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THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA COUNCIL OF THE BLIND, NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, CHRISTOPHER GRAY, RUSSELL RAWLINGS, and VITA ZAVOLI,

Plaintiffs,

v.

SHIRLEY N. WEBER, in her official capacity as California Secretary of State,

Defendant.

Case No. 3:24-cv-01447-SK

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: June 3, 2024
Time: 9:30 a.m.
Court: Courtroom C, San Francisco Courthouse

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I. INTRODUCTION

The preliminary injunctive relief Plaintiffs seek—the ability to return their "remote accessible vote-by-mail" (RAVBM) ballots by electronic fax, accompanied by an electronic signature[1] —is in large part something that California already offers to over 116,000 military and overseas (UOCAVA) voters.[2] Defendant concedes that these UOCAVA voters can already return their ballots by fax, including after filling out those ballots via the very same RAVBM systems utilized by Plaintiffs and other people with print disabilities. These faxed UOCAVA ballots are also already both sent and received electronically: California's Elections Code places no restriction on the method by which ballots are faxed. *See* §§ II(B)(1)(b); II(D)(2), below. Finally, if a voter neglects to sign their ballot return envelope at all, or submits a "mismatched" signature, California already expressly permits voters to submit a signature by email, facsimile, or "by other **electronic** means made available by [the voter's] local elections official." Cal. Elec. Code § 3019(d)(2), (e)(2) (emphasis added). At least twelve California counties already provide voters with an online portal for submission of such signatures. *See* §§ II(B)(1)(a); II(D)(3), below.

Allowing voters with print disabilities to use electronic fax and electronic signatures raises no new security or administrative concerns beyond those that may exist for the 116,000 UOCAVA voters already permitted to use them. There is no reason not to extend the same RAVBM ballot-return options to Plaintiffs and other people with print disabilities who are otherwise deprived of a way to privately and independently participate in California's Vote-by-Mail Program and return their completed RAVBM ballots.

Defendant erroneously asserts that various California Elections Code provisions stand in the way of the preliminary relief Plaintiffs seek, but many of these supposed statutory "requirements"—including that

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[1] Importantly, Plaintiffs' motion for preliminary injunction does not seek a new RAVBM system, obviating the need for any RAVBM certification or approval process by Defendant. *See* ECF 12 (Pls.' Mot.) at §§ II(D); *id*. at 4 (describing relief sought). Defendant's arguments related to certification of RAVBM systems or "voting systems" are thus wholly irrelevant. *See* ECF No. 36 (Def.'s Opp'n) at 18:1-6 (conceding that electronic fax return would be neither a "RAVBM" system nor a "voting system" under California law, and that, consequently, no certification process is necessary); ECF No. 37 (Robinson Decl.) at ¶ 35 (conceding the same as to electronic signatures).

Defendant also makes the puzzling argument that Plaintiffs' requested preliminary relief falls outside of what was sought in their complaint. This, however, is false. *See* ECF No. 1 at ¶¶ 78-81 (seeking injunctive relief so that "voters with print disabilities" can "cast their ballots privately and independently," including "such other relief as the Court deems just and proper").

[2] These voters are referred to throughout as UOCAVA voters, which is a reference to the Uniformed and Overseas Citizens Absentee Voting Act

all ballot signatures be made in "wet ink"—are found nowhere in the actual code. Other asserted limitations, such as provisions preventing voting systems from being connected to the internet or preventing RAVBM systems from connecting to "voting systems," are simply irrelevant. Plaintiffs' requested relief would not require voting systems to be connected to the internet at all—it would just require that the ballot generated by a separate RAVBM system be returnable by electronic fax. Similarly, this remedy would not require RAVBM systems to be connected to "voting systems." Instead, RAVBM ballots (technically, "paper cast vote records") that are faxed in by Plaintiffs and other voters with print disabilities would be manually transcribed (referred to as "ballot duplication" by elections officials) onto official ballots by County election officials, and this official ballot would then be tallied by the voting system—just as already happens for UOCAVA voters who return their RAVBM ballots by fax.

Moreover, even if some California Elections Code provision actually did conflict with Plaintiffs' requested relief, it would not matter: it is well established that conflicting state laws cannot stand in the way of federal antidiscrimination obligations. *See* § II(B)(2), below.

In sum, the preliminary relief sought here—allowing Plaintiffs, their members, and other voters with print disabilities to utilize RAVBM fax ballot-return and electronic signature options that are already available to other California voters—is clearly reasonable. Plaintiffs thus respectfully request that this Court grant their requested preliminary injunction.

II. ARGUMENT

A. The current discriminatory deficiencies in the Vote-by-Mail Program's RAVBM ballot-return protocol are directly traceable to, and redressable by, the Secretary.

The Secretary of State defines the boundaries of the Vote-by-Mail Program in California. Defendant concedes that the Secretary of State is responsible for "certifying components of the State's electoral machinery, including . . . Remote Accessible Vote-by-Mail Systems," and that Counties may only choose from among systems that the Secretary has certified.[3] ECF No 36 (Def.'s Opp'n) at 4. In other words, the Secretary performs the crucial gatekeeping function of determining which RAVBM systems a County may use in connection with California's Vote-by-Mail Program, and which it may not. *See* ECF No. 37 at ¶ 5

[3] As discussed below, certification of a new or modified RAVBM system is not necessary here. However, that does not diminish the fundamental control the Secretary of State exercises over California's Vote-by-Mail Program and its various components.

(conceding that the Secretary of State provides counties with a menu of available certified voting systems, and each county is free to select or reject any system **from that menu of options**) (emphasis added). Any discriminatory deficiencies in the RAVBM systems that are currently available for County adoption—such as, here, the lack of a fully accessible means by which ballots may be returned—are thus directly traceable to, and redressable by, Defendant. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (elements of standing). Indeed, in a case brought under the voting rights act challenging the use of punch card voting systems, the court found that the California Secretary of State was the proper defendant because – as here – "[n]o choice by any single county" was the "source of the problem," and the Secretary of State had the power to define the boundaries of possible county choices. *Common Cause S. Christian Leadership Conf. of Greater Los Angeles v. Jones*, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001).

The fact that the Secretary cannot compel counties to use any particular RAVBM system is immaterial – the Secretary must first ensure that an accessible RAVBM option (including accessible ballot return) is **available** for counties to use. If particular counties subsequently declined to do so, that would be a separate suit. Moreover, an injury is still fairly traceable to the defendant, and redressable by an order against that defendant, when "it is substantially likely" that third parties will alter their conduct in response to such an order. *Utah v. Evans*, 536 U.S. 452, 460 (2002) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality op.)); *accord, e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019).

Defendant also erroneously argues that Plaintiffs' requested preliminary remedy would require a lengthy and expensive new certification process. However, as Defendant elsewhere concedes, there is **no need to certify a new RAVBM system**: all Defendant needs to do is ensure the one it has already certified is actually meaningfully accessible, by allowing Plaintiffs and other people with print disabilities to sign their RAVBM ballot materials electronically, and return their RAVBM ballots by electronic fax. *See* ECF No. 36 (Def.'s Opp'n) at 18:1-6 (conceding that electronic fax return would be neither a "RAVBM" system nor a "voting system" within the meaning of California law, and that, consequently, no certification process is necessary); ECF No. 37 (Robinson Decl.) at ¶ 35 (conceding the same as to electronic signatures).

B. California state law does not stand in the way of the federal requirement to provide voters with print disabilities with an accessible way to return RAVBM ballots.

1. The Elections Code "restrictions" relied on by Defendant do not bar the relief Plaintiffs seek.

Defendant points to a variety of supposed of Elections Code requirements to argue that the Secretary cannot implement the preliminary relief Plaintiffs seek, but a close look at the Elections Code reveals that many of these supposed statutory restrictions either do not exist, or are wholly irrelevant.[4]

a. The "hand" or "wet ink" signature requirement relied on by Defendant does not exist, and California counties already accept electronic signatures.

Defendant attempts to argue that allowing people with print disabilities to sign their ballots electronically would conflict with the Code's "physical" or "wet-ink" signature requirements, but the declaration offered in support of this assertion does not cite to any authority, and the actual Elections Code contains no such requirements.[5] *Compare* Robinson Decl. at ¶ 19-20, 31 *with* Cal. Elec. Code § 354.5 (requiring only that the name of the voter be "written" by a witness if the voter must make a mark in lieu of signing their name.).

As it happens, at least twelve California counties already allow voters to submit electronic signatures to "fix" physical ballot signatures that are missing or mismatched; nothing in the Elections Code would prevent Defendant from offering a similar electronic signature option to Plaintiffs and other voters with print disabilities. *See* Declaration of Bryan Finney (Finney Decl.) at ¶¶ 1-9; Declaration of John Tuteur (Tuteur Decl.) at ¶ 7. Indeed, if a voter neglects to sign their ballot return envelope at all, or submits a signature that is deemed not to match the signature(s) the county elections official has on file for that voter,

[4] Defendant's opposition papers make numerous inaccurate factual assertions regarding California's Vote-by-Mail Program. Plaintiff thus presents factual declarations from County elections officials and voters to clarify how the Vote-by-Mail Program actually works, including the electronic fax return and electronic signature options already available to voters.

[5] While it is true that ballot return envelopes must contain "[a] warning plainly stamped or printed on it that the voter must sign the envelope in the voter's own handwriting in order for the ballot to be counted," Cal. Elec. Code § 3011(a)(7), there is nothing in the Elections Code that would prevent that handwritten signature or mark from being captured electronically. Moreover, a firm requirement that voters provide consistent signatures in "wet ink" would arguably prevent many people with print disabilities from voting at all: either because they do not have the control over their movements necessary to physically sign a ballot envelope or produce a consistent signature, or because they lack the visual acuity necessary to do so. *See, e.g.*, ECF No. 15 (Rawlings Decl.) at ¶¶ 4-8; ECF No. 16 (Gray Decl.) at ¶¶ 8-9 ("even with sighted assistance to identify where a signature should be placed, signing a ballot envelope is difficult for me because I cannot see letters as I handwrite them and follow along closely with the signature line, which may yield a signature inconsistent with that on my government issued identification.").

Elections Code section 3019 expressly permits voters to submit a signature by email, facsimile, or "by other **electronic** means made available by [the voter's] local elections official."[6] Cal. Elec. Code § 3019(d)(2), (e)(2) (emphasis added).

b. The Elections Code contains no restriction on the method by which ballots are faxed.

Defendant similarly but wrongly claims that the Elections Code does not permit UOCAVA voters to return their ballots by electronic fax, but, again, the declaration offered in support of this assertion does not cite to any Elections Code section or other support. *See* ECF No. 37 at ¶ 34. The Elections Code in fact contains no express restriction on the **method** by which such ballots are faxed; it states only that "[a] military or overseas voter who is living outside of the territorial limits of the United States or the District of Columbia. . . may return their ballot by facsimile transmission." Cal. Elec. Code § 3106(a).

In truth, ballots faxed in by UOCAVA voters are already both sent and received electronically. *See* Declaration of Lincoln Smith (Smith Decl.) at ¶¶ 1-8 (UOCAVA ballot submitted by electronic fax); Tuteur Decl. at ¶ 8 (Napa County Election Division "uses e-fax technology"). In addition, the Department of Defense operates a dedicated email-to-fax address (fax@fvap.gov) for use when "an email option is not permitted,"[7] and California counties already permit UOCAVA voters without access to a physical fax machine to transmit their ballots via this electronic email-to-fax method.[8] In other words, the option to return RAVBM ballots by electronic fax that Plaintiffs seek is already available to California's 116,000

[6] California also expressly allows for several other signature options that are not necessarily made by hand or submitted and received in "wet ink." For example, California law permits voters to use a "signature stamp" that "contains the impression" of a signature or a mark. *Id.* § 354.5(f)(3). And, as Defendant acknowledges, military and overseas voters who return their ballots by fax are also permitted to submit their signed declaration forms by fax. By definition, this means that these voters are transmitting an image of their signature electronically, and that elections officials are receiving an electronically-transmitted signature.

[7] Federal Voting Assistance Program, "FVAP Resources," available at https://www.fvap.gov/eo/overview/resources (last accessed April 29, 2024) ("FVAP's Fax Service enables *UOCAVA* voters to transmit voted ballots to their election office using FVAP's email-to-fax service when allowed by state law and an email option is not permitted."); *see also* Supplemental Declaration of Rosa Lee Bichell in Support of Plaintiffs' Motion ("Bichell Suppl. Decl.") at Ex. A (copy of same).

[8] *See, e.g.*, County of San Luis Obispo, "Voting – Military and Overseas Citizens," available at https://www.slocounty.ca.gov/Departments/Clerk-Recorder/All-Services/Elections-and-Voting/Voting-Military-and-Overseas-Citizens.aspx (last accessed April 29, 2024) ("[Y]ou may return your ballot, Voter Declaration and Oath of Voter (to waive your right to a confidential vote) by fax. . . If you need to fax and do not have access to a fax machine you can email your forms to fax@fvap.gov."); *see also* Bichell Suppl. Decl. at Ex. B (copy of same).

eligible UOCAVA voters. *See* ECF No. 37 at ¶ 29 ("just over" 116,000 active UOCAVA voters).

c. Other Elections Code provisions relied on by Defendant are irrelevant.

Other Elections Code restrictions relied on by Defendant have no bearing on Plaintiffs' requested preliminary relief. For example, while the Elections Code prevents RAVBM systems from connecting to an actual "voting "system" used for tabulating votes, and prohibits voting systems from being "connected to the internet,"[9] Plaintiffs' requested relief—the ability to return RAVBM ballots by electronic fax, accompanied by an electronic signature—would not run afoul of either provision.

As Defendant concedes, all RAVBM ballots (which the state refers to as "paper cast vote records") are transcribed onto official ballots by County elections officials, and it is that transcribed official ballot that is then tabulated by the voting system. *See* Opp'n at 9 ("just as with RAVBM voters. . . the faxed paper cast vote record [returned by a UOCAVA voter] must be duplicated onto an actual ballot"); ECF No. 37 (Robinson Decl.) at ¶ 32 (explaining process by which the RAVBM ballots of UOCAVA voters are transcribed onto official ballots to be tabulated by voting systems). This is true regardless of whether the RAVBM ballot is transmitted to a County election official via mail or fax. Robinson Decl. at ¶ 32 (clarifying RAVBM-generated "paper cast vote records received by a county elections office from a UOCAVA voter via fax" are treated "in the same manner" as all other RAVBM ballots). In other words, there is always a manual transcription step between an RAVBM submission and the actual tallying of an official ballot by a voting system. Opp'n at 9; Robinson Decl. at ¶ 32.

This would not change under Plaintiffs' requested injunction: just as with UOCAVA voters who choose to submit RAVBM ballots by fax, RAVBM ballots faxed in by voters with print disabilities would be manually transcribed onto official ballots by County election officials, and this official ballot would then be then tallied by the voting system. *See* Opp'n at 9; Robinson Decl. at ¶ 32. Nothing about Plaintiffs' requested preliminary relief would require RAVBM systems to connect to an actual "voting "system" used for tabulating votes, and nothing would require those voting systems to be "connected to the internet" – meaning that the Elections Code sections prohibiting such connections are wholly irrelevant to this motion.

[9] *See* Cal. Elec. Code § 303.3 (prohibiting RAVBM systems from being connected to voting systems); *id.* at § 19205 (preventing voting systems from being connected to the internet); Opp'n at 4 (explaining that "voting systems" are those systems that are used to record voter choices and count votes).

See Cal. Elec. Code at §§ 303.3, 19205.

2. Even if there were a conflict between the Elections Code and the relief Plaintiffs seek, it would not matter, because state laws are preempted by federal disability rights law.

The Constitution provides that federal law is "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Thus, when a conflict arises between a state or local law and the ADA's requirement that public entities ensure equal opportunity, state and local laws must yield to the ADA. *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 163 (2d Cir. 2013) Indeed, "[t]he 'natural effect' of Title II's 'reasonable modification' requirement . . . requires preemption of inconsistent state law when necessary to effectuate a required 'reasonable modification.'" *Id*.

With this in mind, courts have repeatedly held that the ADA's requirements can preempt conflicting lower laws or regulations—including laws or regulations governing voting.[10] *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (holding that reasonable modification requirement of the ADA can require modifying conflicting state administrative regulation); *Mary Jo C.*, 707 F.3d at 162 (finding "nothing in the statutory phrase 'reasonable modification' to suggest that Congress intended to exclude modifications that require violation or waiver of mandatory state statutes in some circumstances"); *Hindel v. Husted*, 875 F.3d 344, 349 (6th Cir. 2017) (finding that state law requiring all voting machines to be certified did not make requested modification involving uncertified machines facially unreasonable, because "a state procedural requirement may not excuse a substantive ADA violation," and "[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does") (internal quotation marks omitted); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 508–09 (4th Cir. 2016) (rejecting the argument "that the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination"); *Johnson v. Callanen*, 2023 WL 4374998 at *10 (W.D. Tex. 2023) (in absentee voting case, defendant's state law "arguments fail for the simple reason that federal laws preempt state laws and regulations (or lack thereof)"). Courts have reached similar results when considering situations in which state or local laws conflict with analogous federal antidiscrimination

[10] Federal regulations can likewise preempt state or local laws because such regulations "have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *accord Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

statutes. As the Seventh Circuit has aptly observed in a suit under the Age Discrimination in Employment Act, "[a] discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law." *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995).

In sum, even if some provision of the California Elections Code would ordinarily not authorize Plaintiffs' requested preliminary relief, that cannot stand in the way of changes required under federal law to ensure that people with print disabilities have equal access to California's Vote-by-Mail program.[11]

C. People with print disabilities do not currently have equal access to California's Vote-by-Mail Program, and their requested preliminary relief is facially reasonable.

1. By refusing to provide people with print disabilities with a way to privately and independently return RAVBM ballots, Defendant denies them equal access to the Vote-by-Mail Program.

Title II of the ADA requires covered entities to "ensure that communications with . . . members of the public . . . with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a)(1). "In order to be effective, auxiliary aids and services must be provided ... in such a way as to protect the privacy and independence of the individual with a disability." 28 C.F.R. § 35.160(b)(2); *see also Cal. Council of the Blind v. Cnty. of Alameda*, 985 F.Supp.2d 1229, 1238-39 (N.D. Cal. 2013) (hereafter *CCB v. Alameda*) (quoting 28 C.F.R. § 35.160(b)(1)) When voters with disabilities are forced to reveal a political opinion that others are not required to disclose—including because, as here, they need third party assistance to return their RAVBM ballots—effective communication is denied. *See id.*

Despite the uncontroverted fact that Plaintiffs and other people with print disabilities cannot currently return their RAVBM ballots without assistance, Defendant wrongly argues that Plaintiffs already have "meaningful access" to the benefit of California's "Vote by Mail" Program.[12] Plaintiffs do not concede

[11] Moreover, the suggestion that the legislature may have made a conscious choice to offer fax return to UOCAVA voters but not to other people seeking to return RAVBM ballots does not change this analysis. As the Ninth Circuit observed in *Crowder*, "in virtually all controversies involving the ADA and state policies that discriminate against disabled persons, courts will be faced with legislative (or executive agency) deliberation over relevant statutes, rules and regulations." 81 F.3d at 1485. A "court's obligation" in such instances "is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives." *Id.* "Otherwise, any state could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the state authority considered possible modifications and rejected them." *Id.*

[12] While Defendant generally concedes the relevant Program is California's Vote-by-Mail Program—including the "remote accessible vote-by-mail" (RAVBM) system offered as part of that Program—it at one point argues that Plaintiffs have "meaningful access" to this Program because they can vote in person, using

that "meaningful access" is the applicable standard for the ADA requirement of equally effective communication, discussed above. However, even if it were, Defendant's "meaningful access" argument would fail.

In determining whether people with disabilities have "meaningful" access to a public entity's services, programs, or activities, courts ask whether the "same benefit" that is offered to the nondisabled public is "meaningfully and equally offered" to people with disabilities, such that it is "equally accessible to both handicapped and nonhandicapped persons." *Alexander v. Choate*, 469 U.S. 287, 308-09 (1985). If not, "reasonable adjustments in the nature of the benefit offered must at times be made." *Id.* at 301 n.21.

Plaintiffs and other voters with print disabilities do not currently have meaningful and equal access to California's Vote-by-Mail Program, because there is no non-paper-based way to return their completed ballots—meaning that they must rely on assistance from family, friends, or personal assistants, and thus sacrifice their right to a private and independent vote.[13] *See CCB v. Alameda,* 985 F. Supp. 2d 1229 at 1238 (holding that voters with disabilities have a right to "meaningful access to private and independent voting."); *see also* ECF 12 (Pls.' Mot.) at §§ II(A-B) and § V(B) (lack of meaningful access).

In the absence of the preliminary relief Plaintiffs seek, print disabled voters must reveal their ballot choices to friends, family and caregivers, raising risks of interpersonal conflict over divisive issues. Zavoli Supp. Decl. at ¶ 4; Rawlings Supp. Decl. at ¶¶ 4-5; Gray Supp. Decl. at ¶¶ 2-5. Defendant suggests that Plaintiffs' requested relief would not actually provide them with the private and independent vote that they seek, because all RAVBM ballots are reviewed and transcribed by election officials, and UOCAVA voters

assistive devices, on Election Day. *See* Opposition at 20:16-17. The law is clear, however, that Vote-by-Mail is a unique Program to which Plaintiffs must have equal access, distinct from in-person voting. *See, e.g, Lamone,* 813 F.3d at 504 (observing that "[t]he Supreme Court has cautioned against defining the scope of a public benefit so as to avoid questions of discriminatory effects," and determining that absentee voting was a separate program that people with disabilities should have equal access to, distinct from the state's voting program as a whole).

[13] Defendant relies on an old district court case, *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1126 (C.D. Cal. 2004), for the proposition that people with disabilities can be uniquely deprived of their right to a private and independent vote. However, the great weight of authority goes the other way, as does the plain language of the ADA and its implementing regulations (some relevant portions of which were enacted after the *Shelley* decision). *See, e.g., CCB v. Alameda,* 985 F. Supp. 2d at 1238; *Lamone,* 813 F.3d at 506 (finding that providing "right to vote privately and independently without assistance" to nondisabled voters but not to plaintiffs with disabilities was "precisely the sort of harm the ADA seeks to prevent"); *see also, e.g.,* 28 C.F.R. § 35.130(b)(1)(ii) (prohibiting public entities from providing people with disabilities with unequal opportunity to benefit from services or programs).

who fax their ballots must thus sign a form waiving their right to a fully secret vote. This, however, is a red herring. The fact that an anonymous elections official would need to review and transcribe RAVBM ballots faxed in by people with print disabilities is far different than the harm Plaintiffs are seeking to prevent, which is that their friends, family, or personal assistants – people they rely on every day, sometimes for the most intimate life functions – would be aware of their ballot choices. Zavoli Supp. Decl. at ¶¶ 4-5; Rawlings Supp. Decl. at ¶¶ 4-6; Gray Supp. Decl. at ¶¶ 2-5.

2. Plaintiffs' requested preliminary relief is facially reasonable.

"If a public entity's practices or procedures deny people with disabilities meaningful access to its programs or services, causing a disparate impact, then the public entity is required to make reasonable modifications to its practices or procedures."[14] *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021) (citations and quotation marks omitted). "The purpose of the ADA's reasonable accommodation requirement is to guard against the facade of 'equal treatment' when particular accommodations are necessary to level the playing field." *See McGary v. City of Portland*, 386 F.3d 1259, 1267 (9th Cir. 2004).

To state a prima facie case as to the reasonableness of a requested modification, a plaintiff need only show that it "seems reasonable on its face, *i.e.*, ordinarily, or in the run of cases."[15] *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002). Allowing Plaintiffs and other people with print disabilities to return their RAVBM ballots by electronic fax—which over 116,000 UOCAVA voters already have the option to do—is plainly reasonable on its face. *See* § II(D)(1), below. The same is true for Plaintiffs' request that they be permitted to submit all required RAVBM signatures electronically, because electronic signatures are already an option in at least twelve California counties. *See* §§ II(B)(1)(a), above; II(D)(3), below. And, as explained in § II(B)(2), above, the mere fact that some aspect of Plaintiffs' requested relief might conflict with state law (if true), does not make that relief unreasonable. *See* § II(B)(2), above.

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[14] As the Ninth Circuit has explained, "a reasonable accommodation claim is focused on an accommodation based on an individualized request or need, while a reasonable modification in response to a disparate impact finding is focused on modifying a policy or practice to improve systemic accessibility." *Payan*, 11 F.4th at 738 (citations and quotation marks omitted).

[15] When analyzing reasonable modification claims, the Ninth Circuit generally applies ADA, Rehabilitation Act, and Fair Housing Amendments Act case law interchangeably. *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1156 (9th Cir. 2003). Similarly, it has held that the terms "reasonable accommodation" (as used in Title I of the ADA) and "reasonable modification" (as used in Titles II and III) "do not differ in the standards they create." *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 816 n.26 (9th Cir. 1999), *as amended* Nov. 19, 1999.

D. Defendant cannot establish that Plaintiffs' requested relief would fundamentally alter any aspect of the Vote-by-Mail Program, because it consists of things California and its counties already allow other voters to do.

Once a plaintiff has made a prima facie showing of reasonableness or ineffective communication, the burden shifts to the defendant to establish that the requested modification or auxiliary aid would "fundamentally alter the nature of the service, program, or activity" in question. *See* 28 C.F.R. § 35.130(b)(7)(i); 28 C.F.R. § 35.164; *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (explaining burden-shifting framework); *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 816-17 (9th Cir. 1999), *as amended* Nov. 19, 1999 (same); *see also Barnett*, 535 U.S. at 402 (explaining analogous framework under Title I of the ADA) (same). Fundamental alteration is an affirmative defense, on which public entity defendants bear the burden of proof. *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 845 (9th Cir. 2004); *see also* 28 C.F.R. § 35.130(b)(7)(i).

In considering a fundamental alteration defense, the Supreme Court has expressly rejected the contention that "all the substantive rules . . . are sacrosanct and cannot be modified under any circumstances." *Martin v. PGA Tour, Inc.*, 532 U.S. 661, 689 (2001). To the contrary, courts must "carefully weigh the purpose, as well as the letter, of [a given] rule before determining that no accommodation would be tolerable." *Id.* at 691; *see also Crowder*, 81 F.3d at 1485 (court must determine whether "the decision reached by the state authority is appropriate under the law and in light of proposed alternatives"); *McGary*, 386 F.3d at 1270 (noting that court must consider purpose of nuisance law—"protection of the community" from disease, danger, rodents, toxic runoff, and other hazards—in determining whether requested accommodation was susceptible to an affirmative defense); *Hindel*, 875 F.3d at 348–49 (weighing the purpose of requiring voting on voting machines, rather than online, in considering a fundamental alteration defense); *Mary Jo C.*, 707 F.3d at 159 (noting that courts must "analyze the importance" of existing program elements, rather than "defer[ring] automatically" to current program design).

Here, Defendant cannot carry its burden of establishing that Plaintiffs' requested relief would fundamentally alter the nature of its Vote-by-Mail Program, because it consists of things California and its counties already allow other voters to do: namely, fax RAVBM ballots, and submit electronic signatures to verify voting materials.

1. Defendant already allows over 116,000 UOCAVA voters to return RAVBM-generated ballots by fax.

By Defendant's own admission, over 116,000 UOCAVA voters are already permitted to transmit "RAVBM-generated" vote records by fax. Robinson Decl. at ¶¶ 29 - 31; *see also id.* at ¶ 32 ("Once an RAVBM-generated paper cast vote record is received by a county elections office from a UOCAVA voter via fax, it is treated in the same manner as other RAVBM-generated paper cast vote records")

2. UOCAVA ballots are already both transmitted and received by electronic fax.

As discussed in § II(B)(1)(b), above, the Elections Code contains no express restriction on the **method** by which UOCAVA voters fax in their ballots. In practice, ballots faxed in by UOCAVA voters (including RAVBM ballots) are already both sent and received electronically. *See* § II(B)(1)(b), above. In addition, the Department of Defense operates a dedicated email-to-fax address (fax@fvap.gov) for use by UOCAVA voters, and California counties already permit UOCAVA voters without access to a physical fax machine to transmit their ballots via this electronic email-to-fax method. *See* § II(B)(1)(b), above.

3. At least twelve California counties already accept electronic signatures.

As noted in § II(B)(1)(a), above, contrary to Defendant's assertion that ballot materials must always be signed with "wet" signatures, at least twelve California counties already allow voters to submit electronic signatures to "fix" physical ballot signatures that are missing or mismatched; nothing in the Elections Code would prevent California from offering a similar electronic signature option to Plaintiffs and other voters with print disabilities. *See* Finney Decl. at ¶¶ 1-9.

E. There is ample time to implement Plaintiffs' requested relief ahead of the November 2024 election.

Defendant's argument that County election officials would not have time to implement Plaintiffs' requested relief ahead of the November election is wrong as a matter of fact and law,[16] and the Defendant's arguments on this point are belied by the sworn testimony of County election officials, each of whom has

[16] The declarant whose testimony is offered in support of this assertion, Ms. Robinson, is not and never has been a county elections official, and offers no evidence of firsthand knowledge regarding how California counties administer elections. *See* ECF 37 (Robinson Decl.) at ¶ 1 (describing experience); *id.* at¶¶ 36-40 (testifying, without foundation, regarding logistics of County implementation). Ms. Robinson's testimony, and Defendant's arguments on this point, should thus be disregarded. *See* Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

said that they would be able to implement Plaintiffs' requested relief in time for the November election.

Elections officials from counties across California—including Contra Costa, Los Angeles, Napa, Riverside, and San Benito—have confirmed, under oath, that they would be able to implement Plaintiffs' requested relief in time for the November election. Declaration of Kristin B. Connolly (Connolly Decl.) at ¶ 7; Declaration of Dean Logan (Logan Decl.) at ¶ 7; Tuteur Decl. at ¶¶ 7-9; Declaration of Art Tinoco (Tinoco Decl.) at ¶ 7; Declaration of Francisco Diaz (Diaz Decl.) at ¶ 6. County election officials would not need to purchase new equipment because this would be an expansion of existing procedures available to UOCAVA voters to a new subset of voters. Diaz Decl. at ¶ 6; Logan Decl. at ¶ 7. Similarly, extending a fax return option to voters with print disabilities will not place additional burdens on elections officials because they already process faxed ballots from UOCAVA voters. *See* Connelly Decl. at ¶ 7; Tuteur Decl. at ¶ 6. In addition, many of these officials have expressed strong support for Plaintiffs' requested relief and the increased access it would provide. *See* Connelly Decl. at ¶ 6; Diaz Decl. at ¶ 6; Logan Decl. at ¶ 6.

Defendant also disingenuously suggests that Plaintiffs delayed filing their complaint in this case, even as their counsel pursued similar cases in other jurisdictions. This argument ignores the fact that Plaintiffs and/or their counsel made Defendant aware of accessibility problems with the current RAVBM ballot return process long ago, and spent years trying to resolve this matter without litigation.[17] *See* ECF No. 1 at ¶¶ 37-39; *see also* Declaration of Paul Spencer at ¶¶ 3-5 (describing efforts to pursue a legislative fix since 2022, and Defendant's opposition to legislative solutions). Other courts, considering similar knowledge and inaction on the part of state defendants, have found that it weighs in favor of issuing the requested injunction. *Taliaferro v. N. Carolina State Bd. of Elections*, 489 F. Supp. 3d 433, 439 (E.D.N.C. 2020) ("factoring into the Court's consideration of the equities is the fact that defendants have been aware of plaintiffs' concerns and demands regarding North Carolina's inaccessible absentee voting program . . . but have failed to address them").

Defendants' argument that *Purcell* (decided only 18 days before the relevant election)[18] prohibits

[17] *See* California Senate Bill 1480 Remote Accessible Vote By Mail Systems, California Legislative Information (2022), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1480 (last visited April 29, 2024).

[18] *Purcell* was decided on October 20, 2006, and concerned the November 7, 2006 election. *See Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006).

Plaintiffs' requested preliminary injunction also fails, because Plaintiffs do not seek relief "on the eve of an election" and – as discussed in § II(D), above – the preliminary relief they seek is largely already available to other California voters. *See Merrill v. Milligan*, 142 S. Ct. 879, 881 n.1 (2022) (mem.) (Kavanaugh, J., concurring) ("how close to an election is too close" depends on "how easily" change could be made).

Each of the cases relied on by Defendant is wholly distinguishable from this one—both in terms of the timeline at issue, and in terms of the magnitude of relief sought. *Merrill* involved a wholesale challenge to Alabama's congressional district maps and sought that they be "completely redrawn within a few short weeks." *Merrill*, 142 S. Ct. at 879-80 (Kavanaugh, J., concurring) (noting that this change would lead to a situation where candidates for political office "do not even know which district they live in" or whether they would be running against "other incumbents in upcoming primaries."). *Southwest Voter* is likewise distinguishable. There, the plaintiffs sought to enjoin a gubernatorial recall election after "[h]undreds of thousands of absentee voters ha[d] already cast their votes in… reliance upon the election going forward on the timetable announced by the state." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003). The same is true of *American Council of the Blind v. Indiana*, where plaintiffs sought the creation of an entire RAVBM program and other changes just eight weeks before the election and two weeks before absentee voting was set to begin. *Am. Council of Blind of Ind. v. Ind. Election Comm'n*, No. 120CV03118JMSMJD, 2022 WL 702257, at *6 (S.D. Ind. Mar. 9, 2022).

By contrast, the preliminary relief Plaintiffs seek here—via a motion that will be heard five months before the next election and well before the deadline for Counties to send out mail-in ballots[19]—is far less disruptive, because it merely extends fax return options that California already offers to over 116,000 UOCAVA voters. *See* § II(D), above (explaining that the relief sought, including the ability to submit electronic signatures, is largely already available to other California voters). This requested relief is more analogous to what was requested—and granted—in *Taliaferro*, where blind plaintiffs sought an injunction making the electronic voting portal available to North Carolina's UOCAVA voters available to them as well. *Taliaferro v. N. Carolina State Bd. of Elections*, 489 F. Supp. 3d at 436; *id*. at 440 (granting injunction); *see also Johnson v. Callanen*, 2023 WL 4374998 (W.D. Tex. 2023) (July decision requiring

[19] *See* Cal. Elec. Code § 3000.5 (requiring vote-by-mail ballots to be mailed no later than 29 days before the election).

purchase and implementation of an RAVBM system for a November election). Moreover, any potential concerns regarding difficulty of implementation are minimized because the expanded fax return and electronic signature options sought here will only be used by the relatively-small number of additional voters with print disabilities.[20]

F. The public interest weighs in favor of granting Plaintiffs' requested relief.

Defendant asserts that the public interest weighs against Plaintiffs' requested preliminary injunction, but the rationale offered in support of this argument (including that the requested changes would be too "complex" to implement) has no basis in fact. *See* §§ II(D, E), above. These arguments have also been contradicted by the sworn declarations of multiple county election officials. *See* § II(B)(1); § II(E), above. By contrast, Plaintiffs' requested relief is resoundingly in the public interest, as these same county election officials themselves acknowledge. Logan Decl. at ¶ 6; Diaz Decl. at ¶ 6; Tinoco Decl. at 6; Tuteur Decl. at ¶ 6; *see also Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). ("Our society as a whole suffers when we neglect . . . the disabled, or when we deprive them of their rights or privileges."); 42 U.S.C. § 12101(a)(3) (describing voting as one "critical area[]" in which discrimination against people with disabilities persists).

III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant their requested preliminary injunctive relief Plaintiffs seek—the ability to return their RAVBM ballots by electronic fax accompanied by an electronic signature—so that they may use California's Vote-by-Mail Program for the November 2024 election without having to sacrifice their right to a private and independent vote.

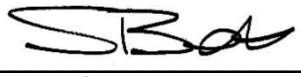
[20] Part of Plaintiffs' proposed preliminary relief is that people with print disabilities be required to attest that they have print disabilities and thus need to use fax-based ballot return procedures and electronic signature options sought, thereby limiting those options to only this relatively-small additional population. Pls.' Mot. at 10, fn. 22 (describing proposed attestation language). Defendant has previously required voters to make similar disability-related attestations, under oath, in connection with use of RAVBM systems. *See* Memo from Susan Lapsley, Dep. Sec'y of State, to All County Clerks/Registrars of Voters, *re: Remote Accessible Vote by Mail System: Approval of (1) Five Cedars Group Inc.'s Alternate Format Ballot (AFB) 4.3; and (2) Democracy Live, Inc.'s Secure Select 1.0 Remote Accessible Vote by Mail System* (Oct. 12, 2017) at 3 (requiring attestation of disability to use RAVBM system), available at https://elections.cdn.sos.ca.gov/ccrov/pdf/2017/october/17089sl.pdf (last accessed May 6, 2024); Bichell Supp. Decl. at Ex. C (copy of same).

Defendant suggests that a self-attestation made under penalty of perjury is likely to be ineffective because voters would lie. Robinson Decl. at ¶ 42. However, under that reasoning, statements currently made under penalty of perjury in every part of the voting process are similarly suspect.

DATED: May 6, 2024

Respectfully submitted,

DISABILITY RIGHTS ADVOCATES



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