

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

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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, in her official capacity	:
as Secretary of the Commonwealth, and	:
DEPARTMENT OF STATE OF THE	:
COMMONWEALTH OF PENNSYLVANIA,	:
	:
Defendants.	:

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**PLAINTIFFS’ RESPONSE AND COUNTERSTATEMENT TO  
DEFENDANTS’ STATEMENT OF MATERIAL FACTS  
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1, Plaintiffs, through their counsel, submit this Response and Counterstatement to Defendants’ Statement of Material Facts in support of their Motion for Summary Judgment (Doc. 51).

**1. The Defendants are finalizing the procurement process to secure a fully accessible remote ballot marking system (RBMS) for the November 2020 General Election, with full confidence that the RBMS will be implemented by September 1, 2020. Marks Tr., 113 (17-22), 117-19.**

RESPONSE: Denied as stated. It is admitted that Jonathan Marks, the Rule 30(b)(6) designee for the Department of State (“DOS”), testified that Defendants are in the process of procuring an accessible ballot delivery and marking tool and

that Mr. Marks testified he feels confident such tool will be up and running by September 1, 2020, and in place for the November 2020 general election. Marks Dep. at 113:17-22 (Doc. 51-1). By way of further answer:

(a) DOS still does not have any finalized contract to secure an accessible ballot marking and delivery tool, even though DOS began the procurement process more than five months ago, Marks Dep. at 119:5-9 (Doc. 51-1);

(b) It is not unusual for the procurement process to take up to, or more than, 12 months, though Defendants are trying to accelerate the process for the upcoming election, Marks Dep. at 112:21-113:3, 118:19-22 (Doc. 51-1);

(c) Defendants have refused, and continue their refusal, to identify the vendor with which Defendants are negotiating to acquire the accessible ballot delivery and marking tool, Marks Dep. at 130:15-131:3, and there are multiple types of accessible ballot delivery and marking tools, each of which works in unique ways, *see* Gilbert Decl. ¶ 36 (Doc. 49-23); Blake Decl. ¶¶ 17-19 (Doc. 49-24), such that it remains disputed whether and to what extent the tool secured by DOS will meet blind voters' accessibility needs;

(d) Defendants have not provided any information about how the tool will be implemented, including whether the County Boards of Election (CBEs) or DOS will be responsible for accepting applications from blind voters who want to use the tool and whether the CBEs or DOS will be responsible for providing blind

voters with access to the tool. This raises serious concerns as to the viability of such a tool to ensure that blind voters have equal and meaningful access to Defendants' absentee and mail-in ballot voting program, especially in light of Defendants' assertion that they have limited control over the CBEs, *see* Marks Dep. at 224:3-20 (Doc. 51-1); Defs.' Summary Judgment Br. at 7 (Doc. 53); and

(e) Defendants have not provided any details about how they will secure the accessible ballot delivery and marking tool, and Defendants have not disclosed the duration of the contract they say is being finalized, even though such details will be important to determining whether and to what extent the contract could provide an accessible solution to blind voters.

(f) Defendants have failed to explain whether and how they will test the ballot delivery and marking tool for accessibility prior to implementation. Supp. Gilbert Decl. ¶¶ 13-15 (Exh. 1 to Pls.' Opp.).

**2. Mail-in ballots are a new method of voting in Pennsylvania. Governor Wolf signed Act 77 of 2019 into law on October 31, 2019. *See* Act 77 of 2019, P.L. 552, No. 77; Office of the Governor, "Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting," *available at* <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>.**

RESPONSE: Admitted. By way of further answer, for decades Pennsylvania voters who qualified to vote by absentee ballot have been able to vote without going to their local polling places, and qualified absentee voters include

voters who, due to illness or disability, are unable to go to their local polling places. 25 P.S. § 3146.1(k).

**3. The Defendants started the process of securing a RBMS in February 2020, before this lawsuit was initiated. Marks Tr., 119(5-9).**

RESPONSE: Denied as stated. DOS's representative testified that he believed "it was more along the lines of February" when DOS was researching specific systems and that DOS "may have started getting price estimates in March of 2020." Marks Dep. at 119:3-9. By way of further answer:

(a) On September 27, 2019, the National Federation of the Blind sent a letter to Defendant Boockvar advising her that the ADA and RA required DOS to implement a ballot delivery and marking tool, Letter from M. Riccobono to Sec'y of Commonwealth (Doc. 49-25);

(b) On February 19, 2020, Disability Rights Pennsylvania, co-counsel for Plaintiffs in this lawsuit, sent a letter to DOS's General Counsel to inform him that the ADA and RA required DOS to implement a ballot delivery and marking tool, Letter from K. Darr to T. Gates (Doc. 49-26); and

(c) Mr. Marks testified that DOS was aware of litigation and the threat of litigation in other jurisdictions on this issue, which motivated DOS to secure a ballot delivery and marking tool, Marks Dep. at 120:8-9, 121:2-5 (Doc. 51-1).

**4. On April 10, 2020, prior to this litigation, the Secretary wrote a letter to the United States Election Assistance Commission requesting CARES Act funds in furtherance of the Commonwealth's commitment to secure a RBMS for the 2020 Federal election cycle. See April 10, 2020 Letter from Kathy Boockvar to Mona Harrington, RE: State Requests for 2020 CARES Act funds.**

RESPONSE: Denied as stated. It is admitted that the April 10, 2020 letter from Secretary Boockvar to the U.S. Election Assistance Commission reflects that Pennsylvania was awarded more than \$14.2 million under the 2020 CARES Act for use for a number of election-related items, including, but not limited to, securing an accessible ballot delivery and marking tool. By way of further answer, Defendants' representative testified that DOS has set aside funding from that award for an accessible ballot delivery and marking tool but still has not spent that funding for that purpose. Marks Dep. at 177:21-178:22, 186:21-187:1 (Doc. 51-1).

**5. As far as remote electronic submission of completed ballots, Pennsylvania has never allowed anyone to cast their vote electronically (by means of fax, or email or other online submission), and no one has ever cast their vote electronically (by means of fax, or email or other online submission) in Pennsylvania. See Marks Tr., 223(9-12).**

RESPONSE: Denied as stated. DOS's representative testified that Pennsylvania has not allowed anyone to submit their vote using email – not the other means mentioned. Marks Tr. at 223:9-12 (Doc. 51-1). By way of further answer:

(a) It is immaterial whether Pennsylvania previously has permitted voters to submit their ballots using email or any other electronic means; and

(b) Defendants state that they will allow blind voters to receive and mark their ballots electronically even though that has never been legislatively authorized. Marks Dep. at 120:12-18, 121:6-11, 122:14-19 (Doc. 51-1).

**6. The General Assembly has not passed a law directing electronic submission of any completed ballots. See Marks Declaration ¶ 12.**

RESPONSE: Denied as stated. It is admitted that the General Assembly has not directed electronic submission of absentee or mail-in ballots. 25 P.S. §§ 3146.6(a), 3150.16(a) (*cited in* Marks Decl. ¶ 12 (Doc. 51-3)). With respect to overseas and military voters, the General Assembly has directed that voters may “submit the ballot for mailing or other authorized means,” 25 Pa. C.S.A. § 3509 (*cited in* Marks Decl. ¶ 12 (Doc. 51-3)), and, as such, the legislature has left the means of submission up to DOS. By way of further answer:

(a) It is immaterial whether Pennsylvania has previously permitted voters to submit their ballots using email or any other electronic means; and

(b) Defendants state that they will allow blind voters to receive and mark their ballots electronically even though that has never been legislatively authorized, Marks Dep. at 120:12-18, 121:6-11, 122:14-19 (Doc. 51-1).

**7. Electronic submission includes submission through an application, online portal, e-mail, or fax, among other things. Marks Decl. ¶ 12.**

RESPONSE: Denied as stated because it is not clear what an “application” is in this context, but it is otherwise admitted that electronic submission can take a range of forms, including email, fax, and use of an online portal.

**8. 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), that recommends “paper ballot return technologies are high-risk even with controls in place.” See Marks Tr., 232-33; CISA, et al., RISK MANAGEMENT FOR ELECTRONIC BALLOT DELIVERY, MARKING, AND RETURN (May 8, 2020).**

RESPONSE: Admitted that Defendants are aware of the cited document and claim to make decisions informed by it. By way of further answer:

(a) Mr. Marks is not a security expert, Marks Dep. at 231:20-21 (Doc. 51-1), and Defendants offer no expert evidence in support of their assertion that electronic submission would constitute so great a security risk as to be a fundamental alteration;

(b) The document cited by Defendants (Doc. 51-4) is inadmissible hearsay;

(c) The document cited by Defendants acknowledges that some voters may be unable to print, sign, and mail a ballot without significant difficulty;

(d) The document cited by Defendants identifies strategies that can be employed to mitigate risks associated with electronic returns; and

(e) Plaintiffs have submitted evidence that any risks associated with electronic submission of marked ballots can be significantly reduced using widely available commercial technology, Pelletier Decl. ¶¶ 6-17 (Exh. 7 to Pls.' Opp.).

**9. In its guidance document, the government relays that, while electronic submission of a blank ballot carries some risk, the security risk related to electronic submission is far more severe and cannot be mitigated even with controls. Marks Declaration ¶ 14; Marks Tr., 206-07; Marks Tr., 232-33.**

RESPONSE: Denied. Defendants do not cite the “guidance document” from “the government” in support of this Statement. By way of further answer, Plaintiffs incorporate by reference their Response to # 8.

**10. 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 Elections or other designated locations identified by the county. 25 P.S. §§ 3146.6(a) and 3150.16(a); 25 Pa.C.S. § 3509.**

RESPONSE: Admitted in part and denied in part. It is admitted that Pennsylvania law provides that absentee and mail-in ballots may be returned by mail or hand-delivery. 25 P.S. §§ 3146.6(a), 3150.16(a). Pennsylvania law allows military and overseas voters’ ballots to be submitted by mail “or other authorized means of delivery.” 25 Pa. C.S.A. § 3509(2). By way of further answer, this is not a material fact.

**11. Polling places were open for the June primary, with a few being consolidated, and social distancing and other preventative measures in place at the remainder to protect against the spread of COVID-19. Marks Tr., 230(2-13), 231(2-13).**



RESPONSE: Admitted in part and denied in part. It is admitted that all counties had some polling places open for the June 2020 primary and that some preventative measures were in place. By way of further answer:

(a) This is not a material fact;

(b) There were more than a “few” consolidated polling places, for example, the number of polling places was reportedly reduced in Pennsylvania’s two largest counties – Philadelphia and Allegheny – from more than 2,100 in a typical election to fewer than 500 for the June primary, Committee of Seventy, *Massive Polling Place Consolidation Announced for June 2 Primary* (May 13, 2020),

<https://seventy.org/media/press-releases/2020/05/13/massive-polling-place-consolidation-announced-for-the-june-2-primary>;

(c) DOS failed to provide personal protective equipment for 35% of polling places, *see* KDKA, *Coronavirus in Pennsylvania: State Steps in to Help Counties with PPE for Polling Places*, <https://pittsburgh.cbslocal.com/2020/05/01/personal-protective-equipment-pennsylvania-polling-places/> (stating DOS provided PPE for only 65% of polling places).

**12. 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. Marks Declaration ¶ 17; PA CONST. Art 7 § 2; 25 P.S. § 3045.**

RESPONSE: Admitted that there will be polling places open in Pennsylvania for the November 2020 general election and that DOS asserts that

some unspecified preventative measures will be employed to protect against the spread of COVID-19. By way of further answer, this is not a material fact.

**13. Every precinct in Pennsylvania has an accessible voting system or an accessible ballot voting place. See Marks Tr., 230(16-21).**

RESPONSE: Denied as stated. It is admitted that the federal Help America Vote Act requires each precinct in Pennsylvania to have an accessible voting system. 52 U.S.C. § 21081(a)(3). By way of further answer:

(a) This is not a material fact;

(b) It is not clear what an “accessible ballot voting place” means;

(c) There are times when the accessible voting systems do not function and/or are not usable by blind voters, *see* Drenth Dep. at 44:2-45:9 (Doc. 51-5).

**14. 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 machine was broken and he was compelled to seek the assistance of his father. Drenth Tr., 47(1-8).**

RESPONSE: Admitted. By way of further answer, this is not a material fact.

**15. Mr. Drenth successfully applied for and received a mail in ballot for the June 2, 2020 primary. Drenth Tr. 47(15-25)-48(1-8).**

RESPONSE: Admitted. By way of further answer, Mr. Drenth found the online application portal “frustrating.” Drenth Dep. at 47:15-25 (Doc. 51-5).

**16. Mr. Drenth did not use his mail-in ballot. Drenth Tr., 48(4-8).**

RESPONSE: Admitted. By way of further answer, Mr. Drenth did not use the mail-in ballot because he applied for and received the AWIB. Drenth Dep. at 48:4-49:4 (Doc. 51-5).

**17. Mr. Drenth requested an AWIB after that solution was developed. Drenth Tr., 49(1-4).**

RESPONSE: Admitted that Mr. Drenth requested an AWIB after the Court ordered Defendants to make that option available.

**18. No one assisted Mr. Drenth with the AWIB process. Drenth Tr., 56(18-20).**

RESPONSE: Admitted. By way of further answer:

(a) Mr. Drenth experienced many issues in trying to complete the AWIB process and it took him more than an hour to do so, Drenth Dep. at 50:4-53:5 (Doc. 51-5);

(b) Mr. Drenth was able to complete the AWIB process because he is “very tech savvy,” Drenth Dep. at 55:6-12 (Doc. 51-5); and

(c) Other blind voters who are less technologically sophisticated than Mr. Drenth experienced greater difficulties in completing the AWIB process, *see* Pls.’ SMF ## 39-55, 59-65 (Doc. 49-1) (describing inaccessibility of AWIB process).

**19. Mr. Drenth independently used his printer to print his AWIB. Drenth Tr., 56(18-20).**

RESPONSE: Admitted that Mr. Drenth could use his printer independently to print the ballot sent in the AWIB process. By way of further answer:

(a) Mr. Drenth experienced difficulty using his printer to print his AWIB envelope due to lack of instructions and, in the end, could not do so, Drenth Dep. at 51:15-22, 60:17-61:25 (Doc. 51-5);

(b) Mr. Drenth could have easily confused where to sign the declaration after it printed if he had been interrupted and lost the orientation of the page and has no actual knowledge of whether he signed in the correct place, Drenth Dep. at 55:20-56:17 (Doc. 51-5);

(c) Other blind voters do not have printers because they do not read printed documents and, thus, would not have been able to use the AWIB process, Pls.' SMF # 41 (Doc. 49-1); Supp. Heitz Decl. ¶ 7 (Exh. 2 to Pls.' Opp.); Supp. Weber Decl. ¶ 12 (Exh. 4 to Pls.' Opp.); Salisbury Decl. ¶¶ 11-15 (Exh. 5 to Pls.' Opp.).

**20. Mr. Drenth went to his polling place in-person for the June 2, 2020 primary to accompany his father. Drenth Tr. 57(19-22).**

RESPONSE: Denied as stated. Mr. Drenth went to his polling place on June 2, 2020, with his father in order to see if Mr. Drenth could drop off his completed AWIB there. Drenth Dep. at 57:19-21 (Doc. 51-5).

**21. Mr. Drenth went “along to see if [he] could drop off [his] completed AWIB [] in a drop-off box. But there were no drop-off boxes there.” Drenth Tr., 57(19-22).**

RESPONSE: Admitted.

**22. Mr. Drenth did not attempt to deliver his AWIB to the address provided for on the return envelope – the Bucks County Board of Elections. Drenth Tr., 61(2-13).**

RESPONSE: Denied. Mr. Drenth put his completed AWIB in the mailbox on June 2, 2020, in an envelope addressed to the Bucks County Board of Elections. *See* Drenth Dep. at 59:5-9, 60:20-61:15 (Doc. 51-5).

**23. Once Mr. Drenth realized that he could not vote in-person, except by provisional ballot, because he had requested an AWIB, Mr. Drenth returned home and placed his AWIB in his mailbox, after the mail had already been picked up for the day. Drenth Tr., 58-59.**

RESPONSE: Admitted. By way of further answer, Mr. Drenth chose not to vote by provisional ballot because it is a paper ballot and there was no accessible way for him to privately and independently vote by provisional ballot. *See* Drenth Dep. at 58:20-59:5 (Doc. 51-5).

**24. Mr. Drenth independently placed his AWIB in an envelope, applied postage, and placed the envelope in his mailbox. Drenth Tr., 61(6-13), 63(6-13).**

REPSONSE: Admitted. By way of further answer, Mr. Drenth was unable to use the PDF file sent by DOS with the AWIB materials to print out a postage prepaid envelope addressed to his County Board of Elections. Drenth Dep. at 51:15-22, 60:17-61:25 (Doc. 51-5).

**25. Mr. Drenth has a mailbox that he uses to send and receive mail. Drenth Tr., 33-35.**

RESPONSE: Admitted. By way of further answer, this is not a material fact.

**26. Mr. Drenth typically uses the mail to send mail when a true signature is required. Drenth Tr., 36(1-15).**

RESPONSE: Denied as stated. Mr. Drenth testified that “the only times” he needs to use the mail is when a true signature is required. Drenth Dep. at 36:8-10 (Doc. 51-5). By way of further answer, this is not a material fact.

**27. Mr. Drenth uses applications on his iPhone, such as the “Seeing AI” application, to read paper documents, including envelopes. Drenth Tr., 11-12.**

RESPONSE: Denied as stated. Mr. Drenth has applications on his iPhone that allow him to read some material, “but it would not necessarily be verbatim.” Drenth Dep. at 11:14-18 (Doc. 51-5); *see also* Drenth Dep. at 15:14-17 (Doc. 51-5) (indicating that the app would only “partially read” an error message on the screen). By way of further answer, as some blind individuals do not have such apps, this is not a material fact. *See* Supp. Heitz Decl. ¶ 9 (Exh. 2 to Pls.’ Opp.); Supp. Senk Decl. ¶ 14 (Exh. 3 to Pls.’ Opp.).

**28. The Seeing AI app uses artificial intelligence to read documents for the blind. Drenth Tr., 15(18-22), 16(17-25).**

RESPONSE: Denied as stated. By way of further answer, Plaintiffs incorporate by reference their response to # 27.

**29. Mr. Drenth can also scan paper documents into his computer and use his screen access software to carefully read documents. Drenth Tr., 11-12.**

RESPONSE: Denied as stated. For any document that Mr. Drenth must “read very carefully,” Mr. Drenth must put the document into a scanner and then must convert the scanned image using an optical character recognition program into text that can be read to him by his screen reader software. Drenth Dep. at

11:1-12:9 (Doc. 51-5). By way of further answer, as some blind voters will not have scanners available to them, this is not a material fact. Supp. Heitz Decl. ¶ 7 (Exh. 2 to Pls.’ Opp.); Supp. Senk Decl. ¶ 14 (Exh. 3 to Pls.’ Opp.).

**30. Mr. Drenth has a printer. Drenth Tr., 14(17-18).**

RESPONSE: Admitted. By way of further response:

(a) Mr. Drenth only uses his printer “[m]aybe once or twice a month,” Drenth Dep. at 17:1-3 (Doc. 51-5); and

(b) Some blind voters do not have printers, so this is not a material fact. Pls’ SMF # 41 (Doc. 49-1); Supp. Heitz Decl. ¶ 7 (Exh. 2 to Pls.’ Opp.); Supp. Weber Decl. ¶ 12 (Exh. 4 to Pls.’ Opp.); Salisbury Decl. ¶ 11 (Exh. 5 to Pls.’ Opp.).

**31. 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. Drenth Tr., 15(18-22), 16(17-25).**

RESPONSE: Denied as stated. Mr. Drenth testified that if there is an error message on his printer, he can use his app “to partially read what error message might be on the screen.” Drenth Dep. at 15:13-17. By way of further answer, this is not a material fact, because:

(a) Some blind voters do not have printers, Pls.’ SMF # 41(Doc. 49-1); Supp. Heitz Decl. ¶ 7 (Exh. 2 to Pls.’ Opp.); Supp. Drenth Decl. ¶ 12 (Exh. 6 to

Pls.' Opp.); Supp. Weber Decl. ¶ 12 (Exh. 4 to Pls.' Opp.); Salisbury Decl. ¶ 11 (Exh. 5 to Pls.' Opp.); and

(b) Some blind voters do not have apps that read some print text. Supp. Senk Decl. ¶ 14 (Exh. 3 to Pls.' Opp.); Supp. Drenth Decl. ¶¶ 12-14 (Exh. 6 to Pls.' Opp.); Salisbury Decl. ¶¶ 6-13.

**32. Members of the National Federation of the Blind-PA (NFB) who were asked, confirmed that they either have a mailbox or P.O. Box. See NFB's inquiry responses.**

RESPONSE: Admitted. By way of further answer:

(a) This is not a material fact; and

(b) Some blind voters rely on sighted individuals to assist them with their mail. Supp. Heitz Decl. ¶ 17 (Exh. 2 to Pls.' Opp.); Supp. Senk Decl. ¶ 14 (Exh. 3 to Pls.' Opp.).

**33. No member of the NFB responded that they do not have a mailbox or P.O. Box. See Exhibit "F."**

RESPONSE: Admitted. By way of further answer:

(a) This is not a material fact; and

(b) Some blind voters rely on sighted individuals to assist them with their mail. Supp. Heitz Decl. ¶ 17 (Exh. 2 to Pls.' Opp.); Supp. Senk Decl. ¶ 14 (Exh. 3 to Pls.' Opp.).

**34. The Secretary of the Commonwealth has 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, 3150.14(a); Marks Declaration, ¶ 19.**

RESPONSE: Admitted.

**35. 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 direct that the return envelope is at least two inches larger than the secrecy envelope so that the envelopes are distinguishable, and the electronic instructions will indicate as such. Marks Declaration, ¶ 20.**

RESPONSE: Denied. Mr. Marks's Declaration does not state that Defendants "will direct" that the return envelope be "two inches larger than the secrecy envelope," but rather states only that Defendants "will *request* that the return envelope *is larger than* the secrecy envelope." Marks Decl. ¶ 20 (emphases added) (Doc. 51-3). By way of further answer:

(a) Defendants have not issued any directive at all to the CBEs and, even if they did, they have not specified and there is no assurance that Defendants will (i) "direct," rather than "request," that the CBEs implement the change, (ii) specifically delineate the envelope size differential to be used to minimize confusion to blind voters, (iii) assure that instructions are provided in an accessible format so that blind voters can assemble and return their ballots once they receive the envelopes, or (iv) delineate and implement enforcement sanctions for noncompliance by the counties;

(b) Merely changing the sizes of the envelopes does not provide equal and meaningful access to blind voters using an accessible ballot delivery and marking tool, Pls.' SMF # 41 (Doc. 49-1); Supp. Heitz Decl. ¶¶ 7-27 (Exh. 2 to Pls.' Opp.); Supp. Drenth Decl. ¶¶ 12-22 (Exh. 6 to Pls.' Opp.); Supp. Weber Decl. ¶¶ 12-14 (Exh. 4 to Pls.' Opp.); Salisbury Decl. ¶¶ 6-23 (Exh. 5 to Pls.' Opp.);

(c) Directing the CBEs to provide the envelopes, rather than having DOS send them, does not ensure that blind voters will receive envelopes of different sizes;

(d) Additional modifications are necessary to ensure that the mailing process is accessible to blind voters, and such measures include the following not offered or implemented by Defendants: (i) adding two hole punches on either side of the signature line on the declaration on all return envelopes (not just those provided to blind voters), both to distinguish the return envelopes from the secrecy envelopes and to guide blind voters to sign the declaration in the appropriate place, (ii) instructions sent electronically to the voter that remain available and provide sufficient detail regarding matters that may affect the validity of ballot return, including but not limited to describing the significance of the sizes of the envelopes that blind voters receive with their ballot and how blind voters must assemble their ballots for mailing, (3) a contact number for blind voters to use to troubleshoot problems and questions at all stages of the voting process, and (4)

requiring DOS rather than CBEs to send the envelopes and instructions or ensuring that DOS delineates and implements sanctions against CBEs if they fail to comply with DOS directives regarding the envelopes. Supp. Heitz Decl. ¶¶ 7-28 (Exh. 2 to Pls.' Opp.); Supp. Drenth Decl. ¶¶ 10-24 (Exh. 6 to Pls.' Opp.); Supp Senk Decl. ¶¶ 9-15 (Exh. 3 to Pls.' Opp.); Supp. Weber Decl. ¶¶ 10-24 (Exh. 4 to Pls.' Opp.); Salisbury Decl. ¶¶ 6-23 (Exh. 5 to Pls.' Opp.).

**36. 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 accept the return envelope as long as a signature appears anywhere on the envelope. Marks Declaration, ¶ 21.**

RESPONSE: Denied. Mr. Marks's Declaration does not state that Defendants will "issue a directive . . . directing the counties to accept the return envelope as long as a signature appears anywhere on the envelope," but instead states only that Defendants will issue a directive "*requesting* the counties to accept the return envelope as long as a signature appears anywhere on the envelope." Marks Decl. ¶ 21 (emphasis added). By way of further answer:

(a) Defendants have yet to issue any directive the CBEs, and there is no assurance that they will do so or, if they do, that Defendants will mandate the counties to count the ballot (as opposed to accept the envelope) regardless of where the signature appears, nor is there any indication that Defendants will delineate and implement sanctions for non-compliance;

(b) Defendants themselves question their ability to enforce any such directive, Defs.' Br. at 7, 23 (Doc. 53);

(c) No such directive would, by itself, provide equal and meaningful access to blind voters using an accessible ballot delivery and marking tool, Pls.' SMF # 41 (Doc. 49-1); Supp. Heitz Decl. ¶¶ 7-8, 12-13 (Exh. 2 to Pls.' Opp.); Supp. Weber Decl. ¶¶ 12-14 (Exh. 4 to Pls.' Opp.); Salisbury Decl. ¶¶ 6-23 (Exh. 5 to Pls.' Opp.);

(d) Absent additional envelope features to guide blind voters to the signature line, such a directive would strip blind voters of privacy, as they likely would be the only voters that would not sign on the line, Salisbury Decl. ¶¶ 19-22 (Exh. 5 to Pls.' Opp.); Supp. Drenth Decl. ¶¶ 20-21 (Exh. 6 to Pls.' Opp.);

(e) Defendants have failed to offer or implement other appropriate and reasonable modifications to the declaration on the return envelopes, including: (i) hole punches on either side of the signature line on the declaration on all envelopes (not just those sent to blind voters), both to guide blind voters to sign in the appropriate place and protect their privacy, (ii) electronic delivery of the text of the declaration, so that voters can know what they are affirming, (iii) requiring DOS rather than CBEs to send the envelopes or ensuring that DOS delineates and implements sanctions against CBEs for failure to comply with a DOS directive regarding the declaration, and (iv) testing the envelopes and the rest of the ballot

delivery and marking tool. *See* Salisbury Decl. ¶¶ 6-23 (Exh. 5 to Pls.' Opp.); Supp. Heitz Decl. ¶¶ 7-28 (Exh. 2 to Pls.' Opp.); Supp. Drenth Decl. ¶¶ 10-24 (Exh. 6 to Pls.' Opp.); Supp. Senk Decl. ¶¶ 9-15 (Exh. 3 to Pls. Opp.); Supp. Weber Decl. ¶¶ 10-24 (Exh. 4 to Pls.' Opp.); Supp. Gilbert Decl. ¶¶ 6-15 (Exh. 1 to Pls.' Opp.).

Respectfully submitted,

Dated: August 3, 2020

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**CERTIFICATE OF SERVICE**

I, Robin Resnick, hereby certify that Plaintiffs' Response to Defendants' Statement of Material Facts and Counterstatement of Material Facts, and Exhibits, was filed on August 3, 2020, with the Court's ECF system and is available for viewing and downloading from the ECF system by the following counsel who consented to electronic service:

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