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.	

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Either Defendants misunderstand their legal obligation to ensure that blind Pennsylvania voters have an equal opportunity to vote privately and independently, or Defendants genuinely believe that a promise of unspecified future action should nullify any claim they have breached that legal obligation. Neither excuses Defendants' persistent discrimination against blind voters, which is at issue in and must be remedied by this litigation. For elections up to and including the June 2020 primary, Defendants have denied blind voters an equal and meaningful opportunity to vote with the same ease, privacy, and independence as sighted voters. The question before the Court is whether Defendants stand in violation of the Americans with Disabilities Act and Rehabilitation Act. They indisputably do, so Plaintiffs are entitled to summary judgment.

II. ARGUMENT

Citing no authority, Defendants suggest their violations of the ADA and RA are cured by promises that, if fulfilled, would only partly remedy Defendants' violations. As part of this misguided argument, Defendants gloss over the clear inaccessibility of both paper-based ballots and the AWIB, both of which are issues that are and remain relevant in this litigation. Defendants' position is incorrect. Accordingly, the Court should grant Plaintiffs' Motion.

A. The Inaccessibility of the AWIB Is Material

Defendants argue that all facts related to the AWIB and its inaccessibility for blind voters should be deemed immaterial. That is incorrect. Details of the failures of the AWIB, which Defendants repeatedly have argued is accessible and ADA-compliant, are relevant and necessary to decide important issues in this case, especially the need for judicial intervention to ensure that Defendants implement appropriate accessible ballot delivery and marking tools.

A fact is material when, if disputed, it "might affect the outcome of the suit under governing law"; a fact is immaterial if it is "irrelevant or unnecessary" to resolving disputed issues. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted). The "governing law" of this case is the ADA and RA, which Defendants do not address at all in their discussion of whether AWIB facts are material. *See* Doc. 56 at 10-14, Opp'n at 4-8. This is a telling omission.

The ADA and RA require that Defendants afford blind Pennsylvania voters equal and meaningful access to and participation in voting programs available to sighted Pennsylvania voters.[1] *See* 28 C.F.R. § 35.130(b)(1)(ii). Defendants offer all

[1] Plaintiffs have established the existence of a disability and their qualification to participate in Defendants' absentee and mail-in voting program. *See Haberle v. Troxel*, 885 F.3d 170, 178 (3d Cir. 2018) (listing elements of ADA and RA claims); Doc. 49-1, SMF, ¶¶ 1-7; Doc. 57, Defs.' Answer to SMF, ¶¶ 1-7. Defendants dispute only that they exclude Plaintiffs from participation in, deny Plaintiffs the benefit of or otherwise discriminate against Plaintiffs with respect to that program. *See Haberle*, 885 F.3d at 178.

Pennsylvania voters the opportunity to vote remotely and, for the 2020 elections, Defendants encouraged voting remotely rather than in-person voting. Doc. 49-1, SMF, ¶¶ 15-17; Doc. 57, Defs.' Answer to SMF, ¶¶ 15-17. Under the ADA and RA, therefore, Defendants must offer blind Pennsylvania voters vote-by-mail option comparable to what Defendants offered sighted voters. *See Nat'l Fed. of Blind v. Lamone*, 813 F.3d 494, 506-07 (4th Cir. 2016); *Disabled in Action v. Bd. of Elections in N.Y.*, 752 F.3d 189, 199-200 (2d Cir. 2014); *Cal. Council of Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1239 (N.D. Cal. 2013).

Although Defendants argue that the AWIB experiences of three[2] blind voters – Mr. Drenth, Mr. Senk and Ms. Weber[3] – are irrelevant because those three voters "ultimately[ ] successfully marked and mailed their ballots," Doc. 56 at 12-13, Opp'n at 6-7, Defendants ignore the numerous accessibility issues that blind voters using the AWIB encountered and the fact that, by all accounts, the AWIB process was time-consuming and mentally taxing.

Defendants also argue AWIB-related facts are immaterial because Defendants promise never to use the AWIB again. *See* Doc. 56 at 12-15, Opp'n at

[2] DOS sent AWIB packages to sixteen blind voters. Doc. 49-1, SMF ¶ 35; Doc. 57, ¶ 35. Plaintiffs provide available accounts with their Motion; it is unknown whether and with what assistance the other thirteen attempted to vote by AWIB.
[3] Defendants' reference to "Ms. Werner" appears to be meant for Rebecca Weber, a blind NFB-PA member who submitted a declaration in support of summary judgment. *See* Doc. 56 at 13, Opp'n at 7.

6-9. Just as Defendants' vague promises do not moot this case, so too their promises about future compliance do not transform material facts into immaterial ones. At this summary judgment stage, the Court must decide whether Defendants have complied with the ADA and RA. They have not, in part because the AWIB used in the most recent federal election in Pennsylvania was inaccessible. AWIB-related facts are material to establishing this inaccessibility.

Even if Defendants live up to their promise to implement an unspecified "Remote Ballot Marking Solution (RBMS)" by November 2020, AWIB facts remain material. Defendants' insistence that the AWIB was fully accessible, despite clear evidence to the contrary, suggests that Defendants do not fully appreciate their obligations under the ADA and RA and may not ensure that, moving ahead with the RMBS, they live up to their federal-law obligations.

Defendants are meticulously vague about their promised RBMS solution, asserting only that the RBMS will "ensure accessibility for blind persons" in the November 2020 and future elections. *Cf.* Doc. 56 at 7, Opp'n at 1. Defendants do not elaborate on how the RBMS will do this. *See* Doc. 49-1, SMF, ¶¶ 36-37, 40, 45-53, 60-62, 64, 66.

Defendants' refusal to acknowledge the problems with the AWIB – indeed, their insistence that the Court strike them as immaterial – underscores Defendants' unwillingness to fix problems from the AWIB when implementing an RBMS. To

provide but one example, blind voters stressed that, when attempting to use a printer in order to print and mail the AWIB, they encountered significant barriers to accessibility. *See* Doc. 49-1, SMF, ¶¶ 36-37, 40, 45-55, 60-64, 66. The RBMS proposed by Defendants appears poised to repeat this very problem. And just as the AWIB "envelope" made it extremely difficult, if not impossible, for blind voters to submit an AWIB privately and independently, so Defendants have not adequately explained how they will ensure the accessibility or utility of any paper-based process for returning RBMS.

In sum, even if Defendants implement an RBMS, AWIB-related facts are material to the unresolved question of whether Defendants' promised RBMS will adequately meet Defendants' obligation. Throughout this litigation, Defendants have shown a troubling misunderstanding of and disregard for the need and importance of equality for blind voters, and their argument to strike key facts about the failures of the AWIB process is no exception. Rather, Defendants' argument highlights the need for the Court to ensure that Defendants not only understand but come into and remain in compliance with their legal obligation to offer blind voters a mail-in voting experience comparable to that enjoyed by sighted Pennsylvanians.

Defendants have moved the target on accessible voting solutions throughout this lawsuit, successively identifying different and supposedly better options as the inadequacies of an earlier-promised accessible remedy came to light. On May 24,

2020, in response to Plaintiffs' request for injunctive relief for the June 2020 primary, Defendants argued that a Federal Write-In Absentee Ballot ("FWAB") would sufficiently allow blind voters to vote on the same footing as sighted individuals for the primary. Doc. 18 at 14, 19-21, 30-31, Defs.' Brief in Opp'n at 9, 14-16, 25-26. On the day of the May 27, 2020 hearing, after Plaintiffs identified deficiencies of the FWAB proposal, Defendants presented the AWIB for the first time, arguing that the late-in-the game AWIB was "a more adequate and feasible alternative remedy to the FWAB." Doc. 31, May 27, 2020 Op., at 5-6. In their Answer, filed nine days after the June 2020 primary, Defendants tout the AWIB process as a "solution" that allegedly "rectified any inaccessibility issues" for that election. *See, e.g.*, Doc. 36, Defs.' Answer, ¶¶ 10-11. Now, Defendants promise another, unspecified "solution," in connection with forthcoming and apparently non-binding "guidance" to CBEs, which Defendants assert – without citing any evidence, facts, or case law – will satisfy their obligations under the ADA and RA.

The Court need not and, given past history,[4] should not take Defendants at their word. The ADA is not satisfied unless and until Defendants present an

[4] Defendants have maintained throughout this litigation that inadequate measures will preserve blind voters' right to equal and meaningful participation in Defendants' mail-in and absentee voting programs. *See, e.g.*, Doc. 49-4, Defs.' Responses to Requests for Admission, ¶¶ 14 (denying blind voters require "assistance at all" to vote by mail-in ballot), 18 (denying need for accessible mail-in voting system that allows blind voters to "return marked ballots . . . without

electronic ballot delivery and marking solution that is compatible with widely-used screen reader technology, offers blind voters an accessible means of completing their ballot comparable to that afforded to sighted voters, clearly instructs blind voters on how to effectively mark and return their ballot, and can be used from start to finish privately and independently – without the need to purchase expensive equipment or rely on sighted individuals. To date, Defendants have been unable to do so, and they offer no evidence that they will or can going forward in the vague description of their proposed "solution" set forth in the Opposition. Facts about the AWIB's shortcomings are material, relevant and necessary to deciding issues in controversy, and the Court should reject Defendants' request to strike.

B. Declaratory Relief Is Appropriate to Resolve the Live Controversy Between the Parties

Plaintiffs are entitled to declaratory relief. Defendants incorrectly suggest that declaratory judgment is inappropriate because the failures of the AWIB are in the past and Defendants' RBMS will be a future cure. Doc. 56 at 15-16, Opp'n at 9-10. Plaintiffs should be given the declaratory relief they request.

Declaratory relief is appropriate when "there is a live dispute between the parties." *See Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir.

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relying on third-party assistance."); Doc. 57, Defs.' Answer to SMF, ¶¶ 24, 31, 45, 91, 98 (insisting AWIB was accessible and that Defendants' current system allows blind voters to vote privately and independently by mail).

2003). The most important guiding principles in determining the propriety of declaratory relief are "the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that judgment." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990). Here, a "live dispute" is present, because "a real question of conflicting legal interests is presented for judicial determination." *See Zimmerman v. HBO Affiliate Grp.*, 834 F.2d 1163, 1170 (3d Cir. 1987).

Plaintiffs assert that neither paper ballots nor the AWIB process has offered them equal and meaningful access to Defendants' absentee and mail-in voting program and that, because Defendants have not implemented an accessible solution, Defendants stand in violation of the ADA and RA. To remedy this violation, Defendants must not only acquire and implement an accessible ballot delivery and marking tool, but also must ensure the accessibility of the tool, including with respect to returning marked ballots, so that blind voters' entire experience is comparable to that of a sighted voter.

Defendants, in contrast, argue paper ballots are accessible to blind voters. Doc. 57, Defs.' Answer to SMF, ¶¶ 24, 31, 98. Likewise, Defendants contend that the AWIB was accessible and fully compliant with the ADA and RA. *Id.* ¶ 45. Defendants deny "that an electronic ballot delivery and electronic marking system is preferable to the AWIB process," or that "[a] fully accessible absentee and mail-

in voting system must include a method by which blind voters may return marked ballots to election officials without relying on third-party assistance." Doc. 49-4, Defs.' Responses to Requests for Admission. As such, the parties are diametrically opposed as to what voting methods the ADA and RA require.

A declaratory judgment is thus needed to "define and clarify the legal rights . . . of the parties." *See Step-Saver Data Sys.*, 912 F.2d at 647. Notwithstanding Defendants' promise to secure a ballot delivery and marking tool, Defendants have never conceded that the ADA requires them to do so. In fact, they now argue the opposite: Defendants argue that their promised RBMS is not necessary to afford Plaintiffs relief, Doc. 56 at 17-19, Opp'n at 11-19, and Defendants continue to insist that paper ballots are accessible, Doc. 57, Defs.' Answer to SMF, ¶ 24, 31, 98. Declaratory judgment would thus clarify both that Defendants' past systems do not provide "meaningful access" to blind voters and that all parts of the voting process, including the process of returning marked ballots, must be accessible.

Utility also supports declaratory judgment, because "the parties' plans of actions are likely to be affected" thereby. *See Step-Saver Data Sys.*, 912 F.2d at 649 n.9. Consistent with Defendants' belief that the process of returning a marked ballot need not be accessible, Defendants currently propose an unworkable, inaccessible system for blind voters who would use the promised ballot delivery and marking tool. *See* Doc. 56 at 8-9, Opp'n at 2-3. A judgment clarifying that

print text is inaccessible to most blind voters would help ensure any ballot delivery and marking tool implemented by Defendants would not, for instance, require blind voters to read and sign print declarations on a return envelope.

More generally, a finding by the Court that all parts of the voting process, including return, must be accessible would help shape Defendants' implementation of the promised ballot delivery and marking tool to ensure ADA and RA compliance. Such guidance would be especially helpful in this litigation, where Defendants continually announce in court filings their new plans regarding how they will implement a ballot delivery and marking tool.

C. Plaintiffs Are Entitled to Injunctive Relief to Ensure that Defendants' Proposed Solution Satisfies the ADA and RA

Defendants oversimplify the issues in their Opposition to support their contention that injunctive relief should be denied based on Defendants' promise to implement a forthcoming, if otherwise unspecified, RBMS. Doc. 56 at 17-18, Opp'n at 11-12. This contention is unavailing. Most obviously, the argument is premature since, as discussed above, Defendants have not actually procured and have not yet implemented any RBMS, and therefore Defendants have not fulfilled their ADA or RA obligations. To satisfy these obligations, Defendants must implement an accessible electronic ballot delivery and marking tool, a fact Defendants implicitly concede in arguing that their promise to implement a forthcoming RBMS should nullify Plaintiffs' right to relief. *See* Doc. 56 at 14-19,

Opp'n at 8-13. *See also* Doc. 49-1, SMF, ¶¶ 22-31 (citing extensive record evidence establishing blind voters cannot vote privately and independently by mail as sighted voters could). Defendants have not done so.

Plaintiffs have satisfied the requirements for injunctive relief, and the Court should grant them the requested injunction. Without this relief, Plaintiffs will suffer irreparable injury that cannot adequately be addressed by an available legal remedy; the balance of hardships favors Plaintiffs, and an injunction is in the public interest. *Cf.* Doc. 56 at 17, Opp'n at 11 (listing elements).

Defendants argue that Plaintiffs cannot succeed on the merits of their request for an accessible ballot delivery and marking system because Defendants have "already procured a RBMS" and the Court cannot order Defendants "to do what they are, and already were, doing." *Id.* at 18, Opp'n at 12. This erroneously conflates Defendants' promise of a RBMS, which is uncertain and non-specific, with their obligation under the ADA and RA to offer blind voters an equal and meaningful opportunity to vote by mail, from application through submission, which Defendants to date have not done. The ADA and RA require more than a promise of accessibility; it requires accessibility.

On the issue of irreparable harm, Defendants again display their fundamental misunderstanding of the issues and their obligation by claiming that their promised RBMS will ensure that Plaintiffs' "right to vote will not be infringed." Doc. 56 at

19, Opp'n at 13. Defendants have not presented any facts or evidence to establish that their RBMS will allow Plaintiffs to vote by mail privately and independently, as a sighted voter can, and therefore they have not carried their burden of showing ADA or RA compliance. More critically, for purposes of injunctive relief, Defendants remain unable to show that they can or will adequately safeguard Plaintiffs' fundamental rights to equal and meaningful participation in a private, independent mail-in voting process. Defendants' casual attitude toward this critical right highlights the continuing threat to Plaintiffs' right to vote privately and independently by mail as sighted voters can. *See* Doc. 31, May 27, 2020 Op. Granting Prelim. Injunction, at 13 ("The loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury.") (quoting *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010)) (additional citation omitted).

The balance of hardships also weighs in favor of Plaintiffs. No evidence supports Defendants' protestations of wasted energy and reputational harm,[5] while there is evidence that this litigation is what spurred Defendants to action, and that Defendants' continued opposition to the solutions Plaintiffs request both question their profession that a RBMS will in fact solve the discrimination. *Compare* Doc.

[5] Defendants are fighting challenges to their voting procedures on several fronts, in higher profile litigation than this one. *See Donald J. Trump for President, Inc. v. Boockvar*, W.D. Pa. No. 2:20-cv-966-NR; *see also Pa. Democratic Party v. Boockvar*, Pa. Commw. Ct. No. 407 MD 2020.

56 at 20, Opp'n at 14, *with* Doc. 49-1, SMF, ¶¶ 69-70. *See also* Section II.A, *supra*. The right to vote "is of the most fundamental significance," as to outweigh general costs to Defendants of protecting that right. Doc. 31, May 27, 2020 Op., at 14 (*quoting Ill. State Bd. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)) (additional citation omitted).

Perhaps most remarkable of Defendants' counterarguments is that protecting blind voters' right to equal and meaningful participation in a private and independent mail-in voting program will disserve the public interest. Doc. 56 at 20-21, Opp'n at 14-15. Without citation or explanation, Defendants contend that injunctive relief would "not lend itself to finality," "detract from the Defendants' ability to carry out their statutory duties," and violate Pennsylvania's Election Code by divesting Defendants of their authority thereunder by giving Plaintiffs the ability to oversee and assist Defendants in their implementation of an accessible ballot delivery and marking tool. *Id.*

This is a disingenuous mischaracterization of Plaintiffs' request and an insult to the Court's discretion to appropriately order lawful monitoring and judicial oversight of the problematic systems Defendants use in carrying out their statutory duties. To the extent Defendants attempt to argue that they need not be subject to continuing oversight because there is no lengthy history of pervasive discrimination against blind voters, this argument misses the mark. *See id.* at 21-

23, Opp'n at 15-17. As discussed above, Defendants have exhibited – and continue to show – a troubling and stubborn refusal to acknowledge how existing systems deprive blind voters of the equal and meaningful opportunity to vote privately and independently, thus violating the ADA and RA. In the circumstances of this case, Plaintiffs are entitled to the relief they request. *See generally* Doc. 49 (Brief in Support of Motion); *see also, e.g.*, *Hindel v. Husted*, No. 2:15-cv-3061, 2017 WL 432839, at *6-7 (S.D. Ohio Feb. 1, 2017) (granting injunctive relief in similar case that allowed blind voters to monitor implementation of court-ordered solution).

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Partial Summary Judgment and deny any relief to Defendants.

Respectfully submitted,

Dated: August 7, 2020

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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' Reply Brief in support of their Partial Motion for Summary Judgment complies with the Court's Order.

Executed this 7th day of August, 2020.

/s/ Robin Resnick
Robin Resnick

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief in Support of Plaintiffs' Motion for Summary Judgment was filed on August 7, 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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