voting option is a panacea. And any individual accommodation may not account for scenarios that render it unreliable to some. But the standard is whether Ohio's accommodations are *reasonable*. *See Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, 58 F. App'x 162, 167 (6th Cir. 2003) (a plaintiff is "entitled only to a 'reasonable' public accommodation of his disability, *not* to the 'best possible' accommodation").

Plaintiffs dismiss the accommodation offered through Ohio Rev. Code § 3509.08(A), which, upon a voter's affirmation under penalty of election falsification, allows a bipartisan team of board of elections staff to hand deliver an absentee ballot to any voter who "will be unable to travel from the [voter's] home or place of confinement to the voting booth" due to the voter's "own personal illness, physical disability, or infirmity." Plaintiffs argue that this option is unavailable to voters like Ms. Kucera who cannot truthfully attest that they are unable to travel. Doc. 51 at PageID 4327. Plaintiffs go so far as to claim that this makes Ms. Kucera ineligible for this accommodation.

But there is simply no evidence to support this in practice. Indeed, the evidence shows the opposite is true.[6] *See* Perlatti Decl. ¶ 17, 19, Doc. 43-3 at PageID 2360-61 (attesting that the Cuyahoga County BOE regularly hand delivers ballots to voters who are "neither jailed nor residents of nursing homes or other care facilities" without first investigating or confirming "the

[6] Plaintiffs attempt to create a material issue of fact through one BOE official's misunderstanding of Ohio Rev. Code § 3509.08(A). Doc. 51 at PageID 4327 n.5. Crucially, however, Plaintiffs point to no evidence that this official ever received a proper application under § 3509.08(A) by an individual like Ms. Kucera and denied it.

existence of that voter's illness, physical disability, or infirmity"). Plaintiffs' strained application of Ohio Rev. Code § 3509.08(A) also fails to account for the many absentee ballots that are hand-delivered to residents in nursing home or care facilities, many of whom *could* travel to the polls.

There is no factual dispute that Plaintiffs can and have accessed absentee voting using the accommodation in Ohio Rev. Code § 3509.08(A) and others. Plaintiffs' ADA claim cannot succeed because Plaintiffs have not shown that they lack meaningful access to absentee voting.

B. Non-enforcement of the ballot-harvesting laws fundamentally alters Ohio's absentee-voting system.

Even if Plaintiffs could show some factual issue as to meaningful access, Plaintiffs' ADA claim still fails because their preferred accommodation—non-enforcement of the ballot-harvesting laws against disabled voters and their assistors—fundamentally alters Ohio's absentee-ballot program. Plaintiffs' arguments otherwise do not convince.

Plaintiffs argue that the Challenged Provisions do not actually address the State's election-security concerns, so non-enforcement would alter nothing. Doc. 51 at PageID 4330. Plaintiffs simply do not understand Ohio's existing security measures for absentee ballots, so they cannot see how Ohio's ballot-harvesting statutes maintain Ohio's high level of election security. Assistors in Ohio fall into two categories: (1) authorized family members and (2) anyone other than an authorized family member. Ohio's legislature, in line with the bipartisan Carter-Baker Commission, judged that authorized family members do not pose a high manipulation or intimidation risk. Doc. 48-1, Strach Dep. 91:16-92:4.[7] Accordingly, Ohio does not require

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[7] The State Defendants will address Plaintiffs' arguments as to the admissibility of the State Defendants' expert in their forthcoming opposition to Plaintiffs' motion to exclude. Relevant here, the State Defendants' expert can consider the Carter-Baker Commission in forming her expert opinion, even if the report is otherwise inadmissible hearsay. *Ask Chems., LP v. Computer Packages, Inc.*, 593 F. App'x 506, 510 (6th Cir. 2014). And of course, the Court can consider the Carter-Baker Commission for any non-hearsay purpose, such as showing that Ohio's laws implement bipartisan best-practice recommendations.

authorized family members to disclose their assistance or present proof that their assistance has been authorized by the voter—they may simply return absentee ballots. Ohio Rev. Code § 3509.05(C)(1). In contrast, Ohio's legislature determined that non-family members (and non-enumerated family members) pose a higher risk of manipulation and intimidation and are therefore *not* permitted to return an absentee ballot as a general matter.[8] Doc. 42-21, Stevens Dep. 90:14-91:8. The legislature carved out limited exceptions to this rule—elections officials and authorized attorneys in fact can assist disabled voters under certain circumstances. Herron Decl. ¶¶ 11-20, Doc. 43-4 at PageID 2380-81. But these exceptions come with additional security measures that decrease the risk of manipulation and intimidation. Specifically, non-family members are disclosed to boards of elections and are required to affirm that they followed the voter's instructions. *Id*.

Plaintiffs' proposed accommodation hollows out these protections. Plaintiffs want Ohio to permit non-family members to assist disabled voters and return their absentee ballots but *without* any of the protections Ohio has deemed necessary when non-family members assist disabled voters with absentee ballots. The State Defendants presented expert testimony that this change would make it harder and more time-consuming for boards of elections to identify the assistor, which would compromise any investigation into potential fraud. Doc. 43-1 at PageID 2222-26. Further, untraceable access by non-family members to absentee ballots flouts the security principles that govern ballot access. Ballots must be stored in a "clean and climate-controlled environment," Doc. 42-14, Election Official Manual at 58, under a dual-control lock system that prohibits access except by a bipartisan team of elections officials, *id*. at 56. And boards are required to keep a Chain of Custody log to document the receipt and storage of all ballots. *Id*. at 59. Plaintiffs offer no replacements for these protections.

[8] This does not apply to postal workers. Ohio Rev. Code § 3599.21(A)(9)(b).

Moreover, Plaintiffs would put the assistors themselves at risk of accusations of election interference. Herron Decl. ¶ 20, Doc. 43-4 at PageID 2381. Indeed, under Plaintiffs' proposed accommodation, we should expect to see many cases like Kayla Waszkiewicz's, who attempted to return a set of absentee ballots from a nursing home to the board of elections and maintained that she had voter authorization to do so. *See generally* Doc 51-2. A ballot-by-ballot and voter-by-voter examination of potential manipulation, intimidation, and authorization would be required.

Next, Plaintiffs argue that the State Defendants offer only bald assumptions about the effects of non-enforcement of the ballot-harvesting provisions. It is true that the State Defendants cannot empirically measure the ballot-harvesting statutes' role in ensuring election security. But States do not have "the burden of demonstrating empirically the objective effects on political stability that [are] produced" by a particular voting regulation. *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (plurality op.). Legislatures are permitted to "respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id*. at 209.

The Ohio General Assembly set up Ohio's absentee-ballot system to balance ballot access against ballot security. A proposed accommodation that removes vital security measures without offering any replacement is not reasonable and constitutes a fundamental alteration.

III. Plaintiffs' vagueness challenges fail as a matter of law.

Initially, Plaintiffs do not even attempt to defend their facial challenge to the ballot-harvesting statutes. Because a facial challenge to the constitutionality of a statute presents a pure question of law, *see Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006), Plaintiffs' failure to address this issue dooms their facial challenge to the ballot-harvesting statutes.

Plaintiffs' as-applied challenge to the ballot-harvesting statutes also fails to survive summary judgment. Plaintiffs must show that enforcement of the ballot-harvesting statutes is imminent against their own conduct. Plaintiffs' claim rests on the fear-of-prosecution theory,[9] but they conveniently omit both the context and the full quotation from *Susan B. Anthony List* in contending that they are "not 'required to await and undergo a criminal prosecution as the sole means of seeking relief.'" Doc. 51 at PageID 4331, quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014). This sentence is lifted from the Court's discussion of *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), in which the plaintiffs admitted to previously violating the challenged law and the government declined to disavow prosecution *of the plaintiffs*. *Id*. at 8. Under these circumstances "[t]he plaintiffs [in *Holder*] faced a 'credible threat' of enforcement and 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Susan B. Anthony List*, 573 U.S. at 161.

Similarly, in *Susan B. Anthony List,* the plaintiffs themselves had been the subject of complaints under the challenged statute and past enforcement was against the same conduct. *Id*. at 164. Also relevant was that proceedings and complaints regarding the challenged conduct were not "a rare occurrence"—there were anywhere from 20-80 complaints per year—and any person, not just prosecutors or state officials "who are constrained by explicit guidelines or ethical obligations," could file a complaint. *Id*. None of these circumstances are present here.

Plaintiffs also argue that there are factual disputes over the meaning of "possess" and "return." But a genuine dispute of material fact does not exist because these words are undefined

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[9] This argument is wrong from the start because Plaintiffs conflate standing and merits analyses. The issue in both *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), and *Kareem v. Cuyahoga Cty. Bd. of Elections*, 95 F.4th 1019 (6th Cir. 2024), was whether the plaintiffs established standing to bring a pre-enforcement First Amendment challenge based on a "credible threat" of prosecution. Whether Plaintiffs have proven their case on the merits is an entirely different question. *See Kareem*, 95 F.4th at 1027. As one court bluntly stated, "[t]he standard reaffirmed in *Susan B. Anthony List* does no work for Plaintiffs beyond the standing context." *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 700 (8th Cir. 2021).

or overlap in application. Similarly, Plaintiffs' vagueness challenge does not survive summary judgment because they can conjure hypothetical scenarios about what the ballot-harvesting statutes proscribe, such as whether a grandmother is prohibited from placing her grandchild's ballot in a drop box (Doc. 51 at PageID 4334). If that were true, a plaintiff could create a genuine issue of material fact simply by pointing to possible ways a statute could be violated, no matter how far stretched. At bottom, Plaintiffs' alleged fact disputes must be *material*—that is, none would change the outcome of the case. Plaintiffs have alleged no such fact disputes here to justify the burden and expense of moving this issue to trial.

Last, while Plaintiffs agree that the Court should decline to reach their vagueness challenge if the Court holds that the ballot-harvesting laws violate either the ADA or Section 208, they incorrectly maintain that certifying the issue to the Supreme Court of Ohio is unnecessary. Doc. 51 at PageID 4337. In support, they point to *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831 (W.D. Tenn. 2023), a case in which the state's highest court *had* interpreted the statute at issue, an interpretation the defendants urged the court to adopt. *Id*. at 875. That is not the situation here. No Ohio court has construed either Ohio Rev. Code § 3599.21(A)(9) or (10); there is simply no interpretation that this Court can or cannot adopt.

While Plaintiffs have concerns with the timing of this process, certification can ultimately save time, energy, and resources. A decision from the Supreme Court of Ohio setting forth the precise conduct prohibited by Ohio Rev. Code § 3599.21(A)(9)-(10) would likely resolve Plaintiffs' void-for-vagueness claim. And a decision setting forth the types of assistance permitted under Ohio Rev. Code § 3599.21(A)(9)-(10) would resolve, or at least narrow, Plaintiffs' other claims. Accordingly, certification is warranted here.

CONCLUSION

The State Defendants' motion for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2024, the foregoing was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

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

CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Ohio Local Civil Rule 7.1(f), I hereby certify that this case has been assigned to the Expedited Track. *See* Doc. No. 31. This memorandum complies with the page limitations for expedited cases.

/s/ Ann Yackshaw
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