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

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

For years, Indiana has provided multiple options for voters with print disabilities to exercise the right to vote. They may vote in-person on Election Day or in-person during the early voting period. They may also opt to vote from home, in which case they are required to utilize a traveling board that comes to their homes and either assists them in completing their ballot or provides them an accessible voting machine.

Dissatisfied with these options, Plaintiffs sued various Indiana election officials in December 2020, alleging that the available accommodations violate the Americans with Disabilities Act and the Rehabilitation Act because the laws do not include a mechanism by

which they may vote from the privacy of their own homes using their preferred assistive technology. Then, in 2021, the Indiana General Assembly passed Senate Enrolled Act 398, which expands the accommodations available under state law by including individuals with print disabilities in the definition of uniformed and overseas citizens voters (UOCAVA voters), which allows them to vote absentee by fax or email.

On February 7, 2022—fourteen months after they filed their complaint and mere weeks before the initial deadlines for Indiana's primary elections—Plaintiffs filed a motion for a preliminary injunction requesting that the Court issue "(1) an order making use of the traveling board permissive rather than mandatory and (2) an order directing Indiana to provide a web-based absentee ballot marking and submission option for use with assistive technology, as other courts and states have done." [Filing No. 82 at 4.]

The Court **DENIES** Plaintiffs' motion for a preliminary injunction. Plaintiffs' request that the Court change the rules governing the May 2022 primary election by forcing Indiana to adopt and implement a new and untested web-based technology in a matter of weeks is barred by the *Purcell* principle, which presumptively forbids federal courts from changing the rules governing elections during the period close to an election. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Common Cause Indiana v. Lawson*, 978 F.3d 1036, 1042–43 (7th Cir. 2020). Moreover, the ADA does not require Indiana to adopt web-based voting. Indeed, Indiana law already provides print-disabled voters with many accommodations, including the ability to vote privately from home via the traveling board bringing an accessible voting machine to the voter's home. SEA 398 further expands the available options by allowing print-disabled voters to vote by fax or email. Federal law does not require Indiana officials to divert resources from their efforts to prepare for the upcoming

May 2022 primary to implement an untested web-based system merely because Plaintiffs prefer it.

I. Findings of fact

A. Indiana's options for print-disabled voters before 2021

Under pre-2021 Indiana law, print-disabled voters have three options to vote: They may vote in-person on Election Day, they may cast an absentee ballot in-person leading up to Election Day, and they may vote absentee by travel board leading up to Election Day. They may not, however, vote absentee by mail.

Most voting in Indiana occurs in-person, either on Election Day or during the early voting period (in-person absentee voting). Indiana makes polling places available for in-person voting from 6:00 a.m. to 6:00 p.m. on the day of the primary election—this year, May 3, 2022. *See* Ind. Code § 3-11-8-8. The State also allows all voters to cast absentee ballots in person at their county clerk's office or other authorized location in the 28 days leading up to Election Day. *See* Ind. Code §§ 3-11-4-1, 3-11-10-26.

State law provides several accommodations for print-disabled voters who vote in-person. All polling places—whether on Election Day or during the early voting period—are required to have at least one accessible voting system equipped for individuals with disabilities, and pollworkers must be trained on how to use the accessible features of the voting system. [Filing No. 91-1 at 143, 186.] A voter with a disability who cannot personally mark her ballot may vote absentee in-person with the assistance of either the absentee voting board or an individual of the voter's choosing (so long as the individual providing assistance is not the voter's employer or union representative). Ind. Code § 3-11-9-2; Ind. Code § 3-11-9-3; [Filing No. 91-1 at 179].

In addition to in-person voting, print-disabled voters may vote from home via a travelling voter board, which brings a ballot to the voter's house and returns it to election officials to be counted.[1] *See* Ind. Code § 3-11-10-25. If necessary, the traveling board—which consists of two members, one from each major political party—assists the voter in marking the ballot. [Filing No. 80-7 at 29 (IED Dep. 109:18–25); Filing No. 80-7 at 30 (IED Dep. 116:8–11).] Alternatively, the traveling board may bring a voting machine—a ballot marking device (if the county uses an optical scan voting system) or a direct record electronic voting system (if the county uses a DRE voting system)—to the voter's house if the county board unanimously adopts a resolution allowing it. *See* Ind. Code § 3-11-10-26.2; [Filing No. 91-1 at 140]. This permits a voter with disabilities to privately and independently mark their ballot at home.

B. Plaintiffs sued on the ground that Indiana's accommodations for print-disabled voters violate the ADA and the Rehabilitation Act

Plaintiffs filed this lawsuit on December 3, 2020, alleging that the voting options for print-disabled voters available under Indiana law do not comply with the ADA and the Rehabilitation Act. [Filing No. 1.] Plaintiffs sued the Indiana Election Commission, the Indiana Secretary of State, and the Indiana Election Division[2], claiming that Defendants discriminate against Plaintiffs because Defendants allegedly do not provide Plaintiffs equal opportunity to vote absentee confidentially and privately in violation of the ADA and Section 504 of the Rehabilitation Act. [Filing No. 57 at 24, 26.]

[1] Although being a voter with a disability is one of the 13 enumerated grounds for casting a mail-in absentee ballot, Ind. Code § 3-11-10-24(a)(4), prior to SEA 398, disabled voters who were unable to make a voting mark on the ballot or sign the absentee ballot secrecy envelope were required to vote before the traveling absentee voter board. Ind. Code § 3-11-10-24(d) (2020).

[2] The Court granted Plaintiffs leave to amend their complaint to add the Indiana Election Division as a party on October 14, 2021. [*See* Filing No. 56.]

The Indiana Secretary of State serves as the chief elections officer for the State of Indiana. [Filing No. 80-7 at 11 (IED Dep. at p. 38:9–12).] In her role as the chief elections officer, she is responsible for performing all ministerial duties related to Indiana's administration of elections, including administering funds received as a part of the Help America Vote Act of 2002. Ind. Code. § 3-6-4.2-2; Ind. Code § 3-11-6.5-2.1; [Filing No. 80-7 at 11 (IED Dep. at p. 38:17–39:9).]

The Indiana Election Commission is a four-member, bi-partisan body. Ind. Code § 3-6-4.1-2. Its duties include enforcing campaign finance laws, hearing challenges to the eligibility of candidates who have filed to run for election in either a primary or general election, and certifying voting systems. [Filing No. 80-7 at 11 (IED Dep. at pp. 39:23–40:12)]; Ind. Code § 3-11-7.5-4 (certification of voting system). The Commission may also hold hearings and issue advisory opinions. Ind. Code § 3-6-4.1-25.

The Indiana Election Division is a bipartisan agency whose Co-Directors are appointed for four-year terms by the Governor following nomination by the chairperson for the respective major political parties. [Filing No. 80-7 at 12 (IED Dep. at p. 43:2–5)]; Ind. Code § 3-6-4.2-3. The Election Division is charged with assisting both the Commission and the Secretary of State in the administration of elections. [Filing No. 80-7 at 12 (IED Dep. at p. 41:21–24)]; Ind. Code. § 3-6-4.2-2(b). The Election Division's core functions include providing guidance regarding Indiana election law and federal laws related to the election process to any stakeholder in the election process, as well as prescribing forms used in the election process. [Filing No. 80-7 at 12 (IED Dep. at p. 42:123); 80-7 at 12 (IED Dep. at pp. 43:9–44:13); Filing No. 80-7 at 12 (IED Dep. at p. 42:21–23).]

C. Senate Enrolled Act 398

In April 2021, the Indiana General Assembly passed Senate Enrolled Act 398 to expand the voting options available to print-disabled voters. Under SEA 398 (effective July 1, 2021), print-disabled voters now qualify to vote by email or fax in the manner that uniformed and overseas citizens voters (UOCAVA voters) cast ballots. In accordance with federal law, Indiana permits uniformed and overseas citizens to submit an application for a mail-in absentee ballot by mail, fax, or email. *See* Ind. Code § 3-11-4-6. UOCAVA voters can also submit their completed mail-in absentee ballots by mail, fax, or email as well—submitting via fax or email requires signing a statement that the voter voluntarily waives the right to a secret ballot. *See* Ind. Code § 3-11-4-6(h); [Filing No. 80-8 at 16 (SOS Dep. at 58:22-24)].

SEA 398 provides that voters with print disabilities—i.e., individuals "who [are] unable to independently mark a paper ballot or ballot card due to blindness, low vision, or a physical disability that impairs manual dexterity," Ind. Code § 3-5-2-50.3—may use email, fax, or a web publication to request a voter registration application and an absentee ballot application and may cast an absentee ballot by email or fax. *See* Ind. Code §§ 3-11-4-5.8, 3-11-4-6(h). The Act requires the Secretary of State, with the approval of the Indiana Election Division, to develop a system that complies with the Web Content Guidelines, which are recommendations for making web content accessible for individuals with disabilities published by the Web Accessibility Initiative of the World Wide Web Consortium. *See* Ind. Code § 3-11-4-6(k); Ind. Code § 3-5-4-53.5. On September 27, 2021, the Secretary of State issued an Order Adopting Absentee Procedures for Voters with Print Disabilities. [Filing No. 80-11 at 1.]

D. Plaintiffs' request for a preliminary injunction

Despite having filed suit in December 2020, Plaintiffs waited until February 7, 2022, to file their motion for a preliminary injunction, demanding an injunction to be put in place in time for the May 2022 primary election. [Filing No. 81.] Plaintiffs seek "(1) an order making use of the traveling board permissive rather than mandatory and (2) an order directing Indiana to provide a web-based absentee ballot marking and submission option for use with assistive technology, as other courts and states have done." [Filing No. 82 at 4.]

E. Implementing a web-based absentee balloting tool in time for the May primary would be logistically impossible

The Court finds that successfully implementing an RAVBM at this point in the election cycle would be logistically impossible. The May 3, 2022 primary election is rapidly approaching, with preparation for the primary election ramping up at the county level. At this time, county and state election administrators are working on ballot development to provide county party chairs and school superintendents for review, which had to be accomplished by February 25, 2022. [Filing No. 91-2 at 5, ¶ 10.] Not later than March 19, 2022, counties must send absentee ballots to voters whose applications have been received and approved. [*Id.* at 2, ¶ 5.] This date may be pushed up if a county receives delivery of their absentee ballots before the statutory 50-day deadline—which is March 14, 2022—and that is not uncommon. [*Id.* at 2, ¶ 5.] After that initial mailing, counties must send absentee ballots to eligible voters on the same day the county receives and approves the application. [*Id.* at 3, ¶ 6.]

County election boards will also be facing the statewide voter registration deadline on April 4, 2022 as well as the beginning of in-person absentee voting (commonly referred to as "early voting") on April 5, 2022 and leading up to election day on May 3, 2022. [*Id.* at

5, ¶ 10.] Should Defendants have to implement an RAVBM, county election officials will also need training, either from whatever vendor is selected or the Indiana Election Division (or both), *see id.* at 5, ¶ 10, straining an already tight schedule. And the timing of an injunction would not feasibly permit Defendants to evaluate the different RAVBM options—even the free options identified by Plaintiffs—for compatibility with the counties' threat intelligence monitoring service or the state and counties' cyber security practices. [*Id.* at 4, ¶ 9.] Further, the Indiana Election Division has no unencumbered funds remaining for this fiscal year, cannot request additional appropriations from the Indiana General Assembly, and to the extent the Election Division could identify available discretionary funds available, it would take time to identify such funds and release them. [*Id.*]

Finally, contrary to Plaintiffs' assertions otherwise, Defendants have recognized that under the language of SEA 398, ballots emailed to voters with print disabilities, along with the voter bill of rights, local instructions, and the secrecy waiver will need to be WCAG compliant. [Filing No. 80-7 at 9 (IED Dep. at p. 176:22–25, p. 177:20–178:2) ("It's clear from Senate Bill 398's amendment to 3-11-4-6(k) that the system developed [by the Secretary of State] must comply with WCAG's requirements…again, in my understanding, if a voter with print disabilities is using the model developed for UOCAVA voters, then presumably that will include the material transmitted to the voter, the ballot and the accompanying documentation, and…the absentee voter's bill of rights").] Plaintiffs have provided no evidence that Defendants will not be able to work with counties to ensure that their emailed ballots can be read and marked using commonly available assistive technology, allowing voters who cannot personally mark their ballot to still vote privately and independently. And this option will be provided voluntarily as one more reasonable

accommodation, in addition to those already available to Plaintiffs and other voters who cannot personally mark their ballot.

II. Conclusions of Law

A preliminary injunction is not warranted here. Plaintiffs request the Court to take the extraordinary step of directing Defendants to adopt and implement a web-based election tool that has never been used or tested in Indiana weeks before the May 2022 primary, as Indiana election officials are focused on the business of implementing the already-existing election rules and processes. And they do so even though Indiana already provides several options for print-disabled voters to cast ballots, in-person and from home. Yet "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Goodman v. Illinois Dept. of Financial and Professional Regulation*, 430 F.3d 432, 437 (7th Cir. 2005) (internal quotation omitted). And to warrant preliminary injunctive relief, the movant must first establish that he has "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). Plaintiffs have failed to make the rigorous showing needed to justify their requested relief.

A. The *Purcell* doctrine bars any injunctive relief

The *Purcell* principle forecloses Plaintiff's requested injunctive relief because Plaintiffs request the Court to order Indiana election officials to adopt and implement—mere weeks before the May 2022 primary election—a web-based election tool that has never been used in Indiana or even presented to Indiana election officials for review and testing.

Federal courts are generally prohibited "from changing state election rules close to the date of an election." *Common Cause v. Lawson*, 978 F.3d 1036, 1039 (7th Cir. 2020); *see also, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." (citing *Purcell*, 549 U.S. 1; *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S. Ct 9 (2014))); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) ("For many years the Supreme Court has insisted that federal courts not change electoral rules close to an election date."). This principle reflects the reality that "state and local officials need substantial time to plan for elections," for "[r]unning elections state-wide is extraordinarily complicated and difficult" and "require[s] enormous advance preparations by state and local officials." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of stay applications). It also accounts for the fact that "[c]ourt orders affecting elections … can themselves result in voter confusion." *Purcell*, 549 U.S. at 4–5. In other words, "[w]hen an election is close at hand, the rules of the road must be clear and settled," and "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

Applying *Purcell*, the Supreme Court has repeatedly stayed or invalidated injunctions issued by federal courts governing myriad election-law issues in the months and weeks leading up to an election. In *Purcell*, the Court vacated an injunction concerning voter-identification procedures that had been issued a month before Election Day. 549 U.S. at 3–5. Most recently, the Court stayed a lower court injunction requiring Alabama to redraw its

districting maps nearly two months before the primary election began, even though the plaintiffs had filed suit the day after the State adopted the maps. *Merrill*, 142 S. Ct. at 888 (Kagan, J., dissenting).

Likewise, in the lead-up to the 2020 general election, the Seventh Circuit stayed multiple district court injunctions adjusting the rules for that election on the basis of the COVID-19 pandemic. In *Common Cause*, the Seventh Circuit stayed an injunction relating to an amendment to Indiana's standards for extending the hour polls close issued five weeks before the election, observing that the "plaintiff brought the *Purcell* rule upon itself by waiting more than a year to bring this lawsuit after the legislature enacted these amendments." *Id.* at 1043. Similarly, in *Common Cause Indiana v. Lawson*, the Seventh Circuit held that an injunction request mandating universal mail-in voting a month before an election was far too late. 977 F.3d 663, 665–66 (7th Cir. 2020); *see also Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641–42 (7th Cir. 2020) (staying an injunction issued four weeks before the first election-deadline it altered, which extended deadlines for requesting and delivering mail-in ballots, and made other changes to Wisconsin's election rules); *cf. Tully v. Okeson*, 977 F.3d 608, 611–12 (7th Cir. 2020) (affirming a district court's *denial* of a preliminary injunction requiring universal mail-in absentee balloting a month before Election Day).

Even if *Purcell* is not an absolute bar, only truly extraordinary circumstances could conceivably overcome the strong presumption against a federal court tinkering with state election rules leading up to an election. As Justice Kavanaugh explained the day Plaintiffs filed their motion for preliminary injunction, even if *Purcell* is not an absolute bar, at the very least "it heightens the showing necessary for a plaintiff to overcome the State's

extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). A plaintiff seeking to overcome *Purcell* would need to "establish[] at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Id.* As explained below, Plaintiffs cannot come close to establishing each of these four factors.

Purcell blocks Plaintiffs' requested relief for at least four reasons. First, requiring Defendants to adopt and implement an RAVBM system in time for the May 2022 primary would be logistically impossible. [*See* Filing No. 91-2 at 7, ¶ 23.] Implementing such a system would be a complex undertaking requiring state officials to run through the procurement process to select a new vendor, to subject the system to the necessary testing to ensure an accurate and secure election, and to train county voting officials on the use of a system that has never before been used in Indiana.[3] [*Id.* at 4, ¶ 9; *Id.* at 4–5, ¶ 10.]

Second, state and county election officials are currently occupied with implementing the already-existing rules and processes in time for the May 3 primary, which begins on March 19—less than two weeks from now—when absentee ballots have to be ready for distribution to eligible voters. [*Id.* at 2, ¶¶ 5–6; *Id.* at 5, ¶ 10.] So-called "early voting" begins

[3] The circumstances here thus differ from other cases where the respective States had already used the web-based system and thus had years of experience testing and training officials on the system. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 499–500 (4th Cir. 2016); *Taliaferro v. North Carolina State Bd. of Elections*, 489 F. Supp. 3d 433, 437 (E.D.N.C. 2020) (explaining that North Carolina already used an RAVBM, Democracy Live, for UOCAVA voters, and that the Board of Elections Executive Director had testified that it would take five weeks to complete the process of extending that already available tool to blind voters).

soon, on April 5, 2022. [*Id.* at 5, ¶ 10.] Forcing those officials to shift gears and implement an entirely new system in the midst of performing the "extraordinarily complicated and difficult" process of running an election would constitute a significant disruption to the process mere days before the election begins. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring).

Third, because of the untested nature of RAVBM in Indiana, ordering state officials to implement such a system in short order with the primary approaching is apt to raise concerns over the security of the election among voters, which may result in voter distrust of the election system. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008); [Filing No. 80-10 (Phelps Dep. at 185:2–11).]

And fourth, Plaintiffs have created the *Purcell* problem themselves by waiting 14 months after filing this suit to seek a preliminary injunction. Indeed, despite the wealth of authority applying *Purcell* during the 2020 general election, Plaintiffs decided to wait until a few weeks before the May 2022 primary to request injunctive relief, ignoring the multiple warnings from the Supreme Court and the Seventh Circuit about delay in election cases.

Plaintiffs' arguments that Defendants' plan to move forward with the combined absentee voter registration and absentee ballot application for the May 3 primary election implicates the same *Purcell* concerns are not well-taken. First, Defendant Indiana Election Division included training on SEA 398's provisions about expanding UOCAVA-style email voting for voters with print disabilities to county election administrators at the annual conference. [Filing No. 80-8 at 18 (SOS Dep. at 70:3–12).] Second, "[i]t is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite

another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election." *Milligan*, 142 S. Ct. at 881.

Plaintiffs' request for an injunction requiring Indiana election officials to adopt and implement an RAVBM tool that has never been used in Indiana in time for an election that will begin in under two weeks, when the first absentee ballots are made available, is precisely the sort of request that the *Purcell* principle is meant to bar. For that reason alone, Plaintiffs' request for a preliminary injunction must be denied.

B. Plaintiffs have not demonstrated a reasonable likelihood of success on the merits

Not only have Plaintiffs filed their request too late, but they also cannot show a reasonable likelihood of success on the merits of their ADA claim, let alone the sort of "clearcut" showing required to overcome *Purcell*. Title II of the Americans with Disabilities Act (ADA) provides that "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, program, or activities of a public entity." 42 U.S.C. § 12132; *see also Steimel v. Wernert*, 823 F.3d 902, 909 (7th Cir. 2016) ("Because the relevant provisions of the Rehabilitation Act and its regulations are materially identical to their ADA counterparts, courts construe and apply them in a consistent manner." (cleaned up)).

To succeed under Title II of the ADA, Plaintiffs must establish (1) that they are a "qualified individual with a disability," (2) that they were "denied the benefits of the services, programs, or activities of a public entity or otherwise subjected to discrimination by such an entity," and (3) "that the denial or discrimination was by reason of [the] disability." *Ashby v. Warric Cty. Sch. Corp.*, 908 F.3d 225, 230 (7th Cir. 2018) (quoting *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015)). They can prove the third prong—that they

were excluded from participation—by showing that Defendants refused to provide a reasonable accommodation. *See Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006); *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 594 (7th Cir. 2018).

Plaintiffs cannot establish a likelihood of success on the merits, for two reasons: First, Indiana already provides meaningful access to voting for print-disabled voters. And second, Indiana's ongoing implementation of Senate Bill 398 will further expand the options for print-disabled voters to vote.

A reasonable accommodation requires "meaningful access" to public services. But public entities are not obligated to "employ any and all means to make" the services available. *Alexander v. Choate*, 469 U.S. 287, 301 (1985); *Tennessee v. Lane,* 541 U.S. 509, 531–32 (2004). Though the accommodation must be effective, it "need not be perfect or the one most strongly preferred by the plaintiff." *Alexander*, 469 U.S. at 301 (cleaned up) (quoting *Dean v. Univ. at Buffalo Sch. Of Med. & Biomedical Scis.*, 804 F.3d 178, 189 (2d Cir. 2015)). Rather, the ADA "requires only reasonable modifications that would not fundamentally alter the nature of the service provided" or "impose an undue financial or administrative burden." *Id.* at 532.

Indiana's voting system reasonably accommodates individuals with print disabilities by providing the opportunity to vote privately and independently in-person and at home. Indiana's polling places have accessible voting systems for in-person voting on Election Day and during the early voting period. Indiana also offers print-disabled voters the option to vote from home via a travelling voter board, which will bring either a ballot to the voter's home to assist the voter in marking the ballot or an accessible voting machine. Indiana law

thus provides the meaningful access that Plaintiffs demand—an option for a voter with print disabilities to privately and independently mark their ballot at home.

None of the out-of-circuit cases Plaintiffs rely on is persuasive because those States had materially different absentee-voting systems that did not afford print disabled voters meaningful access. Maryland, North Carolina, and Pennsylvania all had universal absentee vote-by-mail programs, and none of those States offered an option to print disabled voters to mark their ballots privately and independently, though that benefit was available to non-print disabled voters. *Nat'l Fed. of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016) (recognizing that it was "significant" to the Court's analysis that Maryland allows any voter to vote by absentee ballot"); *Taliaferro v. North Carolina State Bd. of Elections*, 489 F. Supp. 3d 433, 437 (E.D.N.C. 2020) (following *Lamone* after defendants admitted the likelihood of success was met by Plaintiffs given the controlling precedent); *Drenth v. Boockvar*, No. 1:20-cv-829, 2020 WL 2745729 at *1 (M.D. Penn. May 27, 2020) (all voters in the state had the option to cast an absentee ballot by mail). Indiana, by contrast, is not a universal absentee-vote-by-mail State—it is an in-person voting State. And unlike Maryland, North Carolina, and Pennsylvania, Indiana law offers the travelling-board option to its print-disabled absentee voters so that those voters can vote privately and independently from home. *Lamone*, *Taliaferro*, and *Drenth* are thus inapposite given the crucial distinction between the States' systems and the fact that Indiana provides the meaningful access that Maryland and North Carolina did not.

The ADA does not require Indiana to adopt and implement Plaintiffs preferred ballot marking tool. Plaintiffs assert the contrary, relying on a federal regulation that says "[i]n determining what types of auxiliary aids and services are necessary, a public entity

shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. § 35.160(b)(2). But the ADA does not require Defendants to adopt Plaintiffs' preferred choice if there is "another equally effective means of communication … available or that the aid or service requested would fundamentally alter the nature of the program, service, or activity or would result in undue financial and administrative burdens." *Hernandez v. New York State Board of Elections*, 479 F. Supp. 3d 1, 12 (S.D.N.Y. 2020) (citing the U.S. Department of Justice's ADA primer). And the *Drenth* case on which Plaintiffs rely does not support their argument either. In fact, the Court denied the plaintiffs' preferred UOCAVA relief and ordered the defendants to proceed with their proposed ballot marking tool. *Drenth v. Boockvar*, No. 1:20-cv-00826, 2020 WL 2745729 at *6 (M.D. Penn., May 27, 2020).

The traveling board process is equally as effective as Plaintiffs' preferred choice, and in any event their request for the immediate implementation of an uncertified voting tool would fundamentally alter Indiana's election system. By providing the option for the traveling board to bring an accessible voting machine to a print-disabled voter's home, Indiana law provides a means for voting privately and independently from home that is equally effective as Plaintiffs' proposed RAVBM tool. And Plaintiffs' concerns over the COVID-19 pandemic furnish no basis for the Court to find otherwise, as the Supreme Court and the Seventh Circuit have made clear that federal courts cannot use "COVID-19 as a reason to displace the decisions of the policymaking branches of government." *Democratic Nat'l Comm.*, 977 F.3d at 642 (collecting cases). Moreover, permitting Plaintiffs to select a ballot marking tool, and then ordering Defendants to immediately implement the uncertified voting tool will fundamentally alter Indiana's election system and disrupt and

defeat Indiana's intent to ensure that voting equipment is consistently and securely implemented across Indiana's 92 counties.

In addition to the reasonable modifications pre-2021, Defendants' ongoing plan to implement SEA 398 provides another option for print-disabled voters to have meaningful access to vote privately and independently. The new law Defendants are working to implement offers voters with print disabilities the opportunity to request an emailed absentee ballot that the voter can mark using assistive technology and return via email. And Defendant are actively taking steps to implement the law before the primary. The Court finds that Defendants' proposed plan is equally as effective as Plaintiffs' proposed ballot marking tool and that Plaintiffs' criticisms of Defendants' planned implementation are mere speculation insufficient for a preliminary injunction.

C. Section 208 of the Voting Rights Act

The Court denies Plaintiffs demand to make use of the travelling board for voters who cannot personally mark a ballot permissive, rather than mandatory, such that voters who cannot personally mark their ballot can use the individual of their choosing to assist them with marking their paper absentee ballot. Indiana already offers reasonable accommodations to voters who cannot personally mark their ballots, including permitting a voter to have assistance from an individual (other than their employer or union representative) in the voting booth. And Section 208 of the Voting Rights Act, which states that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union," 52 U.S.C. § 10508, does not apply to absentee voting. Section 208 protects the fundamental

right to vote, which does not include the right to vote absentee. *See Democracy North Carolina v. North Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 233–34 (M.D.N.C. 2020); *see also McDonald v. Bd. of Election Commrs. of Chicago*, 394 U.S. 802, 807 (1969); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *McDonald* favorably); *Tully*, 977 F.3d at 613–14.

D. Remaining injunctive relief factors

The Court also finds that Plaintiffs have failed to make a strong showing that the risk of irreparable harm is "actual and imminent," and not speculative or remote. Defendants have represented that they will implement SEA 398 which will provide yet another option for print disabled voters to vote independently and privately through the UOCAVA system, allowing them to vote absentee by fax or email. *See, e.g., Hernandez v. New York State Board of Elections*, 479 F. Supp. 3d 1, 18 (S.D.N.Y. 2020) (finding no actual or imminent irreparable harm when defendants were working to implement their proposed plan for a PDF absentee ballot marking system in advance of the election).

Further, the Court finds that it is not in the public interest for the Court to order such drastic changes in Indiana's election processes this close to the May 3, 2022 primary election. The inability of Defendants to procure and implement an uncertified and untested web-based ballot marking tool within the time remaining before the primary is a reality the Court cannot ignore.

Respectfully submitted,

THEODORE E. ROKITA
INDIANA ATTORNEY GENERAL

By: */s/ Courtney L. Abshire*
Courtney L. Abshire
Deputy Attorney General

Jefferson S. Garn
Deputy Attorney General

Caryn N. Szyper
Deputy Attorney General