



September 27, 2019

Dear Secretary:

The National Federation of the Blind seeks to protect the rights of blind and low-vision voters, both at the polls and when absentee voting. It is vital to our democracy that all citizens are able to exercise the right to cast a secret ballot independently. Unfortunately, the right of many absentee voters with disabilities to mark their ballots privately and independently continues to be denied due to the implementation of inaccessible systems that require them to depend on others to assist them in the ballot-marking process. In advance of the 2020 elections, I am writing to remind you of your obligation, as required by federal law and recent court decisions, to provide voters with print disabilities an accessible way to privately and independently mark an absentee ballot.

Title II of the Americans with Disabilities Act (ADA) requires states to ensure that voters with disabilities are offered an opportunity to vote—whether in person or by absentee ballot—that is equal to the opportunity offered to voters without disabilities. Thus, if all other voters can vote absentee privately and independently, voters with disabilities must be offered the same opportunity. Furthermore, Section 504 of the Rehabilitation Act states that public entities that receive federal financial assistance may not discriminate against people with disabilities in their programs, services, or activities. The law on this issue, particularly in the Fourth Circuit, is quite clear. In *National Federation of the Blind v. Lamone*, the United States Court of Appeals for the Fourth Circuit held that the Maryland State Board of Elections violated Title II of the ADA and Section 504 by providing only a paper absentee ballot that was inaccessible to people with print and dexterity disabilities, while refusing to allow access to a ballot marking tool¹ that would grant them the same opportunity provided to voters without disabilities to mark their absentee ballot independently (see the attached opinion).

The Fourth Circuit explained that the opportunity to mark an absentee ballot privately and independently was a benefit that the Maryland State Board of Elections provided to voters without disabilities but denied voters with disabilities on the basis of their disability. It was of no consequence that Maryland made other methods of voting, like in-person voting, available to voters with disabilities on an equal basis. The right to vote absentee privately and independently was a distinct benefit, and the denial of this opportunity was “precisely the sort of harm the ADA seeks to prevent.” *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 506 (4th Cir. 2016). The opinion further states “that by effectively requiring disabled individuals to rely on the assistance of

¹ Ballot-marking tools allow voters to mark an electronic version of the absentee ballot on devices such as computers, tablets, or smartphones. No votes are cast electronically; voters must still print and mail in their ballots to have their votes counted.

others to vote absentee, defendants have not provided plaintiffs with meaningful access to Maryland's absentee voting program." *Id.* at 507.

The Fourth Circuit also noted that state law, such as a requirement that voting systems be certified, does not exempt "public entities from making otherwise reasonable modifications to prevent disability discrimination" because the "Constitution's Supremacy Clause establishes that valid federal legislation can pre-empt state laws." *Id.* at 508. The Sixth Circuit in the recent case, *Hindel v. Husted*, also found that certification procedures required by state law could not block enforcement of the ADA when it comes to the right to vote absentee on an equal basis. See *Hindel v. Husted*, 875 F.3d 344, 349 (6th Cir. 2017).

Currently, there are a number of accessible absentee ballot-marking systems available for use in US elections. The Maryland State Board of Elections makes its accessible ballot-marking tool available at no charge. Five Cedars, Democracy Live, Dominion Voting, and Prime III are examples of vendors that can also provide absentee ballot-marking systems. Many of these systems have now met Ohio and California's certification requirements for election technology. Given the requirements of the ADA and Section 504, as well as the wide availability of accessible ballot marking systems, I strongly encourage you to implement such a system for use in the 2020 elections, and all subsequent federal, state, and local elections in which absentee voting is available. The National Federation of the Blind will be monitoring the availability of accessible absentee voting through our 2020 national blind voter survey, and subsequent surveys following each presidential general election.

Voters with disabilities must be considered as you design and plan your absentee voting process. Providing an accessible ballot-marking tool will guarantee that people with disabilities have an opportunity to cast their ballots privately and independently that is equal to the opportunity provided to voters without disabilities, as required by the ADA. The National Federation of the Blind is available as you consider the accessibility of your current absentee voting system. We welcome an opportunity to advise you on the development, or in the procurement process, of an accessible ballot-marking tool.

Please do not hesitate to contact us with questions, or if you need assistance with the implementation of accessible absentee voting.

Sincerely,



Mark A. Riccobono, President
National Federation of the Blind

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