

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL FEDERATION OF THE BLIND, *et al.*,

Plaintiffs-Appellees

v.

LINDA H. LAMONE, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING
PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

VANITA GUPTA
Principal Deputy Assistant
Attorney General

MARK L. GROSS
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – RFK 3748
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3192

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BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING
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INTEREST OF THE UNITED STATES

This appeal arises from the application of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794, and their implementing regulations, to the State of Maryland's voting program. Title II of the ADA prohibits state and local governments from excluding an otherwise qualified individual with a disability from their services, programs, or activities. 42 U.S.C. 12132. Section 504 similarly prohibits disability discrimination by recipients of federal funding.

29 U.S.C. 794. The Attorney General has authority to bring civil actions to enforce both provisions. See 42 U.S.C. 12133; 29 U.S.C. 794a. Also, the Justice Department issued regulations implementing Title II and Section 504. See 29 U.S.C. 794, 794a; 42 U.S.C. 12133-12134, 12205a; 28 C.F.R. Pts. 35 & 41. Accordingly, the United States has an interest in ensuring that the federal statutes and accompanying regulations are properly interpreted and applied. The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

We address the following questions:

1. Whether the online ballot marking tool is an auxiliary aid that Maryland must provide to ensure effective communication for persons with disabilities, including the ability to cast their ballots privately and independently.
2. Whether use of the online ballot marking tool would fundamentally alter Maryland's voting program.

STATEMENT OF THE CASE

Plaintiffs are the National Federation of the Blind (NFB) and three individuals with disabilities. They alleged that defendants, the Maryland State Board of Elections (Board) and its members, violated the ADA and Section 504 by declining to allow the use of an online ballot marking tool for absentee voting in

the November 2014 general election. The district court agreed, and defendants have appealed.

1. Voting In Maryland

Voters in Maryland, including those with disabilities, may cast their ballots in several ways. They can vote on election day at their designated polling place, do early in-person voting, or vote by absentee ballot. J.A. 1042.¹ Absentee ballot voting is open to all voters, without the need to offer a reason. Voters can obtain an absentee ballot in several ways, including by mail or by downloading the ballot from the Board's website. J.A. 1042.

All absentee ballots must be marked by hand before being returned to the Board. Therefore, if a voter chooses to download an absentee ballot, the voter must print out the ballot, mark his or her votes on the ballot, sign it, and return it to the voter's board of election. J.A. 1042-1043. Under this system, the paper absentee ballots – including those received online – cannot be used by voters with certain vision or dexterity disabilities because these individuals cannot read the printed text or use a pen or pencil to mark the ballot. As a result, they cannot cast

¹ Citations to “J.A. ___” refer to the page numbers in the Joint Appendix filed by the parties.

their absentee votes privately and independently, as can voters without such disabilities. J.A. 1043-1044.

To assist people voting by absentee ballot, particularly military and overseas voters, in 2011 Maryland began developing a software tool that allows absentee voters to receive their ballots electronically, mark them online, and then print them for submission – the “online ballot marking tool.”² J.A. 361, 1044. The tool was also intended to reduce errors in voting, including overvotes and undervotes. J.A. 362. A version of this tool was successfully used during the 2012 primary election and in the 2012 general election by military and overseas voters covered by the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), 52 U.S.C. 20301 *et seq.*, but it was not usable by individuals with disabilities. J.A. 1045.

Subsequently, the NFB worked with the Board to modify the tool to include features for those with disabilities who need assistive technologies to read or understand content displayed on their computers. J.A. 1032, 1044. As a result, the tool can now be used by those with vision disabilities who use screen access software, and deaf-blind individuals who use a refreshable Braille display to mark

² Maryland law defines an online ballot marking tool as a “system that allows a voter to: (i) access a blank ballot through the Internet; (ii) electronically mark the ballot with the voter’s selections; and (iii) print a paper copy of the marked ballot for mailing to a local board.” Md. Code Ann., Elec. Law § 9-308.1(a) (West 2015).

the absentee ballot. The tool prints out the marked ballot separately from the signature page, so voters with disabilities can cast their votes privately and independently even if they need assistance to sign their ballot. J.A. 1044, 1048.

In 2013, the Maryland General Assembly passed voting legislation requiring, in part, that the online ballot marking tool be “certif[ied]” by a supermajority vote of the Board before being made available to absentee voters. J.A. 1045-1046. The certification process required the Board to determine whether the tool satisfies various security and privacy concerns. J.A. 1045-1046 & n.19; Md. Code Ann., Elec. Law § 9-308.1(c) (West 2015).

During the certification process, the Board reviewed a report from a security consultant that concluded that the tool was secure. J.A. 1046.³ But because some members expressed concerns about security issues, the Board hired an independent auditor to review the report. The auditor did not take issue with the report’s conclusions. J.A. 1046. Ultimately, although a majority of the Board voted to certify, a supermajority did not and certification failed. J.A. 1047.

³ The Board also learned that Alaska and Delaware were making the online ballot marking tool available to voters with disabilities in the 2014 elections. J.A. 1046-1047.

2. *The Present Lawsuit*

In May 2014, the NFB and three individuals with vision or communication disabilities filed suit alleging that defendants' denial of the use of the online ballot marking tool violated Title II of the ADA and Section 504. See J.A. 1.⁴ Title II states: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. 12132. Section 504 states: “No otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program * * * receiving Federal financial assistance.” 29 U.S.C. 794(a). The Board receives federal funds. J.A. 1051 n.22.

⁴ NFB is the oldest and largest national organization of blind persons, and many of its members seek to exercise their right to vote through the use of an absentee ballot. J.A. 12-13. The individual plaintiffs are three registered voters in Maryland with various disabilities affecting their ability to communicate, who “desire to exercise their right to vote in the same way as individuals without disabilities.” J.A. 12. One of the individual plaintiffs is blind, one is deaf-blind, and the third has cerebral palsy and cannot use his voice to speak. All three individual plaintiffs would like to be able to cast his or her absentee ballot privately and independently. See J.A. 13-14 (describing individual plaintiffs).

In June 2014 plaintiffs filed an amended complaint. J.A. 10. Count 1 alleged that defendants violated Title II and its implementing regulations by excluding plaintiffs, because of their disabilities, from the benefits of a publicly-run service, program, or activity. J.A. 21-24. Count 1 alleged that defendants failed to provide voters who have vision or dexterity disabilities an opportunity to vote that is equal to, and as effective as, the opportunity provided to other voters. J.A. 21-22 (citing 28 C.F.R. 35.130(b)(1)(ii)-(iii)). Count 1 also alleged, more specifically, that, in denying the use of the online ballot marker tool, defendants refused to allow the use of an auxiliary aid that would permit plaintiffs to vote as privately, independently, and effectively as others. J.A. 22-23 (citing 28 C.F.R. 35.160(b)). Count 2 alleged that, for the same reasons, defendants violated Section 504. J.A. 24-26. Among other remedies, plaintiffs sought an injunction requiring defendants to make the online ballot marking tool available to them in the November 2014 general election and all future elections. J.A. 26.

3. *The Decision Below*

In August 2014, the court held a three-day bench trial. See J.A. 45-46. On September 4, 2014, the district court issued its Memorandum Opinion concluding that, among other things, defendants violated Title II and Section 504 by denying plaintiffs the opportunity to mark their absentee ballots without assistance using an auxiliary tool. J.A. 1055. The court also found that use of the

online ballot marking tool would not result in fundamental alteration. J.A. 1058-1060.⁵

a. In its findings of fact, the court addressed the accessibility and security risks of the online ballot marking tool. J.A. 1047-1050. The court stated that Dr. Kathryn Summers conducted a usability study during the tool's development phase and found that persons with various disabilities, including vision and dexterity disabilities, were successfully able to use the tool and mark their ballots privately and independently. J.A. 1047-1048. As the court summarized, Dr. Summers testified that the tool "was highly accessible for disabled voters, although she acknowledged that there was still room for improvement, particularly with respect to printing, signing, and mailing of ballots." J.A. 1048. The court also relied upon the testimony of plaintiffs' computer information systems expert, Anne Taylor,

⁵ On August 1, 2014, several individuals and three organizations, including the American Council for the Blind (ACB), moved for permissive intervention pursuant to Federal Rules of Civil Procedure 24(b). See J.A. 3 (Docket Entry 21), 1037. They included a proposed complaint alleging that defendants similarly violated their rights, but also raised independent claims and sought relief directly opposed to that sought by plaintiffs, *i.e.*, they sought an injunction *against* the use of the online ballot marking tool because they believed it is not sufficiently accessible. J.A. 1038-1039. The district court declined to permit the putative intervenors to assert independent claims under their separate complaint, but permitted them to participate in the case and considered their evidence and arguments in reaching its decision. J.A. 1037-1041. These issues are not on appeal.

that the tool was compatible with reasonably up-to-date computer and screen access software, including refreshable Braille displays, and was usable by blind individuals with such software. J.A. 1048-1049.

The court also stated that “there are some other challenges to private and independent voting by absentee ballot for disabled voters even when using the tool,” including the need for assistance in signing the ballot before submission. J.A. 1048. But, the court found, because the signature sheet is a separate page, “the risk of disclosure of a disabled voter’s selections was minim[ized] and, in any event, was significantly less than that afforded under the current paper absentee ballot system, which requires a disabled voter to communicate his or her selection to a third party[,] who would then mark those selections for the voter on the ballot.” J.A. 1048-1049. Finally, the court referred to the testimony of plaintiffs’ expert on secure voting systems, Juan Gilbert, who testified that the tool presented no additional security risks that did not already exist in other voting methods. J.A. 1049.

b. The district court concluded that plaintiffs were denied equal access to a benefit of defendants’ voting program because, if they desired to vote by absentee ballot, they could not vote privately and independently, as could absentee voters who did not have a disability. J.A. 1052-1056. First, the court rejected defendants’ argument that the court need look only at whether plaintiffs,

notwithstanding their disabilities, had the opportunity to cast their ballots. J.A. 1053-1054. The court concluded that because Maryland allows *anyone* to vote by absentee ballot, “the State has created a benefit for all citizens” and the issue is “whether disabled citizens are provided equal access to that precise benefit.” J.A. 1053. The court stated that any other conclusion “would render meaningless the mandate that public entities may not afford persons with disabilities services that are not equal to that afforded others.” J.A. 1053-1054 (citation omitted).

The court further concluded that plaintiffs were denied the benefit of being able to vote by absentee ballot independently and privately, rejecting defendants’ argument that plaintiffs have no right to vote by absentee ballot without assistance. J.A. 1054. The court stated that 28 C.F.R. 35.160(b)(2), which became effective in 2011, states that “auxiliary aids and services must be provided in accessible formats * * * and in such a way as to protect the *privacy and independence* of the individual with a disability.” J.A. 1055 (emphasis added).

The court also addressed whether the online ballot marking tool is a reasonable accommodation, and concluded that it was. J.A. 1056-1058. The court found that individuals with certain disabilities who have access to reasonably up-to-date software could use the tool to vote privately and independently. The court also stated that, although the online tool did not necessarily allow *all* voters with disabilities to participate in absentee voting, “the law only requires reasonable

modifications” and there was no evidence that a tool capable of being used by all persons with disabilities exists or is even feasible. J.A. 1057 & n.24. The court noted that, with the online tool, the selections of persons with disabilities can be kept private, so that “the main interest protected by the right to vote privately and independently is served.” J.A. 1057.

Finally, the court rejected defendants’ argument that forcing the State to use the tool absent State certification – *i.e.*, waiving the State certification requirement – would constitute a fundamental alteration to the State’s voting program. J.A. 1058-1060. The court stated that the ADA may “preempt state statutes or require waiver of certain state requirements under some conditions.” J.A. 1059. The court concluded that, here, waiver of the certification requirement does not constitute a fundamental alteration because plaintiffs are simply seeking to vote in the same way that voters without disabilities can vote (*i.e.*, privately and independently), and plaintiffs are not requesting that the tool be available to *all* voters. J.A. 1059-1060.

The court permanently enjoined defendants from violating plaintiffs’ rights under Title II and Section 504 in all future elections, and ordered defendants to make the online ballot marking tool available to plaintiffs in the 2014 general election. J.A. 1064-1066. The court denied plaintiffs’ request that it order that the tool be available in *all* future elections, noting that “developments of the tool or

new and more effective technologies could render the current tool obsolete and make further use unreasonable.” J.A. 1062.

Defendants filed a timely notice of appeal. J.A. 1067.

SUMMARY OF THE ARGUMENT

This Court should affirm. The district court correctly concluded that defendants violated Title II by denying plaintiffs equal access to the benefits of its voting program – specifically, the opportunity to vote by absentee ballot *privately and independently* using the online ballot marking tool. The district court also correctly concluded that the use of the online ballot marking tool does not fundamentally alter Maryland’s voting program.

Plaintiffs’ claims are most appropriately analyzed under Title II’s “effective communication” regulation, 28 C.F.R. 35.160. This regulation is intended to ensure that a public entity’s communications with members of the public with disabilities are as effective as its communications with others. The regulation specifically requires a public entity to furnish “an appropriate auxiliary aid[]” where necessary to ensure that a person with a disability has an equal opportunity to enjoy the benefits of a service, program, or activity. 28 C.F.R. 35.160(b)(1). To be effective, the auxiliary aid must be provided “in such a way as to protect the privacy and independence of the individual with a disability.” 28 C.F.R. 35.160(b)(2). The effective communication regulation, therefore, speaks

specifically to plaintiffs' claims. Its application here leads to the conclusion that defendants violated Title II by failing to provide plaintiffs with an auxiliary aid – the online ballot marking tool – that would allow them to vote by absentee ballot privately and independently, as voters without disabilities can.

Although the regulation's reasonable modification provision, 28 C.F.R. 35.130(b)(7), also supports liability here, and the district court's decision could be affirmed on that alternative basis, different standards and burdens apply to claims under the effective communication regulation and the reasonable modification provision. For that reason, this Court, in affirming, should apply the effective communication regulation.

ARGUMENT

DEFENDANTS VIOLATED TITLE II BY DENYING PLAINTIFFS THE OPPORTUNITY TO VOTE BY ABSENTEE BALLOT USING THE ONLINE BALLOT MARKING TOOL

A. *By Declining To Permit Plaintiffs To Use The Online Ballot Marking Tool As An Auxiliary Aid, Plaintiffs Were Denied The Ability To Vote By Absentee Ballot Privately And Independently, In Violation Of Title II*

1. Regulatory Framework

To prove a violation of Title II plaintiffs must show that they: (1) have a disability; (2) are otherwise qualified to receive the benefits of the defendant's service, program, or activity; and (3) were denied the opportunity to participate in or benefit from the defendant's service, program, activity, or were otherwise

discriminated against, on the basis of their disability. 42 U.S.C. 12132; see *Constantine v. Rector & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). Only the third element is at issue in this appeal. See J.A. 1051.⁶

The Justice Department has promulgated regulations that restate Title II's general nondiscrimination mandate. These regulations state, in relevant part, that in providing benefits and services, a public entity must not "[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that *is not equal* to that afforded others," or provide such persons "an aid, benefit, or service that is *not as effective* in affording *equal opportunity*" to gain the same result or benefit as that provided to others. 28 C.F.R. 35.130(b)(1)(ii)-(iii) (emphasis added).

Title II's nondiscrimination requirements are articulated more specifically in additional regulations. First, these regulations state that a "public entity shall make

⁶ As noted above, plaintiffs asserted claims under both Title II and Section 504, and the district court held that defendants violated both statutes. This Court has recognized that, as a general matter, claims under Title II and the Rehabilitation Act "can be combined for analytical purposes because the analysis is 'substantially the same.'" *Seremeth v. Board of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 336 n.1 (4th Cir. 2012) (citation omitted). We address only Title II and its regulations. See generally *A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356, 362 (4th Cir. 2008) ("Congress has directed courts to construe the ADA to grant at least as much protection as the Rehabilitation Act and its implementing regulations." (citing 42 U.S.C. 12201(a)). If this Court concludes that defendants have violated Title II, it need not address Section 504.

reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. 35.130(b)(7). The public entity need not make modifications that it can demonstrate would “fundamentally alter” the nature of the program. 28 C.F.R. 35.130(b)(7).

Second, in the specific context of communications, the “effective communication” regulation states that “[a] public entity shall take appropriate steps to ensure that communications with * * * members of the public * * * with disabilities are as effective as communications with others.” 28 C.F.R. 35.160(a)(1) and (b)(2). To this end, the regulation requires public entities to “furnish appropriate auxiliary aids and services where necessary” to afford an individual with a disability “an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity.” 28 C.F.R. 35.160(b)(1). The regulation provides examples of “[a]uxiliary aids and services,” including “accessible electronic and information technology.” 28 C.F.R. 35.104(1).

The regulation, as amended in 2010 (effective in 2011), also specifies that, in order to be effective, auxiliary aids and services “must be provided * * * in such a way as *to protect the privacy and independence* of the individual with a disability.” 28 C.F.R. 35.160(b)(2) (emphasis added). In determining what types of auxiliary aids are necessary, the public entity “shall give primary consideration

to the requests of individuals with disabilities.” 28 C.F.R. 35.160(b)(2); see also United States Dep’t of Justice, *Americans With Disabilities Act: Title II Technical Assistance Manual*, § II-7.1100 (Nov. 1993), available at <http://www.ada.gov/taman2.html#II-7.1100>.

Under the effective communication provisions, unlike the reasonable modification provision in Section 35.130(b)(7), the plaintiff does not need to show that the auxiliary aid is “reasonable.” Rather, the public entity “shall honor the [plaintiff’s requested] choice unless it can demonstrate that another effective means of communication exists,” or demonstrate that providing the aid would result in a “fundamental alteration” in the nature of a service, program, or activity or “undue financial and administrative burdens.”⁷ 28 C.F.R. Pt. 35, App’x B, Subpt. E; 28 C.F.R. 35.160(b)(2), 35.164; see also *Prakel v. Indiana*, No. 4:12-cv-00045, 2015 WL 1455988, at *17 (S.D. Ind. Mar. 30, 2015) (distinguishing Title II’s reasonable modification provision from the effective communication

⁷ The defenses available to a public entity under the reasonable modification regulation are, therefore, not coextensive with the defenses available under the effective communication regulation. The former (28 C.F.R. 35.130(b)(7)) is limited to the fundamental alteration defense, while the latter (28 C.F.R. 35.164) includes both the fundamental alteration and undue burden defenses. The fact that each of these provisions has distinct defenses supports the notion that these are separate ways in which a public entity can violate Title II.

regulation, and rejecting argument that the reasonableness standard applies to the latter).⁸

2. *Defendants Violated The Effective Communication Regulation*

Defendants discriminated on the basis of disability in violation of Title II's effective communication regulation by denying plaintiffs the benefit of being able to vote by absentee ballot independently and privately through the use of the online ballot marking tool. The effective communication regulation requires auxiliary aids so that individuals with disabilities may "enjoy the benefits of" a government service, and the auxiliary aids must "protect the privacy and independence of the individual with a disability." 28 C.F.R. 35.160(b)(1) and (2). As one court has explained, a county could not fulfill its obligation to ensure effective communication by providing third party assistants to blind and visually impaired voters, because "[i]n order to be effective, auxiliary aids and services must be provided ... in such a way as to protect the *privacy and independence* of the individual with a disability." *California Council of the Blind v. Alameda*, 985 F. Supp. 2d 1229, 1239 (N.D. Cal. 2013) (quoting 28 C.F.R. 35.160(b)(2)). In this case, the online ballot marking tool is an auxiliary aid that, by permitting plaintiffs to vote absentee privately and independently, affords them an equal opportunity to

⁸ The issue of an equally effective alternative means of communication is not presented in this case.

participate in and enjoy the benefits of Maryland’s voting program, and does not fundamentally alter the program or cause an undue burden.⁹ Therefore, by denying plaintiffs the use of the tool, defendants have violated 28 C.F.R. 35.160(b).

The conclusion that defendants violated Title II by failing to make the online ballot marking tool available comports with the basic purpose of these statutes, *i.e.*, “to empower individuals with disabilities to maximize employment, economic self-sufficiency, *independence*, and inclusion and integration into society.” J.A. 1055 (citation omitted). Because “most voters may mark their absentee ballots without assistance[,] * * * [p]laintiffs should be afforded the same opportunity.” J.A. 1055. Indeed, the ability to vote privately and independently goes to the core of our election process, and is a corollary to the notion of the secret ballot. See, *e.g.*, *Disabled in Action v. Board of Elections in the City of N.Y.*, 752 F.3d 189, 200 (2d Cir. 2014) (“The right to vote should not be contingent on the happenstance that others are available to help.”); *California Council of the Blind*, 985 F. Supp. 2d at 1238 (providing voting systems that allow for privacy “is a normal function of a government entity”) (citation and internal quotation marks omitted); cf. 52 U.S.C. 21081(a)(1)(A) (provision of the Help America Vote Act setting forth

⁹ We address below defendants’ fundamental alteration argument. Although the district court concluded that use of the tool would not constitute a fundamental alteration and would not impose an undue financial or administrative burden (J.A. 1034), defendants only make the fundamental alteration argument.

requirements for voting systems used in federal elections and including the requirement that voter can verify the votes selected and change them “in a private and independent manner”).

3. *Defendants’ Violation Of The Reasonable Modification Provision Provides An Alternative Basis For Affirmance*

The district court also found that by precluding plaintiffs from being able to vote absentee privately and independently, Maryland failed to make a reasonable modification in violation of Section 35.130(b)(7). Although the court’s application of the reasonable modification requirement is correct, the effective communication regulation is a more appropriate and direct basis on which to resolve plaintiffs’ claims because the claims, and the regulation, specifically involve communication. Nevertheless, we address the reasonable modification analysis as an alternate basis for affirmance.¹⁰

¹⁰ Because Maryland violated the more specific effective communication and reasonable modification provisions, plaintiffs are not afforded an equal opportunity to benefit from Maryland’s online voting system, *i.e.*, they cannot print out a ballot online and mark their votes without assistance, in violation of the general anti-discrimination provisions of Section 35.130. See 28 C.F.R. 35.130(b)(1)(ii)-(iii). This conclusion is supported by other disability cases arising in the context of voting, which defendants acknowledge only in passing. See Br. 40, 56 n.19. See, *e.g.*, *California Council of the Blind*, 985 F. Supp. 2d at 1239 (“requiring blind and visually impaired individuals to vote with the assistance of a third party, if they are to vote at all, at best provides these individuals with an inferior voting experience ‘not equal to that afforded others’”) (quoting 28 C.F.R. 35.130(b)(1)(ii); *Disabled in Action*, 752 F.3d at 196-200 (plaintiffs with vision
(continued...))

The Title II regulations state that a “public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. 35.130(b)(7); see also 42 U.S.C. 12131(2). Congress recognized that “failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion.” *Tennessee v. Lane*, 541 U.S. 509, 531 (2004). Therefore, “[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does.” *Jones v. City of Monroe*, 341 F.3d 474, 487 (6th Cir. 2003).

A plaintiff meets the burden of showing that a modification is reasonable if it is “reasonable on its face” or “ordinarily or in the run of cases.” *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 464 (4th Cir. 2012) (citation omitted). This is not an onerous burden. It is “enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2nd Cir. 2003) (citation omitted). Moreover, this determination must recognize that assistive technology is not frozen in time, and that the “accommodation[s] and

(...continued)

and mobility disabilities were denied equal access to a benefit of the city’s voting program because they could not vote privately and independently).

services provided to individuals with disabilities * * * should keep pace with the rapidly changing technology of the times.” H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 108 (1990). At the same time, a public entity need not make a modification if it can show, as an affirmative defense, that the modification would “fundamentally alter” the nature of the services provided. 28 C.F.R. 35.130(b)(7).

The district court concluded that the online ballot marking tool is a reasonable modification to defendants’ voting program necessary to avoid discrimination on the basis of disability. J.A. 1056-1058. The court found that the tool (1) is reasonably accessible to persons with disabilities; (2) allows voters to mark their ballots secretly and independently; and (3) is sufficiently secure to prevent tampering and protect voters’ privacy. J.A. 1056-1057. The record supports these conclusions. The court cited a usability study that found that persons with various disabilities, including vision and dexterity limitations, were able to use the tool and mark their ballots privately and independently. The court also relied upon testimony that the tool presented no additional security risks that did not already exist in other voting methods already being used. See J.A. 1048-1049. Moreover, a version of the tool was used in the 2012 election “without any apparent incident.” J.A. 1057-1058. For these reasons, the record supports the district court’s finding that the tool constitutes a reasonable modification.

4. *Defendants' Arguments Are Not Persuasive*

In their opening brief, defendants do not address the effective communication regulation. Rather, they principally argue (Br. 54), as they did below, that the court need look only at whether plaintiffs had the opportunity to cast their ballots and have them counted. See J.A. 1053-1054. Defendants take the view that, looking at Maryland's voting program "in its entirety," all voters could choose among several methods of voting and the ADA does not require that every available method for casting a ballot must be equally available to every voter. Br. 54-57.

The argument that defendants cannot be liable under the ADA so long as plaintiffs have some way to vote and have their votes counted is not correct. First, although the district court rejected the argument that the scope of the program at issue is Maryland's voting program as a whole, resolution of this case does not turn on whether absentee voting, rather than voting generally, is *the* program or activity subject to the requirements of Title II. Even if the focus is Maryland's voting program as a whole, defendants are not shielded from liability simply because persons with disabilities have a choice, albeit limited, of voting options.

Indeed, similar arguments have been rejected in the context of access to neighborhood polling places. In *Kerrigan v. Philadelphia Board of Election*, No. 07-687, 2008 WL 3562521, at *13, *18 (E.D. Pa. Aug. 14, 2008), the court stated

that even in the context of Philadelphia’s “entire, city-wide, program of voting,” the city’s failure to ensure that voters with mobility disabilities could vote in neighborhood polling places “is a failure to provide mobility disabled voters with an equal opportunity to access the program of voting.” Likewise, in *Westchester Disabled on the Move, Inc. v. County of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004), the court concluded that “[f]ailing to ensure that disabled individuals are able to vote in person and at their assigned [voting] places – presumably the most commonly used method of voting – could not reasonably be construed as consistent with providing ‘meaningful access’ to the voting process, particularly where the alternatives * * * impose additional costs, risks and inconveniences on disabled voters not faced by others.”

Moreover, courts have recognized that “programs, services, or activities” is a “catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.” *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (citation omitted); see also *Alexander v. Choate*, 469 U.S. 287, 301 & n.21 (1985) (the benefit “cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled”). Here, by allowing all voters to vote by absentee ballot regardless of need and to do so privately and independently, and failing to allow use of an auxiliary aid that would afford plaintiffs equal opportunity, Maryland has violated Title II.

Defendants also argue that the inability to vote privately or without assistance cannot support a Title II violation. Br. 57-60. Defendants cite cases for the proposition that there is no right to privacy in voting, but those cases, as the district court recognized, pre-date amendments to the effective communication regulation discussed above and therefore are inapposite. Br. 59.¹¹ At the same time, defendants do not address those cases, discussed above, recognizing that voters with disabilities were denied meaningful and equal access to the benefits of the city's voting program because they could not vote privately and independently. J.A. 1054 (citing cases).

Defendants further rely on the "program accessibility" regulation, which provides that a public entity shall operate each service, program, or activity so that, "when viewed in its entirety," the service, program, or activity is "readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a); see Br. 54. That regulation does not help defendants here. By its terms, it applies to

¹¹ See J.A. 1054 (citing *Taylor v. Onorato*, 428 F. Supp. 2d 384, 388 (W.D. Pa. 2006)) (denial of preliminary injunction against the change from lever style voting machines to touch screens; court states that the ADA does not "require private, independent voting"); *American Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1126 (C.D. Cal. 2004) (same); *Nelson v. Miller*, 950 F. Supp. 201, 205 (W.D. Mich. 1996) (States not required to provide voters with vision disabilities "voting privacy free from third party assistance"), aff'd on other grounds, 170 F.3d 641 (6th Cir. 1999). In 2013, the court in *California Council of the Blind*, 985 F. Supp. 2d at 1241-1242, expressly rejected the reasoning of *Onorato* and *Shelley*.

“existing facilities,” and it provides that a public entity does not have to make each of its facilities accessible so long as persons with disabilities have access to the offered program or activity. See, e.g., *Constantine*, 411 F.3d at 488 (addressing alternatives for making a program accessible where each facility is not accessible).¹²

B. Use Of The Online Ballot Marking Tool Does Not Fundamentally Alter Maryland’s Voting Program

Defendants argue that requiring them to use a voting tool that has not been certified pursuant to state law, a law intended to preserve the integrity of Maryland’s voting system, would fundamentally alter their voting program. Br. 48-53. This argument is not correct.

Plaintiffs’ use of the online ballot marking tool would not fundamentally alter the voting program simply because the tool was not certified pursuant to state

¹² Defendants also suggest that this case presents a “disparate impact” theory of discrimination, and that plaintiffs cannot succeed on this claim because they cannot show that they were generally denied meaningful access to voting. Br. 38, 57-61 (citation omitted). Neither the plaintiffs nor the district court approach this case under the disparate impact theory of discrimination. Nor is there any need to do so when there is direct evidence of a violation of the statute. As discussed above, the court correctly concluded that Maryland violated the effective communication regulation (and the reasonable accommodation requirement) by failing to provide an auxiliary aid that would permit plaintiffs to vote privately and independently. J.A. 1053-1056. Defendants are simply repackaging their argument that because plaintiffs could have voted in other ways, there is no violation of Title II. That argument, as discussed above, ignores the properly applicable Title II regulations and is not correct.

law. The ADA may preempt inconsistent state laws, or require a waiver or exemption, where necessary to effectuate its purpose. As the Second Circuit has explained, if “all state laws were insulated from Title II’s reasonable modification requirement solely because they were state laws * * * the ADA would be powerless to work any reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and no matter how minimal the costs of doing so. * * * [T]he ADA’s reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II’s reasonable modification provision.” *Mary Jo C. v New York State & Local Ret. Sys.*, 707 F.3d 144, 160, 163 (2d Cir. 2013) (also citing cases); see also *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (request by person with disability using a guide dog for exemption from Hawaii law requiring quarantine of dogs entering the State). Therefore, the mere fact that the requested modification conflicts with state law does not mean that it fundamentally alters a state’s program. Moreover, it follows that defendants’ argument (Br. 46) that plaintiffs have to show that the state certification law is “invalid” to obtain a modification is not correct. A reasonable modification constitutes a limited exception to a state law for persons who, because of their disabilities, cannot enjoy equal access to a state program or benefit without that modification. It does not invalidate the state law.

Likewise, applying the reasonable modification regulation, defendants' interest in preserving the integrity of its voting program does not mean that no modification to a voting program, including to certification rules, can be required under the ADA. See, e.g., *Mary Jo C.*, 707 F.3d at 163 (rejecting notion that "whatever legal requirements [a State] may set are never subject to reasonable modification under Title II"). Moreover, the cases defendants cite to support their argument that "a request to modify a certification requirement is facially unreasonable" do not support that conclusion. Br. 45.¹³ Rather, the question here

¹³ None of these cases holds or even squarely addresses whether noncompliance with state voting certification laws bars application of Title II's nondiscrimination mandates. See *Shelley*, 324 F. Supp. 2d at 1130-1131 (court denied plaintiffs' motion for preliminary injunction against secretary of state's withdrawal of certification of electronic voting system; court concludes that secretary of state did not violate the state administrative procedure act); *Taylor*, 428 F. Supp. 2d at 388-389 (court denied plaintiffs' motion for preliminary injunction against adoption of touch screen voting because plaintiffs unlikely to succeed on the merits; court also noted that the public interest would not be served by granting relief because the touch screens had been certified as compliant with the federal Help America Vote Act, but the lever machines plaintiffs wanted to use had not); *American Ass'n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226, 1240-1241 (M.D. Fla. 2004) (plaintiffs challenged use of optical scan voting system and failure to certify voting system that would allow voter with manual disabilities to vote unassisted; court concluded that defendants violated Title II regulations addressing accessibility of public facilities but did not violate Title II by refusing to certify plaintiffs' desired voting system under Florida law), vacated and remanded sub. nom. *American Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093 (11th Cir. 2011) (voting machines are not "facilities" under Title II's program accessibility regulations); *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003) (court rejected plaintiff's claim that use of touch screen voting system, which

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is whether the requested modification is reasonable. This is a factual inquiry that necessarily takes into consideration the state's interests underlying its voting laws, including the integrity of the voting process. The district court correctly concluded that the modification was reasonable, squarely addressing the concerns underlying the certification law, *i.e.*, whether the tool would ensure the integrity, security, and privacy of the voting process. The court found that the tool was secure and safeguarded voters' privacy, it had been used successfully "in a real-world situation," and, therefore, it was not unreasonable to require an exception to the certification rule in this context. J.A. 1056-1058.

Finally, defendants assert (Br. 48) that the court erred by failing to determine whether the certification requirement is an "essential aspect" of Maryland's voting program. But that argument begs the question. Defendants cannot simply assert that some element of their program is "essential," and therefore immunize it from the ADA's reasonable modification provision. See, *e.g.*, *Mary Jo C.*, 707 F.3d at 158-161. Here, the district court determined based on the record that plaintiffs' use of the tool would not undermine the security of the voting system, and also noted that Maryland had previously used the tool without incident in a prior election.

(...continued)

would not leave a "voter-verified paper trail" permitting officials to audit and verify election results, violated her constitutional right to vote).

The court, therefore, concluded that the requested modification was reasonable and would not fundamentally alter the program. As such, the court concluded that certification of the online ballot marking tool was not essential to Maryland's voting program.

At the same time, we do not minimize general concerns over the security of online voting that may arise in other contexts, or the validity of state certification requirements generally. We argue only that given the district court's specific findings of fact on the security of the ballot marking tool in this case, the court's conclusions that defendants violated Title II and that use of the tool would not fundamentally alter Maryland's voting program, notwithstanding that the tool was not certified, are correct.

CONCLUSION

This Court should affirm the decision of the district court concluding that defendants violated Title II.

Respectfully submitted,

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Thomas E. Chandler
MARK L. GROSS
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - RFK 3748
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3192

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure, that the attached
BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING
PLAINTIFF-APPELLEES AND URGING AFFIRMANCE:

(1) complies with Federal Rules of Appellate Procedure 29(d) and
32(a)(7)(B) because it contains 6843 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate
Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate
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typeface using Microsoft Word 2007, in 14-point Times New Roman font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Dated: April 15, 2015

CERTIFICATE OF SERVICE

I certify that on April 15, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that eight paper copies of the electronically-filed brief were sent to the Clerk of the Court by first class mail.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney