

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

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

**BRIEF IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

Respectfully submitted,

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INTRODUCTION

Secretary Boockvar and the Department of State have made good on their commitment, made long before this lawsuit, that there will be a state-of-the-art Remote Ballot Marking System (RBMS) in place for the November 2020 General Election. The contract for the RBMS is almost entirely through the security approval process, with the Defendants having full confidence that the RBMS will be in place for the November 2020 General Election. The RBMS will provide for electronic receipt and marking of an absentee or mail-in ballot in a format that is fully accessible to the blind and other disabled persons. There is, therefore, no dispute, nor has there even been a dispute, that disabled voters will be able to privately and independently mark their ballots in the November 2020 General Election.

Significantly, the Complaint sets forth no claim relating to electronic submission of completed ballots—and the Plaintiffs do not even request specific relief in the form of an order mandating the electronic submission of completed ballots. Notwithstanding this pleading failure, Plaintiffs have articulated that this is what they are looking for. In short, Plaintiffs are now asking this Court to rewrite Pennsylvania’s Election Code to secure this relief on the eve of the General Election. Electronic submission of completed ballots does not exist in Pennsylvania, is not authorized by the General Assembly, and no voter in

Pennsylvania can, or ever did, submit their ballot electronically. And, the information available to the Defendants, including from four federal agencies, reflects that electronic submission, of any kind, is “high-risk even with controls in place.” *See* SMF¶7. This Honorable Court should reject Plaintiffs’ invitation to so rewrite Pennsylvania’s Election Code in this way because, not only is it presently ill-advised for security reasons, it is also not required under the law.

STATEMENT OF THE FACTS

Act 77 of 2019, which authorized *mail-in* ballots, was signed into law on October 31, 2019. *See* Act 77 of 2019, P.L. 552, No. 77. Within a little over three months of the enactment of the legislation, Secretary Boockvar and the Department of State (DOS) were actively seeking a Remote Ballot Marking System. SMF, ¶ 3. In April 2020, Secretary Boockvar requested federal funds through the CARES Act to ensure that Pennsylvania would have a RBMS. SMF, ¶ 4. The Defendants are now finalizing the approval process, started months ago, to secure a fully accessible RBMS for the November 2020 General Election. SMF, ¶ 1. It is anticipated that the RBMS will be launched two months' in advance of the General Election. SMF, ¶ 1. There is no question that blind voters will be able to receive and mark their ballots in a fully accessible format using a RBMS, moving forward.¹

Act 77 did not authorize the electronic submission of absentee or mail-in ballots. Electronic submission would include anything other than mail or hand

¹ Pennsylvania's commitment to securing a RBMS for the General Election was made long before this lawsuit was filed, and the Defendants had already started the process of securing one when the Plaintiffs filed suit. This lawsuit is not, and never was, necessary for the purpose of securing a RBMS for blind voters for the November 2020 General Election. Likely in recognition of this reality, the Plaintiffs' Complaint, that was never amended, is almost entirely premised upon accessibility for the June 2, 2020 primary election.

delivery of the ballot, such as submission through a web-based application, online portal, e-mail, or fax, among other things. SMF, ¶ 7. Act 77 only authorizes voters to return the ballot by mail or by in-person hand delivery to the voter's respective County Board of Elections. 25 P.S. §§ 3146.6(a) and 3150.16(a), 25 Pa.C.S. § 3509.

Beyond this, electronic submission is ill-advised. The Defendants are aware of, and informed by, collective guidance from the Cybersecurity and Infrastructure Security Agency (CISA), the Election Assistance Commission (EAC), the Federal Bureau of Investigation (FBI), and the National Institute of Standards and Technology (NIST), recommending “paper ballot return [because] electronic ballot return technologies are high-risk even with controls in place.” *See Marks Tr.*, 232-233; CISA, *et al.*, RISK MANAGEMENT FOR ELECTRONIC BALLOT DELIVERY, MARKING, AND RETURN (May 8, 2020). In its guidance document, the government relays that, while electronic delivery of a blank ballot to a voter carries some risk, the security risk related to electronic submission of a completed ballot is far more severe and cannot be mitigated even with controls. *Id.*

Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in-person at their polling places on Election Day. And, of course, even with the option of mail-in voting, voters are always able to vote in-person. County polling places will be open for voters for the November 2020

General Election with preventative measures in place to protect against the spread of COVID-19, just as they were for the primary election. SMF, ¶¶ 11-13; PA CONST Art. 7 § 2, 25 P.S. § 3045. And, every precinct in Pennsylvania has an accessible voting system. SMF, ¶ 12.

Plaintiff Drenth

Besides the June 2020 primary, Mr. Drenth voted in-person every time he has voted, and he did so privately and independently with the exception of one occasion in which the voting machine was broken and he was compelled to seek the assistance of his father. SMF, ¶ 14. Mr. Drenth also privately and independently filled out his Accessible Write-In Ballot (AWIB) for the June 2020 primary, and privately and independently printed his AWIB, put it in an envelope, affixed postage, and placed it in his mailbox. SMF, ¶¶ 18, 24.

Mr. Drenth has a mailbox, and is able to send and receive mail. SMF, ¶ 25. He typically uses the mail to send mail when a true signature is required. SMF, ¶ 26. Mr. Drenth uses applications on his iPhone to read paper documents, including envelopes, such as the “Seeing AI” application. SMF, ¶ 27. The Seeing AI app uses artificial intelligence to read paper documents for the blind. SMF, ¶ 28. Mr. Drenth can also scan paper documents into his computer and use his screen access software to carefully read documents. SMF, ¶ 29. Mr. Drenth also is able to use a printer. SMF, ¶ 30. If Mr. Drenth encounters problems with his printer, he can use

his Seeing AI app on his iPhone to at least partially read what the error message says on the printer screen. SMF, ¶ 31.

Accessibility of Declaration and Envelope

The Defendants are committed to seeking reasonable and safe solutions for the blind to promote inclusivity. Under the Election Code, the Secretary of the Commonwealth has the authority to prescribe the size and shape of secrecy and ballot return envelopes for each absentee and mail-in ballot. 25 P.S. §§ 2621(a), 3146.4, and 3150.14(a). Pursuant to this authority, with respect to voters who apply to use the RBMS to receive and mark their ballots, Defendants have resolved to issue a directive to the counties in advance of the General Election directing the counties to mail the secrecy envelope and the return envelopes addressed to the respective voter's County Board of Elections at the same time that their ballot is delivered electronically. The Defendants will issue guidance requesting that the return envelope is at least larger than the secrecy envelope so that the envelopes are distinguishable, and the electronic instruction will indicate as such. SMF, ¶ 35. Defendants have also resolved to issue a guidance to the counties in advance of the General Election requesting the counties to accept the return envelope as long as a signature appears anywhere on the envelope for voters who apply to use the RBMS to receive and mark their ballots. SMF, ¶ 36.

While enforcement authority is admittedly unclear, the Defendants are willing to use their delegated authority to issue these directives in an effort to aid the blind. A directive requiring the creation of a specific enveloping system, coupled with the allowance of a signature anywhere on the envelope, will allow blind individuals to submit their mail-in ballots more easily.

PROCEDURAL HISTORY

Plaintiffs initiated this action two months ago on May 21, 2020. Doc. 1. Plaintiffs simultaneously filed a Complaint and a Motion for a Temporary Restraining Order with a supporting brief. (Docs., 1, 4-5). Plaintiffs allege a violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134 (Count I), and a violation of Section 504 of the Rehabilitation Act (RA) of 1973, 29 U.S.C. § 794 *et seq.* (Count II). Plaintiffs claim that the Defendants have not provided the blind with an equal opportunity to vote by absentee or mail-in ballots due to the lack of RBMS. *See* Doc. 1. Plaintiffs seek relief in the form of “...a permanent injunction...requiring Defendants to remedy their absentee and mail-in ballot system by implementing a remote accessible vote-by-mail system for Plaintiffs and those similarly situated for all future elections.” Doc. 1, ¶ 118. The Plaintiffs do not allege a claim with respect to electronic submission, nor do they ask for the discrete relief of electronic submission.

The Defendants immediately conferred with the Plaintiffs upon being sued, and endeavored in good faith to formulate a solution to address their concerns, ultimately developing the solution of the AWIB to solve the temporary problem of the lack of a RBMS for the June 2, 2020 primary election. The Defendants proposed the AWIB, and attempted to stipulate to the AWIB, in advance of the hearing scheduled on the TRO. *See* Doc. 16 (indicating that the Parties were

attempting to stipulate to a remedy). The Plaintiffs rejected the AWIB at that time, requesting the relief delineated in the Complaint. Ultimately, this Honorable Court rejected Plaintiffs' desired solution (as it concluded that it was not feasible) and adopted the AWIB as a temporary solution to the lack of a RBMS. *See* Docs. 31-32. The AWIB *is not* the solution that will be in place for the November 2020 General Election (there will be a RBMS).

The Parties have proceeded through discovery, with written discovery exchanged and depositions conducted. The Defendants have confirmed since before this lawsuit, and throughout this lawsuit, that a RBMS will be in place for the General Election. *See* SMF, 1. And, while not required under the law, they have adopted a solution to address the Plaintiffs' concerns regarding mailing in their mail-in ballots. Defendants have now filed a Motion for Summary Judgment. This brief is submitted in support of that motion.

QUESTIONS PRESENTED

- A. Whether this case is not justiciable because there is no controversy regarding the fact that a RBMS will be in place for the November 2020 General Election?**

[Suggested Answer: YES]

- B. Whether Plaintiffs are not excluded from voting by absentee or mail-in by virtue of the fact that they have to mail-in their mail-in ballots?**

[Suggested Answer: YES]

- C. Whether the ADA/RA do not require electronic submission because it is not reasonable?**

[Suggested Answer: YES]

- D. Whether Defendants have formulated a solution, over and above what is required under the law, to address accessibility concerns of the declaration and envelope?**

[Suggested Answer: YES]

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any [supporting a motion for such relief], show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). “Although the non-moving party receives the benefit of all factual inferences in the court's consideration of a motion for summary judgment, the nonmoving party must point to some evidence in the record that creates a genuine issue of material fact.” *Berkeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006). In this respect, “summary judgment is essentially ‘*put up or shut up*’ time for the non-moving party: the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument.” *Id.* (emphasis added) (citing *Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1109–10 (3d Cir.1985)).

In addition, if the non-moving party has the burden of proof at trial, that party must set forth facts “sufficient to establish the existence of an element essential to that party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In this case, Defendants’ Motion for Summary Judgment should be granted because there is no genuine dispute of material fact,

and they are entitled to judgment as a matter of law. The Plaintiffs cannot establish that the Defendants have failed to provide the blind with an equal opportunity to vote.

II. THIS CASE IS NOT JUSTICIABLE BECAUSE THERE IS NO CONTROVERSY REGARDING THE FACT THAT A RBMS WILL BE IN PLACE FOR THE NOVEMBER 2020 GENERAL ELECTION.

Plaintiffs seek relief in the form of “...a permanent injunction...requiring Defendants to remedy their absentee and mail-in ballot system by implementing a remote accessible vote-by-mail system for Plaintiffs and those similarly situated for all future elections.” Doc. 1, ¶ 118. Defendants resolved long before this lawsuit that they would be implementing a RBMS for the November 2020 General Election and all future elections. The approval process had already been started before the Plaintiffs filed suit. SMF, ¶ 3. There is, thus, no actual controversy supporting the relief requested.

In order for there to be a “case of actual controversy” in the constitutional sense, the controversy must be “one that is appropriate for judicial determination.” *Wyatt, Virgin Islands, Inc.*, 385 F.3d 801, 806 (3d Cir. 2004). “A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having *adverse* legal interests.” *Id.* (emphasis added). “It must be a real and substantial controversy

admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” (citing *Aetna Life Ins. Co. of Hartford, Conn. V. Haworth*, 300 U.S. 227, 240, 57 S. Ct. 461 (1937)). The conflict between the parties must be ripe for judicial intervention; it cannot be “nebulous or contingent” but “must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.” *Id.* (citing *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S. Ct. 236, 97 L. Ed. 291 (1952)).

Here, the Parties do not have adverse interests regarding a RBMS. The Defendants agree that it is appropriate to implement a RBMS, and, indeed, are finalizing a months-long approval process to secure the device. The Plaintiffs did not amend their Complaint to request specific relief other than the implementation of a RBMS for the November 2020 General Election. Because the lawsuit seeks a RBMS, and because the Defendants are providing a RBMS, there is no actual controversy, and this case is not justiciable and must be dismissed.

III. PLAINTIFFS ARE NOT EXCLUDED FROM VOTING BY ABSENTEE OR MAIL-IN BY VIRTUE OF THE FACT THAT THEY HAVE TO MAIL-IN THEIR MAIL-IN BALLOTS.

Plaintiffs are the masters of their pleadings, and should not be permitted to proceed on a claim regarding electronic submission because they did not

sufficiently allege such a theory in their complaint, nor did they seek specific relief related to electronic submission. To the extent that this Honorable Court is inclined to entertain this claim, however, it should be denied, nevertheless, because electronic submission is not required under the law for equal access.

To establish “a claim under Title II of the ADA, a person ‘must demonstrate: (1) he is a qualified individual; (2) with a disability; (3) [who] was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was subjected to discrimination by any such entity; (4) by reason of his disability.’ ” *Haberle v. Troxell*, 885 F.3d 170, 178-79 (3d Cir. 2018) (quoting *Bowers v. Nat’l Collegiate Athletic Ass’n*, 475 F.3d 524, 553 n.32 (3d Cir. 2007)). Under the ADA and RA, a qualified disabled person “must be provided with meaningful access” to the program. *CG v. Pennsylvania Dep’t of Educ.*, 734 F.3d 229, 237 (3d Cir. 2013) (quoting *Alexander v. Choate*, 469 U.S. 287, 301 (1985)). In providing “meaningful access” a public entity need not afford a qualified disabled person with “an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others,” or, put another way, a public entity must only “take appropriate steps to ensure that communications with ... participants ... with disabilities are as effective as communications with others.” 28 C.F.R. §§ 35.130(b)(1)(ii), 35.160(a)(1).

With limited exceptions, the same legal principles govern ADA and RA claims. *CG v. Pennsylvania Dep't of Educ.*, 734 F.3d 229, 235–36 (3d Cir. 2013). To satisfy either causation requirement, Plaintiffs must prove that they were treated differently based on the protected characteristic, namely the existence of their disability. This is because the “main thrust” of the ADA and RA “is to assure handicapped individuals receive the same benefits as the non-handicapped,” *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir.1994), “as well as to prohibit discrimination against one “subgroup” of disabled people as compared to another subgroup if the characteristic distinguishing the two subgroups is the nature of their respective disability.” *Id.* at 306 (finding no ADA or RA violation because there was no “discrimination against a subgroup of the group of people who are physically disabled”). In other words, Plaintiffs must prove that they have been deprived of a benefit or opportunity provided to non-disabled voters.

Here, there is no evidence that Plaintiffs have been, or will be, deprived of a benefit afforded to non-disabled voters. All Pennsylvanians are required to return their absentee and mail-in ballots by mail or hand delivery. This is not a situation in which electronic submission is allowed for some persons, yet denied to the blind. No one in Pennsylvania has ever had the benefit of being able to vote electronically.

Moreover, the record reflects that Mr. Drenth and those similarly situated are able to privately and independently mail ballots. Mr. Drenth admitted that he has a mailbox, and is able to send and receive mail. SMF, ¶ 25. He typically uses the mail to send mail when a true signature is required. SMF, ¶ 26. Mr. Drenth uses applications on his iPhone to read paper documents, including envelopes, such as the “Seeing AI” application. SMF, ¶ 27. The Seeing AI app uses artificial intelligence to read paper documents for the blind. SMF, ¶ 28. Mr. Drenth can also scan paper documents into his computer and use his screen access software to carefully read documents. SMF, ¶ 29. Mr. Drenth has a printer and is able to use it. SMF, ¶ 30. If Mr. Drenth encounters problems with his printer, he can use his Seeing AI app to at least partially read what the error message says on the printer screen. SMF, ¶ 31. In fact, Mr. Drenth confirmed that he privately and independently filled out his AWIB for the June 2020 primary, and also privately and independently printed his AWIB, put it in an envelope, affixed postage, and placed it in his mailbox. SMF, ¶ 18, 24.

While it is understood that the blind face more challenges sighted persons, in this case, the blind have not been excluded, or deprived of a benefit, due to their disability. The evidence reflects that the blind can reasonably mail-in their ballots. Mr. Drenth and similarly situated individuals are able to use the United States

Postal Service, and other mail delivery services, and have tools to handle paper documents in everyday life.

Plaintiffs may claim that some blind individuals lack printers, or have other similar circumstances, posing a barrier to participation. But, the lack of a printer is not a plight necessarily limited to the blind, and the mere fact of some disparate impacts of a law is not sufficient to maintain a claim under the ADA or RA. *C.G.*, 734 F.3d at 236-37 (“even assuming that this scheme has a disparate impact on certain disabled students... this alone is insufficient to prove a claim under the RA or ADA. Indeed, the Supreme Court has ‘reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under’ the RA.”).

Further, a voter opposed to mailing their ballot always has the option of submitting their ballot in-person by hand delivery in lieu of mailing. Under the Law, voters can return mail-in ballots by mail, *or* in-person by hand delivery, or by a third-party in limited situations, to the voter’s respective County Board of Election or other designated locations identified by the county. 25 P.S. §§ 3146.6(a) and 3150.16(a), 25 Pa.C.S. § 3509. And, voters can always cast their ballot at the polls. Even if the voter decides, last-minute, to forego a mail-in ballot, a provisional ballot can be cast at the polls. Polling places will be open for the November 2020 General Election with precautions in place to protected against the spread of COVID-19.

For these reasons, blind voters have equal access. And, because the record does not reflect that blind persons are excluded from participating in mail-in voting by virtue of the fact that they have to mail their completed ballots, judgment should be entered in favor of Defendants.

IV. THE ADA AND RA DO NOT REQUIRE ELECTRONIC SUBMISSION.

In addition to the fact that the Plaintiffs have not established a prima facie case, the Plaintiffs' request for an accommodation in the form of electronic submission also fails because it is not reasonable and would fundamentally alter the Defendants' voting systems.

Title II does not “[r]equire 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. § 35.150(a)(3). In *Choate*, in the context of the RA, the Court established that liability could be premised on a failure to make “reasonable accommodations,” a standard that turned on (1) whether the requested accommodation to the program was “reasonable”; (2) whether it was necessary “to assure meaningful access”; and (3) whether it would represent “a fundamental alteration in the nature of [the] program.” *Choate*, 469 U.S. at 300–01, 105 S.Ct. 712 (citation omitted); *see also Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012) (identifying these elements).

As discussed above, electronic submission is not required in the first instance because the blind are generally capable of mailing their ballots. While electronic submission would, perhaps, be more convenient, is not necessary to assure meaningful access. Plaintiffs, therefore, cannot satisfy the second element requisite to their request for an accommodation in the form of electronic submission.

Plaintiffs fare no better with the remaining elements. Plaintiffs' request for electronic submission is not reasonable, and would constitute a fundamental alteration to their voting systems. Reasonable accommodations do not require an institution "to lower or to effect substantial modifications of standards to accommodate a handicapped person." *See Cmty. Coll. v. Davis*, 442 U.S. 397, 413, 99 S. Ct. 2361, 2370 (1979). Accommodations are not reasonable if they impose "undue financial and administrative burdens" or if they require a "fundamental alteration in the nature of [the] program." *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 287 n. 17 (1987).

No one in Pennsylvania has ever cast their vote electronically, and Act 77 did not authorize electronic submission of mail-in ballots. If so ordered in this lawsuit, it would be the first time in the history of the Commonwealth that someone has been able to e-mail or otherwise electronically upload their ballot. This is a fundamental deviation to the Defendant's voting programs.

In addition, the Defendants have testified that they have grave security concerns related to electronic submission. As recently as May 8, 2020, four federal agencies recommended “paper ballot return [because] electronic ballot return technologies are high-risk even with controls in place.” *See* Marks Tr., 232-233; CISA, *et al.*, RISK MANAGEMENT FOR ELECTRONIC BALLOT DELIVERY, MARKING, AND RETURN (May 8, 2020). In the guidance document, the federal agencies relay that, while electronic submission of a blank ballot carries some risk, the security risk related to electronic submission of a completed ballot is far more severe and cannot be mitigated even with controls.

Mr. Marks testified at his deposition that choices have to be made regarding the levels of risk that are tolerated, and that, while there is some risk associated with transmission of a blank ballot, the risk related to electronic submission of a fully executed ballot is not acceptable. He testified that, “the Federal Bureau of Investigation, the Election Assistance Commission, the Department of Homeland Security, and the National Institute for Standards and Technology released a report essentially identifying the levels of risk related to an online balloting system, and they all agreed that there was some level of risk of delivering the blank balloting materials, but that was a low to moderate risk compared to the very severe risk of having a voter return their ballot.” Marks Tr., 232-33. Mr. Marks explained that control is part of the issue, in that the Defendants can confidently transmit a ballot

securely, but once it is received by a voter, the Defendants lose control, with the electronic document becoming subject to the security measures, or lack thereof, on the voter's device. Marks Tr., 232-33. The potential for harm is greater with electronic submission as a corrupted electronic document could give rise to an attack at-scale, potentially affecting or holding hostage hundreds or thousands of votes—a risk not associated with mail-in ballots. Marks Tr., 232-33. In sum, the Defendants have determined that electronic submission carries too much risk, at this time.

The Plaintiffs may point to other jurisdictions that, in some fashion, allow electronic submission. This should be given no moment. In those jurisdictions, it appears as though the respective legislatures have specifically provided for electronic submission.² Furthermore, and alarmingly, most jurisdictions allowing for electronic submission require that voters waive their right to a secret ballot in connection with electronic submission. *See, e.g.*, Or. Admin. R. 165-007-0300 (“Facsimile Vote Secret Ballot Waiver Form”), form available at <https://sos.oregon.gov/elections/Documents/SEL531.pdf>.

² “[O]ne of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371 (1932).

Pennsylvania has not made the choice to risk its citizens' constitutional right to privacy by allowing electronic submission. Requiring electronic submission would jeopardize the secrecy of the ballot, as well as the DOS' ability to protect its systems from electronic attack. It would lower the Defendants' security standards, and constitute a fundamental alteration of their voting systems. As such, Plaintiffs' request for electronic submission should be denied, and judgment entered in Defendants' favor. *See, e.g., Chin v. Rutgers*, 2016 WL 2653908, at *7 (D.N.J. May 9, 2016), *aff'd*, 697 F. App'x 751 (3d Cir. 2017) (granting Defendants' summary judgment motion where "Defendants have offered sufficient evidence to show that the requested accommodations would have 'fundamentally alter[ed] the nature of the [School's] program...That is, Defendants have shown that granting Plaintiff's accommodations would result in the "substantial weakening [of the school's] academic standards."); *Hollinger v. Reading Health Sys.*, No. CV 15-5249, 2017 WL 429804, at *11 (E.D. Pa. Jan. 31, 2017) (noting that, that "*Davis ... struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs.*").

V. **DEFENDANTS HAVE FORMULATED A SOLUTION, OVER AND ABOVE WHAT IS REQUIRED UNDER THE LAW, TO ADDRESS ACCESSIBILITY CONCERNS OF THE DECLARATION AND ENVELOPE.**

The Secretary of the Commonwealth has the authority to prescribe the size and shape of secrecy and ballot return envelopes for each absentee and mail-in ballot. 25 P.S. §§ 2621(a), 3146.4, and 3150.14(a). With respect to voters who apply to use the RBMS to receive and mark their ballots, pursuant to the foregoing authority, the Secretary has resolved to issue a directive to the counties in advance of the General Election directing the counties to mail the secrecy envelope and the return envelopes addressed to the respective voter's County Board of Elections at the same time that their ballot is delivered electronically. The Secretary will direct that the return envelope is at least two inches larger than the secrecy envelope so that the envelopes are distinguishable, and the electronic instruction will indicate as such. SMF, ¶ 35. The Secretary has also resolved to issue a directive to the counties in advance of the General Election directing the counties to accept the return envelope as long as a signature appears anywhere on the envelope for voters who apply to use the RBMS to receive and mark their ballots. SMF, ¶ 36.

As noted, while enforcement authority with respect to the counties is admittedly unclear, the Defendants are willing to use their delegated authority to issue said directive in an effort to aid the blind. A directive requiring the creation

of a specific enveloping system, coupled with the allowance of a signature anywhere on the envelope, will allow blind individuals to submit their mail-in ballots more easily. Therefore, the Defendants have satisfied all of their obligations under the law.

CONCLUSION

For the foregoing reasons, because there is no genuine dispute of material fact, and because Defendants are entitled to judgment as a matter of law, Defendants' Motion for Summary Judgment should be granted, and judgment entered in their favor.

Respectfully submitted,

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Date: July 22, 2020

Counsel for Defendants

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

Joseph Drenth, and the National	:	
Federation of the Blind of	:	
Pennsylvania ,	:	
Plaintiff	:	No. 1:20-cv-00829
	:	
v.	:	Judge Wilson
	:	
Kathy Boockvar, Secretary of the	:	Electronically Filed Document
Commonwealth in her official	:	
capacity, and the Department of	:	
State of Pennsylvania,	:	
Defendants	:	<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 July 22, 2020, I caused to be served a true and correct copy of the foregoing document to the following:

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