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

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|---|---|---|
| **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* |

# REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

**Respectfully submitted,**

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## I. INTRODUCTION

All of the cases cited by the Plaintiffs in response to Defendants' Motion for Summary Judgment involve defendants who shirked responsibilities to the disabled, had pervasive issues with compliance, discounted inclusivity, and only cared to act after a lawsuit was filed. As a result, the courts declined to dismiss those lawsuits as moot even after solutions were implemented due to the defendants' demonstrated lack of reliability. Secretary Boockvar and the Department of State have *nothing* in common with the defendants in those cases. The Secretary and the Department have a history of inclusivity and responsiveness. Indeed, the Defendants already started, and are almost through, the process of obtaining an RBMS. A process started months *before* this lawsuit was filed.

The Defendants' sworn testimony to this Court that an RBMS will be in place *is* enough to moot this lawsuit. In pleading their case, Plaintiffs seek relief in the form of "…a permanent injunction…requiring Defendants to remedy their absentee and mail-in ballot system by implementing a remote accessible vote-by-mail system for Plaintiffs and those similarly situated for all future elections." Doc. 1, ¶ 118. This exact relief is being implemented by the Defendants right now. This should end the Court's involvement for lack of a controversy. The specific relief pled is already happening, and happened without this lawsuit's prompting.

In addition to relying on dissimilar cases involving wholly distinguishable facts, Plaintiffs resort to re-packaging and evading the Defendants' arguments, and muddying the record. Plaintiffs failed to meaningfully acknowledge the Defendants' arguments that blind persons are not being denied a benefit afforded to others because they, too, have to *mail-in* their *mail-in* ballots. No one in Pennsylvania has ever remotely cast a ballot electronically. And, while the Plaintiffs claim that there is a genuine dispute of fact regarding whether electronic submission is a fundamental alteration, because they think it is safe and secure—and found experts who will say so—this is wrong. Case law is clear that the Defendants do not have to "weaken" their program as an accommodation, and this case presents a clear example of a situation wherein it would be unreasonable to require the requested accommodation. Electronic submission would be a fundamental alteration when: it has never been available for any voter; all agree that there are risks (Plaintiffs just claim that they can be mitigated); and, four agencies of the federal government counsel against it (all on the eve of the election during a pandemic).

Finally, even Plaintiffs tacitly admit that the Defendants' adopted approach of directing larger envelopes, that are pre-marked, along with flexibility regarding signing declarations, alleviates any remaining accessibility concerns. They strain to find fault with the Defendants' plan, calling it unreasonable because of the lack of

hole-punches, but agreeing that larger envelopes are appropriate. They claim that a trial is necessary to hash out small differences between what they desire and what the Defendants have decided to do. But, it is clear from the record that the real accessibility issues have been obviated.

In sum, while Plaintiffs' desire greater control over the Defendants' choices—this does not amount to a genuine dispute of material fact. The Defendants are already implementing the tool that the Plaintiffs seek, as further detailed by way of this reply brief, and have gone above and beyond in finding solutions for the blind by directing the counties to provide blind voters with distinguishable envelopes, and flexibility with signatures.

## II. QUESTIONS PRESENTED

A. Should Defendants' Statement of Material Facts be admitted in its entirety where Plaintiffs do not set forth proper denials?

[Suggested Answer: YES]

B. Did the Plaintiffs fail to establish that there remains an actual controversy regarding the implementation of a RBMS?

[Suggested Answer: YES]

C. Whether Plaintiffs have not created a genuine dispute of fact that blind voters are excluded from mail-in voting because some do not have printers?

[Suggested Answer: YES]

D. Are the Defendants' directives to the counties reasonable, and do they moot any purported harm claimed by Plaintiffs?

[Suggested Answer: YES]

E. Whether the issue of electronic submission is not premature, and it is clear from the record that electronic submission would be a fundamental alteration?

[Suggested Answer: YES]

## III. ARGUMENT

To successfully oppose a motion for summary judgment, Plaintiffs cannot rely on the unsupported allegations of the Complaint and he must present more than the "mere existence of a scintilla of evidence" in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Plaintiffs must offer specific material facts that would be admissible at trial and that contradict Defendants' assertion that no genuine issue is in dispute. *Kline v. First West Government Securities*, 24 F.3d 480, 485 (3d Cir. 1994); Fed. R. Civ. P. 56(e).

Not all facts are material and not all disputes are genuine. A fact is "material" only if its existence or nonexistence would affect the outcome of the case under the applicable substantive law. *Anderson*, 477 U.S. at 248. *See also Celotex*, 477 U.S. at 323 ("a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial"). A dispute is "genuine" only where a reasonable jury "could return a verdict in favor of the non-moving party." *Anderson*, 477 U.S. at 255; *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 587

(1986) ("[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial"). Here, the Plaintiffs have failed to create a genuine dispute of material fact, and the Defendants are entitled to judgment as a matter of law.

## A. Defendants' Statement of Undisputed Material Facts should be admitted in its entirety.

Defendants Statement of Undisputed Material Facts should be admitted in its entirety because the Plaintiffs failed to answer in accordance with the rules. In addition, the Court may properly consider the federal guidance document counseling against electronic submission because the document is being offered for a non-hearsay purpose, as admitted by the Plaintiffs.

### 1. Plaintiffs' denials are not supported by citations to the record.

None of the Plaintiffs' denials are properly supported by the record. To be sure, upon inspection, although many facts are "denied as stated," Plaintiffs do not actually dispute the vast majority of Defendants' meager thirty-six statements of material fact. They often admit the fact after setting forth a denial, and respond with immaterial editorialization. This commentary should be stricken, and Defendants' facts should be deemed admitted.

Plaintiffs' attempts to create a dispute of fact through irrelevant commentary should be disregarded. For instance, instead of outright admitting Paragraph 1 of

Defendants' Statement of Material Facts, which states that "[t]he Defendants are finalizing the procurement process to secure a fully accessible [RBMS] for the November 2020 General Election, with full confidence that the RBMS will be implemented by September 1, 2020," Plaintiffs game the response by stating "Denied as stated. It is admitted that Jonathan Marks, the Rule 30(b)(6) designee for the [DOS], testified that Defendants are in the process of procuring an accessible ballot delivery and marking tool and that Mr. Marks testified he feels confident such tool will be up and running by September 1, 2020, and in place for the November 2020 general election. By way of further answer…" Doc. 54, ¶ 1. The Plaintiffs', here, "deny" the fact without citation, and oppositely proceed to admit that that very fact, set forth in their own words, is true. They then go on to list several new and distinct facts of their own. This is improper.

By way of another example, for Paragraph 3, Defendants asserted, "[t]he Defendants started the process of securing a RBMS in February 2020, before this lawsuit was initiated." Doc. 51. Plaintiffs' respond: "Denied as stated. DOS' representative testified that he believed it was "more along the lines of February" when DOS was researching specific systems and that DOS "may have started getting price estimates in March of 2020." Doc. 54, ¶ 3. In other words, Plaintiffs admit that the Defendants started the process in February by researching vendors. There is no true dispute here, or grounds for a denial.

Plaintiffs' Answer is replete with this issue: denials that are unsupported by the record. Local Rule 56.1 provides, in pertinent part, that, "[t]he papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required in the foregoing paragraph, as to which it is contended that there exists a genuine issue to be tried." L.R. 56.1. "Statements of material facts in support of, or in opposition to, a motion *shall include references to the parts of the record that support the statements*." *Id.* (emphasis added). All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." *Id.* Indeed, the Middle District has made clear that, "[i]t is not for the court to search through the record in this case to find support for the plaintiff's purported facts; that burden lies with the plaintiff in responding to the defendant's materials." *Murray v. JELD-WEN, Inc.*, 922 F. Supp. 2d 497, 503 (M.D. Pa. 2013); *see also Doeblers' Pennsylvania Hybrids, Inc. v. Doebler,* 442 F.3d 812, 820 (3d Cir. 2006), *as amended* (May 5, 2006) ("Judges are not like pigs, hunting for truffles buried in' the record.").

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." *Pinegar v. Shinseki*, 2009 WL 1324125, at *1 (M.D. Pa. May, 12,

2009). Courts have the discretion to either strike a statement for non-compliance with the local rule, or deem the opposing statement admitted. *See, e.g., Armenti v. Tomalis*, 2016 WL 6493483, at *1-2 (M.D. Pa. Nov. 2, 2016). Here, all of Defendants' facts should be deemed admitted, because not a single denial is properly disputed by a citation to the record. *Murray*, 922 F. Supp. 2d at 503 ("[A]lthough the plaintiff denies several of the facts set forth by the defendant and provides his own version of the facts, the plaintiff fails to provide any citations to the record in support of these facts… [t]herefore, the defendant's motion to strike the responses to these paragraphs will be granted and the defendant's statement of facts set forth in these paragraphs will be deemed admitted.").

### 2. **The facts set forth in Paragraphs 8 and 9 do not constitute inadmissible hearsay.**

In Paragraph 8 of the Statement of Facts, Defendants submit that: "The Defendants are aware of, and informed by, collective guidance from the Cybersecurity and Infrastructure Security Agency (CISA), the Election Assistance Commission (EAC), the Federal Bureau of Investigation (FBI), and the National Institute of Standards and Technology (NIST), that recommends "paper ballot return as electronic ballot return technologies are high-risk even with controls in place" *See* 51, ¶ 8 (citing Marks Tr., 232-233; CISA, ET AL., RISK MANAGEMENT FOR ELECTRONIC BALLOT DELIVERY, MARKING, AND RETURN (May 8, 2020)). And, in Paragraph 9, "[i]n its guidance document, the

government relays that, while electronic submission of a blank ballot carries some risk, the security risk related to electronic submission is far more severe and cannot be mitigated even with controls." *See* 51, ¶ 9. Plaintiffs admit Paragraph 8—that the Defendants are so informed—yet, cite the statement as inadmissible hearsay.

It is axiomatic that testimony can be offered for the non-hearsay purpose of showing the effect on state of mind. Here, the federal guidance document is non-hearsay because it is being offered for the effect it had on the Defendants' state of mind in choosing not to entertain electronic submission of ballots. And, Plaintiffs expressly admit that the Defendants' were aware of and informed by the foregoing document. Thus, the exception squarely applies, *Wolfson v. Mut. Life Ins. Co. of New York*, 455 F. Supp. 82, 87 (M.D. Pa.), *aff'd,* 588 F.2d 825 (3d Cir. 1978) (testimony of a "business partner concerning his overhearing of assurances given by the insurance agent, did not constitute hearsay since the existence of such assurances was itself in issue at trial and was offered directly to show effect upon decedent's state of mind."). This is in addition to other hearsay exceptions that apply, including the public record exception. These facts, therefore, are admissible evidence.[1]

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[1] Moreover, the Court can take judicial notice of the federal government document. *See Sturgeon v. Pharmerica Corp.*, 438 F. Supp. 3d 246, 257 (E.D. Pa. 2020) ("Courts will, however, take judicial notice of certain matters of public record…examples of matters of public record include 'Securities and Exchange

**B. The Plaintiffs failed to establish that there remains an actual controversy regarding the implementation of a RBMS.**

Plaintiffs claim that the Defendants are seeking summary judgment in relation to "future actions." This argument does not square with the facts, however. The Defendants have been, and are currently, implementing an RBMS. This is not an aspiration or an ambition; they are procuring the tool right now.

The evidence shows, and the Plaintiffs admit, that the Defendants are now "finalizing the procurement process to secure a fully accessible [RBMS] for the November 2020 General Election, with full confidence that the RBMS will be implemented by September 1, 2020." Doc. 54, ¶ 1. The record reflects that the contract is reaching the end of the procurement process, with the final step being approval by the Office of Attorney General. *See* Marks Tr., 106-13; 122, 170. The Plaintiffs' attempt to cast the Defendants' action as speculative or aspirational is wrong and wholly unsupported by the record. The RBMS is actually, currently, and presently being procured and implemented, and the process has been ongoing for months.

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Commission filings, court-filed documents, and Federal Drug Administration reports published on the FDA website.'").

[2] A true and correct copy of the Marks Supplemental Declaration is attached hereto as Exhibit "A."

[3] This remains true despite the fact that the Plaintiffs' requested relief has now morphed into a complete "remedial plan" wherein they seek oversight and testing responsibilities over the Department of State's voting systems. This is neither fair,

Plaintiffs claim that the Defendants are not entitled to relief because they did not waive privilege and confidentiality protections, and disclose the identity of the vendor, during the approval process (which could have jeopardized the months-long process). But, this does not create a controversy. The Plaintiffs did not plead relief in the form of an order directing a contact with a specific vendor, containing certain contract terms, for a tool that meets certain specifications. Indeed, in connection with their motion, they state only that "[a]ccessible ballot delivery and marking tools exist and are commercially available from private vendors and through open-source platforms," and that "accessible ballot delivery and marking tools integrate into a single document the candidate list and the means for the voter to designate their choices." Doc. 49-1, ¶¶ 71, 74. The Defendants have confirmed, throughout this litigation, that they are procuring such a tool for the General Election and all future elections.

Defendants are in a position to share additional information regarding the tool, but summary judgment is properly granted in favor of the Defendants' even without this information. Defendants can confirm that they have nearly finalized the process to purchase OmniBallot, a long-term RBMS that has been used in over 15 states over the last decade. Marks Supp. Dec., ¶ 9.[2] The purchasing contract is for an annual service period subject to annual renewals through the issuance of

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[2] A true and correct copy of the Marks Supplemental Declaration is attached hereto as Exhibit "A."

purchase orders off the Statewide Software Contract. The vendor of the RBMS, Democracy Live, has been added to the Statewide Software Contract. Marks Supp. Dec., ¶ 9.

The RBMS is a cloud-based platform that will allow county election officials to upload their ballot definition files exported from their county's election management software associated with the voting system in use in that county. The RBMS will then create an accessible ballot. Once an eligible voter requests a ballot, the system will create a web-based link which will be provided to the eligible voter. The eligible voter will be able to open the link, which will take the eligible voter to her accessible ballot. Marks Supp. Dec., ¶ 10.

Once the eligible voter accesses her ballot through the link, the eligible voter will be able to vote the accessible ballot by marking her choices. Marks Supp. Dec., ¶ 11. The accessible ballot will support a variety of different assistive technologies. There are no restrictions on the eligible voter as to what type of assistive technology she chooses to use to mark her ballot. Marks Supp. Dec., ¶ 12. The web-based link, containing the accessible ballot, can be sent via email directly to the eligible voter through the RBMS or from a County Board of Elections email address. Marks Supp. Dec., ¶ 13. In order to obtain an accessible absentee ballot or mail-in ballot, an eligible voter will need to submit an application as required by statute and will additionally need to request an accessible ballot. Once an

application has been submitted, the appropriate County Board of Elections must either approve or reject the application. Marks Supp. Dec., ¶ 14.

There will be testing of the RBMS once it has been purchased. Marks Supp. Dec., ¶ 15. Testing will also include consulting with the Commonwealth's Accessibility Coordinator and the Commonwealth Office of Vocational Rehabilitation to ensure RBMS works efficiently for eligible voters. Marks Supp. Dec., ¶ 15.Training options will be available for the County Boards of Elections. Marks Supp. Dec., ¶ 16.

In sum, the record reflects that there is no controversy, because an RBMS will be in place, and a contract is almost finalized. Moreover, the vendor chosen by the Defendants is one suggested by the Plaintiffs. Two of the letters cited by the Plaintiffs (Docs. 49-25, 49-27) specifically name and recommend Democracy Live. Defendants have chosen the best state-of-the-art tool, which also happens to be the tool that the Plaintiffs want. This case is a true example of the lack of meaningful, actual and real controversy.[3]

Additionally, while Plaintiffs' re-packaged Defendants' straightforward "no controversy" defense into their own theories—their claims still fail. Indeed, the Defendants invoke the "voluntary cessation" doctrine, which, it turns out, applies

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[3] This remains true despite the fact that the Plaintiffs' requested relief has now morphed into a complete "remedial plan" wherein they seek oversight and testing responsibilities over the Department of State's voting systems. This is neither fair, warranted, nor supported by the pleadings.

to this case in favor of the Defendants. Indeed, the seminal case cited by the Plaintiffs is a case in which the Third Circuit found that the voluntary cessation doctrine applied in favor of the defendants.

In *Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301 (3d Cir. 2020), the Third Circuit acknowledged that developments can moot a case. The Court noted that courts are hesitant to find a case moot when action was taken only after a lawsuit is filed, but that the doctrine may still apply, nonetheless. Particularly, the Third Circuit stated that, "[o]ne scenario in which we are reluctant to declare a case moot is when the defendant argues mootness because of some action it took unilaterally *after* the litigation began. This situation is often called '[v]oluntary cessation,' and it '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 (emphasis added). The Third Circuit stated that, "the defendant's reason for changing its behavior is often probative of whether it is likely to change its behavior again." *Id.* The Court is skeptical of defendants who claim that the "injury will not recur, yet maintains that its conduct was lawful all along. On the other hand, if the defendant ceases because of a new statute or a ruling in a completely different case, its argument for mootness is much stronger the focus is on whether the defendant made that change unilaterally and so may 'return to [its] old ways' later on." *Id.* at 307. Against that backdrop, the Court held that the voluntary

cessation doctrine applied to the union defendant's actions in discontinuing fees. The Court ruled that, due to a change in law, the union was unlikely to reinstitute fees that were prohibited.

Here, to the extent that the Defendants' actions are considered "voluntary cessation" –the doctrine applies in their favor. In the first place, the Defendants started procuring a RBMS *before* this lawsuit was filed. They did not wait to act until they were sued. Additionally, the Defendants have not had a history of providing inaccessible paper ballots such that there are "old ways" for them to return to. There are no "old ways." Act 77 was passed on October 31, 2019, and within months of its passage, Defendants started the process of obtaining a vendor for an accessible tool. Although the bureaucratic process did not allow for a vendor to be chosen by the primary, one will be chosen, and an RBMS will be in place, for the General Election in November (the very first one using mail-in ballots), and all elections moving forward.

Thus, if there were ever a case where voluntary cessation applies, it is this one, where the Defendants acted before they were sued, and did so promptly after legislation was passed allowing the underlying new method of mail-in voting.

C. **Plaintiffs have not created a genuine dispute of fact that blind voters are excluded from mail-in voting because some do not have printers**.

No one in Pennsylvania is afforded the right to cast their ballot electronically. Not a single voter in the history of the Commonwealth has e-mailed or faxed his vote. This is not a case in which certain groups are allowed to electronically submit their ballot, and others are not. There is consistency across the board in relation to inability to vote by electronic means.

Plaintiffs claim that blind voters are treated differently because they have to print their ballots. But, this ignores the reality that blind voters have requested to use their computer and screen access software to receive and mark their ballots. This sets blind voters apart from non-disabled voters. In other words, Plaintiffs do not contend that the fact that blind voters use computers to vote, while non-disabled persons do not have to, evidences discrimination. So, following that logic, the fact that blind voters have to print their ballots does not suddenly make the process discriminatory. Additionally, while Plaintiffs claim that some blind persons may not have printers, the same logic holds true with computers. Some blind voters may not have computers, or any assistive devices at all. This does not mean that the process is discriminatory. The Plaintiffs cannot have it both ways.

In sum, the Plaintiffs have no proffered any meaningful argument that blind persons are excluded from a benefit that is available to every other voter. No one submits their vote electronically in Pennsylvania. And, the record indicates that blind voters can print, and have mailboxes, and are able to send mail, and send out

documents with live signatures. Summary judgment is properly granted in favor of the Defendants with regard to Plaintiffs' electronic submission claim.

### D. **Defendants' directives to the counties are reasonable, and moot any purported harm claimed by Plaintiffs.**

Although blind persons are not excluded from voting because they have to mail-in their mail-in ballot like all other voters, the Defendants have gone above and beyond to implement a solution, within their authority, to promote inclusivity.

As noted, the Defendants have some authority with respect to the counties in relation to envelopes. Plaintiffs admit that the Secretary of the Commonwealth "has the authority to prescribe the size and shape of secrecy and ballot return envelopes for each absentee and mail-in ballot." 25 P.S. §§ 2621(a). The Defendants do not, themselves, send out mail-in ballots or envelopes to anyone. Under the foregoing authority, the Defendants have resolved to issue a directive to the counties in advance of the General Election directing the counties to mail the secrecy envelope and the return envelopes addressed to the respective voter's County Board of Elections at the same time that their ballot is delivered electronically. The Defendants will direct that the return envelope is larger than the secrecy envelope so that the envelopes are distinguishable, and the electronic instruction will indicate as such. With respect to voters who apply to use the RBMS to receive and mark their ballots, Defendants have resolved to issue a directive to the counties in advance of the General Election directing the counties

to accept the return envelope as long as a signature appears anywhere on the envelope.

The Plaintiffs do not seriously contest that this solution solves their concerns regarding mailing. The distinguishable envelopes will allow blind voters to easily place the smaller secrecy envelope into the larger return envelope. Moreover, there is no issue about a blind voting having to write-out the address portion, and, in this election, even postage is being provided. This alleviates all of the problems that the Plaintiffs have scoured the record to find for mailing and return. Notwithstanding, they claim that even this solution falls short.

As to the envelopes, Plaintiffs assert that the plan is insufficient because, instead of allowing blind persons to sign anywhere on an envelope, they should be required to sign between two hole punches. Plaintiffs contend that this will preserve their privacy. This is a *non sequitur*. The presence of holes punches will more obviously distinguish the envelopes. There could also be confusion if the voter does not land the signature between the marks. Allowing flexibility for the signature anywhere on the envelope promotes greater accessibility. This is true despite the Plaintiffs' arguments that blind persons may accidentally deface the address portions. This argument falls short, as there is little dispute that blind persons, like all persons, can feel the back of an envelope. There is no genuine dispute of fact here warranting denial of summary judgment.

And, the cases cited by the Plaintiffs' only lend support to Defendants' case. Plaintiffs invoke, again, the voluntary cessation doctrine, which, again, counsels in favor of the Defendants. Plaintiffs cite three non-precedential cases with wholly distinguishable facts. In those cases, the defendants only took action after filing suit, following patterns of violations.

In *Nat'l All. For Accessibility, Inc. v. McDonald's Corp.*, 2013 WL 6408650 (M.D. Fla. Dec. 6, 2013), the defendants failed to update their facility to comply with accessibility standards for a number of years. Defendants only brought the property up-to-date after the lawsuit was filed, and then moved for dismissal on grounds of voluntary cessation. The Middle District of Florida ruled against the defendants, holding, "[g]iven that [d]efendants' cessation of the alleged violations took place only after suit was filed, the Court finds that [d]efendants' compliance is more closely related a desire to short-circuit litigation *than to a genuine change of heart…*" *Id.* at *6 (emphasis added).

In *Cottrell v. Good Wheels*, 2009 WL 3208299, at *5 (D.N.J. Sept. 28, 2009), the court held that voluntary cessation did not apply to an ADA-retaliation claim. The Plaintiff brought suit after he was banned from a car dealership for complaining about abuse of handicapped parking spots. The Defendant agreed to lift the ban after suit was filed but the court declined to dismiss the suit. The court ruled that "[t]he timing of Defendants' offer to rescind, as well as the ease by

which Defendants could conceivably re-institute the ban, convince the Court that the alleged injury could reasonably recur absent the requested relief." *Id.* And, finally, in *Ali v. City of Newark*, 2018 WL 2175770, at *2 (D.N.J. May 11, 2018), the court declined to apply voluntary cessation when the city adopted new guidelines for providing for ASL interpreters, after the City repeatedly failed to provide the plaintiff with an ASL provider, and employees had belittled him.

There are no similar facts here. While Defendants resolved to issue the directives regarding the envelopes and the declaration after this lawsuit was filed, it was not after a pattern of inaction. Indeed, mail-in ballots were just instituted in Pennsylvania within the past year. This is the first General Election for which mail-in ballots will be used. Defendants are already implementing solutions.

And, the Plaintiffs did not campaign for electronic submission of the ballot, or place the Defendants of ongoing issues with voters being unable to return ballots, or lack of printers. Plaintiffs never claimed that the UOCAVA system was inadequate, which involves printing and mailing ballots. No one has sued the Defendants on this topic. Even further, the Plaintiffs stipulated to manual return of the AWIBs at the TRO, and did not contest the method of return for the Primary Election. There is no ongoing history of ignoring a known issue. Thus, the directives are not a "change of heart" because the program is now just be

implemented. Defendants are within the first year of mail-in balloting, and are already acting.

In sum, there is no need for a trial on the envelopes because the Defendants' solution is reasonable, and within their authority. It is not the Defendants who send envelopes to voters, the counties do, and the Defendants are using their statutory authority to do what they can to improve accessibility.

### E. The issue of electronic submission is not premature, and it is clear from the record that it would be a fundamental alteration.

Plaintiffs contend that electronic submission is reasonable and would not constitute a fundamental alteration to Pennsylvania's voting programs. They cite a case where a fee was waived to show that disabled persons can be eligible for a benefit beyond that afforded to non-disabled. But this is not a case about a fee.

Plaintiffs are requesting that the Defendants modify their voting systems on the eve of a General Election to allow, for the first, electronically submitted ballots. Plaintiffs are requesting that Defendants allow electronic submission when they acknowledge that the Defendants are aware of and informed by guidance from four federal agencies that recommends "paper ballot return as electronic ballot return technologies are high-risk even with controls in place" *See* 51, ¶ 8. They do not dispute that there is a risk, but instead claim that "any security concerns can be mitigated." Doc. 55, p. 24. That is unacceptable and plainly a weakening of the Defendants' system. Accepting any risk in this process is unacceptable to the

Defendants, and would constitute a fundamental alteration, despite the Plaintiffs' claims that risks can be mitigated.

Defendants do not have to diminish their program as an accommodation, and this case presents a clear example of a situation wherein it would be unreasonable to require the requested accommodation. Electronic submission would be a fundamental alteration when: it has never been available for any voter; all agree that there are risks (Plaintiffs just claim that they can be mitigated); and, four agencies of the federal government counsel against it (all on the eve of the election during a pandemic).

Again, if there were ever a case in which fundamental alteration can be decided from the record, this is the case. A novel change to a voting system to provide a method of voting that has never been approved in Pennsylvania, and that is advised against by the F.B.I. and Homeland Security, among other agencies, is not reasonable nor required.

## V. CONCLUSION

For the foregoing reasons, because Plaintiff has failed to establish a genuine dispute of material fact, and the Defendants' are entitled to judgment as a matter of law, Defendants' Motion for Summary Judgment should be granted.

**Respectfully submitted,**

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**Attorney General**

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**Date: August 7, 2020**

**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* |

**CERTIFICATE OF SERVICE**

I, Nicole J. Boland, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on August 7, 2020, I caused to be served a true and correct copy of the foregoing document to the following:

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

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**CERTIFICATE OF WORD COUNT**

I, Nicole J. Boland, Deputy Attorney General, hereby certify that the Reply Brief in Support of Motion for Summary Judgment filed on August 7, 2020 has 22 pages and is within the 25 page limit set by this Honorable Court.

***s/ Nicole J. Boland***
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Deputy Attorney General