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,

and,

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.
_____/

Case No. 20-11023

Hon. Gershwin Drain
Mag. Judge Michael J. Hluchaniuk

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION FOR JUDGMENT OF CIVIL CONTEMPT AGAINST JOCELYN BENSON, JONATHAN BRATER, ERIK GRILL, AND HEATHER MEINGAST, AND TO ENFORCE THE CONSENT DECREE [ECF # 31]

NOW COME Plaintiffs, by and through counsel, and pursuant to Fed. R. Civ. P. 70, hereby move this Honorable Court to exercise its authority to enforce the May 19, 2020 Consent Decree [ECF # 31] and hold Defendants Jocelyn Benson, Jonathan Brater, and Attorneys Erik Grill and Heather Meingast in Contempt of Court for failing to comply with the terms of the Consent Decree.

Defendants and their counsel have made material misrepresentations to the Court regarding the facts underlying this dispute and have failed to act in good faith to implement the requirements of the Consent Decree. Therefore, Plaintiffs respectfully ask this Honorable Court to issue an appropriate order enforcing the Consent Decree, and sanctioning Defendants and their counsel, as well as ordering expedited briefing. In support thereof, Plaintiffs rely on the attached brief and exhibits.

Pursuant to Local Rule 7.1, on June 26, 2020 Attorney Jason Turkish contacted counsel for Defendants to seek concurrence in the relief sought herein. Such concurrence was not immediately forthcoming.

Respectfully submitted,

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Dated: June 29, 2020 *Counsel for Plaintiffs Powell and Wurtzel*

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QUESTION PRESENTED

Whether the Court should hold Defendants Jonathan Brater and Jocelyn Benson, as well as Attorneys Erik Grill and Heather Meingast in civil contempt and award appropriate relief where they have failed to comply with the Consent Decree entered by the Court, have made material misrepresentations to the Court, and have acted in bad faith throughout the litigation and implementation of the ordered relief?

MOST CONTROLLING AUTHORITY

The most controlling authority for the relief sought includes: Fed. R. Civ. P. 70; John B. v. Menke, 176 F. Supp. 2d 786 (M.D. Tenn. 2001); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 124 (1971); and 28 C.F.R. § 35.130(b)(1)(ii)-(iii).

INTRODUCTION

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the `judicial power of the United States' would be a mere mockery." Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450, 31 S. Ct. 492, 55 L. Ed. 797 (1911).

On May 19, 2020, the Court entered a Consent Decree that had been negotiated by the parties[1] requiring Defendants to implement a Remote Accessible Vote-by-Mail System (RAVBM) for the August election in order to ensure blind voters can cast an absentee ballot privately and independently, just as non-disabled individuals are able to. Despite their representations to the Court that a Request for Proposals ("RFP") for an RAVBM system was already in process in early May, Defendants and their counsel flouted the Court's order and waited five weeks to issue the RFP. Defendants' conduct violates the terms of the Order and, if permitted, will allow Defendants to disenfranchise blind citizens in the August elections.

[1] Plaintiffs filed a motion for status conference on Friday June 26, 2020, based on the belief that Defendants' violations of the Consent Decree were limited to the introduction of a new online absentee ballot application request system that did not offer blind voters an opportunity to request an accessible absent voter ballot. *See* ECF # 31. Since that time, additional investigation has revealed that Defendants have no intention of complying with multiple provisions of the Consent Decree, most notably they have no plan to implement an RAVBM system prior to the August 2020 Election, thus prompting the filing of the instant motion.

Over the past week, numerous important developments have come to Plaintiffs' attention, including Defendants' public acknowledgement of their violations of the Consent Decree.[2] Most notably, Defendants informed the public, prior to informing Plaintiffs' counsel, that they will not be implementing a RAVBM system for the August 2020 elections because they failed to issue the RFP until last week.[3] In so doing, Defendants have treated the Consent Decree as optional rather than mandatory.

In addition, Defendants just introduced a method for voters to apply for an absentee ballot online that is unusable and inaccessible to the blind. As a result, non-disabled voters are now receiving their absentee ballots—while the blind cannot even submit a request.

Finally, the contemptuous conduct extends beyond Defendants and includes their counsel, Erik Grill and Heather Meingast. Mr. Grill made material misrepresentations during the status conference before this Honorable Court,

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[2] Despite the Consent Decree's requirement that Defendants "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," according to a recent news story, Michigan Supreme Court Justice Richard Bernstein, who is blind, was recently turned away from his local clerk's office because they did not have the information and training necessary to assist him in requesting an absentee ballot. ECF # 32-1, pg. 3.

[3] Counsel for Defendants have repeatedly cited the RFP process as the reason a RAVBM cannot be immediately implemented—but failed to initiate the process until it was too late to ensure compliance with the Consent Decree.

claiming the State had already prepared an RFP, when in fact no such RFP was issued until June 24, 2020.[4] Similarly, Mr. Grill and Ms. Meingast violated the Consent Decree by failing to comply with its reporting requirements. Instead of informing Plaintiffs of Defendants' determination not to comply with its obligations, as required by the Consent Decree, Mr. Grill allowed his client, Defendant Brater, to share developments directly with Plaintiffs Wurtzel and Powell via email, and attempted to facilitate a meeting between the parties outside the presence of counsel.[5] Defendant Benson then issued a June 26, 2020 press release publicly announcing Defendants' non-compliance with the Consent Decree,[6] without informing Plaintiffs' counsel. Finally, while Defendants announced their plans not to implement accessible absentee voting on June 26, they never complied with the Consent Decree's requirement to issue a press release

[4] *See* Exhibit 1, May 8, 2020 Status Conference Transcript, pg. 6 (Grill: "I believe the state is in the process of releasing an RFP for a system...").
[5] *See* Exhibit 2, June 26 Email from Erik Grill, pg. 2 ("The RFP was issued Wednesday. At that time, looking at the calendar, it became apparent that the purchased system would likely not be in place in time for the August primary [...] That information had been relayed to Heather and I to provide to you, but due to deadlines in a variety of other matters and because I was on a lay-off day on Thursday and prohibited from working, we did not notice..."
[6] https://www.michigan.gov/sos/0,4670,7-127--533105--,00.html (last visited June 28, 2020) ("accessible application and ballot are being used for the August election as the state develops a permanent solution for November. For November, the state has launched a request for proposals and is accepting public bids now.").

and post a summary of the Consent Decree's requirements within 10 days of its approval by the Court.

Defendants and their counsel have demonstrated contempt for this Court, the Consent Decree, and the blind. Collectively, they failed to take the first basic step of issuing an RFP to procure an accessible voting system in time for August, and they have introduced new voting programs without any accommodation of the needs of the blind. The potential consequences of this contemptuous conduct are catastrophic, and may only be remedied through swift and thorough remedial measures, including, but not limited to, discovery, an evidentiary hearing/oral argument, an order to appear and to show-cause, a public statement concerning the contempt, an order to implement an RAVBM system in time for the August election, an award of damages and attorneys' fees to the named plaintiffs, and any other relief this Honorable Court deems just and proper.

FACTUAL BACKGROUND

A. The Consent Decree.

On May 19, 2020, the Honorable Court signed the Consent Decree, which ostensibly resolved the instant dispute. ECF # 31. The purpose of the Consent Decree was to ensure equal access to voting for the blind and those with print disabilities. ECF # 31, pg. 4-5. The Consent Decree provides that Defendants:

> 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, …. *Id.* (emphasis added)
>
> 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…. *Id*.

The "Voting Program" is specifically defined to include

> (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. *Id.* (emphasis added)

Under the Consent Decree's terms, Defendants are specifically required to "acquire a [RAVBM] system … that shall allow voters with print disabilities to review and mark vote-by-mail ballots electronically, privately, and independently..." *Id.* at 6. The Consent Decree requires this system to be in place in time for the August 2020 primary election, and further requires Defendants to notify Plaintiffs of the specific RAVBM selected at least 15-days prior to its acquisition. *Id.*

The only exception to the RAVBM being operational in time for August is "[i]f unforeseen circumstances beyond the state's control make it impracticable to acquire a RAVBM in time for the August 2020 elections..." *Id.* (emphasis added).

If such unforeseen acts of God occur, the State is required to revert to making its UOCAVA voting system accessible for the August 2020 primary—the same system that was implemented as a temporary solution in the May 2020 election.[7] *Id.* Defendants are required to "inform Plaintiffs immediately and no later than June 29, of the unforeseen circumstances and their impact on acquisition of the RAVBM." *Id.* To date, no such explanation has been provided to Plaintiffs.

In addition to the RAVBM, the Consent Decree requires Defendants to offer "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 the RAVBM." *Id.* at 7. The Decree also requires Defendants "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…." The Consent Decree includes notice and training requirements to ensure that its material provisions are effectively implemented, *id.*, and required Defendants to issue a press release within ten days of the effective

[7] The UOCAVA ballot was a minimally workable last-minute solution for the small, local elections in May 2020. However, it will be cumbersome and unreliable in a large primary election, such as August. Plaintiffs did not bargain for a repeat of May, they bargained for the timely implementation of a permanent solution.

date of the Decree and post a copy of the Consent Decree to the Secretary of State's website with a summary of its requirements. *Id.*, pg. 8.

B. June 26, 2020 E-mail from Jonathan Brater.

On June 26, 2020, Defendant Jonathan Brater sent an email to members of the blind and disability communities providing updates on voting access in the upcoming elections and inviting them to attend a meeting with Defendant Brater to discuss the progress of improving absentee voting accessibility. Exhibit 3, June 26 Email from Jonathan Brater.[8]

Specifically, Defendant Brater's email announced the State's intention to violate the Consent Decree by not launching a RAVBM in time for the August election. Ex. 3, pg. 1. Defendant Brater did not identify any "unforeseen circumstances beyond the state's control" that prevented the State from implementing a RAVBM prior to the August election.

C. June 26, 2020 E-Mail from Erik Grill.

At the May 8, 2020 Status Conference, Attorney Erik Grill told the Court that he was aware of the primary RAVBM systems available, and "that the state is

[8] Counsel for Plaintiffs were never informed that this communication was being issued, and in fact, both Plaintiffs Michael Powell and Fred Wurtzel were included on the email list. Defendants' counsel should have advised them against engaging in communications with represented parties outside the presence of attorneys—particularly communications that would disclose a failure to perform obligations under the Consent Decree in the instant matter.

in the process of releasing an RFP for a system at this point..." Exhibit 1, May 8, 2020 Transcript, pg. 6. At that same status conference, Mr. Grill insisted on a compressed timeline to ensure the State would have time to implement a RAVBM for the August election. *Id.* Again on May 14, Attorney Grill told the Court he thought the issuance of the RFP was "imminent." Exhibit 4, May 14, 2020 Status Conference, p. 16.[9]

In his declaration, Defendant Brater claimed, under penalty of perjury, that over the past year he had participated in multiple meetings with disability advocates, vendors, and election experts. ECF # 17-2, Dec. of Brater, pg. 8. Defendant Brater further claimed that he had engaged in recent follow up meetings with vendors. *Id.* Defendant Brater also claimed that it would be impossible for the State to implement an accessible ballot option in time for the May 2020 election. *Id.*

Despite Defendant Brater's and Mr. Grill's claims that the State was well underway with the selection of a RAVBM system, on June 26, 2020, Mr. Grill informed counsel for Plaintiffs that Defendants had no intention of implementing such a system in time for August.[10] Exhibit 2, June 26 Email from Erik Grill.

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[9] Because Mr. Grill had previously expressed to Plaintiffs' counsel that the RFP had already been issued, Mr. Turkish expressed surprise. *See Id.* at p. 18 ("now we're hearing the RFP hasn't even gone out yet")

[10] Plaintiffs note that their Counsel, Jason Turkish, emailed Mr. Grill regarding his concerns for holding a meeting between the parties without their attorneys being

Incredibly, Mr. Grill stated that "**The RFP was issued on Wednesday [June 24th].**" *Id.* Apparently, because Defendants did not issue the RFP **for over five weeks** after telling this Court it was nearly ready, Mr. Grill and his clients have come to the conclusion that their own actions make it impracticable to implement a RAVBM system in time for August.[11] This directly contradicts Mr. Grill's statement on the record that the State had finally issued a RFP, and Mr. Brater's sworn statement that he had previously met with vendors.

D. Online Absentee Ballot Request System.

Even while dragging their feet on compliance with the Consent Decree, Defendants found time to develop and roll out a new system to allow Michigan voters to apply for an absentee ballot completely online. Using this system, non-disabled voters can complete an absentee ballot application online, which is automatically forwarded to the appropriate local or state official. ECF # 32-1, Letter to Erik Grill, pg. 1. Unfortunately, they did not find the time to make this system accessible for individuals with disabilities or to allow voters with disabilities to request an accessible absentee ballot through the new system. Instead, these individuals must use a separate manual application process and face

present. Exhibit 5, Email Exchange. Mr. Grill did not take this concern seriously, telling Mr. Turkish that no lawyers were allowed, and if the Plaintiffs did not like that they need not attend.

[11] Defendants conveniently decided they do not have sufficient time to implement a RAVBM system on the same day they issued an RFP.

the additional burden of having to find the location of their local clerk and mail or email the absentee ballot application directly to the clerk. This additional burden on individuals with disabilities is yet another violation of the Consent Decree.

Defendants have no excuse for introducing a new online ballot request program, without offering an equal opportunity for disabled individuals to participate. This violates the Consent Decree, and constitutes an additional violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*.

E. Press Release.

Not until June 26, 2020, five weeks after the Consent Decree deadline, did Defendants post a brief press release to their website stating that accessible absent voter applications are now available.[12] Obviously, this release was not made within ten days of the May 19, 2020 Consent Decree, and the Decree itself or a summary thereof appears to be totally absent from Defendants' website.

ARGUMENT

I. LEGAL STANDARD.

Parties to a consent decree "have a duty to take all reasonable steps within their power to comply with the court's order." John B. v. Menke, 176 F. Supp.2d

[12] https://www.michigan.gov/sos/0,4670,7-127--533105--,00.html (last visited June 27, 2020

786, 806 (M.D. Tenn. 2001); *quoting* Glover v. Johnson, 934 F.2d 703, 708 (6th Cir. 1991) (internal quotation marks omitted). A consent decree is a "settlement agreement subject to continued judicial policing." Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013, 1017 (6th Cir. 1994); *quoting* Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983) (internal quotation marks omitted).

The nature of a consent decree "compels the approving court to: (1) retain jurisdiction over the decree during the term of its existence, (2) protect the integrity of the decree with its contempt powers, and (3) modify the decree if changed circumstances subvert its intended purpose." Vanguards of Cleveland, 23 F.3d at 1018. The "courts have inherent power to enforce compliance with their lawful orders through civil contempt." Spallone v. U.S., 493 U.S. 265, 276 (1990). "When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers." Id.; *citing* Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 124, 161 (1971). "Both imprisonment and fines, when coercive or conditional, are legitimate civil contempt sanctions." U.S. v. State of Tenn., 925 F.Supp. 1292, 1301 (W.D. Tenn. 1995); *citing* Shillitani v. United States, 384 U.S. 364, 370 (1966); United State v. Bayshore Assoc, Inc., 934 F.2d 1391, 1400 (6th Cir. 1991).[13]

[13] The Consent Decree explicitly incorporates the requirements of the ADA. Where a Consent Decree references federal law, the court is bound to look to the law that

II. DEFENDANTS ARE IN CONTEMPT BECAUSE THEY DID NOT ACT IN GOOD FAITH TO IMPLEMENT A RAVBM SYSTEM FOR THE AUGUST ELECTION.

The Consent Decree unambiguously requires Defendants to implement a RAVBM system for the August 2020 election. ECF # 31, pg. 7. This requirement is not optional or alternative, it is mandatory. Yet the RFP, which Defendants' counsel previously represented was "imminent," was not issued until June 24, 2020.[14] *See supra.* When Mr. Grill made this representation he either did so out of ignorance or an intentional effort to mislead the Court and Plaintiffs. Nevertheless, Defendants never took steps to comply with this vital requirement of the Consent

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serves as the foundation for the four corners of the consent decree. John B., 176 F. Supp. 2d at 800; s*ee also* Frew v. Gilbert, 109 F.Supp.2d 579 (E.D. Tex. 2000) (noting that a court may stray from the four corners of a consent decree "to the extent that [Medicaid Act] requirements are clearly imported by the language of the decree."). Under the ADA, in providing aids, benefits, or services, public entities may not "[a]fford 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," nor may public entities provide qualified individuals with disabilities "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. 28 C.F.R. § 35.130(b)(1)(ii)-(iii). Furthermore, such public entities "shall furnish 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." 28 C.F.R. § 35.160(b)(1).

[14] Defendants issued the RFP, the first ministerial step in the process, over five weeks after the entry of the Consent Decree, over five weeks after deciding to mail all voters an absentee ballot application for the August election, and most critically, the day before they began distributing absentee ballots for August to non-disabled voters. Furthermore, the State's procurement website does not currently list the RFP as active, leaving open the question of whether Defendants have issued it at all.

Decree and Mr. Brater recently confirmed that Defendants have no intention of implementing a RAVBM system in time for August.

The only exception under the Consent Decree is "[i]f unforeseen circumstances beyond the state's control make it impracticable to acquire a RAVBM in time for the August 2020 Election..." ECF # 31, pg. 6 (emphasis added). Defendants' failure to take even the very first ministerial step of issuing an RFP prior to June 24, 2020 was not a circumstance beyond the state's control. *Dragging one's feet* is not an unforeseeable circumstance leading to "impracticability," rather it is deliberate sabotage.

Additionally, even if the timely issuance of the RFP were impracticable, the Consent Decree required Defendants to inform Plaintiffs "immediately..." *Id.* at pg. 6. Instead, Mr. Brater announced in his June 26, 2020 *ex parte* communication that the State would not be implementing a RAVBM for the August election. Not only did Defendants never inform Plaintiffs of unforeseeable or unavoidable delays in the RFP process, but Mr. Grill and Ms. Meingast waited several days to inform Plaintiffs' counsel that an RFP had even been issued, and only in response to an inquiry from Plaintiffs' counsel. Mr. Grill has confirmed that both he and Ms. Meingast had knowledge of the non-compliance, but were too busy with other cases to notify Plaintiffs. Ex. 2. This is an additional, unequivocal, and unacceptable violation of the Consent Decree. To date, Plaintiffs have been

provided no explanation of why timely issuance of the RFP could not be accomplished, as specifically required by the Consent Decree.

A party seeking to discharge its obligations under a consent decree based on impracticability must show an unforeseeable event preventing it from performing its obligations—"beyond the party's control." Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 149-50 (6th Cir. 1983). Defendants' hands are unclean. It is clear from their statements and conduct that Defendants did not act in good faith in negotiating or implementing the Consent Decree. Prior to entering into the Consent Decree, Defendants represented that work was well underway with vendors and an RFP would issue immediately. It is now unequivocally clear that those statements were misrepresentations, and Defendants never intended to comply with the Consent Decree. Perhaps Defendants plan to argue that the last-minute ad hoc expansion of the State's UOCAVA system, as implemented in May, is equal to a professional RAVBM. However, Defendants' counsel has already foreclosed that argument, and Plaintiffs agree. Mr. Grill informed the Court on May 14 that:

> What we were able to do for the May election itself was a very short term, very specific situation where we basically took the UOCAVA overseas military ballots and the bureau of elections individually modified each ballot requested by a voter and sent that voter the ballot to be marked on. That worked okay for a May election with limited jurisdictions and only a couple school board issues. We do not believe that that type of situation represents any type of viable fix for the primary or November election. Ex. 4, Transcript of May 14, 2020 hearing at p. 21.

III. DEFENDANTS ARE IN CONTEMPT BY FAILING TO OFFER ONLINE ABSENTEE VOTING APPLICATIONS IN AN EQUAL MANNER.

The Consent Decree and the ADA require Defendants to ensure that (1) individuals with disabilities are not excluded from the State's voting programs, and (2) absentee ballots and applications are available to the disabled at the same time they are available to non-disabled voters. ECF # 31 pg. 4-5. Defendants' new program allowing inaccessible online absentee ballot applications to be submitted completely online violates both these provisions, because it excludes people with disabilities. ECF # 32. As discussed above, non-disabled voters are now able to apply for an absentee ballot completely online, while individuals with disabilities requiring an accessible absentee ballot face the additional burden of locating and returning their application to their local clerk.

Defendants should not have launched this program until it was accessible for individuals with disabilities. 28 C.F.R. § 35.130(b)(1)(ii)-(iii). This disparate treatment of people with disabilities poses devastating consequences, as illustrated by a recent WDIV Detroit story stating that Michigan Supreme Court Justice Richard Bernstein, who is blind, was turned away from his local clerk's office when he sought assistance applying for an absentee ballot.[15] Justice Bernstein did

[15] https://www.clickondetroit.com/news/local/2020/06/26/blind-michigan-supreme-court-justice-is-turned-away-by-clerks-office-when-trying-to-get-absentee-ballot/ (last visited June 27, 2020)

not blame the office workers, but cited an apparent lack of training or communication from the State on how to issue and assist with accessible absentee ballots. This has put the Honorable Justice in an impossible situation. He is unable to apply for an absentee ballot online because the system is unusable by blind voters and does not result in an accessible ballot, and he is unable to apply for or complete an absentee ballot in-person, because local clerks have not been trained to provide these required accommodations, and while many offices remain closed to the public during COVID-19.

Conversely, non-disabled individuals are able to apply for a ballot totally online, and upon information and belief, such individuals have already received their absentee ballots for the August 2020 election. In this dynamic, we have non-disabled individuals already receiving absentee ballots, and blind individuals still unable to even submit a request. This is an ongoing threat to the integrity of our voting systems and the rights of voters with disabilities.

Defendants' contemptuous conduct is inexcusable. In the midst of litigation affirming that Defendants have failed to offer absentee voting in an equal manner, they have introduced a new online program that is inaccessible to people with disabilities and that will not produce an accessible ballot, all while refusing to assist voters with disabilities to complete ballots in person. Defendants are

violating both the Decree and the ADA requirement that government services must be equally available and accessible to persons with disabilities.

IV. DEFENDANTS ARE IN CONTEMPT BY FAILING TO TIMELY ISSUE A PRESS RELEASE AND POST THE CONSENT DECREE.

As of the time of filing this motion, despite the Consent Decree's requirement that they issue a press release and summary of the Consent Decree within 10 days, Defendants have still not even attempted to comply with the public notice requirements of the Consent Decree. Instead, Defendants posted a press release nearly 30 days after the deadline that simply stated that blind individuals may now request accessible absentee ballots—albeit using a program that, itself, violates the Decree.[16] The Consent Decree and summary thereof is conspicuously absent from the website. No press release has been issued informing the public of the Decree, or of the availability of accessible absentee ballots. This failure to notify the public of the relief required by the Decree has undermined its purpose and threatens to once again disenfranchise the blind community.

Defendants could not be bothered to comply with even this most basic requirement. They have demonstrated contempt, not only for this Court and its Order, but for Michigan's voters with disabilities. Just weeks after acknowledging their absentee ballot program excluded blind voters, Defendants introduced a new

[16] https://www.michigan.gov/sos/0,4670,7-127--533105--,00.html (last visited June 27, 2020)

system, with no viable option for the blind and others with disabilities. Clearly, Defendants are in need of additional motivation and oversight if the purpose of the Consent Decree—ensuring voting access for the blind—is to be fulfilled.

CONCLUSION

For all these reasons, Plaintiffs ask this Honorable Court to hold Defendants Jonathan Brater and Jocelyn Benson, as well as their Counsel, Erik Grill and Heather Meingast, in contempt. Defendants did not act in good faith in entering into the Consent Decree, and they are in material breach of its express terms.

Defendants have failed to take steps as basic as timely issuing an RFP and posting the Consent Decree to their website. Their failure to implement a RAVBM system for the August 2020 election was of their own doing—not due to unforeseeable circumstances beyond their control. This Court has broad authority to order an appropriate remedy, including ordering the individual Defendants to appear and show cause for their failure to fulfill the requirements of the Decree.

For Mr. Grill's part, he has made material misrepresentations to this Court and attempted to facilitate an *ex parte* meeting between the parties outside the presence of counsel—conduct that is contrary to his ethical duties, and that threatens the integrity of the Consent Decree as well as the voting rights of the blind. Mr. Grill and Ms. Meingast also failed to notify Plaintiffs, as required by the Consent Decree, that the State would not be pursuing a RAVBM option for August

because they were too busy with other matters, depriving Plaintiffs of valuable time to remedy Defendants' non-compliance prior to August.

Defendants have not made a good faith effort to comply with the Consent Decree, and in fact, they demonstrated bad faith during the negotiation process. Accordingly, Plaintiffs respectfully ask this Honorable Court issue an order directing the following relief:

- Order expedited briefing on the instant motion so that a judicial remedy may be available in time for the August election;
- Order Defendants Brater and Benson to appear personally to show cause for their failure to comply with the Consent Decree;
- Order the parties to engage in discovery to learn the full extent of contempt;
- Schedule oral arguments and an evidentiary hearing on the instant motion;
- Order an award of damages, fines, and reasonable attorney's fees to the named Plaintiffs for having to bring this enforcement motion;
- Order Defendants to immediately comply with the requirement that they obtain and implement a RAVBM system in time for the August Election (either by waiving or expediting the RFP process);
- Order the appointment of a third-party monitor, to be selected by the Court, and paid for by Defendants, to ensure continued day-to-day to compliance by Defendants through the expiration of the consent decree;

- Order Defendants to issue a press release informing the electorate of their deliberate violations of the Consent Decree and their plan for remediation—in order to prevent further disenfranchisement of the blind community; and
- Order any and all other relief necessary to compel compliance with the Consent Decree and to prevent the disenfranchisement of Michigan's voters with disabilities in upcoming elections.

Respectfully submitted,

/s/ Eve Hill
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Counsel for Plaintiffs Powell and Wurtzel

Dated: June 29, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2020 I filed the foregoing document and attached exhibits using the Court's CM/ECF filing system, which will automatically generate notice of such filing to all counsel of record.

/s/ Jason M. Turkish
Jason M. Turkish (P76310)

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,

and,

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.
_____/

Case No. 20-11023

Hon. Gershwin Drain
Mag. Judge Michael J. Hluchaniuk

ORAL ARGUMENT REQUESTED

Index of Exhibits

Exhibit #	*Description*
1.	May 8, 2020 Status Conference Transcript Excerpt
2.	June 26, 2020 Email from Erik Grill
3.	June 26, 2020 Email from Jonathan Brater
4.	May 14, 2020 Hearing Transcript
5.	Email from Erik Grill Regarding Meeting of the Parties

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

JOCELYN BENSON, MICHIGAN SECRETARY OF STATE, in her official capacity and JONATHAN BRATER, MICHIGAN DIRECTOR OF ELECTIONS, in his official capacity,

Defendants.
_____/

No. 20-cv-11023

STATUS CONFERENCE

BEFORE THE HONORABLE GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Friday, May 8, 2020

APPEARANCES:

For the Plaintiffs:

MR. JASON M. TURKISH
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For the Defendants: MR. ERIK GRILL
MS. HEATHER S. MEINGAST
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Reported by: Merilyn J. Jones, RPR, CSR
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Detroit, Michigan

Friday, May 8, 2020 - 3:00 p.m.

THE LAW CLERK: The Court calls the matter of Civil Action, Powell, et al versus Benson, et al. Case Number 20-cv-11023.

Counsel, please state your appearances for the record.

MR. TURKISH: Good afternoon, your Honor. Jason Turkish, David Mittleman, and Eve Hill for the plaintiffs.

MR. GRILL: And, good afternoon, your Honor. Erik Grill with the Michigan Department of Attorney General, along with Heather Meingast, also with the Michigan Department of Attorney General, appearing on behalf of the defendants.

THE COURT: Okay. All right.

Have you all been talking at all about trying to resolve the case?

MR. GRILL: There have been discussions, your Honor. We received last night at 9:30 in the evening a proposal from the plaintiffs. The defendants are still reviewing it. We haven't had a chance or an opportunity to respond to it just yet.

THE COURT: Okay. Just out of curiosity, what are the contents of the proposal?

MR. GRILL: Without getting into too many specifics, your Honor, it has to do with the implementation of

a, of an accessible voting system and the process by which that would occur, along with -- there's also been the --

THE COURT: I hate to say this, but I didn't get that.

MR. GRILL: Certainly, your Honor. I'm sorry. I can repeat myself.

The proposal we received, and I'm reluctant to get too fair into the specifics on it at this point, but in general terms the discussion turns around the, you know, the state's acquisition of an accessible absentee voting mechanism for voters with disabilities and the process by which that system would be selected and implemented.

There's also -- we haven't got any specifics on it yet, but there's been some suggestion of costs and fees as well.

THE COURT: Okay. Is the system one that has been mentioned in the pleadings already?

MR. GRILL: We're not that far into the process, your Honor. I think we're not at a point where the parties -- they're either telling us of a particular system or we've chosen one. I think the idea would be that, that we would pick a system and that would be the part of the process going forward.

THE COURT: Okay. I was looking again at my notes from the pleadings and it looked like there was a Prime Three

system and then there's another system that the State of Maryland uses.

Are those the systems that are in discussion?

MR. GRILL: Your Honor, those are two systems that we know exists. I believe the state is in the process of releasing an RFP for a system and at that point we would see what system is, respond as compliant systems.

THE COURT: Okay. Well, it's good to hear that you all are discussing a resolution and implementing a system.

I did create a scheduling order for you all with an ultimate date of June the 22nd for a hearing on the preliminary injunction.

How does that date sound?

MR. TURKISH: Your Honor, that was very close, actually, in proximity to the schedule that we had tried to propose to the attorney general's office in terms of ultimate date.

We stumbled along the way, your Honor, if I may, on an issue of limited discovery, and I would be happy to speak to that at an appropriate time.

THE COURT: Okay.

MR. GRILL: And, your Honor, if I may --

THE COURT: Go ahead.

MR. GRILL: We do have a problem with that type of timeline, your Honor. My position and the position we would

urge would be having a hearing much, much sooner. What we would seek to avoid is a situation where the Court is issuing an order on the preliminary injunction, and, again, I have every confidence the Court would be inclined to be persuaded by the state's arguments, but if there were to be a different result, we would not want to be in the position of trying to be implementing something less than a month away from the August 4th election.

THE COURT: Okay.

All right. Well, with the deadline that I have of the 22nd, you'd still be over a month away. It would be the whole month of July and maybe a week or so in addition to that.

MR. GRILL: That's -- I know, your Honor, that sounds like a lot of time, but what has been informed by the people of the bureau of elections, is that, if the Court were to order something be implemented in that time, that would not be a sufficient length of time for there to be any kind of meaningful implementation of the kind of thing that we're talking about.

It basically puts us in the same position we were in for the May 5th election, only instead of a week before or a month before, but the same concerns show up: Security, testing, making sure that it works, and we're not trying to shove a square peg in a round hole.

MR. TURKISH: Your Honor, generally, the

Ryan Kaiser

From: Jason Turkish
Sent: Friday, June 26, 2020 6:49 PM
To: Grill, Erik (AG)
Cc: Meingast, Heather (AG); Melissa Nyman; Ryan Kaiser; David Mittleman (dmittleman@4grewal.com)
Subject: RE: Powell v. Benson

Importance: High

Mr. Grill and Ms. Meingast:

The consent decree (entered on May 19, 2020) reads in pertinent part:

"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." (emphasis added)

Your e-mail makes it clear that an RAVBM system will not be available for August **because the State failed to a issue an RFP for five weeks after entering into this agreement.** This inability was neither "unforeseen" or "beyond the State's control,' rather it was because of your client's and your contemptuous neglect of their obligations under the court approved consent decree. Your e-mail goes on to assert that that after waiting five weeks to issue the RFP, the Secretary determined on the **same exact date** that it would not be practicable to have it in place for August. You still have not informed us what unforeseen circumstances (other than your client's own neglect) prevented the use of an RAVBM for the August Election.

It is obvious that Secretary Benson and Director Brater have completely neglected their obligations under the consent decree, and that you as signatories to the agreement on their behalf have acted with complete contempt to the obligations of the Decree. Pursuant to the local rules, I am seeking concurrence in a forthcoming motion to enforce the terms of the consent decree, motion for sanctions, and motion for contempt against Jocelyn Benson, Jonathan Brater, and the Counsel.

Govern yourselves accordingly.

Jason M. Turkish, Esq.*
President and Managing Partner
Jason.Turkish@NymanTurkish.com

*Admitted to Michigan Bar

NYMAN TURKISH PC
A LITIGATION & DISABILITY LAW FIRM

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From: Grill, Erik (AG) <GrillE@michigan.gov>
Sent: Friday, June 26, 2020 5:07 PM
To: Jason Turkish <Jason.Turkish@nymanturkish.com>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Powell v. Benson

[EXTERNAL EMAIL--USE CAUTION]

In response to your inquiry:

The RFP was issued on Wednesday. At that time, looking at the calendar, it became apparent that the purchased system would likely not be in place in time for the August primary, and that the UOCAVA would likely be necessary. That information had been relayed to Heather and I to provide to you, but due to deadlines in a variety of other matters and because I was on a lay-off day on Thursday and prohibited from working, we did not notice that it had been provided to us. The failure is ours, not the Secretary of State. Regardless, we maintain that the language of the Decree provides that notice may be provided until the 29th.

Erik A. Grill
Assistant Attorney General
Civil Litigation, Elections, & Employment Division
517.335.7193
517.335.335.7640 (fax)


STATE OF MICHIGAN
ATTORNEY GENERAL

Ryan Kaiser

From: Ryan Kaiser
Sent: Monday, June 29, 2020 8:23 AM
To: Ryan Kaiser
Subject: FW: Accessible Voting Updates and Call July 1 at 1 p.m.

From: **Brater, Jonathan (MDOS)** <BraterJ@michigan.gov>
Date: Fri, Jun 26, 2020 at 1:56 PM
Subject: Accessible Voting Updates and Call July 1 at 1 p.m.
To: [redacted] Fred Wurtzel <f.wurtzel@att.net>, mpowell7583@yahoo.com <mpowell7583@yahoo.com>

I'm writing to give you an update on the Department of State and Bureau of Elections' efforts to improve voting access in the August and November Elections, and to invite you to a meeting for further discussion.

First, I wanted to let you know that the Bureau of Elections has launched an accessible electronic absent voter ballot application, which can be used to apply for an accessible electronic absent voter ballot for the August Election. The state will be publicizing the availability of this option more broadly soon.

The ballot can be marked on an electronic device, using a voter's own assistive technology. This allows voters to mark ballots remotely, without visiting a polling place or clerk's office. This accessible application and ballot are being used for the August election as the state develops a permanent solution for November. For November, the state has launched a request for proposals and is accepting public bids now.

We invite you to review the application and provide any feedback. For those who are eligible for the accessible absent voter ballot and wish to apply for it, we would also welcome your feedback on the ballot itself. Again, please keep in mind these are only interim solutions for the August election, and there will be user testing opportunities for the November solution before the application and ballot are launched.

https://www.michigan.gov/documents/sos/Michigan_Accessible_Electronic_Absent_Voter_Ballot_Application_August_695058_7.pdf.

Additionally, we would like to invite you to a meeting to discuss this and other accessibility issues, both for absent voter ballots and in-person voting, leading up to the August and November Elections. It's of personal importance to the Secretary and the Bureau we continue work to ensure our elections are truly accessible to all voters.

The meeting will be held on Wednesday, July 1 at 1 p.m. The call information is below. We will also send a calendar appointment.

Phone Number: 248-509-0316

Conference ID: 897 757 507#

Sincerely,

Jonathan Brater

Director of Elections
Michigan Department of State

Secretary of State Jocelyn Benson

Bureau of Elections

Direct: 517-335-3271
Cell: 517-599-5723

BraterJ@Michigan.gov

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

JOCELYN BENSON, MICHIGAN SECRETARY OF STATE, in her official capacity and JONATHAN BRATER, MICHIGAN DIRECTOR OF ELECTIONS, in his official capacity,

Defendants.
_____/

No. 20-cv-11023

MOTION

BEFORE THE HONORABLE GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Thursday, May 14, 2020

APPEARANCES:

For the Plaintiffs:

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APPEARANCES:

For the Plaintiffs: MS. EVE LYNN HILL
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For the Defendants: MR. ERIK GRILL
Michigan Department of Attorney General
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Reported by: Merilyn J. Jones, RPR, CSR
Official Federal Court Reporter
merilyn_jones@mied.uscourts.gov

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Detroit, Michigan

Thursday, May 14, 2020 - 2:01 p.m.

THE LAW CLERK: The Court calls the matter of civil action Powell, et al versus Benson, et al. Case Number 20-cv-11023.

Counsel, please place your appearances on the record.

MR. TURKISH: Good afternoon, your Honor. Jason Turkish, David Mittleman, and Eve Hill for the plaintiffs.

THE COURT: All right. Good afternoon.

MR. TURKISH: Good afternoon.

MR. GRILL: Good afternoon, your Honor. Erik Grill with the Michigan Attorney General's office on behalf of the defendants.

THE COURT: Okay. Where is Ms. Meingast?

MR. GRILL: There are a number of other emergencies this afternoon, your Honor, and I don't think she will be joining us today.

THE COURT: Okay.

All right. Have you all talked and tried to work out your differences with the 30(b)(6) dep?

MR. GRILL: Your Honor, we have had an exchange of our relative positions. My understanding is I don't believe that there's any further development here based on the positions of the parties.

MR. TURKISH: Your Honor, respectfully, I don't believe that's correct. We did exchange our positions in writing, but I also offered and suggested a few hour window yesterday that I could get on the phone with Mr. Grill and go through them one by one and I've yet to hear back, but I'd still be willing to do so if you'd like to.

MR. GRILL: I guess in response to that, your Honor, my understanding is that Mr. Turkish's offer of revolving this would be to narrow the scope if we were willing to waive or concede defenses in the Plaintiffs' favor, which I don't really see that there's much room to negotiate on that, but if there's a willingness to negotiate on the scope of the actual requests that we have in terms of what you need to actually argue the preliminary injunction hearing, I'm still, again, I expressed I'm willing to do that.

THE COURT: Okay. Mr. Turkish, I'm just curious, one of the things that Mr. Grill talked about in his pleading was putting a time limit on some of the requests that you made. Did you think about that at all, or is there a timeframe within which you would feel comfortable confining yourself; for example, say the last two years, documents relating to the last two years.

MR. TURKISH: Your Honor, it's just serendipity that the last two years was the timeframe Ms. Hill suggested earlier today and that was something that we were going to

offer hopefully in consultation with Mr. Grill.

THE COURT: Okay. I'll put that limitation on it, then, within the last two years.

Now, the other thing, Mr. Grill, that I noticed in your conclusion to your pleading is that you mentioned you wanted to only allow discovery on the items that you were going to admit during the preliminary injunction hearing. Did I read that correctly?

MR. GRILL: Yes, your Honor. I think that kind of -- that was my understanding of what we were doing here was that in lieu of having Director Brater testify live during the hearing that we would conduct his deposition instead and allow the plaintiffs an opportunity to hear what he has to say; understand the basis of it before they make their arguments before the Court, which that's the approach that I've been taking and I certainly think that that's what we ought to be doing if what we're doing in this timeframe.

I'm looking at the response that they filed and I guess taking that in turn with one of the requests which I think they said was the deponent should be prepared to testify to all information that may tend to support the affirmative defense, and I kind of get the impression that the plaintiffs are taking the approach that it is the burden of defendants to prove the entirety of their affirmative defense during the preliminary injunction hearing. And I don't believe that

that's accurate. I'm aware of no case law that provides that the burden shifts to the defendant to prove an affirmative defense in the preliminary injunction hearing.

So, I guess, that's kind of maybe underlying a lot of the confusion here is I think that what we ought to be doing is talking about what we're going to do for the preliminary injunction hearing and if they prevail and, you know, we'll go forward from there.

But if the idea is that the defendants, we're going to be doing discovery on the entirety of the defendants' affirmative defense, then, again, I don't think that's a preliminary injunction. I think that's a summary judgment and if we're going to do that, then we should have a hope of discovery. We should exchange witness lists, do experts, and do the whole thing. But there's no reasonable way of doing that in a week.

What I'm proposing instead is that we, you know, constrain this to the issues that will be brought before the Court at the hearing which is set for June 2nd, I believe.

THE COURT: Yeah. You know, the only problem I have with your request is, I mean, as I understand it, I don't have it right in front of me, but you want to limit the testimony in the 30(b)(6) deposition to what you anticipate presenting to the Court, and the problem I have is that, I mean, I know you won't intentionally or deliberately withhold

any information that may not be favorable to your position, but to confine the plaintiffs to solely what you present, I think is pretty restrictive at this point.

What's your response to that, because I don't think that they should be held to only what you want to offer and present to the Court.

MR. GRILL: Well, certainly, your Honor, and I think in a normal 30(b)(6) situation we might be differently situated and I think I understand the Court's point and, again, I certainly wouldn't want to make this one-sided.

I guess, again, my understanding, I guess, I would start by saying, the way I understood this process to be would be this is an opportunity for the plaintiffs to hear and understand what Director Brater was basing our assertion of the affirmative defense on. And for the purpose of this preliminary injunction they have said, these are claims. We have said, well, we think that the existence of this affirmative defense makes it unlikely that you can establish or demonstrate and carry the burden of persuasion on showing that there is a likelihood of success on the merits.

So with that in mind, the idea being that this deposition of Director Brater would be to allow plaintiffs to hear what he's basing that on. In other words, to test or see if he's fitted. That if we're making this up out of thin air, that there's no basis for him to make any of these claims, then

that would come forth.

I guess, from the standpoint of whether or not there's any unfavorable information there, I guess my confusion would be, I'm not sure what the unfavorable information would look like in this context from the standpoint of, you know, the argument, or the defense, the affirmative defense that we're raising is that there is a, that this would be a fundamental alteration or undue burden of the state to implement.

So, the -- it's not a matter of, you know, well, you know, we think, we think that there is a secret e-mail out there that says, ha, ha, we really don't want to do this. But instead the idea with being, these are the things, or these are the obstacles that we perceive to be impeding us in being able to do this or do it in a timeframe plaintiffs are asking for.

And with that in mind, I guess, I suppose from the standpoint if -- and we can go a long way, your Honor, I know the plaintiff has suggested a two-year limitation would be sufficient, but it's, you know, again, when we're dealing with the two entities that have been named in this lawsuit, the defendants are the secretary of State and the director of elections in their official capacity, which means it's not just these two persons who we can scroll through their e-mail accounts and see what they have to say about this. We kind of invoked the entirety of the department, which means we have to, you know, that's an awful broad stroke of stuff to go through,

as I think the plaintiff describes it, e-mails, voicemails, drafts, letters, memoranda, this ends up being a sizable scope of documents and I have no idea what that ends up looking like. I would anticipate that would be pretty voluminous. It would talk about anything that might come to bear on what the implementation of this project would look like. Because as it's even been alleged in the complaint, there were at least several meetings with the plaintiffs themselves and Director Brater on this topic going back some length of time.

So my concern is that in trying to gather the information in order to have a coherent conversation for the sake of the preliminary injunction hearing, I think we need to put a limit on the number -- who -- what -- the persons they want, you know, they want information from, is it just Director Brater? Is it Director Brater and some other person associated with him? Is it the secretary of state herself or some other person associated with her. I guess --

THE COURT: Mr. Grill --

MR. GRILL: I would certainly be --

THE COURT: Hold on one second.

Let me just tell you what my concern is.

MR. GRILL: Uh-huh.

THE COURT: Let's say the secretary of state or the director has put out, let's say, three or four RFP's. Okay.

MR. GRILL: Okay.

THE COURT: And you've gotten different amounts in terms of what it will cost to implement what the plaintiffs want, and you decide, well, I'm going to take the highest amount and that's what I'm going to admit and use to support the expense and the burdensomeness of this whole request, and at the same time you received two or three other RFP's that are much less expensive, and so, I don't want to tie the plaintiffs' hands in terms of going into the information that's available, and so, I guess, the bottom line is, I've looked at the subject matter of the request that the plaintiffs want to go into and, frankly, other than the timeframe that's involved, I think a lot of the questions and subject matters are appropriate for this 30(b)(6) deposition. And, I guess, I would just indicate that you should do the best you can to try to accumulate all the evidence and the records and documents that the plaintiff wants.

So, I'm going to have you, I'm going to grant the plaintiffs' request with regard to the topics they want to cover and I'm going to issue an order requiring you to cooperate and produce the documents you can as soon as possible for the deposition.

MR. GRILL: Your Honor, if I may?

I'm sorry. I didn't mean to interrupt.

THE COURT: And so if there's a way to narrow

down what's been requested by the plaintiffs and you all agree to that, then, that's fine with me. But, I think the subject matter of these topics, I think, there's like eight of them, or nine of them, there's nine, I think they're all pretty pertinent to the issues you've raised because your defense is pretty broad. It's too costly. It's over burdensome, and it's an unreasonable request. And so I just, I think, the plaintiffs are entitled to discover the material they're requesting.

So that's my decision.

MR. GRILL: Your Honor, if I may implore the Court to put, just in an effort, and I'm not going to try to change the scope, but I really would ask the Court to consider limiting it not just to two years back, but to, can we get -- and I would, since we have the parties here, can we limit it to Director Brater, specifically, the records and documents that he has, or that are in his possession or control.

My concern is just the way these requests are worded and as we point out in the objection, if any and all, and it goes all over, and I just -- we have five days to get this stuff together and I just don't believe -- I really would ask that we limit it to particular custodians, and certainly since Director Brater would likely be the witness, I think that that would be the appropriate scope of, to document production.

THE COURT: What do you think about that, Mr.

Turkish?

MR. TURKISH: Your Honor, my concern is that we do not have a lens into the interworkings of the bureau of elections and secretary of state's office. We know anecdotally that Secretary Benson participated in one of these meetings with the plaintiffs quite some time ago, although, obviously, within the last two years. It would just be such a convenient way to say that a subordinate or another staff member handled it and then, therefore, not have to produce it.

Again, it does phrase things like all e-mails or documents, but it narrows it to the very, very finite issue of accessible absentee voting. And, your Honor, I will -- I understand five days is a compressed timeline. I will, again, even in light of the Court's ruling, offer to Mr. Grill that he can pick up the phone and call me if we can simply understand what issues the state intends to argue at this hearing are burdening them.

You know, is it budget? Is it technology? Is it a security concern? If we can start zooming in on a specific category, we'll zoom in on our discovery request. We tried to keep them as tight as we possibly could but with this broad, broad defense of its just too difficult, we couldn't really go narrower than we did.

THE COURT: Okay.

Mr. Grill, you want to take Mr. Turkish up on his

request to talk about it to narrow it down, because I think now, you know, like I mentioned, I think everything he's requested all eight, or rather, all nine of these subjects I think are important.

MR. GRILL: Your Honor, if -- I certainly don't disagree that the topics as identified that's, it's never been our objection that they shouldn't be able to ask or get documents about, for example, what's the, I'm looking here at number four, you know, system and user testing. As we pointed out -- we raised in our brief the idea that to implement any system requires a certain length of testing. We anticipate a number of hours. There are costs associated with that.

The problem is not that they not be allowed to investigate and explore documents or testimony related to testing. My concern is just the language of this of these requests when we say, because when we say like a document, the deponent shall produce all documents in the possession of either defendant, which means, again, the entire department, included, but not limited to requests for proposals, drafts, letters, memorandums, e-mails, voicemails, which I don't even know how we would provide those and reduce them in their substantive form if they even exists, text message, related to any testing contemplated above.

So these are very broad requests that encompass not just what we know and what we based the idea that we might

raise this affirmative defense upon, but the idea that we have to comb through absolutely every person's e-mail, absolutely, every person's filing cabinet, absolutely every person's inbox, hard drive and find out if there is any information.

Like, again, I would also point to the Court, we have raised a privilege issue that I think we need to address as well as in regards to RFP's.

MR. TURKISH: Your Honor, if I may respond quickly.

The defendant knows themselves, though, who participated in these discussions on accessible absentee voting.

So it's not everybody in the department.

MR. GRILL: Except that's not the way the request is worded. It's not any persons who participated in discussions. It's any documents in the possession of either defendant.

MR. TURKISH: Related to accessible voting.

MR. GRILL: Right. Which could be -- just because there was a person who had a discussion, doesn't mean there's not a document somewhere.

Again, I really do think we need the Court to rule on the privilege issue, because that is also an issue that needs to be decided.

There are, there is law on this, that, you know,

the production of these documents waives it. I reserve that privilege and I think that there's been no arguments in response from the plaintiffs about why those documents are not covered by the deliberative process privilege.

MR. TURKISH: We've had no opportunity to respond to a privilege assertion. It's never been raised before.

MR. GRILL: That's not true. I raised it in the e-mail where I asked you for concurrence.

THE COURT: I didn't ask for any responses either.

I guess, I'm not totally familiar. You're talking about a privilege with regard to the RFP's?

MR. GRILL: The draft RFP's in particular, your Honor, what we're talking about here are -- we have not yet issued the RFP's. I think they are imminent, but the idea that we're going to produce through discovery these draft RFP's poses a problem because by their very nature they're drafts. These represent the individual ideas of the person or individual staff person writing a proposal saying this is what we think it could look like, maybe we can try this, and release of those documents, I think, not only poses a problem for being able to candidly and, you know, honestly, you know, do things for government before they become public, but I also have concerns about their release, as I said, since the RFP is not yet public, the introduction of those materials could be potentially damaging to, to the process itself.

Basically, we're giving the plaintiffs an opportunity to see this RFP before anybody else does and at this point in the case we don't know if anybody has any connection to potential vendors.

I'm certain that that part of it at least we can hash out through some kind of confidentiality, but the problem still remains, the idea that deliberative process itself is not the type of thing that, well, we'll let you see it, but nobody else, do you agree to destroy that after the close of the case.

So, our objection is specifically on that point to the draft RFP's that those are privileged documents that should not be produced.

THE COURT: Mr. Turkish?

MR. TURKISH: Your Honor, if Mr. Grill contacted me or if he still wishes to contact me, we would have no objection to, if the Court would entertain ordering that, stipulating to a protective order for the draft. The draft RFP's.

I have concerns about the sufficiency of the legal argument that's being advanced.

Counsel cites case law that relates to the Freedom of Information Act, not to the common law privilege that I believe he's trying to describe.

The relevant precedent in the Sixth Circuit describes it as applying to documents that are pre-decisional

in nature. Meaning, the decision of whether to offer accessible absentee voting or not. Here throughout their briefing they at least claim to support accessible absentee voting.

But what we just heard from Mr. Grill is somewhat probative in itself, in that, now we're hearing the RFP hasn't even gone out yet and this is why we have to be able to, you know, ascertain the status of these things, because it's somewhat less reliable to understand how burdensome something is on the state if we haven't even tried.

But we would have no hesitation to, without reaching the merits of this particular privilege of stipulating to a protective order.

THE COURT: And I'd be happy to enter a protective order, too, dealing with this issue.

MR. GRILL: Again, the protective order would address the confidentiality issue and at least as far as the distribution of potential vendors, the concern is still, your Honor, is the idea of the deliberative process within the department itself, and I'm not sure what drafts really have to entertain on the idea of whether or not there would be a fundamental alteration or an undue burden on the state. And by their very nature, they're drafts. They're most likely to be inaccurate. They're in a draft form because it hasn't been finalized. It hasn't been authorized. That's not the final

product.

MR. TURKISH: Your Honor, I think, that goes to weight, not to admissibility, but they would be under seal regardless. So Mr. Grill's concerns are being mitigated.

MR. GRILL: Again, your Honor, this all goes back to my concern here. I feel as though the State is being required to demonstrate the entirety of its defense. We haven't even filed the answer yet.

THE COURT: Let me ask this question before we go any further.

I noticed that the plaintiffs made a settlement proposal which would allow the secretary of state to use any of the known vendors prior to the August election that have been used in other states.

What -- did you consider that, Mr. Grill?

MR. GRILL: I'm -- yes, your Honor. And, actually this afternoon we resent a response to the plaintiffs. I'm not sure to what degree we should talk with the Court about the terms of any proposals.

THE COURT: Okay. I just wondered if you had really discussed that. That sounds like a pretty reasonable offer, or proposal. If other states --

MR. GRILL: Your Honor.

THE COURT: If other states are already doing certain, or using certain tools, and that's been approved by

those states, it would seem to me that it would make sense to look at those and maybe even adopt one of them.

MR. GRILL: Well, your Honor, we -- certainly the state has looked at it and I don't want to, you know, chew the Court's ear off of the details of the election procedures, but what we run into, as I understand it, and, again, this is, I'm an attorney not the election director himself, but my understanding is what we run into is the other states that have adopted it, run their elections a little differently than we do in Michigan.

Michigan is very decentralized. We put the local clerks in charge of an awful lot of the process of how ballots are delivered and received and returned.

So, implementation in Michigan is not necessarily a drag and drop, you know, we can do it because we just download software. There's a little bit more mechanical implementation involved, and making sure that that system works correctly involves testing and making sure that it integrates with the State of Michigan computers.

There's a lot that goes into it that isn't just going to the, you know, going over to Maryland saying, can you throw us a copy of the software and we'll install it over here. If it were that easy, I think that we would likely have done it by now.

What I imagine the plaintiffs will come to

discover in the deposition is that there are more facets to this than might be immediately obvious.

What we were able to do for the May election itself was a very short term, very specific situation where we basically took the UOCAVA overseas military ballots and the bureau of elections individually modified each ballot requested by a voter and sent that voter the ballot to be marked on. That worked okay for a May election with limited jurisdictions and only a couple school board issues.

We do not believe that that type of situation represents any type of viable fix for the primary or November election.

So there are -- I wish things were as simple as we sometimes want them to be, but is likely that it is anything that's the case goes forward we will see that things are more complicated than that.

THE COURT: Okay. Well, I've heard enough and I've got some other matters to take care of and I'm going to allow the plaintiffs to cover the topics that are listed, all nine.

I'm going to put a two-year limitation on them, and other than that, and other than being available to enter a protective order, I'm going to grant the request of the plaintiffs and order that the 30(b)(6) person being deposed respond to those subject matters.

MR. GRILL: Your Honor, may we, can we have some discussion on the idea is this meant to preclude the defense from at some point in the future adding or supplementing with new information or evidence as it comes to light? If we pass the PI stage and we go into discovery there's likely going to be --

THE COURT: No. I'm not prohibiting you from going into that later. No.

MR. GRILL: Okay.

THE COURT: Okay. All right.

Ladies and gentlemen, I guess we'll be in recess and I hope the deposition goes smoothly. And, again, you all can continue to talk and try to narrow things down, but like I said, I think each one of the topics really involves questions about the process that are important.

So, with that, we will officially be in recess.

MR. TURKISH: Thank you, your Honor.

MR. GRILL: Thank you, your Honor.

THE COURT: All right. Thank you. Thank you, all.

(At 2:27 p.m. proceedings concluded)

C E R T I F I C A T E

I, Merilyn J. Jones, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages 1-23, inclusive, comprise a full, true and correct transcript taken in the matter of Michael Powell, et al versus Jocelyn Benson, et al, 20-cv-11023 on Thursday, May 14, 2020.

/s/Merilyn J. Jones
Merilyn J. Jones, CSR, RPR
Federal Official Reporter
231 W. Lafayette Boulevard
Detroit, Michigan 48226

Date: May 26, 2020

Ryan Kaiser

From: Ryan Kaiser
Sent: Saturday, June 27, 2020 10:22 AM
To: Ryan Kaiser
Subject: FW: Voter Accessibility Meeting with Director Brater

From: Grill, Erik (AG) <GrillE@michigan.gov>
Sent: Friday, June 26, 2020 5:13 PM
To: Jason Turkish <Jason.Turkish@nymanturkish.com>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: Voter Accessibility Meeting with Director Brater

[EXTERNAL EMAIL--USE CAUTION]

In response to your e-mail about Director Brater's July 1 meeting, your clients are welcome to participate along with other disability advocates. If they do not feel comfortable having a discussion about election accessibility without a lawyer present, then they do not have to attend. But attorneys involved in litigation—including myself and Ms. Meingast—are not invited. Please advise of your clients' decisions, and if they do not want to come, they can be removed from the list of attendees.

Also, just for clarification, please provide a list of individuals you feel should not be contacted by the Director of Elections unless through you.

Erik A. Grill
Assistant Attorney General
Civil Litigation, Elections, & Employment Division
517.335.7193
517.335.335.7640 (fax)

From: Jason Turkish <Jason.Turkish@nymanturkish.com>
Sent: Friday, June 26, 2020 3:00 PM
To: Grill, Erik (AG) <GrillE@michigan.gov>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>; David Mittleman (dmittleman@4grewal.com) <dmittleman@4grewal.com>; Melissa Nyman <Melissa.Nyman@nymanturkish.com>; Eve Hill <EHill@browngold.com>
Subject: RE: Voter Accessibility Meeting with Director Brater

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Mr. Grill:

Thank you for your e-mail.

In addition to being the Director of Elections, it is my understanding that Mr. Brater is also an attorney, and is in fact a graduate of the University of Michigan Law School. I am sure that Mr. Brater recalls from his legal training that it is inappropriate to contact a represented party during the pendency of litigation (and your e-mail makes it clear that the subject of the meeting is the very subject of the lawsuit: accessible absentee voting).

I take extreme exception to Director Brater attempting to have an *ex parte* conversation with my represented client. It also extremely troubling that you did not instruct your client as to the inappropriate nature of his communication with Mr. Wurtzel. Given that the Attorney General's Office had advance knowledge of this planned *ex parte* communication make it all the more troubling.

I will let Mr. Wurtzel know that I will be happy to accompany him as his counsel to the meeting.

Regards,

Jason M. Turkish, Esq.*
President and Managing Partner
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*Admitted to Michigan Bar

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From: Grill, Erik (AG) <GrillE@michigan.gov>
Sent: Friday, June 26, 2020 2:43 PM
To: Jason Turkish <Jason.Turkish@nymanturkish.com>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Voter Accessibility Meeting with Director Brater

[EXTERNAL EMAIL--USE CAUTION]

Mr. Turkish,

My understanding is that Director Brater has invited a number of disability advocates—including Mr. Wurtzel--to a meeting on July 1 to discuss accessibility issues for absentee and in-person voting. The meeting is not about the *Powell* case specifically, but in the interests of transparency, we thought you should know about the invitation.

Erik A. Grill
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