IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CARSHENA GARY, *et al.*, Plaintiffs, v. VIRGINIA DEPARTMENT OF ELECTIONS, *et al.*, Defendants.	)	Case No. 1:20-cv-00860-CMH-TCB

REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Dated: August 26, 2020

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I. INTRODUCTION

Plaintiffs moved for a preliminary injunction (Dkt. No. 20) in order to obtain access to absentee ballots to enable them and other voters with print disabilities to vote privately and independently in the November 2020 election on the same terms as other Virginia voters, as required under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Virginians with Disabilities Act. Defendants end their opposition to this relief where Plaintiffs began, acknowledging that every qualified voter should have the opportunity to vote privately and independently. Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opp.") (Dkt. No. 30 at 29) ("the Commonwealth Defendants believe that every qualified voter should have the opportunity to cast their ballot safely and privately").

Defendants go on to acknowledge that technology already is available to enable Plaintiffs to realize this right, in the form of a Remote Accessible Vote-By-Mail ("RAVBM") System that enables voters to mark their ballots electronically and accessibly. Opp. at 6 & Declaration of James M. Heo ("Heo Dec.") (Dkt. No. 30-2) ¶ 35. Defendants claim that they initially believed the MyBallot's ballot marking tool could be added to the MyBallot voting system they purchased for military and overseas voters ("UOCAVA voters") to receive ballots electronically. *Id.* ¶ 34. In May and June, 2020, the National Federation of the Blind tested Virginia's MyBallot UOCAVA system and found that it was accessible and allowed ballot marking and download of a marked ballot for printing and mail return. Exhibit 1, Declaration of Karl Belanger ("Belanger Dec.") at ¶ 4 – 21. At that time, Plaintiff NFBV communicated the same to Defendants. Declaration of Tracy Soforenko ("Soforenko Dec."), Ex. 1 (Dkt. No. 21-1) to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction. Inexplicably, Defendants now claim MyBallot does not provide for ballot marking and they cannot implement ballot marking capability by September 19. Heo Dec. ¶ 33-35.

Defendants admittedly received a letter from the National Federation of the Blind ("NFB") raising the issue of accessible absentee voting 11 months ago, Opp. at 9; Soforenko Dec., Ex. A, (Sept. 26, 2019 Letter from NFB), and responded by assuring the NFB that they were well aware of the applicable law and were "committed to guaranteeing that all citizens' voting rights are protected and preserved," *Id.* at Ex. B. (Oct. 15, 2019 Response of Commissioner Christopher E. Piper). Yet they sat on their hands.

Now, confronted with this violation of Plaintiffs' rights, Defendants protest that their own delay has made it difficult for them to implement a RAVBM System in time for the General Election. In order to justify this remarkable position, they blame Plaintiffs for believing Defendants' commitments and not suing sooner. They also apply the wrong legal standard, ignore their own delay in taking action to safeguard Plaintiffs' entitlement to equal ballot access, and argue that, as a consequence of their delay, implementing the RAVBM System now would impose an undue hardship and effect a fundamental alteration of Virginia's Absentee Ballot Program. None of these arguments survive serious scrutiny.

II. Defendants Apply the Wrong Legal Standard

A. Defendants Must Provide Appropriate Auxiliary Aids and Services for Equally Effective Communication, Giving Primary Consideration to Plaintiffs' Request.

Defendants ignore the effective communication regulation that governs this case. *Martinez et al v. Cuomo*, 2020 WL 2393285 (S.D.N.Y. 2020) *10-11. Under Title II, public entities are required to "furnish appropriate auxiliary aids and services" to "ensure that communications with . . . members of the public . . . with disabilities are *as effective* as communication with others." 28 C.F.R. § 35.160(a)(1), (b)(1) (emphasis added). Absentee voting clearly implicates communication between the government and its citizens. Defendants' analysis, asserting that they need only offer Plaintiffs a "reasonable accommodation" without considering

Plaintiffs' "preferred" or more effective accommodation, Opp'n 15, is flatly contradicted by the governing standard. 28 C.F.R. §§ 35.160(a)(1), 35.164. *See also Nat'l Fed. of the Blind v. Lamone*, 813 F.3d 494, 505 & n. 7 (4th Cir. 2016) (recognizing relevance of 28 C.F.R. § 35.160).

Critically, the ADA requires that the entity providing the service or activity must give "primary consideration to the requests of individuals with disabilities" when providing such auxiliary aids and services. *Id.* § 35.160(b)(2). "Primary consideration" means Defendants "must honor [Plaintiffs'] choice, unless [Defendants] can demonstrate that another equally effective means of communication is available or that the aid or service requested would fundamentally alter the nature of the program, service, or activity or would result in undue financial and administrative burdens." Dep't of Justice, *ADA Update: A Primer for State and Local Governments* 8 (2015), https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf. Defendants cannot meet that burden.

B. Defendants Cannot Meet Their Burden of Demonstrating Undue Burden or Fundamental Alteration.

Defendants may reject Plaintiffs' requested auxiliary aid or service—here, a remote accessible vote-by-mail ("RAVBM") tool—only if Defendants can demonstrate that their alternative provides communication that is equally effective to the requested auxiliary aid or that the requested aid would fundamentally alter the nature of the Absentee Voting Program or pose an undue financial or administrative burden. *Id.* § 35.164. As discussed *infra* pages 4 to 11, Defendants have not met their burden.[1]

[1] "The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. § 35.164. Nothing in Defendants' brief or declarations indicates this has been done.

First, Defendants offer no method for making absentee ballots accessible to voters with print disabilities. Thus, they cannot claim to be offering an auxiliary aid that is as effective as the aid Plaintiffs requested. They offer no auxiliary aid at all.

Second, Defendants cannot meet their burden to show that the requested auxiliary aid somehow would constitute an undue burden or fundamental alteration. Defendants admit that they already offer electronic delivery of ballots to overseas voters through the MyBallot system purchased in 2019 from VotingWorks. Defs. Opp. p. 6. While Defendants argue that implementing the ballot marking and accessibility features of the MyBallot system that the Commonwealth has already purchased would somehow constitute an undue burden or fundamental alteration, they point to no facts or admissible evidence to support their conclusions.

Use of an accessible electronic ballot system is facially not a fundamental alteration of a state's absentee voting program. Virginia already offers an electronic ballot delivery system as part of its absentee voting program for certain voters. In addition, dozens of states already use accessible electronic ballots systems, including New Hampshire and New Jersey, which use a version of the same system Virginia already has purchased. *See* Exh. C to Hill Dec. (New Hampshire VotingWorks contract), ("In New Jersey [VotingWorks] implemented [Accessible Vote-by-Mail] in 6 days"). And the Fourth Circuit has made it clear that, in order to prove a fundamental alteration, a state must show that an RAVBM actually creates a substantial security risk, not merely that it has not gone through the administrative security process. *See Nat'l Fed. of the Blind v. Lamone*, 813 F.3d at 508-10. *See also Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017). Defendants, therefore, must prove that something about their particular system makes it incompatible with accessibility.

Defendants rely on James Heo's declaration to argue that, although VotingWorks offers an accessible vote-by-mail system that provides for ballot marking, Virginia mistakenly purchased an inaccessible version of the system that does not allow ballot marking. According to Mr. Heo, Virginia believed it had purchased a system that offered an add-on feature of accessible ballot marking, but "[t]he vendor later clarified" that it did not and that the ballot marking tool was a separate product to be purchased from another vendor. Heo Dec. ¶¶34-35. First, Mr. Heo's declaration on this point is inadmissible hearsay under F.R.E. 802 and not subject to any exception. F.R.E. 803. He does not state that he participated in this conversation, or even the date, method, or participants in the conversation. Moreover, his statement is contradicted by VotingWorks' website, which does not purport to offer a non-markable ballot system. It lists VotingWorks' products only as Risk-Limiting Audits, Voting Machines, and *Accessible* Vote-by-Mail systems. Finally, as follow-up to their conversations with Defendants in May of this year, the National Federation of the Blind tested the accessibility, marking, and pdf download features of MyBallot as implemented in Virginia, and successfully worked with the vendor to ensure MyBallot was accessible, markable and downloadable as an accessible pdf. Belanger Dec. at ¶ 21.

Finally, it is no defense that, as Mr. Heo claims, Virginia chose to purchase the inaccessible version of a brand new voting system or not to implement the accessibility features of that system, despite being "aware of the Fourth Circuit's decision in *National Federation of the Blind v. Lamone*, as well as the requirements of Title II of the [ADA]." Ex. B to Soforenko Dec. (Dkt. No. 21-1) (Oct. 15, 2019 Response of Commissioner Christopher E. Piper to NFB). The Commonwealth cannot avoid its duties "by painting itself into a corner and then lamenting the view." *Steimel v. Wernert*, 823 F.3d 902, 918 (7th Cir. 2016).

In fact, it is feasible for Virginia to implement an RAVBM system in time for the November election. The MyBallot system implemented in Virginia was already tested by the National Federation of the Blind in May and updated by the vendor to make it accessible, markable, and downloadable as an accessible pdf. Belanger Dec. ¶¶ 5-9. As VotingWorks' website states, its Accessible Vote-by-Mail system has been implemented in New Jersey in six days. A recent contract dated August 17, 2020 between VotingWorks and New Hampshire (Exh. C. to Hill Dec.) calls for full implementation in time for the September 8, 2020 New Hampshire Primary Election – a total of 22 days. Implementation according to the milestones in the contract will occur between August 14, 2020 and August 25, 2020, when it will be completed – a period of just 11 days – and the remaining time will be spent providing training for state staff. And, as New Hampshire described in its briefs, that state, unlike Virginia, is "implement[ing] an online absentee ballot process that has never previously existed in New Hampshire." Exh. D to Hill Dec., *Frye, et al. v. Gardner, et al.,* Case No. 1:20-cv-00751 (D.N.H.), Memorandum of Law in Support of Defendants' Objection to Motion for Preliminary Injunction at 8 (August 11, 2020).[2]

C. The Commonwealth's Procurement Process Does Not Convert the Implementation of an RAVBM System into an Undue Burden or a Fundamental Alteration.

Defendants argue that, having wasted 11 months, the Commonwealth's "procurement processes" might now mean the ballot marking and accessibility features could not be offered in

[2] Defendants misquote Plaintiffs' Memorandum for the proposition that "[t]he facts of *Lamone* are distinguishable," Opp. at 16 [*sic*], ostensibly because the system at issue in that case already had been used successfully. But the Voting Works' system also has been used successfully. E.g., July 24, 2020 Michigan Department of Technology, Management & Budget Review of Protest of Accessible Absentee Voting System Award, RFP No. 200000001856 at 2, attached as Exhibit B to Declaration of Eve Hill ("Hill Dec.") ("[VotingWorks] asserts that they lost a point for listing a Virginia project, which was not completed in a time that would meet Michigan's needs. VW correctly points out that they provided reference to a timely implementation in New Jersey, also a State of similar size."]

time for the September 19 beginning of absentee voting. Heo Dec. ¶ 42. Defendants admit, however, that they could implement those features by October 15.[3] Heo Dec. ¶ 43. Mr. Heo's position and background indicate no experience with procurement, and he provides no basis for either conclusion. Even if a procurement process were required at all,[4] no explanation is given as to why the procurement process to implement the marking and accessibility features of a system Defendants already have purchased, and which they believed already included marking, should take so long.

Further, Virginia has an emergency procurement procedure, and Governor Northam already has declared that the COVID pandemic creates an emergency for certain procurement purposes. *See* Executive Order No. 51, Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19),[5] The Virginia Public Procurement Act (hereinafter "VPPA") provides that in case of an emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation. *See* Va. Code Ann. §§ 2.2-4303(F). Indeed, the Virginia Information Technology Agency (VITA) states on its website that any agency can make emergency procurements when "an urgent situation arises and the particular IT need cannot be met through normal procurement methods."[6] Importantly, VITA also admits that the procuring agency "may authorize a supplier to commence performance or delivery in the event of an

[3] Defendants' brief cites to Christopher Piper's declaration paragraph 31 for the proposition that these features could be implemented by October 19. However, Mr. Piper's declaration does not include a paragraph 31.

[4] The National Federation of the Blind's testing of the MyBallot system as implemented in Virginia in May and June showed that it was already accessible and markable then.

[5] https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf.

[6] Chapter 17 - Emergency IT Procurements, Virginia Information Technologies Agency.

emergency prior to a contract or purchase order being prepared and should prepare a purchase order or contract as soon as practicable." *Id.*

The VPPA also provides for a sole source bid, stipulating that in situations where "there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to the source without competitive sealed bidding or competitive negotiation". *See* Va. Code Ann. §§ 2.2-4303(E). In the context of sole source information technology procurements, an example of a situation which would necessitate sole source procurement for technology goods or services includes products that are unique and possess specific characteristics or have a unique capability to provide a particular function and is available from only one supplier.[7] When the Commonwealth has already purchased a product, and the vendor offers both the product and the needed additional features of that same product, that would appear to justify a sole source contract, or even a mere extension to its existing contract.

Procurement of the MyBallot accessibility features is fully justified under the VPPA's emergency and sole source procurement provisions. Given that COVID-19 has been declared an emergency, VITA could instruct the vendor to commence the implementation of the MyBallot accessibility features even before the contract or purchase order is finalized. In addition, the MyBallot solution is the only feasible system that will integrate into an existing tool already determined by the Department of Elections to be safe and effective. *See* Heo Dec. ¶¶ 18-20, 26-27, 33-35. Even if those considerations were not enough, Virginia apparently has ruled out the competing "Democracy Live" tool as a viable alternative. *Id.* ¶¶ 36-41. In other words, MyBallot is the only readily available system with a function enabling voters with print

[7] Chapter 16.1 - Sole source procurement justification.

disabilities to vote remotely and confidentially, and it is available from only one supplier and can be installed in time for the general election.

D. The Commonwealth's Testing and Certification Process Does Not Render the Implementation of an RAVBM System an Undue Burden or a Fundamental Alteration.

Mr. Heo provides a number of excuses for why Virginia purportedly cannot meet its obligations under the ADA, but upon close examination, his statements are devoid of the details necessary to sustain the Defendants' assertions. Mr. Heo blames "the necessary testing and certifying of the equipment" for the time he claims it would take to implement the system. Heo Dec. ¶ 42. However, Mr. Heo acknowledges that the MyBallot system has already received an exemption from the ECOS process. Heo Dec. ¶ 22. He provides no explanation why marking and accessibility features for a system that is already exempted from the ECOS process should require either "testing" or re-exemption from that process. MyBallot's exemption from the ECOS process was based on the fact that it did not provide "external access to personally identifiable information." Heo Dec. ¶ 22. He makes no claim that the accessibility or marking features would make personally identifiable information externally accessible. Nor does he provide a factual estimate of the timing of ECOS testing, stating only that "[a]ccording to VITA's website, the ECOS process on average takes three weeks." Heo Dec. ¶ 44. Significantly, Mr. Heo acknowledges that, as of August 21, 2020, "ELECT" (unidentified) was already working with VITA to seek an exemption. Heo Dec. ¶ 44.[8] However, he provides no schedule for obtaining an exemption from VITA.

[8] Again, he does not state that he participated in or has personal knowledge of those discussions, their substance, timing, or participants. F.R.E. 802.

Defendants also claim they usually implement a "freeze" on code and infrastructure changes 60 days prior to a major election. Heo Dec. ¶ 50. However, they admit they are not implementing such a freeze this year. Heo Dec. ¶ 12 (although September 4, 2020 is 60 days prior to the November 3 election, planned "modifications are not expected to be completed until September 9"). The Commonwealth's waiver of its freeze for some changes, but explicitly not for voters with disabilities, is evidence of discrimination.

Defendants also claim they "cannot begin [the ADA related changes] until September 9." Mr. Heo, again, provides no reason for this and no information from the vendor indicating that the ADA related changes must wait for unrelated changes to the VERIS system. In fact, VotingWorks' website states that its system "does not require a voter registration system integration."

None of these "issues" is the real reason Virginia is not implementing an accessible system. Mr. Heo, himself, sums up the real reason the Commonwealth declines to make its electronic ballot system accessible in Paragraph 52 of his declaration – they would prefer to focus on other optional and future projects than to make absentee voting available to voters with disabilities. Heo Dec. ¶ 52 (implementing the accessibility features "would be taking resources from the multi-language initiatives …and would also delay preliminary work to improve efficiencies for the Redistricting Initiative in preparation for 2021.") Mr. Heo provides no estimate of the resources needed to implement accessibility, and glaringly, he ignores the 25% capacity of 17 Information System staff that is not being used for implementation of the No Excuse In-Person Early Voting project for people without disabilities. Heo Dec. ¶ 16.[9] Yet,

[9] For 17 staff members, 25% capacity provides 680 hours per week, in addition to vendor capacity. Over the three weeks between the scheduled Preliminary Injunction hearing and the start of absentee voting, that means 2040 hours are available, nearly the equivalent of a full-time

Mr. Heo asks the Court to accept that Defendants do not have enough resources to comply with their obligations under federal law.

E. The Implementation of the RAVBM by Individual Jurisdictions Does Not Make Implementation of an RAVBM System an Undue Burden or a Fundamental Alteration.

Finally, Defendants argue that only 25 of 133 jurisdictions have signed up to use the MyBallot system. Heo Dec. ¶ 53. The Commonwealth studiously avoids mentioning that it has not made the system available to all jurisdictions, let alone required them to use it. Heo Dec. ¶ 53. It claims most jurisdictions currently use a pdf ballot sent by email for military and overseas voters, Heo Dec. ¶ 31, and in its desperation to avoid allowing people with print disabilities to vote, claims "The Department is not aware … of a solution that will assist with ballot marking for electronic ballots delivered by email." Heo Dec. ¶ 56. Adobe Acrobat is the software that creates pdf documents.[10] Pdf ballots can be made fillable, as well as accessible.[11] The fact that Defendants have never even considered the issue, nearly a year after the National Federation of the Blind wrote to them demanding accessible absentee ballots, demonstrates the Defendants' disdain for the rights of voters with disabilities.

staff person for a year. In addition, as these staff people are only scheduled to work on non-accessibility modifications until September 9, they should be able to dedicate themselves full time for the remaining 10 days before absentee voting opens (968 hours).

[10] Belanger Dec. ¶ 9.

[11] *Id.* Indeed, New York State has recently decided to require its counties to contract with pdf remediation vendors to ensure all their pdf UOCAVA ballots are accessible in advance of the November election. Plaintiffs do not recommend this approach when other more professional systems, such as VotingWorks, are available, because of the risk of human error and quality control problems, and because it is more time-consuming and expensive for local elections staff.

III. Defendants' Cannot Invoke Laches to Justify Their Own Failure to Act.

Defendants lastly seek to place the blame for their complete abrogation of their legal obligations on the fact that Plaintiffs did not sue them sooner. Defendants cloak this defense in the equitable doctrine of laches. The doctrine of laches "imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 345 F. Supp. 3d 614, 671 (E.D. Va. 2018) (quoting *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990)). This defense "applies to preclude relief for a plaintiff who has unreasonably 'slept' on his rights,' barring 'claims where a defendant is prejudiced by a plaintiff's unreasonable delay in bringing suit after the plaintiff knew of the defendant's violation.'" *Steves and Sons, Inc.*, 345 F. Supp. 3d at 672 (quoting *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 121 (4th Cir. 2011)). "The laches analysis is highly fact-dependent." *Id.*

Here, the laches defense fails because Defendants have not met their burden of establishing either a failure on the part of Plaintiffs to act diligently to pursue the claim or prejudice to Defendants resulting from the purported delay. *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 345 F. Supp. 3d 614, 671 (E.D. Va. 2018).

Defendants admit that they received a letter dated September 26, 2019, from the national organization of which Plaintiff NFBV is an affiliate, placing them on formal notice of their obligations under the federal disability rights laws to provide voters with print disabilities equal access to private and independent absentee balloting. Opp. at 9. In his October 15, 2019 response, Defendant Christopher Piper acknowledged that Defendants were aware of their obligations under the ADA and the Fourth Circuit's decision in *National Federation of the Blind v. Lamone*, and that they were committed to acting to ensure that Plaintiffs' rights were

protected. Far from telling the NFB that Defendants would not implement an RAVBM, Mr. Piper wrote:

> The Department and the State Board are committed to guaranteeing that all citizens' voting rights are protected and preserved … [W]e look forward to working with the National Federation of the Blind in the future, to ensure that all Virginians can vote privately and independently in safe, free and fair elections throughout the Commonwealth.

Ex. B to Soforenko Dec. (Dkt. No. 21-1) (Oct. 15, 2019 Response of Commissioner Christopher E. Piper to NFB).

When circumstances became more acute in light of the COVID-19 pandemic, NFBV wrote again to Mr. Piper on April 20, 2020, offering to meet with Virginia election officials to discuss the "numerous accessible remote ballot delivery systems, both online and offline, that enable voters with print disabilities to mark their ballot privately and independently." Ex. C. to Soforenko Dec. (Dkt. No. 21-1) (Apr. 20, 2020 Letter from Tracy Soforenko to Christopher Piper); Soforenko Dec. ¶ 8.

NFBV met with Mr. Piper on May 1, 2020, followed up to explain that NFB had done accessibility testing on the VotingWorks system, and urged the Board of Elections to take further steps to implement accessible absentee voting. Soforenko Dec. ¶ 9. Mr. Piper again delayed meeting with NFBV until July. Not until July 9 did Mr. Piper communicate that Defendants would not commit to making an accessible vote-by-mail solution available to Commonwealth voters. *Id*. ¶¶ 10-11. Plaintiffs filed suit just over two weeks later. Contrary to Defendants' remarkable assertion, the foregoing record does not reflect any lack of diligence on Plaintiffs' part.

Nor does the record reflect prejudice attributable to Plaintiffs' purported inaction. To the contrary, Defendants admit that they have been aware of their obligations to ensure voters with print disabilities an equal opportunity to vote privately and independently since at least

September 2019. Opp. at 9-10. Under these circumstances, Defendants' failure to take any action is inexplicable.

IV. Eleventh Amendment Immunity

Defendants argue that the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), prevents this court from providing prospective relief under the Virginia Disabilities Act ("VDA"). In reality, the *Ex parte Young* doctrine "permits a federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law, on the rationale that such a suit is not a suit against the state for purposes of the Eleventh Amendment." *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010). The "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought," *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 at 107 (1984). Here, plaintiffs are seeking an injunction, not monetary damages, and so the relief is permitted under the *Ex parte Young* doctrine and the effect of the relief sought is not the type of relief intended to be subject to sovereign immunity. Additionally, the ADA provides that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. The Unites States Supreme Court has determined that 42 U.S.C. §12202 is an unequivocal expression of Congress's intent to abrogate state sovereign immunity. *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 363-364 (2001). As Defendants concede, the VDA standards for liability follow the standards established in the Rehabilitation Act of 1973 and incorporated 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)). When a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes. Therefore, the ongoing violation that

Plaintiffs here seek to prevent is a violation of federal law, as adopted by the Commonwealth, and this suit is not barred by the Eleventh Amendment.

V. The Balance of the Equities Favors the Plaintiffs and Granting Plaintiffs' Motion for a Preliminary Injunction is in the Public Interest

Defendants argue that a preliminary injunction would harm the Commonwealth because the election is fast-approaching and Defendants are "extremely busy" preparing other aspects of their absentee voting program and implementing a RAVBM tool would require technical work that, allegedly, cannot be completed until October 15, 2020 (weeks before the November 3, 2020 election). Def. Opp. To Ps. Mot. For PI., (Dkt. No. 30 at 24-27). These arguments are merely a reiteration of the defenses Defendants raise in their Response and which have been addressed *supra*.

Nor do these arguments serve the public interest. As discussed above, if Defendants have to work harder between now and the November 3 election to implement a RAVBM tool, that is a burden they brought on themselves by ignoring the issue for 11 months. *See supra* p. 12. What Plaintiffs have at stake here – the right to cast a secret ballot without unduly risking their health – far outweighs any inconvenience or additional work that Defendants claim they might suffer.

It is axiomatic that the right of every qualified voter to cast a secret ballot is the foundation of the American democratic system. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); accord *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."). Importantly, when enacting the ADA, Congress acknowledged that it is in the public interest to eliminate discrimination against individuals with disabilities, including persistent discrimination in voting. 42 U.S. Code § 12101. And, as Defendants acknowledge, "ensuring all eligible voters have access to the ballot is one of their core functions and is, in

itself, *always in the public interest* (emphasis added)." (Dkt. 30 at 24). Indeed, the "public interest…favors permitting as many qualified voters to vote as possible." *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 at 247-48 (4th Cir. 2014). The exclusions of voters with print disabilities, not their inclusion, from the November 3, 2020 election threatens the integrity of Virginia's election – a severe disservice to the public interest. *Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012) ("the public has a strong interest in exercising the fundamental political right to vote."). Plaintiffs' request for a RAVBM tool serves the public interest because it will eliminate discrimination against voters with disabilities in Virginia's absentee voting program and will promote the public interest of having as many qualified voters as possible vote in the November 3, 2020 general election.

Additionally, ordering the state to implement a RAVBM promotes "the public interest in…safeguarding public health." *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013) (holding that "the public interest in this case lies with safeguarding the public health."); *Diretto v. County Inn & Suites by Carlson*, No. 1:16CV1037 (JCC/IDD), 2016 WL 4400498 at *4 (E.D. Va. Aug 18, 2016) ("The public interest is clearly in remedying dangerous or unhealthy situations and preventing the further spread of the disease."). The Commonwealth recognizes this, with the Virginia Department of Health urging "all Virginians to stay home and practice social distancing" and to "stay at least 6 feet away from others" if going out,[12] and the Virginia Department of Elections acknowledging that the safest way to vote is "not to go to the polls at all."[13] Ordering Defendants to make a RAVBM tool available to Virginia voters with print

[12] Mel Leonor & Justin Mattingly, UVA researchers project mid-August peak for new COVID-19 cases in Virginia, Richmond Times Dispatch, Apr. 13, 2020, https://www.richmond.com/special-report/coronavirus/uvaresearchersproject-mid-august-peak-for-new-covid-19-cases-in-virginia/article_c4e2c008-1617-52d8-ad08-706abfb3d696.html.

[13] Virginia Department of Elections (@vaELECT), Twitter (June 16, 2020, 11:32 AM).

disabilities will allow them to continue to observe Virginia Department of Health guidelines and Virginia Department of Elections advice to protect public health and will avoid situations where individuals with underlying conditions must face the choice between disenfranchisement or risking the public health, and their own.

Moreover, the harm to Plaintiffs – effective disenfranchisement – if their concerns about ballot access are not addressed is irreparable, definite, and, imminent while Defendants' concerns about their workload and possible technology glitches are speculative at best. Even in situations of minimal burdens on the voter, a court must "actually weigh the burdens imposed on the plaintiff against the precise interests put forward by the State," and take into account, "the extent to which those interests make it necessary to burden the plaintiff's rights." *Price v. N. Y. State Bd. of Elections,* 540 F.3d 101 at 108–09 (2nd Cir. 2008) (internal citations and quotation marks omitted). It is beyond dispute that Plaintiffs are entitled to accessible ballots under federal law. *Lamone,* 813 F.3d 494 (4th Cir. 2016). Defendants' speculation about hypothetical risks does not justify failing to provide equal access for Plaintiffs to absentee voting during one of the most consequential elections of their lifetimes in the midst of a global pandemic.

Implementing a RAVBM that would allow Plaintiffs to exercise their fundamental right to vote from the safety of their own homes is in the public interest even if it requires Defendants to work harder. And, as Governor Northam said, "Virginians should never have to choose between casting a ballot and risking their health."[14] Plaintiffs, therefore, respectfully request this Court grant Plaintiffs' Motion for a Preliminary Injunction and order Defendants to implement a RAVBM tool for voters with print disabilities for use in the November 3, 2020 election.

[14] Whittney Evans, *Lawsuit Tries to Stop Virginians From Using Coronavirus as Excuse to Vote Absentee*, Virginia's Home for Public Media (VPM) (May 21, 2020).

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction directing Defendants to implement throughout the Commonwealth of Virginia a remote accessible vote-by-mail system to enable voters with disabilities to cast their ballots in the upcoming general election, and all subsequent elections in Virginia, on equal terms with other Virginia voters.

Respectfully submitted,

Dated: August 26, 2020

By: /s/ Zachary S. DeVore

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of August, 2020, I served a copy of the foregoing Reply to Defendants Opposition to Plaintiffs' Motion for Preliminary Injunction and the accompanying exhibits and proposed Order on Counsel for Defendants via the Court's ECF filing system, with a copy by e-mail, in accordance with Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure.

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