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

JOSEPH DRENTH *and* **NATIONAL FEDERATION OF THE BLIND OF PENNSYLVANIA,**	:	
Plaintiffs	:	**No. 1:20-0829**
	:	
v.	:	**Judge Wilson**
	:	
KATHY BOOCKVAR *and* **DEPARTMENT OF STATE OF THE COMMONWEALTH OF PENNSYLVANIA,**	:	**Electronically Filed Document**
Defendants	:	*Complaint Filed 05/21/20*

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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I. INTRODUCTION

Plaintiffs are not entitled to judgment because they are requesting that this Honorable Court Order the Defendants to do exactly what they are already doing. The Defendants are already implementing a Remote Ballot Marking System (RBMS) to ensure accessibility for blind persons for the November 2, 2020 General Election and all future elections. The Defendants started the process of obtaining the RBMS long before this lawsuit was filed, and, at this point, a contract is being finalized with a vendor. It is now undergoing final administrative review, which is expected to be completed imminently, and will certainly be implemented before the General Election. Because the Defendants will have a RBMS in place for the General Election—there is no controversy, and this case is not justiciable.

II. COUNTER-STATEMENT OF THE FACTS

Plaintiffs acknowledge that the Defendants will have a RBMS in place by the General Election. *See* SMF, Doc. 49-1, ¶ 85. They do not dispute that the Defendants are now finalizing the contracting process with the final step being approval of the contract by the Office of Attorney General for form and legality. *See* SMF, Doc. 49-1, ¶ 85. Plaintiffs recognize that the DOS requested federal funds in April 2020 for the purpose of implementing "an accessible electronic ballot marking device and tool to enable voters with disabilities to vote absentee or by mail." *See* SMF, Doc. 49-1, ¶ 86. And, that, indeed, the DOS "has set aside

approximately $1.5 million of the CARES Act funding to implement the electronic ballot marking and delivery tool…," which will be disbursed upon finalization of the contract. *See* SMF, Doc. 49-1, ¶ 87. Plaintiffs accept that DOS "anticipates that it will have an accessible ballot delivery and marking tool in place and operational by September 1, 2020, which will be available for use in the November 2020 election." *See* SMF, Doc. 49-1, ¶ 85.

Plaintiffs further admit that the Defendants have no intention of using the Accessible Write-In Ballot (AWIB) ever again, in light of the availability of an RBMS. *See* SMF, Doc. 49-1, ¶ 84 ("DOS does not intend to use the AWIB process in the November 2020 election."). The AWIB was a temporary solution that was Ordered by this Honorable Court in the absence of the immediate availability of an RBMS. Doc. 31. While this Honorable Court noted that the AWIB was "imperfect," it was deemed to be an adequate and feasible short-term solution. Doc. 31. Indeed, it was deemed to be more adequate and feasible than the solution that was proposed by the Plaintiffs. Plaintiff Joseph Drenth privately, independently and successfully filled out and mailed his AWIB ballot without any assistance from any other person. Drenth Tr., 56(18-20).

In addition to the implementation of the RBMS, with respect to voters who apply to use the RBMS to receive and mark their absentee or mail-in ballots, Defendants have resolved to issue guidance to the counties in advance of the

General Election directing the counties to mail a secrecy envelope and a return envelope addressed to the respective voter's County Board of Elections at the same time that their ballot is delivered to the voter electronically. *See* Marks Declaration, ¶ 20. The Defendants will request that the return envelope is larger than the secrecy envelope so that the envelopes are distinguishable, and the electronic instruction will indicate as such. *See* Marks Declaration, ¶ 20. With respect to voters who apply to use the RBMS to receive and mark their ballots, Defendants have resolved to issue 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. *See* Marks Declaration, ¶ 21. Also, the DOS has just confirmed that it will be providing funds to the counties for use in furnishing mail-in voters with postage pre-paid envelopes. *See* https://www.media.pa.gov/Pages/State-details.aspx?newsid=391.

The Parties have filed cross-motions for Summary Judgment. Plaintiffs' have filed a "Partial Motion for Summary Judgment," seeking summary judgment only on the issue of a RBMS. They assert that a fully paper-based system is inadequate, and that a permanent injunction is required because the AWIB is inaccessible and an RBMS is necessary. Defendants now submit this Brief in Opposition to Plaintiffs' motion. An injunction is not appropriate, because Plaintiffs acknowledge that the Defendants will have an RBMS in place by the

General Election, and for all future elections, in addition to other accommodations to improve accessibility and inclusivity, and the AWIB will never be used again.

III. QUESTIONS PRESENTED

A. Whether Plaintiffs' facts about the AWIB are immaterial and should be stricken?

[Suggested Answer: YES]

B. Whether Plaintiffs are not entitled to a declaration on the accessibility of the AWIB, or the need for a RBMS, because there is no actual controversy?

[Suggested Answer: YES]

C. Whether Plaintiffs are not entitled to a permanent injunction?

[Suggested Answer: YES]

D. Whether Plaintiffs' request for a "remedial order" is improper?

[Suggested Answer: YES]

IV. ARGUMENT

A. Plaintiffs' facts about the AWIB are immaterial and should be stricken.

Under the Federal Rules of Civil Procedure, a court may grant a motion for summary judgment only if there is no genuine issue of material fact and the moving party is subject to judgment as a matter of law. Fed.R.Civ.P. 56(c). A dispute is genuine "if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Any dispute over a fact which is irrelevant or unnecessary will not preclude a grant of summary judgment." *Connors v. Fawn Min. Corp.*, 30 F.3d 483, 489 (3d Cir. 1994).

A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson*, at 248. The Supreme Court of the United States has explained that "the substantive law will identify which facts are material." *Id.* "[M]ateriality is [] a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes." *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

Under Local Rule 56.1, "[a] motion for summary judgment filed pursuant to Fed.R.Civ.P.56, shall be accompanied by a separate, short and concise statement of the *material* facts…" L.R. 56.1 (emphasis added). "It is the obligation of the movant's counsel to scour the record thoroughly and identify facts that (it would submit) are not in genuine dispute." *Gantt v. Absolute Machine Tools, Inc.*, 2007 WL 2908254 (M.D.Pa. Oct. 4, 2007) (Smyser, M.J.) (Kane, C.J.). The purpose of the short and concise statement of facts is "to structure a party's summary judgment

legal and factual theory into a format that permits and facilitates the court's direct and accurate consideration to the motion." *Hartshorn v. Throop Borough*, 2009 WL 761270 (M.D.Pa. March 19, 2009) (citations omitted). A proper statement of facts should enable "the court to identify contested facts expeditiously and [prevent] factual disputes from becoming obscured by a lengthy record." *Park v. Veasie*, 2011 WL 1831708, at *3 (M.D. Pa. May 11, 2011).

In this case, the Plaintiffs have littered their 103 paragraph Statement of Material Facts with immaterial facts, in contravention of the rules. To be sure, the Plaintiffs admit that the Defendants will have an RBMS in place for the November 2020 General Election, and for future elections, and do not dispute, because they cannot dispute, that the Defendants have been in the process of procuring the RBMS for months. *See* SMF, Doc. 49-1, ¶¶ 85-87. Plaintiffs further acknowledge that the Defendants do not intend to use the AWIB again. *See* SMF, Doc. 49-1, ¶ 84. Yet, the Plaintiff's Statement of Material Facts contains numerous facts about the AWIB, including its history, use, and voters' purported experiences with the ballot. All of these facts are immaterial.

The AWIB, and whether or not it was a success, is not a matter that is in actual controversy, and does not affect the outcome of this suit. As stated, the AWIB will not be used in any future elections, and, instead, an RBMS will be in place. Thus, while the Plaintiffs go to great lengths to point out the deficiencies

with the AWIB (although Mr. Drenth, Mr. Senk and Ms. Werner all, ultimately, successfully marked and mailed their ballots), it is not germane to the matter at hand—whether a RBMS will be in place for the November 2020 General Election—particularly because there will be a RBMS in place for the election.

"Given the important purposes served by Local Rule 56.1 in providing structure and coherence to summary judgment presentations, this Court has broad discretion in addressing the failure of parties to fully comply with this rule." *Breslin v. Dickinson Twp.*, 2012 WL 7177278, at *3 (M.D. Pa. Mar. 23, 2012), *R&R adopted,* 2013 WL 654491 (M.D. Pa. Feb. 21, 2013), *on reconsideration sub nom. Breslin v. Jones*, 2016 WL 6962592 (M.D. Pa. Nov. 29, 2016) (citing *Aubrey v. Sanders,* 346 F.App'x 847 (3d Cir.2009); *Smith v. Addy,* 343 F. App'x 806 (3d Cir.2009); *Conn v. Bull,* 307 F.App'x 631 (3d Cir.2009)). Courts routinely strike pleadings that do not comport with the requirements of the local rule. *See Hartshorn*, 2009 WL 761270; *Park*, 2011 WL 1831708; *Weitzner v. Sanofi Pasteur, Inc.*, 2017 WL 3894888, at *4 (M.D. Pa. Sept. 6, 2017). Here, because facts about the AWIB are totally immaterial, they should be completely disregarded. *See* Weitzner, 2017 WL 3894888 ("Because this Court finds that many of the statements within Plaintiffs' response contravene the purpose of Local Rule 56.1, those statements will be stricken); *Rice v. First Energy Corp.*, 339 F. Supp. 3d 523, 530 (W.D. Pa. 2018) ("Plaintiffs' Statement of Facts []

contain a number of immaterial facts… which the Court has disregarded for purposes of deciding the motions for summary judgment.”).

B. <u>Plaintiffs are not entitled to a declaration on the accessibility of the AWIB, or the need for a RBMS</u>.

The Declaratory Judgment Act (“DJA”) requires that a “case of actual controversy” exist between the parties before a federal court may exercise jurisdiction. 28 U.S.C. § 2201(a); *see also Korvettes, Inc. v. Brous*, 617 F.2d 1021, 1023–24 (3d Cir. 1980). In determining whether there is subject matter jurisdiction over declaratory judgment claims, a court should ask “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007); *see also Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1335–36 (Fed. Cir. 2008). A case or controversy must be “based on a real and immediate injury or threat of future injury that is caused by the defendants—an objective standard that cannot be met by a purely subjective or speculative fear of future harm.” *Prasco,* 537 F.3d at 1339.

“Declaratory judgment is inappropriate solely to adjudicate past conduct.” *Corliss v. O'Brien*, 200 F. App'x 80, 84–85 (3d Cir. 2006). “Nor is declaratory judgment meant simply to proclaim that one party is liable to another.” *Id.* Likewise, it is not a vehicle to obtain “an opinion advising what the

law would be upon a hypothetical state of facts." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 649 (3d Cir. 1990). As such, litigants will not satisfy the "actual controversy" requirement when their dispute becomes moot prior to judicial resolution. *Korvettes*, 617 F.2d at 1023–24. Indeed, "[o]ne of the primary purposes behind the [DJA] was to enable plaintiffs to preserve the status quo before irreparable damage was done . . . [t]he idea behind the Act was to clarify legal relationships so that plaintiffs (and possibly defendants) could make responsible decisions about the future." *Step-Saver Data Sys.,* 912 F.2d at 649. Such is not the case here.

1. Plaintiffs are not entitled to a declaratory judgment on the AWIB.

As an initial matter, Plaintiffs appear to want to further litigate the AWIB, devoting pages in their filings to contesting the success of the AWIB. The AWIB is moot, however—it will never be used again. *See* SMF, Doc. 49-1, ¶ 84. The DJA is not a vehicle to obtain advisory opinions about "past conduct." *See Corliss, supra.* Thus, because the AWIB is a remnant of the past, Plaintiffs are not entitled to a declaratory judgment regarding the accessibility of the AWIB.

2. Plaintiffs are not entitled to a declaratory judgment on the RBMS.

As noted, a declaratory judgment is only warranted where there is an "actual controversy" of "sufficient immediacy *and reality* to warrant the issuance of a

declaratory judgment." *MedImmune, Inc.*, *supra* (emphasis added). In this case, the reality is that this lawsuit was never necessary to obtain a RBMS for the November 2020 General Election and all future elections. The Defendants were in the process of obtaining a RBMS before this lawsuit was filed.

The record reflects that the Defendants started taking steps in as early as February 2020 to start procuring a RBMS. Marks Tr., 119(5-9). By the spring, the Defendants were actively seeking funds to support their procurement of the tool. On April 10, 2020, before this lawsuit was filed, the Secretary of the Commonwealth represented to the federal government that CARES Act funds would be used, in part, for the purpose of obtaining a RBMS for the November 2020 General Election. *See* SMF, Doc. 49-1, ¶ 86. And, the Defendants have, indeed, obtained and dedicated $1.5 million dollars to spend on the RBMS. *See* SMF, Doc. 49-1, ¶ 87. A vendor has been chosen, and the contract is in the very final stages of the months-long approval process, at which point these monies will be disbursed. *See* SMF, Doc. 49-1, ¶ 85. Therefore, there is no "actual controversy" giving rise to a declaratory judgment. It is not necessary for this Honorable Court to declare that a RBMS is necessary, because the Defendants agree and have already, meaningfully, obtained one.

C. **Plaintiffs are not entitled to a permanent injunction.**

"In deciding whether a permanent injunction should be issued, the court must determine if the plaintiff has actually succeeded on the merits (i.e. met its burden of proof)." *Am. Civil Liberties Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 (3d Cir. 1996). After that initial hurdle, the party seeking a permanent injunction must, next, "make a sufficient showing that (1) it will suffer irreparable injury, (2) no remedy available at law could adequately remedy that injury, (3) the balance of hardships tips in its favor, and (4) an injunction would not disserve the public interest." *TD Bank N.A. v. Hill*, 928 F.3d 259, 278 (3d Cir. 2019). "While we consider these factors holistically, the inability to show irreparable harm—or, relatedly, that a legal remedy would be inadequate—defeats a request for injunctive relief." *Id.* (citing *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017)). In this case, Plaintiffs cannot satisfy any element requisite to obtaining a permanent injunction.

1. Plaintiffs have not actually succeeded on the merits with regard to the need for an RBMS.

Plaintiffs claim that the Defendants are violating Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act (RA) of 1973, 29 U.S.C. § 794 *et seq.*, by "denying blind voters equal and meaningful access to its absentee and mail-in ballot program," and refusing "to make a reasonable accommodation" by implementing an RBMS. Doc.

49, 14-18. They contend that the lack of an RBMS also violates the ADA by failing to ensure that blind voters have “effective” communications, as required under the law, due to the lack of an audio component for a mail-in ballot.

Plaintiffs’ claims are all based upon a faulty premise—that the Defendants have not already procured a RBMS. Their entire motion is based upon the proposition that the absentee and mail-in ballots are going to be entirely paper-based for the November 2020 General Election. Yet, they acknowledge that the Defendants have confirmed that this will not be the case. The Defendants have affirmed and sworn to this Court that the RBMS will be in place as soon as the approval process, which has been ongoing for months, is finalized, which is happening imminently. In short, this should end this Court’s involvement in this matter.

Plaintiffs, therefore, cannot succeed on their claims. There is no authority indicating that an injunction is proper to direct a party to do what they are, and already were, doing. And, neither the ADA nor RA compels a different result. The essence of the Plaintiffs’ discrimination claim is that the Defendants have rejected or refused the “reasonable modification” of an RBMS, excluding blind persons from mail-in voting. But, the Defendants are already implementing an RBMS. The Defendants have not rejected this accommodation and will have an RBMS in place as a permanent tool for blind voters beginning with the November 2020 General

Election. Plaintiffs simply cannot succeed on the merits, and they are not entitled to any relief, at all.

2. Plaintiffs have not demonstrated that they will suffer irreparable harm.

Third Circuit case law confirms that "what may constitute irreparable harm in a particular case is, of course, dependent upon the particular circumstances of the case." *Oburn v. Shapp*, 521 F.2d 142, 151 (3d Cir. 1975), *holding modified by Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421 (3d Cir. 1994). "The key word in this consideration is Irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory *or other corrective relief* will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.* (emphasis added).

Here, the Plaintiffs will not suffer harm, and their right to vote will not be infringed, because the Defendants are already implementing a state-of-the-art RBMS—the exact relief that they request by way of their motion. Thus, not only is there "the possibility" that there will be corrective relief in the future, there is, even more significantly, in this case, no dispute that the corrective relief will be in place. The RBMS should be launched as early as September 1, 2020, in advance of the November 2020 General Election. *See* SMF, Doc. 49-1, ¶ 84.

3. The balance of the hardships weighs in favor of Defendants.

The Defendants resolved to implement a RBMS for the November 2020 General Election long before this litigation started. This lawsuit was not necessary to bring about this result, and, this ongoing litigation has, if anything, diverted time and resources away from the Defendants who are attempting to meet their various obligations under the Election Code, and other applicable laws, before the General Election. And all of this while the country is facing an unprecedented pandemic. Thus, an injunction granting the Plaintiffs unprecedented oversight over the Defendants' implementation of the voting systems, including the installation of the RBMS, will be further counterproductive, particularly when any harm is completely speculative, and, based upon the faulty premise that there will be a paper-based system in place.

Entry of a permanent injunction against the Defendants will also harm their reputations. The public will assume that the Defendants have not been, all along, seeking to implement a RBMS, and that they had to be sued to be forced to do so. This simply does not reflect reality, and this reputational harm is inequitable. For these reasons, the balance of hardships weighs in favor of the Defendants.

4. An injunction would disserve the public interest.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of

injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In this case, an injunction will be detrimental to the public interest. Granting the Plaintiffs the relief they seek—including oversight authority over the Defendants—will not lend itself to finality and will only detract from the Defendants' abilities to carry out their statutory duties. It will also be violative of the Election Code which delegates authority to the Defendants to administer the voting systems in Pennsylvania—not private persons or interests. And, as noted, an injunction will cast doubt upon the Defendants' integrity, which is particularly dangerous to the public interest during an election year. For these reasons, the public interest weighs against an unnecessary permanent injunction.

D. Plaintiffs' request for a "remedial order" is improper.

For the foregoing reasons, Plaintiffs are not entitled to any relief at all. But, it is particularly worth noting that a "remedial order" is not an appropriate remedy in this case, and Plaintiffs' request for such a far-reaching order is improper.

To be sure, the Plaintiffs pray that this Court enter an Order compelling Defendants to "cooperate with NFB-PA to test the accessible ballot delivery and marking tool prior to the November 2020 election" and allow NFB-PA to "monitor use of the accessible ballot delivery and marking tool in the November 2020 and in the 2021 primary and general elections to identify any problems, concerns, or complaints and timely address them." Doc. 49, p. 24. They also want the

Defendants to issue status reports to Plaintiffs' counsel on an ongoing basis, not only having to do with this election, but regarding future elections. Doc. 49, p. 24. In other words, the Plaintiffs are requesting that this Court grant them oversight authority over Secretary Boockvar and the Department of State. Such an order would be unprecedented in the Third Circuit.

Indeed, Plaintiffs furnish no authority from the Third Circuit supporting this claim for relief. Rather, they cite to a Second Circuit case involving wholly distinguishable facts. In *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189 (2d Cir. 2014), the defendant failed to remove barriers to access at polling places over the course of several years. *Id.* at 192. The record established that, "year after year more than 80% of poll sites that are inspected contain at least one barrier that may prevent a person with a disability from accessing his or her assigned polling place." *Id.* at 199. Ultimately, the Second Circuit found that a remedial order was "tailor[ed] ... to fit the nature and extent of [BOE's] violation[s]," because the evidence showed that "barriers to access are pervasive and stem both from BOE's inadequate operation of poll sites on election days and its failure to properly plan to make facilities temporarily accessible." *Id.* at 202-03.

No such record has been established in the case at bar. No one has accused the Defendants of "pervasive violations," and, indeed, with respect to the mail-in ballots, no one credibly could. Act 77 was only passed less than a year ago, and

already the Defendants have procured a RBMS. There will be an RBMS in place when mail-in ballots are used for the first time in a General Election. The Plaintiffs can cite to no history wherein the Defendants have flagrantly disregarded the rights of the disabled or blind. The Defendants have always been responsive, and proactive in promoting accessibility. Therefore, in addition to the fact that such relief would be unprecedented and unwarranted—it would also be inequitable and unfair to the Defendants who have a history of *making* accommodations.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment should be denied, and judgment should be entered in favor of the Defendants.

Respectfully submitted,

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Date: August 3, 2020

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Defendants	:	*Complaint Filed 05/21/20*

CERTIFICATE OF SERVICE

I, Nicole J. Boland, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on August 3, 2020, I caused to be served a true and correct copy of the foregoing document to the following:

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CERTIFICATION OF WORD COUNT

Undersigned counsel hereby certifies that, according to the "Word Count" feature on Microsoft Word, this brief contains 3,983 words excluding the caption and signature block, and is within the word count limit set forth in the Local Rules.

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