UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMERICAN COUNCIL OF THE BLIND OF INDIANA, et. al, Plaintiffs, v. INDIANA ELECTION COMMISSION, et. al., Defendants.	)	No. 1:20-cv-3118-JMS-MJD

DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

The Court should grant summary judgment in favor of Defendants because Indiana's absentee voting system for print-disabled voters does not violate federal law. Plaintiffs largely ignore the allowance under Indiana law for the traveling board to bring an accessible voting machine to the voter's residence, complaining only that not every county has adopted such a resolution. That, of course, only highlights that Plaintiffs have sued the wrong defendants, for none of the defendants has any role whatsoever in a county's decision to adopt or not to adopt a resolution. Moreover, on the accommodation side, Plaintiffs' argument boils down to a contention that an RAVBM tool with web-based return would be the "perfect" accommodation in their view. But the ADA requires only a reasonable accommodation, not a perfect accommodation, and the accommodations that exist under Indiana law and that the defendants are pursuing easily pass that threshold of reasonableness, without fundamentally altering the State's non-internet-based program for absentee voting.

I. Plaintiffs Lack Standing Because Their Injuries Are Traceable to County Election Officials, Not Defendants

Plaintiffs lack standing to sue Defendants because Plaintiffs' injuries are traceable to (and redressable by) independent third parties who are not before the Court, namely, county election officials.

A plaintiff cannot satisfy the traceability component of Article III standing if the injury "results from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976); *see also, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2114 (2021); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Pavlock v. Holcomb*, 35 F.4th 581, 590 (7th Cir. 2022); *Doe v. Holcomb*, 883 F.3d 971, 979 (7th Cir. 2018). A third party's action is "independent" when it is neither compelled nor coerced by the defendants. *Compare Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020) ("In the absence of any evidence that the Secretary controls ballot order, the voters and organizations likewise cannot rely on the Secretary's general election authority to establish traceability. Florida law expressly gives a different, independent official control over the order in which candidates appear 'n the ballot." (citation omitted)), *and Southern Pacific Transp. Co. v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980) (holding that plaintiff lacked standing to sue the Oregon Attorney General to enjoin enforcement of an allegedly unconstitutional criminal statute because although the Attorney General intended to issue an opinion that the statute was constitutional, the decision to file charges was left to district attorneys who were not bound by that opinion), *with Ben-*

nett v. Spear, 520 U.S. 154, 169 (1997) (holding that plaintiffs had standing to challenge an advisory agency's issuance of an opinion that would in all practical effect coerce a different action agency into following that opinion).

The perceived barriers to Plaintiffs being able to vote absentee privately and independently from home under current Indiana law are traceable to county election officials, not Defendants. Indiana law creates a decentralized election-administration system and, as relevant here, both the travel-board-with-accessible-voting-machine accommodation and SEA 398 require *county officials* to act. The decision to authorize the travel board to take an accessible voting machine to a print-disabled voter's home lies exclusively with each county's election board, and neither the Secretary of State, the Election Division, nor the Election Commission can compel a county to adopt such a resolution. Ind. Code § 3-11-10-26.2(b); [Filing No. 140-1 at 6]. And while the Secretary of State and the Election Division are tasked with implementing SEA 398, their actions can only go so far because county officials, not state officials, are exclusively responsible for ballots, and Plaintiffs' complaints are focused on inaccessible ballots. *See* Ind. Code §§ 3-11-2-2.1, 3-11-3-10, 3-11-4-14, 3-11-4-18; [Filing No. 80-7 at 13 (IED Dep. 47:16–48:19; Filing No. 140-1 at 2]. All the Defendants can do on those issues is provide guidance to county officials. [Filing No. 140-1 at 2–3, 7.] They have already alerted county officials to the vote-by-accessible-machine option and the way the county can adopt that route under state law. [Filing No. 91-1 at 140–41.] But they have no power to coerce or compel county officials to act in a particular manner.

Nor does it suffice that the Secretary of State is designated as the chief election official in the State and is assisted in that role by the Election Division. It may be that the Secretary performs "all ministerial duties related to the administration of elections by the State," Ind. Code § 3-6-4.2-2, but on the particular subject of the county travel board and the format of ballots, the Secretary has no role. If a county election board failed to follow the Secretary of State's guidance on passing a resolution or altering the format of ballots to make them accessible, the Secretary would have no power to compel a board to adopt a resolution or remake a county's ballot. Indeed, the Secretary cannot even, for example, remedy errors in vote-count certifications or refuse to certify election results. Ind. Code §§ 3-12-5-13, -3-12-5-15. To be sure, a few district court cases suggest that the Secretary's status as chief election official suffices to make her the appropriate defendant for certain challenges to Indiana election laws. *Frederick v. Lawson*, 481 F. Supp. 3d 774, 790 (S.D. Ind. 2020); *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). Those decisions, however, do not support Plaintiffs' position for at least three reasons.

First, by concluding that the Secretary of State's designation as chief election officer makes her a proper defendant for an election challenge, *Frederick* and *Common Cause* contravene well-established justiciability principles. In *Pavlock*, for example, the Seventh Circuit held that plaintiffs could not sue the Indiana Governor and Attorney General merely by virtue of their general duties to enforce and defend laws because neither official had caused plaintiffs' alleged injury, which stemmed

from a decision of the Indiana Supreme Court. 35 F.4th at 590. And in *Doe v. Holcomb*, the Seventh Circuit held that plaintiffs could not sue the Indiana Governor and Attorney General to challenge the constitutionality of a name-change law simply because they had a general duty to enforce and defend state laws.[1] 883 F.3d at 976–77. Similarly, the Eleventh Circuit held in *Jacobson* that voters challenging ballot-placement decisions could not sue the Florida Secretary of State despite that official's role as chief election officer because Florida law vested county election supervisors with independent authority to design their ballots. 974 F.3d at 1254; *see also, e.g.*, *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration,* 778 F. Supp. 1458, 1461 (S.D. Ind. 1991) (Indiana State Election Board not a proper defendant because unable to order county boards to redress injuries); *Rubin v. City of Santa Monica,* 308 F.3d 1008, 1019 (9th Cir. 2002) (California Secretary of State not a proper defendant because unable to order cities to redress injuries in municipal elections). By embracing a species of "figurehead" standing, *Frederick* and *Common Cause* conflict with established justiciability principles and thus afford no help to Plaintiffs.

Second, *Frederick* and *Common Cause* also depended in part on the Indiana Supreme Court's adjudication of an election-law dispute where the Secretary was the only named defendant. *See Frederick*, 481 F. Supp. 3d at 791; *Common Cause*, 2013

[1] Although *Doe* grounded its decision on that score in the Eleventh Amendment and the limits of *Ex parte Young*, 209 U.S. 123 (1908), "the requirements of *Ex parte Young* overlap significantly with the last two standing requirements—causation and redressability," *Doe*, 883 F.3d at 975, and the standing requirements of traceability and redressability are even more demanding than *Ex parte Young*. *See id.* at 975–76; *see also Okpalobi v. Foster*, 244 F.3d 405, 416–24, 426–27 (5th Cir. 2001) (en banc).

WL 12284648, at *4; *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010). Yet the state court in that case did not address standing. *See League of Women Voters*, 929 N.E.2d at 778 (Boehm, J., dissenting) ("As a final point, because the majority finds the law constitutional, the majority is not required to address the State's contention that these plaintiffs do not have standing to challenge the voter ID law, and does not do so."). In any case, the Indiana Supreme Court has stressed that while state and federal standing jurisprudence often have similarities, they are not necessarily coterminous, *see, e.g.*, *Solarize Indiana, Inc. v. Southern Indiana Gas & Elec. Co.*, 182 N.E.3d 212, 219 n.5 (Ind. 2022); *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1261–63 (Ind. 2020); *Horner v. Curry*, 125 N.E.3d 584, 589–90 (Ind. 2019); *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995), so whether a state court deems an official to be a proper defendant in a state lawsuit has little bearing on whether that official is an appropriate defendant in an Article III court.

And third, *Frederick* and *Common Cause* involved different aspects of Indiana election law and thus have no bearing on the challenge here. *See Frederick*, 481 F. Supp. 3d at 791 (due process challenge to signature-verification requirement for absentee ballots); *Common Cause*, 2013 WL 12284648, at *4 (constitutional challenge to prior method of selecting judges in Marion County). It is well-established that "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (citations omitted). Because one plaintiff

must have standing for each claim asserted in an individual case, it necessarily follows that the one group's standing to challenge a particular law in one case has little if any relevance in assessing another group's standing to sue the same defendant to challenge a different law.

So irrespective whether the standing analyses in *Frederick* and *Common Cause* are defensible on their own terms, they have nothing to do with Plaintiffs' ADA and Rehabilitation Act challenges in this case. As explained in Defendants' opening brief and below, Indiana law already provides ADA-compliant accommodations for print-disabled voters, but those options require county election officials to undertake actions that are separate and independent from actions of Defendants. If Plaintiffs are dissatisfied with their respective counties' implementation of state law, then Plaintiffs should have sued the relevant county election officials. They cannot use the Secretary of State, the Election Division, or the Election Commission as a short-cut by imputing county actions to those state officials.[2, 3]

[2] Plaintiffs' claim that the Rehabilitation Act claims remain viable against all Defendants because the Secretary of State's office receives federal funding is also incorrect. Plaintiffs "full stop" interpretation of a "program or activity receiving Federal financial assistance" sweeps far too broadly. Though a "program or activity" includes "all of the operations of ... a department, agency, … or other instrumentality of a State," 29 U.S.C. § 794(b)(1)(A), it is well-settled that a State as a whole cannot be a "program or activity" just because the State receives federal dollars. *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991); *see also Koslow v. Pennsylvania*, 302 F.3d 161, 171 (3d Cir. 2002) (collecting cases). In any case, their Rehabilitation Act claims fail for the same reasons their ADA claims fail.

[3] Plaintiffs' belief that Congress validly abrogated sovereign immunity under the ADA as applied in this case is similarly mistaken. Unless it is being applied to remedy or prevent a violation of a constitutional right, Title II of the ADA does not validly abrogate state sovereign immunity. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004); *King v. Marion Circuit Court*, 868 F.3d 589, 593–94 (7th Cir. 2017). And although there is a constitutional right to vote, "the fundamental right to vote does *not* extend to a claimed right to cast an absentee ballot." *Tully*

II. Indiana's Existing Accommodations for Print-Disabled Voters Comply with the ADA and the Rehabilitation Act

Indiana law already provides print-disabled voters with the opportunity to vote absentee from home in a private and independent manner. First, Indiana law provides the opportunity for print-disabled voters to vote privately and independently from home through means of the traveling board bringing an accessible machine to the voter's home. Second, Defendants continued implementation of SEA 398 will provide print-disabled voters yet another option to vote privately and independently from home by using their assistive technology to mark an accessible ballot.

A. The travel board vote-by-accessible-machine option provides voters with print disabilities a reasonable accommodation to vote privately and independently from home

The option for a print-disabled voter to cast a ballot on an accessible machine at home before the traveling board provides meaningful and effective access to the absentee-voting program and thus complies with the ADA and the Rehabilitation Act. Plaintiffs' claim that voters cannot vote privately and independently by travel board, but their arguments largely ignore the travel board vote-by-accessible-machine option. Indiana law permits county election boards to adopt a resolution to take to the voter's home an accessible voting machine, which may be an accessible DRE machine or an accessible optical-scan ballot-marking device. Ind. Code § 3-11-10-26.2; [Filing No. 140-1 at 6]. And while the traveling board members may assist the voter in connecting any accessible device to the machine or offer other requested assistance, state

v. Okeson, 977 F.3d 608, 609 (7th Cir. 2020) (citing *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969)). Plaintiffs challenge only the absentee-voting system in Indiana, and so their challenge does not involve the fundamental right to vote.

law *does not* require the traveling board members to remain in the room or hover while the voter marks her ballot. [Filing No. 140-1 at 6.] Indeed, state and federal law both require that the voter be allowed to mark her ballot in a private and independent manner. *See* Ind. Code § 3-11-10-25(f)(1); 52 U.S.C. § 21081(a)(3)(A); [Filing No. 140-1 at 6]. In other words, Indiana's travel board vote-by-accessible-machine option allows voters to vote privately and independently from home as if the voter voted in person during the early voting period or on Election Day. *See* Ind. Code § 3-11-10-25(f)(1); 52 U.S.C. § 21081(a)(3)(A); [Filing No. 140-1 at 6]. And that satisfies the ADA's mandate that qualified individuals with disabilities be afforded meaningful and effective access to Indiana's at-home absentee-voting program.

The fact that only 16 counties had adopted a resolution does not make the accommodation unreasonable. The accommodation itself is unchanged: it provides the option of private independent voting from home to voters with print disabilities in the same manner as if they had voted in-person. And the number of counties employing this option establishes that this is a real and available—not imaginary—accommodation at the county level that could be requested by voters with print disabilities. In fact, Plaintiffs' complaint that the option is underused is not evidence of discrimination by Defendants—rather, it is a concession that if the option were employed by more counties (assuming every county received a request), then Indiana's absentee voting system would comply with the ADA. At bottom, this only further underscores the fact that these decisions are out of the hands of the defendant state-officials—if

Plaintiffs believe more counties should embrace this option, then their dispute rests with county officials.

Plaintiffs' few remaining complaints about the travel board vote-by-accessible-machine option are unconnected to whether it affords voters with the ability to vote privately and independently. For instance, Plaintiffs invoke COVID-19 fears, but those are irrelevant to their ADA claim because such fears have nothing to do with Plaintiffs' print disabilities or Defendants' actions, and Plaintiffs have that in common with everyone. *See Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006) (en banc); *cf. Tully v. Okeson*, 977 F.3d 608, 611, 614 (7th Cir. 2020) ("It's the pandemic, not the State, that might affect Plaintiffs' determination to cast a ballot."). And the fact that the travel board members would be somewhere in the general vicinity while a voter privately and independently uses an accessible machine does not make the accommodation unreasonable; indeed, election officials and others are always in the general vicinity when citizens vote in-person, and that does not run afoul of the ADA or Rehabilitation Act. Plaintiffs also complain that the vote-by-travel-board option is subject to a shorter voting window than mail-in absentee voting, but that is immaterial because a 19-day window is sufficient to provide meaningful and effective access to voting absentee in a private and independent manner, which is all that the ADA requires. Finally, Plaintiffs point to one instance in October 2020 when a county board denied a voter's request to bring an accessible machine (a Votronic vote recorder) to her home because the county did not have that particular technology available remotely and the traveling board was unavailable that year—in

the height of a global pandemic—but the county was still working to recruit volunteers. [Filing 145 at 21 citing Filing No. 144-1 at 7–8]. Beyond that unique circumstance, Plaintiffs provided no evidence that a voter was denied a request for an accessible machine to be brought to the voter's home in the May 2022 primary. Again, Plaintiffs' lone instance establishes only that Plaintiffs have sued the wrong defendants, for the defendant state election officials had and have no control over counties' decisions to adopt a resolution allowing the traveling board to take a voting machine to a voter's home. [Filing No. 140-1 at 7.]

B. Defendants continue to work toward implementing SEA 398 and, once fully implemented, that option will provide print-disabled voters yet another option to vote privately and independently from home

1. Defendants' continued work to implement SEA 398 will provide voters with print disabilities yet another reasonable accommodation under the ADA. For the May 2022 primary election, the Election Division created a state-wide form (known as the ABS-VPD form) in an HTML format that is compatible with print-disabled voters' assistive technology [Filing No. 140-1 at 8–9]—even according to plaintiffs' experiences and their expert's testing [Filing No. 126-19 at 6; *see also* Filing No. 145 at 22 (criticizing the earlier .pdf version of the ABS-VPD form, but admitting that the HTML version was accessible)]. And since that key component of the system was launched, the Division has continued its efforts to improve upon the functionality of the form and process to work out bugs and defects identified through user acceptance testing with its contractor. [Filing No. 140-1 at 8–13.] The Division is also conducting training for county officials on the new functionality of the system and is currently

soliciting a web-accessibility-testing vendor to retest indianavoters.com and its documents using the latest WCAG standard. [Filing No. 140-1 at 11.]

On top of their work to implement SEA 398 at the state level, Defendants are pursuing creative options to aid the counties in making their ballots accessible for voters with print disabilities. Since the June 16, 2022, status hearing, Defendants have received information from the State's current vendor, Civix, about Civix's new partnership with DemTech, which provides an accessible ballot-marking tool known as eBallot. [Filing No. 150-1 at 1.] Assuming DemTech's technical specifications meet Defendants' approval and a contract is entered into to make this tool available to county election officials, Defendants are considering offering counties the *option*[4] of using the ballot-marking tool to make their ballots accessible to voters with print disabilities, with a return option by email or mail only (not a web-based return). [Filing No. 150-1 at 2–3.] To that end, Defendants are exploring launching a pilot program in at least four counties in the upcoming general election in November 2022, provided that Civix's technical specifications are approved by the Co-Directors of the Election Division and the Secretary of State, who jointly oversee the statewide voter registration system (SVRS) and the various absentee voting and election management tools and modules that are including in the system. [Filing No. 150-1 at 1–3.]

Defendants' efforts in this regard are ongoing—they received a formal proposal from Civix on July 8, 2022—and the ability to implement a pilot program depends heavily on Civix's and DemTech's ability to meet the requisite specifications and to

[4] This would not preclude a county from seeking a separate solution to provide an accessible ballot to voters with print disabilities in their county. [Filing 150-1.]

implement it in a manner that ensures print-disabled voters who use the system are able to mark their respective ballots. [Filing No. 150-1 at 2–3.] But if Civix/DemTech is unable to meet that standard, the Election Division will have to consider other options, which would take additional months to go through the State's procurement process, training, and the many other election duties Defendants must attend to for the general election.[5] [Filing No. 140-1 at 13; Filing No. 150-1 at 2 n.1.]

Irrespective of the possibility of the eBallot pilot program, Defendants intend to provide guidance to counties on using a system similar to the federal write-in absentee ballot process for UOCAVA voters. [Filing No. 140-1 at 12.] This process is similar to the process employed at the preliminary-injunction stage in *Drenth v. Bookvar*, No. 1:20-cv-829, 2020 WL 2745729, at 6–7 (M.D. Pa. May 27, 2020), and entails presenting a print-disabled voter with a list of candidates for each office and then the voter types in the name of their selected candidate or the party affiliation for their candidate of choice in a separate accessible document using text boxes and the voter's assistive technology. [Filing No. 140-1 at 11–12; Filing No. 150-1 at 3.] The Election Division plans to provide an example template "write in" ballot and instructions on how to complete that ballot for county guidance. [Filing No. 150-1 at 3.] This example template will be used to assist counties in adapting Indiana's ballot layout

[5] Defendants have continued working toward a solution since the June 16, 2022, status conference and were hoping to have a more-definitive plan by the time they filed their reply brief. But Plaintiffs filed their brief 14 days early and thus triggered Defendants' five-business-day response deadline early. Defendants intend to notify and update the Court of the non-web-based RAVBM pilot program once they have more concrete information from the vendor, which as Plaintiffs concede would comply with the ADA and Rehabilitation Act and should result in judgment in favor of Defendants.

law to ensure as much uniformity among all the counties as is possible. [Filing No. 150-1 at 3.] But this, too, would not preclude a county from seeking a separate solution to provide an accessible ballot to voters with print disabilities in their county. [Filing No. 150-1 at 3.] The goal of the *Drenth* option is to ensure that all counties have an option to provide print-disabled voters to vote under SEA 398, notwithstanding whether the county is a test county or otherwise unable to produce an accessible ballot.

2. Plaintiffs concede that the option that Defendants are pursuing—a non-internet-based return through the Civix RAVBM—would comply with the ADA (and thus the Rehabilitation Act), even though it is not Plaintiffs' preferred accommodation. [Filing No. 145 at 24–25.] Throughout the litigation, Plaintiffs have demanded that Indiana election officials implement an internet-voting system and have asserted that their preferred choice was the only ADA-compliant option. [Filing No. 128 at 31–32 ("The individual Plaintiffs in this case all prefer a *web-based* Remote Accessible Vote By Mail tool to mark and cast their ballots in this case, a position to which Defendants owe deference" (emphasis added)); Filing No. 128 at 38 (requesting an injunction "directing Defendants to provide an accessible, *web-based* absentee ballot and processes for requesting, receiving, signing, and returning absentee ballots" (emphasis added)); Filing No. 81 at 7 (requesting the Court enter a preliminary injunction that "directs Indiana to provide a *web-based* absentee ballot marking and submission option" (emphasis added)).]

As explained in Defendants' opening brief and below, that web-based option would fundamentally alter Indiana's non-internet-based system for collecting and tabulating votes and would require significant time for Defendants to subject such a system to the necessary testing and train county officials on such a novel (to Indiana) system. [Filing No. 140-1 at 13–14; Filing No. 141 at 34–44.] But now, Plaintiffs concede that something less than internet-voting would be a reasonable accommodation. They admit that the use of an electronic ballot-marking tool with an email or mail return option to county officials "would meet the privacy and independence requirements of the ADA/Rehabilitation Act." [Filing No. 145 at 31; *see also* Filing No. 145 at 32 (explaining that "[t]his method would allow voters with print disabilities to cast their ballots privately and independently without requiring transmission of the ballot through the RAVBM portal").] And what is more, Plaintiffs now specifically endorse the option Defendants are pursuing—Civix/DemTech—and correctly note that one benefit of that vendor is to give Defendants "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." [Filing No. 145 at 39]. In other words, Plaintiffs' web of concessions defeats the need for court-ordered declaratory or injunctive relief because Defendants are actively pursuing an option Plaintiffs now agree would comply with federal law.

III. Plaintiffs' Preferred Accommodation of a Web-Based RAVBM Tool Would Fundamentally Alter Indiana's Non-Web-Based System for Collecting and Tabulating Absentee Ballots

Plaintiffs' request that Indiana implement internet voting through use of an RAVBM tool to send accessible ballots and then allow print-disabled voters to return their ballots through an internet portal would fundamentally alter Indiana's absentee voting system, which forbids collecting and tabulating votes over the internet. No one is allowed to vote in Indiana using an online ballot-marking tool with online ballot return, and state law expressly forbids connecting any voting system to the internet. Ind. Code § 3-11-15-61. Plaintiffs thus seek to use the ADA to force an entirely new program on the State, and one of the essential features of that program—web-based ballot return—is unavailable to any other voter.

Yet the creation of such a new program unavailable to others is precisely the sort of change that the fundamental-alteration defense prohibits—that is, it is an unreasonable accommodation. *See, e.g.*, *Southeastern Community College v. Davis*, 442 U.S. 397, 407–10 (1979) (creating didactic-class-only curriculum would fundamentally alter nursing program); *Vaughn v. Walthall*, 968 F.3d 814 (7th Cir. 2020) (requiring State to create extra-Medicaid program to comply with ADA constituted a fundamental alteration); *A.H. by Holzmueller v. Illinois High Sch. Ass'n*, 881 F.3d 587, 592–93 (7th Cir. 2018) (requiring athletic association to create a new "para-ambulatory division" constituted a fundamental alteration); *see also, e.g.*, *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 611 (7th Cir. 2004) ("a State is not obliged to create entirely new services"); *Rodriguez v. City of New York*, 197 F.3d 611,

618 (2d Cir. 1999) ("The ADA requires only that a particular service provided to some not be denied to disabled people." (citation omitted)). And while "a public entity must make 'reasonable accommodations,' it does not have to provide a disabled individual with every accommodation he requests or the accommodation of his choice." *McElwee v. County of Orange*, 700 F.3d 635, 641 (2d Cir. 2012).

Plaintiffs' arguments to the contrary are unavailing. Their first two arguments seek to sidestep the fundamental-alteration argument altogether by asserting waiver, either because Defendants did not file a statement of claims or defenses or because Defendants did not create a paper trail. It is true that Defendants should have but did not file a statement of defenses including the fundamental-alteration defense, which is an affirmative defense, *Steimel v. Wernert*, 823 F.3d 902, 915 (7th Cir. 2016), and Defendants regret the oversight. But the decision whether to bar the defense is a discretionary decision, and the Court should exercise its discretion to excuse the oversight because there is no plausible basis for Plaintiffs to claim prejudice, for they have known about the defense since at least the preliminary-injunction hearing and had the opportunity to brief the matter. [Filing No. 97 at 17; Filing No. 111 at 29–30, 43; Filing No. 145 at 27–36.] Moreover, given the importance of election integrity and the complexities involved [Filing No. 140-2 at 2–3, 5–6], the issues at stake are sufficiently important that the Court should resolve them on the merits. Regarding 28 C.F.R. § 35.164, Plaintiffs still have not cited any authority that the regulation imposes a special pre-litigation burden on a public entity to explain its

fundamental-alteration theory on pain of waiver. [Filing No. 145 at 26–27.] Defendants have provided the written explanation as to how adopting an RAVBM tool with web-based return would fundamentally alter Indiana's non-web-based absentee-voting system [Filing No. 141 at 34–39], and Plaintiffs have had a full and fair opportunity to respond to those reasons [Filing No. 145 at 27–36].

Plaintiffs' arguments on the merits similarly falter because they misapprehend the contours of Defendants' fundamental-alteration defense. Until recently, Plaintiffs represented that they deemed an RAVBM with non-web-based return to be insufficient, and so Defendants focused their fundamental-alteration argument on the internet-voting species of the RAVBM option. [Filing No. 81 at 7; Filing No. 128 at 31–32, 38]. In Defendants' view, Plaintiffs' preferred accommodation of an RAVBM tool with web-based return would fundamentally alter Indiana's absentee-voting system because it would allow completed ballots to be returned through an internet portal. That poses a host of concerns that require careful evaluation by election officials because it simply does not exist under Indiana's current structure, even though UOCAVA voters and print-disabled voters may return votes by email. With email, an individual voter's ballot may carry some risk, but a web-based return with a larger pool of voters may create a window into larger voting systems. [*See* Filing No. 140-2 at 5 ("Software vulnerabilities in web applications could allow attackers to modify, read, or delete sensitive information, or to gain access to other systems in the elections infrastructure. Sites that receive public input, such as web forms or uploaded files, may be particularly vulnerable to such attacks and should be used only after

careful consideration of the risks, mitigations, and security/software engineering practices that went into that software.").] The bottom line is that Plaintiffs demand something that election officials have not vetted and no Indiana voter has ever been permitted to use, so it would fundamentally alter Indiana's elections to require it as an accommodation under federal law.

Defendants, however, do not take the position that use of an RAVBM tool with return via mail, email, or fax would necessarily constitute a fundamental alteration of Indiana's absentee-voting program. Indeed, Defendants are considering the option from its existing vendor—who only in the past year acquired the tool—for a pilot program with the goal of trying that tool in a small number of counties during the November 2022 general election before making it an option statewide. [Filing No. 150-1 at 1–2.] The ability to implement that pilot program this year is of course contingent on the tool being purchased by the State through a contract amendment with its current vendor, the tool meeting certain technical specifications, the vendor's ability to implement it in an effective, secure, and timely manner so that voters using the tool are able to mark their accessible ballots with their assistive technology, and counties embracing the option. [Filing No. 150-1 at 1–2.] Defendants will promptly notify the Court of any significant developments in this dynamic situation.

IV. The *Purcell* Doctrine Prohibits Plaintiffs' Requested Injunctive Relief

The *Purcell* principle blocks the Court from forcing Defendants to adopt and implement an RAVBM tool with web-based return before the November 2022 general election. That principle similarly prevents the Court from forcing Defendants to adopt

an RAVBM tool with non-web-based return statewide before November 2022, or even to implement a pilot by then should Defendants' planned pilot with its current vendor not come to fruition despite efforts to make that happen. As explained in Defendants' opening brief, the procurement process for a new vendor alone takes several months, and November is less than four months away, with the initial election deadlines for absentee voting coming as early as September 19. [Filing No. 140-1 at 13.] On top of those logistics, Defendants need time to evaluate a new tool that has never been used in Indiana and to train county election officials. [Filing No. 140-1 at 13–14.]

The Court should reject Plaintiffs' attempt to combat the *Purcell* argument through use of the affidavit of Dr. Ted Selker because Plaintiffs did not disclose him as a witness, much less an expert witness, at any point in the litigation. [Filing No. 27 (not listing Dr. Selker on Plaintiffs' preliminary witness list); Filing No. 150-2 (not listing Dr. Selker on Plaintiffs' May 2022 amended initial disclosures); Filing No. 80 (not including a declaration from Dr. Selker in Plaintiffs' appendix of exhibits in support of their motion for preliminary injunction)]. Plaintiffs' deadline to disclose any "expert testimony in connection with a motion for summary judgment" was originally 90 days prior to the dispositive motion deadline—August 4, 2021[6] [Filing No. 25 at 11.] The Court later, on December 22, 2021, moved the deadline to 50 days prior to the filing of the dispositive motion deadline—March 29, 2022 [Filing No. 70; Filing

[6] Plaintiffs were well-aware of the deadline and in fact objected to Defendants' request to move their deadline by 30 days, arguing that Defendants should be held to the deadline because Plaintiffs would be prejudiced, explaining that they would need "30 days to identify, engage, and request a rebuttal report from an expert of their own as well as conduct additional discovery, including a deposition of Defendants' expert while also preparing their motion for summary judgement." [Filing No. 42 at 3.]

No. 117; Filing No. 127.]. Plaintiffs did not disclose Dr. Selker by that date, yet they have included with their reply a 16-page declaration from Dr. Selker with two supporting exhibits. [Filing No. 144-3; Filing No. 144-4; Filing No. 144-5.]

The federal rules require a party to "disclose to the other parties the identity of any witness it may use at trial to present [expert] evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26(a)(2)(A). An "expert" is a person who possesses "specialized knowledge" due to his "skill, experience, training, or education" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. This includes providing the other parties with the subject matter on which the experts are expected to present evidence, along with a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C); *see Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756–57 (7th Cir. 2004) ("Thus, *all* witnesses who are to give expert testimony under the Federal Rules of Evidence must be disclosed under Rule 26(a)(2)(A); only those witnesses *"retained or specially employed to provide expert testimony"* must submit an expert report complying with Rule 26(a)(2)(B)." (footnote omitted)); *see also* Fed. R. Civ. P. 26(a)(2)(C) advisory committee's note (2010) ("Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind

that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.").

Plaintiffs' failure to disclose their computer science expert (on accessible voting systems specifically) is neither justified nor harmless. *See* Fed. R. Civ. P. 37(c)(1); *Musser*, 356 F.3d at 758. In determining whether to exclude testimony, the court considers four factors: "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *Westefer v. Snyder,* 422 F.3d 570, 585 n. 21 (7th Cir. 2005) (citation omitted); *see Bannister v. Burton,* 636 F.3d 828, 833 (7th Cir. 2011).

None of these factors weighs in favor of Plaintiffs' nondisclosure being harmless or justified. Plaintiffs cannot clear the first hurdle because they did not disclose Dr. Selker as a witness—lay or expert—in the litigation, even though they updated their initial disclosures as recently as May 13, 2022, which came after Plaintiffs had the opportunity to preview Defendants arguments (including on *Purcell*) in the preliminary-injunction proceedings. [Filing No. 150-2.] Plaintiffs cannot meet the second prong to cure their nondisclosure either because the ability to cure any prejudice is nonexistent based on the compressed briefing schedule [Filing No. 135] with a looming general election. Indeed, had Plaintiffs disclosed this type of expert witness, Defendants could have retained their own computer science expert, or at a minimum, tested Dr. Selker's testimony in a deposition. But the lack of disclosure signaled that

this case would not be fought among experts of that sort, and so Defendants are left with unfair surprise.

The third factor fares no better for Plaintiffs. The late disclosure impacts summary judgment, not trial, but that nevertheless weighs heavily against a finding of harmlessness. In general, Defendants are prejudiced by Plaintiffs' injection of Dr. Selker in their reply brief, when Defendants have a mere five business days to reply. [Filing No. 135.] But that prejudice is much greater given that Plaintiffs rely so heavily on Dr. Selker's points as an expert on the precise issue in this case—accessible voting systems. Further, though Plaintiffs only specifically cite to Dr. Selker's declaration to support their *Purcell* arguments, the 16-page declaration appears to serve as a second brief to counter many of Defendants' arguments on summary judgment, and Plaintiffs appear to regurgitate Dr. Selker's points throughout their own brief when discussing concerns about potential security risks of using RAVBM tools, their view of Indiana's law on internet-based voting, and Defendants' timing concerns under *Purcell*, though they decline to cite the evidentiary support. [*Compare* Filing No. 145 at 29-35 (arguing no violation of Indiana law to implement web-based RAVBM), 42-46 (claiming security concerns are overblown), 36–41 *and* (arguing Defendants exaggerate *Purcell* concerns for implementing an RAVBM in Indiana), *with* Filing No. 144-3 at 6–7 (arguing no violation of Indiana law to implement web-based RAVBM), 8–15 (claiming security concerns are overblown), *and* 16–17 (arguing Defendants exaggerate Purcell concerns for implementing an RAVBM in Indiana).]

Finally, the fourth factor is impossible for Defendants to evaluate without discovery into when Plaintiffs first engaged Dr. Selker as an expert and the reason why he was not disclosed. But the fact that Dr. Selker reviewed the filings, deposition transcripts, and all applicable state laws before preparing his lengthy affidavit (with pincites to various deposition transcripts) suggests he may have been working well-before the short 15-day window between Defendants' cross-motion for summary judgment (filed on June 16) and Plaintiffs' response with his affidavit (filed on July 1). [Filing No. 144-3 (discussing all the filings, exhibits, and deposition transcripts, data, and Indiana statutes sent by Plaintiffs' counsel that he reviewed).] At bottom, Plaintiffs' unfair surprise litigation tactic should result in exclusion of their undisclosed expert.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for summary judgment and enter judgment in favor of Defendants.

Respectfully submitted,

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