UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMERICAN COUNCIL OF THE BLIND OF INDIANA, INDIANA PROTECTION AND ADVOCACY SERVICES COMMISSION, KRISTIN FLESCHNER, RITA KERSH, and WANDA TACKETT, Plaintiffs, v. INDIANA ELECTION COMMISSION; THE INDIVIDUAL MEMBERS of the INDIANA ELECTION COMMISSION, in their official capacities; INDIANA SECRETARY OF STATE, in her official capacity, THE INDIANA ELECTION DIVISION; and THE CO-DIRECTORS OF THE INDIANA ELECTION DIVISION, in their official capacities, Defendants.	)	Case No. 1:20-cv-3118-JMS-MJD

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As this Court observed in its March 9, 2022, decision on Plaintiffs' preliminary injunction motion ("March Order"), "[t]his case involves the values at the core of the ADA and the Rehabilitation Act: equal treatment, equal access, and independence for individuals with disabilities." Filing No. 99 at 2. Evidence to date clearly indicates that these values remain as poorly served by Indiana's current voting regime as they were at the time the Court issued its March Order. Crucially, Defendants' absentee voting procedures ("Absentee Vote by Mail Program") continue to fail to provide voters with print disabilities a way to independently and privately cast their votes from home, in plain violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* ("Section 504"). As further discussed below (and as discussed at length in Plaintiffs' prior briefings), these voters remain forced to seek third party assistance to vote from their homes because—despite the fact that this lawsuit was filed over a year and a half now—Defendants have yet to implement a process that would allow them to independently request, receive, complete, and submit their absentee ballots. This unjustified continued inaction infringes on a right that has long been recognized as "of the most fundamental significance under our constitutional structure" [1] and requires this Court's prompt intervention.

As Plaintiffs have briefed extensively in their motion requesting an entry of summary judgment and a permanent injunction, Defendants' Absentee Vote by Mail Program effectively presents voters with print disabilities with two options: (1) to admit strangers from the so-called traveling board into their homes in order to receive assistance with filling out their paper ballots, if the traveling board comes at all; or (2) struggle with the many accessibility barriers plaguing

[1] *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

the voting process Defendants have attempted to implement in the wake of the passage of the Senate Enrolled Act 398, 2021 Ind. Legis. Serv. Pub. L. No. 109-2021 §§ 21-22 (2021) ("SEA 398"). This Court recognized the discriminatory nature of such a regime in its March Order, noting that Defendants' "current voting procedures . . . fail to provide voters with print disabilities with an option to cast their vote privately and independently from home while others are afforded such an option." Filing No. 99 at 13. With new elections—most immediately, the November 2022 General Election—ahead, it is imperative that this failure be swiftly remedied.

In light of Defendants' ongoing failures and the need to achieve such a remedy in time for the November General Election, this Court should, for reasons further set forth below, deny Defendants' summary judgment motion and: (1) issue an order finding Defendants liable for discriminating against voters with print disabilities in their Absentee Vote by Mail Program in violation of Title II of ADA and Section 504, and (2) enter a permanent injunction making the traveling board permissive rather than mandatory, and requiring Defendants to implement an Remote Accessible Vote By Mail system ("RAVBM") to make that Program accessible to voters with print disabilities. To the extent the Court determines that issues of fact remain, Plaintiffs respectfully ask that the Court issue a preliminary injunction directing the same for November and all elections thereafter until there has been a trial and decision in this case.

ARGUMENT

As both parties have noted in their earlier briefings, a successful Title II ADA claim consists of three elements: (1) that the plaintiffs are individuals with disabilities who are qualified to benefit from a government program, service, or activity; (2) that Defendants running that program are covered entities under the statute; and (3) that plaintiffs were denied the benefits of the service, program, or activity, or otherwise discriminated against, on the basis of

their disability. *See Ravenna v. Vill. of Skokie*, 388 F. Supp. 3d 999, 1009 (N.D. Ill. 2019) (citing *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015)). Claims under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.*, are generally analyzed in the same way. *See Meyer v. Walthall*, 528 F. Supp. 3d 928, 947 (S.D. Ind. 2021). Defendants do not dispute that Plaintiffs are qualified individuals with disabilities but argue that, for a variety of ultimately implausible reasons, the second and third elements are not met. For reasons set forth in sections (I)(A)-(I)(C) below, the Court should find that all elements are satisfied, and that Plaintiffs' proposed remedy is warranted to redress the violations at issue in this case.

I. Defendants' Attempts to Escape the Reach of Federal Disability Rights Laws Fly in the Face of Both this Court's Prior Ruling and the Existing Caselaw.

In its March Order, this Court found that "Defendants are public entities covered by the ADA and the Rehabilitation Act . . . ." Filing No. 99 at 16. Despite this, Defendants argue that: (1) they are insufficiently connected with the discriminatory conduct at issue for Plaintiffs to have standing; (2) they are outside the scope of Section 504 because they do not receive federal funding for their Absentee Vote by Mail Program; and (3) they are shielded from compliance with the ADA because they enjoy sovereign immunity. Because these theories have no cognizable basis in law or evidence, they should be rejected.

A. Defendants' Assertion that Plaintiffs Lack Standing Relies on Interpretations of State Law that Have Been Repeatedly Rejected by Courts.

Defendants' assertion that Plaintiffs lack standing because the discriminatory conduct at the center of this suit is attributable to counties rather than themselves is patently unavailing. As Plaintiffs set forth in their moving brief, the Secretary of State is "the state's chief election official," Ind. Code § 3-6-3.7-1, and, as such, tasked with "perform[ing] all ministerial duties related to the administration of elections by the state," Ind. Code § 3-6-4.2-2(a). The office of the

Secretary of State is indeed the entity counties depend on for the receipt of federal dollars given to Indiana to administer its elections. Filing No. 80-8 at 7 (Deposition of Indiana Secretary of State ("SOS Dep.") at 23:10-24:16). Defendant Indiana Election Division ("IED"), a subunit of the Secretary of State, Ind. Code § 3-6-4.2-1, is charged with assisting the Secretary of State with the administration of these sweeping "ministerial" responsibilities. Ind. Code § 3-6-4.2-2. Lastly, the Indiana Code similarly vests the Indiana Election Commission ("IEC") with various broad powers relating to the administration of Indiana's election laws, Ind. Code § 3-6-4.1-14(a)(1), including, among others, promulgating rules governing the conduct of those elections and "advis[ing] and exercis[ing] supervision over local election and registration officers." *Id.* § 3-6-4.1-14(a)(2). The notion that these three agencies cannot be held accountable for claims of discrimination in the conduct of the state's elections despite being expressly imbued with such broad powers over those elections is incredible on its face.

Unsurprisingly, courts have consistently rejected Defendants' arguments. In *Frederick v. Lawson*, 481 F. Supp. 3d 774, 790 (S.D. Ind. 2020), Defendant Secretary of State argued, as it does here, that Plaintiffs lacked standing because it was the counties, rather than itself, that bore the responsibility under state law for performing signature match comparisons to decide whether to accept mail-in absentee ballots. In its decision rejecting this theory, this Court explained:

> [The delegation of authority with respect to the implementation of the signature match requirement] does not mean . . . that the county election boards are the only entit[ies] that possess[ ] any power with respect to the administration and enforcement of the absentee balloting procedures. The Secretary is designated as Indiana's chief election official, (Ind. Code § 3-6-3.7-1), and broadly tasked with perform[ing] all ministerial duties related to the administration of elections by the state . . . The Office of the Secretary of State also contains the Indiana Election Division, which assists the Secretary of State in the administration of the Indiana election laws and is statutorily obligated to instruct county election boards as to [t]heir duties under Title 3 of the Indiana Code, which governs elections, including the absentee voting procedures. In line with these duties, the Election Division, via the Indiana Election Administrator's Manual ("the Manual"), which is used as an interpretive resource for general election law provisions, routinely issues guidance

> to county election officials in each of Indiana's 92 counties, including on the signature verification process at issue in this litigation. While the guidance in the Manual is not binding on county election officials, it provides a roadmap for the county election administrator to follow in carrying out the absentee ballot procedures. As such, we have no doubt that the Manual has a powerful coercive effect on county election officials.
>
> Thus, although the Secretary does not personally review ballot signatures or make the comparisons herself, as the state official responsible for overseeing elections in Indiana and the administration of Indiana's election laws, including heading the office that advises county election officials regarding the manner in which to implement the signature verification requirement, she is sufficiently connected with the duty of enforcement of the challenged provisions such that the alleged invalidity of those provisions is fairly traceable to and redressable by her.
>
> *Id.* at 790–91 (internal quotes and citations omitted).

Similarly, in *Common Cause Indiana v. Indiana Secretary of State*, No. 1:12-cv-01603-RLY-DML, 2013 WL 12284648, at *1, *3–5 (S.D. Ind. Sept. 6, 2013), this Court found that Defendants Secretary of State and individual members of the IEC were proper parties to a suit challenging the constitutionality of the electoral process used to elect judges to the Marion Superior Court. In particular, the Court found that "the Secretary's role as Indiana's chief election officer sufficiently connects the Secretary with the duty of enforcement to make her a proper party to this suit." *Id.* at *4. The Court further found that the statutory duties ascribed to the IEC rendered it a proper party as well: "Given the Commission's clear statutory duty to advise and supervise local election officers, and, more generally, to administer Indiana election laws, Defendants' argument that the Common Cause's injury cannot be fairly traceable and redressed by the Commission cannot stand." *Id.* at 5. Especially notably and in common with the *Frederick* holding, the Court emphasized that the "delegation of authority from the state to the county level with respect to the administration and enforcement of Indiana election law" did not transform individual counties into "the only [entities possessing] any power with respect to the administration and enforcement" of the statute at issue. *Id.* at *3.

The facts here support an identical conclusion: The injury Plaintiffs have identified is clearly traceable to Defendants as the agencies in charge of administering the state's elections. Indeed, in this particular instance, the law at the center of the case—namely, SEA 398—expressly contemplates that "[t]he secretary of state, with the approval of the election division, shall develop a system that complies with the Web Content Guidelines." Ind. Code § 3-11-4-6(k). For that matter, the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 *et seq.* ("UOCAVA"), which SEA 398 has amended to add voters with print disabilities to the categories of voters eligible to vote under UOCAVA in Indiana, applies to states rather than individual counties by its very terms. Ind. Code §§ 3-11-4-6(a)-(b); 52 U.S.C. § 20302. Accordingly, not only are Defendant agencies proper parties given their broad general powers over the conduct of elections, but they have express leadership roles in this particular context, as reflected by the plain language of both SEA 398 and UOCAVA.

Further, Defendants SOS and IED issued a policy in September 2021 that purported to give the guidance necessary to enable the state and county boards of elections to comply with SEA 398. *See* Indiana Secretary of State, "Absentee Procedures for Voters with Print Disabilities" (Sept. 27, 2021), Filing No. 80-11 (hereinafter "September 2021 policy"). Like the Indiana Election Administrator's Manual, this guidance "provides a roadmap for the county election administrator to follow" and, "[a]s such [undoubtedly] has a powerful coercive effect on county election officials." *Frederick*, 481 F. Supp. 3d at 790 (internal quotes omitted) (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). Combined with the similarly "powerful coercive effect" that dependence on the Secretary of State for federal money entails, *see supra*, Defendants' duty to instruct counties on the implementation of SEA 398 compels the conclusion

that Defendants are more than sufficiently involved with the administration and enforcement of the provisions at issue to qualify as proper parties.

Ultimately, Defendants' argument that Plaintiffs lack standing boils down to the idea that the delegation of authority from the state to the counties with respect to certain aspects of the electoral process effectively renders counties the only entities with the responsibility to avoid discrimination in the electoral process. This implausible interpretation of both the degree and the meaning of the delegation envisioned by the state law has been repeatedly rejected by courts. This Court should likewise resist the notion that the three state agencies expressly charged with broad powers relating to the administration of Indiana's elections are without power—or responsibility—to ensure non-discrimination against voters with print disabilities.

B. Defendants' Claim that They Are Outside the Scope of Section 504 Is Without Basis in Either the Regulatory Language or Caselaw.

As Plaintiffs have pointed out previously and Defendants do not deny, Defendant SOS has expressly admitted to receiving federal funding; *see* Filing No. 80-8 at 24 (SOS Dep. at 91:6-22). Further, Defendant IED has utilized federal funding as a subunit of the office of the SOS charged with assisting SOS in its duties, *see* Filing No. 80-7 at 20 (Deposition of Indiana Election Division ("IED Dep.") at 73:12-74:3); Ind. Code § 3-6-4.2-2(b). Lastly, the work of the Defendant IEC is made possible through the expenditures of the Defendants IED and SOS, *see* Filing No. 126-32 at 30-31 (Deposition of Indiana Election Commission ("IEC Dep.") at 115:24-119:5). Each Defendant has thus received federal funding to help administer elections in Indiana either independently or as a subunit of another Defendant, making this Court's prior determination that they are subject to Section 504 as well as the ADA eminently justified.

Rather than offer new insights into the federal funding received by each agency to date, Defendants instead attempt to excuse themselves from compliance by positing that they have not

received federal dollars for the Absentee Vote by Mail Program *specifically*. The relevant statute, however, expressly defines any program receiving federal financial assistance as "*all* of the operations of . . . the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government." 29 U.S.C. § 794(b) (emphasis added). Guided by this plain language, courts have repeatedly found that an entity is a qualifying Section 504 recipient as long as it has received federal money, regardless of whether that federal money was expressly reserved for any specific individual activity. In *Phipps v. Sherriff of Cook County*, 681 F. Supp. 2d 899 (N.D. Ill. 2009), the court explained:

> [T]he question is not whether the CCDC receives federal funds "for programs under the ADA" or for making programs and services "accessible to those qualified under the ADA." Rather, for purposes of the [Rehabilitation Act], the question is whether the program or activity in question receives federal financial assistance, full stop. . . . The County must point to evidence that the CCDC receives no federal funds of any sort.

Id. at 912. Guided by these principles, the court rejected the CCDC's argument that it was not liable under Section 504 because the facts indicated that it had received federal dollars, even if it had not received them for the specific activities that were the subject of litigation.

Similarly, in *Doe v. City of Chicago*, 883 F. Supp. 1126, 1131–32, 1136–37 (N.D. Ill. 1994), a case that alleged improper use of pre-employment testing to discriminate against applicants with HIV, the court concluded that the defendants were subject to Section 504 without expressly finding that federal dollars were specifically used to fund such testing because the police department as a whole was a federal funding recipient. *See also T.S. ex rel. T.M.S. v. Heart of CarDon, LLC*, No. 1:20-cv-01699-TWP-TAB, 2021 WL 981337, *9 (S.D. Ind. March 16, 2021) (emphasizing that "Section 504—since 1988—explicitly covers *all* of the operations of a program or activity that receives Federal financial assistance.") (internal quotes and citations omitted) (emphasis added).

Accordingly, Defendants' argument that they are outside the scope of Section 504 because no federal funding has gone toward the Absentee Vote by Mail Program specifically is contrary both to the plain language of the statute and related caselaw (in response to arguments identical to those Defendants advance here). As such, it should be rejected.

C. Defendants' Sovereign Immunity Argument Is Without Basis in Caselaw and Would Defeat the Very Purpose of the ADA.

Defendants' sovereign immunity argument, tellingly reduced to two footnotes of their memorandum of law, is wholly without basis. Congress has unequivocally expressed its intent to abrogate sovereign immunity with respect to ADA's Title II, *see* 42 U.S.C. § 12202; 28 C.F.R. § 35.178; no less significantly, the Supreme Court has held that Title II validly abrogates sovereign immunity in order to prevent and deter unconstitutional conduct. *United States v. Georgia*, 546 U.S. 151, 158 (2006); *Tennessee v. Lane*, 541 U.S. 509, 518–20 (2004). This abrogation is particularly clear in cases involving fundamental rights, such as voting. *Lane*, 541 U.S. at 524, 533–34 (noting laws preventing people with disabilities from voting as an example of the "systemic deprivations of fundamental rights" that Title II was intended to address). Defendants do not cite to, and Plaintiffs could not find, any cases where public entities such as themselves were excused from ADA compliance in the area of access to voting on sovereign immunity grounds. To the contrary, the wealth of caselaw litigating the rights of voters with disabilities, overviewed in both parties' briefings to date, holds public agencies charged with overseeing their state's elections accountable for discrimination under the ADA.

Voting is a fundamental right, and to hold that those public agencies enjoy sovereign immunity against claims of discrimination by voters with disabilities would not only be inconsistent with this case law but indeed defeat one of ADA's main purposes. *See, e.g.,* 42 U.S.C. § 12101(a)(3) ("discrimination against individuals with disabilities persists in such

critical areas as . . . voting"); *id.* § 12101(b)(1) (providing that one of ADA's purposes is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" in light of these findings). Quite simply, the ADA's goals—including but not limited to its goal of eliminating discrimination in the area of voting—cannot be effectuated if offices of the secretaries of state across the country enjoy blanket sovereign immunity against the ADA. This Court should not hesitate to summarily reject such a theory.[2]

II. Despite the Passage of SEA 398, Defendants' Program Continues to Discriminate Against Voters with Print Disabilities.

It is well established that all voters, including voters with print disabilities, have the right to vote privately and independently, and that if voters without disabilities are given the ability to do so, voters with disabilities must also. *See* Help America Vote Act of 2002, Pub. L. No. 107–252, § 301, 116 Stat. 1666, 1704-06 (*codified as amended at* 52 U.S.C. § 21081) (enshrining the right to review and change one's ballot privately and independently in federal elections); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 506–07 (4th Cir. 2016) (*citing Disabled in Action v. Bd. of Elections in N.Y.C.*, 752 F.3d 189, 199–200 (2d Cir. 2014)); *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013). Further, it is undisputed that paper absentee ballots discriminate against voters with print disabilities. *Lamone*, 813 F.3d at 506–07; *see also Hindel v. Husted*, 875 F.3d 344, 345–46 (6th Cir. 2017) (acknowledging discriminatory nature of Ohio's paper-based absentee voting system and finding that plaintiffs' request for accessible electronic ballots did not constitute a fundamental alteration); *Taliaferro v.*

[2] Notwithstanding sovereign immunity, *Ex parte Young*, 209 U.S. 129, 159-60 (1908), permits suits against state officials in their official capacity for violations of Title II. *See Bd. of Trustees of Univ. Of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (noting that claims under Title I of the ADA could enforced by actions against individuals under *Ex parte Young*); Bruggeman *ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th Cir. 2003), *superseded by statute on other grounds* (holding that *Ex parte Young* "authorizes, notwithstanding the Eleventh Amendment, suits for prospective injunctive relief against state officials who as in this case are sued in their official capacity" for Title II violations as there is "no relevant difference between Title I and Title II . . . so far as the applicability of *Ex parte Young* is concerned").

N.C. State Bd. of Elections, 489 F. Supp. 3d 433, 437–38 (E.D.N.C. 2020); *Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 2745729, at *5 (M.D. Pa. May 27, 2020). In the face of these undisputed facts, Defendants argue that their Absentee Vote by Mail Program nonetheless does not discriminate against Plaintiffs because it provides two accommodations: the traveling board, Ind. Code § 3-11-10-25, and SEA 398, which will—at some indefinite point in the future—allow voters with print disabilities to vote via fax or email. Ind. Code §§ 3-11-4-5.8; 3-11-4-6(a)(4). As further discussed below, neither of these options suffices to support the conclusion that voters with print disabilities enjoy the right to which they are entitled—the right to cast their vote privately and independently from their homes just as sighted Indiana citizens are able to do.

A. The Traveling Board System Deprives Plaintiffs of Their Right to Vote Privately and Independently.

The operative question here is whether the traveling board gives Plaintiffs meaningful access to Defendants' Absentee Vote by Mail Program—a system in which voters without print disabilities can vote privately and independently. The unequivocal answer is no. As this Court rightly observed in its March Order, the traveling board arrangement requires Plaintiffs to "submit to the intrusion of two strangers into their home and into the voting process, which is secret and independent for other voters." Filing No. 99 at 16. Any arrangement such as this—namely, an arrangement which inherently requires voters with disabilities to accept the assistance of sighted individuals in order to cast their vote—violates the ADA and Section 504. *See Lamone*, 813 F.3d at 507 ("The right to vote should not be contingent on the happenstance that others are available to help.") (*quoting Disabled in Action*, 752 F.3d at 200); *Taliaferro*, 489 F. Supp. 3d at 437 ("[E]ffectively requiring disabled individuals to rely on the assistance of others to vote absentee denies such voters meaningful access to the state's absentee voting program") (internal quotations omitted); *see also Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1264

(D.C. Cir. 2008) ("[W]hile [t]here was a time when disabled people had no choice but to ask for help—to rely on the kindness of strangers[,] . . . [i]t can no longer be successfully argued that a blind person has meaningful access to currency if she cannot accurately identify paper money without assistance.") (internal quotations omitted).

Further, the mandatory traveling board restricts Plaintiffs' options in additional ways that sighted Indiana voters need not navigate. As this Court found in its March Order, the mandatory traveling board also forces voters with print disabilities to vote absentee with "a shorter window for absentee voting (19 days versus 45 days), . . . at a time that is based on the schedule of the Traveling Board rather than their own schedule." Filing No. 99 at 16. *See* Ind. Code §§ 3-11-4-15; 3-11-4-18(c); 3-11-10-24(d); 3-11-10-25(b)(3); 3-11-9-2. In contrast, voters who can vote absentee using paper ballots can do so at any time within the 45 days preceding an election, at whatever hour and under whatever circumstances they choose, and in complete privacy and isolation. Further compounding these difficulties, the traveling board is unreliable; Plaintiff Wanda Tackett was unable to vote in the 2020 presidential election altogether because the traveling board never showed up at her home. Filing No. 80-3 at 2 (Tackett Dec. ¶ 6).[3] While Defendants waive this fact away as a mere anecdote, it remains unclear how many additional

[3] Defendants argue that it "does not matter" that the traveling board sometimes fails to show up to appointments or that some voters with print disabilities may be uncomfortable with this option, either due to COVID-19 or for other reasons. Filing No. 141 at 31-32. This is absurd. "[T]he relevant inquiry asks…whether those with disabilities are *as a practical matter* able to access benefits to which they are legally entitled." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003) (emphasis added); *see also Paulson*, 525 F.3d at 1267 ("Where the plaintiffs identify an obstacle that impedes their access to a government program or benefit, they likely have established that they lack meaningful access to the program or benefit"). As a practical matter, the traveling board's reliability is an obstacle that impedes Plaintiffs' access to absentee voting, a benefit they are entitled to under Indiana law, as is discomfort with allowing strangers into their homes—whether due to COVID-19 or otherwise. *See Paulson*, 525 F.3d at 1269 ("But coping mechanisms and alternate means of participating…do not address the scope of the denial of access…The Secretary's argument is analogous to contending that merely because the mobility impaired may be able to rely on the assistance of strangers or to crawl on all fours in navigating architectural obstacles, they are not denied meaningful access to public buildings. Such dependence is anathema to the state purpose of the Rehabilitation Act, and places the visually impaired at a distinct disadvantage…") (internal citations omitted).

voters would need to be forced to miss an election in this way before they would deem the unreliability significant enough.

Finally, the traveling board's unnecessary restrictions on print-disabled voters' choice of who their assistant (if any) will be violates both federal disability rights laws and the Voting Rights Act. *See* 52 U.S.C. § 10508; *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 233–35 (M.D.N.C. 2020). Given this board's mandatory nature, voters with print disabilities who desire assistance in completing an absentee ballot are prohibited from requesting help from the people they already know and trust. That they would be entitled to an assistant of their choice when voting in-person, Ind. Code § 3-11-9-2, further underscores the discriminatory nature of Indiana's Absentee Vote by Mail Program.

Defendants attempt to minimize these concerns by arguing that the traveling board is capable of providing voters with a private and independent vote because county boards of election have the option to bring accessible voting machines into voters' homes. The existence of such an option, however, does not cure the discriminatory nature of the state's Absentee Vote by Mail Program for the simple, undisputed fact that a mere 16 counties have adopted resolutions authorizing this option (though, notably, Defendants do not state if any of those 16 counties have actually provided an accessible voting machine via traveling board). Def.'s Mot. Summ. J., Filing No. 141 at 31. Given that Indiana has 92 counties in total, that leaves 76 counties that do not currently, and may never, permit their traveling boards to take accessible voting machines to voters' homes.[4] That the state law requires these resolutions to be unanimous introduces further

[4] Defendants' claim that "several more" counties are considering adopting resolutions authorizing their traveling boards to take accessible voter machines into voters' homes, Filing No. 141 at 31, is inadmissible hearsay. *See* FED. R. EVID. 801-803. Even if such claim was admissible, moreover, the fact that a small handful of additional counties intend to adopt such resolutions does not give Plaintiffs meaningful access to Indiana's Absentee Vote by Mail Program.

uncertainty for voters with print disabilities, since some counties may not be able to reach a unanimous consensus nor even consider such a resolution with sufficient time before an election to obtain the necessary consensus. Ind. Code § 3-11-10-26.2(b).

At any rate, contrary to Defendants' claim that none of the Plaintiffs requested that their counties send them accessible voting machines by traveling board, it is indeed the case that Ms. Tackett requested that the Vanderburgh County Election Office send a traveling board with an accessible voting machine to her home in the 2020 general election and was denied. Filing No. 144-1 (Pls.' Resp. to Def.'s First Set Interrog. at 6-7). In practice, as was true for Ms. Tackett, the vast majority of voters with print disabilities will not have their counties send them accessible voting machines, assuming they have the sophistication to particularly request that accommodation to begin with. However, even if this were a realistic possibility, it would not allow voters with print disabilities the same degree of privacy and independence as a RAVBM option because such an arrangement still requires these voters to submit to the intrusion of two strangers into their homes, at the strangers' convenience, and in a more limited timeframe than the other absentee voting options in Indiana, requirements to which voters without print disabilities are not subjected. In sum, the mandatory traveling board discriminates against voters with print disabilities regardless of this (at best geographically highly restricted) option.

B. Defendants' Implementation Efforts Surrounding SEA 398 Show that the Discrimination Against Voters with Print Disabilities Is Continuing Despite the Passage of this Law.

Irrespective of what they plan to implement in the future in connection with SEA 398, Defendants are liable for their failures to provide voters with print disabilities access to a private and independent vote now. All available evidence indicates that the implementation of SEA 398 has not yet allowed Plaintiffs to vote absentee privately and independently and is unlikely to do

so in the future. While Defendants claim that they have made great strides in implementation with the exception of a few "bugs," the facts paint a different picture entirely: While trying to apply for accessible absentee ballots in the May 2022 primary, *none* of the voters with print disabilities who attempted to use the .pdf combined voter registration and absentee ballot application ("ABS-VPD") form using their assistive technology succeeded. Filing No. 126-1 at 2 (May 17 Fleschner Dec. ¶ 9); Filing No. 126-5 at 3-4 (May 13 Kersh Dec. ¶ 14). As Plaintiffs' expert explained in her May 17, 2022, declaration, the .pdf ABS-VPD form was inaccessible: It was neither compliant with the Web Contact Access Guidelines ("WCAG") nor tagged properly, such that when she attempted to fill it out using two popular screen readers, she could not navigate the form, hear the information each field called for, enter information into the fields, or apply an electronic signature. Filing No. 126-19 at 7 (Youngblood Savage Supp. Dec. ¶¶ 18-21).

Although some voters with print disabilities were able to use the HTML version of the ABS-VPD form—which was available for only one day before what many counties presumed to be the deadline—many others were not. Filing No. 126-1 at 3 (May 17 Fleschner Dec. ¶ 10); Filing No. 126-15 at 2-3 (Salisbury Dec. ¶¶ 9-12). Further, because Defendants failed to instruct the counties on the deadline for either version of the form, some voters with print disabilities were deprived of their vote or unable to get an electronic absentee ballot. Filing No. 126-1 at 4 (May 17 Fleschner Dec. ¶¶ 13-15); Filing No. 126-9 at 4-5 (May 12 Hart Dec. ¶¶ 9-10). Of those who did manage to receive electronic absentee ballots and accompanying secrecy waivers, *none* were able to complete them with assistive technology as contemplated by SEA 398. Filing No. 126-19 at 8-13 (Youngblood Savage Supp. Dec. ¶¶ 22-33); Filing No. 126-10 at 2-3 (Anderson Dec. ¶ 8); Filing No. 126-13 at 4-5 (Munson Dec. ¶ 10); Filing No. 126-5 at 5 (May 13 Kersh Dec. ¶ 17). These voters all had to ask for assistance from sighted individuals, sometimes more

than one, or not vote at all. Filing No. 126-5 at 5-6 (May 13 Kersh Dec. ¶¶ 18-19); Filing No. 126-10 at 3 (Anderson Dec. ¶ 11); Filing No. 126-13 at 5-6 (Munson Dec. ¶¶ 13-16).

Considering that Defendants have so far failed to comply with SEA 398 despite already having had over a year to do so, there is no reason to believe future elections will be any different than May's primary. The most Defendants suggest they intend to do to make accessible absentee ballots available is to develop "best practices" to assist county boards of election. *See* Filing No. 141 at 34; Filing No. 140-1 at 11-12 (Declaration of Bradley King and Angela Nussmeyer ¶ 15(d)). They certainly did not do so for the May 2022 primary. In fact, Marion County election board officials admitted that Defendant Indiana Election Division refused to answer questions about whether their absentee ballots could be made accessible. Filing No. 126-10 at 2-3 (Anderson Dec. ¶¶ 8-9); Filing No. 126-13 at 5 (Munson Dec. ¶ 12). Neither have Defendants amended the September 2021 policy purporting to guide the counties on how to comply with SEA 398, which does not mandate, or provide a process for ensuring, that the basic documents of absentee voting be made accessible or tested for WCAG compliance, *see* Filing No. 80-8 at 36 (SOS Dep. 137:9-140:23), or exempt voters with vision or dexterity disabilities from inaccessible signature requirements. *See* Filing No. 80-11 at 8 (September 2021 Policy at ACBI000839); Filing No. 80-6 at 3, 9 (Feb. 3 Youngblood Savage Dec. ¶¶ 8, 28-29). Defendants' statement of future intentions to comply with the statute, without more, does not constitute a reasonable accommodation to Plaintiffs. *See Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 158 (3d Cir. 2005) ("General assurances and good-faith intentions neither meet the [ADA] nor a patient's expectations. . . . [T]hey are simply insufficient guarantors in light of the hardship daily inflicted upon patients [by discriminatory practices].").

In short, Defendants' progress in implementing SEA 398 is plainly insufficient to remedy the discriminatory nature of the regime that, pre-SEA 398, required voters with print disabilities to rely on the traveling board to vote absentee. Because Defendants are continuing to fail to implement this law in a way that will allow these voters to cast their ballot privately and independently, their Absentee Vote by Mail Program remains discriminatory—thus warranting summary judgment on Defendants' liability for violating both ADA's Title II and Section 504.

III. RAVBM Tool Is the Appropriate Remedy to Redress the Ongoing Discriminatory Treatment of Indiana's Voters with Print Disabilities.

Plaintiffs' proposed remedy, the RAVBM tool, is the appropriate method for remedying the discriminatory nature of Indiana's current voting regime, as overviewed in Section II above. Contrary to Defendants' objections, an RAVBM is not a fundamental alteration of the state's voting system nor is it a risky proposition that runs afoul of the state's law: Rather, it is a safe, practical, and easily implemented tool that many jurisdictions already use. Section A below overviews fatal flaws in Defendants' fundamental alterations argument while Section B addresses Defendants' claim that the *Purcell* principle bars this Court from ordering the remedy Plaintiffs seek. Section C explains why the security concerns Defendants cite are overblown and indeed contradicted by their current practices. Finally, section D shows why, in light of all these facts, Defendants' professed concerns are clearly outweighed by Plaintiffs' fundamental right to a private and independent vote, which the RAVBM tool, unlike Defendants' implementation efforts (or plans) to date, would secure.

A. Defendants' Theory that an RAVBM Is a Fundamental Alteration is Untenable.

"It is the state's burden to prove that the proposed changes would fundamentally alter their programs." *Steimel v. Wernert*, 823 F.3d 902, 916 (7th Cir. 2016) (citing *Radaszewski ex*

rel. Radaszewski v. Maram, 383 F.3d 599, 611 (7th Cir. 2004)). Here, Defendants' fundamental alteration argument fails for three reasons. First, Defendants have waived this defense by failing to file a statement of defenses. Second, Defendants have not met the evidentiary burden required by 28 C.F.R. § 35.164. Third, the requested RAVBM would not fundamentally alter Indiana's absentee voting program, such that Defendants' fundamental alterations defense fails on the merits as well.

1. Defendants waived the fundamental alteration defense by failing to file a statement of claims or defenses.[5]

The Case Management Plan—originally adopted April 16, 2021, and subsequently amended as late as April 7, 2022—set forth the following requirement:

> On or before May 10, 2022, and consistent with the certification provisions of Fed. R. Civ. P. 11(b), the party with the burden of proof shall file a statement of the claims or defenses it intends to prove at trial, stating specifically the legal theories upon which the claims or defenses are based. *A party's failure to file a timely statement of claims or defenses may result in the waiver of the party's claims or defenses.*

Filing No. 117 (emphasis added).

Despite this requirement, Defendants did not file a statement of claims/defenses. This Court has held that such a failure waives a claim or defense. Specifically, in *Jackson v. Regions Bank*, this Court discussed at length the purpose of a statement of claims/defenses and the consequences of failing to identify claims/defenses in the statement[6]:

> [T]his Court (through the CMP, which is a binding order) requires that parties submit a Statement of Claims (or a Statement of Defenses, as the case may be) outlining their claims and the specific legal theories underlying those claims. This

[5] Defendants have submitted no evidence showing that the financial costs of implementing Plaintiffs' requested relief would constitute an undue financial burden. As Defendants have the burden of proof, their failure to submit such evidence waives this defense. Significantly, Defendants have not identified evidence of (1) the likely cost of implementing Plaintiffs' requested relief; or (2) the likely cost of the current SEA 398 program. Without evidence of either, the Court cannot determine whether the cost of (1) substantially outweighs the cost of (2).

[6] *Jackson* involved a plaintiff's failure to include a legal claim in his statement, so the decision refers only to claims. However, its reasoning is equally applicable to affirmative defenses for which a defendant bears the burden of proof.

> requirement is intended to clarify and focus the issues for summary judgment and for trial, in order to avoid wasting time and resources on issues that will not be pursued and ensure that the claims that are going forward can be addressed and disposed of in the most efficient manner possible. The parties must be able to rely upon the Statement of Claims in developing their litigation strategy, moving for summary judgment, and preparing for trial, and the Court must be able to rely upon it in order to craft jury instructions and make other trial preparations. After conducting discovery, the parties should understand the issues involved in their case and be prepared to outline them in a way that is helpful to the Court and to each other. In addition, the Statement of Claims, like any other filing, is subject to Rule 11, and therefore the Court expects that it be thoughtful, accurate, and made in good faith. Because the Statement of Claims serves all of these important purposes, the Court in most cases will treat it as a binding statement of the issues and claims a party is pursuing and, by implication, a binding statement of the issues that the party is abandoning.

No. 1:19-cv-01019-JMS-MPB, 2020 WL 2949777, at *3 (S.D. Ind. June 3, 2020), *aff'd*, 838 F. App'x 195 (7th Cir. 2021). *See also Mwangangi v. Nielsen*, 536 F. Supp. 3d 371, 383–85 (S.D. Ind. 2021).

Accordingly, Defendants waived the fundamental alteration defense by failing to file a statement of claims/defenses.[7]

2. Defendants did not meet the evidentiary burden required for asserting a fundamental alteration defense.

Defendants have the burden of proof on their fundamental alteration defense, a burden they have failed to meet. Regulations promulgated by the Attorney General under the ADA set forth specific evidentiary requirements for public entities claiming the fundamental alteration defense. "Within the ADA, Congress granted the Attorney General the authority to promulgate regulations necessary to its implementation, 42 U.S.C. § 12134(a), which 'are entitled to "controlling weight, unless they are arbitrary, capricious, or manifestly contrary to the statute."'"

[7] It is too late for Defendants to argue that, despite failing to file a statement of claims/defenses, the defense should not be waived. Defendants did not argue why their failure to file a statement of defenses should be excused in their original filing, and addressing it in their reply will be too late. *Zimmerman v. Bd. of Tr. of Ball State Univ.*, 940 F. Supp. 2d 875, 890 (S.D. Ind. 2013) (argument raised for first time in reply is waived).

Hindel, 875 F.3d at 347 n.3 (quoting *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998)). One of those regulations, 28 C.F.R. § 35.164, applies here. *See Hindel*, 875 F.3d at 347 (applying this section to fundamental alteration defense in context of claim requesting implementation of RAVBM for voters with print disabilities). This section provides:

> The decision that compliance [with this subpart] would result in such [fundamental] alteration or [undue financial and administrative] 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.[8]

Defendants did not submit evidence that the "head of the public entity" (the Secretary of State, the co-directors of the IED, or members of the IEC) issued such a written statement. Thus, Defendants have failed to meet the evidentiary burden imposed by 28 C.F.R. § 35.164. The fundamental alteration defense must therefore be rejected.

3. An RAVBM system is not a fundamental alteration of Indiana's absentee voting program.

Defendants likewise fail to carry their burden of proof on the fundamental alteration defense on the merits. *Steimel*, 823 F.3d at 916 (citing Radaszewski, 383 F.3d at 611) ("It is the state's burden to prove that the proposed changes would fundamentally alter their programs."). To start with, Defendants have not identified a court decision finding an RAVBM to be a "fundamental alteration" of a state's absentee voting system. Contrary to Defendants' assertion,

[8]Defendants have not argued that the regulation is arbitrary, capricious, or manifestly contrary to the statute. In a footnote, Defendants do contend that treating this regulation as binding "would raise serious constitutional concerns over whether Congress could delegate such authority to the Executive Branch." Filing No. 141 at 37 n.5. This argument is undeveloped and therefore waived as Defendants do not identify what these "constitutional concerns" are, or why such concerns should be resolved in their favor. *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("arguments [are] waived on appeal if they are underdeveloped, conclusory, or unsupported by law.").

Drenth did not hold that an RAVBM is such an alteration. No. 1:20-cv-829, 2020 WL 2745729. While the court did decline to order the RAVBM system that the plaintiffs had requested in that instance, the court's reasons for doing so had nothing to do with the fundamental alterations defense. *Id.* at *6. Rather, the court found that the system was infeasible to implement in such a short time frame; the case was filed on May 21, and the primary election at issue was scheduled for June 2. *Id.* at *2, *6.

All of Defendants' additional arguments fail as well. First, as set forth in section (a), an RAVBM is not a new program or service but rather a modification of an existing program which already provides for electronic ballot transmission. Second, as set forth in section (b), an RAVBM is not a "voting system" within the meaning of state law and does not require internet use any more than the voting processes the state has already implemented under the UOCAVA system and SEA 398. Lastly, as set forth in section (c), Defendants' reliance on the idea that most people vote in-person in Indiana is misplaced, as is their claim that the RAVBM tool would alter the division of responsibility between the state and the counties. For all these reasons, this Court should not hesitate to reject Defendants' fundamental alteration defense, not just on procedural grounds, but on the merits as well.

a. An RAVBM is not a new program or service.

Defendants' assertion that an RAVBM would be a new program or service and, as such, a fundamental alteration not required under the ADA, *see* Filing No. 141 at 35-37, is unsupported both by caselaw and the factual record in this case. First, as already noted above, none of the cases Defendants cite have held that requiring an RAVBM program fundamentally alters a state's election system. Second, Indiana already has a program providing for forms of electronic voting as both UOCAVA and SEA 398 both provide for electronic transmission of blank ballots

to certain voters, and for those voters to return completed ballots electronically. SEA 398, moreover, specifically requires WCAG-compliant ballots for voters with print disabilities who request them. Adding Plaintiffs' requested RAVBM option would thus merely alter the format in which the electronic ballots are transmitted, completed, and returned, in order to bring the state's absentee program in line with the requirements of SEA 398. *See* P.s' Mot. Summ. J., Filing No. 128 at 23-24 (citing to various evidence of Defendants' continued failure to ensure WCAG-compliant ballots consistent with SEA 398).[9] The requested relief is, in light of these facts, properly understood as a modification of an existing program that is necessary to bring that program into compliance with the law, not a whole new program as Defendants argue.

b. An RAVBM with electronic return does not violate Indiana law.

Defendants' claim that Ind. Code § 3-11-15-61 precludes Plaintiffs' requested relief because it bans "voting systems" from being connected to the Internet, *see* Filing No. 141 at 37-38, fails for several reasons. First, Defendants present no evidence to show that this is the case: They do not cite to the statutory definition of "voting system," let alone evidence showing that an RAVBM system constitutes one. As more is required to prove this affirmative defense, the argument should be rejected for this reason alone. *See Wade v. Ramos*, 26 F.4th 440, 446 (7th Cir. 2022) (quoting *Schacht v. Wis. Dep't of Corr.*, 175 F.3d 497, 504 (7th Cir.1999)) (warning that summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.").

Second, it is at best unclear that an RAVBM even meets the statutory definition of a voting system. Indiana law defines a "voting system" as follows:

[9] Plaintiffs are not arguing that Defendants' failure to comply with SEA 398 in and of itself is a violation of the ADA/Rehabilitation Act. Rather, it is the failure to provide Plaintiffs with ballots that can be completed privately and independently that violates their rights. Plaintiffs highlight SEA 398 merely to show what Indiana's absentee voting program already entails, such that implementing an RAVBM would not be a fundamental alteration.

> "Voting system" means, as provided in 52 U.S.C. § 21081:
>
> (1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support that equipment) that is used:
>
> (A) to define ballots;
>
> (B) to cast and count votes;
>
> (C) to report or display election results; and
>
> (D) to maintain and produce any audit trail information; and
>
> (2) the practices and associated documentation used:
>
> (A) to identify system components and versions of those components;
>
> (B) to test the system during its development and maintenance;
>
> (C) to maintain records of system errors and defects;
>
> (D) to determine specific system changes to be made to a system after the initial qualification of the system; and
>
> (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

Ind. Code § 3-5-2-53.

At the minimum, Plaintiffs' requested RAVBM does not clearly fit this definition: It is not the device used to define ballots (this is done by the Counties and their voting machine vendors); it is not the device that casts and counts votes (even with the RAVBM system, the actual votes are transferred to the ballot form that is then fed into the tabulation machine, Filing No. 126-30 at 31-32 (Deposition of Bryan Finney ("Finney Dep.") at 30:7-31:25); Filing No. 126-31 at 44-46 (Deposition of Aaron Wilson ("Wilson Dep.") at 43:8-45:14); and it does not show results or maintain and produce an audit trail.

Even subsection (2)(E) of the statutory definition, which includes "practices and associated documents used . . . to make available [paper ballots] to the voter," does not clearly define an RAVBM as a "voting system" that cannot be connected to the internet. *See* Ind. Code §

3-5-2-53(2)(E). Assuming such practices include electronic transmission of ballots to voters, Indiana law already permits electronic transmission. In particular, UOCAVA and SEA 398 permit ballots to be sent electronically to voters and for completed ballots to be returned electronically by voters; Defendants do not contend these two types of electronic transmissions are unlawful (presumably because they are aware that doing so would entail asserting that both the UOCAVA system currently in place and SEA 398 are effectively unlawful). The provision at issue thus cannot prohibit transmission of ballots through the RAVBM system any more than it already prohibits Indiana's existing UOCAVA system and SEA 398.

Third, the theory that RAVBM is prohibited by the law in question is further undermined by the fact that, as a practical matter, implementation of the RAVBM tool entails no greater degree of internet use than the existing practices implemented under UOCAVA and SEA 398. Indeed, the only difference between the current practices and the system requested by Plaintiffs is that completed ballots could be submitted through the RAVBM portal, rather than by email. The completion of the ballot itself can be done completely locally on the voter's computer or other device, which requires no internet connectivity. Filing No. 126-30 at 43 (Finney Dep. at 42:14-19). As such, the only portion that requires internet connection is the transmission of the blank ballot to the voter and the return of the completed ballot to the County. Ballot return can be done through the RAVBM portal. *Id.* at 50-53 (Finney Dep. at 49:19-52:11). Alternatively, it can be done by saving the completed ballot and faxing or emailing it to the county. *Id*. While the latter is not Plaintiffs' preferred solution, it is something the Court could order, and it would meet the privacy and independence requirements of the ADA/Rehabilitation Act.[10] Specifically,

[10] Although Plaintiffs did not request this option in their opening brief, the Court should not find that such a request is waived. As noted above, Defendants did not file a statement of claims/defenses. Therefore, Plaintiffs had no reason to address this issue in their motion for summary judgment. Because Defendants only belatedly raised this issue in their combined summary judgment brief/response, Plaintiffs should be permitted to address it here.

the Court could order Defendants to implement an RAVBM system that allows voters to complete their ballot, electronically sign or authenticate the ballot and secrecy waiver (in lieu of a hand signature), then save the completed file (as an accessible .pdf) and email it to the County Election Board in a manner similar to the process for UOCAVA voters. This method would allow voters with print disabilities to cast their ballots privately and independently without requiring transmission of the ballot through the RAVBM portal.

In sum, like the UOCAVA and SEA 398 system already in place, the only parts of the process that would require connection to the internet would be the receipt of the blank ballot and return of the completed ballot to the County (after which it would be transferred to ballot stock and fed into the actual voting machine). Because the degree of internet use that the RAVBM option would entail is thus no greater than the degree of internet use already built into the voting processes under UOCAVA and SEA 398, the undisputed evidence compels the conclusion that the RAVBM tool, even if it does meet the statutory definition of a "voting system," does not rely on internet use in a way that is prohibited under the state law.

Fourth, to the extent that Ind. Code § 3-11-15-61 is inconsistent with the requirements of the ADA/Rehabilitation Act, the latter controls. "The Supreme Court has held that the ADA's Title II, at least in certain circumstances, represents a valid exercise of 14th Amendment powers . . . and as such it trumps state regulations that conflict with its requirements." *Lamone*, 813 F.3d at 508 (internal citation omitted); *see also Hindel*, 875 F.3d at 349. "Requiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does." *Jones v. City of Monroe, Mich.*, 341 F.3d 474, 487 (6th Cir. 2003) (Cole, J., dissenting) (citing *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782–83 (7th Cir. 2002)), *abrogated in part on other grounds by Lewis v. Humboldt Acquisition Corp.*, 681 F.3d

312 (6th Cir. 2012) (en banc). *See also Mary Jo C. v. N.Y. State and Local Ret. Sys.*, 707 F.3d 144, 163 (2d Cir. 2013) ("If all state laws were insulated from Title II's reasonable modification requirement solely because they were state laws. . . . the ADA would be powerless to work any reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and no matter how minimal the costs of doing so."). Accordingly, even assuming there is tension between state law and the RAVBM tool Plaintiffs propose, Defendants' obligation to provide Plaintiffs with a private and independent voting method prevails.

Holdings in *Lamone* and *Hindel* are especially instructive, notwithstanding Defendants' unconvincing attempts to distinguish those cases. In both instances, the state defendants argued that the requested RAVBM relief would be a fundamental alteration because the RAVBM system had not been certified under state processes. *Lamone*, 813 F.3d at 508; *Hindel*, 875 F.3d at 348. The Fourth and Sixth Circuit, respectively, rejected these defenses.[11] *Lamone*, 813 F.3d at 508–09; *Hindel*, 875 F.3d at 348–49. While Defendants here do not rely solely on a certification argument, but also on the prohibition on voting systems being connected to the internet, the *Lamone* and *Hindel* courts' reasoning nonetheless applies since both the certification and prohibition arguments are grounded in state law, which cannot override the requirements of the ADA and Section 504.

Finally, while Defendants' brief, for reasons set forth above, sheds little light on the scope and substance of the provisions of Ind. Code § 3-11-15-61, Plaintiffs respectfully posit that it can be inferred that this provision was passed to ensure that ballots are transmitted securely

[11] In *Lamone*, the Fourth Circuit affirmed the district court's rejection of the defense after a bench trial. *Lamone*, 813 F.3d at 498, 509-10. In *Hindel*, the Sixth Circuit reversed a grant of the district court's Fed. R. Civ. P. 12(c) judgment on the pleadings based on the fundamental alteration defense, finding that the defendants failed to prove the defense by competent evidence. *Hindel*, 875 F.3d at 346, 347–50. As shown here, Defendants have not put forth sufficient evidence to prove the fundamental alteration defense, so summary judgment is appropriate.

and are reasonably protected against interference.[12] Presuming this to be the case, Defendants' arguments still fail because, as discussed further in greater detail in Section C below, they have not put forth evidence showing that Plaintiffs' requested RAVBM system is materially less secure than current processes. Rather, they have merely cited to some evidence showing that, *in some circumstances, some RAVBM processes* are less secure than paper ballots. Absent evidence demonstrating that Plaintiffs' specific proposed processes are less secure than the current processes allowed under Indiana law, including electronic transmission under UOCAVA and SEA 398, this generalized proposition is insufficient to carry Defendants' burden under the fundamental alteration defense.

As the court explained in *Hindel*, generalized concerns are insufficient because "[t]he underlying question is fact-specific" and demands more than a mere "allegation that the remedy would fundamentally alter [a state's] voting system simply because it ha[s] not passed the certification process—*only if the substantive interests undergirding the certification rules cannot be met by the ballot marking tools and electronic ballots, as shown by evidence presented by the parties*, can the district court properly make a determination on defendant's affirmative defense." *Hindel*, 875 F.3d at 348–49 (emphasis added) (internal citation omitted). Because Defendants here fail to present concrete evidence that the RAVBM system Plaintiffs propose is substantially less secure than the processes they already utilize, and instead limit their argument to non-specific claims about some RAVBM systems generally, they plainly fail to meet the burden of proof required to establish the affirmative defense of fundamental alteration.

[12] Because Indiana law permits transmission of ballots by fax and email, it is clear that Ind. Code § 3-11-15-61 does not require ballot transmission be absolutely protected against these threats. Defendants admit that fax and email transmission are not 100% secure. Filing No. 80-10 at 13 (Deposition of Jay Phelps ("Phelps Dep.) at 46:16-47:3) (noting that there are no security requirements to voters' email systems used for email ballots).

c. An RAVBM does not otherwise fundamentally alter Indiana's voting system.

Defendants' remaining claims of fundamental alteration are equally unconvincing. To start with, Defendants' complaint that Plaintiffs' requested RAVBM would cause Indiana to stop being a largely "in-person voting state," *see* Filing No. 141 at 38, is beside the point for the simple fact that the overall percentage of voters who are eligible to, or who do, vote by absentee ballot from home is irrelevant. (It is also untrue, as evidenced by the undisputed fact that the number of voters likely to use the RAVBM tool is small, as discussed in more detail below in Section (III)(C)). Defendants cannot dispute that Plaintiffs are among voters who are statutorily permitted to vote absentee from home. Ind. Code § 3-11-10-24(4). Nor can they dispute that a substantial percentage of Indiana voters are permitted to vote by absentee ballot from home, whether they are able to vote in person or not. For instance, state law permits "elderly voters" to vote from home. Ind. Code § 3-11-20-24(5). Elderly voters (defined as those over 65 years of age) in turn made up more than 25% of registered voters in Indiana in November 2020. U.S. Census Bureau, Voting and Registration in the Election of November 2020, Table 4(c), available at https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html (last checked June 22, 2022). Adding a few hundred eligible voters to this number, out of more than 3.4 million eligible voters overall, *and who are already qualified to vote absentee from home*, simply does not amount to a fundamental alteration.

Finally, granting Plaintiffs' requested relief will not fundamentally alter the division of duties among Indiana election officials because, under the RAVBM system that Plaintiffs request, the only change will be in the method of presenting the ballot to voters with print disabilities. Counties will still be responsible for determining who is on the ballot and will likewise still be responsible for designing (or contracting to design) the ballot layout for the vast

majority of voters. Further to the point, SEA 398 already controls some aspects of ballot presentation, in that it requires that ballots be WCAG compliant.[13] The change Plaintiffs request is accordingly minor by comparison and does not rise to the level of a fundamental alteration.

In view of both these undisputed facts and Defendants' failure to meet their evidentiary burden, the Court should rule that the fundamental alteration defense does not apply.

B. *Purcell* Does Not Bar this Court from Ordering Implementation of the RAVBM Tool in the More Than Four Months Remaining Before the Next Election.

1. More than four months remaining before the November 2022 General Election does not qualify as a "period close to an election" within the meaning of *Purcell*.

Defendants' argument that the injunction should be denied because of the holding in *Purcell v. Gonzalez*, *see* 549 U.S. 1, 5–6 (2006)—namely, the principle that federal courts "ordinarily should not enjoin state election laws in the period close to an election[,]" *see Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring)—is fatally undermined by the fact that more than four months before an election does not constitute a "period close to an election." While the Supreme Court has not clearly defined the term "period close to an election" as used in *Purcell* and its progeny, many *Purcell* cases were decided on timelines far more compressed than the timeline here—namely, in the days or a week prior to the election at issue. In *Merrill v. Milligan*, Justice Kavanaugh stated that the definition of "close to an election" depends on the laws being challenged and the relief sought." 142 S. Ct. at 881 n.1. Specifically, "[h]ow close to an election is too close may depend in part on the nature of the election law at issue, and

[13] Indeed, the National Institute of Security and Technology has issued reports advocating for the use of RAVBMs in order to "remove barriers for people with disabilities to vote privately and independently." *See*, *e.g.*, Kerrianne E. Buchanan, et al., *Promoting Access to Voting: Recommendations for Addressing Barriers to Private and Independent Voting for People with Disabilities*, (NIST Special Publication 1273) (Mar. 2022), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1273.pdf.

how easily the State could make the change without undue collateral effects. Changes that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement." *Id.* Here, the change sought is minor, at least relative to the changes sought in the cases Defendants cite; moreover, the timeline is significantly longer than the timeline on which other states were required to implement an RAVBM tool. Taken together, these facts doom Defendants' theory that we have entered a "period too close to election."

To start with, *Merrill* itself involved issues far more complex than this litigation: Specifically, it revolved around an injunction ordering Alabama to redraw its proposed congressional district maps approximately four months prior to the upcoming primary elections. 142 S. Ct. at 883–84 (Kagan, J., dissenting). Justice Kavanaugh's concurrence noted that re-drawing congressional district maps would create significant challenges for candidates and parties in determining who would be able to run in which election and securing any necessary signatures to get on the ballot, and for election officials preparing for the election. *Id.* at 879–80. Thus, this was a complex issue, and the State could not make the changes required by the injunction without substantial collateral effects. The second case Defendants rely on, *League of Women Voters of Florida, Inc. v. Florida Secretary of State*, is likewise inapposite. There, the Eleventh Circuit found that *Purcell* stayed the injunction granted by the district court pending appeal because the election was already underway, and the plaintiffs' position had not been "entirely clearcut.". 32 F.4th 1363, 1371–72 (11th Cir. 2022).

This case, by contrast, involves an "entirely clearcut" violation of federal disability laws[14] and a changing elections landscape. As Defendants themselves admit, they are already making substantial changes to their absentee voting procedures pursuant to SEA 398 in advance of the

[14] *See* Section II, *supra*.

November election. *See* Filing No. 141 at 42-43, 46. Accordingly, it is highly improbable that requiring those changes to include an RAVBM system would be unduly disruptive. At any rate, Plaintiffs' ask for an RAVBM tool is not a request for a change in the status quo, as in the cases Defendants cite, but rather a request for this Court to direct the nature of changes that are already underway.

Separate and apart from reliance on inapposite caselaw, Defendants' argument is likewise undermined by the length of the time available to them to implement the relief Plaintiffs seek. Currently, the November 2022 election is more than four months away. This is ample time compared to the five weeks in *Common Cause v. Lawson*, *see* 937 F.3d. 944, 946 (7th Cir. 2019);[15] the one month in *Common Cause Indiana v. Lawson*, *Democratic Nat'l Comm. v. Bostelmann, see* 977 F.3d. 639, 641 (7th Cir. 2020); *Tully v. Okeson*, 977 F.3d. 608, 612 (7th Cir. 2020), and *Purcell* itself—and notably ample time from the two months in *Merrill*, *see* 142 S. Ct. 879, 879 (2022), and the 55 days between this Court's March 9, 2022 order and the May 3, 2022 primary. Moreover, the more than four months Defendants have to implement this vital tool well exceeds the length of time in which other states were ordered to implement RAVBMs in 2020—approximately a month in Michigan in *Powell v. Benson*, No. 2:20-cv-11023-GAD-MJH (E.D. Mich. May 19, 2020), Filing No. 80-14 (Copy of *Powell v. Benson*), and less than five weeks in North Carolina in *Taliaferro. See* 489 F. Supp. 3d at 436. Finally, more than four months is plenty of time given the general speed at which RAVBMs can typically be implemented. Filing No. 126-30 at 18-19, 20 (Finney Dep. at 17:22-18:2, 19:14-21); Filing No.126-31 at 17, 76 (Wilson Dep. at 16:5-16, 75:8-11).

[15] The time periods stated between court order and election day are calculated by Plaintiff counsel based on the timing between court orders and the relevant election day for the stated cases.

In short, because Defendants have more than four months to implement the RAVBM tool and the record reflects that a number of states have accomplished the task in a far shorter period of time, *Purcell* is not a bar to ordering the relief Plaintiffs seek.

2. Any factors that may cause delays are within Defendants' control.

To the extent that factors such as Defendants' procurement process or the length of time it will take for Indiana election officials to become familiar with a RAVBM may cause delays, several possible solutions exist. First, Defendants' own statewide voter registration services ("SVRS") vendor, Civix, recently acquired an electronic ballot product ("eBallot") from Demtech, *see* Filing No. 144-2 at 2-3 (Deposition of Mike Brown ("Brown Dep.") at 8:10-9:7, such that Defendants have the option of foregoing the procurement process in favor of utilizing a product from the company with which the Secretary of State has already approved and contracted.[16] Alternately, Defendants can choose to use one of several vendors that will likely be able to efficiently train Indiana election officials on the RAVBM; Democracy Live, for example, offers training to election officials that typically lasts no longer than an hour. Filing No. 126-30 at 26 (Finney Dep. at 25:3-25). The RAVBM vendor, moreover, can begin implementing the RAVBM program while simultaneously negotiating the contract: Bryan Finney testified that Democracy Live simultaneously negotiated its contract with Boston while implementing that system, and that it completed the entire process in approximately two weeks. Filing No. 126-30 at 87-88, 92 (Finney Dep. at 86:25-87:21, 91:11-20). Ultimately, both the length of the procurement process and the amount of time it would take to deliver necessary data to an RAVBM vendor are firmly in

[16] As of April 22, 2022, Civix's eBallot was not scheduled to become fully accessible until after the November 2022 general election. *See* Filing No. 144-2 at 3 (Brown Dep. 11:20-12:22, 30:15-20). If the Court issues a permanent injunction ordering Defendants to adopt Civix's eBallot, Plaintiffs expect full accessibility as soon as practicable.

Defendants' hands: They can accomplish all necessary steps in the period before the election if they exert the effort.

The funding problems Defendants cite as one additional factor placing the RAVBM implementation out of their reach are likewise solvable. To start with, Defendants have more than four months to procure any extra funding they may need, and they do not explain why this timeline will not suffice. Further, contracting with outside vendors such as Enhanced Voting would cost less than four or five cents per registered voter, with room for negotiation based on the state's budget needs. Filing No. 126-31 at 87 (Wilson Dep. at 86:6-19). As it is undisputed here that Defendants' implementation of an RAVBM will impact only a "relatively modest" number of voters, the cost is unlikely to be significant. *Frederick v. Lawson*, 481 F. Supp. 3d at 798 (proposed remedy did not pose undue financial burden "such that it would outweigh mail-in absentee voters' interest in protecting their votes, particularly given the data showing the relatively modest numbers of voters affected"). Finally, Defendants may choose to use Maryland's RAVBM, which is free of cost to other states. *See* Filing No. 126-18 at 11; *see also Lamone*, 813 F.3d at 508 (noting that because the online ballot marking tool had already been developed, allowing visually impaired voters to use it did not pose "substantial cost").

In short, each problem Defendants cite is entirely within their power to solve and, as such, not a viable basis for a *Purcell*-based defense.

3. Any timeline-related difficulties are of Defendants' own making and, as such, should not be grounds for denying the remedy Plaintiffs request.

Defendants' argument that there is insufficient time to implement an RAVBM system—and that this lack of time is Plaintiffs' fault—rings hollow. Defendants have known since December 2020, when Plaintiffs filed their initial Complaint, that Indiana's Absentee Vote by Mail Program discriminates against voters with print disabilities, and they have had ample opportunity to

implement a working system since then. They have likewise known that an RAVBM system like the one Plaintiffs are requesting would meet these requirements; indeed, Defendants' own contractor, Baker Tilly, discussed that as an option as early as May 2021. *See* Filing No. 93-2; Filing No. 93-3 at 3. That Defendants ignored this option, *see* Filing No. 93-3 at 1, and plowed ahead with an unworkable system does not obviate their duty to comply with the law.

Defendants' failure to act after April 2021 and the passage of SEA 398 is even more inexcusable. As noted *supra*, SEA 398 specifically directed Defendants to plan for an absentee voting option that complies with WCAG. Defendants' failure to include WCAG-compliant ballots in the September 2021 policy is inexplicable in the light of this clear directive and cannot be grounds for justifying refusal to prepare an accessible option. *See also* Filing No. 99 at 23-24.

In short, although Defendants blame Plaintiffs for the "*Purcell* problem," it is in fact Defendants who have caused it through their failure to voluntarily agree to implement an RAVBM in the more than year and a half that this litigation has been pending, or in the nine months since SEA 398 was announced. Plaintiffs should not be deprived of meaningful access to Indiana's Absentee Vote By Mail Program because Defendants prefer arguing that they lack time before each upcoming election to doing the work necessary to implement the tool Plaintiffs need in order to be able to vote from home independently and privately.

4. Defendants' *Purcell* arguments do not affect Plaintiffs' request for a permanent injunction for elections after November 2022.

Finally, Plaintiffs emphasize that Defendants' *Purcell* arguments only apply to the request for an RAVBM for the November 2022 election. Accordingly, even if the Court determines that *Purcell* bars such relief for November, such determination does not prevent the Court from ordering this relief for future elections.

C. Defendants' Security Concerns, Completely Unsupported by any Expert Testimony, are Generalized and Unsupported by the Record in this Case.

While Defendants insist that the remedy Plaintiffs seek poses undue security risks, their concerns are unsupported and indeed undermined by their own current practices. First, though Defendants theorize—tellingly without the benefit of any expert testimony whatsoever—that an RAVBM tool would jeopardize the security of Indiana's elections, ample evidence indicates that this remedy is at least comparably secure to—if not more secure than—the mechanisms that Defendants already employ. As an initial matter, Defendants' general argument that electronic delivery of ballots poses a security risk is disingenuous considering that they already rely on electronic ballot delivery for overseas voters, military voters, and voters with print disabilities, as discussed *supra* in section III(A). Further, RAVBMs are designed specifically with security in mind, in contrast to Defendants' current electronic delivery mechanisms. Filing No. 144-3 at 3, 10 (Declaration of Dr. Ted Selker ("Selker Dec."), ¶¶ 7, 26). The electronic submission via RAVBM which Plaintiffs seek can easily be made secure in a variety of ways, including but not limited to through integrated production of unique identifiers, multifactor authentication, and hashing. Filing No. 144-3 at 11 (Selker Dec. ¶ 27) (identifying methods for securing electronic ballot submission); Filing No.126-31 at 49-50 (Wilson Dep. at 48:10-49:10) (describing use of integrated production of unique identifiers, multifactor authentication, password protection, and other protections built into the Enhanced Voting platform). Indeed, even the 2020 report from the National Institute of Standards in Technology ("NIST") that Defendants allege supports their argument against the use of RAVBMs articulates methods by which to verify the integrity of the electronic return of ballots. Filing No. 144-3 at 3-4 (Selker Dec. ¶¶ 9-10). Undisputed evidence in the record shows that these methods have already been successfully employed by other jurisdictions without raising any

security concerns to date.[17] Filing No. 144-3 at 11 (Selker Dec. ¶ 27); Filing No.126-31 at 48-49 (Wilson Dep. at 47:7-48:1); Filing No.126-30 at 64-65 (Finney Dep. at 63:23-64:1). That any risks of an electronic ballot return can be successfully mitigated is additionally confirmed by the testimony of a representative from Democracy Live who, when questioned by Defendants' counsel, testified that Democracy Live has taken the issues raised in the 2020 NIST report into account when updating its system. Filing No.126-30 at 84 (Finney Dep. at 83:5-14); Filing No. 144-3 at 10 (Selker Dec ¶ 26).

The risks of using an RAVBM, moreover, are further lessened by the fact that relatively few voters are likely to choose this method, making it a low-value target for prospective hackers. Filing No. 144-3 at 12-13 (Selker Dec ¶¶ 28-30) (setting forth reasons to expect that the pool of votes submitted in this way will be low and thereby raise few security risks); Filing No.126-30 at 91 (Finney Dep. at 90:6-12). Ultimately, the supremely modest risks this method entails are highly unlikely to be more significant than the security risks introduced by paper ballots and the traveling board, much less the email- and fax-based ballot return mechanisms already in place. Filing No. 144-3 at 13-14 (Selker Dec ¶¶ 31-32). It additionally bears emphasizing that the Statewide Voter Registration System ("SVRS") which houses all of Indiana's voter registration data is hosted on the Amazon Web Services ("AWS") cloud, *see* Filing No.126-29 at 6 (Deposition of Sean Fahey at 21:25-22:21), the same server that hosts at least one RAVBM, *see* Filing No.126-30 at 36 (Finney Dep. at 35:4-8); Filing No. 144-3 at 7 (Selker Dec. ¶ 18).[18] If Defendants and their contractors already trust that server to host sensitive voter information, it cannot follow that they

[17] Of note, the representative from one of the RAVBM companies deposed by the parties "[u]sed to work for the Center for Internet Security… [as] the senior director of election security." Filing No.126-31 at 88 (Wilson Dep. 87:15-17).

[18] Many other government entities, including the CIA [https://www.theatlantic.com/technology/archive/2014/07/the-details-about-the-cias-deal-with-amazon/374632/] and NSA [https://www.wsws.org/en/articles/2022/05/27/qemh-m27.html] also use the AWS server.

do not trust that server for the potentially less risky hosting of an RAVBM. *See* Filing No. 144-3 at 7 (Selker Dec. ¶ 18) (describing the potentially higher risk of Indiana's SVRS system as opposed to an RAVBM).

In sharp contrast to this clear lack of evidence that there are security needs that justify continuing to deny Plaintiffs their right to vote absentee privately and independently, there is substantial basis for the concern that the current electronic ballot delivery mechanisms under SEA 398 may be less secure than the remedy Plaintiffs propose. As noted *supra* in Section (III)(A), Defendants already allow electronic delivery, marking, and return of ballots via email and fax to military and overseas voters and—since the passage of SEA 398—to voters with print disabilities. Despite the risks posed by unsecure fax systems, *see* Filing No. 144-3 at 8 (Selker Dec. ¶¶ 21-22), the office of the Secretary of State freely admits that the state imposes no security requirements on faxes used to submit or receive votes cast under UOCAVA. *See* Filing No. 80-8 at 14 (SOS Dep. at 50:6-11). Likewise, despite the existence of readily available email-based protections, such as hashing, multifactor authentication, and encryption, *see* Filing No. 144-3 at 11-12 (Selker Dec. ¶ 27), the state chooses to impose no security requirements on emails used to submit UOCAVA votes either, *see* Filing No. 80-8 at 14 (SOS Dep. at 51:23-52:10), nor does it impose any heightened, election-related requirements on emails used by counties to receive those votes. Filing No. 80-8 at 14-15 (SOS Dep. at 51:23-56:4) (testimony that the email systems used by counties are overseen by FireEye, a company the office of the Secretary of State retained in 2019 to enhance the cybersecurity of its email system generally); Filing No. 80-10 at 12-13 (Phelps Dep. at 43:25-47:3) (describing the lack of specific protections for Defendants' and county election boards' email and fax systems besides the standard suite employed by FireEye); Filing No. 144-3 at 9 (Selker Dec. ¶ 24). The office of the Secretary of State indeed has no plans to change its current rules

around security requirements for faxes and emails used to participate in the UOCAVA program, *see* Filing No. 80-8 at 39 (SOS Dep. at 152:17-23), even though this system has fewer security protections in place than the remedy Plaintiffs seek. Defendants cannot argue on one hand that RAVBMs are unsafe, while on the other hand insisting that the inaccessible and less secure electronic return mechanisms that are already part of the state's Absentee Vote by Mail Program are sufficient to meet the needs of Indiana's voters.

Lastly, Defendants' security concerns are likewise misguided in light of their continued use of the traveling board. While the ostensible purpose of requiring that voters with print disabilities receive assistance from a bipartisan traveling board rather than a person of their own choice is to prevent fraud by ensuring that the intent of the voter is recorded on the ballot, *see* Filing No. 80-7 at 30 (IED Dep. at 116:8-11), a voter with print disabilities using the assistance of a traveling board to mark their ballot has no way to independently confirm that their ballot has been marked according to their wishes. Filing No. 144-3 at 14 (Selker Dec. ¶ 32). The state cannot viably claim that the provision of the online ballot marking tool Plaintiffs seek jeopardizes the security of its elections more than does its system in which strangers record the votes of voters with print disabilities, many of whom are blind or visually impaired, on inaccessible paper ballots.

At any rate, regardless of their absentee voting system's security protections or lack thereof, Defendants likely exaggerate the risks of manipulation of Indiana's elections. Defendant agencies can point to no history of targeted attempts at interfering with Indiana's elections. The testimony of Secretary of State's Director of Election Modernization, Administration, and Special Projects reflects that there have been no attempts to deliberately target counties' election systems, *see* Filing No. 80-10 at (Phelps Dep. at 155:20-23); no incidents of stolen election data, *id.* at 40, 42 (Phelps Dep. at 155:8-19; 161:24-162:3); no need for FireEye to take any steps outside of its

standard operating procedures, *see id.* at 42 (Phelps Dep. at 161:24-162:3); and—when minimal intrusions have taken place—no investigations that Fire Eye did not resolve successfully, *id.* at 42 (Phelps Dep. at 164:8-16). As RAVBMs have been employed for over a decade in multiple jurisdictions for multiple elections without producing any security anomaly, it is extremely improbable that the addition of an RAVBM tool here would introduce dangers to a system that has thus far experienced no problems despite practices which, as overviewed above, likely raise more substantial security concerns relative to this tool. Filing No. 144-3 at 10-12 (Selker Dec ¶¶ 26-27); Filing No. 126-31 at 48-49 (Wilson Dep. 47:7-48:1); Filing No. 126-30 at 64-65 (Finney Dep. at 63:23-64:1).

In sum, Defendants' security-related objections boil down to purely theoretical—and ultimately illusory—concerns that cannot outweigh Plaintiffs' indisputable evidence that the RAVBM tool is, at the minimum, no less secure than Defendants' current practices.

D. Plaintiffs' Fundamental Right to the Same Private and Independent Vote Afforded to Voters Without Disabilities Indisputably Outweighs Defendants' Generalized and Unsupported Concerns.

While Indiana could always seek to make its system more secure, even Defendants acknowledge that integrity of the elections process must ultimately be balanced against voter access. Filing No. 80-8 at 25-26 (SOS Dep. at 94:12-98:17). *See also* Filing No. 144-3 at 4-5 (Selker Dec. ¶ 11). Indeed, the Secretary of State admits that, past a certain point, further security investments may not be the worth the cost, especially given the undeniable fact that preventing fraud must be balanced with the corresponding obligation to make voting available to as many citizens as possible. Filing No. 80-8 at 25 (SOS Dep. at 96:10-97:15) (admission that perfect cybersecurity is impossible and certain measures may not be worth the cost); *id.* at 26 (SOS Dep. at 98:13-17) (agreeing that preventing fraud and maximizing access to voting is a "balancing act").

See also Filing No. 144-3 at 4-5 (Selker Dec. ¶ 11). The NIST report on which Defendants rely finds that electronic ballot return should be available to "voters who have no other means to return their ballot and have it counted." Filing No. 140-2 (NIST report at 1). Plaintiffs and voters with print disabilities are such voters, as Indiana provides no other means by which they may vote privately and independently from home. Filing No. 144-3 at 14 (Selker Dec. ¶ 33). Because Defendants' brief thus offers no concrete basis for prioritizing theoretical security at the expense of Plaintiffs' fundamental civil right to a private and independent absentee ballot, Defendants have failed to provide this Court with sufficient basis for denying Plaintiffs' motion, warranting conclusion that the balance of equities weighs in Plaintiffs' favor. *Smith v. Severn*, 129 F.3d 419, 427 (7th Cir.1997) (emphasizing that "a party will be successful in opposing summary judgment only when they present definite, competent evidence to rebut the motion") (citations and internal quotation marks omitted).

CONCLUSION

For all the reasons set forth both in this and Plaintiffs' filing of May 18, 2022, Plaintiffs respectfully ask that this Court: (1) deny Defendants' summary judgment motion, (2) enter a judgment of liability in favor of Plaintiffs, and (3) issue a permanent injunction making use of the traveling board permissive rather than mandatory, and directing Defendants to provide an accessible, web-based absentee ballot and process for requesting, receiving, signing, and returning absentee ballots. In the alternative, Plaintiffs request that this Court issue a preliminary injunction directing the same for the November 2022 General Election and any elections thereafter until there has been a trial and decision in this case.