

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, )

Case No. 1:20-cv-3118-JMS-MJD

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. )

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**[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Introduction**

1. Plaintiffs filed a Complaint on December 3, 2020, alleging that Defendants' Absentee Voting Program is inaccessible to blind voters and therefore in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794. Filing No. 1 (Complaint).

2. Plaintiffs thereafter filed this Motion for Preliminary Injunction on February 7, 2022, to ensure secure and equal access to Defendants' Absentee Vote By Mail Program in the May 2022 primary elections for voters with print disabilities. Filing No. 81 (Motion for Preliminary Injunction).

## Findings of Fact

### **A. Absentee Vote By Mail Program**

3. Indiana's Absentee Voting Program is comprised of four parts: (1) In-person absentee voting, known as "early voting," which is done at elections offices on voting machines in advance of Election Day, Ind. Code §§ 3-11-10-26, 3-11-10-26.2; (2) absentee voting by mail, which is done on paper ballots from the voter's home as an option made available to many<sup>1</sup> in the state, Ind. Code § 3-11-10-24; (3) visiting absentee voter board for voters with print disabilities who cannot mark or sign a paper absentee ballot, colloquially known as the "traveling board," which travels to the voter's residence by appointment to assist the voter in completing the ballot in the nineteen days preceding the election, Ind. Code § 3-11-10-25; and (4) Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301 *et. seq.*, that permits military voters, overseas civilian voters, and (as of April 2021, 2021 Ind. Legis. Serv. P.L. 109-2021) voters with print disabilities to vote absentee using mail, email, or fax, Ind. Code § 3-11-4-6.

4. Voters wishing to vote absentee somewhere other than a polling place must fill out an application form demonstrating that they have one of the thirteen qualifying excuses. Ind. Code § 3-11-10-24(a); Filing No. 80-7 at 6, 24, 32 (Deposition of Indiana Election Division ("IED") (hereinafter "IED Dep.") 17:4-20:17, 90:18-92:13, 121:1-8).

5. UOCAVA voters are permitted to fill out a single, special combined voter registration and absentee ballot application form. Filing No. 80-7 at 32-34 (IED Dep. 121:14-124:15, 125:4-132:19).

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<sup>1</sup> Indiana law provides for thirteen statutory categories of Indiana voters who may cast their votes by mail, including voters with disabilities of all kinds. Ind. Code § 3-11-10-24(a).

6. Qualifying absentee voters are sent an absentee voter bill of rights and absentee voter secrecy waiver (permitting county election officials to transfer the voter's absentee ballot choices onto the paper size that the local election machines read)—the forms of which are consistent statewide—and an absentee ballot and any county-specific instructions, which are developed by the county boards of elections. Filing No. 80-7 at 38, 45, 48, 49 (IED Dep. 146:14-147:2, 175:12-19, 185:20-187:5, 189:13-25).

7. The voter marks their choices on the absentee ballot, signs the absentee ballot mailing envelope or secrecy waiver (for UOCAVA voters), and returns these to their county board of elections by mail or in person. Ind. Code § 3-11-10-24; Filing No. 80-7 at 37-39 (IED Dep. 143:15-151:3).

8. Voters who qualify to use the UOCAVA voting program are permitted to receive and return all these documents by mail, fax, or email. Ind. Code § 3-11-4-6.

9. In past years, before voters with print disabilities had access to the UOCAVA email system, emailed absentee ballots were prepared by the counties and were not accessible for voters with print disabilities. Filing No. 80-7 at 37-38 (IED Dep. 143:18-146:13). Those who opted to receive their ballots by email would “access, print, and then return” them, including by emailing photographs of their printed and marked ballots. Filing No. 80-7 at 37 (IED Dep. 143:18-144:2).

10. Indiana voters with print disabilities who wish to vote by absentee ballot have one option available to them (aside from the UOCAVA option passed in April 2021, 2021 Ind.

Legis. Serv. P.L. 109-2021): They must use the assistance of a “traveling board” of two election officials to fill out their ballots.<sup>2</sup> Ind. Code §§ 3-11-10-24(d); 3-11-10-25.

11. Whereas paper absentee ballots must be mailed starting forty-five days before an election, Ind. Code §§ 3-11-4-15, 3-11-4-18(c), the traveling board schedules visits in the nineteen days before an election. Ind. Code §§ 3-11-10-24(d), 3-11-10-25(b)(3).

**B. The COVID-19 pandemic has impacted voting.**

12. People with disabilities are at higher risk of serious complications or death from COVID-19, as are those with other risk factors, including older adults and those with immune deficiencies; heart, lung, kidney, or liver disease; diabetes; chronic lung disease; asthma; and obesity.<sup>3</sup>

13. Plaintiffs Fleschner and Tackett have health impairments that place them at higher risk of serious complications or death from COVID-19. Filing No. 80-1 at 2 (Fleschner Dec. ¶ 9); Filing No. 80-3 at 2-3 (Tackett Dec. ¶ 7).

14. The virus remains a threat to the health, safety, and welfare of all residents of Indiana.<sup>4</sup>

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<sup>2</sup> As to voters with print disabilities, the purpose of the traveling board is to mark the choices of voters who cannot mark a paper ballot by themselves. Filing No. 80-7 at 29 (IED Dep. 112:11-15). Some counties provide accessible voting machines to the traveling boards so that these voters may mark their own ballots, but the state does not track how many counties follow this practice. Filing No. 80-7 at 109 (IED Dep. 114:18-22).

<sup>3</sup> See *COVID-19: People with Certain Medical Conditions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated July 14, 2021). Research shows that people who are Black and/or Latino are more likely to contract the virus and die from associated complications than white people. See *The COVID Racial Data Tracker*, THE COVID TRACKING PROJECT, <https://covidtracking.com/race> (last updated Mar. 7, 2021); *Risk of Severe Illness or Death: Racial and Ethnic Health Disparities*, CDC, Dec. 10, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-illness.html>. See also Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, NEW YORK TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

<sup>4</sup>Javier Becerra, *Renewal of Determination That A Public Health Emergency Exists*, HHS Office of the Assistant Secretary for Preparedness and Response (ASPR) (Jan. 14, 2022), <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-14Jan2022.aspx> (last visited Mar. 3, 2022); *Indiana COVID-19 Dashboard and Map*, IN.gov, <https://www.coronavirus.in.gov/indiana-covid-19-dashboard-and-map/> (last visited Mar. 3, 2022).

15. Due to COVID-19, the Centers for Disease Control and Prevention (CDC) recommended that states “offer alternative voting methods to limit direct contact and crowd sizes.”<sup>5</sup>

16. In 2020, Defendant Indiana Secretary of State (“SOS”) applied for and was granted over \$8,000,000 in federal funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act for measures to make elections safer, including by “minimizing direct contact among Hoosier voters and election staff” by expanding access to absentee voting.<sup>6</sup>

17. Of the approximately 3 million votes cast in Indiana in the 2020 general election, 61% were cast by absentee ballot.<sup>7</sup>

### C. Plaintiffs

18. Plaintiffs Kristin Fleschner, Rita Kersh, and Wanda Tackett are blind<sup>8</sup> Hoosiers, and each is a registered voter in the state. Filing No. 80-1 at 1-2 (Declaration of Kristin Fleschner ¶¶ 3, 8 (hereinafter “Fleschner Dec.”)); Filing No. 80-2 at 1-2 (Declaration of Rita Kersh ¶¶ 3, 5-6 (hereinafter “Kersh Dec.”)), Filing No. 80-3 at 1-2 (Declaration of Wanda Tackett ¶¶ 2, 4 (hereinafter “Tackett Dec.”)). All of them are registered Indiana voters who were faced with the traveling board when they wanted to vote absentee in 2020. Several of them had to accept strangers

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<sup>5</sup> Centers for Disease Control and Prevention, *Toolkit for Reducing the Spread of COVID-19 During Elections* (June 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations/elections-toolkit.html>.

<sup>6</sup> Filing No. 80-7 at 22 (IED Dep. 81:2-82:3), Filing No. 80-8 at 48 (Deposition of Indiana Secretary of State (hereinafter “SOS Dep.”) 187:3-188:18) (“The CARES Act funding was used for a variety of purposes related to issues arriving from the COVID pandemic. . . [including] assist[ing] counties in coping with postage costs due to the increased volume in absentee ballot voting by mail. . . and other items to accommodate the unprecedented level of absentee voting by mail”), Filing No. 80-12 (Letter from Indiana SOS to U.S. Election Assistance Commission, April 16, 2020).

<sup>7</sup> Defendant SOS’s publicly posted 2020 voter turnout data shows that 61% of the total 2020 general election ballots were absentee. *2020 General Election Turnout and Registration*, IN SEC. OF STATE, Dec. 2, 2020, [https://www.in.gov/sos/elections/voter-information/files/Election\\_Turnout\\_and\\_Registration\\_20201202\\_052923PM.pdf](https://www.in.gov/sos/elections/voter-information/files/Election_Turnout_and_Registration_20201202_052923PM.pdf).

<sup>8</sup> Plaintiffs use the word “blind” to describe individuals who, as a result of a vision disability, use alternative techniques or assistive technology for tasks done visually by persons without a visual disability. The term encompasses both people who identify as “totally” blind and people with low vision.

in their homes in the middle of a pandemic, on someone else's schedule, in order to exercise their right to vote, or risked voting in person in order to avoid the traveling board. The exception was Ms. Tackett, who was outright denied the right to vote when her county failed to send her a traveling board despite repeated requests. Tackett Dec. ¶ 6.

19. The American Council of the Blind of Indiana ("ACBI") is an organization comprised of blind Hoosiers whose purpose is to advocate for and improve the well-being of Indiana's blind residents. Filing No. 80-4 at 1 (Declaration of Dee Ann Hart (hereinafter "Hart Dec.") ¶ 3).

20. All Plaintiffs are constituents of the Indiana Protection and Advocacy Services Commission ("IPASC"), Indiana's federally mandated Protection and Advocacy System (P&A) for all people with disabilities.

#### **D. Remote Accessible Vote By Mail Tools**

21. Recognizing the need for accessible electronic voting, remote accessible vote by mail ("RAVBM") tools were used across the country for the 2020 General Election, including in Maryland, Delaware, Florida, Ohio, Michigan, Pennsylvania, North Carolina, New York City, Washington State, Maine, California, Colorado, Hawaii, Massachusetts, Virginia, Minnesota, Vermont, New Hampshire, Delaware, West Virginia, Oregon, New Jersey, the District of Columbia, Illinois, Kentucky, and Nevada. Filing No. 80-5 at 4-5 (Declaration of Lou Ann Blake (hereinafter "Blake Dec.") ¶¶ 19-26).

22. RAVBM tools have been successfully used by individuals with print disabilities to vote independently and privately. *See id.*

23. The underlying technologies used in RAVBM have been tested and developed with numerous different combinations of hardware, web browsers, and assistive technologies,

including the most frequently used screen readers (which read the computer screen for blind and dyslexic users, among others), screen magnifiers (for users with low vision), Filing No. 80-5 at 2-6 (Blake Dec. ¶¶ 8-14, 16-30), and voice recognition software (which enables users with dexterity disabilities to control their computers by speech), Filing No. 80-6 at 3 (Declaration of Terri Youngblood Savage (hereinafter “Youngblood Savage Dec.”) ¶ 8).

24. These technologies meet the international standard for web-based content compatibility with the assistive technology used by those with disabilities, the Web Content Access Guidelines (“WCAG”) of the international World Wide Web Consortium. Filing No. 80-5 at 3, 5-6 (Blake Dec. ¶¶ 16, 29).

25. Because these systems have been developed and employed in other states, they may be implemented in as little as one week. *See* Filing No. 80-5 at 5 (Blake Dec. ¶ 27).

#### **E. Senate Enrolled Act 398 of 2021**

26. In April 2021, about four months after this lawsuit commenced, Filing No. 1, Indiana enacted Senate Enrolled Act 398 (“SEA 398”). 2021 Ind. Legis. Serv. P.L. 109-2021. SEA 398 was enacted in part to increase accessibility in absentee voting for voters with print disabilities.<sup>9</sup> Filing No. 80-7 at 45 (IED Dep. 173:8-16), Filing No. 80-8 at 21 (SOS Dep. 79:10-18).

27. SEA 398 provides that voters with print disabilities may participate in the UOCAVA email voting program and that “[t]he secretary of state, with the approval of the

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<sup>9</sup> “A voter with print disabilities... may apply for an absentee ballot for the next scheduled primary, general, or special election by filing...[a] form prescribed under IC 3-5-4-8 that identifies the applicant as an absent uniformed services voter, an overseas voter, or a voter with print disabilities. A form prescribed under this subdivision must permit the applicant to designate whether the applicant wishes to receive the absentee ballot by electronic mail, fax, or United States mail.” Ind. Code § 3-11-4-6(a-c).

election division, shall develop a system that complies with the Web Content Guidelines.” Ind. Code § 3-11-4-6(k).

28. Defendants SOS and IED issued a new policy in September 2021 that purports to provide guidance to enable the state and county boards of elections take the many steps to adapt the UOCAVA program to voters with print disabilities. Indiana Secretary of State, “Absentee Procedures for Voters with Print Disabilities” (Sept. 27, 2021), Filing No. 80-11 (hereinafter “September 2021 policy”).

29. The September 2021 policy does not call for the basic documents of absentee voting—the absentee ballot itself, the county-specific absentee voting instructions, or the bill of rights—to be made accessible or tested for WCAG compliance. Filing No. 80-8 at 36 (SOS Dep. 137:9-140:23); Filing No. 80-11 at 11-12 (September 2021 policy at ACBI000842-43).

30. Casting a UOCAVA absentee ballot in Indiana requires the voter to sign a document called the secrecy waiver, which permits the county board of elections to transfer the voter’s choices to a document size that the voting machines can read. Ind. Code § 3-11-4-6(h).

31. The September 2021 policy provides that “[t]he voter must be able to affix their signature or mark to the ballot secrecy waiver. The voter’s signature can be affixed to the secrecy waiver using traditional methods like an indelible ink or pencil, or by using a computer mouse or finger on a touch sensitive device.” Filing No. 80-11 at 8 (September 2021 policy at ACBI000839).

32. Voters with dexterity disabilities (like paralysis of the arms due to spinal cord injury) cannot control a mouse to navigate a computer or other electronic device. Filing No. 80-6 at 3, 9 (Youngblood Savage Dec. ¶¶ 8, 28-29).



33. Blind voters cannot use a mouse or trackpad to produce an electronic signature that is sufficiently consistent to pass the signature match requirement for absentee voters, leading to a significant risk that their absentee ballots will be disallowed. Filing No. 80-6 at 8-9 (Youngblood Savage Dec. ¶¶ 27-29).

34. Many blind voters do not own computer mouses, trackpads, or printers since they cannot use them without sighted assistance. Filing No. 80-2 at 3 (Kersh Dec. ¶¶ 10-11); Filing No. 80-3 at 3-4 (Tackett Dec. ¶ 10); Filing No. 80-4 at 3 (Hart Dec. ¶ 6).

35. Some .pdf software, such as Adobe, provides a way to create a mouse-based “signature” in such documents, but that function is also inaccessible independent of the mouse/touch sensitive device requirement. Filing No. 80-6 at 9 (Youngblood Savage Dec. ¶ 29).

36. Ballots are particularly complex documents. Filing No. 80-7 at 57 (IED Dep. 221:23- 222:13), Filing No. 80-8 at 8 (SOS Dep. 28:8-10).

37. The September 2021 policy acknowledges that “[a] voter with print disabilities must be able to personally mark their own ballot, which would include the voter’s personal use of adaptive technology to complete their ballot.” Filing No. 80-11 at 8 (September 2021 policy at ACBI000839).

38. Voters with print disabilities cannot use their adaptive technology to complete electronic ballots privately and independently unless they are made properly accessible through appropriate software formatting. Filing No. 80-6 at 3-4, 8 (Youngblood Savage Dec. ¶¶ 9-11, 24); Filing No. 80-7 at 205 (IED Dep. 207:12-25).

39. Making complex documents accessible is a special skill set that requires training. Filing No. 80-6 at 7-8 (Youngblood Savage Dec. ¶¶ 23-24). It can also be labor intensive. *See id.*

40. Making the absentee ballots accessible is not listed as a necessary task in the September 2021 policy. Filing No. 80-11 at 11-12 (September 2021 policy at ACBI000842-43), Filing No. 80-8 at 36 (SOS Dep. 138:10-12).

41. Making the ballots accessible is not mentioned in the new section on “Voters with Print Disabilities” in the 2022 Indiana Election Administrator’s Manual. *2022 Indiana Election Administrator’s Manual*, INDIANA ELECTION DIVISION, 165-68 (available at <https://www.in.gov/sos/elections/files/2022-Election-Administrators-Manual.FINAL.pdf>).

Defendants did not notify the county boards that they would need to make the absentee ballots accessible in their December 2021 annual training for county boards of elections. *See* Filing No. 80-8 at 33-34 (SOS Dep. 128:3-130:10).

42. Indiana has 4,500 voting precincts in ninety-two counties that will have to produce from 2,500 to 3,000 different ballots for a primary election. Filing No. 80-7 at 13-15, 52-53 (IED Dep. 48:22-56:3, 204:13-205:24), Filing No. 80-8 at 9 (SOS Dep. 29:10-13). New vendors will be necessary to make this volume of absentee ballots accessible. Filing No. 80-7 at 50, 53 (IED Dep. 193:23-194:16, 205:25-206:24), Filing No. 80-8 at 36-37 (SOS Dep. 140:24-142:24).

43. Defendants have begun rolling out a system for voters with print disabilities to register and request ballots under the UOCAVA system. Filing No. 91-3 at 1-2 (Declaration of Brad King ¶¶ 2, 4-5).

44. Defendants have not begun preparing—or planning to prepare—accessible ballots, whether in .pdf form or otherwise, nor have they instructed the counties how to do so. Filing No. 82 at 18 and evidence cited therein; Filing Nos. 91-2 and 91-3 (omitting mention of

preparation of accessible ballots and guidance to counties on making ballots accessible); Filing No. 80-7 at 50 (IED Dep. 193:5-194:8).

45. Defendants have not yet informed county election boards of the need to make absentee ballots accessible. Making the absentee ballots accessible is not listed as a necessary task in Defendants' September 2021 SEA 398 policy. Filing No. 80-11 at 11-12 (September 2021 policy at ACBI000842-43), Filing No. 80-8 at 36 (SOS Dep. 138:10-12) (admitting that the ballot is omitted from the list of documents to be made accessible under SEA 398). Making the ballots accessible is not mentioned anywhere in the new section on "Voters with Print Disabilities" in the 2022 Indiana Election Administrator's Manual. *2022 Indiana Election Administrator's Manual*, INDIANA ELECTION DIVISION, 165-68 (available at <https://www.in.gov/sos/elections/files/2022-Election-Administrators-Manual.FINAL.pdf>). In their December 2021 annual training for county boards of elections, Defendants failed to notify the county boards (which have the responsibility for developing all ballots in Indiana, *see* Filing No. 80-7 at 48, 49 (IED Dep. 185:20-186:11, 189:13-23)), that they would need to make the absentee ballots accessible. *See* Filing No. 80-8 at 34 (SOS Dep. 130:7-10).

46. New vendors will be necessary to make absentee ballots accessible. Filing No. 80-7 at 50, 53 (IED Dep. 193:23-194:8, 205:25-206:24), Filing No. 80-8 at 36-37 (SOS Dep. 140:24-142:24). Defendants have been aware of the need to engage with vendors to make absentee ballots accessible since at latest May 2021. *See* Filing No. 94 (Plaintiffs' Memo of Law in Support of Their Motion for Preliminary Injunction) at 9-10 and evidence cited therein. Yet, Defendants have not demonstrated any attempt to engage vendors for this effort, *see* Filing No. 80-8 at 36-37 (SOS Dep. 140:24-142:24), and even declined to create a new contract with a

preexisting vendor to address implementation of SEA 398 at all, Filing No. 80-9 at 37-38 (Cooper Dep. 144:21-148:17).

47. Defendants have not begun informing voters of the changes resulting from SEA 398 and do not intend to do so imminently. Filing No. 80-10 at 35 (Phelps Dep. 134:3-12 (“[SOS] communications team [wants] to promote that to voters across the state here in the next couple of months.”)).

### **Conclusions of Law**

Based on the foregoing undisputed facts, the Court makes the following Conclusions of Law:

#### **A. Preliminary injunction standard**

38. The Court may issue a preliminary injunction under Federal Rule of Civil Procedure 65.

39. A party seeking a preliminary injunction must demonstrate that (1) “absent a preliminary injunction, it will suffer irreparable harm in the interim period prior to final resolution of its claims”; (2) “traditional legal remedies would be inadequate”; and (3) “its claim has some likelihood of succeeding on the merits.” *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 965 (7th Cir. 2018).

40. If these three elements are met, “the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief.” *Id.* at 966.

41. The Court evaluates the balance on a sliding scale so that “the more likely it is the plaintiff will succeed on the merits, the less balance of irreparable harm need weigh towards its

side.” *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 (7th Cir.2013). “[I]f the plaintiff has a strong likelihood of prevailing in the full trial, and the costs to him if the preliminary injunction is denied are at least as great as the costs to the defendant if it is granted, and the plaintiff’s costs could not be fully recouped by him in a final judgment in his favor, the injunction should be issued.” *Id.*

**B. Likelihood of success on the merits**

42. Plaintiffs assert claims under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794 *et seq.*

43. Claims under Section 504 of the Rehabilitation Act are generally given the same analysis as claims under Title II of the ADA. *See Meyer v. Walihall*, 528 F. Supp. 3d 928, 947 (S.D. Ind. 2021) (*citing Lacy v. Cook Cnty., Ill.*, 897 F.3d 847, 852 n.1 (7th Cir. 2018)).

44. In the preliminary injunction context, a “likelihood of success” exists if the party seeking the injunctive relief shows that it has a “better than negligible” chance of succeeding on the merits. *Valencia*, 883 F.3d at 966 (*citing Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017)).

45. Under Title II of the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

46. A successful claim under Title II of the Americans with Disabilities Act 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)).

**a. Plaintiffs are qualified individuals with disabilities.**

47. Plaintiffs are qualified individuals with disabilities under the ADA and Rehabilitation Act.

48. Under the ADA, a disability is a “physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U.S.C. § 12102(1)(A).

49. The individual Plaintiffs are blind, and the organizational Plaintiffs have members who are blind or represent individuals who are blind. Defendants do not challenge that the Plaintiffs have disabilities.

50. A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies or practices . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2); *see also* 29 U.S.C. § 794.

51. Plaintiffs are qualified individuals under the programs at issue. The individual Plaintiffs are registered voters, and the organizational Plaintiffs have members who are registered voters or represent individuals who are registered voters. Defendants do not challenge that Plaintiffs are qualified individuals with disabilities.

**b. Defendants are covered entities under the ADA and Rehabilitation Act.**

52. Defendants are covered entities under the ADA. Title II of the ADA governs the conduct of any “public entity,” meaning “(A) any State or local government; [or] (B) any

department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131(1).

53. Defendants are departments, agencies, and/or instrumentalities of the State of Indiana. Defendant Indiana Secretary of State is created under the laws of the State of Indiana; serves as “the state’s chief election official,” Ind. Code § 3-6-3.7-1; and “perform[s] all ministerial duties related to the administration of elections by the state,” Ind. Code § 3-6-4.2-2(a). Defendant Indiana Election Commission is created under the laws of the State of Indiana and is tasked with “[a]dminister[ing] Indiana election laws” and “[a]dvis[ing] and exercis[ing] supervision over local election and registration officers.” Ind. Code § 3-6-4.1-14. Defendant Indiana Election Division is created under the laws of the State of Indiana and is tasked with assisting the Secretary of State with the administration of elections in Indiana. Ind. Code § 3-6-4.2-2(b). Each defendant agency is a public entity. The individual Defendants are members and officers of the state agencies and are sued here in their official capacities as a public entity. *See Nat’l Fed’n of the Blind, Inc. v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016) (no dispute regarding the “public entity” prong of the ADA; various elections agencies and related individuals were sued in their official capacities). Defendants do not challenge that they are covered entities under the ADA.

54. Section 504 of the Rehabilitation Act governs the programs or activities of all recipients of federal financial assistance. 29 U.S.C. § 794(a). Defendants Secretary of State and Indiana Election Division receive federal funding. Filing No. 80-7 at 22 (IED Dep. 81:2-12).

Defendants do not challenge that Defendants Secretary of State and Indiana Election Division (and its co-Directors in their official capacities) are covered by the Rehabilitation Act.<sup>10</sup>

**c. Defendants are denying Plaintiffs the opportunity to participate in or benefit equally from the Absentee Vote By Mail Program because of their disabilities.**

55. Under Title II of the ADA, a public entity may not, in providing any aid, benefit, or service, “[d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service[,] [a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others[,]” or “[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others[.]” 28 C.F.R. §§ 35.130(b)(1)(i)-(iii).

56. “A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability,” unless doing so would create a fundamental alteration of the service. 28 C.F.R. §§ 35.130(b)(7)(i); *see also Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 847 (7th Cir. 1999).

57. Under the ADA, facially identical communication methods may not provide identical communication outcomes for qualified individuals with disabilities, and public entities must therefore “take appropriate steps to ensure that communications with applicants, participants,

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<sup>10</sup> For purposes of this order, the Court does not consider whether the Indiana Election Commission and its members are recipients of federal funding or are covered by the Rehabilitation Act, as there is no dispute that they are covered by the ADA and there is no relevant difference in the standards applied to the two statutes.



and members of the public ... with disabilities are as effective as communications with others.” 28 C.F.R. § 35.160(a)(1).

58. To ensure effective communication, a public entity must provide appropriate auxiliary aids and services and give primary consideration to the auxiliary aid or service requested by individuals with disabilities. 28 C.F.R. § 35.160(b); *see also* 29 U.S.C. § 794c. Auxiliary aids and services include “accessible electronic and information technology” such as the accessible absentee ballots and ballot request process Plaintiffs seek. 28 C.F.R. § 35.104.

59. The relevant “program, service, or entity” at issue is Indiana’s absentee voting program, not its voting program as a whole. *Lamone*, 813 F.3d at 504 (recognizing and analyzing the accessibility of the absentee voting program as its own program required to be accessible to people with disabilities); *see also Hernandez v. N.Y. State Bd. of Elections*, 479 F. Supp. 3d 1, 14 (S.D.N.Y. 2020) (“The Fourth Circuit has held, and this Court agrees, that where, as here, a challenge is lodged to the accessibility of a widely-available absentee voting program, the ‘relevant public service or program at issue’ is not the ‘voting program in its entirety’ but rather the ‘absentee voting program.’”); *Hindel v. Husted*, 875 F.3d 344, (6th Cir. 2017) (assuming without deciding that absentee voting was the program, service, or activity to be analyzed); *Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 2745729, at \*5 (M.D. Pa. May 27, 2020) (same); *Taliaferro v. N. Carolina State Bd. of Elections*, 489 F. Supp. 3d 433, 437-438 (E.D.N.C. 2020) (same); *see also Merrill v. People First of Ala.*, 141 S. Ct. 25, 27 (2020) (mem.) (Sotomayor, J., dissenting) (“Absentee and in-person voting are different benefits, and voters with disabilities are entitled to equal access to both”); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1158 (N.D. Ala. 2020) (“[B]ased on the ADA’s broad remedial purpose, if a state

provides voters with a choice between in-person and absentee voting, then the ADA mandates that both options be accessible to voters with disabilities.”).

60. Indiana law provides for a right to a secret ballot, including as secret an absentee ballot as practicable. *Williams v. Stein*, 38 Ind. 89, 94 (Ind. 1871); *Brown v. Grzeskowiak*, 101 N.E.2d 639, 647 (Ind. 1951); *see also McArtor v. State ex rel. Lewis*, 148 N.E. 477, 480 (Ind. 1925); *Brown v. State ex rel. Stack*, 84 N.E.2d 883, 886 (Ind. 1949).

61. Indiana’s Absentee Vote By Mail program denies voters with print disabilities its benefits on the basis of their disability. Requiring absentee voters with print disabilities to rely on the assistance of the traveling board denies them the same opportunities and benefits given to non-disabled voters, excludes them from opportunities and benefits provided to others, and provides voters with disabilities with an unequal opportunity to a right afforded to voters without disabilities: A private and independent absentee vote.

62. Defendants’ plan to allow voters with print disabilities to cast a ballot under the UOCAVA program does not adequately provide them with an effective means of privately and independently casting their absentee ballots.

63. The mouse-and-touch-sensitive-device plan for signing the secrecy waiver is inaccessible to voters with dexterity impairments and voters who lack a mouse, touch pad, or similar device. Additionally, blind voters may not be able to consistently produce a signature with a mouse or touch screen device, leading to a significant risk that their votes would be rejected by election officials. *See Frederick v. Lawson*, 481 F. Supp. 3d 774, 785-86 (S.D. Ind. 2020) (finding that that erroneous signature inauthenticity determinations were particularly likely to affect elderly and disabled voters because their signatures tend to have greater variability); *see also Richardson v. Tex. Sec’y of State*, 485 F. Supp. 3d 744, 781-82 (W.D. Tex. 2020)

(describing how “older voters and disabled voters . . . are exactly the type of voters that are most likely to face difficulties matching their signatures”); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 205-206 (D.N.H. 2018) (“Variations [in signatures] are more prevalent in people who are elderly [and] disabled”).

64. Plaintiffs have shown, and Defendants do not challenge, that Defendants do not have an adequate plan to provide accessible absentee ballots that can be completed, signed, and returned privately and independently by voters with print disabilities.

65. Defendants’ Absentee Vote By Mail program denies Plaintiffs the benefits of the service, program, or activity, or otherwise discriminates against them, on the basis of their disability.

66. Plaintiffs have demonstrated a strong likelihood of success on the merits.

**C. Plaintiffs will suffer irreparable harm.**

67. Plaintiffs have shown that they will suffer irreparable harm. “[A] violation of the right to vote is presumptively an irreparable harm.” *Indiana State Conf. of the NAACP v. Lawson*, 326 F. Supp. 3d 646, 663 (S.D. Ind. 2018), *aff’d sub nom. Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019). *See also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (*citing Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“Courts routinely deem restrictions on fundamental voting rights irreparable injury. . . . [O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done . . . .”)); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, (3d Cir. 1997)). The denial of a private and independent ballot is a denial of the right to vote. *Taliaferro*, 489 F. Supp. 3d at 438; *Drenth*, 2020 WL 2745729 at \*5; *Nat’l Fed’n of the Blind*,

*Inc. v. Lamone*, No. CIV.A. RDB-14-1631, 2014 WL 4388342, at \*15 (D. Md. Sept. 4, 2014), *aff'd sub nom. Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016).

68. Providing only paper absentee ballots to blind voters constitutes irreparable harm. *See, e.g., Taliaferro*, 489 F. Supp. 3d at 438; *Drenth* 2020 WL 2745729, at \*5; *Nat'l Fed'n of the Blind, Inc. v. Lamone*, No. RDB-14-1631, 2014 WL 4388342, at \*15 (D. Md. Sept. 4, 2014).

69. Plaintiff Wanda Tackett experienced irreparable harm when she was denied her right to vote in November 2020 after the traveling board failed to appear to assist her in voting.

**C. Plaintiffs have shown that traditional legal remedies are inadequate.**

67. Plaintiffs have shown that traditional legal remedies are inadequate.

68. To meet this prong, the moving party must show that an adequate alternative remedy in the form of money damages or other relief does not exist. *See EnVerve, Inc. v. Unger Meat Co.*, 779 F. Supp. 2d 840, 844 (N.D. Ill. 2011).

69. There is no way to award damages to compensate for the denial of the right to cast a private and independent ballot. *See League of Women Voters of N.C.*, 769 F.3d at 247; *accord Obama for Am.*, 697 F.3d at 436; *see also Williams*, 792 F.2d 323 at 326; *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); *Taliaferro*, 489 F. Supp. 3d at 438.

70. If Defendants do not make absentee ballots accessible in time for the May 2022 primary election, Plaintiffs and other individuals with print disabilities will suffer irreparable harm. Such individuals will be forced to choose between risking their health by traveling to a polling place or board of elections office, or else foregoing their right to vote privately and independently in these primary elections.

71. Preliminary injunctive relief is needed to ensure that Plaintiffs can exercise their right to vote by absentee ballot privately and independently in the May 2022 primary election.

**D. The balance of harms favors granting Plaintiffs' requested injunction.**

74. Plaintiffs' proposed remedies—making the use of the traveling board permissive rather than mandatory and allowing voters to use the help of an individual of their choice to mark and return their paper absentee ballots, and requiring Defendants to provide a remote accessible vote by mail (“RAVBM”) program—would sufficiently provide voters with print disabilities the benefits of Indiana's Absentee Vote By Mail program that are enjoyed by non-disabled voters.

75. Similar RAVBM programs have been implemented by states and cities across the country.

76. The Court finds that the cost to Defendants in providing this remedy is minimal, especially as compared to the harms to Plaintiffs.

77. The Court finds that making the traveling board optional and allowing voters with print disabilities to rely on the assistance of an individual of their choosing is negligible.

78. The Court finds that the cost of implementing a RAVBM program is minimal.

79. The Court finds that many HTML-based absentee voting tools are “available and capable of implementation at this time.” *See Lamone*, 2014 WL 4388342 at \*15. Defendants can implement a RAVBM program in time for the May primary election.

80. While implementing a RAVBM program for the May 2022 election will require some time, effort, and costs, the Court finds that this will not be pose an undue burden. The Court also notes that Defendants have already begun work creating a registration process for accessible absentee ballots, but have not begun work on making accessible ballots available for voters with print disabilities. Therefore, the Court finds that the costs to Defendant in providing this program are not prohibitive.

81. Allowing voters with print disabilities to register under the UOCAVA system and request an accessible ballot, but failing to provide an accessible ballot, is likely to create additional confusion and irreparable harm, as such voters may forego other opportunities to cast an accessible ballot and lose their right to vote.

82. Only a small number of voters are expected to qualify and vote under the RAVBM system. *See* Filing No. 80-5 at 5 (Blake Dec. ¶ 24); *see also, e.g., Taliaferro*, 489 F. Supp. 3d at 440 (“[I]t is likely that the number of blind voters who opt into this system for the November 3 election will be low since this would be the first election where the electronic voting technology would be introduced”) (citation omitted).

83. The public interest is also served by granting Plaintiffs’ requested injunction. An injunction “assur[ing] that people with disabilities can vote privately and independently by absentee ballot” is in the public interest even in the absence of a public health crisis. *Lamone*, 2014 WL 4388342, at \*15. The same holds true during the COVID-19 pandemic. *Drenth*, 2020 WL 2745729, at \*5. “[T]he public has a strong interest in exercising the fundamental political right to vote,” *Obama for Am.*, 697 F.3d at 436-37 (internal quotations omitted), and “it is always in the public interest to protect First Amendment liberties.” *Anderson v. Hansen*, 489 F. Supp. 3d 836, 845 (E.D. Wis. 2020) (citing *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004)).

84. The balance of harms favors granting Plaintiffs’ requested injunction.

85. The Court finds that this injunction is not barred by *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

86. *Purcell* provides that federal courts “ordinarily should not enjoin state election laws in the period close to an election[.]” *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (mem.) (Kavanaugh, J., concurring).

87. “How close to an election is too close may depend in part on the nature of the election law at issue, and 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.* at n. 1.

88. The Court finds that the changes required by this injunction are not complex, affect few voters, and can be easily implemented.

89. Further, the Court finds that the changes required by this injunction are “feasible before the election without significant cost, confusion, or hardship.” *Id.* at 881.

90. Plaintiffs have shown, and Defendants have not disproven, that the costs associated with the injunction are not significant.

91. As to the change making the traveling board permissive rather than mandatory, any costs would be minimal, and the change may even save the Defendants’ resources. The only additional cost, if any, would come from informing voters and county boards of the new options. The change may save resources if fewer traveling board visits are required.

92. As to the RAVBM program, the Court finds that these costs would be minimal. Defendants will be required to expend some resources in making absentee ballots accessible to voters with print disabilities. Since these costs would be necessary regardless, the Court finds that any additional costs in adding the RAVBM program would not be significant.

93. The Court also finds that the changes are not likely to cause significant confusion. Defendants admit that they will be required to inform county election boards and voters about

the changes arising from SEA 398 prior to the election, and that they have not yet determined the content of these education efforts. Therefore, making any changes to account for making the traveling board permissive and implementing the RAVBM program will not be substantial.

94. Finally, because Defendants have not yet expended the efforts that are required to make absentee ballots accessible to voters with print disabilities, there will not be significant hardship in implementing the changes required by this injunction.

95. For these reasons, the Court concludes that *Purcell* does not prohibit the injunction that Plaintiffs request.

**E. No bond is required.**

92. The Court further finds that Plaintiffs are not required to provide security for the grant of this injunction.

93. This Court has discretion to determine the amount, if any, of a bond under Federal Rule of Civil Procedure 65(d). *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1141 (7th Cir. 1994) (noting that court has discretion in determining the amount of bond to be posted); *see also, e.g., Pashby v. Delia*, 709 F.3d 307,332 (4th Cir. 2013) (district courts may waive the security requirement).

94. Plaintiffs have requested that no bond be required, and Defendants have not objected to this request.

95. Plaintiffs have shown that a bond would impose a significant hardship.

96. The Court finds that this lawsuit and injunction further important civil rights, and therefore, no bond is required.

97. For these reasons, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction. The specific terms of the preliminary injunction will be set forth in a separate order.



So ORDERED.

Date: \_\_\_\_\_

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Hon. Jane Magnus-Stinson, Judge  
United States District Court  
Southern District of Indiana

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