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A NEW START DOWN AN OLD ROAD TOWARD SUBSTANTIVE VOTER EQUALITY FOR PEOPLE WITH DISABILITIES

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INTRODUCTION

As the June 2020 state primary election in Pennsylvania approached, Joseph Drenth, who is legally blind, faced an untenable choice: vote by mail and sacrifice the ability to cast a private and independent vote, or continue to vote privately and independently at a polling location and sacrifice the health and safety of himself and his family due to the COVID-19 pandemic?[1] Fortunately, a preliminary injunction ordering the state to implement a remote accessible vote-by-mail system made such a choice unnecessary for Mr. Drenth.[2] Unfortunately, voters with disabilities in many other jurisdictions throughout the country were not so lucky. Even as the threat of COVID-19 hopefully moves to our rearview mirrors, Mr. Drenth's successful lawsuit highlighted a critical but underutilized legal tool for ensuring that voters with disabilities are afforded an equal voting experience—including the ability to cast a private and independent ballot—as compared to other voters.

New technology and federal investments over the last few decades have finally enabled Mr. Drenth and millions of other Americans with visual, manual dexterity, and cognitive impairments to cast private and

1. Complaint at 11–12, Drenth v. Boockvar, No. 1:20-CV-00829, 2020 WL 2745729 (M.D. Pa. May 27, 2020).
2. *See Drenth*, 2020 WL 2745729 at *6.

independent votes at their local polling locations.[3] But as with everything else in 2020, COVID-19 threw a deadly wrinkle into voting as usual. Because crowded, poorly ventilated polling places are ideal environments for widespread transmission of COVID-19, the Centers for Disease Control (CDC) encouraged people to use an absentee or mail-in ballot rather than travel to their polling places on election day.[4] Nearly 1.5 million Pennsylvania voters followed the CDC recommendation for the June 2020 primary—or seventeen times the number of Pennsylvanians who voted absentee in the 2016 primary.[5] Most voters did not have to consider any functional difference between their mail-in votes and previous in-person votes. Before court intervention, the same could not be said for Mr. Drenth and other voters who are unable to mark a standard ballot without third-party assistance or assistive technology. For them, a mail-in ballot would have meant the loss of ballot secrecy and independence if the state had not been required to provide accessible absentee ballots that could be read and marked with common technology available on personal computers and other devices.

This kind of disparate treatment of individuals with disabilities is exactly what Congress sought to prevent with passage of the Americans with Disabilities Act of 1990 (ADA).[6] Yet, before 2020, only a small handful of states offered remote accessible vote-by-mail that allowed voters with disabilities the same opportunity to cast private, independent votes as other voters.[7] Advocacy by disability advocates such as the National Federation of the Blind[8] and a global pandemic helped increase that number to twenty-seven states, the District of Columbia, and several counties in Florida for the November 2020 elections.[9] Those jurisdictions

3. *See id*. at *8. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-941, VOTERS WITH DISABILITIES: ADDITIONAL MONITORING OF POLLING PLACES COULD FURTHER IMPROVE ACCESSIBILITY (2009) [hereinafter 2009 GAO SURVEY].

4. *See Recommendations for Election Polling Locations*, CTRS. DISEASE CONTROL & PREVENTION (Mar. 27, 2020) https://web.archive.org/web/20200331140323/https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

5. PA. DEP'T OF STATE, PENNSYLVANIA 2020 PRIMARY ELECTION ACT 35 OF 2020 REPORT, at 4 (2020).

6. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 *et seq*. (2012)).

7. *See, e.g.*, CAL. ELEC. CODE § 3016.5 (West 2020).

8. Letter from Mark A. Riccobono, President, Nat'l Fed'n Blind, to State Sec'ys State (Sept. 27, 2019) (on file with author).

9. The list, as maintained by the National Federation of the Blind, includes Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida (some counties), Hawaii, Illinois (most counties), Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and West Virginia. *See generally Voting Resources*, NAT'L FED'N BLIND,

will hopefully maintain their new systems when the pandemic subsides as Pennsylvania has said it will.[10] But voters in nearly half of states are still restricted from privately and independently casting mail-in ballots.[11] And that is not the only way voters with disabilities are denied equal treatment and dignity in exercising their fundamental right to vote. Others are left with only curbside voting instead of the ability to vote inside their local polling locations,[12] and still others are prevented from voting at a polling location altogether.[13]

In granting Mr. Drenth's request for a preliminary injunction, the U.S. District Court for the Middle District of Pennsylvania became one of the latest federal courts to recognize that providing substantively different voting experiences to voters with disabilities from other voters can violate the ADA and Section 504 of the Rehabilitation Act of 1973 (Rehab Act).[14] This represents a welcome departure from the first two decades of ADA litigation when judges[15] and commentators[16] largely concluded that the ADA guaranteed nothing more than technical equality—namely the ability to cast a vote, regardless if the process for doing so is inferior for individuals with disabilities. The Pennsylvania court's reasoning, and that of several courts that came before it, do not rest on the existence of a global pandemic but on statutory and regulatory promises of substantive equality.[17] Litigants should continue to build on this growing body of case law to ensure that voters with disabilities are afforded an equal opportunity to utilize and enjoy the benefits of the same

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https://nfb.org/resources/voting-resources (last visited Oct. 17, 2021) (providing voting resources and general voting information for each US state).

10. *See Drenth*, 2020 WL 2745729, at *5 (recognizing the need for a preliminary injunction to protect Plaintiffs' right to vote independently and privately).

11. *Voting Laws Roundup: February 2021*, BRENNAN CTR. JUST. (Feb. 8, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021.

12. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18_4, VOTERS WITH DISABILITIES: OBSERVATIONS ON POLLING PLACE ACCESSIBILITY AND RELATED FEDERAL GUIDANCE 16 (2017) (finding that 41% of polling places surveyed with one or more potential physical impediments did not offer curbside voting) [hereinafter 2017 GAO SURVEY].

13. *See, e.g.*, Merrill v. People First of Ala., No. 20A67, 2020 WL 6156545, at *1 (U.S. Oct. 21, 2020) (granting stay of permanent injunction against Alabama enforcing statewide ban on curbside voting); Hoffard v. Cnty. of Cochise, No. CV-20-00243, 2020 WL 6555235, at *1 (D. Ariz. Oct. 22, 2020) (denying preliminary injunction to enjoin defendants from implementing countywide ban on curbside voting).

14. *See Drenth*, 2020 WL 2745729 at *7. *See also* Americans with Disabilities Act § 12101 *et seq.*; Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2018)).

15. *See infra* Section II.A.

16. *See, e.g.*, Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 361 (2003).

17. *See Drenth*, 2020 WL 2745729 at *4–7.

voting methods available to other voters. As the Second Circuit wrote, "The right to vote should not be contingent on the happenstance that others are available to help."[18]

This article proceeds in three parts. Part I summarize the history of voting with a disability and outlines the main federal statutes related to voting rights for individuals with disabilities. Part II explains how federal courts initially narrowed the guarantee of the ADA and the Rehab Act to mere technical equality in a way that denied equal dignity and treatment when voting with a disability. It then analyzes a more recent line of cases that backs away from this early case law to expand the reach of the ADA and Rehab Act to also ensure substantive equality and a fuller, more robust right to vote with a disability. Part III then speculates about broader adherence to a mandate of substantive equality throughout the federal judiciary.

I. THE HISTORY AND CURRENT STATE OF VOTING WITH A DISABILITY

Most retellings of the historical expansion of voting rights in the United States cover three key moments: ratification of the Fourteenth Amendment,[19] which, at least until the end of Reconstruction and the establishment of Jim Crow, ensured the right to vote for Black men; ratification of the Nineteenth Amendment,[20] which initially ensured the right to vote for White women; and finally, passage of the Voting Rights Act of 1965 (VRA),[21] which more fully realized the promises of the Fourteenth and Nineteenth Amendments by beginning the process of dismantling barriers to voting for racial minorities. Often left out of this condensed history are the voting rights of individuals with disabilities, who the law has only relatively recently begun to recognize as equal participants in American democracy.

Six major federal statutes now address barriers to voting with a disability.[22] The Voting Rights Act Amendments of 1982 provide that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a

18. Disabled in Action v. N.Y.C. Bd. of Elections, 752 F.3d 189, 200 (2d Cir. 2014).

19. U.S. CONST. amend. XIV.

20. U.S. CONST. amend. XIX.

21. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

22. For additional discussions of these statutes, see Michael Ellement, *Enfranchising Persons with Disabilities: Continuing Problems, an Old Statute, and a New Litigation Strategy*, 39 T. MARSHALL L. REV. 29, 32–36, 45–47, 52–61 (2013); *see also* Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1499–1505 (2016).

person of the voter's choice."[23] While this was the first time the federal government singled out the voting rights of individuals with disabilities for specific protection, the provision notably does not contain a definition of disability beyond blindness[24] and "is in tension with voters' right to a secret ballot."[25]

Shortly after the VRA Amendments, Congress passed the Voting Accessibility for the Elderly and Handicapped Act (VAEHA)[26] to "promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections."[27] But the VAEHA's guarantees and protections have obvious holes. For one, it permits state and local election officials to ignore in-person accessibility problems by instead merely providing voters alternative means to cast a ballot, such as vote-by-mail or curbside voting.[28] Moreover, it contains "no minimum standards for accessibility" and its legal "remedies are limited."[29] And perhaps most importantly, it did not allocate any federal money to actually expand in-person accessibility despite a recognition that achieving meaningful accessibility standards "could impose substantial costs on States and localities."[30] Five years after passage of the VAEHA Senator David Durenberger noted that many individuals with disabilities were still facing unacceptable barriers to voting at their assigned polling locations.[31] When Congress finally passed comprehensive disabilities rights legislation with the ADA, it justified the new law, in part, on continued and pervasive discrimination against individuals with disabilities "in such critical areas as . . . voting."[32]

The ADA greatly expanded earlier legislative efforts—namely the Rehab Act.[33] While the Rehab Act helped individuals with disabilities

23. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134-35 (codified as amended at 52 U.S.C. § 10508).

24. Belt, *supra* note 22, at 1499.

25. Ellement, *supra* note 22, at 33 n.30.

26. Voting Accessibility for the Elderly and Handicapped Act of 1984, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified as amended at 52 U.S.C. §§ 20101-20107).

27. 52 U.S.C. § 20101.

28. *See* 52 U.S.C. § 20102(b).

29. Belt, *supra* note 22, at 1501.

30. SEN. CHARLES MATHIAS, JR., IMPROVING ACCESS FOR HANDICAPPED AND ELDERLY INDIVIDUALS TO REGISTRATION AND POLLING FACILITIES FOR FEDERAL ELECTIONS, S. REP. NO. 98-590, at 1–2 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2801, 2802.

31. *See Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Comm. on Lab. & Hum. Res. & Subcomm. on the Handicapped*, 101st Cong. 799-801 (1989) (statement of Sen. Durenberger, Chairman, Select Comm. of Intel.).

32. 42 U.S.C. § 12101(a)(3).

33. *See* 29 U.S.C. § 794 (limiting reach of Rehab Act to any program or activity receiving Federal financial assistance).

better access education, healthcare, and some other social services, it had little effect on access to voting at the time of passage (and for many years after) because states and localities administered elections without federal funding.[34] The ADA largely followed the Rehab Act's model, but subjected any "public entity"[35] and "any place of public accommodation"[36] to its anti-discrimination mandate. Courts enforcing the ADA quickly deemed voting and elections to be "services, programs, or activities" covered by Title II of the Act,[37] and many buildings used for polling places are independently covered by Title III.[38] Even so, the ADA's legacy "with respect to voting protection is mixed."[39] For many years, a narrow, instrumentalist view of disability rights and the right to vote blunted the ADA's impact on voter equality.[40] More recent litigation has fortunately begun to beat back this misguided implementation of the ADA and has laid the groundwork to demand that states and localities ensure substantive equality in voting as opposed to mere technical equality.[41]

Since passing the ADA, Congress has passed two other voting specific laws with significant consequences for voters with a disability. First, in 1993, the National Voter Registration Act (NVRA)[42] successfully attempted "to increase voter registration in historically underrepresented communities—including persons with disabilities."[43] Specifically, the NVRA requires every state agency that administers services for persons with disabilities to provide voter registration materials in their offices, or at the homes of individuals with disabilities if that is where the agency normally provides services, and to assist in completing those materials.[44]

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34. That dynamic changed following passage of the Help America Vote Act in 2002, which allocated billions of federal dollars to election administrators in every state. *See* Ellement, *supra* note 22, at 58.

35. 42 U.S.C. § 12132.

36. 42 U.S.C. § 12182(a).

37. *See, e.g.*, Nelson v. Miller, 950 F. Supp. 201, 204 (W.D. Mich. 1996) (quoting 42 U.S.C. § 12132), *aff'd on other grounds*, 170 F.3d 641 (6th Cir. 1999); Lightbourn v. County of El Paso, 904 F. Supp. 1429, 1432 (W.D. Tex. 1995) (quoting 42 U.S.C. § 12132), *rev'd on other grounds*, 118 F.3d 421, 428–31 (5th Cir. 1997).

38. Waterstone, *supra* note 16, at 359.

39. Belt, *supra* note 22, at 1502.

40. *See infra* Section II.A.

41. *See infra* Section II.B.

42. 52 U.S.C. §§ 20501-20511.

43. Ellement, *supra* note 22, at 35; *see also* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 469 (2008) ("Voter registration rose 3.72% nationally between 1994 and 1998.").

44. 52 U.S.C. § 20506(a).

More consequentially, Congress passed the Help America Vote Act (HAVA) in 2002.[45] The legislation imposed clear voter accessibility standards for voters with disabilities and, importantly, provided significant federal funding to ensure compliance across the country.[46] By the end of 2006, states had received $3 billion in HAVA funds and spent 60% of that federal allocation on upgrading their voting systems to bring them in compliance with HAVA's accessibility and security standards[47]—such as ensuring that every polling location has at least one "voting system equipped for individuals with disabilities."[48]

The heart and power of HAVA are its federal grants to states, but it also initiated a much-needed shift in how policymakers and the law conceptualize voting rights for individuals with disabilities. Past legislative efforts like the VRA and VAEHA predicated voting rights on third-party assistance. HAVA rightly rejected that approach and, instead, sought to ensure that voters with disabilities can vote independently in much the same way as other voters.[49] For example, HAVA mandates that federal payments be used to make polling places "accessible to individuals with disabilities, including the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters."[50] But HAVA provides no private right of action to enforce its nondiscrimination and accessibility mandates.[51]

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45. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901-21145).

46. *Id.* at 1669-70.

47. U.S. ELECTION ASSISTANCE COMM'N, REPORT TO CONGRESS ON STATE GOVERNMENTS' EXPENDITURES OF HELP AMERICA VOTE FUNDS 7 (2007), https://www.eac.gov/sites/default/files/eac_assets/1/6/EAC%20Report%20to%20Congress%20on%20State%20Expenditures%20of%20HAVA%20Funds%202003-2006.pdf. As of September 2019, $3.6 billion in federal funds had been awarded and states had spent $3.4 billion of the available funds. U.S. ELECTION ASSISTANCE COMM'N, ANNUAL GRANT EXPENDITURE REPORT: FISCAL YEAR 2019, at 2 (2020), https://www.eac.gov/sites/default/files/paymentgrants/expenditures/2019_EAC_Annual_Grant_Expenditure_Report.pdf.

48. 52 U.S.C. § 21081(a)(3)(B).

49. Belt, *supra* note 22, at 1504; *see also* Arlene Kanter & Rebecca Russo, *The Right of People with Disabilities to Exercise Their Right to Vote Under the Help America Vote Act*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 852, 852 (2006).

50. 52 U.S.C. § 21021(b)(1); *see also* 52 U.S.C. § 21081(a)(3)(A).

51. Waterstone, *supra* note 16, at 382. HAVA's lack of independent private right of action is offset in part by its, perhaps unexpected, interplay with the Rehab Act. *See* Ellement, *supra* note 22, at 58.

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Together these six statutes helped ensure that an estimated 17.7 million Americans with disabilities were able to vote in the November 2020 elections[52]—likely a high watermark in U.S. history.[53] Even so, the "hodgepodge of statutes" and "their lack of enforcement" has led at least one commentator to conclude that "it is difficult to rely upon statutory protection to vindicate the political rights of people with disabilities."[54] Indeed, while the voter turnout rate of people with disabilities has greatly increased in the age of the ADA, NVRA, and HAVA, it still continues to oscillate between five and seven percentage points lower than that of other voters.[55] If we fully closed the gap, there would be around two million more voters.[56]

II. CONTRASTING APPROACHES TO THE ADA AND VOTING RIGHTS

A variety of factors are likely driving the persistent, if shrinking, voter turnout gap between voters with disabilities and the rest of the population.[57] Voting is strongly and positively correlated with education, income, and employment, and people with disabilities tend to have lower educational levels, lower employment levels, and lower earnings.[58]

52. LISA SCHUR & DOUGLAS KRUSE, RUTGERS SCH. OF MGMT. AND LAB. RELS., FACT SHEET: DISABILITY AND VOTER TURNOUT IN THE 2020 ELECTIONS 1 (2021), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/FactSheet_Disability_Voter_Turnout_2020.pdf.

53. *See* LISA SCHUR & DOUGLAS KRUSE, RUTGERS SCH. OF MGMT. AND LAB. RELS., FACT SHEET: DISABILITY AND VOTER TURNOUT IN THE 2016 ELECTIONS 1 (2017), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/Fact%20Sheet%20Disability%20Voter%202016%20Elections.pdf; LISA SCHUR ET AL., RUTGERS SCH. OF MGMT. AND LAB. RELS., DISABILITY, VOTER TURNOUT, AND VOTING DIFFICULTIES IN THE 2012 ELECTIONS 3–4 (2013), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/Disability%20and%20voting%20survey%20report%20for%202012%20elections.pdf; LISA SCHUR & DOUGLAS KRUSE, RUTGERS SCH. OF MGMT. AND LAB. RELS., FACT SHEET: DISABILITY AND VOTER TURNOUT IN THE 2008 ELECTIONS 1 (2009), https://smlr.rutgers.edu/faculty-research-engagement/program-disability-research/disability-and-voting.

54. Belt, *supra* note 22, at 1499.

55. *See* sources cited *supra* notes 52–53. The gap in the 2018 midterm elections was slightly smaller. LISA SCHUR & DOUGLAS KRUSE, RUTGERS SCH. OF MGMT. AND LAB. RELS., FACT SHEET: DISABILITY AND VOTER TURNOUT IN THE 2018 ELECTIONS 1 (2019), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/Fact%20Sheet%20Disability%20Voter%202018%20Elections.pdf.

56. *See* sources cited *supra* notes 52–53.

57. *See* Lisa Schur et al., *Enabling Democracy: Disability and Voter Turnout*, 55 POL. RSCH. Q. 167, 169–71 (2002).

58. *Id.* at 169–70.

Moreover, "many disabilities limit people's physical or mental resources" at the same time that socially constructed barriers "make it [comparatively] harder for people with disabilities to participate in public life."[59] For those reasons, continuing to increase physical access to education, employment, voting, and other societal institutions must remain a core focus. But we also cannot discount the psychological effects of disability and how solutions to increase access address, or fail to address, those effects. In the context of voting, for example, we perhaps should not be surprised that even as states and localities hold out a technical right to vote with a disability, some people with disabilities are still disinclined toward exercising that right given the stigma, discrimination, and social isolation[60] reinforced by the inferior voting methods often available to them.[61]

For much of the ADA's lifespan, many federal courts were inattentive to these psychological effects as well as the ADA's broad promise of equality.[62] In particular, they refused to acknowledge that the law guarantees anything more than the right to cast a ballot, whatever its form or the voting method.[63] This adherence to mere technical equality perpetuated "what is, in effect, 'separate but equal'" treatment of voters with disabilities,[64] and has ultimately failed to address the harms from stigma, discrimination, and social isolation that the ADA was designed to address.

More recently, however, voters with disabilities like Mr. Drenth have been successfully pressing federal courts to change course and blaze a new path that deems mere technical equality in voting insufficient.[65] Instead, these courts have mandated substantive equality by requiring states to offer voters with disabilities the same options to vote as they offer to others.[66] In many ways COVID-19's disruption to voting as usual accelerated progress down this path, even as there have been a few setbacks. This Part summarizes and contrasts an early line of federal cases which held that the ADA guarantees only technical equality with more recent cases that have begun to enforce a broader mandate of substantive equality.

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59. *Id.* at 169 (alteration to original).
60. *See id.* at 170.
61. *See* Belt, *supra* note 22, at 1496–98.
62. *See generally id.* at 1501–02.
63. *Id.*
64. Lightbourn v. County of El Paso, 904 F. Supp. 1429, 1434 (W.D. Tex. 1995), *rev'd on other grounds*, 118 F.3d 421 (5th Cir. 1997).
65. *See* discussion *infra* Section II.A.
66. *See* discussion *infra* Section II.B.

A. An Initial Misguided Approach: Mere Technical Equality

The first two reported federal court decisions to address the ADA's implications for voting and election administration offered vastly different interpretations of the law's legal promises. In *Nelson v. Miller*, the court dismissed plaintiffs' allegations that the Michigan secretary of state violated the ADA by ensuring a secret ballot for sighted voters but not for voters with visual impairments.[67] The court argued that the ADA protected little more than the right to cast a ballot, even if the methods for doing so differed in important ways between disabled and non-disabled voters.[68] *Nelson* explicitly broke from *Lightbourn v. County of El Paso* decided just the year before.[69] In contrast to *Nelson*, the court in *Lightbourn* concluded that the "ADA is about equality" and required state and local election officials to afford all voters the same rights and privileges on election day regardless of disability.[70] If non-disabled voters can vote secretly at the precinct in which they live, states and localities violate the ADA when they fail to provide voters with disabilities the same voting experience absent sufficiently compelling reasons.[71]

The conflicting district court rulings in *Nelson* and *Lightbourn* turned in part on different interpretations of the ADA's interplay with previous protections for voters with disabilities in the VRA and VAEHA. In *Lightbourn*, the court concluded that Congress's passage of the ADA evinced a congressional understanding that the VRA and VAEHA had proven insufficient in addressing problems of voter access.[72] Thus, the ADA should be read in conjunction with those older statutes.[73] The court in *Nelson* explicitly rejected that analysis.[74] It "did not find anything in the ADA to indicate that Congress believed that the Voting Rights Acts were insufficient."[75] As with the VRA and VAEHA, Congress only intended for the ADA to ensure "that blind voters have access to the voting booth and freedom from coercion within the voting booth, not complete secrecy in casting a ballot."[76]

67. Nelson v. Miller, 950 F. Supp. 201, 202, 205 (W.D. Mich. 1996), *aff'd on other grounds*, 170 F.3d 641 (6th Cir. 1999).
68. *Id.* at 204.
69. *Id.* at 204–05; *Lightbourn*, 904 F. Supp. at 1433–34.
70. *Lightbourn*, 904 F. Supp. at 1433.
71. *Id.* at 1433–34.
72. *Id.* at 1432.
73. *Id.*
74. *Nelson*, 950 F. Supp. at 204–05.
75. *Id.* at 205.
76. *Id.*

In the decade following *Nelson* and *Lighbourn*, many federal courts adhered to the *Nelson* position[77] and *Lightbourn*'s analysis was largely forgotten. For example, in *American Association of People with Disabilities v. Shelley*, voters with visual and manual impairments sought a preliminary injunction under the ADA and Rehab Act enjoining California's secretary of state from decertifying electronic voting machines that enabled those voters to vote privately and independently.[78] The court held that plaintiffs were unlikely to succeed on the merits because decertifying the accessible voting machines would not completely deprive them of their fundamental right to vote.[79] In the court's eyes, the ADA only ensured "the opportunity to vote," not the right to "vote in a manner that is comparable in every way with the voting rights enjoyed by persons without disabilities."[80]

In *National Federation of the Blind v. Volusia County*, the court cited *Shelley* favorably and similarly held that plaintiffs were unlikely to succeed on the merits in their claim that the ADA required election officials "to provide voting machines which enable blind persons to vote secretly and independently."[81] The court noted the lack of precedential support for concluding that requiring disabled voters to rely on the assistance of others constituted an ADA violation.[82]

Finally, in *Taylor v. Onorato*, the court adopted *Shelley*'s logic and language almost verbatim, though it did not directly cite that case or any

77. There were some exceptions, to be sure, but procedural defects and subsequent appeals of district court decisions that endorsed substantive equality limited the precedential value and reach of those decisions requiring more than technical equality. *See, e.g.*, Am. Ass'n of People with Disabilities v. Hood, 310 F. Supp. 2d 1226, 1235–40 (M.D. Fla. 2004) (holding that requiring visually and manually impaired voters to vote with third-party assistance violated ADA regulation requiring accessible "facilities," but not ADA's "effective communication" regulation), *rev'd sub nom.*, Am. Ass'n of People with Disabilities v. Harris, 647 F.3d 1093, 1108 (11th Cir. 2011) (vacating judgment upon holding that voting equipment is not a "facility" under relevant ADA regulation); Westchester Disabled on the Move, Inc. v. Cnty. of Westchester, 346 F. Supp. 2d 473, 478, 480 (S.D.N.Y. 2004) (denying preliminary injunction ordering county to make polling places accessible, but writing that failing to ensure individuals with disabilities can vote at their assigned polling places is inconsistent with ADA's guarantee of "meaningful access" to voting process); Am. Ass'n of People with Disabilities v. Smith, 227 F. Supp. 2d 1276, 1291–92 (M.D. Fla. 2002) (noting that allegations of inaccessible voting equipment could state a claim under ADA).

78. Am. Ass'n of People with Disabilities v. Shelley, 324 F. Supp. 2d 1120, 1123–24 (C.D. Cal. 2004).

79. *Id.* at 1131–32.

80. *Id.* at 1125–26.

81. Nat'l Fed'n of the Blind v. Volusia County, No. 605-CV-997, 2005 WL 1712038, *1–2 (M.D. Fla. July 21, 2005).

82. *Id.* at *2.

others in support of its position.[83] As in *Shelley*, the court held that the ADA and Rehab Act "mandate only that disabled persons are given the opportunity to vote."[84] The federal statutes do not "require an accommodation that enables disabled persons to vote in a manner that is comparable in every way with the manner in which persons without disabilities vote."[85]

As others have previously argued, refusing to guarantee anything more than technical equality for voting with a disability has "troubling instrumental consequences"—namely lower voter turnout among individuals with disabilities—and also "offend[s] the policy values of equal dignity."[86] Indeed, the instrumentalist consequences may be intimately tied to the denial of equal dignity. Treating individuals differently when they exercise a fundamental right without good cause "perpetuates 'less than' stereotypes"[87] and contributes to stigma, discrimination, and social isolation that we know depress political and civic engagement.[88]

And of course, technical equality alone also permits more tangible barriers to voting. A U.S. GAO study that reviewed a representative cross-sample of polling locations throughout the country for the 2000 presidential election found that 28% of locations did not offer curbside voting despite having at least one physical impediment that could prevent access for voters with disabilities.[89] Moreover, not a single polling place "had special ballots or voting equipment adapted for blind voters."[90] By 2008, some of those barriers had come down, but many remained. The number of polling places with no potential physical impediments increased by nine percentage points from 2000 to 2008, but roughly the same percentage (27.4%) had potential impediments and still did not offer curbside voting.[91] On the positive side, every polling place had "an

83. Taylor v. Onorato, 428 F. Supp. 2d 384, 388–89 (W.D. Pa. 2006). Not only did the court in *Taylor* fail to cite any favorable precedent, but it also failed to address an earlier district court decision from the same circuit that had denied a motion to dismiss claims alleging ADA violations for purchasing "voting machines that [were] not accessible and independently usable by visually disabled voters" and for selecting "polling places that [were] inaccessible to mobility impaired voters." Nat'l Org. on Disability v. Tartaglione, No. 01-CV-1923, 2001 WL 1231717, at *5–7 (E.D. Pa. Oct. 11, 2001).

84. *Taylor*, 428 F. Supp at 388.

85. *Id.*

86. Waterstone, *supra* note 16, at 365.

87. *Id.* at 366.

88. *See* SCHUR, *supra* note 52, at 170.

89. U.S. GEN. ACCT. OFF., VOTERS WITH DISABILITIES: ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS 7 (2001), https://www.gao.gov/new.items/d02107.pdf.

90. *Id.*

91. 2009 GAO SURVEY, *supra* note 3, at 12.

accessible voting system to facilitate private and independent voting for people with disabilities."[92] But 46% of those "accessible" systems could have been inaccessible to certain voters with mobility impairments.[93]

By permitting a heavy reliance on curbside voting and absentee voting with third-party assistance, mere technical equality ultimately betrays the ADA's broad aims to enable independent and integrated participation in civic life for all.[94] Neither voting method affords the communitarian or expressive benefits of voting with one's neighbors that many voters take for granted. And voting with third party assistance heightens the risk of voter coercion, unnecessarily invades voter privacy, and reinforces a message of dependence to individuals who are fully capable of and interested in exercising personal autonomy. In short, neither voting method is a "completely 'equal' substitute[] for accessible polling places and ballots."[95]

B. A Better Path Forward: Substantive Equality, Too

Despite its shortcomings, a guarantee of mere technical equality in voting long appeared all that federal courts might require under both the ADA and Rehab Act. More recently, however, a growing number of federal courts have started to turn away from *Nelson*, *Shelley*, and *Taylor* and ask more of state and local election administrators under both statutes.[96] For these courts, election administrators must have good reasons for offering most voters a voting method that they do not also offer to voters with disabilities. The turn to substantive equality by these courts began with calls for private and independent voting with a disability, but the consequences extend to other aspects of voting as well, including the communitarian and expressive benefits of voting with others inside a polling location.[97] However, it still remains to be seen whether substantive equality in voting under the ADA and Rehab Act will predominate throughout the federal judiciary.

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92. *Id.* In 2016, however, 5% of polling places surveyed did not have accessible voting systems. 2017 GAO SURVEY, *supra* note 12, at 19.

93. 2009 GAO SURVEY, *supra* note 3, at 12. In 2016, that number increased to 65% of polling places surveyed. 2017 GAO SURVEY, *supra* note 12, at 19.

94. *See* Waterstone, *supra* note 16, at 367 n.116.

95. *Id.* at 369.

96. *See, e.g.*, Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494 (4th Cir. 2016); Disabled in Action v. Bd. of Elections of New York, 752 F.3d 189, 199–200 (2d Cir. 2014); Hindel v. Husted, No. 15-CV-3061, 2016 WL 2735935 (S.D. Ohio May 11, 2016), *rev'd on other grounds*, 875 F.3d 344 (6th Cir. 2017); Cal. Council of the Blind v. Cnty. of Alameda, 985 F. Supp. 2d 1229 (N.D. Cal. 2013).

97. *See Disabled in Action*, 752 F.3d at 199–200.

The turn away from *Nelson*'s limited promise of technical equality and toward a more inclusive substantive equality is substantiated on several, primarily textual, grounds. First, the text of the ADA and Rehab Act prohibit more than the total exclusion from covered programs or services. They also separately prohibit the "deni[al] of the benefits" of covered programs, and generally prohibit "discrimination."[98] The Supreme Court summarized these prohibitions as denying "meaningful access to the benefit the [covered program or service] offers."[99] In closing the ADA's and Rehab Act's door at technical equality, *Nelson*, *Shelley*, and *Taylor* did not recognize the statutes' textual prohibitions beyond outright exclusion from a covered program or service;[100] nor did they cite the Supreme Court's "meaningful access" standard from *Alexander v. Choate*.

Second, federal regulations promulgated to implement the ADA and Rehab Act mirror and reinforce the statutory texts in prohibiting a much broader swath of activity than just complete exclusion from covered programs or services.[101] For example, the "General prohibitions against discrimination" provides that a covered program or service 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;"[102] nor may it "[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others."[103] Moreover, covered programs and services must "take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are

98. 29 U.S.C. § 794; 42 U.S.C. § 12132; *see also Nat'l Fed'n of the Blind*, 813 F.3d at 503–04; *Disabled in Action*, 752 F.3d at 196.

99. Alexander v. Choate, 469 U.S. 287, 301 (1985). Although this standard was developed for claims under the Rehab Act, it is now also used for ADA claims. *See* McElwee v. Cnty. of Orange, 700 F.3d 635, 640 (2d Cir. 2012).

100. Taylor v. Onorato 428 F. Supp. 2d 384, 388 (W.D. Pa. 2006) ("[I]t is clear that they will not be deprived of their fundamental right to vote."); Am. Ass'n of People with Disabilities v. Shelley, 324 F. Supp. 2d 1120, 1125–26 (C.D. Cal. 2004) ("Although it is not disputed that some disabled persons will be unable to vote independently and in private without the use of DREs, it is clear that they will not be deprived of their fundamental right to vote."); Nelson v. Miller, 950 F. Supp. 201, 204 (W.D. Mich. 1996) (same), *aff'd on other grounds*, 170 F.3d 641 (6th Cir. 1999).

101. *See* Nat'l Fed'n of the Blind, Inc. v. Lamone, No.14-CV-1631, 2014 WL 4388342, at *10 (D. Md. Sept. 4, 2014), *aff'd*., 813 F.3d 494 (4th Cir. 2016); *Cal. Council of the Blind*, 985 F. Supp. 2d at 1236–37.

102. 28 C.F.R. § 35.130(b)(1)(ii).

103. *Id.* § 35.130(b)(1)(iii).

as effective as communications with others."[104] That includes a duty to "furnish appropriate auxiliary aids and services where necessary to afford . . . an equal opportunity to participate in, and enjoy the benefits of [the covered program or service]."[105] And such auxiliary aids must be provided "in such a way as to protect the privacy and independence of the individual with a disability."[106]

Recognizing that the statutory and regulatory texts of the ADA and Rehab Act prohibit more than the complete exclusion from a covered program or service is not sufficient on its own, however, to advance a robust vision of substantive equality for voting with a disability. Substantive equality also requires broadly defining the "benefits" of any given voting program.[107] "[A] strict 'instrumentalist' view of voting" limits the benefits of voting to "the ability to cast a ballot and to have that ballot counted."[108] Under such a view, even the complete exclusion from a particular voting method on the basis of disability could be valid under the ADA and Rehab Act so long as at least one method to cast a ballot is available to individuals with disabilities.

Courts, at least in the context of alleged ADA and Rehab Act violations, have begun to define the benefits of voting much more broadly than the traditional instrumentalist view.[109] Their conclusions appear to rest less on some expansive view of the fundamental aspects of voting, and more on an analysis of those aspects of voting which are generally available to voters without disabilities and taken for granted by them.[110] For example, a secret ballot is not inherently fundamental to voting, but

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104. *Id.* § 35.160(a)(1).

105. *Id.* § 35.160(b)(1).

106. *Id.* § 35.160(b)(2). This language was promulgated in 2010 and became effective in 2011. *See* Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,184 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 35). It is unclear whether this change alone is enough to explain the difference in case outcomes between the *Nelson*-line of cases and more recent cases guaranteeing substantive equality in voting. *See Nat'l Fed'n of the Blind, Inc.*, 2014 WL 4388342, at *11 (distinguishing those cases which pre-date 2010 revisions to ADA regulations).

107. *See* Alexander v. Choate, 469 U.S. 287, 301 (1985).

108. Waterstone, *supra* note 16, at 364–65.

109. *See, e.g.*, Disabled in Action v. Bd. of Elections of New York, 752 F.3d 189, 199 (2d Cir. 2014); *Nat'l Fed'n of the Blind, Inc.*, 2014 WL 4388342, at *12; Cal. Council of the Blind v. Cnty. of Alameda, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013).

110. This approach to determining the benefits offered by a program or service covered by the ADA or Rehab Act has also gained purchase as applied to other institutions such as restaurants and other public accommodations. *See, e.g.*, Kalani v. Starbucks Corp., 117 F. Supp. 3d 1078, 1087–90 (N.D. Cal. 2015) (holding that Starbucks violated ADA by positioning accessible tables to face wall because doing so deprived plaintiff of communal and social "Starbucks experience" that was afforded to other patrons), *aff'd in part, vacated in part as moot*, 698 Fed. App'x 883, 886 (2017).

it becomes fundamental in the eyes of the ADA and the Rehab Act when "most voters at the polls cast their ballots in private, without interference by poll workers, the government, or curious onlookers."[111] Similarly, voting in person at one's local polling place is not inherently fundamental to voting,[112] but any benefits derived from voting in that manner come under the protections of the ADA and the Rehab Act when those benefits are available to most voters.[113] One might also add the ability to have one's vote simultaneously verified as cast at a polling location, rather than risking failed delivery or subsequent rejection of a mail ballot, under this conception of a voting method's benefits.[114]

Some of these courts have added an additional, and arguably, unnecessary step to the benefits inquiry. They have first sought to resolve a dispute about the scope of the program or service covered by the ADA and Rehab Act: Is the proper scope the voting program in its entirety (e.g., in-person on election day, early voting, absentee voting, etc.) or only the specific voting method challenged?[115] Defendants have pointed to 28 C.F.R. § 35.150(a) to assert that the reviewing court should consider the voting program in its entirety[116] despite the fact that recent plaintiffs have not asserted violations of this regulation in their claims for substantive equality.[117] The regulation states: "A public entity shall operate each service, program or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities."[118] But as the Fourth Circuit has correctly noted, this regulation only "pertains to 'existing facilities'" and "simply provides that a public entity does not have to make each of its facilities

111. *Cal. Council of the Blind*, 985 F. Supp. at 1238; *see also Nat'l Fed'n of the Blind, Inc.*, 2014 WL 4388342, at *12.

112. Indeed, California, Colorado, Hawaii, Nevada, Oregon, Utah, Vermont, and Washington conduct their elections entirely by mail. *See All-mail Voting*, BALLOTPEDIA, https://ballotpedia.org/All-mail_voting (last visited Nov. 7, 2021).

113. *See* United Spinal Ass'n v. Bd. of Elections of New York, 882 F. Supp. 2d 615, 624 (S.D.N.Y. 2012), *aff'd sub nom*; Disabled in Action v. Bd. of Elections of New York, 752 F.3d 189, 198–99 (2d Cir. 2014).

114. *See* Merrill v. People First of Ala., 141 S. Ct. 25, 26 (2020) (Sotomayor, J., dissenting) (mem.); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 212 n.4 (2008) (Souter, J., dissenting); People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1091 (N.D. Ala. 2020).

115. *See, e.g.*, Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494, 503–05 (4th Cir. 2016); Hindel v. Husted, No. 2:15-CV-3061, 2016 WL 2735935, at *5 (S.D. Ohio May 11, 2016), *rev'd on other grounds*, 875 F.3d 344 (6th Cir. 2017).

116. *Nat'l Fed'n of the Blind*, 813 F.3d at 504; *Hindel*, 2016 WL 2735935, at *5.

117. *See infra* note 134 and accompanying text.

118. 28 C.F.R. § 35.150(a) (emphasis added).

accessible as long as individuals with disabilities have access to that entity's offered public services."[119]

Even if defendants were right that courts should consider the voting program in its entirety when adjudicating ADA and Rehab Act claims, the end result should not differ one way or another so long as courts properly define the benefits of the program.[120] Take the benefit of private and independent absentee voting as an example. If the program or service is defined as the specific method of absentee voting, elections administrators deny a benefit of that program or service to disabled voters when private and independent absentee ballots are only available to non-disabled voters. If, on the other hand, the program or service is defined as the voting program in its entirety, the existence of private and independent in-person voting does not save election administrators from transgressing the ADA and Rehab Act. The benefits of the voting program in its entirety include private and independent voting on election day as well as private and independent voting at one's convenience via an absentee ballot. Election administrators run afoul of the ADA and Rehab Act when they only make one benefit available to voters with disabilities but make both benefits available to others.[121]

Defining the benefits of voting in this way and faithfully adhering to statutory and regulatory prohibitions to the denial of benefits on the basis of disability should result in a guarantee of substantive equality under the ADA and Rehab Act. That "voters with disabilities are able to cast a ballot in some way, shape, or form" no longer becomes a defense to affording one set of voting methods to voters without disabilities and another, inferior set of methods to voters with disabilities.[122] So, for example, election administrators violate the ADA and the Rehab Act when they require individuals with disabilities to rely on third-party assistance to vote absentee despite available accommodations for private, independent voting that are reasonable and do not fundamentally alter or impose an undue burden on the overall voting program.[123] The same is true when election administrators require third-party assistance to vote at a polling location or deny access to in-person voting altogether.[124]

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119. *Nat'l Fed'n of the Blind*, 813 F.3d at 504.

120. *See id.* at 503 n.6.

121. *See id.*

122. United Spinal Ass'n v. Bd. of Elections of New York, 882 F. Supp. 2d 615, 623 (S.D.N.Y. 2012).

123. *See* Hindel v. Husted, 875 F.3d 344, 348–49 (6th Cir. 2017); *Nat'l Fed'n of the Blind*, 813 F.3d at 507–10.

124. *See* Disabled in Action v. Bd. of Elections of New York, 752 F.3d 189, 202 (2d. Cir. 2014); Cal. Council of the Blind v. Cty. of Alameda, 985 F. Supp. 2d 1229, 1242 (N.D. Cal. 2013).

The growing body of case law mandating substantive voter equality under the ADA and Rehab Act proved a powerful tool in greatly expanding the availability of private and independent absentee voting in the face of the COVID-19 pandemic. Advocacy by the National Federation of the Blind, which emphasized state and local government obligations under *National Federation of the Blind* v. *Lamone* and *Hindel v. Husted*, prompted a number of jurisdictions to voluntarily implement remote accessible absentee voting systems.[125] Several others agreed to settlements or consented to judgment following lawsuits.[126] And still others unsuccessfully fought motions for preliminary injunctions.[127]

COVID-19 certainly heightened the immediate need for accessible absentee voting and provided a useful rhetorical flourish in lawsuits alleging ADA and Rehab Act violations, but the existence of COVID-19 was by no means necessary for plaintiffs to sustain all of their claims. Generally providing independent and private absentee voting but failing to do so for voters with disabilities is just as much an ADA and Rehab Act violation before the COVID-19 pandemic as it is during the pandemic.[128] In any case, successful legal advocacy during COVID-19 has highlighted what has recently become a solid foundation for making good on the ADA's and Rehab Act's promises of substantive equality.

III. ROADBLOCKS TO SUBSTANTIVE EQUALITY?

Momentum in recent years has clearly been building in support of substantive equality. Yet, it has not yet achieved universality. As discussed above, three U.S. Court of Appeals have required substantive equality under the ADA and Rehab Act when it comes to voting, but most of the others have not weighed in on the issue. Moreover, the Supreme Court passed on its one opportunity to enforce substantive equality for 2020 elections in at least one state.[129]

The Sixth and Eleventh Circuits are the only other courts of appeals to touch on these issues. The last reported Sixth Circuit opinion on the

125. *See supra* notes 7–11.

126. *See, e.g.*, Judgment, Rivero v. Galvin, No. 1:20-CV-11808 (D. Mass. Oct. 13, 2020), ECF No. 14; Partial Consent Judgment and Decree, Gary v. Va. Dep't of Elections, No. 1:20-CV-00860 (E.D. Va. August 28, 2020), ECF No. 39; Stipulation and Consent Order Resolving Plaintiffs' Motion for Temporary Restraining Order, Nat'l Fed'n of the Blind of Mich. v. Benson, No. 20–11023 (E.D. Mich. May 1, 2020), ECF No. 24.

127. *See, e.g.*, Taliaferro v. N.C. State Bd. of Elections, 489 F. Supp. 3d 433, 440 (E.D.N.C. 2020); Drenth v. Boockvar, No. 1:20-CV-00829, 2020 WL 2745729, at *5 (M.D. Pa. May 27, 2020).

128. *See* 28 C.F.R. § 35.150(a) (emphasis added).

129. *See* Merrill v. People First of Ala., 141 S. Ct. 25, 26 (2020).

issue, however, is two decades old and did not squarely address election administrators' obligations under the ADA and the Rehab Act.[130] The court ignored whether the ADA independently required the state to offer private and independent voting to individuals with disabilities when it offered that type of voting to others. Instead, the court only asked whether the state violated a state constitutional right to a secret ballot.[131]

The relevant Eleventh Circuit opinion is more recent and on point.[132] The court of appeals reversed a district court judgment, which had held defendants liable under the ADA regulation 28 C.F.R. § 35.151(b) for purchasing new voting equipment that did not allow individuals with visual and manual impairments to vote without assistance, "on the ground that voting machines are not 'facilities' under [the regulation]."[133] Litigants in other circuits that have successfully advanced claims for substantive equality under the ADA and Rehab Act have not relied on 28 C.F.R. § 35.151 so *Harris* may not be much of a roadblock moving forward. On the other hand, the court of appeals did not disturb the district court's holdings against plaintiffs' claims that inaccessible voting equipment violated the ADA's effective communication regulation as well as the so-called "generic" discrimination prohibition in the statutory text of the ADA.[134] Indeed, the court of appeals' statement that "the Plaintiffs '[had] been afforded an equal opportunity to participate in an [sic] enjoy the benefits of voting,'"[135] even though plaintiffs were unable to cast a private and independent vote, puts the Eleventh Circuit at direct odds with the guarantee of substantive equality in *Disabled in Action*, *Lamone*, and *Hindel*.[136] Then again, plaintiffs had not appealed those aspects of the district court's judgment.[137]

A recent case out of Alabama precipitated by COVID-19 sheds some light on where the Eleventh Circuit might now stand nearly a decade removed from *Harris*. The district court for the Northern District of

130. *See generally* Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999).

131. *See id.* at 650.

132. *See generally* Am. Ass'n of People with Disabilities v. Harris, 647 F.3d 1093 (11th Cir. 2011).

133. *Id.* at 1095–96.

134. *Id.* at 1107–08; *see also* Am. Ass'n of People with Disabilities v. Hood, 310 F. Supp. 2d 1226, 1236–40 (M.D. Fla. 2004), *rev'd sub nom.* Am. Ass'n of People with Disabilities v. Harris, 647 F.3d 1093 (11th Cir. 2011).

135. *Harris*, 647 F.3d at 1108.

136. *See generally Disabled in Action*, 752 F.3d; *Lamone*, 813 F.3d; *Hindel*, 2016 WL 2735935.

137. *Harris*, 647 F.3d at 1108. The result also would likely have been different if the previous version of the ADA's effective communication regulation had not still be in effect at the time of litigation. *See Lamone*, 2014 WL 4388342, at *10, *aff'd*., 813 F.3d 494 (4th Cir. 2016); *Cal. Council of the Blind*, 985 F. Supp. 2d at 1236–37.

Alabama held that the Alabama secretary of state violated the ADA by banning curbside voting during the COVID-19 pandemic because the ban had the effect of preventing some voters with disabilities from voting in person due to the high health risks COVID-19 poses to them.[138] The court of appeals denied a motion for stay of the district court's injunction as to the curbside voting ban even as it granted stays as to other aspects of the injunction.[139] But Judge Barbara Lagoa dissented to the denial of a stay.[140] Judge Lagoa did not issue an opinion with her dissent so it is unclear whether she disagreed on the merits of the ADA claim or had other reasons for voting to grant a stay. Many conservative jurists[141] and legal commentators[142] express apprehension about federal courts "meddling" with state election laws, especially only a few weeks from election day. That argument, often called the *Purcell* principle,[143] may have formed the basis of Judge Lagoa's dissent.[144] It is also possible, however, that she disagreed on the merits.

The Supreme Court's grants of stays to both the preliminary and permanent injunctions issued by the district court in the Alabama case raise similar questions and concerns. On July 2, 2020, the Court granted a stay to the preliminary injunction issued on June 15 that would have impacted a July 14 election.[145] The stay of the permanent injunction came less than two weeks before the November 2020 election.[146] The justices in the majority may have had the *Purcell* principle in mind for both stays, but neither majority offered any written opinions for their decisions so we can only guess what role, if any, the merits of the ADA claim had on

138. *See* People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1156–63 (N.D. Ala. 2020).

139. People First of Ala. v. Merrill, No. 20-13695-B, 2020 WL 6074333, at *1 (11th Cir. Oct. 13, 2020).

140. *Id.* at *1 n.2.

141. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206–08 (2020).

142. *See* Zack Smith & Hans A. von Spakovsky, *The 11th Circuit Again Quashes Judge's Continued Election Meddling in Alabama*, HERITAGE FOUND. (Oct. 18, 2020), https://www.heritage.org/courts/commentary/the-11th-circuit-again-quashes-judges-continued-election-meddling-alabama.

143. *See generally* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427 (2016).

144. The state appellants made this argument in their motions for stays. *See* Time Sensitive Motion for Admin. Stay & Stay Pending Appeal at 8–11, *People First of Ala.*, 2020 WL 6074333 (11th Cir. Oct. 13, 2020); Emergency Application for Stay at 11–17, Merrill v. People First of Ala., No. 20A67 (U.S. Oct. 15, 2020). Judge Britt C. Grant also cited similar concerns in a concurrence denying a stay of a preliminary injunction earlier in the case. *See People First of Ala.*, 815 F. App'x 505, 516 (11th Cir. 2020) (Grant, J., concurring).

145. *See* Merrill v. People First of Ala., 141 S. Ct. 190 (2020) (mem.). The four liberal justices at the time would have denied the application for stay. *Id.*

146. *See id.*

the result. The three liberal dissenters, on the other hand, argued that *Purcell* did not justify a stay.[147] They also made clear that the plaintiffs' ADA claims against the curbside voting ban were sound because the state was denying certain voters with disabilities the benefits of in-person voting that the state was affording to other voters.[148] Only time will tell whether any of the six conservative justices agree that the ADA guarantees substantive equality in voting.

At least one other COVID-related case from 2020 also raised some question marks about the universal embrace of substantive equality under the ADA and Rehab Act. In *Hoffard v. County of Cochise*,[149] a plaintiff with physical disabilities and a heightened risk of suffering severe illness from COVID-19 sought a preliminary injunction enjoining county election officials from implementing a blanket ban on curbside voting for the November 2020 election.[150] The court found that the plaintiff was unlikely to prevail on the merits of her ADA claim and denied relief.[151] Although the court concluded that curbside voting was not a reasonable modification given logistical hurdles,[152] it also made troubling statements that indicate an adherence to mere technical equality. For example, the court saw no issue with a state policy that permitted counties to deny voters with disabilities the benefit of voting in-person at their assigned polling location when no accessible polling locations were available in the county.[153] Moreover, the court emphasized that the plaintiff would not be completely denied her opportunity to cast a ballot without acknowledging that she would be denied the benefits of in-person voting available to others.[154] Even if the *Purcell* principle[155] and higher standard of review for issuing a preliminary injunction played roles in the court's disposition here, these statements by the court make clear that substantive equality has not yet fully won the day.

147. *See id.* at 26–27 (Sotomayor, J., dissenting).
148. *See id.*
149. No. CV-20-00243-TUC-SHR, 2020 WL 6555235 (D. Ariz. Oct. 22, 2020).
150. *See id.* at *1–2.
151. *Id.* at *5, *7.
152. *Id.* at *5.
153. *Id.* at *4.
154. *Id.* at *5–6.
155. *See id.* at *6 (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) in its analysis).

CONCLUSION

Much has changed over the now more than thirty-year existence of the ADA.[156] That includes a profound increase in meaningful access to the ballot box. Yet, continued barriers to voting with a disability, and the differences between what many voters take for granted with their voting experiences and what voters with disabilities often experience, make clear that the ADA has yet to fulfill its promise in the context of voting and elections. Recent litigants in a number of jurisdictions have successfully persuaded some federal courts to discard previously applied but ultimately erroneous and offensive notions of what constitutes voter equality under the ADA. The broader notion of substantive voter equality under the ADA to which these courts have adhered appears to be on the cusp of becoming the universal norm, but there may yet be a few road bumps ahead. The statutory and regulatory texts of the ADA as well as its overall aim to fully integrate individuals with disabilities into public life should provide future litigants all they need to successfully navigate those potential bumps. Their success would bring us back from the twenty-five-year detour after *Lightbourn v. County of El Paso* and could go a long way to finally eliminating what that court correctly called a "separate but equal" system for voting with a disability.[157]

156. *See generally* Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CAL. L. REV. ONLINE 308 (2020).

157. Lightbourn v. County of El Paso, 904 F. Supp. 1429, 1434 (W.D. Tex. 1995), *rev'd on other grounds*, 118 F.3d 421, 428–431 (5th Cir. 1997).