IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CARSHENA GARY, *et al.*,	)	
	)	
	)	
Plaintiffs,	)	
	)	
	)	
v.	)	Civil Action No. 1:20-CV-860
	)	
VIRGINIA DEPARTMENT OF ELECTIONS, *et al.*,	)	
	)	
	)	
	)	
Defendants.		

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants the Virginia Department of Elections and its Commissioner, Christopher Piper, as well as the Virginia Board of Elections and its officers, Robert H. Brink, John O'Bannon, and Jamilah D. LeCruise (collectively, the Commonwealth Defendants), are in the midst of final preparations for the November 3, 2020 General Election. Early voting begins in just 28 days. The General Assembly's passage of laws changing absentee voting to early voting has necessitated an intensive effort at the Department to ready its IT system to accommodate the changes. The COVID-19 pandemic dramatically increased the number of voters who will vote early and placed increased burdens on election officials by requiring the procurement of PPE and sanitizing supplies for both the General Registrars' Offices and every polling location. State and local election officials are working diligently to ensure the safety of voters and poll workers and to ensure that the election will be conducted with fairness and integrity.

But Plaintiffs' Complaint and Motion for Preliminary Injunction arrive so late in election season that their requested relief, if granted, could imperil the Commonwealth's ability to deliver a safe and secure election for the electorate as a whole. Plaintiffs suggest it would be relatively easy for Virginia to provide ballots that print disabled individuals can receive electronically and electronically mark. Unfortunately, Plaintiffs misunderstand the capabilities of Virginia's electronic ballot transmission process, which allows only for electronic transmission. To provide electronic ballot marking capabilities, an entirely new system would have to be procured and the system implemented without the benefit of testing or the certification required by the Virginia Information Technologies Agency (VITA). This effort would fundamentally alter and could imperil early voting in Virginia by diverting resources from the many emergent needs facing Virginia in its administration of the 2020 General Election. Accordingly, Plaintiffs are not likely

to succeed on the merits of their claim because they cannot show that the accommodation they seek is a reasonable one, such that the Commonwealth Defendants' failure to provide it violates Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*. (ADA) or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (§ 504). Plaintiffs will be similarly unable to show that the balance of equities favors the entry of an injunction, or that the injunction they seek is in the public interest in the context of the 2020 General Election.

The Commonwealth Defendants acknowledge that ensuring all eligible voters have access to the ballot is one of their fundamental responsibilities. Further, the right of all eligible voters to access the ballot is, in itself, always in the public interest. However, the specific accommodations Plaintiffs' request, particularly in light of the limited time remaining before Election Day, may threaten the Commonwealth Defendants' ability to deliver a safe, secure, and pure election for all of Virginia's 4.5 million voters. Such a change will not best serve the public interest in the context of this presidential election occurring in the midst of a pandemic. Accordingly, Plaintiffs' request for a preliminary injunction should be denied.

STATEMENT OF FACTS AND PROCEDURAL POSTURE

State and Local Election Officials

Elections in Virginia are accomplished through the coordination and cooperation of the Commonwealth Defendants and local election officials – general registrars and electoral boards. The Commonwealth Defendants provide guidance to local election officials to "obtain uniformity in their practices and proceedings and legality and purity in all elections." Va. Code § 24.2-103. Additionally, the State Board of Elections "make[s] rules and issue[s] instructions and provide[s] information consistent with the election laws to the electoral boards and registrars to promote the proper administration of elections laws." *Id*. The local election officials are the

interface between the voter and Virginia's election infrastructure. General registrars receive voter registration applications, Va. Code § 24.2-411 *et seq.,* and voters' applications to vote early. Va. Code § 24.2-701. General Registrars prepare ballots, and following approval by the State Board of Elections, print the ballots. Va. Code § 24.2-612. It is the General Registrars who mail and receive ballots voted by mail, and it is the general registrar and local electoral board members who conduct the canvass following Election Day and tabulate the election results. Va. Code § 24.2-655.

Virginia Election Registration and Information System (VERIS)

A primary way that state and local election officials cooperatively and timely and exchange of information is through VERIS. *See* Declaration of Christopher E. Piper at ¶ 7 (Ex. A). VERIS is an IT system that maintains the list of registered voters, voter history, and assists the General Registrars in generating mailings and reports, including reports of which voters are to receive ballots by mail and which voters qualify as Uniform Military and Overseas (UOCAVA) voters. The Virginia elections community heavily relies on VERIS to ensure the accuracy of voter lists, to ensure that information on a voter's status is accurate and to ensure that all election officials are able to simultaneously access and share voter information. *See id*. at ¶ 10.

The Virginia Department of Elections Citizen Portal serves as the outward facing tool through which information is fed into VERIS. *See id*. at ¶ 11. The Citizen Portal allows qualified individuals to register to vote, voters to confirm their polling place and view the candidates who will appear on their ballot, and voters to request a mailed ballot. *See id*.

The forty-five days leading up to an election, particularly the 2020 General Election where voter turnout is expected to be very high, see an almost constant use of VERIS. *See id*. at

12. A VERIS outage during any of the forty-five days prior to the November 3, 2020 would result in the potential disenfranchisement of any voter who attempted to vote in person or who attempted to complete an application to request a mailed ballot or to complete a registration application. *See id*. For example, during 2016, the VERIS system malfunctioned and then crashed on multiple occasions in the week leading up to the close of voter registration. *See New Virginia Majority Education Fund v. Virginia Department of Elections*, No. 1:16cv1319 (E.D. Va). Were it not for this Court's order extending the deadline for the close of voter registration, many Virginians would have been prevented from registering for and voting in the 2016 General Election. *Id*.

Absentee Voting

Prior to July 1, 2020, Virginians were only permitted to vote prior to Election Day if they had a statutorily approved excuse for why they would be unable to appear at their polling place on Election Day. Va. Code § 24.2-700 (2019), *amended by* Acts of General Assembly 561, 1149, 1151, and 1201 (2020). In order to secure an absentee ballot, the voter completed an absentee ballot application on which she supplied her reason for her inability vote on Election Day. *Id*. A qualified voter could either request that a ballot be mailed to her or she could vote in-person at her general registrar's office. *Id*.

No Excuse Absentee Voting – July 1, 2020

Virginia no longer requires qualified voters to provide an excuse to vote prior to election day. *See* Declaration of James M. Heo at ¶¶ 6-7. The November 2020 General Election will be the first election in Virginia in which any Virginia may vote by mail or in person at a general registrar's office during the forty five days prior to the general election. *See id*. at ¶ 8. Sometimes called no-excuse absentee voting or early voting, it permits Virginians to vote prior

to the election without having to supply an excuse for why they would be unable to vote at their polling place on Election Day. Va. Code § 24.2-700. Extending the days available to voters to vote does not relax Virginia's well-established absentee voting system containing check and balances to ensure that the voter requesting the ballot is qualified to vote. *See generally* Va. Code § 24.2-700 et seq.

Substantial Department Efforts Continue to Ready VERIS for Early Voting

Once new elections legislation was signed into law in April, the Department was able to begin work on the VERIS system overhaul required to accommodate early voting. *See* Heo Decl., ¶ 8. A No Excuse In-Person Early Voting project team formed with 17 Information System resources with an average project commitment at 75% of their overall time. *See id*. at ¶ 16. 7,239 Information Systems resource hours have been expended to support the technological infrastructure for No Excuse In-Person Early Voting requirements. *See id*. at ¶ 15. Thus far, three releases have been rolled out to production – a June release, a July release, an August release. *See id*. at ¶ 14. A fourth release is scheduled for September 9, 2020. *See id*.

Significant changes could not be made until after July 1, 2020, because there were elections in certain Virginia localities at the end of June where traditional absentee voting laws remained in effect. *See id*. at ¶ 11. Despite the fact that the information systems team at the Department began this work as soon as permissible given the need to maintain the prior system through all elections prior to July 1, 2020, these modifications are not expected to be completed until September 9, 2020. *See id*. at ¶ 12. This initiative ultimately resulted in one of the widest scopes to date in the required updates needed to VERIS to comply with the legislative mandates of the 2020 session. *See id*. at ¶ 17.

Electronically Transmitted Ballots

Virginia offers electronic transmission of ballots to qualifying Virginia uniformed service members and overseas voters (UOCAVA voters) who request to receive the ballots electronically. Va. Code § 24.2-706(D). In 2019, the Department purchased MyBallot because it believed it would help improve the efficiency and security of the process used by general registrars to send ballots electronically to UOCAVA voters. *See* Heo Decl. at ¶ 18. In order to use this product, the Department had to request an exemption from the Virginia Information Technology Agency's (VITA) Enterprise Cloud Oversight Service (ECOS) program. *See id*. at ¶ 20. The ECOS program is intended to ensure compliance with VITA's security standards. *See id*. at ¶ 21. The Department takes very seriously cyber security issues particularly given the threats experienced during the 2016 election cycle and appreciates the review and guidance of Virginia's Information Technology Agency with respect to the its use of voting systems. In this case, the Department was able to secure an exemption by requesting that the vendor implement certain product adjustments to remove all external access to personally identifiable information. *See id*. at ¶ 22. This process took several months and significantly delayed the implementation of the tool. *See id*. at ¶ 23.

Department representatives believed that this that the MyBallot voting system contained an additional feature that would allow a voter to remotely mark the ballot. *See id*. at ¶ 34. Because 24.2-706(D) permits ballots to be transmitted electronically only to UOCAVA voters who specifically request them, the Department did not investigate the remote marking feature. More recently, however, the vendor clarified that the ballot marking tool was a separate product that would either need to be purchased through a different reseller or directly from the product developer. *See id*. at ¶ 35. Like the MyBallot system purchased in 2019, any RAVBM system

would also need to receive approval or an exemption from VITA, a time consuming process that would not be complimentary to the 2020 election cycle.

Accessible Voting in Virginia

If a qualified voter requires assistance in voting, they may complete an application for an absentee ballot. Va. Code § 24.2-704. On receipt of an application for an absentee ballot from an applicant marked to indicate he will require assistance, the general registrar then delivers, along with the items required by Virginia Code § 24.2-706, the voter assistance form furnished by the State Board pursuant to Virginia Code § 24.2-649. Otherwise, if a qualified voter who requires assistance to vote by reason of physical disability or inability to read or write may, if he so requests, be assisted in voting in person. Va. Code § 24.2-649(B). If he is blind, he may designate an officer of election or any other person to assist him. *Id.*

Implementing a new voting system so close to an election occurring during unprecedented times could have drastic consequences

VERIS is an essential tool used by the Department and by the General Registrars every single day during the election – September 19 – November 3. *See* Piper Decl. at ¶ 26. The stress on the system will be unprecedented due to the fact that VERIS will be used for the purposes of early voting administration for the first time ever and there will be an unprecedented number of voters seeking to vote by mail. *Id*. Most local election officials use VERIS to verify whether a voter is qualified to cast a ballot. *See id*. at ¶ 27. VERIS being used for early voting administration during business hours at least five days a week, six for the localities that maintain Saturday hours, means that there are very limited windows in which the Department can implement any additional changes to the system. *See id*. at ¶ 28.

In addition to the added stress of early voting administration, it is highly unusual for the Department to make changes to any system 60 days before an election because it poses a considerable risk. *See id*. at ¶ 29. Any change during this 60 day window would have to be applied to a production environment, while the system is simultaneously being used to process transactions such as registrations, absentee applications, and early voting. *See id*. at ¶ 30. Roll outs to production systems can limit the access for local election officials and any potential issues can have substantial impacts on their business processes. *See id*.

It is simply impossible to have a functional RAVBM system in place before September 19, 2020 given the procurement process as well as the necessary testing and certifying of the equipment. *See* Heo Decl. at ¶ 42. The earliest time that a RAVBM system could be in place for voters, assuming no internal or external factors that impact the Department's ability to provide sustained attention to the development of the toll would be October 15. *See id*. at ¶ 31. October 15 is just 19 days prior to Election Day. In addition to adding additional permutations to the Citizen Portal, ELECT will need to redesign the current paper application form. *See id*. at ¶ 45. VERIS will have to be reprogramed so that it can process the redesigned paper early voting application. *See id*. at ¶ 46. Implementing the required updates would necessitate code and infrastructure changes to both VERIS and the Citizen Portal. *See id*. at ¶ 47. New pushes to production run the risk of causing potential outages at a time of significant operational loading. *See id*. at ¶ 48. New builds always carry the risk of affecting system integrity; especially in high traffic conditions as exist during early voting. *See id*. at ¶ 49.

Following its own and industry best practices, the Department typically maintains a code and infrastructure freeze of 60 days prior to a major election. *See id*. at ¶ 50. Because current

resources do not permit development and implementation of this new tool until September 9, the implementation for the ADA related changes will run into the freeze period and has the potential to cause the system outages. *See id*. at ¶ 51. The major concern is that making changes to the system any time in the 45 days leading up to election could interrupt the voting process and possibly the integrity of the election as a whole. *See id*. at ¶ 51.

Locality Adoption and Use of RAVBM

Of the approximately 130 localities, only 25 localities are familiar with the MyBallot system and even fewer have used the system to send ballot to UOCAVA voters. *See id*. at ¶ 53. In the event that RAVBM cleared the necessary procurement and security hurdles and the Department was able to get it up and running before November 3, it is unclear how many localities would have the time to participate in training in the midst of early voting. *See id*. at ¶ 54. For the localities that email PDF ballots to UOCAVA voters, the Department is not aware at this time of a solution that will assist with ballot marking for electronic ballots delivered by email. *See id*. at ¶ 55-56.

Procedural Posture

Prior to this case, the parties had only minimal interactions regarding Plaintiffs' request for electronic delivery of ballots for absentee voters with print disabilities. On September 27, 2019, Plaintiff the National Federation for the Blind of Virginia (NFBV) submitted a letter to the Commonwealth Defendants, "reminding them" that the ADA and § 504 require that voters with disabilities have an equal opportunity to cast private and independent absentee ballots. Compl. ¶ 107. Although this letter provided information regarding accessible electronic systems, it stopped short of requesting any specific accommodation for individuals with print disabilities. Defendant Commission Piper responded on October 19, 2019, affirming the Commonwealth

Defendants' commitment to complying with the ADA and § 504 by ensuring that all voters are able to cast ballots in elections in Virginia. Notably, the parties exchanged these letters prior to the General Assembly's decision to expand absentee voting to all eligible voters, even to those without an excuse, a change that took effect on July 1, 2020.

The Commonwealth Defendants received no additional communications from Plaintiffs until April 21, 2020, when NFBV sent another letter to Commissioner Piper in which it specifically requested that the Commonwealth consider implementing a remote access vote by mail (RAVBM) tool.[1] Compl. ¶ 109. The parties subsequently communicated twice, on May 1, 2020 and again on July 9, 2020. Compl. ¶¶ 110-11. Commissioner Piper informed the NFBV that the Commonwealth's RAVBM tool—the myBallot KNOWiNK system—had only been tested in a single county, would only be expanded for use in a few other counties, and could not be made available to voters with disabilities due to the limited statutory ability of the Commonwealth Defendants to distribute ballots electronically under the Virginia Code. Compl. ¶ 111.

Despite having been aware of the limitations of the Commonwealth's RAVBM system, Plaintiffs did not file their lawsuit until July 27, 2020—less than two months before early voting was set to begin. ECF No. 1. The Commonwealth Defendants waived service of the Complaint on July 31, 2020. ECF No. 9. Plaintiffs subsequently filed their Motion for Preliminary Injunction on August 10, 2020. ECF No. 20. A hearing on that Motion has been set for August 28, 2020, only twenty-one days before ballots must be made available to early voters as a matter of Virginia state law, and only sixty-seven days prior to the 2020 General Election. ECF No. 23.

[1] Plaintiff American Council of the Blind of Virginia sent a substantively similar letter to Commissioner Piper on June 28, 2020. Compl. ¶ 112.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). Rather, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* (citation omitted). In all cases, the party seeking injunctive relief (here, Plaintiffs) "must establish [1] that [they are] likely to succeed on the merits, [2] that [they are] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in their favor, and [4] that an injunction is in the public interest." *Id.* at 20.

ARGUMENT

I. Plaintiffs are not entitled to a preliminary injunction under *Winter*.

Plaintiffs cannot show that a preliminary injunction is warranted in this case because they are not likely to succeed on the merits of their claim in the context of the 2020 General Election, and because the balance of equities and the public interest do not favor injunctive relief. Plaintiffs' requested accommodation is not reasonable; requiring this change such a short time before the election will fundamentally alter and unduly burden Virginia's absentee voting program such that it could imperil the integrity of the election as a whole. Risking the safety and integrity of the process surrounding any election is never in the public interest, but this is particularly true of a presidential election occurring in the middle of a global pandemic. The balance of the equities, therefore, weighs heavily in favor of maintaining the status quo through the completion of the 2020 General Election. The request for a preliminary injunction, therefore, should be denied.

A. Plaintiffs have not established that they are likely to succeed on the merits.

Relying heavily on the Fourth Circuit's decision in *National Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016), Plaintiffs suggest that the ADA and § 504 require the Commonwealth Defendants to provide the relief they seek: a RAVBM tool that allows for electronic ballot marking. But the facts before the Court, particularly the time frame within which the Commonwealth Defendants would have to implement an entirely new process prior to the 2020 General Election, markedly distinguish this case from *Lamone*. The requested accommodation will fundamentally alter and unduly burden the Commonwealth's absentee voting process. Plaintiffs, therefore, have not requested a reasonable accommodation for their disabilities, and have not stated a claim that is likely to succeed under the ADA or § 504.

1. The ADA and § 504 prohibit discrimination against people with disabilities.[2]

Both Title II of the ADA and § 504 of the Rehabilitation Act prohibit discrimination against people with disabilities. Title II of the ADA provides that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. Similarly, § 504 provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794.

[2] In addition to claims under the ADA and § 504, the Complaint includes a claim arising under the Virginians with Disabilities Act, Va. Code § 51.5-1, et seq. (VDA). "'The VDA standards for liability follow the standards established in the federal Rehabilitation Act of 1973 and adopted in the ADA.'" *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 669 n.6 (4th Cir. 2019) (quoting *Tyndall v. Nat'l Educ. Ctrs. Inc.*, 31 F.3d 209, 216 (4th Cir. 1994)). All references herein to the ADA and § 504, therefore, also incorporate Plaintiffs' claims under the VDA.

In order to state a claim under the ADA, a plaintiff "must allege that (1) she has a disability, (2) she is otherwise qualified to receive the benefits of a public service, program or activity, and (3) she was excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of her disability." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F. 3d 474, 498 (4th Cir. 2005). The Fourth Circuit has made clear that claims under the ADA's Title II and Section 504 "can be combined for analytical purposes because the analysis is substantially the same." *Seremith v. Bd. of Cty. Comm'rs Frederick Cty.*, 673 F.3d 333, 336 n.1 (4th Cir. 2012). The causes of action "differ only with respect to the third element, causation. To succeed on a claim under the Rehabilitation Act, the plaintiff must establish he was excluded solely by reason of his disability; the ADA requires only that the disability was a motivating cause of the exclusion." *Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 750 (4th Cir. 2018) (internal quotations omitted).

2. Plaintiffs cannot show that they will be excluded from the Commonwealth's absentee voting program in the 2020 General Election on the basis of their disabilities.

In light of the allegations in the Complaint, and the facts asserted in the declarations which were attached as exhibits to the Memorandum in Support of Plaintiffs' Motion for Temporary Injunction, the Commonwealth Defendants do not contest, for the purpose of litigating the Motion for Preliminary Injunction only, the sufficiency of Plaintiffs' evidence as to the first two elements of a discrimination claim under the ADA and § 504.[3] Specifically, the Commonwealth Defendants do not at this time contest that Plaintiffs: (1) have a disability, and

[3] The Commonwealth Defendants make this concession only for the purposes of litigating Plaintiffs' Motion for Temporary Injunction, and reserve the right to contest the sufficiency of those elements in later stages of this proceeding.

(2) are otherwise qualified to vote by absentee ballot in the upcoming November 2020 General Election. Moreover, the Commonwealth Defendants do not dispute—again, for the purposes of litigating the Motion for Preliminary Injunction only—that the current paper absentee ballot does not provide individuals with print disabilities with a private and independent voting option. Nonetheless, Plaintiffs cannot satisfy the third element of a disability discrimination claim; that is, Plaintiffs cannot show that they have requested a reasonable accommodation such that they will be excluded from voting by a private and independent absentee ballot in 2020 General Election on the basis of their disabilities.

a. Plaintiffs must show that the Commonwealth Defendants have failed to make reasonable accommodations in the absentee ballot program.

In assessing this third element of a disability discrimination claim, there are "three distinct grounds for relief: (1) intentional discrimination or disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations." *A Helping Hand, LLC v. Balt. Cnty.*, 515 F.3d 356, 362 (4th Cir. 2008). Plaintiffs here appear to solely contend that the Commonwealth has failed to reasonably accommodate their disabilities by not making available a private and independent option for absentee voting. Compl. ¶¶ 118-19. Specifically, "Plaintiffs seek preliminary injunctive relief in the form of an affirmative order directing Defendants to allow voters with print disabilities statewide to use the Commonwealth's existing RAVBM tool for the November general election." ECF No. 21, p. 11.

As explained by Judge Chasanow in *Adams v. Montgomery College (Rockville)*:

> The requirement that a public institution make reasonable accommodations for disabled individuals finds support in the

> implementing regulations of Title II, which provide that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.'

834 F. Supp. 2d 386, 393 (D. Md. 2011) (quoting 28 C.F.R. § 35.130(b)(7)). In light of this provision of the Code of Federal Regulations, the Fourth Circuit has concluded that the ADA and § 504 require public entities to make reasonable accommodations for persons with disabilities. *See, e.g.*, *Waller v. City of Danville*, 556 F.3d 171, 174 (4th Cir. 2009); *A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356, 362 (4th Cir. 2008).

b. A suggested modification is not reasonable if it imposes an undue hardship on the public entity such that it fundamentally alters the nature of the program.

The Commonwealth Defendants acknowledge and embrace their obligation to make reasonable accommodations to ensure that all eligible people—including those with disabilities—are able to vote, either in-person or by absentee ballot. But "[n]ot all public services, programs, or activities, can be made meaningfully accessible to all citizens, or at least they cannot be made so without a prohibitive cost or unreasonable effort on the part of the public entity." *Lamone*, 813 F.3d at 507. For this reason, plaintiffs in a disability discrimination case arising under the ADA or § 504 "must propose a reasonable modification to the challenged public program that will allow them the meaningful access they seek." *Id.* "A modification 'is not reasonable if it either imposes undue financial and administrative burdens … or requires a

fundamental alteration in the nature of the program.'" *Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454, 464 (4th Cir. 2012) (quoting *Sch. Bd. v. Arline*, 480 U.S. 273, 287 n.17 (1987)); *see also* 28 C.F.R. § 35.164. "Determination of the reasonableness of a proposed modification is generally fact specific." *Lamone*, 813 F.3d at 508 (citation omitted).

c. Plaintiffs' request for an electronic ballot-making tool is not a reasonable accommodation in the context of the 2020 General Election.

Plaintiffs propose that the Court order the Commonwealth Defendants to make an online ballot marking tool available to all voters with print disabilities for the November 2020 General Election. ECF No. 21, p. 11. Because early voting begins on September 19, 2020, the new online tool must also be ready by September 19. Declarations of Christopher E. Piper, Commissioner of ELECT ("Piper Decl."), ¶ 7. Plaintiffs rely heavily on *Lamone* in support of the relief sought. It is the case cited more than any other in their brief - wherein Plaintiffs also claim that "[t]he facts in *Lamone* are distinguishable: Virginia denies voters with disabilities the right to vote absentee without assistance when the technology that would allow those voters an independent and private absentee vote is available. It is settled law that denying so violates the ADA." ECF 21 No. pp. 15-16.

As discussed in more detail below, the facts in *Lamone* are distinguishable from those at issue here. Moreover, Plaintiffs' understanding of the status and capacity of Virginia's current absentee voting system is fundamentally flawed as, for example, they apparently believe that some voters in Virginia already are using an online ballot marking tool – which is not the case. Rather than simply providing individuals with print disabilities with access to an existing service, therefore, Plaintiffs' proposed accommodation would require the Commonwealth Defendants to

acquire and implement an entirely new system in the few short weeks remaining before the 2020 General Election. The proposed relief, therefore, is not reasonable. As a result, Plaintiffs have not shown that they are likely to succeed on the merits and their Motion for Preliminary Injunction must fail.

i. Maryland's Online Ballot Marking Tool in *Lamone*

In *Lamone*, "[t]he National Federation of the Blind and individual disabled Maryland voters sued state election officials under Title II of the [ADA} and Section 504 []. Plaintiffs allege[d] that marking a hard copy ballot by hand without assistance is impossible for voters with various disabilities, and that they have therefore been denied meaningful access to alternate voting." *Lamone*, 813 F.3d at 498. The remedy proposed by the plaintiffs in *Lamone* was "the use of an 'online ballot marking tool' that would enable disabled voters to mark their ballots electronically." *Id*.

Notably, in *Lamone*, such an online ballot marking tool as proposed by the plaintiffs already existed in Maryland. *Id.* at 499. The tool could be used by absentee voters who chose to electronically receive their absentee ballots to electronically mark their choices and then print out a completed ballot. *Id.* Voters would then return a hard copy of their ballot to the local board of elections. *Id.* Moreover, the online ballot marking tool in Maryland was years in the making. "Maryland's Board [of Elections] developed the online ballot marking tool over a number of years, including with the participation of plaintiff National Federation of the Blind." *Id*. The Maryland Board of Elections "solicited feedback and implemented a number of usability and accessibility enhancements for disabled voters." *Id*. The court in *Lamone* further noted that:

> The tool is not compatible with all computer browsers or operating systems, but does function properly with a variety of reasonably up-to-date products.

> Importantly for individuals with certain disabilities, the ability to use the tool on their own computers may enable them to use the personal assistive devices that they ordinarily use to interface with the computer, such as a refreshable Braille display, to mark their ballot choices.

Lamone, 813 F.3d at 499. In short, the Court in *Lamone* was able to make factual findings as to the development, testing and implementation – in other words, the "usability and accessibility" - of online ballot marking tool in the Maryland. As a result, a determination could be made as to whether such a tool was in fact a reasonable accommodation in *Lamone*. As noted in more detail below, no similar determination can be made in the instant case.

ii. Virginia's Absentee Ballot System

In contrast with Maryland, Virginia does not have an online ballot marking tool available to any of its voters. Declaration of James M. Heo, Confidential Policy Advisor at ELECT ("Heo Dec.") ¶¶ 19, 33. Virginia permits ballots to be electronically transmitted to voters pursuant to the Uniform and Overseas Citizens Absentee Act, 52 U.S.C. § 20301 *et seq.* ("UOCAVA"), but only if these voters request that the ballot be sent electronically.

Once the voter requests to receive her ballot electronically, how she receives that ballot varies based on what Virginia locality is her home. Twenty-five localities in Virginia signed up to use MyBallot, a product that sends a secure link that allows the voter to access their ballot online and print it so that they can vote it. At this time, only twenty-one localities have taken the training, while eight localities have completed setting up the product. Heo Dec., ¶¶ 28. The remaining 108 localities use a variety of solutions to manage voter requests for an electronic ballot. The majority of these General Registrars send the ballot as a PDF file to the requesting voter at the email address supplied on the application. Heo Dec, ¶ 31. In either case, the voter

must print out the ballot, mark it, and return the ballot to her general registrar. Heo Decl., ¶¶ 32. Neither option has the capability to allow the voter to mark her choices electronically. Heo Decl., ¶¶ 19, 33. Thus, Plaintiffs' arguments that Virginia currently offers a tool to some voters but not to others who would benefit from the use, is incorrect.

iii. Plaintiffs' proposed modification would fundamentally alter the nature of Virginia's absentee ballot program.

As noted above, unlike the circumstances in *Lamone*, no voters in Virginia currently have access to an online ballot marking tool. Virginia's MyBallot tool permits electronic transmission of the ballot only; it does not have the capability that would allow the voter to mark her ballot online, nor is it capable of electronically returning the voted ballot to the appropriate general registrar. Heo Dec., ¶¶ 19, 33. In order to use the current product, the Department of Elections had to request an exemption from VITA's certification program, the Enterprise Cloud Oversight Service ("ECOS"). The ECOS program is intended to ensure compliance with VITA's security standards. The Department was able to secure an exemption by requesting that the vendor implement certain product adjustments to remove all external access to personally identifiable information. This process took several months and significantly delayed the implementation of the tool. Heo Dec., ¶¶ 18-23

"A fundamental alteration may or may not occur where the proposed modification is waiver of a state rule and where such waiver 'undermines' or is 'at odds' with the purpose of the rule… [I]t is not the mere existence of a contradiction of purpose, but the nature and severity of such a contradiction that matters." *Nat'l Fedn. of the Blind v. Lamone*, 2014 U.S. Dist. LEXIS 123020, *46 (D. Md. Sept. 4, 2014), *aff'd* 813 F.3d 494 (4th Cir. 2016) (citing *Jones v. City of Monroe*, 341 F.3d 474,480 (6th Cir. 2003)). Granting Plaintiffs' proposed modification – access

to an online ballot marking tool – would bypass the above-mentioned ECOS system for that particular tool. Waiving that system would undermine its very purpose completely (*i.e.*, to make sure that the tool being installed is safe and meets the security standards required of state agencies in Virginia) and thus could result in severe consequences. In short, the requested accommodation would result in a waiver of a security system – and potentially security standards - thus fundamentally altering Virginia's absentee ballot system.

Moreover, unlike in *Lamone* - where Maryland had the opportunity to develop, test and successfully implement its existing ballot marking tool over the course of many years – the ECOS security process would be the only opportunity for Virginia to determine the safety and effectiveness of such a tool before implementing it "live" for the first time. Virginia does not have the luxury of time and experience to evaluate a new ballot marking tool to be installed on the eve of a general election.[4] The ECOS system is not merely "a procedural requirement," but rather something integral to resolving any substantive concerns as to the safety and security of the particular tool to be installed and then later implemented for the first time in the context of implementing a general election. Put another way, the ECOS system "goes to the very heart of the voting program by ensuring the integrity of the voting process as a whole. Public confidence in elections is undoubtedly an important governmental concern." *Lamone*, 813 F.3d at 509.

[4] "The State's argument concerning the effect of [Maryland's] certification requirement does not alter this Court's conclusion as to the reasonableness of the modification because that argument glosses over an important fact in this case. A version of the tool was available in [an earlier] election without any apparent incident, which speaks to the reasonableness of the accommodation – the Maryland Assembly's after-the-fact creation of the certification requirement for the online ballot marking tool notwithstanding. While perhaps the analysis would be different if Plaintiffs sought to gain access to an uncertified tool that had never been used in a real-world situation, those are not the precise facts of this case." *Lamone*, 2014 U.S. Dist. LEXIS 123020 at *44-45 (emphasis added).

iv. Plaintiffs' proposed modification would impose an undue hardship on the Commonwealth Defendants.

An undue burden defense presents "a multi-faceted, fact-intensive inquiry, requiring consideration of: (1) financial cost, (2) additional administrative burden, (3) complexity of implementation, and (4) any negative impact which the accommodation may have." *Lamone*, 438 F. Supp. 3d 510, 544 (D. Md. 2020) (*quoting Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 737 (D. Md. 1996)).

Ordering the Commonwealth Defendants to install a new, untested online ballot marking tool for the first time weeks before a presidential general election would create an undue hardship. The challenges and difficulties to install such a tool at this time are explained in detail in the Declarations of Christopher E. Piper, Commissioner of ELECT and James M. Heo, Confidential Policy Advisor at ELECT (which are attached hereto and incorporated by reference herein). As is apparent in these declarations, the burdens created by the modification proposed by the Plaintiffs herein are multiple, onerous and severe. By way of illustration, but not limitation: (1) general presidential elections, like the one in November, typically have the highest voter turnout and require the most amount of time and resources (Piper Dec., ¶ 6); (2) the IT system used by ELECT, "VERIS", will be in constant use from the time absentee voting begins (45 days prior to the election, or September 19, 2020) (Piper Dec., ¶ 7), *see* Va. Code § 242.2-701.1; (3) VERIS, which crashed as recently as 2016, will now be put under further strain as significant changes were made by the General Assembly (effective July 1, 2020) to Virginia's absentee voting scheme (for example, this will be the first election in Virginia where any voter who wishes to vote absentee may do so) (Heo Dec., ¶¶ 10, 11); (4) despite ELECT's efforts, and due primarily to elections that occurred in certain localities in Virginia in June of 2020 which led

to a delay in implementation, changes necessary to VERIS to comply with the new laws in Virginia will not be completed until September 9, 2020 (Heo Dec., ¶ 12); (5) "DiscoveryLive", a tool suggested by the Plaintiffs, previously has been unsuccessfully tried in Virginia (Heo Dec., ¶¶ 36-41); (5) "[i]t is simply impossible to have a functional RAVBM system in place before September 19, 2020 given the procurement process as well as the necessary testing and certifying of the equipment" (Heo Dec., ¶ 42); (6) the "most optimistic" date for to have such a system in place would be October 19, 2020 – just 19 days before the general election - and that date is itself uncertain due to the various risks involved (Heo Dec., ¶¶ 43-52); and (7) both election officials and localities in Virginia (of which only a handful, 25 out of 133, presently have signed up to use MyBallot) have limited time and resources and having to learn and implement a new tool at this late stage would thus be problematic (Heo Dec, ¶¶ 43-57; Piper Dec., ¶¶ 26-30).

In light of the undue burden that would be placed on the Commonwealth Defendants, the modification suggested by the Plaintiffs is not reasonable and should be denied.

3. Plaintiffs' claims under the VDA are barred by the Eleventh Amendment.

In addition to their claims under the ADA and § 504, Plaintiffs third cause of action arises under the Virginians with Disabilities Act (VDA). As a general matter, claims under the VDA are subject to the same analysis as claims under the ADA and § 504. *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 669 n.6 (4th Cir. 2019). But because the VDA is a state law, it is also subject to scrutiny under the Eleventh Amendment to the United States Constitution. Plaintiffs' claims under the VDA are not likely to succeed on the merits because the Eleventh Amendment bars them from federal court.

The Eleventh Amendment "confirms principles of State sovereign immunity that are embedded in the constitutional structure and … bars 'citizens from bringing suits in federal court against their own states.'" *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 291 (4th Cir. 2001) (quoting *Litman v. George Mason Univ.*, 186 F.3d 544, 549 (4th Cir. 1999)). "And when, as in this case, a suit is brought only against State officials, the suit is barred 'when the State is the real, substantial party in interest.'" *Id.* (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)). Moreover, although the doctrine the Supreme Court outlined in *Ex Parte Young*, 209 U.S. 123 (1908), allows the federal courts to order injunctive or declaratory relief against a state official, that doctrine has been "strictly limited … to circumstances in which injunctive relief is necessary 'to give life to the Supremacy Clause.'" *Id.* at 292 (quoting *Green Mansour*, 474 U.S. 64, 68 (1985)).

In *Bragg*, the Fourth Circuit applied all of these principles to claims against the Director of the West Virginia Division of Environmental Protection and concluded that the *Ex Parte Young* doctrine did not apply to a suit seeking injunctive relief against a state official for alleged violations of state law. *Id.* In finding that the state official was entitled to Eleventh Amendment immunity, the Fourth Circuit emphasized that "its decision was driven by the indignity to which a State is subject where a federal court orders that State's officers to conform their conduct with their own laws …" *Bragg*, 248 F.3d at 297 (citing *Pennhurst*, 465 U.S. at 106). The Fourth Circuit further quoted *Pennhurst* in observing that "it is difficult to think of a greater intrusion on state sovereign immunity than when a federal court instructs state officials on how to conform their conduct to state law…" *Id.* at 293 (quoting *Pennhurst*, 465 U.S. at 106).

Plaintiffs' claims in this case fall squarely within the Fourth Circuit's analysis in *Bragg*. Plaintiffs are citizens of the Commonwealth who have filed a suit in federal court asking the

Court to order agencies and officials of the Commonwealth to comply with the laws of the Commonwealth. The Eleventh Amendment prohibits a federal court from "instruct[ing] state officials on how to conform their conduct to state law…" *Id.* Plaintiffs' claims under the VDA, therefore, will not succeed on the merits because they are barred by the Eleventh Amendment.

B. The balance of equities and public interest factors independently foreclose a grant of preliminary equitable relief.

As the Supreme Court has emphasized, the third and fourth preliminary injunction factors tend to "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). And here, any harm plaintiffs may experience if this Court *denies* a temporary injunction must be balanced against the permanent harm that others could suffer if the Court *grants* one. See *Winter*, 555 U.S. at 24 ("courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief" and "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction" (quotation marks and citation omitted)).

The Commonwealth Defendants acknowledge that ensuring all eligible voters have access to the ballot is one of their core functions and is, in itself, always in the public interest. But the specific accommodations Plaintiffs request here, particularly in light of the limited time remaining prior to the 2020 General Election, will threaten the Commonwealth Defendants' ability to deliver a safe, secure, and pure election for all of Virginia's 4.5 million voters. Such a change will not best serve the public interest in the context of this busy presidential election.

Implementing a new election ballot marking tool in all jurisdictions across the Commonwealth will require significant modifications to the Commonwealth Defendants' information technology infrastructure. *See* Heo Decl., ¶ 42. The Commonwealth currently has

no system in place by which a disabled voter might request an electronic ballot. *See id.* at ¶¶ 46-48. Creating such a system would require coding modifications to the Citizen Portal, as well as to VERIS, which would need to be updated to process both electronic and paper applications for electronic ballots. *See id. at* ¶ 46. Moreover, because they are currently in the process of implementing the broad changes necessitated by the transition to universal no-excuse absentee voting, the Commonwealth Defendants will be unable to begin implementing any additional changes to these systems until at least September 9, 2020. *Id.* at ¶ 51. Assuming the Commonwealth Defendants encounter no delays or other challenges in implementing the changes that the online ballot marking tool will necessitate, the earliest this tool could be made available for voters to request a ballot is October 15, 2020. *Id.* at ¶ 43. By the time this solution could conceivably be made available to Plaintiffs, therefore, early and absentee voting will be nearly complete.

Not only would this proposed accommodation be of limited utility to voters in the 2020 General Election, but its implementation in such a short time frame will stretch the Commonwealth Defendants' resources well beyond their capacity. First, the Commonwealth Defendants simply have no information technology resources to deploy to develop the requested accommodation until after September 9, 2020, when the updates to allow for no-excuse early and absentee voting will be complete. *Id.* at ¶ 12. Requiring the Commonwealth Defendants to divert resources from that essential project will imperil the stability of the technological systems that underpin Virginia's entire absentee ballot program. The Commonwealth Defendants will also have to divert financial resources away from other priority projects designed to encourage access to voting, including the multi-language ballot initiative. *Id.* at ¶ 52. Moreover, the local General Registrars—particularly in the 108 localities that have not yet adopted MyBallot for

UOCAVA voters—will have to devote substantial resources in the middle of a presidential election season to training and updating their IT configurations in order to use the tool. *Id.* at ¶ 57. Plaintiffs' suggestion that implementing the accommodation they seek will simply be a matter of the Commonwealth Defendants' "flipping a switch," could not be further from the truth.

Most importantly, implementing Plaintiffs' requested accommodation, to the degree that is even possible prior to the General Election, poses extreme technological risks to the Commonwealth's voting systems. VERIS is an essential tool that the Commonwealth Defendants and the General Registrars use every day in administering early and absentee voting during an election. *See* Piper Decl. at ¶ 26. The stress on this system will be particularly acute this year, as it will be used to manage no-excuse early and absentee voting for the first time, during the middle of a global pandemic, no less, when demand for absentee voting is expected to be particularly high. *Id.* VERIS will be in use essentially twenty-four hours per day, leaving very limited time for the configuration and updates that will be necessary to implement the proposed RAVBM tool. *Id.* at ¶ 28. The rollout of this new tool would of necessity take place while VERIS is in use, and any issues that cause the system to go down would threaten its ability to perform its essential function: to completely and accurately process and store data regarding voter registration, absentee ballot applications, and other voting-relating information. Heo Decl. at ¶ 51. The building of new software programs always poses some initial risks upon implementation to the existing system, especially if the implementation is done in high-traffic conditions. *Id.* at ¶ 47, 49. For this reason, the Commonwealth Defendants have historically imposed a coding and modification freeze for the sixty days immediately prior to an election, to ensure that no changes inadvertently result in a disruption to the system. *Id.* at ¶ 50. Should the

Commonwealth Defendants be ordered to implement the requested accommodation prior to the November 2020 General Election, those changes would be implemented well after that sixty-day threshold. Piper Decl. ¶ 29.

The Commonwealth Defendants simply cannot guarantee the stability of a brand new, completely untested system implemented after voting in Virginia has already begun. Integrating such a system into the Commonwealth's existing technological infrastructure for early and absentee voting will threaten the stability and security of that entire program. Were issues to inadvertently occur that disrupted absentee voting, the public's faith in the purity of the election could be disrupted, an outcome with potentially devastating consequences for democracy in the Commonwealth. *Winter* requires the Court to balance the potential harm to Plaintiffs against the harms that the entry of a preliminary injunction could cause. *Winter*, 555 U.S. at 24. The Commonwealth Defendants respectfully submit that implementing Plaintiffs' requested accommodation prior to the start of early and absentee voting in Virginia is impossible, and implementing it prior to the 2020 General Election threatens their ability to securely manage the absentee ballot program and, therefore, the election as a whole. These potential harms outweigh those that Plaintiffs have alleged in the Complaint and the Motion for Preliminary Injunction. The requested injunction should be denied.

II. Plaintiffs' filing for relief on the eve of an election dictates that their claims be barred by the doctrine of laches.

Plaintiffs waited until the eleventh hour to file the present action. While it was clear that the Virginia Code did not permit absentee ballots to be electronically transmitted to anyone except overseas or military voters, Plaintiffs delayed in filing this suit until the midst of a presidential election cycle, when the Commonwealth Defendants are attempting to orchestrate an

election for 133 localities. To the extent that Plaintiffs would be harmed by the lack of relief from this Court, the injury is due to their own failure of diligence.

"Laches is an equitable doctrine that precludes relief when a plaintiff has delayed bringing suit to the detriment of the defendant." *Perry v. Judd*, 840 F. Supp. 2d 945, 950 (E.D. Va. 2012). In order to state an adequate affirmative defense under the doctrine of laches, a defendant is required to prove two elements: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Perry v. Judd*, 471 Fed. Appx. 219, 224 (4th Cir. 2012) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)). Both prongs of the laches test have been met here.

First, Plaintiffs have demonstrated a clear lack of diligence in pursuing relief from the statutory requirements under the Virginia Code. It has long been clear in the Virginia Code that the only individuals to whom the Commonwealth Defendants may mail ballots are overseas and military voters. Va. Code § 24.2-460. Plaintiffs nonetheless chose to abstain from instituting this action until July 27, 2020, ECF No. 1, and they did not file their Motion for Preliminary Injunction until August 10, 2020 ECF No. 20 — meaning that a ruling on such motion likely will not be issued until approximately six (6) weeks before absentee ballots are required to be sent to voters.

Second, the Commonwealth Defendants will clearly be prejudiced by the relief requested by Plaintiffs. Plaintiffs' requested accommodation would hinder the Commonwealth Defendants during an already extremely busy presidential election cycle. With less than three months before the November 2020 election, the Commonwealth Defendants are focused on ensuring that absentee ballots are mailed out to an influx of voters, that voting equipment is ready for in-person voting, that poll workers are informed of their responsibilities, and, especially during the

COVID-19 pandemic, that election officials take proper precautions to ensure that all qualified individuals can vote safely and fairly. To impose an additional technological requirement with which the Commonwealth Defendants must comply at this late date is not only infeasible, but it would also imperil the ability of the Commonwealth Defendants to carry out their statutory duties to conduct the November 2020 elections.

While the Commonwealth Defendants believe that every qualified voter should have the opportunity to cast their ballot safely and privately, to require the installation of new technology at this late date in the election cycle will cause severe detriment to elections in the Commonwealth. *See Republican Nat'l Comm. v. Democratic Nat'l Comm*., 140 S. Ct. 1205, 1207, 206 L. Ed. 2d 452 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

CONCLUSION

The motion for a preliminary injunction should be denied.

Respectfully submitted,

By: */s/ Carol L. Lewis*
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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, a true and accurate copy of this paper was filed electronically with the Court's CM/ECF system, which will then send a notification of such filing to the parties.

By: */s/ Carol L. Lewis*
Carol L. Lewis