

STATE OF MICHIGAN

DANA NESSEL, ATTORNEY GENERAL

CONST 1963, ART 1, § 2:	Constitutionality of 2022 PA 196, 197, amending Michigan Election Law.
U.S. CONST, AM XIV:	
AMERICANS WITH DISABILITIES ACT:	Modifications to 2022 PA 197 to accommodate individuals with a print disability.

On a facial review, Public Acts 196 and 197 of 2022 do not unconstitutionally burden the fundamental rights of overseas voters who do not possess a Department of Defense verified electronic signature.

Whether the Americans with Disabilities Act requires the Department of State to allow individuals with a print disability to use the secure web portal to be developed under Public Act 197 of 2022 cannot be determined without a request for an accommodation by a potential voter and the development of a factual record.

Opinion No. 7322

May 5, 2023

The Honorable Jocelyn Benson
Secretary of State
Richard H. Austin Building
430 W. Allegan
Lansing, MI 48918

You have asked whether Public Acts 196 and 197 of 2022, which amended the Michigan Election Law, 1954 PA 116, MCL 168.1 *et seq.*, to allow overseas military personnel, but not other overseas voters, to return completed absent voter ballots electronically, violate the Equal Protection Clauses of the federal and state constitutions. You also ask whether the Americans with Disabilities Act requires the expansion of Public Act 197's provisions to individuals with a print disability.

Background

Public Acts 196 and 197 of 2022 were signed by the Governor and took immediate effect on October 7, 2022.¹

Public Act 196 creates a new section in the Michigan Election Law, MCL 168.18a, which now defines a “United States Department of Defense verified electronic signature” as “the certificate-based digital identification code issued to qualified personnel by the United States Department of Defense as part of the Common Access Card, or its successor.”

Public Act 197 amends MCL 168.759a to provide that—beginning on January 1, 2024—members of uniformed military services on active duty or members of the merchant marine who are absent from the United States by reason of their service and who do not expect to return to the United States to vote may be allowed to electronically return a voted ballot to the appropriate city or township clerk to be counted. MCL 168.759a(13). MCL 168.759a(17) authorizes the Secretary of State to develop and maintain a secure web portal on the Secretary of State’s website to facilitate the electronic return of voted ballots by service members, and expressly limits the persons who may access the web portal to “[o]nly the secretary of state or the secretary of state’s duly authorized agent, a city or township clerk, the clerk’s deputy clerk, or a sworn member of the clerk’s staff.”

¹ Public Acts 196 and 197 were introduced as Senate Bills 8 and 311, respectively.

MCL 168.759a(17) also requires the Secretary of State to promulgate rules no later than January 1, 2024, that establish policies and procedures for the electronic return of voted ballots by members of uniformed military service on active duty or by members of the merchant marine who are absent from the United States by reason of their service and who do not expect to return to the United States to vote.

MCL 168.759a(17) further provides that, in promulgating those policies and procedures, the Secretary “shall require an eligible member to use a United States Department of Defense verified electronic signature, as that term is defined in section 18a, so that the identity of the eligible member can be verified utilizing those policies and procedures.” The statute expressly states that “[a] member who is unable or unwilling to provide a United States Department of Defense verified electronic signature is not eligible to electronically return a voted ballot.” MCL 168.759a(17).

Although the Legislature’s intent is not expressly stated, it is significant that Public Act 197 was tie-barred with Public Act 196, which, as mentioned, defined a Department of Defense “verified electronic signature” as “the certificate-based digital identification code issued to qualified personnel by the United States Department of Defense as part of the Common Access Card, or its successor.” MCL 168.18a. Coupled with the requirement that members use their “verified signature” to return their voted ballot electronically, it is apparent that the Legislature intended to limit the return of ballots electronically based upon the security afforded by those “verified signatures.”

Legal Principles

When addressing a constitutional challenge to a statute, the statute is “presumed to be constitutional” and there is a “duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6 (2003) (citations omitted). “Further, when considering a claim that a statute is unconstitutional . . . the wisdom of the legislation” is not part of the inquiry. *Id.* (citation omitted). “[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution” that the statute’s validity will not be sustained. *Phillips v Mirac, Inc*, 470 Mich 415, 423 (2004) (citations omitted).

Because the statutes amended or added by Public Acts 196 and 197 have yet to be applied or enforced as to any person, this office is limited to conducting a facial review of their constitutionality.² Generally, a statute will fail to withstand facial review only if “no set of circumstances exists under which the statute would be valid” and “the fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient” to render it invalid. *Council of Orgs & Others for Educ About Parochiaid, Inc v Governor*, 455 Mich 557, 568–569 (1997) (cleaned up). Indeed, “if any state of facts reasonably can be conceived that would

² Moreover, the opinions process is generally confined to answering questions of law and not the resolution or finding of facts. MCL 14.32. See also *Mich Beer & Wine Wholesalers Ass’n v Attorney General*, 142 Mich App 294, 300–302 (1985).

sustain the statute, the existence of the state of facts at the time the law was enacted must be assumed” and the statute upheld. *Id.* (citation omitted).

Analysis

You first ask whether the Equal Protection Clause of the U.S. Constitution or the Michigan Constitution requires the Secretary of State to extend Public Act 197’s provisions to all voters covered by the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 USC 20301 *et seq.* You observe that UOCAVA, as amended by the Military and Overseas Voter Empowerment Act of 2009, requires that ballots be made available to members of the military, their eligible family members, and overseas citizens, and you question whether Public Act 197’s limitation to only active-duty military service members and members of the merchant marine contravenes the equal-protection rights of military family members residing on overseas military bases and other voters living overseas. The Equal Protection Clause of the Michigan Constitution commands that “[n]o person shall be denied the equal protection of the laws . . .” Mich Const 1963, art 1, § 2. The Michigan Supreme Court has held that this constitutional provision is coextensive with that of its federal counterpart. *Crego v Coleman*, 463 Mich 248, 258 (2000). In *Crego*, the Court quoted *Doe v Dep’t of Social Services*, 439 Mich 650, 670–671 (1992), which stated that “a review of the jurisprudence and constitutional history of this state suggests . . . that our Equal Protection Clause was intended to duplicate the federal clause and to offer similar protections.” 463 Mich at 258. Accordingly, questions of equal protection under both the Michigan and U.S.

constitutions may be considered together. See *People v James*, 326 Mich App 98, 105 (2018).

As the Sixth Circuit has previously observed, “voting is of the most fundamental significance under our constitutional structure.” *Mays v LaRose*, 951 F3d 775, 783 (CA 6, 2020), quoting *Ill Bd of Elections v Socialist Workers Party*, 440 US 173, 184 (1979). “Other rights, even the most basic, are illusory if the right to vote is undermined.” *Obama for Am v Husted*, 697 F3d 423, 428 (CA 6, 2012), quoting *Wesberry v Sanders*, 376 US 1, 17 (1964). Equal protection applies not only in the initial allocation of the franchise, but also in the manner of its exercise. *Id.* at 428, quoting *League of Women Voters v Brunner*, 548 F3d 463, 477 (CA 6, 2008). “[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Id.* at 428, quoting *Dunn v Blumstein*, 405 US 330, 336 (1972). Once a state grants the right to vote on equal terms, it “may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.* at 428, quoting *Bush v Gore*, 531 US 98, 104 (2000). The Sixth Circuit also noted that, “[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.” *Id.*, quoting *Wesberry*, 376 US at 17–18.

“It does not follow, however, that the right to vote in any manner . . . [is] absolute.” *Burdick v Takushi*, 504 US 428, 433 (1992), citing *Munro v Socialist Workers Party*, 479 US 189, 193 (1986). In *Mays*, the Sixth Circuit noted that the U.S. Constitution “explicitly provides State legislatures with authority to regulate

the “Times, Places, and Manner of holding Elections.” *Mays*, 951 F3d at 783, quoting US Const, art 1, §4, cl 1. “So while States can regulate elections, they must be careful not to unduly burden the right to vote when doing so.” *Id.* at 783. The Court also recognized that courts “must evaluate the burden on disparately treated voters considering all available opportunities to vote.” *Id.* at 785, citing *Rosario v Rockefeller*, 410 US 752, 757 (1973).

In *Obama for America*, the Sixth Circuit held that “the Equal Protection Clause applies when a state either classifies voters in disparate ways, see *Bush*, 531 US at 104–105 (arbitrary and disparate treatment of votes violates equal protection), or places restrictions on the right to vote, see *League of Women Voters*, 548 F3d at 478 (“voting system that burdens the exercise of the right to vote violates equal protection”). 697 F3d at 428. “The precise character of the state’s action and the nature of the burden on voters will determine the appropriate equal protection standard.” *Id.* If a plaintiff alleges only that a state treated him or her differently than a similarly situated voter—but without a corresponding burden on the fundamental right to vote—courts use a rational basis standard of review. Under rational basis review, a statute is valid if it rationally furthers a government interest, and the statute will be given a strong presumption of validity under which it will be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *LensCrafters, Inc v Robinson*, 403 F3d 798, 806 (CA 6, 2005).

“Under rational basis scrutiny, government action amounts to a constitutional violation only if it ‘is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government’s actions were irrational.’” *Michael v Ghee*, 498 F3d 372, 379 (CA 6, 2007), quoting *Club Italia Soccer & Sports Org, Inc v Charter Twp of Shelby*, 470 F3d 286, 298 (CA 6, 2006). A court “will be satisfied with the government’s ‘rational speculation’ linking the regulation to a legitimate purpose, even ‘unsupported by evidence or empirical data.’” *Am Express Travel Related Servs Co v Kentucky*, 641 F3d 685, 690 (CA 6, 2011), quoting *Craigmiles v Giles*, 312 F3d 220, 224 (CA 6, 2002). “Thus, if a [government action] can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny.” *Id.*

In contrast, when a state’s classification “severely” burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard. *Obama for Am*, 697 F3d at 429, citing *Burdick*, 504 US at 434. Most cases, however, fall somewhere in between. *Id.* at 429. For such intermediate cases, where the burden on the right to vote is moderate, courts will weigh that burden against “‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Mays*, 951 F3d at 784, quoting *Burdick*, 504 US at 434. Only where the state’s interests outweigh the burden on the

plaintiff's right to vote do voting restrictions not offend the Equal Protection Clause.
Id.

When a plaintiff alleges that a state has burdened voting rights through disparate treatment of voters, courts review the claim using the “flexible standard” outlined in *Anderson v Celebrezze*, 460 US 780 (1983), and *Burdick*, 504 US at 434. *Obama for Am*, 697 F3d at 429. The Sixth Circuit—quoting the *Burdick* decision—recited that standard as follows:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiffs’ rights.” [*Obama for Am*, 697 F3d at 429.]

So, with regard to Public Act 197, it must first be determined whether any voters’ fundamental right to vote will be burdened. If there is a burden, then the standard applied would depend on the relative amount of burden imposed: moderate burdens are weighed against the state’s interests and severe burdens are subject to strict scrutiny. If there is no burden imposed on non-serving family members or overseas voters, then Public Act 197’s different treatment of military service members would be reviewed under the rational basis standard discussed above.

Here, the Act creates a new method for active members of uniformed services and the merchant marine to return voted ballots that has never before existed in

Michigan law. While electronic transmission of absent voter ballots *to* military and overseas voters was added to MCL 168.759a by 2010 PA 50, electronic return of those ballots has not previously been allowed. The analysis of equal protection here first requires consideration of whether there is any burden to overseas voters who are not active-duty uniformed service members or members of the merchant marine and therefore have to continue returning their ballots by mail instead of having the new electronic-return option that has now been granted to those service members.

This precise question does not appear to have been addressed by the courts. There are, however, cases reviewing similar issues that may be instructive. In *McDonald v Board of Election Commissioners*, the Supreme Court considered an equal protection challenge to an Illinois statute that extended absentee voting privileges to those physically incapacitated because of medical reasons from appearing at the polls, but it did not grant the same privilege to persons unable to appear at the polls because they were “judicially incapacitated” by reason of their incarceration while unsentenced and awaiting trial. 394 US 802, 805–806 (1969). This case was decided years before the *Anderson-Burdick* standard was articulated by the Court, but the Court still appeared to struggle with “how stringent a standard to use in evaluating the classifications made” by the state law. *McDonald*, 394 US at 806–807. The Court determined that an “exacting approach” was unnecessary in that case because the distinctions drawn by the statute were not based on wealth or race, and also because there was “nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants’ ability to

exercise the fundamental right to vote.” *Id.* at 807. Of particular interest is the following observation made by the Court in expressing its reasoning:

It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants’ claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois’ Election Code so operate as a whole, for the State’s statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants. Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. [*Id.* at 807 (citation omitted).]

The Supreme Court then applied a rational basis standard to the statute. *Id.* at 808–809. The Court ultimately concluded that, since there was nothing in the record showing that a pretrial detainee was “absolutely prohibited from exercising the franchise,” it was reasonable for the state legislature to “treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot.” *Id.* at 809.

Notably, *McDonald* was later clarified by the Supreme Court in two subsequent cases. In *Goosby v Osser*, the Court noted that—unlike the situation in *McDonald*—the statute at issue had expressly prohibited the pre-trial detainees from voting by absentee ballot, and there was a record of requests to vote that had been denied. 409 US 512, 520–522 (1973). However, the Court did not reach the question of whether the petitioners were entitled to relief and instead referred the case to a three-judge panel for further hearing. A year later, the Supreme Court

again considered its opinion in *McDonald* and stated that, “[e]ssentially the Court’s disposition of the claims in *McDonald* rested on failure of proof.” *O’Brien v Skinner*, 414 US 524, 529 (1974).

Also, in the *Obama for America* case discussed earlier, the Sixth Circuit reviewed a challenge to an Ohio law that—after a series of events involving an amendment, a referendum, and a repeal attempt by the state legislature—provided a more generous deadline for in-person early voting for military and overseas voters than was provided to other voters. 697 F3d at 426–427. This case did not address absent voting; instead, the issue was that military and overseas voters were allowed three extra days of in-person early voting. The controversy in that case began when the Ohio legislature attempted to shorten the then-existing deadline for early voting from the Monday before the election to the Friday before the election. *Id.* at 427. But efforts to repeal that law failed to address a separate statute that had attempted to correct the deadlines in the original law. *Id.* As a result, “even though the original bill . . . was repealed, the technical changes contained in [the replacement bill] remained in place, and Ohio voters were still left with inconsistent deadlines.” *Id.* at 427. Non-military voters could cast ballots in-person only until 6:00 p.m. on the Friday before the election, but military and overseas voters had two deadlines: Friday at 6:00 p.m. and the close of the polls on election day. *Id.* In an attempt to resolve any confusion, the Ohio Secretary of State applied the more generous deadline to military and overseas voters but denied attempts to apply that same deadline to non-military voters. *Id.*

Following a hearing and briefing by the parties that included voluminous exhibits including legislative history, expert reports, and declarations by military officers and government officials, the federal district court granted a preliminary injunction and ordered that all Ohio voters have the same opportunity for early voting that was available to them before the legislative attempt to shorten the deadline. *Id.* at 426. On appeal, the state argued that the district court should have applied rational basis review instead of the *Anderson-Burdick* framework. *Id.* at 430. In its arguments, the state relied heavily on the Supreme Court opinion in *McDonald*. *Id.* at 430. The Sixth Circuit—citing *O’Brien* and *Goosby*—held, however, that *McDonald* was based on the failure of the plaintiffs to present any evidence supporting their allegation that they were prevented from voting. *Id.* at 431. But in *Obama for America*, the plaintiffs “introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting.” *Id.* at 431. The Sixth Circuit further held that plaintiffs “did not need to show that they were legally prohibited from voting, but only that ‘burdened voters have few alternate means of access to the ballot.’” *Id.*, quoting *Citizens for Legislative Choice v Miller*, 144 F3d 916, 921 (CA 6, 1998).

The Sixth Circuit determined that—based on the evidence in the record—the federal district court’s decision was not clearly erroneous where it concluded that, “because early voters have disproportionately lower incomes and less education than election day voters, and because all evening and weekend voting hours prior to

the final weekend were eliminated by Directive 2012-35, ‘thousands of voters who would have voted during those three days will not be able to exercise their right to cast a vote in person.’” *Id.* at 431. Because the plaintiffs’ right to vote was found to have been burdened, the Sixth Circuit held that the federal district court properly applied the *Anderson-Burdick* framework and concluded that, “if Plaintiffs can show that the State’s burden on their voting rights is not sufficiently justified, they are likely to succeed on their claim that the State has violated the Equal Protection Clause.” *Id.* at 431-432.

The Sixth Circuit then evaluated the justifications offered by the state—the difficulty of local county boards of elections to both prepare for Election Day and accommodate early voters during the weekend before the election, and the “unique challenges” faced by military members and their families justified in-person voting for them but not for other Ohio voters. *Id.* at 432. The court first concluded that the state’s interest in “smooth election administration” it claimed to be advanced by the law was contradicted by evidence in the record and unsupported by other evidence. *Id.* at 433. The Sixth Circuit also held that under the *Anderson-Burdick* standard, it must weigh “the character and magnitude of the asserted injury against the ‘precise interests put forward by the State . . . taking into consideration the extent to which those interests make it *necessary* to burden the plaintiff’s rights.’” *Id.* at 433, citing *Burdick*, 504 US at 434 (quotation marks omitted).

The Sixth Circuit then concluded that, “[i]f the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting

for all Ohio voters, its ‘important regulatory interests’ would likely be sufficient to justify the restriction,” but Ohio’s statutory scheme was neither generally applicable to all voters, nor was the state’s “vague interest in the smooth functioning of local boards of elections” a sufficient excuse of the discriminatory burden it placed on some—but not all—Ohio voters. *Id.* at 433–434.

Next, the Sixth Circuit recognized that although accommodating the unique situation of military members and their families, “who may be called away at a moment’s notice in service to the nation,” was a worthy and commendable goal, and while there was “a compelling reason to provide more opportunities for military voters to cast their ballot, there is no corresponding satisfactory reason to prevent non-military voters from casting their ballots as well.” *Id.* at 434. The Sixth Circuit’s holding, however, noted that there was “no relevant distinction between” military or overseas voters and other voters with respect to in-person early voting:

The State and Intervenor worry about the logical extensions and practical implications of Plaintiffs’ position. If states are forced to provide the same accommodations to every voter that they currently provide to military and overseas voters, such as added flexibility and extra time, states may simply eliminate these special accommodations altogether. However, virtually all of the special voting provisions in federal and Ohio law address problems that arise when military and overseas voters are *absent* from their voting jurisdictions. They are not similarly situated to all other voters in this respect, and states are justified in accommodating their particular needs. With respect to in-person voting, the two groups are similarly situated, and the State has not shown that it would be burdensome to extend early voting to all voters. Its argument to the contrary is not borne out by the evidence. [*Id.* at 435.]

Again, the Sixth Circuit’s holding was rooted in the evidence presented and the specific circumstances of the interests asserted by the state. Having concluded

that the state's asserted interests were insufficient to justify the limitation on in-person early voting for non-military voters, the Sixth Circuit held that the plaintiffs were likely to prevail on the merits. *Id.* at 436.

More recently, in *Mays*, the Sixth Circuit applied the *Anderson-Burdick* standard to an Ohio statute that required all voters to request an absentee voter ballot by noon three days before election day, except for “unexpectedly hospitalized electors,” who were allowed to request an absent voter ballot until 3 p.m. on Election Day. 951 F3d at 780. In that case, the law was challenged by persons who were arrested before Election Day and who alleged disparate treatment between unexpectedly hospitalized electors and unexpectedly jailed electors. *Id.* at 780. Evaluating the burden imposed on the plaintiffs, the Sixth Circuit held that, “[c]onsidering Ohio’s absentee ballot request deadlines from the perspective of unexpectedly jail-confined electors and given the alternative voting opportunities that Ohio provides, the burden those laws place on Plaintiffs’ right to vote is moderate.” *Id.* at 786. But—although the plaintiffs had planned to vote on Election Day and did not foresee their arrest—the Sixth Circuit noted that any voter can be called away unexpectedly, and plaintiffs could have avoided any uncertainty by taking advantage of opportunities provided to vote early. *Id.* at 786–787. The Court thus concluded that the jailed plaintiffs were, “no more burdened than any other elector.” *Id.* at 787. Because the Sixth Circuit concluded that the burden was moderate, the laws would survive review if the state’s justifications outweighed the moderate burden. *Id.*

In *Mays*, the Sixth Circuit accepted the state’s asserted interest in the orderly administration of elections, finding that the record before it supported the conclusion that the local election boards have a long list of responsibilities in the days before an election, and that limited staff and resources prevented them from accommodating jailed voters the same as hospitalized voters because board staff delivering absentee ballots to jails would need advance planning to locate the elector in jail, pass through security, and verify that the jailed voter will be there when they arrive, while such advance planning was unnecessary for hospitalized voters. *Id.* at 787–788. The Sixth Circuit also took particular notice that “prisoners are not similarly situated to non-prisoners.” *Id.* at 788.

Of special note is the Sixth Circuit’s opinion distinguishing the holding in *Obama for America*. First, the Sixth Circuit emphasized that—while Ohio had attempted to roll back in-person early voting in *Obama for America*—it had never provided jail-confined voters a chance to request absentee voter ballots at the last minute. *Id.* at 790. The Sixth Circuit also distinguished *Obama for America* by noting that the plaintiffs in *Mays* had failed to counter the evidence put forth by the State showing that counties would have difficulty accommodating the jailed voters. *Id.* at 790. In short, the Sixth Circuit held that, “none of our *Obama for America* rationales apply.” *Id.* at 790. The court held that the Secretary of State had “the burden of establishing that [the State’s] disparate treatment of confined electors furthers the State’s interest in orderly election administration,” and that the Secretary had carried that burden. *Id.* at 790.

Turning back to the Michigan statute at issue here, Public Act 197 has only very recently been passed and it has not been implemented yet. Accordingly, there is no factual record showing what burden—if any—limiting electronic return of ballots to only the defined members of military services might have on non-member overseas voters. Still, even without a record, it is clear that non-military overseas voters are not “absolutely prohibited” from the franchise since they may continue to return ballots by mail or a similar service. See *McDonald*, 394 US at 809. Also, unlike the Ohio law in *Obama for America*, Public Act 197 does not remove any ability or opportunity non-military overseas voters had before—it simply does not affect them at all. Public Act 197 does not, on its face, prohibit or foreclose any overseas voters from voting. Non-military voters have alternatives to returning their ballots electronically, including returning them by mail or similar service as they have previously done. Because the non-military members have not lost anything and may continue voting as they already have, there is arguably no burden imposed upon non-military overseas voters and Public Act 197 should be examined under the deferential rational basis standard. At worst, any burden imposed upon non-military overseas voters by Public Act 197 would be a moderate one, calling for the *Anderson-Burdick* analysis. Under either rational basis or *Anderson-Burdick*, it would be necessary to consider the state’s asserted rationale for the law.

As mentioned, the rationale for treating military members differently is not stated in the law but appears based upon the security afforded by the “verified

electronic signature” system operated by the U.S. Department of Defense. While military members are treated differently by being allowed to return ballots electronically, their ability to do so is explicitly contingent on the member using “a United States Department of Defense verified electronic signature.” MCL 168.759a(17). Accordingly, it is reasonable to conclude that the Legislature sought to limit the return of ballots electronically not because of any race, sex, or economic-based classification, but upon the security afforded by those “verified signatures.”

This interest would likely fall within the same “orderly administration of elections” justification offered by the State of Ohio in *Obama for America* and in *Mays*. Again, this office does not have the benefit of a factual record, but it seems probable that state interests in security and the prevention of fraud—assuming they can be supported factually—and the lack of an equivalent to the Department of Defense verified electronic signatures for non-military overseas voters would provide sufficient justification to outweigh any burden on non-military overseas voters of having to return voted ballots by mail.

This rationale would also be sufficient to satisfy the lower rational basis test. The use of the Department of Defense verified electronic signature might also be seen as comparable to the affidavit required of absentee voters who were “physically incapacitated” in the *McDonald* case, and so might be considered a factor that distinguishes military members from non-military overseas voters.

It is my opinion, therefore, that Public Acts 196 and 197 of 2022 do not unconstitutionally burden the fundamental rights of overseas voters who do not possess a Department of Defense verified electronic signature. This opinion is based upon a facial review of the statute, and the conclusion may change if new factual information becomes available.³

Your second question asks whether the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, requires the Department of State to allow use of the secure web portal to be developed under Public Act 197 by individuals with a print disability. While not expressly stated, your question is understood to refer to Title II of the ADA, which provides that no 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 USC 12132.

The ADA is a broad remedial civil rights law enacted to provide uniform federal protections for the disabled and to address the historic and pervasive discrimination against people with disabilities in all areas of public life.⁴ In enacting the ADA, Congress declared that “discrimination against individuals with

³ The request also asks whether, if the statute is unconstitutional, that unconstitutionality can be remedied if the Department of State simply interprets the amendments as applying to non-military overseas voters. It is unnecessary to address this question, however, because this opinion concludes the statute is not unconstitutional on its face.

⁴ It should also be noted that Michigan’s Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq.*, and the ADA “share the same purpose and use similar definitions and analyses.” *Chiles v Machine Shop, Inc*, 238 Mich App 462, 472–473 (1999).

disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services,” and, relevant to your question, “voting.” 42 USC 12101(a)(3). This discrimination, Congress noted, “continue[s] to be a serious and pervasive social problem,” 42 USC 12101(a)(2), that denies people with disabilities the opportunity to compete and pursue opportunities on an equal basis, 42 USC 12101(a)(8).

As an initial matter, the ADA does not “invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.” 28 CFR 35.103(b). But the ADA does contemplate modification to, and thereby preemption of, state laws when necessary to effectuate the protections afforded under the ADA. *Mary Jo C v New York State & Local Ret Sys*, 707 F3d 144, 163 (CA 2, 2013).

Your request notes that under current law and practice, voters with print disabilities may receive and complete their ballots electronically, but must then print and return a paper ballot and are not permitted to return their ballots electronically.⁵ In essence, you have asked whether the creation of a legal process

⁵ As a result of litigation, the Department of State agreed to establish a process for voters with print disabilities to receive and complete an absentee voter ballot electronically and thereafter print and mail the ballot to their local clerk. See *Powell, et al v Benson*, Case No. 20-cv-11023 (ED Mich).

for military members with verified electronic signatures to return their ballots electronically triggers an obligation under Title II of the ADA for the Department of State to make that program available to persons with print disabilities.

Under Title II, two types of claims are cognizable: claims for intentional discrimination and claims for a reasonable accommodation. *Ability Ctr of Greater Toledo v City of Sandusky*, 385 F3d 901, 907 (CA 6, 2004). It is the latter type – a claim for a reasonable accommodation – that most relates to your question.⁶

When seeking an accommodation to fully participate in the act of voting and returning a completed absentee voter ballot, a voter must show that the voter has a “disability” and that the voter is a “qualified individual with a disability” as those terms are understood under the ADA. The definition of “disability” includes “a physical . . . impairment that substantially limits one or more major life activities of such individual,” which includes “seeing.” 42 USC 12102(1)(A), (2)(A). And a “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the

⁶ With respect to concerns over intentional discrimination, the ADA requires the challenged discrimination “to occur *because* of disability, which is another way of saying that the plaintiff must establish a but-for relationship between the protested Act and the individual’s disability.” *Gohl v Livonia Pub Schools Sch Dist*, 836 F3d 672, 682 (CA 6, 2016), citing *Univ of Tex Sw Med Ctr v Nassar*, 133 S Ct 2517, 2527-28 (2013). Here, it is unclear that a disabled voter could establish the required “but-for” causation where the inability to access the military ballot return portal is based on whether a voter has a Department of Defense “verified electronic signature” instead of whether they have any print disabilities.

receipt of services or the participation in programs or activities provided by a public entity.” 42 USC 12131(2).

Assuming a request for an accommodation is received from a “qualified individual with a disability,” the next step is to determine whether the requested accommodation is appropriate under the “reasonable-modifications regulation,” *Olmstead v L C ex rel Zimring*, 527 US 581, 581 (1999); 28 CFR 35.130(b)(7). A modification or accommodation “is reasonable unless it requires ‘a fundamental alteration in the nature of a program’ or imposes ‘undue financial and administrative burdens.’” *Smith & Lee Assoc, Inc v City of Taylor*, 102 F3d 781, 795 (CA 6, 1996), quoting *Southeastern Community College v Davis*, 442 US 397, 410, 412 (1979); 28 CFR 35.150(a)(3). An accommodation is not reasonable if it imposes a fundamental alteration in the nature of the program. *Jones v City of Monroe*, 341 F3d 474, 480 (CA 6, 2003). So, while a public entity may be required to make “reasonable modifications” to rules, policies, or practices, it is not necessary to do so where the necessary modification would “fundamentally alter” the program or service. The public entity, however, bears the burden of proving that the modification would fundamentally alter the program. *Id.* at 480.

Thus, if a request for an accommodation is received from a qualified voter with a disability, the Department of State would have to consider whether it can modify the electronic process required by Public Act 197 without incurring an undue burden or fundamentally altering the nature of the process. And whether an undue

burden or fundamental alteration exists is typically fact-based and not capable of determination as a legal question alone. See *Hindel v Husted*, 875 F3d 344, 347 (CA 6, 2017). Here, no potential voter has thus far requested an accommodation, and therefore there is no factual record on which to determine the reasonableness of the Department of State modifying the statutory process. I cannot, therefore, provide an opinion about whether the ADA requires the Department of State to allow use of the secure web portal to be developed under Public Act 197 by individuals with a print disability.

A handwritten signature in blue ink that reads "Dana Nessel". The signature is fluid and cursive, with the first name "Dana" being more prominent than the last name "Nessel".

DANA NESSEL
Attorney General