

the ADA and RA. *Id.*

Following the filing of Plaintiffs' Motion for Preliminary Injunction [DE 26], on September 24, 2020, the Court granted the motion and ordered Defendants to open an accessible electronic voting portal, Democracy Live, for use by plaintiffs and other blind voters to submit their ballots as expeditiously as possible so that it may be utilized for the November 3, 2020 election. [DE 41]. As a result, the Democracy Live portal was made available to visually impaired voters for the 2020 General Election. The Court did not require ballots in alternative print formats such as Braille or large print to be made available to visually impaired voters. *Id.*, p. 10.

Defendants have requested, and been granted, multiple extensions of time to file an answer, and the parties sought a stay of the matter on two occasions. [DE 28, 29, 34, 39, 42, 43, 45, 46, 48, 49, 51, 52].

On April 16, 2021, Defendants filed an Answer to Plaintiffs' Complaint. [D.E. 53]. On May 13, 2021, Plaintiffs filed a Motion for Judgment on the Pleadings supported by a Memorandum of Law and a Proposed Order. [D.E. 55, 55-1, 56]. On May 19, 2021, Plaintiffs filed an Amended Motion for Judgment on the Pleadings and Proposed Order. [D.E. 57, 57-1].

Plaintiffs' motion relies upon the pleadings to argue that Defendants' answer includes sufficient factual admissions to support a finding that Plaintiffs are entitled to final judgment on the merits. [D.E. 56, 57]. Plaintiffs' motion seeks an order that Defendants (a) make Absentee Voting in North Carolina accessible to blind voters; (b) provide an accessible absentee ballot and processes for requesting, receiving, signing, and returning absentee ballots in future elections; and (c) establish a process by which blind voters may request auxiliary aids and services in the Absentee Voting Program to be processed by a designated ADA Coordinator employed by the State Board. [D.E. 57, p. 3].

Plaintiffs' Proposed Order provides additional details regarding proposed implementation of the requested relief, including the establishment of an accessible electronic voting system, a system by which requests for accommodation will be processed, and specific reporting requirements imposed upon Defendants, among other issues. [D.E. 57-1].

Within the requested relief is a reporting requirement that Defendants identify and pre-approve a list of vendors who could produce Braille and large print ballots if a request for those ballots was made. [D.E. 57-1, ¶ 10(b)]. However, none of the Plaintiffs in this matter require Braille or large print ballots to vote absentee, as this service can be effectively delivered via an accessible electronic voting system such as Democracy Live. [D.E. 1, ¶¶ 44, 58-61]. Furthermore, any future voter who did require such an accommodation is already contemplated within the proposed relief because it includes a provision that Defendants will designate an ADA Coordinator who will process any and all requests for such services if and when such a request is made. [D.E. 57-1, ¶ 6]. For that reason, Defendants oppose this specific provision within the proposed order.

STATEMENT OF THE FACTS

Pursuant to North Carolina law, mail-in absentee voting begins 60 days prior to general elections held in even-numbered years. N.C. GEN. STAT. § 163-227.10(a). For the 2020 general election, mail-in absentee voting began on September 4, 2020. In most circumstances, a paper ballot is sent to any voter who requests a mail-in absentee ballot. That paper ballot must be marked and returned, either by mail or by in-person delivery, to the appropriate county board of elections. N.C. GEN. STAT. §§ 163-229 and -231. The exception to this requirement of the standard paper ballots is for absentee voting done by military and overseas voters under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. §§ 20301 *et seq.*, as amended by the Military and Overseas Voter Empowerment Act ("MOVE Act"), National Defense

Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 575-589, 123 Stat. 2190, 2318-35 (2009). This federal legislation was expressly incorporated into North Carolina law. *See* N.C. GEN. STAT. Chapter 163, Article 21A (Uniform Military and Overseas Voters Act). Under the UOCAVA process, county boards of elections are required to accept valid voter registration applications, absentee ballot applications, voted ballots, or Federal Write-In Absentee Ballots without regard to other requirements of North Carolina law, such as notarization requirements, restrictions on paper type or envelope type or authentication other than the voter’s attestation. N.C. GEN. STAT. § 163-258.17. North Carolina implements UOCAVA voting by sending absentee ballot materials to UOCAVA voters by email, fax, mail, and through the Democracy Live portal, which was added in 2020. Under current North Carolina law, there exists no similar exception to implement an accessible electronic voting system for visually impaired voters.

ARGUMENT

A. Legal Standard

Rule 12(c) of the Federal Rules of Civil Procedure provides that “after the pleadings are closed but early enough not to delay trial, a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). For purposes of Rule 12(c), consideration may be given to the complaint, the answer, exhibits to the pleadings, matters of public record, and exhibits to the motion that are integral to the complaint and authentic. *Massey v. Ojaniit*, 759 F.3d 343, 347-48 (4th Cir. 2014) (citing Fed. R. Civ. P. 10(c); *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)).

The motion “allows a court to eliminate actions that are fatally flawed in their legal premises and destined to fail.” *Parham v. Pepsico, Inc.*, 927 F. Supp. 177, 178 (E.D.N.C. 1995), *aff’d*, 1996 U.S. App. LEXIS 12295 (4th Cir. 1996). Moreover, the Fourth Circuit has held that courts are not required “to accept as true allegations that are merely conclusory, unwarranted

deductions of fact, or unreasonable inferences” nor should courts “accept as true allegations that contradict matters properly subject to judicial notice or by exhibits.” *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). To the extent allegations in the pleading of the non-moving party conflict with the allegations in the pleading of the moving party, the court should assume the allegations in the non-moving party’s pleading to be true. *Deutsche Bank Nat’l Tr. Co. v. Fegely*, 767 F. App’x 582, 583 (4th Cir. 2019).

B. ADA and RA Claims

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 subject to discrimination by any such entity.” 42 U.S.C. § 12132. Under the RA, “[n]o otherwise qualified individual with a disability [...] shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....” 29 U.S.C.S § 794.

The elements of a claim under ADA and RA are so similar that the acts are construed together and impose the same requirements. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005); *Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999); *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995).

In order to demonstrate a viable claim under either statute, a plaintiff must be able to prove that: (1) she has a disability; (2) she is otherwise qualified for the benefit or activity in question; and (3) she was excluded from the benefit due to discrimination solely on the basis of disability.” *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 U.S. Dist. LEXIS 138492,

at *157-58 (M.D.N.C. Aug. 4, 2020) (quoting *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502-03 (4th Cir. 2016)); see also *Constantine*, 411 F.3d at 498.

Here, Defendants do not dispute that any of the plaintiffs are disabled or that they are qualified voters eligible to participate in the upcoming election. For the third element, *Nat'l Fed'n of the Blind v. Lamone*, a Fourth Circuit case decided in 2016 that appears to be directly on point, provides guidance. In *Lamone*, the issues before the court turned on a dispute about how to define the scope of the public service at issue. *Id.*, at 503. If the scope encompassed only absentee voting, the denial of benefits was plain, but if the scope was access to voting in its entirety, including voting in-person, the State provided all disabled persons with ample access to the ballot. *Id.* The Fourth Circuit engaged in an in-depth analysis of the underlying statutes and interpretive case law regarding the proper manner by which to define the scope of a public benefit. *Id.*, at 503-05 (citing *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (“The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled.”)). The Court found that an expansive definition that swallowed the purpose of the underlying statutes was illogical; thus it defined the public service as absentee voting, and not the entire voting system. *Id.*, at 504.

The Fourth Circuit concluded that the State’s failure to provide any means by which a blind voter could vote absentee without assistance resulted in a clear denial of meaningful access to the absentee voting program. *Id.*, at 506-07 (“Ensuring that disabled individuals are afforded an opportunity to participate in voting that is equal to that afforded others, 28 C.F.R. § 35.130, helps ensure that those individuals are never relegated to a position of political powerlessness.”). The facts in *Lamone* are substantially similar to this matter, and *Lamone* is controlling, as recognized by this Court in its preliminary injunction order. [D.E. 41, p. 5].

However, the fact that Plaintiffs meet the threshold requirement to make a request under the ADA and RA does not end the analysis. Once a valid request is made, Defendants must process that request and make a reasonable accommodation if possible. First, the government agency must give consideration to the type of accommodation requested, 28 C.F.R. § 35.160(b)(2), but can deny that specific accommodation if (i) another equally effective means of communications is available; (ii) the aid or service requested would fundamentally alter the nature of the program, service, or activity; or (iii) the aid or service request would result in undue financial and administrative burdens. *See* U.S. Dept. of Justice, Civil Rights Division, Disability Rights Section, “Americans with Disabilities Act, ADA Update: A Primer for State and Local Governments,” p. 8, June 2015, https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf; *see also Hernandez v. N.Y. State Bd. of Elections*, No. 20-cv-4003 (LJL), 2020 U.S. Dist. LEXIS 146934, at *21-23, 27 nn. 9 & 10 (S.D.N.Y. Aug. 14, 2020) (“Within the ADA, ‘there is an express delegation of authority’ to the United States Attorney General to promulgate regulations necessary to its implementation, 42 U.S.C. § 12134(a), and therefore those regulations are entitled to ‘controlling weight, unless they are arbitrary, capricious, or manifestly contrary to the statute.’” (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984))). Following this framework, Plaintiffs have not met the burden to demonstrate any plaintiff requires a Braille or large print ballot where an equally effective alternative is available.

First, based on Plaintiffs’ Complaint, it appears that only one Plaintiff, Mr. Kenneth Durden, requests to use Braille over accessible electronic interfaces. [D.E. 1, ¶¶ 43, 59]. There is no allegation or argument that Mr. Durden requires a Braille ballot or is unable to use an accessible electronic system, such as Democracy Live. *Id.* In fact, Mr. Durden states only that he prefers Braille, but sometimes uses a computer and smartphone with assistive technology to read, fill out,

and sign accessible electronic documents, send emails, text messages, edit documents, browse the internet, and he used an accessible voting machine to vote in person in the past. *Id.*; *see also Declaration of Kenneth Durden*, ¶ 6 [D.E. 25-2]. Thus, if the State Board was ordered to implement an accessible electronic voting system, Mr. Durden would not be denied the ability to vote on the basis of his disability.

Second, for the same reasons stated above, the accessible electronic voting system is an equally effective alternative accommodation that can be offered by the State Board to Mr. Durden and others similarly situated. In order to be considered effective, the benefit or service at issue must be provided in a timely manner. 28 C.F.R. 35.160(b)(2). An accessible electronic voting system is essentially instantaneous, whereas any process to provide a Braille ballot will take weeks, even with pre-approved vendors. Thus, the electronic voting option is more effective to meet the needs of this voter.

Following this framework, and relying on the Complaint, Plaintiffs have not met their burden to demonstrate that Mr. Durden would be denied his ability to vote based on his disability. Even if that were the case, the accessible electronic ballot system is an equally effective alternative. This conclusion mirrors the holding from the Fourth Circuit in *Lamone*, where the court defined the benefit or service offered as access to absentee voting. *Lamone*, 813 F.3d at 504. Because an electronic accessible voting system, such as Democracy Live, would provide the benefit or service of absentee voting to Mr. Durden, the State Board is permitted to offer it as a reasonable accommodation under controlling law, in lieu of Braille or large print.

Finally, this particular remedy is not essential to the resolution of this matter because Plaintiffs' requested relief, and their Proposed Order, include a requirement that the State Board appoint an ADA Coordinator, implement an ADA policy, and commit to process any and all

requests for accommodations under that policy through that ADA Coordinator. Thus, while Mr. Durden does not require a Braille or large print ballot, should another visually impaired voter make such a request in the future, then it would be processed accordingly.

Therefore, this portion of Plaintiffs' Proposed Order goes beyond the needs and scope of this case. It seeks to impose upon the State Board an obligation to identify and preapprove vendors to provide a specific type of service based on the speculation that this service will be requested before a valid request for such service has been made. By doing so, Plaintiffs would be forcing the State Board to expend resources that may never be utilized by a voter when those resources could be better used elsewhere to prepare for future elections. For that reason, Defendants oppose this specific provision found at paragraph 10(b) of the proposed order.

CONCLUSION

Defendants oppose Plaintiffs' Motion for Judgment on the Pleadings on the limited grounds stated above. With respect to the remainder of the provisions found in Plaintiffs' motion and proposed order, Defendants acknowledge the merits of those arguments under controlling precedent and stand ready to implement such an order, if entered by the Court.

This the 3rd day of June, 2021.

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