

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LARRY JOHNSON, WENDY WALKER,
AMELIA PELLICCIOTTI;

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NATIONAL FEDERATION
OF THE BLIND OF TEXAS; and

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THE COALITION OF TEXANS
WITH DISABILITIES,

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Plaintiffs,

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Civil Action No. 5:22-cv-409

§

vs.

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JACQUELYN F. CALLANEN, in her official
capacity as the Bexar County Elections
Administrator; and BEXAR COUNTY, TEXAS,

§

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Defendants.

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**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT**

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PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, by their undersigned counsel and pursuant to Fed. R. Civ. P. 65 and 42 U.S.C. § 12188(a)(2), move the Court to issue a preliminary injunction against Defendant Jacquelyn F. Callanen, in her official capacity as Bexar County Elections Administrator, prohibiting her from violating Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 1201-12213, and Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794, and requiring her to make vote-by-mail ballots accessible in time for the November 8, 2022 election. The attached Memorandum in Support and accompanying exhibits further explain the legal basis for this Motion.

WHEREFORE, Plaintiffs request that their Motion be granted and that the Court issue an immediate preliminary injunction against Defendant Callanen for the November 8, 2022 election.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

This is an action for injunctive relief to give Bexar County citizens with disabilities equal access to vote-by-mail ballots in upcoming elections. “[T]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Harman v. Forssenius*, 380 U.S. 528, 537 (1965), *citing Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

That right is severely compromised for many eligible voters with disabilities in Bexar County who wish to vote by mail, as other Bexar County voters can. Because ballot-by-mail ballots are provided only in hard copy and must be read in standard print and filled in by hand, Bexar County citizens who are blind, have low vision, or impaired manual dexterity (collectively herein,

“print disabilities”) cannot cast their ballots secretly, privately and independently. Instead, they must reveal their choices to another person and hope that person correctly records their votes.

Bexar County already deploys technology to electronically deliver ballot-by-mail ballots to members of the military and citizens who live overseas pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 52 U.S.C. § 20301 et. seq., Pub. Law 111–84. However, Bexar County has refused to make those ballots available electronically to voters with disabilities.

Bexar County’s failure is a violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. (“ADA” or “Title II) and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 et seq. (“Section 504”). The rights violation—the deprivation of equal access to the ballot—is incontrovertible, as is the irreparable injury with which Plaintiffs are threatened. Plaintiffs seek preliminary injunctive relief in the form of an order directing Bexar County to provide access to accessible markable electronic ballots for voters with print disabilities for the November 2022 General Election and subsequent elections.

II. STATEMENT OF FACTS

A. The Bexar County Vote-by-Mail Program.

Texas restricts ballot-by-mail voting to persons meeting certain criteria. To be eligible, a person must be age 65 or older, have a disability, be outside of the county, or be in jail, but otherwise eligible to vote.¹ Bexar County uses paper mail-in ballots for early ballot-by-mail voting. Voters receive a paper mail-in ballot in the mail, then complete the paper ballot and submit it via mail to the County. Compl. ¶¶ 44-48.

¹ See Texas Secretary of State, Application for a Ballot by Mail, <https://www.sos.texas.gov/elections/voter/reqabbm.shtml> (last visited April 22, 2022).

Paper mail-in ballots exclude persons with vision and print disabilities who cannot read or mark the ballot. Thus, persons who are blind or who have print disabilities must rely upon the assistance of a third-party to read them the ballot, mark the ballot for them, and return the ballot for them. *Id.* at ¶¶ 50-53. This reliance robs persons with disabilities of their fundamental right to vote by mail privately and independently and of their right, under Texas law, to vote in secret. Tex. Elec. Code § 62.0115(b)(2). As other circuits have found, this violates the ADA and Section 504. *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016); *Hindel v. Husted*, 875 F.3d 344, 349 (6th Cir. 2017). Defendants refuse to offer an accessible electronic ballot that would allow Plaintiffs, and voters like them, to vote by mail privately and independently.

A Bexar County UOCAVA voter, on the other hand, can request, receive, and mark that voter's ballot via electronic means.

In sum, in order to cast a vote-by-mail ballot in Bexar County, voters must be able to read a paper ballot in standard print, physically mark the ballot choices, and fill in and sign the statement printed on the back of the envelope. Even though Defendants have already implemented an accessible electronic system for overseas voters, they have refused to make that system accessible and available to voters with print disabilities.

B. Plaintiffs Would Cast Vote-by-Mail Ballots in the 2022 General Election if the System Were Accessible.

Because they are blind, Mr. Johnson, Ms. Walker, and Ms. Pellicciotti (together, "Individual Plaintiffs") face significant hardship if they intend to exercise their right to a private, secret ballot. All are registered voters who live in Bexar County and who intend to vote in future elections, including in November 2022. Ex. B, Declaration of Larry Johnson (hereinafter "Johnson Decl.") at ¶¶ 1, 7; Ex. D, Declaration of Amelia Pellicciotti (hereinafter "Pellicciotti Decl.") at ¶¶ 1, 5; Ex. C, Declaration of Wendy Walker (hereinafter "Walker Decl.") at ¶¶ 1, 5. Each would use

an accessible absentee ballot if available. Ex. B, Johnson Decl. at ¶¶ 7, 13, 16; Ex. D, Pellicciotti Decl. at ¶¶ 5, 16, 18; Ex. C, Walker Decl. at ¶¶ 5, 12. However, none can cast an absentee ballot independently, as nondisabled Bexar County voters may, using a paper ballot. Nor are they permitted to use Bexar County's electronic voting system for military and overseas voters. Instead, they are forced to reveal their votes to friends or family if they want to exercise the right to vote by mail.

Plaintiff Larry Johnson, a member of the Coalition of Texans with Disabilities ("CTD"), is a resident of San Antonio, Texas and is blind. Ex. B, Johnson Decl. ¶¶ 1-3. He is a regular voter, is eligible for ballot-by-mail voting, and would like to vote in upcoming elections, including the November General Election, by mail. *Id.* at ¶ 7. Mr. Johnson has screen reader technology and uses it regularly to read and complete forms. *Id.* at ¶¶ 6, 22.

Without an accessible electronic ballot, Mr. Johnson would have to ask family members who do not live with him to help complete the ballot. *Id.* at ¶ 8. He would not trust anyone other than family. *Id.* In fact, even with family completing the ballot he is concerned they may not mark it correctly and his ballot will be counted incorrectly or will not be counted at all. *Id.* at ¶ 9. He is also uncomfortable giving his identifying number (voter ID, driver's license, or Social Security number) to a third party, as required by Texas law. *Id.* at ¶¶ 10, 12. It is very important to Mr. Johnson to be able to vote privately and independently because it is a personal and private decision. *Id.* at ¶ 11.

Mr. Johnson reached out to Bexar County Election Administrator Jacquelyn Callanen before the November 2020 election requesting accessible electronic vote-by-mail ballots be provided to people with disabilities. *Id.* at ¶ 13. Ms. Callanen said she needed approval from the Secretary of State. *Id.* at ¶ 15. Ms. Callanen sent Mr. Johnson a copy of the electronic ballot Bexar

County uses for military and overseas voters and he found it to be accessible using his screen reader. *Id.* at ¶ 16. However, no accessible electronic ballot was provided for people with print disabilities for the November 2020 election.

Because Mr. Johnson has COPD and is at high risk of contracting and getting severely ill from COVID-19, he was concerned about putting his health at risk to vote in person in the 2020 primary and general elections. *Id.* at ¶¶ 14, 18. Therefore, he asked his granddaughter to drive to his home to help him complete his ballots. *Id.* at ¶ 18. He voted in person for the March 2022 primary election because he did not want to impose on family again to assist him or worry about his ballot being completed incorrectly or rejected. *Id.* at ¶ 19. Because of his health condition (COPD), doing so put his health at serious risk. In addition, he faced accessibility barriers at the polls because the election judge refused to direct him to the accessible polling booth. He had to rely on a neighbor to help him. *Id.* at ¶ 20.

Plaintiff Wendy Walker, President of the San Antonio chapter of the National Federation of the Blind of Texas (“NFB-TX”), is a resident of San Antonio, Texas and is blind. Ex. C, Walker Decl. ¶¶ 1-3. She is a regular voter, is eligible for ballot-by-mail voting, and would like to vote in upcoming elections, including the November General Election, by mail. *Id.* at ¶¶ 5, 8, 12. Ms. Walker has screen reader technology and uses it regularly to read and complete forms. *Id.* at ¶¶ 4, 16.

Ms. Walker cannot vote by mail because she is unwilling to tell a third party who she is voting for because of the current political climate. In the past she has had to ask someone with opposing political views to assist her and it made her very uncomfortable. *Id.* at ¶ 6. In addition, she is concerned because she cannot be certain that such an assistant will mark the ballot correctly, either intentionally or unintentionally, which may lead to her ballot being rejected. *Id.* at ¶ 12.

She would prefer to vote by mail because of her past experiences trying to vote in person, where she has had to rely on untrained poll workers who did not know how to activate the accessible machine. *Id.* ¶ 8, 10. In addition, because the polling place is always laid out differently, she had trouble navigating to the accessible machine. *Id.* at ¶ 8.

For the November 2020 election, Ms. Walker knew the ballot-by-mail program was inaccessible, so she arranged for a friend to take her to her polling place. *Id.* at ¶ 7. Ms. Walker did not want to go to a polling place because she had been careful to stay out of public places in order to avoid contracting COVID. *Id.* at ¶ 9. She was very concerned about contracting COVID at the polling place, because she had to wait in a very long line with many other people, had to try to stay socially distanced, and had to touch a machine that other people had touched. *Id.* Once she made it into the polling place, she discovered that there was only one staff person who knew how to use the accessible voting machine, so she had to wait for that person to be free to provide assistance. *Id.* at ¶ 10. Once she got to use the accessible machine, she discovered that the headphones on the machine were broken. Luckily, she had brought her own headphones. *Id.* at ¶ 11.

Ms. Walker was unable to vote in the March 2022 primary because she did not want a third party to fill in a vote-by-mail ballot for her. *Id.* at ¶ 13. She could not vote in person because she did not have transportation to the polls. She also did not have sufficient time to wait for assistance to activate the accessible machine, as she had to do in 2020. *Id.*

Plaintiff Amelia Pellicciotti, a member of NFB-TX, is a resident of San Antonio, Texas and is blind. Ex. D, Pellicciotti Decl. ¶¶ 1-3. She is a regular voter, is eligible for ballot-by-mail voting, and would like to vote in upcoming elections, including the November General Election,

by mail. *Id.* at ¶¶ 5, 16. Ms. Pellicciotti has screen reader technology and uses it regularly to read and complete forms. *Id.* at ¶¶ 4, 13.

Ms. Pellicciotti does not want to provide a third party with access to her ballot choices because that is supposed to be private information and because they may mark the ballot incorrectly. *Id.* at ¶ 17. She also believes that accessible voting by mail would let her vote in more elections because she would not have to arrange transportation to the polling place and would not have to face the accessibility barriers at polling places. *Id.* at ¶¶ 15, 18. In past elections when she has voted in person she has faced accessibility barriers such as poll workers who were untrained and did not know how to use the accessible voting machines, and problems with the voting machines themselves. *Id.* at ¶ 7. In past elections, she has encountered defective earphones, which make the machine inaccessible to a blind person. *Id.* She has also had to wait an hour to vote because no poll workers knew how to operate the accessible machine. *Id.*

Because she knew the ballot-by-mail program was not accessible in November 2020, Ms. Pellicciotti had a friend take her to the polling place for early voting. She had to arrange for a friend to drive her to the polling place, which is on a freeway, not accessible by public transportation, and too far away to walk to. *Id.* at ¶¶ 8, 12. She was very worried about contracting COVID because vaccines were not yet available to people in her age group and voting required her to touch keys on the accessible voting machine without knowing whether they had been disinfected since the last voter used them. *Id.* at ¶¶ 7, 10.

Because Ms. Pellicciotti was worried about sharing devices with other people who might have COVID, she brought her own headphones to use with the accessible voting machine. *Id.* at ¶ 9. She was unable to maintain social distancing while voting. *Id.* at ¶¶ 8, 11. When she arrived in the polling place, a poll worker grabbed her to lead her to the voting machine. *Id.* at ¶ 8. Later,

while assisting her to use the accessible machine, a staff member got very close to Ms. Pellicciotti, increasing her concern about contracting COVID even further. *Id.* at ¶ 11.

These burdens are not unique to the Individual Plaintiffs. They are common to blind and print-disabled individuals throughout Bexar County. Organizational Plaintiff NFB-TX has many blind and deaf-blind members who are registered to vote in Bexar County, are eligible to vote by mail, and wish to vote in upcoming elections by casting a mail-in ballot privately and independently. See Ex. E, Declaration of Norma Crosby (hereinafter “Crosby Decl.”), ¶¶ 4, 7, 15-18. NFB-TX has heard from numerous members that they want to vote by mail in upcoming elections but will be unable to do so without an accessible electronic ballot system. See Ex. E, Crosby Decl., ¶¶ 14, 15-18.

Plaintiff CTD also represents many individuals with disabilities who have visual and print disabilities who are registered to vote in Bexar County, are eligible to vote by mail, and wish to vote in upcoming elections by casting a mail-in ballot privately and independently. Ex. F, Declaration of Chase Bearden (hereinafter “Bearden Decl.”), ¶¶ 3, 5-10. CTD has advocated for accessible mail-in ballots for at least five years, and in that process learned from Bexar County Election Administrator Jacquelyn Callanen that Bexar County piloted electronic ballots for deployed, overseas voters. *Id.* at ¶¶ 5, 11. NFB-TX and CTD seek a preliminary injunction on behalf of their members with visual and print disabilities in Bexar County.

III. LEGAL STANDARD

Plaintiffs seek a preliminary injunction to ensure that Bexar County’ ballot-by-mail system is accessible to people with print disabilities in the next election and thereafter. Plaintiffs seeking a preliminary injunction must show: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4)

that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009), citing *Speaks v. Kruse*, 445 F.3d 396, 399 – 400 (1976). Here, each factor decisively favors Plaintiffs.

IV. ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits of Their ADA and Section 504 Claims.

Establishing a party's likelihood of success on the merits "requires more than a mere possibility that relief will be granted." *Nken v. Holder*, 556 U.S. 418, 420 (2009). However, the Supreme Court has also acknowledged that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Moreover, "it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair grounds for litigation and thus for more deliberative investigation." *Six Clinics Holding Corp. II v. CAFOPM Systems, Inc.*, 119 F3d 393, 402 (6th Cir. 1997).

Plaintiffs are highly likely to succeed on the merits of their claims. Individuals with disabilities are entitled to more than "merely the opportunity to vote at some time and in some way." *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 199 (2d Cir. 2014). Plaintiffs are entitled to nothing short of an equal opportunity to "participate in [and] benefit from" the Bexar County Vote-by-Mail Program, 28 C.F.R. § 35.130(b)(1)(ii), and access to equally effective communication to and from their government, including via the ballot, *id.* § 35.160(a)(1); *see also* 29 U.S.C. § 794(a). Nondisabled individuals who want to vote by mail can independently complete their ballots, preserving their privacy and control over their vote. Voters with print disabilities who want to vote by mail cannot. Requiring Plaintiffs to obtain assistance to vote by mail "at best

provides these individuals with an inferior voting experience ‘not equal to that afforded others’ . . . [because] [b]lind and visually impaired voters are forced to reveal a political opinion that others are not required to disclose.” *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1239 (N.D. Cal. 2013) (quoting 28 C.F.R. § 35.130(b)(1)(ii)).

To prevail on a discrimination claim under either Title II or Section 504, a plaintiff must establish that he (1) has a disability, (2) is otherwise qualified to participate in the service, program, or activity of the public entity, and (3) is being denied the benefits of the service, program, or activity, or is otherwise subject to discrimination because of his disability. *Cadena v. El Paso Cnty.*, 946 F.3d 717, 723 (5th Cir. 2020).

1. Plaintiffs are individuals with disabilities.

A disability is “[a] physical or mental impairment that substantially limits one or more of the major life activities.” 42 U.S.C. § 12102; 28 C.F.R. § 35.108(a)(1)(i). Physical impairments include “[a]ny physiological disorder or condition . . . affecting . . . special sense organs,” and major life activities include “seeing,” among others.” 28 C.F.R. § 35.108(b)(1)(i), (c)(1)(i)–(ii). Because they are blind or have other print disabilities, the Individual Plaintiffs and members of NFB-TX and CTD have disabilities within the meaning of the ADA and Section 504.

2. Plaintiffs are otherwise qualified to participate in Bexar County’s vote-by-mail program.

Voting by mail is a program or service within the meaning of disability rights law. *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 503–05 (4th Cir. 2016). Voting by mail and vote-by-mail registration, not only “voting in its entirety,” must be made accessible. *Id.* at 503. The Individual Plaintiffs and many NFB-TX and CTD members are registered to vote in Bexar County and are eligible to vote by mail under the disability provision of the Texas Election Code early vote by mail provision. *See* Tex. Elec. Code Ch. 82. Plaintiffs and their members are, therefore,

“qualified” to receive the benefits of ballot-by-mail voting in the November 2022 General Election and subsequent elections.

3. Defendants’ vote-by-mail program discriminates against Plaintiffs because of their disabilities.

Title II covers a broad spectrum of unlawful “discrimination” in government “services, programs, [and] activities.” 42 U.S.C. § 12132. Disability discrimination includes “[a]fford[ing] a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others” and “provid[ing] a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result[] [or] gain the same benefit . . . as that provided to others.” 28 C.F.R. § 35.130(b)(1)(ii)–(iii); accord 28 C.F.R. § 41.51(b)(1)(ii)–(iii) (Section 504 regulation).

The ADA also requires public entities “to ensure that communications with . . . participants [and] members of the public . . . with disabilities are as effective as communications with others.” *Id.* § 35.160(a)(1). Equally effective communication requires public entities to provide “appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.” *Id.* § 35.160(b)(1). The state must “give primary consideration to the requests of individuals with disabilities” when selecting “auxiliary aids and services,” and auxiliary aids and services must “protect the privacy and independence of the individual with a disability.” *Id.* § 35.160(b)(2).

Bexar County’s ballot-by-mail program excludes voters with print disabilities, including Plaintiffs, from voting privately and independently, a textbook violation of Defendants’ obligation to ensure equally effective communication. Bexar County’s ballot-by-mail program requires voters to fill out a paper ballot using a pen or marker, sign the inner envelope, and return the ballot

by mail. Thus, in order to cast an absentee vote, the voter must read the ballot in standard print and physically write and/or fill in the ballot choices. Unlike voters without disabilities, voters with print disabilities who vote by mail are forced to seek assistance from other persons. Forcing people with disabilities “to rely on the honesty and carefulness of sighted individuals” violates federal law. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1270 (D.C. Cir. 2008). As courts recognize, “The right to vote should not be contingent on the happenstance that others are available to help.” *Disabled in Action*, 752 F.3d at 200; *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1239 (N.D. Cal. 2013).

Under similar circumstances, the Fourth Circuit had “little trouble concluding . . . that Maryland’s absentee voting program does not provide disabled individuals an ‘opportunity to participate . . . equal to that afforded others.’” *Lamone*, 813 F.3d at 506 (quoting 28 C.F.R. § 35.130(b)(1)(ii)). As the Court explained, even if there were no “standalone right to vote privately and independently without assistance,” having provided such a right to sighted individuals, the state could not deny it to the blind. *Id.* By contrast, in Texas, the right to a secret ballot is enshrined in the Election Code, making Plaintiffs’ entitlement to that benefit even more clear. Tex. Elec. Code § 62.0115(b)(2).

The Fourth Circuit recognized that “[e]nsuring that disabled individuals are afforded an opportunity to participate in voting that is equal to that afforded others” protects a primary purpose of the ADA: to “ensure that those individuals are never relegated to a position of political powerlessness.” *Lamone*, 813 F.3d at 507. The facts in *Lamone* are indistinguishable: Bexar County denies voters with disabilities the right to vote by mail without assistance when the technology that would allow those voters an independent and private absentee vote is available. It

is settled law that such a denial violates the ADA. *See also Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017).

Public entities must “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities” equally effective communication and equal opportunity. 28 C.F.R. § 35.160(b)(1). Bexar County already has secured an electronic ballot delivery system for overseas and military voters and the state has found it to be secure. See Declaration of Jacquelyn F. Callanen in *Semien v. Hughs*, Civil Action No. 1:20-cv-00789-LY, ¶¶ 4-6 (attached as Exhibit A). According to Defendant Callanen, and as confirmed by Plaintiff Johnson, the system is also accessible to people with print disabilities *Id.* at ¶ 6; Ex. B, Johnson Decl. ¶ 16. A system already in use that has been found to be “reasonably secure and reasonably accessible” is clearly an appropriate auxiliary aid or service. *Lamone*, 813 F.3d at 508.

To be effective, no matter what the context, an auxiliary aid or service must “protect the privacy and independence of the individual with a disability.” 28 C.F.R. § 35.160(b)(2). Such privacy and independence is even more important in the context of voting, which is an inherently private matter and for which independence is necessary in order to prevent interference, and for which the right to secrecy is legally protected in Texas. Tex. Elec. Code § 62.0115(b)(2).

Finally, Defendants are obligated to give “primary consideration” to Plaintiffs’ request to use an accessible electronic ballot-by-mail tool. 28 C.F.R. § 35.160(b)(2). Defendants “must honor [Plaintiffs’] choice, unless [Defendants] can demonstrate that another equally effective means of communication is 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.” Dep’t of Justice, *ADA Update: A Primer for State and Local Governments* 8 (2015),

https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf. Defendants cannot meet that burden.

4. Expanding its electronic vote-by-mail system to voters with print disabilities would not pose an undue burden or fundamental alteration to Bexar County.

Defendants may only refuse to make a ballot-by-mail system accessible to individuals with disabilities if they can prove that doing so would either fundamentally alter the nature of the ballot-by-mail program or, in the case of providing an auxiliary aid or service, that it would pose an undue financial or administrative burden. 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 35.164. “Fundamental alteration” however, is an affirmative defense under the ADA, and its analysis is a fact-intensive inquiry where Defendants bear the burden of proving that the requested modification would be a fundamental alteration to the program. 28 C.F.R. § 35.130(b)(7). Defendants’ current use of an electronic voting system for some voters clearly precludes the conclusion that using a such a system for voters with print disabilities would constitute either a fundamental alteration or an undue burden.

In similar cases, courts already have explained that implementing reasonable modifications similar to modifications proposed by Plaintiffs here do not fundamentally alter voting systems. *Hindel v. Husted*, 875 F.3d at 349; *Lamone*, 813 F.3d at 509. As the Fourth Circuit noted in *Lamone*, the use of the online ballot marking tool is reasonably secure, safeguards voters with print disabilities’ privacy, and has been used in actual elections without apparent incident, rendering substantive concerns about the use of the online ballot marking unreasonable. *Id.* at 509-10. In both *Lamone* and *Hindel*, the courts made clear that a state law requirement that a voting system go through an administrative certification process could not stand in the way of a required auxiliary aid or service, in the absence of actual evidence of the insecurity of the system. No such insecurity

is at issue here. In fact, Texas law already permits electronic delivery and marking of absentee ballots for some voters and Bexar County provides such electronic service for those voters.

Defendants may argue that, because Texas Election Code § 86.003(a) generally provides that ballots delivered to voters other than by mail may not be counted, electronic ballots are prohibited. The Texas Election Code goes on to provide that military and overseas voters may receive ballots electronically. Tex. Election Code § 101.102, 106. Yet, “[t]he Supreme Court has held that the ADA’s Title II, at least in certain circumstances, trumps state regulations that conflict with its requirements.” *Lamone*, 813 F.3d at 508 (“As an initial matter, the strong form of defendants’ argument – that the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination – cannot be correct. The Constitution’s Supremacy Clause establishes that valid federal legislation can preempt state laws.” *Id.*). See also *Hindel*, 875 F.3d at 349 (“a state procedural requirement may not excuse a substantive ADA violation).

Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, the laws of the United States “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.” State law must give way to the extent it “conflicts with federal law.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 378 (2000). Such conflicts exist not only where “it is impossible . . . to comply with both state and federal law,” but also “where under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 372-73 (internal citation and quotation marks omitted). To the extent the Texas Election Code prevents counties from complying with federal law, it is preempted by federal law. The Supreme Court has “held repeatedly that state laws can be

pre-empted by federal regulations as well as by federal statutes,” *Hillsborough Cnty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985), and that “[f]ederal regulations have no less pre-emptive effect than federal statutes,” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

The courts of appeals have also consistently applied such principles in holding that federal disability rights laws, including the ADA, preempt state statutes to the extent that state laws conflict with federal mandates. See, e.g., *Astralis Condo. Ass’n v. HUD*, 620 F.3d 62, 69-70 (1st Cir. 2010) (defendant could not permissibly rely on Puerto Rico law to refuse to provide an accommodation required under the Fair Housing Act for a person with a disability); *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) (concluding that Hawaii’s animal quarantine law, as applied to guide dogs, denied plaintiffs access to state services, programs, and activities in violation of the ADA); *Barber v. Colorado Dep’t of Revenue*, 562 F.3d 1222, 1233 (10th Cir. 2009) (finding that a proposed accommodation under federal anti-discrimination law is not unreasonable based solely on the fact that it might require defendants to violate state law). As the Tenth Circuit has emphasized, “[r]eliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause.” *Id.* A defendant “is duty bound not to enforce a [state] statutory provision if doing so would either cause or perpetrate unlawful discrimination” under federal law. *Astralis*, 620 F.3d at 69.

Thus, even if Texas law bars the distribution of electronic ballots to domestic voters who are blind or have print disabilities, the U.S. Constitution’s Supremacy Clause makes clear that the state law does not excuse compliance with the ADA’s and Section 504’s mandates. To the extent Defendants rely on Texas law as a reason to deny an accessible ballot-by-mail, this Court should make clear that the Supremacy Clause mandates that federal law supersedes state law.

Second, Defendants are unable to show that providing an accessible electronic tool to individuals with print disabilities for the November 2022 General Election poses an undue financial or administrative burden. Defendant Callanen has testified that the system Bexar County already uses for overseas voters is accessible and could be expanded to print disabled voters. Ex. A, Decl. of Jacquelyn F. Callanen in *Semien v. Hughs*, ¶¶ 6.

B. A Preliminary Injunction Is Necessary to Prevent Irreparable Harm to Plaintiffs.

Irreparable harm may be presumed when a defendant has violated a civil rights statute. Courts have recognized that the ADA is a federal civil rights statute enacted to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. *Middleton-Keirn v. Stone*, 655 F.2d 609, 611 (5th Cir. 1981) (“[I]rreparable injury should be presumed from the very fact that the statute has been violated.”) (citation omitted); *see also Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) (“irreparable injury may be presumed from the fact of discrimination and violations of fair housing statutes”); *EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984) (holding that the plaintiffs faced injuries Congress explicitly sought to avoid through the ADEA, and that constituted irreparable harm).

Irreparable harm may also be presumed when a statute, such as the ADA, explicitly provides for injunctive relief. *See* 42 U.S.C. § 12188(a)(2). “The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm.” *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020).

Even if irreparable injury were not presumed, “[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (hereinafter “LWVNC”) (collecting cases). This is so because

“the right of suffrage is a fundamental matter in a free and democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Infringement on voting rights causes irrecoverable injury: “once the election occurs, there can be no do-over and no redress,” so the injury to “voters is real and completely irreparable if nothing is done to enjoin [the challenged] law.” *LWVNC*, 769 F.3d at 247; *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016) (a voting rights case is not one where “failing to grant the requested relief would be a mere inconvenience to Plaintiff and its members”—an election “isn’t golf: there are no mulligans.”).

The secret ballot, a right recognized by Texas law, is integral to the right to vote. It is an important defense against “voter intimidation and election fraud” and “necessary to cure electoral abuses.” *Burson v. Freeman*, 504 U.S. 191, 206–07 (1992). Plaintiffs and their members have good reason to fear such consequences—malicious or accidental—if they are forced to rely on others to mark their ballots. Ex. B, Johnson Decl. at ¶¶ 11–12, 21; Ex. C, Walker Decl. at ¶ 6, 12; Ex. D, Pellicciotti Decl. at ¶¶ 17, Ex. F, Bearden Decl. at ¶ 8.

A preliminary injunction provides the only effective means of protecting Plaintiffs and many other Bexar County citizens’ rights to vote privately and independently in the November Election.

C. The Balance of Hardships Is In Plaintiffs’ Favor.

In deciding whether a preliminary injunction is proper, “courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Nat’l. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted).

Here, the balance of equities tilts heavily in favor of Plaintiffs. Without access to accessible voting by mail, Plaintiffs will be excluded from voting from home unless they sacrifice the privacy of their ballots. Despite being some of the voters with the most difficulty getting to the polls (because they cannot drive), blind voters will be required to do so when nondisabled voters need not. Bexar County gains no benefit from such a system. Defendants will suffer minimal, if any, harm if a preliminary injunction is granted. The County already uses an electronic ballot delivery system and need only extend it to voters with print disabilities. Accordingly, the balance of equities heavily favors granting Plaintiffs a preliminary injunction.

D. Injunctive Relief Will Service the Public Interest.

“The third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418 (2009). Because the balance of equities strongly favors the Plaintiffs, granting the injunction similarly advances the public interest.

“The right to vote is fundamental to our constitutional democracy.” *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 413 (5th Cir. 2020). Accordingly, the public interest includes “exercising the ‘fundamental political right’ to vote [and] . . . favors permitting as many qualified voters to vote as possible.” *Obama for Am. v. Husted*, 697 F.3d 423, 436–37 (6th Cir. 2012) (citations omitted); see *Reaching Hearts Int’l, Inc. v. Prince George’s Cnty.*, 584 F. Supp. 2d 766, 796 (D. Md. 2008), *aff’d*, 368 F. App’x 370 (4th Cir. 2010) (finding that an injunction serves the public interest where it would “further[] the exercise and protection of [a] constitutional right”). “Any restrictions on that right strike at the heart of representative government.” *Harman v. Forseeus*, 380 U.S. 528, 537 (1965).

Congress made clear in enacting the ADA that the public interest lies in the eradication of discrimination against persons with disabilities, declaring that the ADA’s purpose is “to provide a

clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” *Tennessee v. Lane*, 541 U.S. 509, 516 (2004) (quoting 42 U.S.C. § 12101(b)(1)).

As in *Lamone*, granting injunctive relief is appropriate in this case where Plaintiffs “are being deprived of their right to vote by absentee ballot privately and independently” and where “the end of that deprivation is nowhere in sight,” and where the accessible voting “tool is available and capable of implementation at this time.” *Nat’l Fed’n of the Blind, Inc. v. Lamone*, No. Civ. Action No. RDB-14-1631, 2014 WL 4388342, at *15 (D. Md. Sept. 4, 2014), *aff’d* 813 F.3d 494.

V. PLAINTIFFS SHOULD NOT BE REQUIRED TO POST A BOND

Plaintiffs request that they not be required to post any cash bond. The Court has the discretion to issue a preliminary injunction without requiring the Plaintiffs to give security. *See Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 302-303 (5th Cir. 1978) (The amount of bond “is a matter of discretion of the trial court; it may elect to require no security at all.”) (cited approvingly in *Gordon v. City of Houston, Tex.*, 2015 WL 138115 at *16 (S.D. Tex. January 9, 2015). This Court should not require a bond because the Plaintiffs have brought this claim to protect their fundamental right to vote. Requiring a bond would place an undue and effectively unconstitutional hardship on the Plaintiffs by requiring Plaintiffs to pay a tax for their right to vote. *See* U.S. Const., amend XXIV.

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction directing Defendants to implement throughout Bexar County an accessible electronic ballot-by-mail system to enable voters with vision and print disabilities to cast their ballots in the November General Election, and all subsequent elections in Bexar County, on equal terms with other Bexar County voters.

Respectfully submitted,



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*Motions for Admission or Motions to Participate *Pro Hac Vice* will be filed after case opening.