

April 25, 2023

Frank LaRose
Ohio Secretary of State
22 North Fourth Street, 16th Floor
Columbus, Ohio 43215

Re: Further Questions Regarding HB 458

Secretary LaRose:



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

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Dr. Ebony Speakes-Hall, LISW-S
President

J. Bennett Guess
Executive Director

Thank you for responding to our February 9, 2023, letter, which requested clarification of certain provisions of HB 458. We are following up with additional questions about that now-implemented law. In particular, we are seeking answers as to how R.C. §§ 3505.18, 3509.05, and 3599.21 will be applied to Ohio's population of voters with disabilities. We are concerned that without your guidance, these provisions will adversely affect voters with disabilities in a manner that violates Title II of the Americans with Disabilities Act (the ADA), 42 U.S.C. § 12131 *et seq.* With the May 2, 2023, elections occurring next week, we are hoping for a prompt reply to ensure that every one of Ohio's voters with disabilities can cast a ballot.

(1) Affidavit alternative regarding the photo identification requirement. As stated in our previous letter, Section 3505.18 of HB 458 creates new limitations on which forms of photo identification will be accepted at the polls. The process of obtaining photo identification can be prohibitively burdensome for voters with disabilities, who will often have difficulties in traveling to (and within) identification-issuing offices. For many voters with disabilities, the photo ID requirement effectively means that they cannot participate in the state's voting program on equal terms with other voters. As applied to voters who cannot obtain a photo ID by reason of their disability, the photo ID requirement of HB 458 constitutes improper discrimination in violation of Title II of the ADA.

Since Ohio law must be consistent with the ADA, voters with disabilities who lack the otherwise requisite photo identification document should be permitted to provide an affidavit attesting to their identity in lieu of a photo identification document where the voter does not have the requisite photo identification document. The affidavit would state that the voter was unable to obtain the otherwise required photo ID by reason of their disability. Such an

accommodation would be consistent with that provided to voters who have religious objections to providing a photo identification (and do not have a photo identification document) as set forth in section 3505.19 of the Revised Code. *Cf.* Directive 2023-03 at 5.

Unless such a modification is available, discriminating against voters with disabilities in this regard runs afoul of the ADA and its implementing regulations. “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, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7). Given that Ohio already provides an affidavit alternative for certain voters, it would appear that providing such an option to voters with disabilities would not “fundamentally alter” the nature of the state’s voting program. Will your office support such an accommodation? If so, how will your office communicate that option to voters with disabilities?

(2) Prohibition of assistance by non-family members regarding the return of absentee ballots. HB 458 created a new criminal penalty for persons returning an absent voter’s ballot unless that person is authorized to do so by statute. Specifically, R.C. § 3599.21(A)(9) now makes it a fourth-degree felony for a person to “knowingly . . . [r]eturn the absent voter’s ballot of another to the office of a board of elections, unless . . . [t]he person is a relative who is authorized to do so under division (C)(1) of section 3509.05 of the Revised Code[.]”

Under R.C. § 3509.05(C)(1), the list of authorized relatives permitted to return an absent voter’s ballot includes:

[T]he spouse of the elector, the father, mother, father-in-law, mother-in-law, grandfather, grandmother, brother, or sister of the whole or half blood, or the son, daughter, adopting parent, adopted child, stepparent, stepchild, uncle, aunt, nephew, or niece of the elector[.]

That provision then further states that “[t]he return envelope shall be returned by no other person, in no other manner, and to no other location, except as otherwise provided in section 3509.08 of the Revised Code.”¹

¹ Section 3509.08 concerns the manner in which disabled and confined voters who are unable to vote in person on election day may apply for, receive, and vote absentee ballots. This includes the narrow circumstances where the board of elections may designate two board employees to deliver and return a ballot, as well as the situation in which two board employees may assist a physically infirm voter with the marking of the voter’s ballot.

In combination, these provisions have the potential to prevent absentee voters with disabilities from casting a ballot. There are two problematic aspects of this constraint: (a) who can assist the voter, and (b) what that person can do without running the risk of criminal liability.

Who can assist. For electors with disabilities, returning a voted absentee ballot often requires assistance. However, such voters may only have a limited group of people available to provide such assistance. For example, a voter with a disability may not have an authorized relative in existence, or, if they do have an authorized relative, that relative may not be able to assist for a variety of reasons, such as living too far from the voter. In such scenarios, the only persons capable of assisting the voter with a disability in returning an absentee ballot might be the individual's caretakers, friends, neighbors, grandchildren, or domestic partners. But because these groups are not listed as authorized to return absentee ballots under R.C. § 3509.05(C)(1), and return of an absentee ballot by a non-authorized person is now criminalized, certain voters with disabilities will have no one to help them cast their absentee ballots.

To ensure that voters with disabilities understand the full scope of who may return an absentee ballot on their behalf, please state whether R.C. §§ 3599.21(A)(9) and 3509.05(C)(1) prohibit the following persons from returning voted absentee ballots on behalf of persons with disabilities:

- (1) caretakers of voters with disabilities, including both staff employed at assisted living facilities, such as nursing homes, and at-home caretakers,
- (2) friends or neighbors of voters with disabilities; and
- (3) grandchildren or domestic partners.

To the extent Ohio law purports to prohibit these persons from assisting voters with disabilities with returning their ballots, such a restriction effectively prevents certain voters with disabilities from participating in the state's voting program on equal terms with other voters. Ohio law, however, must be consistent with the ADA and with Section 208 of the Voting Rights Act. In connection with VRA Section 208, we note that it provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."

Accordingly, voters with disabilities should be permitted to receive assistance with returning their voted ballot by a person of the voter's choice, including non-familial caregivers, friends, neighbors, grandchildren, or domestic partners who fall outside of the enumerated list of relatives in R.C. § 3509.05(C)(1). Will your office support such an accommodation? If so, how will your office communicate that option to voters with disabilities and those who may assist them?

What assistance is prohibited. We further ask for clarification as to what your view of the term “return” in R.C. § 3599.21(A)(9) encompasses. In particular, please state whether the following activities are prohibited:

- (1) Collection of a sealed absentee ballot envelope from a voter and placing it in a mail box;
- (2) Collection of a sealed absentee ballot envelope from a voter and placing it in a drop-box;
- (3) Collection of a sealed absentee ballot envelope from a voter and delivering it to the Board of Elections.

In addition, although HB 458 added a new prohibition on *returning* an absent voter’s ballot, the bill also maintains a previously existing prohibition on *possessing* an absent voter’s ballot. R.C. § 3599.21(A)(10) (“No person shall knowingly[,] . . . [e]xcept as authorized under Chapters 3509. and 3511. of the Revised Code, possess the absent voter’s ballot of another.”). Can you please clarify whether any additional activities are now criminalized by the new provision concerning the return of an absent voter’s ballot, R.C. § 3599.21(A)(9), that were not criminalized by the provision prohibiting possession of an absent voter’s ballot, R.C. § 3599.21(A)(10)?

With the May 2, 2023, election coming next week, we respectfully request your prompt attention to this matter. We thank you in advance for your responses to these important questions affecting Ohio’s voters with disabilities.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Collin Marozzi", is written over a light gray rectangular background.

J. Collin Marozzi
Deputy Policy Director
American Civil Liberties Union of Ohio