

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN**

MICHAEL POWELL, and
FRED WURTZEL,
individually and on behalf of those
similarly situated,

Case No. 20-11023

and,

Hon. Gershwin A. Drain
Mag. Judge Michael J. Hluchaniuk

THE NATIONAL FEDERATION OF THE
BLIND OF MICHIGAN,

Plaintiffs,

v.

JOCELYN BENSON,
MICHIGAN SECRETARY OF STATE,
in her official capacity, and

JONATHAN BRATER,
MICHIGAN DIRECTOR OF ELECTIONS,
in his official capacity,

Defendants.

_____ /

CONSENT DECREE

JURISDICTION AND VENUE

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 1343.

Venue is appropriate in this District pursuant to 28 U.S.C. § 1391.

BACKGROUND

1. On April 25, 2020, Plaintiffs, Michael Powell and Fred Wurtzel, individually and on behalf of others similarly situated, and the National Federation of

the Blind of Michigan (“NFBMI”) filed a Complaint and Motion for Preliminary Injunction against Defendants, Michigan Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater (“Defendants”), in their official capacities, alleging that Defendants were violating Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, and the Michigan Persons with Disabilities Civil Rights Act, MCL § 37.2301 *et seq.*, by failing to provide an absentee/mail-in voting system that is fully accessible to individuals who are blind or have print disabilities for Elections scheduled for May, August, and November, 2020, and thereafter.

2. Defendants deny the allegations in the Amended Complaint and Motion for Preliminary Injunction and assert that their entry into this Consent Decree does not constitute an admission of liability, wrongdoing, or violation of the ADA, or any other statute, regulation, or provision of any federal or state law.

3. Plaintiffs Powell and Wurtzel are blind individuals who are registered to vote in Michigan, and desire to exercise their right to vote by absentee ballot in an accessible and independent manner.

4. Plaintiff NFBMI is the Michigan affiliate of the National Federation of the Blind, an organization of individuals who are legally blind. The NFBMI is a 501(c)(3) non-profit corporation made up of blind Michiganders and their families and friends. The organization promotes the general welfare of the blind by assisting the blind in their efforts to integrate themselves into society on terms of equality and by removing barriers that result in the denial of opportunity to blind persons in virtually

every sphere of life.

5. Defendant Secretary Benson is the chief election officer of the State of Michigan and has supervisory control over local election officials in the performance of their duties under the Michigan Election Law, MCL 168.1 *et seq.* In this capacity, she oversees Michigan's absentee voting program and maintains and operates the Secretary of State's voter information website.

6. Defendant Director Brater is vested with the powers and shall perform the duties of the Secretary of State under the Secretary's supervision with respect to the supervision and administration of elections laws.

7. This Consent Decree is entered into by Plaintiffs and Defendants (collectively "the Parties") and resolves the allegations set forth above.

8. The parties agree it is in their collective best interest to resolve this lawsuit on mutually agreeable terms without further litigation. Accordingly, the Parties agree to the entry of this Consent Decree, subject to the approval of this Court, without trial or further adjudication of any issues of fact or law raised in Plaintiffs' Amended Complaint.

In resolution of this action, the Parties hereby **AGREE** and the Court expressly **APPROVES, ENTERS, AND ORDERS** the following:

I. DEFINITIONS

The following terms shall have the following meanings with respect to this

Agreement. All other terms shall be interpreted according to their plain and ordinary meaning:

1. Unless otherwise provided in this Agreement, technical terms used in this Agreement have the same meaning as provided in the Web Content Accessibility Guidelines (“WCAG”) 2.0 published by the World Wide Web Consortium (“W3C”), available at www.w3.org/TR/WCAG/. The term “WCAG 2.0 AA” as used in this Agreement incorporates the WCAG 2.0 Level A and Level AA Success Criteria. “Accessible Forms” are forms, applications, ballots, or transactions that are electronically fillable and submittable, produce a savable confirmation of submission for users, are provided in an HTML format option, and are compliant with WCAG 2.0 AA.
2. “Print disabilities” are disabilities that interfere with the effective reading, writing, or use of printed material. This definition includes persons who are visually impaired, those with learning disabilities, as well those with a physical disability that interferes with holding and manipulating paper or a pen or pencil.
3. “Conformance” and “conform” have the same meaning as used in WCAG 2.0 AA.
4. “Effective Date” is the date of the last signature on this Agreement.
5. “Voting Program” includes, but is not limited to: (i) the opportunity provided to Michigan residents to vote privately and independently in-person at designated Polling Places or to vote by mail/absentee in lieu of voting in person; (ii) the provision of sample ballots to Michigan residents in advance of Elections; and (iii) the processes for Michigan voters to request, receive, mark and submit ballots.

II. REQUIREMENTS

Pursuant to the terms of this Consent Decree, by June 25, 2020, Defendants will implement the following:

1. Shall not exclude individuals with print disabilities, including Plaintiffs

- and their members, from participation in, or deny them the benefits of, the Voting Program's services, programs, or activities, or subject them to discrimination with respect to Michigan's Voting Program, 42 U.S.C. § 12132, unless the individual is otherwise ineligible from participating in the Voting Program under state or federal law.
2. Shall not provide individuals with print disabilities, including Plaintiffs and their members, an unequal opportunity to participate in or benefit from aids, benefits, or services, or provide an aid, benefit, or service that is not as effective in affording equal opportunity to gain the same result or benefit as provided to others with respect to Michigan's Voting Program, 28 C.F.R. § 35.130(b)(1)(ii)-(iii), unless the individual is otherwise ineligible from participating in the Voting Program under state or federal law.
 3. Shall take the necessary and timely steps to ensure that it furnishes appropriate auxiliary aids and services where necessary to afford individuals with print disabilities, including Plaintiffs and their members, an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of Michigan's Voting Program, 28 C.F.R. § 35.160(b)(1), unless the individual is otherwise ineligible from participating in the Voting Program under state or federal law. Nothing in this order should be interpreted to require the Defendants to provide software or hardware technical support.
 4. **Voting at Polling Places.** Defendants shall continue to ensure that all persons with print disabilities have an opportunity that is equal to the opportunity the State affords to all other persons to vote privately and independently at their designated, local Polling Place, by using an accessible voting machine.
 5. **Voting by Mail.** Defendants shall ensure that all persons with print disabilities have an opportunity that is equal to the opportunity Michigan affords to all other persons to vote privately and independently by mail,

subject to the provisions of this paragraph.

- a. So that it may be used for the August 2020 Election, Defendants shall acquire a remote accessible vote-by-mail system (“RAVBM”) that shall allow voters with print disabilities to review and mark vote-by-mail ballots electronically, privately and independently, in accordance with the following:
 - i. At least 15 days before purchasing any RAVBM for the August 2020 election, Defendants shall notify Plaintiffs in writing of which RAVBM they intend to acquire, including identifying information such as the name, model number, and vendor, a summary description of the system and how it achieves accessibility, how accessibility will be monitored and maintained, and how complaints regarding accessibility will be addressed; provided that, if it is impractical to provide 15 days notice prior to purchasing a system for use in the August 2020 Election, Defendants shall notify Plaintiffs as far in advance of the purchase as possible. Defendants and Plaintiffs will commit to seeking a protective order in the event that Defendants need to share draft purchasing and other materials prior to those materials being made public.
 - ii. If unforeseen circumstances beyond the state’s control make it impracticable to acquire a RAVBM in time for the August 2020 Election, Defendants will inform plaintiffs immediately and no later than June 29, of the unforeseen circumstances and their impact on acquisition of the RAVBM. In such an event, Defendants will implement an expansion of the state’s UOCAVA voting system to people with print disabilities, in a manner similar to that described in the Stipulation and Consent Order Resolving Plaintiffs’ Motion for Temporary Restraining Order in this Action dated May 1, 2020, for the August 2020 Election. All other requirements of this Consent Decree that are not impracticable will remain in effect.

- b. Beginning with the August 2020 Election, and in each Election thereafter for the term of this Agreement, unless a change in federal law requires otherwise, Defendants shall, consistent with the time frame for providing absent voter ballots:
 - i. Provide accessible, electronic forms in HTML format through which voters with disabilities can independently request vote-by-mail ballots and certify that they are voters with disabilities. Such certification shall be no more burdensome for voters with disabilities than is required by the laws and regulations that govern RAVBM;
 - ii. Provide a mechanism for voters who certify that they are voters with disabilities and that their disability is unlikely to improve in the foreseeable future to be placed on a Permanent Accessible Absent Voter Application List if their jurisdiction of residence maintains a Permanent Absent Voter Application List and be provided prior to all future elections an electronic application form to apply for ballots that can be marked using the RAVBM, on the same terms and conditions as members of the jurisdiction's Permanent Absent Voter Application List;
 - iii. Notify the public of the availability of the accessible request system and the RAVBM, and post information about the RAVBM in the same locations where Defendants provide information about other means of mail-in/absentee voting, including posting step-by-step instructions for how to use the RAVBM on the Secretary of State Website;
 - iv. Train all county and local Election officials regarding the accessible request and RAVBM through the same methods by which they train county and local Election officials on other voting processes;
 - v. Send or train local or county election officials to send voters with disabilities electronic ballots that can be marked using the RAVBM, along with instructions on how to use the

RAVBM to mark and print their ballots;

- vi. Permit voters with disabilities to use the acquired RAVBM to review and mark their vote-by-mail ballots electronically and to print and return those marked ballots for counting; and
- vii. Train local election officials to accept and tabulate all ballots properly completed using the RAVBM that are received by the time polls close on the day of the election.

6. Reporting. Within 45 days after the August 4, 2020, Primary Election, and within 90 days after the November 3, 2020 Election, Defendants will provide Plaintiffs a report for the preceding Election containing the following information:

- a. The number of individuals with disabilities who requested an accessible ballot;
- b. The number of individuals who accessed the RAVBM; and
- c. Descriptions of any complaints or feedback received from voters with disabilities regarding attempts to use or use of the RAVBM and descriptions of how any complaints were resolved.

III. NOTICE TO PUBLIC

Within 10 days of the Effective Date of this Consent Decree, Defendants shall issue a press release, in accordance with their ordinary procedures for doing so, regarding the Consent Decree, and post a copy of this Consent Decree on the Secretary of State Website, along with a summary of its requirements.

IV. ATTORNEYS' FEES AND COSTS

Within 30 days of the Effective Date of this Agreement, Defendants shall pay \$124,258.25 to the trust account of Nyman Turkish PC for Plaintiffs' attorneys fees and costs. Payment will be sent to Plaintiffs' attorneys at the following address: 20750 Civic Center Drive, Suite 290, Southfield, Michigan 48076.

V. RELEASE

Plaintiffs waive and release any claims against Defendants and their agents, successors, and assigns, including claims for declaratory and injunctive relief and attorneys' fees and costs, that are based on the allegations raised, or which could have been raised, in the complaint or amended complaint.

VI. TERM OF AGREEMENT

The term of this Agreement shall be 30 months from the Effective Date.

VII. NOTICES

Any notice or communication provided under this Agreement shall be made in writing and shall be delivered or sent by way of the U.S. Postal Service, private commercial carrier, hand delivery, facsimile transmission, or electronic mail to the addresses below or to such other addresses as may be specified in writing by any Party:

1. To Plaintiff National Federation of the Blind of Michigan: Eve L. Hill, Brown, Goldstein & Levy LLP, 120 East Baltimore Street, Suite 1700, Baltimore, Maryland 21202, ehill@browngold.com
2. To Plaintiffs Michael Powell and Fred Wurtzel: Jason M. Turkish, Nyman Turkish PC, 20750 Civic Center Drive, Suite 290, Southfield, Michigan 48076. Jason.Turkish@nymanturkish.com
3. To Defendants: Erik A. Grill, Assistant Attorney General, P.O. Box 30736, Lansing, MI 48909. grille@michigan.gov

IN WITNESS WHEREOF, the Parties hereto, intending to be legally bound, have caused this Consent Decree to be executed as of the date set forth below.

SO ORDERED this 19th day of May 2020.

s/Gershwin A. Drain
Hon. Gershwin A. Drain
United States District Judge

The signatories represent that they have the authority to bind the respective Parties identified below to the terms of this Consent Decree.

AGREED AND CONSENTED TO:

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