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

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"Trust us." In a nutshell, that is what Defendants ask this Court to do. They want the Court simply to rely on their promises of future action and release them from liability for their violations of the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA"). Based on Defendants' word alone, they ask this Court to deny Plaintiffs their right to the permanent eradication of discrimination in Defendants' absentee and mail-in voting program. The law requires an end to Defendants' discrimination against blind voters—not a promise to an end. Moreover, Defendants already promised that their solution for the primary election would be fully accessible to blind voters—and it was not.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

Plaintiffs, Joseph Drenth and the National Federation of the Blind of Pennsylvania ("NFB-PA"), filed a Complaint (Doc. 1) on May 21, 2020, against Defendants Kathy Boockvar, Secretary of the Commonwealth, and the Pennsylvania Department of Statement (collectively, "Defendants" or "DOS"). Plaintiffs allege that Defendants violate the ADA and RA because their absentee and mail-in voting program discriminates against blind voters. Plaintiffs sought relief for the June 2, 2020 primary election and for future elections. *See* Compl. ¶¶ 117-18.

That same day, Plaintiffs filed a Motion for a Temporary Restraining Order or, in the Alternative, for a Preliminary Injunction (Doc. 4), seeking interim relief

to ensure blind voters had better (if not full) access to the absentee and mail-in voting program for the June 2020 primary. The Court entered a preliminary injunction, ordering Defendants to use the Accessible Write-In Ballot ("AWIB") process while acknowledging it was not "entirely adequate to achieve compliance with the ADA and RA[.]" *Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 2745729, at *6 (M.D. Pa. May 27, 2020); Order ¶¶ 1-9 (May 27, 2020) (Doc. 32).

Plaintiffs have filed a Motion for Partial Summary Judgment (Doc. 48) and Defendants have filed a Motion for Summary Judgment. (Doc. 50).

COUNTERSTATEMENT OF FACTS

A. Defendants Do Not Dispute the Facts that Establish their Liability Under the ADA and RA.

In their Motion for Summary Judgment, Defendants do not contest the following facts detailed in Plaintiffs' Brief in Support of their Motion for Partial Summary Judgment ("Pls.' Br.") and their Statement of Material Facts ("Pls.' SMF") (respectively, Docs. 49 and 49-1), which are sufficient to establish Defendants' liability under the ADA and RA:

- Defendants' paper-based absentee and mail-in voting program is inaccessible and does not afford blind voters meaningful access to the absentee and mail-in program. Pls.' SMF ¶¶ 15-31; Pls.' Br. at 3-4, 15-17.
- Defendants' AWIB process also is inaccessible to blind voters. Pls.' SMF ¶¶ 32-66; Pls.' Br. at 5-6, 17-18.

- It is feasible for Defendants to implement an accessible ballot delivery and marking tool. Pls.' SMF ¶¶ 67-88; Pls.' Br. at 6-8, 18-19.

B. The Shortcomings in Defendants' Purported Plan to Purchase a Ballot Delivery and Marking Tool

It is beyond dispute that other U.S. states have implemented accessible ballot delivery and marking tools in recent years. Pls.' SMF ¶ 72. It also is uncontested that, before this lawsuit was filed, DOS was on notice that its failure to implement such a tool violated blind voters' rights under the ADA and RA. *Id.* ¶¶ 69, 70.

Defendants now claim they are "finalizing the approval process" to secure an accessible ballot delivery and marking tool to be used in the November 2020 general election. Defs.' Statement of Material Facts ("Defs.' SMF") ¶ 1 (Doc. 51); Defs.' Br. at 3 (Doc. 53). This self-serving assertion avoids inconvenient facts and ignores important open questions. For instance:

- Defendants claim that they began this procurement process in February 2020—five months ago— and yet it is undisputed that DOS still has not finalized an agreement to secure an accessible ballot marking and delivery tool. *See* Defs.' SMF ¶ 1 (Doc. 51).
- Defendants' representative testified the procurement process can take more than 12 months; Defendants say they are attempting to use an "emergency" process to accelerate that timeline. Marks Dep. at 112:21-113:3 (Doc. 51-1).

- Defendants have refused to identify the vendor from whom they purportedly are securing an accessible ballot delivery and marking tool. Marks Dep. at 130:15-131:3 (Doc. 51-1). There are many different ballot delivery and marking tools. *See* Gilbert Decl. ¶ 36 (Doc. 49-23); Blake Decl. ¶¶ 17-19 (Doc. 49-24). Without knowing the vendor, Plaintiffs and the Court cannot begin to assess whether the tool will meet blind voters' accessibility needs.
- Defendants have not identified how the tool will be implemented. These details matter. For instance, it will be important to know if the County Boards of Election (CBEs)—rather than DOS—will be responsible for accepting applications from blind voters who want to use the tool and providing blind voters with access to the tool. Given Defendants' repeated assertions that DOS has limited control over the CBEs, *see* Marks Dep. at 224:3-20 (Doc. 51-1); Defs.' Br. at 7, a system that depends on implementation by the CBEs raises concerns as to whether such a system could ensure that blind voters throughout the Commonwealth have equal and meaningful access to Defendants' absentee and mail-in voting program.[1]

[1] Based on Defendants' Brief, it appears that the CBEs, rather than DOS, will be responsible for delivering blind voters' ballots electronically. *See* Defs.' Br. at 6 (indicating that CBEs will be told to deliver paper envelopes to blind voters "at the same time that their ballot is electronically delivered").

- Defendants have not identified how they will "secure" the tool or whether further contracts and/or payments will be needed to use the tool in elections after November 2020. For instance, it is important to know whether the agreement will be limited to only one or two elections before Defendants must re-contract with a vendor, or whether it will ensure more permanent relief for blind voters.[2]
- Although Defendants say their "goal" is to have the tool "up and running" by September 1, 2020, Marks Dep. at 113:20-21 (Doc. 51-1), it is unclear whether and how Defendants will subject this new tool to testing, including with respect to accessibility and usability issues, prior to implementation. Pennsylvania's new proposed system for delivering, marking, and returning ballots must be rigorously tested in advance in order to ensure it is accessible to, and useable by, blind Pennsylvanians. This is a basic premise for any new voting system: it must be rigorously tested in advance. The problems

[2] Although Defendants say their decision to acquire an accessible ballot delivery and marking tool is wholly unrelated to this lawsuit, that contention is not credible. Even if Defendants began "researching" and getting price quotes from vendors before this lawsuit was filed, *see* Marks. Dep. at 119:3-9 (Doc. 51-1), those efforts began after DOS was on notice from blind voters and their counsel that failure to implement an accessible ballot delivery and marking tool violated the ADA and RA and could expose them to liability. *See* Pls.' SMF ¶ 69 (Doc. 49-1); *see also* Marks Dep. at 120:8-9, 121:2-5 (noting that litigation in other states related to the accessibility of ballots was a motivating factor).

with the implementation of the AWIB further underscore why advance testing is critical. Supp. Gilbert Decl. ¶¶ 13-15 (Exh. 1 to Pls.' Opp.).

C. The Need for and Feasibility of Reasonable Modifications for Blind Voters to Submit Their Ballots.

Use of a ballot delivery and marking tool to provide an accessible means by which blind voters can receive and mark their ballots will not remedy all discriminatory aspects of Defendants' paper-based absentee and mail-in voting program. The means by which blind voters submit their ballots also must be modified to ensure blind voters have equal and meaningful access to the program.

Absent additional reasonable modifications relating to the submission of ballots, once a blind voter marks a ballot using the accessible ballot delivery and marking tool, the voter must do the following to ensure his or her vote is counted: (a) print out the marked ballot, (b) locate a package of materials sent to the voter in the U.S. mail, containing a secrecy and return envelope; (c) insert the marked ballot into the secrecy envelope, (d) insert the secrecy envelope into a return envelope; (e) read and sign the declaration on the return envelope; and (f) mail or hand-deliver the return envelope to his or her CBE. Pls.' SMF ¶ 21 (Doc. 49-1); Supp. Heitz Decl. ¶¶ 10-15 (Exh. 2 to Pls.' Opp.); Supp. Senk Decl. ¶¶ 7-14 (Exh. 3 to Pls. Opp.); Supp. Weber Decl. ¶¶ 10, 23-24 (Exh. 4 to Pls.' Opp.); Salisbury Decl. ¶¶ 9-10, 13-15, 18-20 (Exh. 5 to Pls.' Opp.). This process raises three core

accessibility issues: (1) the requirement the ballot be printed; (2) the use of multiple return envelopes; and (3) the inaccessibility of the declaration.

- Requiring blind voters to print the ballots they mark using the accessible ballot marking and delivery tool is discriminatory. Unlike blind voters, sighted voters need not print their absentee and mail-in ballots; they simply mark the paper ballots they receive from their CBEs. Pls.' SMF ¶ 22. Moreover, many blind people do not have printers because they do not, or rarely, read printed text. Pls.' SMF ¶ 41; Supp. Heitz Decl. ¶ 7; Supp. Weber Decl. ¶¶ 12-15; Salisbury Decl. ¶¶ 11-16. To print their ballots, such voters would need to deliver an electronic copy of their marked ballot (if this were possible) to a third-party or a public place for printing. Doing so could cause their electoral choices to be revealed, eviscerating the privacy of their vote. Supp. Weber Decl. ¶¶ 12-22; Salisbury Decl. ¶¶ 12-16.
- Some blind voters would struggle to use the secrecy and return envelopes without assistance from a sighted person. Indeed, absent such assistance, some blind voters would be unable to identify the package containing the secrecy and return envelopes that a CBE sends to them in the mail. *See* Pls.' SMF ¶ 27; Supp. Heitz Decl. ¶¶ 16-17; Supp. Senk Decl. ¶¶ 12; Supp. Weber Decl. ¶¶ 23-24; Supp. Drenth Decl. ¶¶ 11-13 (Exh. 6 to Pls.' Opp.).

- Blind voters cannot read the print declaration on the envelope or know where it should be signed. *See* Pls.' SMF ¶ 28. If they signed on the reverse side of the envelope, their votes might not be counted. *Id.* ¶¶ 29-30. Blind voters also might inadvertently sign over the "To" or "Return" address, rendering the return envelope undeliverable. Supp. Heitz Decl. ¶ 22; Supp. Drenth Decl. ¶ 19.

Although some blind voters, like Mr. Drenth, have more advanced technological tools that enable them to read some printed material, those tools have limits. *See* Drenth Dep. at 11:7-12:16, 15:13-17 (Doc. 51-5) (testifying that the smartphone app he uses does not provide a verbatim translation of the material); Supp. Drenth Decl. ¶¶ 12-13 (confirming smartphone app has trouble reading some fonts and writing). More significantly, not all blind voters have smartphones, scanners, or other tools that would enable them to read printed material like envelopes or declarations. Supp. Heitz Decl. ¶ 9; Supp. Senk Decl. ¶ 14.

Because the current process for returning absentee and mail-in ballots is inaccessible to many blind voters, Defendants are required by law to provide reasonable modifications relating to ballot return. Otherwise, blind voters would not have equal and meaningful access to absentee and mail-in voting.

Defendants should allow blind voters to electronically submit their ballots as a reasonable modification. Although Defendants cite security concerns relating to

broad use of electronic returns by all voters, *see* Defs.' Br. at 4, 20-21, there is evidence that such concerns can be mitigated:

- The document cited by Defendants acknowledges that "[s]ome voters, due to specific needs or remote locations, may not be able to print, sign, and mail in a ballot without significant difficulty." Cybersecurity and Infrastructure Security Agency, *et al.*, *Risk Management for Electronic Ballot Delivery, Marking, and Return* at 3 (Doc. 51-4).
- The document cited by Defendants identifies strategies that can be employed to mitigate risks associated with electronic return of ballots. *Id.* at 3-6. Plaintiffs also have submitted evidence from an expert confirming there are strategies and techniques that Pennsylvania can implement to make the electronic submission of ballots by blind voters more secure. Pelletier Decl. ¶¶ 6-17 (Exh. 7 to Pls.' Opp.).
- Several states—including Delaware and West Virginia—allow blind voters to return ballots by email or via an online portal. Blake Decl. ¶¶ 25-28 (Doc. 49-24).
- More than 25 states allow voters eligible under the Uniformed and Overseas Citizens Access to Voting Act ("UOCAVA") to submit their marked ballots by email, fax, and/or through an online portal rather than only by mail. Blake Decl. ¶ 29; Pughsley Decl. ¶¶ 5-7 (Exh. 8 to Pls.' Opp. Br.)

(summarizing UOCAVA information for U.S. states available at https://www.fvap.gov).

Alternatively, Defendants should modify their proposed process for returning marked ballots to ensure it is accessible. These modifications can readily be implemented by Defendants and include: (1) significantly modifying the sizes of the secrecy and return envelopes to allow blind voters to more readily identify them; (2) placing hole punches on both sides of the signature line for the declaration printed on the return envelope to guide blind voters as to where they should sign; (3) providing instructions electronically to voters that can be accessed before and after they receive the secrecy and return envelopes to inform them how to assemble and return their ballots; (4) electronically providing the text of the declaration so blind voters know what they are affirming when they sign the return envelope; (5) providing a contact number for blind voters to use to help with accessibility and usability issues; and (6) requiring that DOS, rather than the CBEs, deliver the envelopes to blind voters or, alternatively, ensuring that DOS develops and implements sanctions for CBEs that fail to comply. Defendants effectively concede that further modifications to the envelopes and declarations used in the return process are needed in order to ensure the return process is accessible, *see* Defs.' SMF ¶¶ 34-36; Defs.' Br. at 6-7, 23-24, but their untested and unexecuted proposals are both factually and legally insufficient to evade liability.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is the case justiciable despite Defendants' mere promise to implement an accessible ballot marking and return system? Suggested Answer: Yes.

2. Could Defendants remain liable for violating the ADA and RA with respect to the return process for absentee and mail-in ballots, despite Defendants' promise to request that CBEs make limited changes to envelopes and declarations used by blind voters to submit their ballots? Suggested Answer: Yes.

3. Are Defendants' attacks on e-return as a reasonable modification contrary to the ADA and RA and premature? Suggested Answer: Yes.

4. Is there a genuine dispute of material fact as to whether electronic return would result in a fundamental alteration? Suggested Answer: Yes.

ARGUMENT

I. PLAINTIFFS' ADA AND RA CLAIMS WERE AND REMAIN JUSTICIABLE.

Defendants vaguely contend that Plaintiffs' claims are not justiciable because Defendants *intend* to implement an accessible ballot delivery and marking tool for the November 2020 election. Defs.' Br. at 12-13. Although it is far from clear, Defendants' citation to *Wyatt, Virgin Islands, Inc. v. Gov't of Virgin Islands*,

385 F.3d 801, 806 (3d Cir. 2004), suggests that Defendants' vague justiciability argument is in fact a challenge to ripeness.[3]

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). The ripeness doctrine forecloses courts from deciding issues that are premature for review and where the injury may never occur, depending on facts that remain unresolved. *See N.Y. Public Interest Research Group v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003). To assess ripeness, the Court must assess whether the action is based on actual or imminent injuries or, instead, on mere contingencies. *Plains All American Pipeline L.P. v. Cook*, 866 F.3d 540, 541 (3d Cir. 2017).

[3] Defendants' ripeness challenge is disingenuous. Where, as here, Defendants seek to manipulate the litigation by unilaterally taking action to provide some form of relief to Plaintiffs, the appropriate justiciability issue is mootness. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (noting that the question of whether "an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit" after the lawsuit is filed goes to the question of mootness). Yet, Defendants cannot prevail on a mootness challenge for at least three reasons. First, the mere promise of future action is insufficient to moot Plaintiffs' claims. *See, e.g.*, *CSI Aviation Services, Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 414 (D.C. Cir. 2011). Second, their voluntary cessation of unlawful conduct will not moot Plaintiffs' claims. *See Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020). Third, the availability of meaningful relief beyond mere acquisition of the tool will also warrant rejection of any mootness argument. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env. Prot.*, 833 F.3d 360, 374 (3d Cir. 2016).

At all times, this case has been and remains ripe for adjudication. At the time this lawsuit was filed, Defendants stood in violation of the ADA and RA due to their failure to ensure that blind voters have equal and meaningful access to their absentee and mail-in ballot voting program. Defendants were liable in part because they failed to implement an accessible ballot delivery and marking tool. Plaintiffs have suffered actual harm in every election in which they have not had equal access to the program. Defendants, by their own admission, still have not acquired such a tool and the mere promise to do so does not render Plaintiffs' claims unripe. Even if Defendants acquire such a tool, there is no assurance this will end the dispute—Defendants trumpet this promised remedy without divulging any details on how such a tool would work and how it would ensure that blind voters throughout Pennsylvania have equal and meaningful access to the absentee and mail-in ballot program. In addition, until the tool is actually implemented in November and thereafter, there will remain open questions as to whether Plaintiffs have the access to which they are entitled under the ADA and RA. Finally, acquisition of the tool will not address further modifications needed to the return process. Accordingly, declaratory and injunctive relief remain necessary to ensure that Plaintiffs do not remain subject to the same discriminatory treatment this lawsuit is meant to address.

Perhaps even more significantly, Defendants cannot seriously contend that the parties' interests are not sufficiently adverse based on their promised acquisition of the tool. Defendants continue to assert that they have no obligation under the ADA and RA to ensure that blind voters have an accessible way to return marked ballots. *See* Defs.' Br. at 9. They cannot have it both ways—Defendants cannot claim the parties' positions are aligned while disputing the extent of their obligations under the ADA and RA. *Cf. Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 88 n.9 (1993) (rejecting argument that parties are not adverse where they continue to dispute the underlying issue).

II. DEFENDANTS CANNOT EVADE LIABILITY BY PROMISING TO REQUEST THAT CBEs IMPLEMENT LIMITED CHANGES TO THE RETURN PROCESS.

In Pennsylvania, the entire paper-based absentee and mail-in ballot voting program is inaccessible to blind voters—including how blind voters return their ballots. Defendants do not really dispute that the paper-based absentee and mail-in voting program—including the requirement that the ballot be placed in multiple envelopes and that the declaration on the return envelope be signed by hand—is inaccessible to blind voters, *see* Pls.' SMF ¶¶ 23-30, and thus violates the ADA and RA.[4] Defendants' proposed implementation of an accessible ballot delivery

[4] Defendants new announcement that they intend to make modifications to the return process in order to address these issues, Defs.' Br. at 23-24, is an acknowledgement that the current system is not fully accessible.

and marking tool will not remedy the inaccessibility of the return process. Further modifications with respect to the return of marked ballots are required.

Defendants promise that they will fix any accessibility issues related to the return process. In their brief, Defendants state that they "have resolved" to "issue directives" to the CBEs to "direct" them to: (1) send secrecy and return envelopes to blind voters using the accessible ballot marking and delivery tool and to ensure that the return envelope is at least two inches larger than the secrecy envelope; and (2) accept the return envelope of a blind voter who voted using the accessible ballot marking and delivery system as long as a signature appears anywhere on the envelope (rather than on the signature line for the declaration that will be printed on the exterior of the return envelope). Defs.' Br. at 23. Defendants' promised relief is inadequate both factually and legally.

Factually, the relief is inadequate for several reasons. First, Defendants have yet to issue any directives. Second, Defendants do not, in fact, promise that they will "direct" CBEs to send return envelopes two inches larger than the secrecy envelopes, but only that they will "request" that CBEs send a return envelope that is "larger" than the secrecy envelope. Marks Decl. ¶ 20 (Exh. 51-3). Similarly, Defendants do not promise that they will "direct" CBEs to accept the return envelope, only that they will "request" that CBEs do so. *Id.* ¶ 21. Third, DOS concedes that its "enforcement authority with respect to the counties is admittedly

unclear," Defs.' Br. at 23, meaning the value to blind voters of any DOS "requests" to counties also is unclear. Fourth, allowing blind voters to sign "anywhere" on the envelope while failing to provide an accessible means for them to locate a signature line destroys their privacy. There should be two holes punched on either side of the signature line on the envelope in order to guide blind voters to the appropriate place to sign their name. Fifth, instructions on mailing and the text of the declaration must be delivered electronically in an accessible manner. Sixth, all parts of a voting system must be tested before implementation. *See* Supp. Gilbert Decl. ¶¶ 13-15. There is no evidence that the AWIB was ever tested; thus, it is unsurprising that the AWIB was inaccessible, despite its accessibility claim. Defendants mention no intention to test any part of their promised voting system. Finally, if DOS does not deliver the envelopes itself, it must develop and implement sanctions on CBEs that do not comply. *See* Supp. Heitz Decl. ¶¶ 14-28; Supp. Senk Decl. ¶ 15; Supp. Weber Decl. ¶¶ 23-24; Salisbury Decl. ¶¶ 18-23.

More significantly, Defendants' promises to issue directives do not preclude issuance of a remedy for Plaintiffs on these matters. Defendants offer no legal basis to justify why such changes—even if they were adequate—would immunize them from liability and relief. The only possible argument—mootness—is unavailing. A mere promise of future action—such as Defendants' promise to "issue directives" that they cannot enforce—cannot conceivably moot a case. *See*

CSI Aviation Services, Inc., 637 F.3d at 414 (rejecting defendant's argument that case was moot because it planned to hold a rulemaking on the subject of the litigation since the "promised rulemaking had yet to occur."); *Benjamin v. Dep't of Public Welfare*, 768 F. Supp. 2d 747, 755-56 (M.D. Pa. 2011) (holding that defendants' adoption of plan did not moot plaintiffs' ADA claims).

Even if Defendants actually issue those directives, they would be insufficient to moot this case. It is well-settled that voluntary cessation of conduct will moot a case only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Hartnett*, 963 F.3d at 306. The focus in a voluntary cessation case "is on whether the defendant made the change unilaterally and so may 'return to [its] old ways' later on." *Id.* at 307 (citation omitted). "[C]ourts are particularly skeptical of mootness in voluntary cessation situations," and so defendants bear a heavy burden proving mootness in such cases. *Id*. Defendants identified their limited solutions only after this case was filed and offer no evidence that the directives will continue in force or that they will actually be implemented to ensure equal access to blind voters. This would not be sufficient to moot Plaintiffs' claims. *Cf. Ali v. City of Newark*, No. 15-8374 (JLL), 2018 WL 2175770, at *6 (D.N.J. May 11, 2018) (city's adoption of new policy to provide ASL interpreters for hearings did not moot plaintiff's ADA and RA claims because it was not clear that the new policy sufficiently removed impediments to access to

interpreters); *Nat'l Alliance for Accessibility, Inc. v. McDonald's Corp.*, No. 8:12-CV-1365-T-17TBM, 2013 WL 6408650, at *5-*7 (M.D. Fla. Dec. 6, 2013) (defendants' removal of architectural barriers did not moot case with respect to injunctive relief to assure maintenance and future compliance); *Cottrell v. Good Wheels*, No. 08-1738 (RBK/KMW), 2009 WL 3208299, at *5 (D.N.J. Sept. 28, 2009) (defendants' recission of policy did not moot plaintiff's ADA claims).

III. DEFENDANTS' ARGUMENTS ON ELECTRONIC RETURN MISCONSTRUE THE STATUES AND ARE PREMATURE.

In light of the accessibility problems associated with returning marked ballots via paper envelopes and print declarations, Plaintiffs also propose the electronic return of marked ballots as a reasonable modification. Defendants' argument that e-return could never be a reasonable modification misunderstands the nature of the ADA and RA. And Defendants' argument that no factual disputes exist with respect to e-return is both incorrect and premature, considering that expert discovery on this fact-intensive issue continues until August 15.

Defendants first assert that the ADA and RA cannot require Defendants to allow electronic return of ballots for blind voters because Pennsylvania law does not allow any voters to return ballots electronically, so blind voters are not being denied a benefit afforded to others. Defs.' Br. at 15. Defendants' argument reflects a profound misunderstanding of the ADA and RA, *i.e.*, that it sometimes requires that people with disabilities be treated differently than others in order to

receive equal access. As the Supreme Court explained in the context of the ADA's reasonable accommodation mandate in the employment context:

> The [ADA] requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires [a defendant] to treat [an individual] with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodations beyond the Act's potential reach.

U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

In applying this concept to hold that the ADA required a public accommodation to waive admission fees for personal attendants accompanying individuals with disabilities, the court in *Anderson v. Franklin Institute*, 185 F. Supp. 3d 628 (E.D. Pa. 2016), rejected the same argument as that advanced by Defendants here:

> Defendant's theory that no violation exists because [the plaintiff] receives the same treatment as all other patrons reflects a misreading of the case law and a lack of appreciation for one of the purposes of the ADA. Because disabled people are not similarly situated to the able-bodied, a facially neutral policy can still result in discrimination. The ADA was promulgated in part to level the playing field for disabled individuals who begin with a disadvantage. Stated differently, if disabled persons protected under the ADA were similarly situated to all other persons, there would be no need for the ADA in the first place. The need to offset that disadvantage is what justifies preferential treatment of disabled persons when warranted under the statute.

Id. at 644-45.

Defendants' contention that electronic submission cannot be a reasonable modification for blind voters because Pennsylvania does not permit any voters to electronically submit their ballots ignores the ADA's and RA's reasonable modification mandate. That mandate requires state governments to modify otherwise neutral rules—and give individuals with disabilities an option not otherwise available—when necessary to ensure that individuals with disabilities have the same opportunities available to others. Here, Plaintiffs contend that allowing electronic submission of ballots by blind voters who use an accessible ballot delivery and marking device is a reasonable modification of Pennsylvania's requirement that voters submit absentee and mail-in ballots by either mail or hand-delivery. "[A] benefit exceeding that of the general public is necessary for [Plaintiffs] to achieve the baseline of equality." *Anderson*, 185 F. Supp. 3d at 645.[5]

Defendants further contend that no reasonable modification to the submission process is necessary because blind voters are able to privately and indepen-

[5] The fact that part of the program at issue involves "mail-in ballots" does not undermine Plaintiffs' claim that the program must be modified to allow electronic return. The absentee and mail-in voting program permits voters to vote remotely rather than in-person at their polling places. While typically a "mail-in ballot" will be returned by mail, it may also, as Defendants concede, be returned by hand delivery, so use of postal mail is not a prerequisite even under the terms of the program. Thus, allowing electronic return—for instance, by email rather than postal mail—would simply be another means of return and may be necessary to ensure blind voters can use the absentee and mail-in voting program.

dently mail their ballots. Defs.' Br. at 16-17. To support this assertion, Defendants primarily rely on Mr. Drenth's testimony that he is able to print documents, has special technology that allows him to "partially" read printed information, and uses the mail. Defs.' Br. at 5-6, 16. But Plaintiffs have put forward substantial evidence that: (1) blind voters often do not own the printers needed to print ballots marked using an accessible ballot marking and delivery tool; (2) blind voters without printers would need to have third parties print their ballots, which nullifies their ability to vote privately and independently; (3) blind voters cannot independently assemble their ballot into the two envelopes unless they are readily distinguishable; and (4) blind voters cannot independently review the declaration and sign it. *See* Pls.' SMF ¶ 41; Supp. Heitz Decl. ¶¶ 7-27; Supp. Weber Decl. ¶¶ 12-14; Salisbury Decl. ¶¶ 6-23. At minimum, this evidence creates a genuine dispute of material fact about whether blind voters—without a modification that allows electronic submission—are denied equal and meaningful access to Defendants' absentee and mail-in ballot program.

Defendants observe that non-blind voters also may lack printers, and argue the lack of printers is not a sufficient barrier to participation to justify a reasonable modification to allow electronic submission. Defs.' Br. at 17. This observation is irrelevant. First, blind voters often do not have printers because they cannot read printed material and so have no reason to purchase a printer—not because they

may be unable to afford printers. Supp. Heitz Decl. ¶ 7; Supp. Weber Decl. ¶ 12; Salisbury Decl. ¶¶ 11-16. Second, sighted voters do not need printers to vote by absentee or mail-in ballot because they can privately and independently mark the printed ballots sent to them. By contrast, to utilize the accessible ballot marking and delivery tool Defendants promise, blind voters must be able to print out the ballots they mark on their computers. If they cannot do that, then they cannot use the tool and vote by absentee and mail-in ballot.

Defendants assert, too, that blind voters can always vote in person using accessible voting machines. Defs.' Br. at 18-22. This statement fails to understand that the "program" at issue is the absentee and mail-in voting program—not all of Pennsylvania's voting programs. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 504 (4th Cir. 2016). Defendants cannot define the program "in a way that effectively denies" individuals with disabilities "the meaningful access to which they are entitled." *Alexander v. Choate*, 469 U.S. 287, 301 (1985); *accord Lamone*, 813 F.3d at 504; *Anderson*, 185 F. Supp. 3d at 645. Plaintiffs have the same right to vote without going to their local polling places as non-blind voters.[6]

Finally, Defendants suggest that a blind voter who cannot print out, assemble, and/or deliver his or her absentee or mail-in ballot can travel to his or

[6] Defendants' contention that blind voters can use hand delivery to return their ballots is likewise misguided. Defs.' Br. at 17. This does not resolve the issues related to printing, assembling, and signing the ballot.

her polling place on election day and vote by provisional ballot. Defs.' Br. at 17. This would eviscerate the benefit of having the accessible ballot delivery and marking tool and deny blind voters equal opportunity to vote by absentee or mail-in ballot without going to their polling places. Indeed, it would be worse because provisional ballots are paper ballots and, thus, inaccessible. *See* Drenth Dep. at 58:20-59:5; Commw. of Pennsylvania, *Voting in Pennsylvania*, https://www.pa.gov/guides/voting-and-elections/#VotingataPollingPlace. And it may force blind voters to travel to polling places amidst an ongoing pandemic.

IV. THERE IS A GENUINE DISPUTE REGARDING THE MATERIAL FACT OF WHETHER ELECTRONIC RETURN WOULD RESULT IN A FUNDAMENTAL ALTERATION.

Defendants contend that allowing blind voters to electronically return their ballots would constitute a fundamental alteration because Pennsylvania law does not specifically permit it and no Pennsylvania voter has ever done so. Defs.' Br. at 19. This argument fails to acknowledge that the ADA and RA require Defendants to make reasonable modifications to afford individuals with disabilities equal and meaningful access to Defendants' programs, services, and activities. To say that it would be a fundamental alteration to allow electronic return simply because Pennsylvania's current policy does not allow it puts the rabbit in the hat.[7]

[7] Pennsylvania law does not explicitly permit electronic delivery and marking of absentee and mail-in ballots. *See* 25 P.S. §§ 3146.6(a), 3150.16(a)

Defendants have the burden of proving that a proposed modification would result in a fundamental alteration. *See Frederick L. v. Dep't of Public Welfare*, 364 F.3d 487, 492 n.4 (3d Cir. 2004). Defendants' citation to a report that electronic return of ballots presents "grave security concerns," Defs.' Br. at 20-21, fails to meet that burden, particularly at this stage of the proceedings.[8] Plaintiffs have submitted ample facts, including from their expert, *see* Pelletier Decl. ¶¶ 6-17, that any security concerns can be mitigated and that other states allow use of electronic return. *See* Pughsley Decl. ¶¶ 4-7. Moreover, the report cited by Defendants acknowledges that some voters may be unable to vote without electronic return and offers strategies to mitigate security concerns. *Risk Management for Electronic Ballot Delivery, Marking, and Return* at 3-6. This evidence is more than sufficient

(requiring absentee and mail-in ballots to be marked in pencil or ink). And Defendants acknowledge that they have the authority to implement an *electronic* ballot delivery and marking tool in order to allow blind voters to mark absentee and mail-in ballots on their computers. In so doing, Defendants concede that the *electronic delivery* and *marking* of the ballot is not a fundamental alteration. *See* Marks Dep. at 120:12-121:11, 122:11-19. Accordingly, the *electronic return* of the ballot also should not be a fundamental alteration.

[8] Defendants also cite the declaration of Jonathan Marks of DOS, but Mr. Marks conceded that he is not a security expert and relies only on the federal report. Marks Dep. at 231:20-232:23.

to create a genuine dispute of material fact and preclude entry of summary judgment on the issue of whether e-return constitutes a fundamental alteration.[9]

CONCLUSION

Plaintiffs request that the Court deny Defendants' motion in its entirety.

Respectfully submitted,

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Dated: August 3, 2020

[9] With respect to electronic return of marked ballots, Defendants dismiss the actions of other U.S. states by asserting that, unlike in Pennsylvania, "it appears" those states' legislatures authorized electronic return. Defs.' Br. at 21. Other states' authorization of electronic return is evidence that those states considered the issue and concluded that any security risks posed by electronic return could be mitigated and/or were acceptable. Defendants also cite one state in order to assert that voters must waive their right to secrecy if they use electronic return. *Id.* There is no basis to conclude electronic return must be premised on a waiver of secrecy.

LOCAL RULE 7.8(b) CERTIFICATION

Pursuant to the Order dated July 7, 2020 (Doc. 44), the Court authorized the parties to submit briefs relating to summary judgment motions that exceed Local Rule 7.8's page and word limits so long as they do not exceed 25 pages, exclusive of cover pages, tables of contents and authorities, and certifications. I certify that Plaintiffs' Brief in opposition to Defendants' Motion for Summary Judgment complies with the Court's Order.

Executed this 3rd day of August, 2020.

/s/ Robin Resnick
Robin Resnick

CERTIFICATE OF SERVICE

I, Robin Resnick, hereby certify that Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, Exhibits, and Proposed Order were filed on August 3, 2020 with the Court's ECF system and are available for viewing and downloading from the ECF system by the following counsel who consented to electronic service:

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