

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

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

**BRIEF IN SUPPORT OF MOTION *IN LIMINE* TO  
EXCLUDE EVIDENCE REGARDING THE  
ACCESSIBLE WRITE-IN BALLOT**

Defendants, by and through their undersigned counsel, hereby submit this Brief in Support of their Motion *in Limine* to Exclude Evidence Regarding the Accessible Write-In Ballot, as follows.

**I. PERTINENT FACTUAL BACKGROUND**

Secretary Boockvar and the Department of State (“Defendants”) have made good on their commitment, made long before this lawsuit, that there will be a state-of-the-art Remote Ballot Marking System (RBMS) in place for the November 2020 General Election. The contract for the RBMS is almost entirely through the security approval process, and the RBMS will be in place for the November 2020 General Election. Defendants have no intention of using the Accessible Write-In

Ballot (AWIB) ever again, in light of the availability of an RBMS—a fact admitted by the Plaintiffs. *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. Consequently, evidence regarding the AWIB is irrelevant, and any probative value is outweighed by its prejudice.

## **II. QUESTIONS PRESENTED**

- A. Whether evidence regarding the AWIB should be excluded as irrelevant under Rule 401?

**[Suggested Answer: YES]**

- B. Whether any probative value related to the AWIB is substantially outweighed by the danger of unfair prejudice, confusing the issues, undue delay, and wasting time?

**[Suggested Answer: YES]**

## **III. ARGUMENT**

- A. **Evidence regarding the AWIB should be excluded as irrelevant under Rule 401.**

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Kyeame v. Buchheit*, 2011 WL 4949220, at \*1 (M.D. Pa. Oct. 18, 2011). “Irrelevant evidence is not admissible.” Fed. R. Evid. 402. It is anticipated that Plaintiffs will seek to

introduce testimony regarding the brief history, use, and voters' purported experiences with the AWIB. Evidence regarding AWIB ballots is irrelevant and, therefore, inadmissible, however.

Defendants are implementing an RBMS. This completely moots the Plaintiffs' case (with the exception of the electronic submission issue that they pled, for the first, time through summary judgment briefing). Assuming that the issues proceed to trial, evidence regarding the AWIB will not make the existence or adequacy of the RBMS any more or less probable. The RBMS is a sophisticated state-of-the-art system made by a third-party professional vendor. The same people did not create the AWIB, and the temporary AWIB solution cannot speak to the functioning of the RBMS. Evidence regarding the AWIB, including the delivery and marking of the AWIB, is inconsequential to the RBMS.

Nor are facts regarding the return of the AWIB relevant. The Defendants are issuing guidance to the counties directing them, with respect to voters who apply to use the RBMS to receive and mark their ballots, 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 larger than the secrecy envelope so that the envelopes are distinguishable, and the electronic instruction will indicate as such. Marks Declaration, ¶ 20. Defendants have also resolved to issue a directive to the

counties in advance of the General Election directing the counties to accept the return envelope as long as a signature appears anywhere on the envelope. Marks Declaration, ¶ 21. In light of this new landscape, facts regarding the procedure to return the AWIB are of no consequence. The fact pattern is no longer extant. For instance, testimony regarding frustration with printing of the AWIB return envelope does not matter, because now the Defendants are providing envelopes. In sum, all facts about the AWIB are not germane to the new scheme in place.

**B. Any probative value related to the AWIB is substantially outweighed by the danger of unfair prejudice, confusing the issues, undue delay, and wasting time.**

Under Federal Rule of Evidence 403, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. To the extent that there is probative value in evidence of the AWIB (which is denied), it is substantially outweighed by considerations including unfair prejudice, confusing the issues, undue delay, and wasting time.

To be sure, all agree that the AWIB was a temporary solution that was approved by this Court. It will not be used ever again. Thus, testimony regarding the success of the AWIB, or problems encountered by blind voters using the AWIB, will only work to sully the Defendants, when that evidence does not speak

to the workings of an RBMS. In other words, allowing the Plaintiffs to point out shortcomings of a former and temporary solution will not advance the issues remaining in this case, but will cast the Defendants in a negative light. This is unfair. Moreover, since the AWIB will never be used again, such evidence will only cause undue delay with respect to getting to the heart of the matter, which is especially problematic when the trial in this matter is scheduled to be held over a two day period. The evidence will also confuse the issues, because it does not matter whether the AWIB was a success because it will not be used again, and a completely different system is going to be in place.

#### **IV. CONCLUSION**

For the foregoing reasons, evidence regarding the AWIB should be excluded under Federal Rules of Evidence 401 and 403.

**Respectfully submitted,**

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**Date: August 3, 2020**

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**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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