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

Joseph Drenth, and the National Federation of the Blind of Pennsylvania,	:	**Civil No. 1:20-CV-00829**
Plaintiffs,	:	**Judge Jennifer P. Wilson**
v.	:	
Kathy Boockvar, Secretary of the Commonwealth, in her official capacity, and the Department of State of the Commonwealth of Pennsylvania,	:	
Defendants.	:	

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants do not even attempt to argue that the current system of voting by mail-in and absentee ballots complies with the Americans with Disabilities Act ("ADA") or Section 504 of the Rehabilitation Act. Instead, they resort to twisting the facts and arguing—without support—that Plaintiffs' proposed remedy is too cumbersome, that the June 2 primary is too close, and that Plaintiffs waited too long to sue the Commonwealth. The Court should reject those arguments. Plaintiffs have more than met the standard for a Temporary Restraining Order ("TRO") and, with swift action from this Court, there is still a chance to help blind Pennsylvanians vote privately and independently in the crucial elections occurring on June 2 and during a pandemic. Plaintiffs' proposed solution is workable. Accordingly, the Court should grant Plaintiffs' Motion for a TRO.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

Defendants concede that Plaintiffs are "qualified individual[s]" with a disability, and that the Commonwealth's system of voting by absentee or mail-in ballots constitutes a service, program, or activity under the ADA. They further concede that the Commonwealth's absentee and mail-in paper ballots are completely inaccessible to blind voters, and that blind voters have a right to vote privately and independently. And Defendants do not even bother to argue that the current system of voting by mail-in and absentee ballots complies with the ADA

and Section 504. It does not, and Defendants do not contend otherwise. Opp'n. 14-16, 25-26.

Instead, Defendants suggest that Plaintiffs will no longer be harmed by the Commonwealth's discrimination because Plaintiffs "will be able to vote privately and independently" by "[u]sing the FWAB voting method." Opp'n. 25–26. The Court should reject this argument. Even if the Federal Write-In Absentee Ballot ("FWAB") "solution" enabled blind individuals to vote privately and independently, it simply does not achieve equally effective communication, as required by the law. 28 C.F.R. § 35.160(a)(1). Nor does it give primary consideration to the choice of Plaintiffs. 28 C.F.R. § 35.160(b)(2).

But even if it did, Defendants have neither implemented this "FWAB voting method" nor stated when it will be in place. Defendants may not evade liability under the ADA and Section 504 by claiming that, at some unspecified future date, they will implement a new system that complies with federal law. Courts routinely reject such arguments. *See, e.g.*, *Feltenstein v. City of New Rochell*, 254 F. Supp. 3d 647, 656 n.7 (S.D.N.Y. 2017) ("[A] claim for prospective injunctive relief can only be deemed moot when it is clear that the defendant's alleged violations have been remedied and there is no longer a live controversy as to defendant's compliance with the ADA.").

In order to avoid implementing a more compliant accessible communication method, Defendants bear the burden of showing that Plaintiffs' solution is an undue burden or fundamental alteration. Defendants claim that using Pennsylvania's UOCAVA ballots "would be an unusual and drastic deviation from the normal election processes." Opp'n. 26. Not so. Under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), Defendants already send electronic absentee ballots to voters overseas. For the June 2 primary, Plaintiffs ask only that Defendants make such electronic absentee ballots accessible to blind individuals. That slight change is not "unusual" or "drastic."

Nor does Mr. Marks' declaration support a conclusion that Plaintiffs' solution would pose an undue burden or could not be accomplished. Mr. Marks admits that counties already provide native pdf format ballots, Marks Decl. ¶ 19, which can be made accessible relatively easily using Adobe tools. Therefore, he cannot say it is impossible, infeasible, or even impracticable to make the ballots accessible and allow Plaintiffs to use them. Mr. Marks says only that he is "concerned the Department would not be able to obtain the appropriate ballot for blind voters in a timely manner," *id.* ¶ 42, and that doing so "would put considerable strain" on counties, *id.* ¶ 44, and that the FWAB is "more feasible," *id.* ¶ 51. Not surprisingly, Defendants do not cite a single case to support their argument, and the Court should reject.

II. ABSENT A TRO, PLAINTIFFS WILL SUFFER IRREPARABLE HARM.

With respect to irreparable harm, Defendants concede that infringement of the right to vote privately and independently constitutes irreparable harm. Opp'n. 15–16. But, again turning the facts and law inside-out, Defendants argue Plaintiffs "cannot prove irreparable harm because the Department has developed a solution that addresses their concerns about voting independently"—the write-in ballot "solution." Opp'n. 14–15. "[B]ecause the Department has developed a solution that squarely applies to vitiate the alleged harm," Defendants argue, "Plaintiffs cannot prove irreparable harm." *Id.* 16. But the write-in ballot option does not "vitiate the alleged harm" because, unlike Plaintiffs' proposed solution, it does not allow blind voters to vote privately and independently. More fundamentally, this argument is unavailing, because Defendants have not implemented this purported solution.[1]

Defendants also argue the infringement of Plaintiffs' right to vote privately and independently in the June 2 primary is not irreparable because a TRO is not "the only way of protecting [them] from harm." Opp'n. 19 (quoting *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 410 (E.D. Pa. 2016)). But it is unclear what alternative remedy—besides a TRO—Defendants have in mind.

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[1] In support of this argument, Defendants cite *Moteles v. Univ. of Pennsylvania*, 730 F.2d 913 (3d Cir. 1984). In that case, the alleged harm was "easily compensable by damages" and thus has no bearing here. *Id.* at 919.

Defendants do not allege that money damages adequately would compensate Plaintiffs, either for harms to their health (if Plaintiffs travel to polling places on June 2) or for harms to their right to vote privately and independently (if they stay at home and rely on third-party assistance)—nor could they. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) (infringement of voting rights constitutes irreparable harm); *Cmty. Servs., Inc. v. Heidelberg Twp.*, 439 F. Supp. 2d 380, 399 (M.D. Pa. 2006) ("[T]he court finds that there is a risk of irreparable harm to the health and well-being" of plaintiffs); *see also Frank's GMC Truck Center, Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 n.3 (3d Cir. 1988) (availability of money damages "typically will preclude a finding of irreparable harm").[2] Injunctive relief is needed to safeguard Plaintiffs' health and right to vote.

III. THE BALANCE OF THE EQUITIES FAVORS PLAINTIFFS.

Defendants also contend the Court should not issue a TRO because the election is fast-approaching and, in any event, Plaintiffs waited too long before filing their Complaint and TRO Motion. Both arguments are meritless.

[2] Defendants further suggest that a court order requiring Defendants to make UOCAVA ballots accessible and available to blind voters would be "broader than necessary to provide full relief" to Plaintiffs. It is not. Such a solution is be narrowly tailored to the problem at hand—inaccessible mail-in and absentee paper ballots for the June 2, 2020 primary election during a pandemic.

With respect to the June 2 primary, Defendants rely on cases where courts declined to strike down fundamental election laws days before an election, *see, e.g.*, *Cortes*, 218 F. Supp. 3d at 401 ("Plaintiffs' requested relief . . . would alter Pennsylvania's laws just five days before the election."); *Crookston v. Johnson*, 841 F.3d 396, 397 (6th Cir. 2016) (plaintiffs' requested relief would "prevent the State from enforcing the Michigan law in the upcoming election"), and complex cases centered on a state's legislative apportionment scheme, *see Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (approving district court's decision not to stay an impending primary election that was conducted pursuant to a reapportionment plan that the district court had found unconstitutional); *Page v. Bartels*, 248 F.3d 175 (3d Cir. 2001) (challenge to state legislative reapportionment plan). Here, by contrast, Plaintiffs merely seek a court order requiring Defendants to provide them with accessible ballots so that they can vote in the June 2 primary. And it is beyond dispute that Plaintiffs are entitled to accessible ballots under federal law.[3]

[3] Defendants incorrectly argue that "Plaintiffs' TRO would result in violations of the Election Code," because "the TRO (as requested by Plaintiffs) would allow voters with disabilities to submit their application and declaration for an accessible [ballot] by 4:00 p.m. on election day," thereby "extending the deadline for requesting an absentee or mail-in ballot. Opp'n. 23. As the Court clarified in its May 22 Order, ECF No. 16, any relief granted pursuant to the TRO will not alter the statutory deadline for applying for absentee or mail-in ballots. ECF No. 16. For that reason, Defendants' argument is non-sensical and should be ignored.

Defendants' backup argument—the Court should not issue a TRO because Plaintiffs did not sue the Commonwealth sooner—also falls flat. Although courts may, in some cases, hesitate to grant injunctive relief when requested just before an election, the cases cited by Defendants have little resemblance to the facts here. Since at least September 2019, disability rights advocates have urged the Commonwealth to make its mail-in and absentee voting procedures accessible. *See* Ex. A (Timeline). Indeed, although Defendants suggest that the problems with accessibility were first brought to its attention weeks ago, Opp'n. 1 ("Immediately upon being approached by the Plaintiffs two weeks ago, the Department embarked upon efforts to resolve concerns about ballot accessibility. . . ."), the truth is that Defendants have known of these problems. Plaintiffs informed Defendants *no less than four times* about the inaccessible ballot problem from September 2019 to May 2020. Ex. A (Timeline). Each time Defendants failed to act. Ex. A (Timeline). For example, Defendants mentioned the FWAB solution on May 12 and again on May 14, yet Defendants never followed through with implementing their FWAB solution. *See* Ex. B (K. Darr Amended Certification). In comparable situations, courts have granted preliminary injunctive relief in the weeks preceding an election. *See United States v. Berks County, PA*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) (courts have ordered injunctive relief 24 days, 18 days, and 8 days before an election).

Although implementing the UOCAVA solution may potentially "result in some administrative expenses for Defendants, such expenses are likely to be minimal and are far outweighed by the fundamental right at issue." *United States v. Berks County, PA*, 250 F. Supp. 525, 541 (E.D. Pa. 2003).

IV. DEFENDANTS CAN, AND MUST, IMPLEMENT A REMEDY.

Defendants suggest they cannot make mail-in and absentee ballots accessible in the ways that Plaintiffs demand because such ballots are "created and controlled at the county level." Opp'n. at 1; *see id.* at 1–2 (counties control data used to create the ballots); *id.* at 10 (counties "have the autonomy to create their ballots as they see fit," and the Department of State "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"); Opp'n. at 17 (the Commonwealth's "statewide voter registration database" does not "have the ability to generate ballots for the registered voters contained there"); Opp'n. at 18 ("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"). This Court should reject this transparent effort to shirk Defendants' binding responsibilities under the ADA and Section 504.

In making this argument, Defendants argue that the UOCAVA solution, which worked in Michigan, cannot work in Pennsylvania because "Pennsylvania is not Michigan." Opp'n. 9. While Michigan is not Pennsylvania, Michigan is very

similar to Pennsylvania. For example, both states have a decentralized voting system. Michigan has 83 counties. Ex. C ¶ 7 (J. Turkish Decl.). Pennsylvania has 67 counties. Opp'n. 24. Michigan and Pennsylvania allow elections to be administered at the local level. Ex. C ¶ 8 (J. Turkish Decl.); Opp'n. 24. Both states require training to implement new voting procedures. Ex. C ¶ 9-10 (J. Turkish Decl.); Opp'n. 24. Given these similarities, this Court can be confident that the same UOCAVA system which worked for blind voters in Michigan—despite Michigan's initial arguments that it would not work—will work in Pennsylvania. Ex. C ¶ 13 (J. Turkish Decl.) (Michigan's UOCAVA system was expanded to people with print disabilities over the course of four days).

To distinguish itself from Michigan, Defendants misstate the facts. Defendants assert that "Michigan apparently had the technology to accomplish [the] feat [of implementing the UOCAVA system for the blind]." Opp'n. 10. Not true. Michigan had no special technology. Ex. C ¶ 12 (J. Turkish Decl.). Michigan's Secretary of State reported that it was able to make its ballots accessible "within minutes of their requests being processed," Ex. C ¶ 14 (J. Turkish Decl.), by using Adobe—the same software used by Defendants. Finally, despite Defendants' contention that Michigan only had to make one uniform ballot accessible, Opp'n. 10, Michigan's ballot was not uniform—it varied from jurisdiction to jurisdiction. Ex. C ¶ 16 (J. Turkish Decl.).

Like Michigan, Defendants are responsible for administering Pennsylvania's election scheme and, they are responsible for ensuring that the election scheme complies with the ADA. Defendant Boockvar "administer[s] the state election scheme," *see Baldwin v. Cortes*, 378 F. App'x 135, 138–39 (3d Cir. 2010) (noting "the Pennsylvania legislature's explicit delegation of authority to the Secretary of the Commonwealth to administer the state election scheme") (citing 25 Penn. Stat. Ann. § 2621), and she "is Pennsylvania's Chief Election Officer and is responsible for overseeing elections in Pennsylvania," *Garcia v. 2011 Legislative Reapportionment Comm'n*, 938 F. Supp. 2d 542, 545 (E.D. Pa. 2013), *aff'd*, 559 F. App'x 128 (3d Cir. 2014). The Commissioner for the Bureau of Commissions, Elections and Legislation—who reports to the Secretary—"has administrative responsibility for various aspects of the election process, including ballot access." *Belitskus v. Pizzingrilli*, 343 F.3d 632, 638 (3d Cir. 2003).

Because the Department of State oversees elections, it may be held liable for Pennsylvania's failure to comply with the ADA and Section 504. *Cf. Rivera Madera v. Lee*, 2019 WL 2077037, at *2 (N.D. Fla. May 10, 2019) ("[T]he Secretary maintains ample power over municipal elections, at least with regards to the issue here—compliance with federal law."). Although Defendants' insist that they do not "create" or "control" the ballots currently used by county boards of election, Defendants never assert that they lack the authority to implement the

remedy proposed by Plaintiffs. Indeed, such an argument would be surprising. Even under Defendants' own proposal to use a write-in ballot, the Department of State would create and send electronic ballots to blind voters who request them. *See* Opp'n. Ex. 1 ¶ 51 (J. Marks Decl.). (under Defendants proposal, the Department of State "will be able to control the process of creating the ballots and sending the ballots to voters with disabilities"). And it is the Department of State—not the counties—that determines the contents of the ballots, including which candidates for office will be listed on such ballots. *See* 25 Pa. Stat. Ann. § 3146.5a(b) ("the Secretary of the Commonwealth shall transmit to the county board of elections a list . . . of candidates to be voted on in the county at the election"). "The Commonwealth also is responsible for tracking absentee ballots that are processed at the county level. . . ." *Cortes*, 218 F. Supp. 3d at 411. Defendants have all the authority and information they need to implement Plaintiffs' requested relief, and they should be required to do so.[4]

Defendants' suggestion that they lack authority or data to implement a real solution that allows blind voters to mark an electronic ballot online is especially surprising in light of an April 2020 letter written by Defendant Boockvar to the

[4] Although Defendants suggest "a TRO would require the compliance of non-parties—the counties—if the Court granted Plaintiffs their preferred remedy," this bald assertion is not supported by the declaration by Jonathan Marks. *See* Opp'n. 19.

U.S. Election Commission. In that April 2020 letter, Defendant Boockvar requested over $14 million in federal funds for the 2020 election cycle, so her Department could "implement an accessible electronic ballot marking device tool to enable voters with disabilities to vote absentee or by mail." Ex. D (Letter K. Boockvar to M. Harrington). Additionally, Pennsylvania's receipt of this federal money is arguably conditioned on in making its voting system accessible for the June 2, 2020 primary. That is a condition it has not met and yet, it has taken the federal money. *See* Ex. D (Letter K. Boockvar to M. Harrington).

Finally, even if Defendants did not have the power, under state law, to force county boards of election to comply with the ADA and Section 504—something that Defendants have not argued—that would not preclude the court from issuing an injunction against Defendants. Courts have rejected such efforts by Defendants to evade responsibility in comparable lawsuits. *See Robertson v. Jackson*, 972 F.2d 529, 535 (4th Cir. 1992) (fact that defendant was "unable to bring the entire [state] system into full compliance" "does not, of itself, preclude issuance of an injunction mandating that [Defendants] try vigorously to compel compliance with federal statutes and regulations"); *Susavage v. Bucks Cty. Sch. Intermediate Unit No. 22*, 2002 WL 109615, at *20 (E.D. Pa. Jan. 22, 2002) (defendant's "argument that it delegated its duty cannot absolve it of liability under the ADA" or Section 504,

because defendant "was the public agency responsible for Pennsylvania's compliance with federal statutory requirements").

At bottom, Defendants cannot be bothered to implement a real solution that meets the needs of blind voters and complies with federal law. As even Defendants concede, the issue is one of ease—not authority. *See* Opp'n. 9, 15 (counties are "more familiar" with the federal write-in ballot than other potential electronic ballots, and the Department of State "can more easily convert" the write-in ballot "to be a fillable PDF that can then be completed electronically").

V. DEFENDANTS PROPOSED REMEDY IS NOT WORKABLE, BUT PLAINTIFFS' SOLUTION COULD BE READILY IMPLEMENTED.

This Court rightly has recognized the importance of granting some relief to Plaintiffs in advance of the June 2 primary. Defendants do not claim they cannot implement Plaintiffs proposed solution—they merely proffer that the solution favored by Defendants is easier and "more feasible." Opp'n. Ex. 1 ¶ 51 (J. Marks Decl.). Contrary to Defendants' protestations, making the UOCAVA ballots available to blind Pennsylvanians is a feasible solution, and Defendants have offered no compelling reason why it should not be ordered here. And the UOCAVA ballots are closer to providing "equal access" to blind Pennsylvanians because the UOCAVA ballot lists all candidates and races in one document—just like the ballots sighted Pennsylvanians receive. And the UOCAVA solution more

closely approximate "effective communication" because the FWAB "solution" is prone to errors and confusion. *See* Jonathan Lazar Decl.

Defendants' solution seeks to shift the burden of creating accessible ballots from the state to individuals with disabilities. The FWAB solution is not workable because it introduces the likelihood of a litany of potential errors that effectively may deny many blind individuals their right to vote. There is a high likelihood that blind voters will make errors when filling out the Federal Write-In Absentee Ballot ("FWAB"), including because that blank form does not clearly indicate to users "what data should be entered into the form, and where." Ex. E ¶¶ 7-9 (J. Lazar Decl.). The blank spaces to be filled in by voters on the FWAB are not where blind voters will expect them to be—and the quantity of information that blind users are expected to manipulate in filling out the FWAB is not tenable. *Id.* ¶ 8. In addition, the need to either cut and paste (non-visually) from one document to another, or listen to an audio file while typing information into the FWAB, will increase errors that are likely to result in vote denial. *Id.*

Plaintiffs' proposed solution, by contrast, could be readily implemented. At bottom, Plaintiffs only request that Defendants ensure ballots are in PDF format, and then use common commercial software to make those PDFs accessible—the same software that Defendants would use to make the FWAB accessible. As Defendants concede, at least some county boards of elections already generate

"native PDF" files from their "ballot programming software." Opp'n. Ex. 1 ¶ 19 (J. Marks Decl.). And although Defendants favor using the FWAB because "[c]ounty election offices are familiar with and must accept FWABs," the same can be said of Plaintiffs' proposal—counties certainly are "familiar" with their own ballots. As Prof. Jonathan Lazar concludes,

> [T]he use of the FWAB for voting will likely lead to error. Given that PDF forms which are serving as ballots are not hard to make accessible, and given that it is not likely that thousands of Blind voters will request this option, I feel that creating accessible PDF ballots upon request, is the most feasible, reasonable option to protect the privacy of blind voters during the upcoming June 2, 2020 elections.

Ex. E ¶ 13 (J. Lazar Decl.).

In sum, the Court must choose what is the more effective way for blind people to communicate their vote. The ADA and Section 504 specifically require Pennsylvania to "take appropriate steps *to ensure that communications with* applicants, participants, members of the public, and *companions with disabilities are as effective as communications with others*." 28 C.F.R. § 25.160. Under this standard, providing a UOCAVA ballot is a far effective means for a blind person to communicate their vote than a FWAB ballot. This is not a situation where both proposed solutions would protect Plaintiffs' rights. Defendants' FWAB "solution" is an empty promise, which Defendants have never implemented and they provide no evidence that it will work. By contrast, Plaintiffs provide the evidence of the

Michigan UOCAVA example and the expertise of Prof. Lazar to demonstrate that its UOCAVA solution can work for the June 2, 2020 primary election.

CONCLUSION

For the foregoing reasons, this Court should issue a TRO to require Defendants to make the UOCAVA ballot process accessible and available to Plaintiffs and other blind voters for the June 2, 2020 primary election and to notify voters on DOS's website of the changes.

Dated: May 26, 2020

Respectfully submitted,

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LOCAL RULE 7.8(b)(2) CERTIFICATE

I certify under penalty of perjury that Plaintiffs' Reply contains 3,705 words (excluding the Table of Citations and Table of Contents) based on the processing system used to prepare the Brief (Word 365).

Dated: May 26, 2020

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