

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>Joseph Drenth, and the National Federation of the Blind of Pennsylvania ,</b>	:	
	:	
<b>Plaintiffs</b>	:	<b>No. 1:20-cv-00829</b>
	:	
<b>v.</b>	:	<b>Judge Wilson</b>
	:	
<b>Kathy Boockvar, Secretary of the Commonwealth in her official capacity, and the Department of State of Pennsylvania,</b>	:	<b>Electronically Filed Document</b>
	:	
<b>Defendants</b>	:	<i>Complaint Filed May 21, 2020</i>

**DEFENDANTS’ BRIEF IN OPPOSITION TO PLAINTIFFS’  
MOTION FOR A TEMPORARY RESTRAINING ORDER  
OR, IN THE ALTERNATIVE, PRELIMINARY INJUNCTION**

Respectfully submitted,

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Kathy Boockvar, Secretary of the Commonwealth in her official capacity, and the Department of State of Pennsylvania (collectively, “Defendants” or “the Department”), by and through their undersigned counsel, hereby submit this Brief in Opposition to Plaintiff’s Motion for a Temporary Restraining Order or, In the Alternative, Preliminary Injunction, as follows.

**I. INTRODUCTION**

Secretary Boockvar and the Department of State support enhancing ballot accessibility for the disabled. Immediately upon being approached by the Plaintiffs two weeks ago, the Department embarked upon efforts to resolve concerns about ballot accessibility for the blind for the re-scheduled June 2, 2020 primary election. The Department explored available and feasible options—while communicating with interested stakeholders—and eventually identified a workable solution to answer Plaintiffs’ concerns about voting independently that can be securely implemented in the short timeframe before the election. The Department relayed this proposed good faith resolution to the Plaintiffs, who never responded, and, instead, filed this lawsuit, requesting a Temporary Restraining Order (TRO) that implements their desired approach.

The Plaintiffs’ proposed solution, which mirrors one temporarily adopted in Michigan, is not feasible in Pennsylvania. Ballots are created and controlled at the county level—not by the Department—in Pennsylvania and, in Pennsylvania, the

67 counties control the data used to create ballots. Even if the Department had control it does not have the means to implement Plaintiffs' approach at this time. This is a consequence of the fact that Plaintiffs unreasonably waited until the very last minute to file their lawsuit. Therefore, because, among other reasons, the remedy requested by the Plaintiffs cannot be afforded by the Department, their motion should be denied.

## **II. FACTUAL BACKGROUND**

The Department, nor any of its employees, has ever refused to implement an accessible online ballot for voters with disabilities. The Department fully supports ballot accessibility and voter inclusivity and is, and has been, engaged in efforts to develop long-term solutions to enhance the ability of disabled persons, including the blind, to cast their ballots. These efforts have continued even in the face of the COVID-19 pandemic.

Due to the pandemic, the primary election date was postponed from April 28, 2020 until June 2, 2020, and, as a result of legislation late last year, a new voting method—the mail-in ballot—has been implemented for the first time for all qualified electors in the Commonwealth. Plaintiffs waited until less than two weeks before the *re-scheduled* election to bring this lawsuit demanding that their method of voting immediately be adopted in the midst of an already atypical

election cycle. But, while the Department is willing to work with the Plaintiffs, this demand simply cannot be met in the truncated period of time before election day.

### Civilian Absentee and Mail-In Ballot Voting

Until late 2019, the Pennsylvania Election Code provided for two methods of voting: in-person on election day or absentee ballot for voters outside of their municipality on election day or with an illness or disability. *See* Declaration of Jonathan Marks, ¶ 5.<sup>1</sup> On October 31, 2019, Governor Wolf signed Act 77 of 2019 (“Act 77”) into law. Among other significant reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots. *Id.* ¶ 7. Act 77 did not change the deadline for applying for non-emergency absentee ballots; this deadline is still 5:00 p.m. on the Tuesday before the election and the same deadline now applies for mail-in ballot applications. *Id.* ¶ 8. Act 77 extended the deadline for receipt of voted ballots, however, from 5:00 p.m. on the Friday before the election to 8:00 p.m. on the day of the election. *Id.* ¶ 9.

On March 27, 2020, the Governor signed into law Act 12 of 2020 (“Act 12”), which further amended the Election Code, to among other things, move the date of the 2020 primary election from April 28, 2020 to June 2, 2020, and expand use of mail-in ballots to allow *any* qualified elector to vote with a mail-in ballot. *Id.*

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<sup>1</sup> A true and correct copy of the Declaration of Jonathan Marks, Deputy Secretary for Elections and Commissions, is attached hereto as Exhibit “A.”



¶ 10. Voters who wish to receive an absentee or mail-in ballot must apply. The Commonwealth has made a range of options available for voters to request these ballots. Voters with drivers' licenses or other state-issued identification can apply for these ballots electronically on the Department's website. Other voters can download and print their own applications or request them by mail, email, or telephone from their county election office or from the Department. In counties where election offices have reopened to the public, voters can also request ballots in person, fill them out, and submit them in one visit. *Id.* ¶ 11.<sup>2</sup> 13. The county boards of elections mail the ballots, along with a secrecy envelope and a return envelope, to the voters, unless a voter requests the ballot in person. *Id.* ¶ 132. Upon receipt, voters mark their ballots following the instructions. Voters then place their ballot in the secrecy envelope and put the secrecy envelope into the return envelope for delivery to the county board of election by mail or in person. *Id.* ¶ 14

It is anticipated many Pennsylvanians may use an absentee or mail-in ballot in lieu of traveling in-person to the polls due to the recent COVID-19 pandemic. To date, the counties have received 1,821,288 applications from absentee and mail-in ballots. *Id.* ¶ 44. The polls will remain open in the Commonwealth, however,

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<sup>2</sup> When voters apply for a civilian absentee or mail-in ballots, as opposed to a military and overseas absentee ballots, they must provide proof of identification which must be verified against the Pennsylvania Department of Transportation's database or the Social Security Administration's database before the ballots can be counted. *Id.* ¶ 12.

although some polling places will be consolidated, and social distancing rules must be followed. Those wishing to take advantage of the new mail-in voting method, or who want to use the traditional absentee valid, must apply to their respective County Board of Elections to receive the ballot. 25 Pa. Stat. Ann. § 3146.2(e). This request can be made electronically. The deadline in Pennsylvania to request a ballot is May 26, 2020 at 5 p.m. A paper ballot is then sent to the voter who is responsible for filling it out and returning it back to the County Board of Elections by June 2, 2020 at 8 p.m. *See* 25 Pa. Stat. Ann. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c).

**A. UOCAVA/UMOVA Absentee Voting**

The federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) provides protections for military and overseas citizens to register and vote by absentee ballot in elections for Federal office. 42 U.S.C. §§ 1973ff-1973ff-6. Likewise, Pennsylvania has enacted its own statute, the Uniformed Military and Overseas Voters Act (“UMOVA”) that extends many of the UOCAVA accommodations given to military and overseas voters in federal elections to state and local elections conducted in Pennsylvania. 25 Pa. Stat. and Cons. Stat. Ann. § 3501 *et seq.*

Among other provisions, both UOCAVA and UMOVA require county boards of elections to send absentee ballots to covered military and overseas voters

at least 45 days before an election, and allow military and overseas absentee voters to specify whether they want to receive their absentee ballot from the county board of elections by mail or electronically. 25 Pa. Cons. Stat. Ann. § 3508. Much like civilian absentee voters, military and overseas absentee voters initiate the ballot request process via application, typically by submitting a Federal Post Card Application (“FPCA”) to their county board of elections. Marks Dec., ¶ 18.

The county board of elections processes the FPCA and determines, based on the voter’s selection on the form, how the military-overseas voter wants to receive the ballot. If the voter requests to receive the ballot electronically, the county board of elections generates either a native PDF from its ballot programming software or a scanned PDF image of the ballot, depending on the county, that corresponds to the voter’s election district. *Id.* ¶ 19. The ballot image of the voter’s ballot is then uploaded to a location in the statewide registry of electors’ portal. *Id.* Any source documents or ballot definition files used to create the ballot images are within the custody and control of the county boards of elections. *Id.* The voter then receives an encrypted email with instructions on how to access the ballot through a secure program. *Id.*

The voter then prints the ballot, marks it and mails it back to the county board of elections using the postage-paid envelope template which must be printed

and affixed to an envelope. Unlike other states, Pennsylvania does not have an online ballot marking tool for UOCAVA and UMOVA voters. *Id.*, ¶ 20.

**B. Federal Write-In Absentee Ballot**

If UOCAVA or UMOVA voters do not receive their state-issued absentee ballot in enough time to send it back before the election, UMOVA authorizes Pennsylvania military and overseas voters to use the Federal Write-In Absentee Ballot (“FWAB”), available online at FVAP.gov, which exists as backup ballot. The voter completes the FWAB voter information form and the Official Backup Ballot. Marks Dec., ¶¶ 21-22. The Official Backup Ballot is a form on which the voter can write in the name of the candidate they wish to vote for federal offices and non-federal offices. *Id.* ¶ 23.

To obtain a list of the candidates for which a voter can vote, the voter can visit the county board of election’s website or contact the county board of elections. *Id.* ¶ 24. Each county board of elections is required to maintain an election notice with the names of candidates and ballot questions for that jurisdiction to be used in conjunction with the FWAB. *See* 25 Pa.C.S. § 3511. *Id.* Many counties also maintain sample ballots on their websites. *Id.* When using the FWAB, the voter will write in the name of the office voting for, the candidate they wish to vote for, and the political party of the candidate. *Id.* ¶ 25.

Once the voter has completed their ballot, they place the Official Backup Ballot in an envelope and mail it back to the county board of elections. The voter is provided with instructions on how to fold the ballot to maintain secrecy and a template that can be printed and placed on the envelope designating it as “official absentee balloting materials.” *Id.*, ¶ 26.

**C. Accessibility of the Ballot**

Plaintiffs did not contact the Department ahead of the original April 28, 2020 primary election date to discuss any accessibility concerns regarding the mail-in ballot process, and to propose how they want Pennsylvania’s primary to be altered. Around that time, however, the issues raised by Plaintiffs in this litigation were being raised elsewhere. Indeed, the National Federation of the Blind filed a lawsuit in Michigan on April 25, 2020 lodging concerns nearly identical to those raised here. *Powell v. Benson*, 20-11023 (E.D. Mich. 2020). A resolution was reached in that case on May 1, 2020. that implemented a temporary solution for Michigan’s May 5, 2020 special election.

About a week after the Michigan temporary solution, on May 7, 2020, the Department was first contacted regarding implementing a new voting method identical to that used in Michigan for the re-scheduled Pennsylvania primary on June 2, 2020. The Department responded in good faith, by seeking out options that address the Plaintiffs’ accessibility concerns and that ensure the integrity of the

ballot and the election process. The Department also communicated with the Plaintiffs regarding their desired approach, and investigated its feasibility. The Department ultimately relayed that it was not possible to adopt the Plaintiffs' solution, but the Department *did* identify a viable alternative—use of a Federal Write-In Absentee Ballot.

As noted, there is already a procedure in place that provides for the use of FWABs. County election offices are familiar with and must accept FWABs pursuant to statute, and are required to post notices on their websites with information about the offices and questions on the official ballot for the election for use with FWABs. *See, 25 Pa.C.S § 3511, Marks. Dec., . ¶ 24* A FWAB can be received electronically and the Department is willing to work to make the FWAB accessible to disabled voters. Further, the Department determined that it can implement technology that employs an audio listing of the candidates for each office for the voter to use in casting their vote (since, with a FWAB, the candidates are not listed directly on the document).

While this solution is doable (especially given the extremely tight time-frame) and provides Plaintiffs with accessible voting, Plaintiffs demand more—they insist that the Department adopt the approach implemented in Michigan *in its entirety*. Pennsylvania is not Michigan, however. In Michigan, the Department agreed to convert individual ballots to fillable PDFs. *See Powell, 20-11023, Doc.*

24, ¶4. This approach is feasible in Michigan largely due in part to its trifurcated primary system, which allows for simpler ballots. The May 1, 2020 stipulation governed the ballot only for Michigan's May 5, 2020 election, which was a special election with which were county level ballot proposals or city level elections. Marks. Decl., ¶ 36., which ballot sets forth only ballot questions requiring yes or no answers. The ballot applied uniformly to the 33 counties voting.<sup>3</sup> *Id.* Additionally, Michigan apparently had the technology to accomplish this feat

Pennsylvania's ballot, on the other hand, is not as simple. The ballots, while containing common state-wide entries, set forth candidates for office that vary from county to county, and from election district to election district. There are sixty-seven counties in the Commonwealth, over 9,100 election districts, and there are a myriad of offices and candidates participating in the June 2, 2020 election. Marks. Dec., ¶¶ 37, 40. This is a product of the fact that Pennsylvania's voting system is unique in being de-centralized amongst its counties. The counties have the autonomy to create their ballots as they see fit, typically relying on outside vendors. The Department plays no role in the creation of ballots, it does not control the ballots, nor does it have access to the data used to develop the ballots. *Id.*, ¶ 19.

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<sup>3</sup> The parties in that case have also reached a resolution as embodied in a Consent Decree as to voting methods for the August election in Michigan. *See Powell*, 20-11023, Doc. 31.

In short, there are hundreds of ballots and, perhaps, thousands of different ballot configurations that will be used in the June 2, 2020 primary election. *Id.* ¶ 37.

Perhaps, if the Plaintiffs would have contacted the Defendants at some earlier point in time, their solution could have been more fully explored. This is an issue that Plaintiffs could have addressed in advance of the original primary date. Yet, Plaintiffs waited until after the original deadline, and until a week after they reached a resolution in Michigan, to contact Pennsylvania authorities and place them on notice of their specific demand. The Department has not disregarded the Plaintiffs, respects their concerns, and has responded with the best possible remedy that provides Plaintiffs with the opportunity to vote.

## II. QUESTIONS PRESENTED

- A. Whether Plaintiffs cannot demonstrate irreparable harm because the FAWB voting method allows them to vote privately and independently?**

[Suggested Answer: YES]

- B. Whether the balance of the harms and the public interest weigh against injunctive relief where the Plaintiffs' requested relief is not feasible?**

[Suggested Answer: YES]

- C. Whether the Plaintiffs cannot prove a likelihood of success on the merits because they have not been excluded from voting with the FAWB method, and because the fundamental alteration defense is applicable?**



**[Suggested Answer: YES]**

### **III. ARGUMENT**

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Corp. Synergies Grp., LLC v. Andrews*, 775 F. App'x 54, 58 (3d Cir. 2019).<sup>4</sup>

“It has been well stated that upon an application for a preliminary injunction to doubt is to deny.” *Madison Square Garden Corp. v. Braddock*, 90 F.2d 924, 927 (3d Cir. 1937). Indeed, “[t]here is no power . . . which requires greater caution, deliberation, and sound discretion... than the issuing [of] an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury. . .” *Norfolk S. Corp. v. Oberly*, 594 F. Supp. 514, 519 (D. Del. 1984).

“Generally, a temporary restraining order or preliminary injunction is issued to maintain the status quo.” *Schlesinger v. Carlson*, 489 F. Supp. 612, 619 (M.D. Pa. 1980). Here, Plaintiffs seek to upend it. Where the requested preliminary injunctive relief “is directed not merely at preserving the status quo but . . . at providing mandatory relief, the burden on the moving party is particularly heavy.” *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980); *see also Lane v. New Jersey*, 725 F. App'x 185, 187 (3d Cir. 2018).

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<sup>4</sup> “Courts apply one standard when considering whether to issue interim injunctive relief, regardless of whether a plaintiff requests a temporary restraining order (“TRO”) or preliminary injunction.” *Davenport v. USAA Cas. Ins. Co.*, No. 1:16-cv-2378, 2017 WL 3981369, at \*3 (M.D. Pa. June 2, 2017) (J. Jones) (citing *Ellakkany v. Common Pleas Court of Montgomery Cnty.*, 658 F. App'x. 25, 27 (3d Cir. July 27, 2016)).

This is especially true in the election context. “[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief...” *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). “There is good reason to avoid last-minute intervention in a state's election process. Any intervention at this point risks practical concerns including disruption, confusion or other unforeseen deleterious effects.” *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 404–05 (E.D. Pa. 2016) (denying injunctive relief, in part, because the plaintiffs created a “judicial fire drill” and offered no reasonable explanation for the “harried process they created.”).

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Benner v. Wolf*, No 20-775, Doc. 15 (M.D. Pa. May 21, 2020)(J. Jones) (citing *Apple Inc. v. Samsung Electronics Co.*, 695 F.3d 1370, 1373–74 (Fed. Cir. 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008))). “The power to issue a temporary restraining order or an injunction should be used sparingly and relief should not be granted except in those rare instances in which the law, the facts, and equities are

clearly in the moving party's favor." *Johnson v. Ogershok*, 2003 WL 24221182, at \*2 (M.D. Pa. May 19, 2003). Here, the Plaintiff cannot satisfy any element requisite to obtaining injunctive relief.

**A. PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE HARM.**

Plaintiffs cannot demonstrate irreparable harm because: 1) the Department has developed a solution that answers Plaintiffs' privacy concerns, and, 2) a TRO ordering that the Department implement the Plaintiffs' proposed plan will be ineffectual because it cannot be feasibly executed. Therefore, because the Plaintiffs cannot establish a risk of irreparable harm, their request for injunctive relief must be denied.

**1. Plaintiffs cannot prove irreparable harm because the FWAB solution addresses their accessibility concerns.**

"Establishing a risk of irreparable harm is not enough." *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987). A plaintiff has the burden of proving a "clear showing of immediate irreparable injury." *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir.1980). The "requisite feared injury or harm must be irreparable—not merely serious or substantial," and it "must be of a peculiar nature, so that compensation in money cannot atone for it." *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977). Here, Plaintiffs cannot prove irreparable

harm because the Department has developed a solution that addresses their concerns about voting independently.

Plaintiffs assert that “[a]bsent an injunction, [they] will be forced to either risk their health and their loved ones’ health by traveling to a polling place on election day...or forfeit their right to vote privately and independently.” Doc. 5, p. 21. This is because, under the status quo, a mail-in ballot must be filled-in manually, requiring the blind to recruit third party assistance. Screen reader technology exists, however, that allows many disabled persons to read and write independently electronically. Therefore, Plaintiffs propose that the mail-in ballots be converted to accessible PDFs to alleviate the aforementioned harm.

But, converting the election district specific mail-in ballots into PDFs is not the only solution. Indeed, it is not a solution at all because it simply cannot be accomplished before the primary election. The Department, as discussed, *did* identify a viable solution that addresses the Plaintiffs’ concerns, and that *can* be feasibly implemented by the June 2, 2020 primary election, however. Namely, the use of the FWAB Official Backup Ballot. A FWAB is a write in form the Department can more easily convert to be a fillable PDF that can then be completed electronically. Screen-reader technology can be used with a FWAB to the same extent as it would be used with any other fillable PDF. Therefore, the disabled will not need to rely on a third party to assist them in manually filling out

their ballot, and will be in the same position as they would be under the Plaintiffs' proposed plan. The only difference is that they will have the minor inconvenience of viewing (or listening to) the listed candidates on a separate document rather than directly on the FWAB.

This additional inconvenience does not constitute actionable harm when the Department's solution directly addresses the Plaintiffs' proffered irreparable harm. Therefore, because the Department has developed a solution that squarely applies to vitiate the alleged harm, the Plaintiffs cannot prove irreparable harm sufficient to support a TRO. *See Moteles v. Univ. of Pa.*, 730 F.2d 913, 919 (3d Cir. 1984) (“[i]f a discharge from employment with all of its attendant difficulties is not irreparable injury, it is obvious that the involuntary transfer to another shift amounts to nothing more than inconvenience—not enough to warrant the issuance of a preliminary injunction.”).

**2. Plaintiffs' proposed remedy cannot be adopted in time for the June 2, 2020 election.**

Plaintiffs cannot prove that a TRO is proper because they have not demonstrated that it can redress their harm.

Particularly, Plaintiffs are seeking a TRO which is similar to what they received in a recent U.S. District Court Case in the Eastern District of Michigan. Simply put, Pennsylvania is not Michigan and the Department cannot adopt the changes Michigan implemented with regards to its UOCAVA absentee ballots.

The Stipulation and Consent Order in that matter required the Michigan Secretary of State to make its UOCAVA absentee ballots available to eligible voters in Michigan who submitted a declaration that they are blind or otherwise severely disabled, and that such disability would prevent them from being able to independently complete a paper absentee ballot, without traveling to a location accepting in-person registration and voting on May 5, 2020. *See*, Plaintiffs Memorandum of Law in support of Plaintiff's Motion for Temporary Restraining Order, Exhibit N; Marks Dec., ¶ 29. In the federal lawsuit in Michigan, the Director of Elections, Jonathan Brater, submitted a declaration that contained information regarding Michigan's voting structure. In Michigan, electronic ballots for Michigan's UOCAVA voters are generated through the Qualified Voter System. Marks Dec., ¶ 33. Using the data in the Qualified Voter System, Michigan's local clerks generate ballots customized for each voter, which contains items that each voter will vote on based on their residence. *Id.*, ¶ 34.

Pennsylvania generates its UOCAVA ballots differently than Michigan. The Department is not involved in any process of creating the UOCAVA ballots for its voters, nor does the Commonwealth's statewide voter registration database have the ability to generate ballots for the registered voters contained therein. *Id.*, ¶ 35. Once the County Board of Elections processes the FPCA, and determines based on the voter's selection on the form, how the military overseas voter wants to receive

a ballot. If the voter requests to receive the ballot electronically, the County Board of Elections generates either a native PDF from its ballot program software or a scanned PDF image of the ballot, depending on the county, that corresponds to the voter's election district. The ballot image of the voter's ballot is then uploaded to a location in the statewide registry of electors' portal. Any source documents or ballot definition data files used to create the ballot images are within the custody and control of the County Board of Elections. *Id.*, ¶ 19.

Additionally, the Commonwealth's June 2, 2020 primary election is not similar to the election Michigan held on May 5, 2020. Michigan held its presidential primary election on March 10, 2020 and its state primary election will be held on August 4, 2020. The May 5, 2020 election was a special election held in approximately thirty-three of the eighty-seven counties which were county level ballot proposals, such as school bonds, or city level elections. *Id.*, ¶ 36.

The Commonwealth's June 2, 2020 primary election will be for all offices – federal, state and local. *Id.*, ¶ 28. Considering that Pennsylvania has over 9,100 election districts, there will be hundreds of different candidate variations and thousands of ballot styles for the upcoming election. *Id.*, ¶ 37. The sheer volume of ballot styles that will be used on our June 2, 2020 primary poses a significantly greater challenge to converting our UOCAVA ballots than what Michigan had to convert for their May 5, 2020 election. *Id.* ¶ 38.

And, a TRO would require the compliance of non-parties—the counties— if the Court granted Plaintiffs their preferred remedy.

Therefore, despite the Department’s very best efforts to comply, it is unclear that a TRO would be effectual because of the impossibility of the remedy. *See Cortes*, 218 F. Supp. 3d 396 (denying injunction because, among other reasons, the plaintiff did not prove that the injunction was the “the only way of protecting [them] from harm.”); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 649–50 (3d Cir. 2003)(“district courts granting injunctions pursuant to this rule should craft remedies ‘no broader than necessary to provide full relief to the aggrieved plaintiff’”).

**B. THE BALANCE OF THE HARMS AND THE PUBLIC INTEREST WEIGH AGAINST INJUNCTIVE RELIEF.**

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Id.* “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.*

In the election context, equities are particularly relevant. Where, as here, the “Plaintiffs unreasonably delayed filing their Complaint and Motion,” the equities weigh “decidedly against granting the extraordinary relief they seek.” *Cortes*, 218



F. Supp. 3d at 404–05 (“The delay is particularly relevant where, as here, an election is looming.”) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006)). “[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief...” *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

“There is good reason to avoid last-minute intervention in a state's election process. Any intervention at this point risks practical concerns including disruption, confusion or other unforeseen deleterious effects.” *Cortes*, 218 F. Supp. 3d at 404. “Comity between the state and federal governments also counsels against last-minute meddling. Federal intervention at this late hour risks ‘a disruption in the state electoral process [which] is not to be taken lightly.’” *Id.* (quoting *Page v. Bartels*, 248 F.3d 175, 195–96 (3d Cir. 2001)). “This important equitable consideration goes to the heart of our notions of federalism.” *Id.*

In *Cortes*, the Eastern District of Pennsylvania denied a preliminary injunction sought five days before the election. There, the Plaintiffs challenged the statute requiring that poll watchers be qualified electors in the county in which they serve. The Court ruled that the Plaintiffs’ “claims of irreparable harm were undermined by the fact that their emergency was largely of their own making when

the plaintiff ‘sought to challenge long-standing election laws in the weeks leading up to an election.’” *Cortes*, 218 F. Supp. 3d at 404-06.

The Eastern District cited the Sixth Circuit’s decision in *Crookston v. Johnson*, 841 F.3d 396, 397–98, 2016 WL 6311623 at \*1 (6th Cir. 2016). In that case, the plaintiff challenged Michigan’s law that prohibits voters from photographing ballots. *Id.* at 397–98, at \*1 He sued to enjoin the law on September 26, 2016, and the district court issued the injunction. *Id.* On appeal, the Sixth Circuit held that although the case raised “interesting [constitutional] issues,” the district court’s injunction was improper because it effectively altered Michigan’s election laws just ten days before election day. *Id.*

Instantly, Plaintiffs’ requested relief in this case would alter Pennsylvania’s laws less than a week before the election. This eleventh hour change to the process, alone, warrants the denial of the TRO, and even more so because the Department has specifically indicated that it does not have the wherewithal to complete the task. The requested relief, if implemented on the fly, could cause extreme harm to the Department, and to the public.

As explained by Deputy Marks, in Pennsylvania, the primary election for all offices – federal, state and local – are held on the same day. Marks Dec., ¶ 28. This year, the general primary election will be held on June 2, 2020. 25 P.S. § 3584(a). Considering that Pennsylvania has over 9,100 election districts, there will be

hundreds and maybe thousands of different ballot styles for the 2020 general primary election. Marks Dec., ¶ 37. For the 2020 general primary election in Pennsylvania, the federal offices on the ballot include the Office of President of the United States and Representative in Congress. *Id.* The non-federal offices on the 2020 general primary election ballot include Attorney General, Auditor General, State Treasurer, and Representative in the General Assembly. *Id.* Some county ballots will also include Senator in the General Assembly. *Id.* Additionally, because this is a presidential primary election there will also be ballot selections for Delegates to the Republican and Democratic National Conventions. *Id.* Further, Pennsylvania conducts closed primaries, meaning only the registered party members can participate in the political primary election. *Id.* ¶ 39. For the June 2, 2020 election, there will be separate ballots for registered Republican voters and registered Democratic voters. *Id.* And, to the extent there are any local level ballot questions, there will be a third ballot style available to voters who are not otherwise registered in either of the two major political parties. *Id.*

To have a ballot that is fillable and readable with standard screen reader technology, each county board of elections would have to send each ballot that will be used in the various election districts to the Department of State. The Department of State would then have to convert each of these ballot styles to a PDF (using technology that it currently does not have), change the PDF to allow for fillable

buttons, and ensure the new ballot is readable and correct. The Department would have to rely on the county boards of elections, who are not parties to this litigation, to effectuate Plaintiffs' proposed relief. In this week before the election, the counties are extremely busy doing a multitude of tasks. The Department may not be able to obtain the appropriate ballot for blind voters in a timely manner. This would be an exercise in futility to the great detriment of the Department, and the counties and the voters during a crucial time. *See Marks Dec.*, ¶¶ 41-42.

Further, Plaintiffs' TRO would result in violations of the Election Code. For instance, the TRO (as requested by Plaintiffs) would allow voters with disabilities to submit their application and declaration for an accessible by 4:00 p.m. on election day, June 2, 2020. This would be extending the deadline for requesting an absentee or mail-in ballot. The Pennsylvania Election Code states that applications for absentee and mail-in ballots are to be received no later than 5:00 p.m. on the first Tuesday prior to the day of any primary or election (25 P.S. §§ 3146.21 and 3150.12a). *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

And in addition to being a violation of the law, extending the deadline for submission of applications and declarations would put considerable strain on the county boards of elections who are already allocating significant time and

resources to processing and mailing absentee and mail-in ballots. Because the effect on turnout due to the COVID-19 pandemic is uncertain, it is difficult to know how many voters will ultimately seek mail-in or absentee ballots. As of Sunday, May 24, 2020, the counties have more than one million applications for absentee and mail-in ballots – 1,821,288 to be exact. Marks Dec., ¶¶ 44.

Allowing Plaintiffs to submit an application and declaration by 4:00 p.m. on June 2, 2020, especially on such short notice, could have the undesirable consequence of having counties turn their attention away from pre-canvassing, which can begin at 7 a.m. on election day, and other election day duties, including providing assistance to poll workers and voters. *See* Marks Dec., ¶¶ 45.

Finally, putting a new classification of ballot in place this election process would also require training of the employees of all sixty-seven (67) of the counties. This would take a great deal of time, especially in light of current election procedures that are occurring right now, such as processing absentee and mail-in ballots, preparing and mailing out absentee and mail-in ballots, and the return process of absentee and mail-in ballots, not to mention preparation for election day set up. *See* Marks Dec., ¶ 46..

The Department, and the public, will suffer real and significant harm if the Plaintiff's request for a TRO is granted. On the other hand, the Plaintiffs will not suffer any cognizable harm at all if the Department's resolution is implemented.

They will be able to independently vote, exactly as they request, although in a slightly different format. Any inconvenience caused by the difference in formats between a fillable converted ballot PDF and a fillable converted FWAB PDF is outweighed by the obvious harm in upending the election process on the eve of election day. T Plaintiffs' request for a TRO should, therefore, be denied.

**C. PLAINTIFFS CANNOT PROVE A LIKELIHOOD OF SUCCESS ON THE MERITS.**

In order to state a prima facie case under Title II, a plaintiff must establish that: (1) they are a qualified individual with a disability; (2) they were excluded from participation in or denied the benefits of a public entity's services, programs, or activities by the public entity, or was discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was because of plaintiff's disability. *See Douris v. Bucks Cty. Office of Dist. Attorney*, No. 2005 WL 226151, at \*8 (E.D. Pa. Jan. 31, 2005). If a prima facie case is established, a defendant can assert the affirmative defense of "fundamental alteration," which provides that the law does not "require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164.

Plaintiffs cannot prove a prima facie case because they are not excluded from voting. Using the FWAB voting method, the Plaintiffs will be able to vote

privately and independently, without the assistance of a third party to manually fill out the ballot. The FWAB method directly answers their concerns. Therefore, they are not being deprived of any benefit with respect to safely casting their vote during the pandemic, and cannot meet their prima facie burden.

Even if they could, their case would still fail under the “fundamental alteration” defense. The Plaintiffs are asking the Department to implement a novel voting method, that they do not believe is reliable or safe, on the eve of election day. The Department has never converted ballots in the manner requested by the Plaintiff, and there is no procedure already built-into the process to effectuate this conversion process. It would be an unusual and drastic deviation from the normal election processes, with no basis in the Election Code. This is the epitome of a fundamental alteration.

Thus, because the Plaintiffs cannot establish a likelihood of success on the merits, their request for a TRO must be denied.

**IV. CONCLUSION**

For the foregoing reasons, Plaintiff's Motion for a Temporary Restraining Order, or, in the alternative, Preliminary Injunction, should be denied.

**Respectfully submitted,**

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Attorney General**

**By: s/ Nicole J. Boland**

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**Date: May 24, 2020**

**Counsel for Defendants**



**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>Joseph Drenth, and the National Federation of the Blind of Pennsylvania ,</b>	:	
	:	
	:	
<b>Plaintiff</b>	:	<b>No. 1:20-cv-00829</b>
	:	
<b>v.</b>	:	<b>Judge Wilson</b>
	:	
	:	
<b>Kathy Boockvar, Secretary of the Commonwealth in her official capacity, and the Department of State of Pennsylvania,</b>	:	<b>Electronically Filed Document</b>
	:	
	:	
<b>Defendants</b>	:	<i>Complaint Filed May 21, 2020</i>

**CERTIFICATE OF SERVICE**

I, Nicole J. Boland, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on May 24, 2020, I caused to be served a true and correct copy of the foregoing document to the following:

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