

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN**

CHRYSTAL EDWARDS, et al.,

Plaintiffs,

v.

ROBIN VOS, et al.,

Defendants

No. 3:20-cv-00340

**BRIEF OF *AMICUS CURIAE* THE
AMERICAN DIABETES ASSOCIATION
IN SUPPORT OF PLAINTIFFS**

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INTEREST OF AMICUS¹

The American Diabetes Association (“Association”) is a nationwide, nonprofit, voluntary health organization founded in 1940 made up of persons with diabetes, healthcare professionals who treat persons with diabetes, research scientists, and other concerned individuals. The Association’s mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. The Association is the largest non-governmental organization that deals with the treatment and impact of diabetes.² The Association reviews and authors the most authoritative and widely followed clinical practice recommendations, guidelines, and standards for the treatment of diabetes³ and publishes the most influential professional journals concerning diabetes research and treatment.⁴

Among the Association’s principal concerns is the equitable and fair treatment of people with diabetes. 574,000 Wisconsinites have diabetes, 135,000 of whom

¹ *Amicus Curiae* certifies that this brief was authored in whole by counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No party, nor any other person or entity, made any monetary contribution to the preparation or submission of this brief.

² The Association has over 485,000 general members, over 15,000 health professional members and over 1,000,000 volunteers.

³ American Diabetes Association: Standards of Medical Care in Diabetes 2020, *Diabetes Care* 43: Supp. 1 (2020).

⁴ The Association publishes five professional journals with widespread circulation: (1) *Diabetes* (original scientific research about diabetes); (2) *Diabetes Care* (original human studies about diabetes treatment); (3) *Clinical Diabetes* (information about state-of-the-art care for people with diabetes); (4) *BMJ Open Diabetes Research & Care* (clinical research articles regarding type 1 and type 2 diabetes and associated complications); and (5) *Diabetes Spectrum* (review and original articles on clinical diabetes management).

have undiagnosed diabetes,⁵ greatly increasing their health risk from something like the coronavirus. The Association knows through long experience that people with diabetes are frequently unlawfully denied opportunities. In most cases, disenfranchisement is the result not of malice toward those with diabetes, but rather, is a product of misinformation, stereotypes, or lack of attention. Thus, the Association aims to share information about diabetes, its relationship to COVID-19, and the effects of both on the lives of its Wisconsin members to aid this Court in reaching its decision.

As a 501(c)(3) organization, the American Diabetes Association is nonpartisan and does not support or oppose any party or candidate for political office. The Association's interest in this matter is limited to ensuring its members are able to vote in a safe manner.

SUMMARY OF ARGUMENT

Amicus Curiae supports Plaintiffs in their opposition to Defendants' motions to dismiss and writes to supply the Court with information concerning the specific needs of those more vulnerable due to their diabetes. *Amicus Curiae* requests this Court deny Defendants' motions to dismiss, which would surely result in another election that disenfranchises many voters, especially those with disabilities.

⁵ Centers for Disease Control and Prevention, U.S. Diabetes Surveillance System, Diagnosed Diabetes, Total, Adults with Diabetes, Number, Wisconsin <https://gis.cdc.gov/grasp/diabetes/DiabetesAtlas.html#>; Timothy M. Dall et al., *The Economic Burden of Elevated Blood Glucose Levels in 2017 Diagnosed and Undiagnosed Diabetes, Gestational Diabetes Mellitus, and Prediabetes*, 42 DIABETES CARE 9 (September 2019).

ARGUMENT

I. PEOPLE WITH CHRONIC CONDITIONS, SUCH AS DIABETES, ARE AT INCREASED RISK FOR SERIOUS ILLNESS AND DEATH FROM COVID-19.

Preliminary Centers for Disease Control and Prevention (CDC) findings indicate that in the United States, people with underlying health conditions are at a higher risk for severe disease from COVID-19 than people without these conditions. Centers for Disease Control and Prevention, *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 — United States, February 12–March 28, 2020*, 69 *Morbidity and Mortality Wkly. Rep.* 382, (March 31, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm>. People with chronic conditions of all ages face high risks. For those under the age of 65, the presence of an underlying condition, such as diabetes, nearly triples a person’s risk of hospitalization and nearly quintuples the risk of ICU admission. *See id.* (Table 2).

The CDC lists people with diabetes as one of the categories at high risk for serious illness from COVID-19. Centers for Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last updated May 14, 2020). This particularly high risk is substantiated by CDC’s research, which indicates that 26% of patients hospitalized due to COVID-19 had diabetes. *See*

Preliminary Estimates (Table 1). A recent study found that the presence of diabetes quintuples the risk of death. Bruce Bode et al., *Glycemic Characteristics and Clinical Outcomes of COVID-19 Patients Hospitalized in the United States*, J. OF DIABETES SCI. AND TECH., at Page 6, Figure 3, <https://glytecsystems.com/wp-content/uploads/JDST-Glytec-Covid-Research.pdf>. Another study covering nearly the entire population of the U.K. found that people with diabetes made up *one-third* of COVID-19 related deaths. Emma Barron et al, *Type 1 and Type 2 Diabetes and COVID-19 Related Mortality in England: a Whole Population Study*, United Kingdom National Health Service (NHS), May 19, 2020, at 2, <https://www.england.nhs.uk/wp-content/uploads/2020/05/valabhji-COVID-19-and-Diabetes-Paper-1.pdf> (awaiting peer review and publication). As these studies illustrate, diabetes has rapidly emerged as a major comorbidity for COVID-19 severity. The growing body of medical literature depicts the grim reality that people with diabetes face if they contract the coronavirus.

II. BECAUSE OF THE LIFE-THREATENING RISKS TO THEIR HEALTH, THE AMERICAN DIABETES ASSOCIATION'S WISCONSIN MEMBERS ARE FEARFUL OF TRADITIONAL IN-PERSON VOTING.

Kristin Thompson-Lerberg is a registered voter residing in Holmen, Wisconsin. She has lived with type 1 diabetes for 28 years and has a second autoimmune condition. Ms. Thompson-Lerberg is a high school English teacher. As a result of her position, she was among the first to be alerted to the fact that

schools would be closing indefinitely—she was so notified on March 15. After receiving this news, Ms. Thompson-Lerberg realized that the coronavirus was not something that was likely to disappear in the near future, and that her school (and others) were unlikely to remain a polling place. As a result, she immediately requested an absentee ballot to vote in Wisconsin’s April 7 primary. Ms. Thompson-Lerberg was one of the lucky Wisconsin residents to receive her absentee ballot in time to cast it, but countless of her friends and family did not receive their ballots in time to vote by mail.

On May 4, Ms. Thompson-Lerberg requested absentee ballots for the remainder of the year. Her right to vote is incredibly important to her, but she does not want to risk her life and vote in person if, for whatever reason, she does not receive her absentee ballot. Ms. Thompson-Lerberg is currently living her life in a dramatically different way than she would prefer to, in order to protect herself from exposure to the coronavirus. For example, her husband does the vast majority of the grocery shopping and she has not visited with her parents or her sister in person, despite the fact that they live in close proximity and are used to seeing each other regularly. Ms. Thompson-Lerberg stays at home as much as possible even though Wisconsin’s stay-at-home order was struck down. She has continued to abide by these physician-recommended restrictions despite the negative effects on her mental health and quality of life. She would love to hug her family members,

browse the cheese aisle at the grocery store, and even have the traditional, in-person voting experience. But her health remains her first priority, and as a result, she is fearful of what would happen if she does not receive an absentee ballot and would be required to vote in a traditional, in-person environment.

If her absentee ballot did not arrive in time, Ms. Thompson-Lerberg would consider voting in person if there were clear protections in place to ensure that she, a person with a disability, can be safe doing so. However, even after conducting her own research into how to cast her vote in past and future elections, Ms. Thompson-Lerberg was not aware that curbside voting was an available option. Ms. Thompson-Lerberg would feel comfortable voting in person if there was robust and reliable curbside voting available to her.

III. THE AMERICANS WITH DISABILITIES ACT PROHIBITS DISCRIMINATION AGAINST VOTERS WITH DISABILITIES.

A. The ADA has broad, sweeping aims that prohibit more than intentional discrimination.

Congress passed the Americans with Disabilities Act (ADA) with the stated purpose of providing a clear and comprehensive national mandate to eliminate discrimination against individuals with disabilities. *Wis. Cmty. Servs. v. City of Milwaukee*, 465 F.3d 737, 750 (7th Cir. 2006) (citing 42 U.S.C. § 12101(b)(1), (b)(4)). After decades of deliberation and investigation into the need to address discrimination against persons with disabilities, both Houses of Congress passed

the ADA by large majorities. *Tennessee v. Lane*, 541 U.S. 509, 516 (U.S. 2004). The conclusion that Congress drew from the vast body of evidence it considered in passing the ADA was that “[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, *voting*, and access to public services.” 42 U.S.C. § 12101(a)(3) (emphasis added). Congress was explicitly concerned about the ability of citizens with disabilities to exercise their right to vote. *See* H.R. Rep. No. 101-485 at 37 (1990) (people “who cannot get to . . . the voting place cannot exercise their rights and obligations as citizens.”).

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.” 42 U.S.C. § 12132. As the Supreme Court guides in *Tennessee v. Lane*, “it is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.” 541 U.S. at 524–25 (discussing a pattern of unequal treatment in the administration of public programs such as voting, and citing its earlier decision in *Bd. of Trs. v. Garrett*, 531 U.S. 356, 371, n.7 (2001) which acknowledged an “overwhelming majority” of examples in the administration of public programs and services).

Included in Title II's antidiscrimination mandate is an affirmative obligation to do more than simply refrain from intentional discrimination. *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004); *see also Disabled in Action v. Bd. of Elections in N.Y.*, 752 F.3d 189, 200–01 (2d Cir. 2014); *Toledo v. Sanchez*, 454 F.3d 24, 32 (1st Cir. 2006); *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454–55 (5th Cir. 2005); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 488 (4th Cir. 2005). The ADA requires public entities to be “proactive” in their efforts to ensure accessibility. *See Clemons v. Dart*, 168 F. Supp. 3d 1060, 1068 (N.D. Ill. 2016).

The Supreme Court has also clarified that Title II of the ADA targets more than just intentional discrimination. *Lane*, 541 U.S. at 536 (“Congress understood in shaping the ADA [that it] would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.”) (Ginsburg, J., concurring); *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 598 (1999) (Title II advances “a more comprehensive view of the concept of discrimination” than one limited to the traditionally recognized categories of intentional and disparate impact discrimination). *See also Alexander v. Choate*, 469 U.S. 287, 295 (1985) (the Rehabilitation Act was motivated by Congress’s determination that “discrimination against the handicapped . . . [is] most often the product, not of invidious animus, but rather of thoughtlessness and indifference - of benign

neglect.”); *Wis. Cmty. Servs.*, 465 F.3d at 751 (failure to accommodate is an independent basis for liability under the ADA); *Ability Ctr.*, 385 F.3d at 910 (stating that Title II does not merely require public entities to refrain from intentionally discriminating against those with disabilities).

The Legislative Defendants argue in their motion to dismiss that because Defendants did not deny voters ballots *intentionally*, with knowledge that they had disabilities, they did not violate the ADA. Def.’s Mot. to Dismiss 26–27, ECF No. 13. The Supreme Court has expressly rejected this construction of the ADA. *Olmstead*, 527 U.S. at 598 (rejecting the state’s argument that plaintiffs did not face discrimination “by reason of” their disabilities because they were not denied community placement *on account of* those disabilities.”). It is clear: Title II prohibits public entities from administering their programs, even unintentionally, in such a way that excludes individuals with disabilities from the services and benefits they provide.

B. Under the ADA, public entities must not use methods of administration that exclude people with disabilities from participation and must make reasonable modifications to their policies and procedures.

The regulations promulgated pursuant to Title II’s prohibition on the exclusion of persons with disabilities from participation define various forms of prohibited discrimination, including two which are relevant to this case. The first is the requirement that public entities refrain from using “criteria or methods of

administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3). This regulation targets policies and practices, or the absence of policies and practices, which result in the discrimination or exclusion of people with disabilities. *See Dunn v. Dunn*, 318 F.R.D. 652, 664 (M.D. Ala. 2016); *Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 277–78 (D. Conn. 2010) (holding that plaintiffs adequately alleged a "methods of administration" claim where defendants lacked a policy or practice of evaluating residents for community placement readiness). Policies and practices that exclude people with disabilities from participation are actionable even if they are not explicitly required by statute. *See Dunn*, 318 F.R.D. at 664. This "methods of administration" regulation "applies to written policies as well as actual practices, and is intended to prohibit both blatantly exclusionary policies or practices as well as policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate." *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 995 (N.D. Cal. 2010) (citing 28 C.F.R. Pt. 35, App. A). *See also Indep. Living Res. Ctr., Inc. v. City of Wichita*, No. 00-1190, 2002 U.S. Dist. LEXIS 6324, at *2-3 (D. Kan. Mar. 15,

2002) (Plaintiffs stated a claim where they challenged practices that resulted in failures to enforce handicapped parking violations which had the effect of excluding persons with disabilities from the use of said spaces; Defendant’s argument that Plaintiffs had not been excluded on account of their disability was unavailing).

The second pertinent obligation is that public entities must “make reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7). The Seventh Circuit has interpreted this regulation to require public entities to take “prophylactic steps” to avoid discrimination. *Wis. Cmty. Servs.*, 465 F.3d at 753. And as the Second Circuit has observed, “it is not enough to open the door for the handicapped . . . ; a ramp must be built so the door can be reached.” *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982).⁶

Defendants, as public entities, have an affirmative obligation pursuant to 28 C.F.R. § 35.130(b)(3) to ensure that the methods they are using to administer elections do not have the effect of excluding persons with disabilities from participating in voting as well as an obligation to provide reasonable modifications

⁶ *Dopico* was a decision pursuant to § 504 of the Rehabilitation Act; Courts routinely rely on cases construing the ADA and Rehabilitation Act interchangeably. *See, e.g., Hamm v. Runyon*, 51 F.3d 721, 725 (7th Cir. 1995); *Coursey v. Univ. of Md. E. Shore*, 577 Fed. Appx. 167, 173–74 (4th Cir. 2014); *T. W. v. Sch. Bd.*, 610 F.3d 588, 604 (11th Cir. 2010); *Enica v. Principi*, 544 F.3d 328, 338 n.11 (1st Cir. 2008); *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 926 (6th Cir. 2000). Additionally, Congress has directed courts to construe the ADA to grant at least as much protection as the Rehabilitation Act and its implementing regulations. 42 U.S.C.S. § 12201(a).

to election policies and practices pursuant to 28 C.F.R. § 35.130(b)(7). This means ensuring that, in addition to the provision of mail-in ballots, in-person voting must be administered in a way that allows people with disabilities to vote safely in the event they cannot vote by mail.

C. Many reasonable modifications and alternate methods of administration exist to ensure that Wisconsin voters with chronic health disabilities, such as diabetes, can access voting.

The Americans with Disabilities Act does not prescribe the precise contours of all the modifications that government programs and services must make or methods they must use to ensure programs are accessible to people with disabilities. *See* 42 U.S.C. § 12131–12134; 28 C.F.R. § 35.101 et seq; *A.H. v. Ill. High Sch. Ass’n*, 881 F.3d 587 (7th Cir. 2018) (quoting *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002)). In part, this is due to the law’s requirement that modifications must be reasonable, and reasonableness is a highly fact-specific inquiry. *See Oconomowoc Residential Programs*, 300 F.3d at 784.

An ancillary benefit of the way in which the statute and implementing regulations are written is that they create space for innovation and human ingenuity. Creativity has been on full display throughout the coronavirus pandemic. *Global Map of Coronavirus Innovations*, STARTUP BLINK, <https://coronavirus.startupblink.com/> (last visited June 12, 2020). A few notable

examples of Americans' resourcefulness include a restaurant's use of shower curtains to create physical barriers between tables, Austin Horn, *Shower Curtains — And Rubber Duckies — Help One Restaurant Reopen*, NPR (May 15, 2020), <https://tinyurl.com/y8932gec>, and county officials in California using borrowed ticket booths and walkie talkies, set up in a temporarily vacant parking lot, to perform marriage ceremonies, Ada Tseng, *Love in the time of coronavirus: Couples get hitched in parking lot of O.C.'s Honda Center*, L.A. TIMES (April 18, 2020), <https://tinyurl.com/y9peo73e>. In fact, some of the solutions borne of the constraints of the pandemic have demonstrated an improvement over prior ways of doing things. For example, a church found that after it moved its services online, its attendance increased and younger parishioners were more engaged thanks to the online platform's chat function. Michael C. Wenderoth, *The Constraints That Move Us Forward: How Covid-19 Has Sparked Creative Solutions*, FORBES (May 15, 2020), <https://tinyurl.com/ybsx4sz7>.

In these unprecedented times, reasonable modifications for voters with disabilities may look different than they did in a coronavirus-free world. But the change in the nation's circumstances does not obviate the need for modifications—just the opposite. Public entities must factor the current circumstances into their approach to ensuring that people with disabilities can access government programs and services, such as voting. *See Baughman v. Walt Disney World Co.*, 685 F.3d

1131, 1135 (9th Cir. 2012) (requiring that covered entities consider circumstances such as evolving technology that make it easier and cheaper to ensure accessibility because as circumstances change, so too does the reasonableness calculation).

There are many methods the Wisconsin Election Commission and the municipal bodies responsible for administering elections can use to ensure the safety of voters with disabilities and preserve their access to voting. One such method is curbside voting. While curbside voting is already a legally available option in Wisconsin, Wis. Stat. § 6.82(1), the Wisconsin Election Commission could grant authority to municipalities to expand it such that it is a robust and reliable offering, and issue guidance encouraging local communities to clearly communicate to voters how to access curbside voting. Ms. Thompson-Lerberg, for example, was not aware that she could vote curbside, even after conducting research about how to vote. In addition, it is common for polling sites to fail to deliver curbside voting services in a reliable fashion. *See* Protection and Advocacy for People with Disabilities, *Polling Place Accessibility Report* (2014), at 7–8 <https://tinyurl.com/y7senj5w> (finding that poll workers checked the curbside voting location at intervals ranging from “never” to “we wait for people to come in.”). The methods each municipality might use to provide a robust and reliable curbside voting program may differ based on each community’s dynamic. One might envision a reservation system working well in a small community, whereas a

designated, full-time curbside voting poll worker or clerk might be necessary in larger communities. Providing robust and reliable curbside voting is especially likely to be needed if polling locations are limited, as they were in the April primary election, resulting in more voters per polling location and a decreased ability to remain socially distant in order to mitigate the risk of coronavirus transmission. Regardless of the way in which elections might be modified, it is clear that expanding and adapting curbside voting to ensure that it is well advertised, well publicized, readily available and fully reliable is an important method of administration to consider.

Significantly, any methods used to administer accessible elections must be clearly communicated to voters. For purposes of this argument, a public service campaign regarding curbside voting options and protocol would be incredibly useful and a worthwhile investment of resources. Such a campaign would serve two purposes – it would allow voters with disabilities who want to vote on election day the opportunity to plan to do so and be reasonably reassured that a curbside poll worker will be available to assist them. A public service campaign would also serve to provide voters with disabilities notice that even if they do not receive an absentee ballot on time, they have another option and do not have to be disenfranchised if they don't want to risk their health to vote in-person in a polling booth.

D. Individuals with diabetes are likely to be disenfranchised if they cannot vote by mail and Wisconsin does not modify its in-person voting system.

For people living with diabetes, the risks associated with contracting the coronavirus are great, as discussed in Section I, *supra*. It is understandable that people with diabetes would make decisions in accordance with the increased risks they face, as the ADA's member illustrates in Section II, *supra*. In that vein, people with diabetes who cannot vote by mail because they do not receive a ballot, do not have a person to serve as a witness for their absentee ballot, are not able to make a photocopy of their photo ID, are unable to access the technology required to upload a copy of their photo ID, or for any other reason, are more likely to simply refrain from voting in a time of global pandemic unless clear and comprehensive procedures are established to ensure their ability to safely access in-person voting.

Congress determined that when systems are not designed with people with disabilities in mind, people with disabilities cannot and do not participate. H.R. Rep. No. 101-485 at 37 (1990). The ADA is Congress's remedy to this problem. And the remedy does not ask that people with disabilities attempt access at all costs, or require someone to put themselves in harm's way in order to access a public program. *See Lane*, 541 U.S. at 514; *Baughman*, 685 F.3d at 1135; *Thill v. Olmsted Cnty.*, No. 08-cv-4612, 2010 U.S. Dist. LEXIS 87215, at *7 (D. Minn.

Aug. 24, 2010) (“Title II of the ADA does not leave a person with disabilities who manages to crawl up a courthouse’s steps with no remedy for the courthouse’s inaccessibility.”). Going to vote in person, in a traditional, unmodified system during a global pandemic poses extraordinary risks to the lives of people with diabetes, much greater risks than the risk to those without chronic health disabilities. This is an unlawful barrier that violates the ADA. The “ramp” of a robust and reliable curbside voting program is necessary to ensure Plaintiffs are not excluded from participation in Wisconsin’s elections, for which they are fully qualified. *Cf. Dopico*, 687 F.2d at 652. Without something like robust and reliable curbside voting, Defendants cannot “accomplish[] the objectives” of the public entity’s program with respect to individuals with disabilities, 28 C.F.R. § 35.130(b)(3)(ii); and Defendants will fail to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully submits that the Court should deny Defendants' motions to dismiss.

Respectfully submitted,

/s/

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**Motion for admission pro hac vice pending*

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