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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 The NATIONAL FEDERATION OF
17 THE BLIND, The AMERICAN
18 COUNCIL OF THE BLIND, and
19 DARRELL SHANDROW,

20 Plaintiff,

21 vs.

22 The ARIZONA BOARD OF REGENTS
23 and ARIZONA STATE UNIVERSITY

24 Defendants.

Case No: CV09-01359 GMS

**DEFENDANTS' OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION**

(Assigned to Honorable G. Murray Snow)

25 Defendants Arizona Board of Regents (ABOR) and Arizona State University
26 (ASU) oppose Plaintiffs' Motion for Preliminary Injunction. ASU has not prevented or
27 excluded any blind student from participating in the Human Event classes that will pilot
28 Kindle DX, and therefore Plaintiffs cannot establish either success on the merits or the
likelihood of any irreparable harm. Plaintiff Shandrow has not applied to participate in
the pilot, and he is not otherwise qualified. The plaintiff organizations will suffer no
irreparable harm, nor would the requested relief prevent the pilot from continuing in
other jurisdictions. The balance of equities weighs in favor of ASU, which has already

1 entered into an agreement with Amazon, announced and planned for the pilot project,
2 has purchased Kindle devices, has registered students, and has notified them of their
3 participation. An injunction is also directly contrary to the public interest, as it will
4 prevent ASU from testing the Kindle DX in an actual classroom and from providing
5 feedback to Amazon on a number of issues, *including accessibility for the blind and*
6 *other disabled students.*

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION.**

9 The real target of this litigation is not ASU, but Amazon. The plaintiff
10 organizations have been trying to convince Amazon to produce the Kindle with
11 accessible menus and controls, which ASU certainly does not oppose. Amazon has
12 released a statement indicating that they are working on this issue, but have not indicated
13 when they expect to release an accessible version. Rather than partner with ASU to
14 provide usable feedback to Amazon about the Kindle, Plaintiffs have chosen to try to
15 stop progress altogether, regardless of the harm this may cause other students or ASU.

16 The ASU course participating in the Kindle DX pilot remains just as accessible to
17 blind students as it has been in the past. In previous years, and in those sections not
18 participating in the Kindle DX pilot, sighted students obtain course materials through
19 printed texts. The Kindle DX is simply a different means for delivering a printed book.
20 Blind students already obtain course materials through a variety of other means. Blind
21 students will continue to receive course materials as they have in the past. To the extent
22 that the Kindle DX is less accessible to blind students, it is no less accessible than the
23 printed texts that sighted students would otherwise use.¹

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27 ¹ The Kindle DX is probably more accessible than a printed book. If a blind person has
28 personal assistance moving through the menus to the desired publication, the student can
use the text-to-speech feature, which printed books obviously do not have.

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II. FACTS.

ASU is one of seven institutions partnering with Amazon to pilot the use of the Kindle DX on a limited basis and to provide feedback to Amazon about the experience. (Ex. 1 at ¶ 3.) It is, quite simply, an experiment scheduled to last for a single academic year. ASU is limiting its participation to a maximum of fifty-eight students enrolled in the Human Event. (Ex. 1 at ¶4 & Ex. 2 at ¶ 4.) The Human Event is a two-semester course required for, and limited to, students in the Barrett Honors College. (Ex. 2 at ¶2.) Students must apply and be accepted to the Barrett Honors College, which chooses academically outstanding students. (Id.) Generally, the course explores and discusses the classic questions that humankind has wrestled with throughout the ages. (Id.) The readings start with ancient texts, such as Homer, and move forward through time over the two semesters. (Id.)

In the fall semester of 2009, ASU is offering forty-seven different sections of the Human Event at various times and on a Monday, Wednesday, Friday or Tuesday and Thursday schedule. (Ex. 2 at ¶3.) Roughly 900 students will take the class. (Ex. 2 at ¶3.) Each section will have approximately twenty to twenty-five students. (Id.) ASU will pilot the Kindle DX in three sections of this class, each taught by Professor Ted Humphrey. (Ex 2 at ¶¶4 & 7.) At this time all three pilot sections are full, and no blind students are enrolled (and none sought to be enrolled). (Ex 2 at ¶7.) In fact, no blind students have registered in the Barrett Honors College freshman class for the 2009-2010 academic year. (Ex. 3 at ¶9.)

Registration materials did not separately list or designate the Kindle DX pilot sections. (Ex. 2 at ¶6.) They were open to registration just like any other Human Event section. (Id.) Although a few students learned about the pilot and were informed which sections were participating, most students did not know that they had registered for a

1 pilot course until they received a letter from Dr. Humphrey. (Id.) ASU made no effort
2 to screen any disabled students from these sections. (Ex. 2 at ¶8.)

3 Participating students will receive a Kindle DX and will obtain course texts on
4 their Kindle DX through Amazon. (Ex. 2 at ¶5.) In exchange for receiving the Kindle
5 DX device, the students will agree to provide feedback on the experience to ASU and
6 Amazon. (Id.) The pilot will continue in the spring semester with the second half of the
7 Human Event course, and will involve the same students. (Id.) Professor Humphrey
8 will not grade students on their ability to use, or their preference for, the Kindle DX.
9 (Ex. 2 at ¶9.)

10 ASU's Disability Resource Center (DRC) was and is fully prepared to
11 accommodate any blind students who enroll in a Human Event class using Kindle DX,
12 although to date no such students exist and the pilot classes are full. (Ex. 3 at ¶8.) DRC
13 can obtain the same texts from the same publisher in either an electronic or hard copy
14 format and then can convert it to the student's preferred delivery method. The texts on
15 the reading list do not contain significant charts, graphs, or mathematic and scientific
16 symbols and formulas. Thus, these texts can be converted in a matter of days, not weeks
17 or months. (Ex. 3 at ¶4.) Blind students can use the same technology that they will need
18 for their other courses and thus they will not be required to purchase any additional
19 equipment.

20 Plaintiffs tout the Kindle DX's alleged superiority (and hence the supposed unfair
21 advantage to sighted students) due to its ability to hold a number of otherwise heavy
22 texts, as well as its wireless internet access, which will allow students to instantly look
23 up words or connect to sites such as Wikipedia. When it comes to condensing books to
24 electronic format, however, blind students are already well ahead of the sighted world.
25 Blind students already have a number of electronic devices available to them on which
26 they can download searchable electronic versions of multiple books and then convert
27 them to speech or to Braille. (Ex. 3 at ¶5.) One example is the Braille notetaker and
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1 reader. The following web address connects to a video clip, produced by Bookshare
2 (another popular source of books for the print disabled), demonstrating this technology.
3 <http://www.youtube.com/watch?v=fdxL88jXQjE&feature=related> . Blind ASU students
4 also have the same ability as Kindle users to instantly look up words or to access other
5 research sites on the internet. Blind students can access these sources with a laptop
6 computer, rather than the Kindle DX. ASU students have access to free wireless internet
7 service all over campus. (Ex. 3 at ¶5.)

8 In short, the pilot will not harm any students and will potentially help many.

9 **III. Plaintiffs Cannot Establish Grounds for a Preliminary Injunction.**

10 A plaintiff seeking a preliminary injunction must establish (1) that he is likely to
11 succeed on the merits, (2) he is likely to suffer irreparable harm absent relief, (3) the
12 balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter*
13 *v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374 (2008).

14 **A. Plaintiffs are Unlikely to Succeed on the Merits.**

15 **1. Plaintiff Shandrow Has No Standing.**

16 To establish standing to sue, a plaintiff must demonstrate “a sufficient personal
17 stake in the outcome.” *Fleck and Assoc., Inc. v. Phoenix*, 471 F.3d 1100, 1103 (9th Cir.
18 2006). The plaintiff must allege “(1) a threatened or actual distinct and palpable injury
19 to [himself]; (2) a fairly traceable causal connection between the alleged injury and the
20 ... challenged conduct; and (3) a substantial likelihood that the requested relief will
21 redress or prevent the injury.” *Id.*, 471 F.3d at 1104 (internal citation omitted). The
22 element, sometimes described as “injury in fact,” necessitates a showing of “an invasion
23 of a legally protected interest” that “affect[s] the plaintiff in a personal and individual
24 way.” *Id.* (internal citation omitted). A plaintiff seeking to invoke federal court
25 jurisdiction must plead the *he* has suffered some cognizable injury to make the threshold
26 showing of a case or controversy. *See id.*

1 Plaintiff Shandrow cannot establish an injury in fact. The Kindle DX pilot is
2 limited to the Human Event course in the Barrett Honors College. Plaintiff Shandrow is
3 a junior in the School of Journalism and is therefore ineligible for the Human Event
4 course. (Ex. 3 at ¶10 and Plaintiff’s Motion at 2.) No class that Plaintiff Shandrow
5 could enroll in is participating in the Kindle pilot. (Ex. 1 at ¶4.) Thus Plaintiff
6 Shandrow has suffered no injury in fact, nor would the issuance of a preliminary or
7 permanent injunction prevent or redress any injury he may suffer.

8 **2. The Plaintiffs Cannot Succeed on Their Discrimination Claims**
9 **Because No Plaintiff or Members of the Plaintiff Organizations**
10 **Are Excluded From the Kindle DX Pilot or the Human Event**
11 **Course Because of Their Disabilities.**

12 ASU has neither violated nor threatened to violate Title II of the Americans with
13 Disabilities Act (ADA) or the Rehabilitation Act. ASU has no policy or practice of
14 excluding any disabled individuals from participating in the Barrett Honors College or
15 the Human Event course. Title II of the ADA prohibits discrimination in education:

16 No qualified individual with a disability shall, by reason of
17 such disability, be excluded from participation in or be
18 denied the benefits of the services, programs, or activities of
19 a public entity, or be subjected to discrimination by any such
20 entity.

21 42 U.S.C. § 12132. Title II applies to state and local agencies, including publicly funded
22 universities, such as ASU. *See Zukle v. Regents of the University of California*, 166 F.3d
23 1041, 1045 (9th Cir. 1999).

24 Section 504 of the Rehabilitation Act prohibits discrimination by recipients of
25 federal funds:

26 No otherwise qualified individual with a disability ... shall,
27 solely by reason of her or his disability, be excluded from the
28 participation in, be denied the benefits of, or be subjected to
discrimination under any program or activity receiving
Federal financial assistance ...

29 U.S.C. § 794.

The standards for establishing a claim under Title II of the ADA and Section 504
of the Rehabilitation Act are essentially the same. *See Zukle*, 166 F.3d at 1045 n.11.

1 The plaintiff must show: (1) a disability under the Act; (2) that he or she is “otherwise
2 qualified” for the program or activity; (3) dismissal or exclusion from the program or
3 activity because of the disability; and (4) that the school receives federal financial
4 assistance and is a public entity. *See id.*, 166 F.3d at 1045. ASU and ABOR do not
5 dispute that ABOR is a public entity that receives federal financial assistance and that
6 ASU is an institution under ABOR’s governance. Nor does ASU dispute that a blind
7 student is disabled under both acts.

8 Plaintiff Shandrow’s discrimination claim fails immediately and for the same
9 reason that he has no standing. Shandrow is not a qualified individual. A qualified
10 individual, for purposes of postsecondary education, is “a handicapped person who
11 meets the academic and technical standards requisite to admission or participation in the
12 recipient’s education program or activity.” 45 C.F.R. 84.3(1)(3). Only students in the
13 Barrett Honors College are eligible to participate in the Kindle DX pilot; Plaintiff
14 Shandrow is not a student in the Barrett Honors College. He therefore does not meet the
15 academic requirements.

16 Although it is purely hypothetical at this point, qualified blind students may
17 participate in any section of the Human Event, including those piloting the Kindle DX.
18 Registration materials did not separately designate the sections piloting the Kindle DX,
19 nor did they list sight as a prerequisite. (Ex. 2 at ¶¶ 6 and 8.) No blind students have
20 been excluded. (Ex. 2 at ¶7.)

21 Plaintiffs contend (at 10) that that the Kindle pilot would violate the Acts’
22 implementing regulations because it would afford blind students an unequal opportunity
23 to participate and would provide a service that is not as effective in affording equal
24 opportunity. (Citing 28 C.F.R. 35.130(b)(1) and 34 C.F.R. 104.4(b)(1).) Plaintiffs cite
25 no case, however, in which these regulations have been used to prohibit the use or mere
26 testing of a new technology. Nor have Defendants found such a case. The law does not
27 require identical access:

1 For purposes of this part, aids, benefits, and services, to be
2 equally effective, are not required to produce the identical
3 result or level of achievement for handicapped and
4 nonhandicapped persons, but must afford handicapped
5 persons equal opportunity to obtain the same result, to gain
6 the same benefit, or to reach the same level of achievement,
7 in the most integrated setting appropriate to the person's
8 needs.

9 34 C.F.R. 104.4(b)(2). Plaintiffs' arguments thus hinge on their sheer speculation that
10 the accommodations blind students currently use will be less effective in conveying the
11 Human Event course content than the Kindle DX. No one knows whether that is true. In
12 fact, ASU is conducting the pilot, in part, to determine whether the Kindle DX is as
13 effective as traditional texts and whether students like using it. (See Ex. 1 at ¶6.)
14 Plaintiffs can provide no evidence that blind students supplementing Kindle by accessing
15 the texts on other electronic devices will not be able to achieve the same benefit, result,
16 or understanding of the Human Event course as their Kindle DX-using peers.

17 Plaintiffs' complaint and motion allege delays in the time it takes to obtain
18 accessible texts and Plaintiffs complain about the quality of those materials. Plaintiffs
19 have thus far offered no affidavits or evidence to support those allegations, nor will they
20 be able to do so, particularly with regard to DRC's ability to provide course materials for
21 the Human Event. If a blind student wanted to scan and covert those materials, the DRC
22 could meet that request in a few days due to the nature of those texts. (Ex. 3 at ¶ 4.) The
23 materials would then be available to the blind student on the technology that the student
24 is currently using. Such a student, using an already familiar technology, might even
25 have a technological advantage over his Kindle DX-using classmate who is trying to
26 adjust to reading texts and making notes on an electronic screen, as opposed to a
27 standard textbook. Even if the DRC's services were less than ideal, Plaintiffs' requested
28 relief would do nothing to resolve those issues.

As an alternative to participating in a pilot section, a hypothetical blind student
can achieve the full benefit of the Human Event course by registering in a non-pilot
section. For the 2009-2010 academic year, there are forty-seven sections of the Human

1 Event offered to students in the Barrett Honors College. (Ex. 2 at ¶3.) Of those, only
2 three will participate in Kindle DX pilot and of the 900 students taking the Human Event
3 course, only fifty-eight will participate in the pilot. (Ex. 2 at ¶3 and Ex. 1 at ¶4.)
4 Assuming arguendo that the Kindle pilot could not accommodate a blind individual,
5 Plaintiffs have not cited a single case or authority that would require abandonment of the
6 pilot. If there were a blind individual in the 2009-2010 meeting the academic
7 requirements for the class, that person would have “equal opportunity to obtain the same
8 result, to gain the same benefit, or to reach the same level of achievement,” in a section
9 of the Human Event course that is not involved in the Kindle DX pilot. That individual
10 can still participate in the Human Event course and receive an equal opportunity to
11 succeed and participate in an integrated setting with over 90% of the students in the
12 Barrett Honors College.

13 Because no otherwise qualified blind student has been excluded from or provided
14 unequal participation in the Human Event, Plaintiffs are unable to show that they are
15 likely to succeed on the merits of their discrimination claim.

16 **B. There is No Injury to Any Blind Individual or to the Plaintiff**
17 **Organizations, Let Alone Likely Irreparable Harm.**

18 Even if the Court concludes that Plaintiffs are likely to succeed on the merits, the
19 Court should deny the request for an injunction because there is no irreparable harm.
20 Plaintiffs must demonstrate that irreparable harm is likely, not just possible. *See*
21 *Stormans, Inc. v. Selecky*, 2009 WL 1941550, at *13 (9th Cir. July 8, 2009) (recognizing
22 that the standard for irreparable harm in the Ninth Circuit is more stringent since the
23 Supreme Court’s decision in *Winter*).

24 Plaintiffs claim that Shandrow will be denied the opportunity to participate in the
25 Kindle DX pilot beginning in the Fall of 2009. As discussed above, Plaintiff Shandrow
26 is not “otherwise qualified” to participate in the Kindle DX pilot. He will thus suffer no
27 harm if the pilot proceeds.
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1 No other blind students will suffer harm, irreparable or otherwise. No blind
2 students have registered as freshmen in the Barrett Honors College for the Fall of 2009.
3 (Ex. 3 at ¶9 and Ex. 2 at ¶7.) Although ASU admitted one blind student to the Barrett
4 Honors College, that student has not accepted or registered for classes. (Ex. 3 at ¶9.)
5 Even if there were a blind student entering Barrett Honors College, that student will not
6 be harmed because the pilot sections of Human Event are full. (Ex. 2 at ¶4.) Even if
7 they were not, a hypothetical late-registering blind student would have a choice of
8 reasonable accommodations, each providing the full benefit of the Human Event course.
9 The student could opt to switch to any one of the other forty plus sections of the class not
10 using the Kindle DX or the student could agree to participate in the pilot, with the likely
11 need to supplement the Kindle DX with accessible materials that are easily available.
12 With either accommodation, ASU is confident that the student can achieve the full
13 benefit of the Human Event course.

14 The plaintiff organizations will also suffer no irreparable harm. They cite a drain
15 on their resources if they are forced to fight the alleged discrimination. The cases
16 Plaintiffs cite, however, address the issue of standing, not irreparable harm. *Havens*
17 *Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1979); *Fair Housing of Marin v. Combs*,
18 285 F.3d 899, 905 (9th Cir. 2002). No Ninth Circuit case supports the proposition that
19 an organization can institute litigation and then claim that its voluntary action constitutes
20 irreparable harm. Were that the case, a plaintiff could always prove irreparable harm,
21 because every lawsuit is a drain on resources. Even if the alleged drain on resources
22 could constitute an actionable harm, an injunction against ASU would not prevent this
23 harm, because the Court’s order would not enjoin the six other institutions currently
24 participating in the pilot

25 The plaintiff organizations also contend that if this Court does not enjoin ASU’s
26 participation in the pilot, it will “delay development of accessible menus.” (Motion at
27 10.) This is sheer speculation, which the plaintiffs cannot possibly prove. Again, the
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1 pilot will continue with or without ASU's participation. (Ex. 1 at ¶7.) There is no
2 evidence that an order preventing one institution's participation would speed the
3 development of accessible menus. In fact, it is just as likely that ASU's participation in
4 the Kindle DX pilot will help to speed the development of accessible menus. If ASU is
5 impressed with the Kindle DX, perhaps an ASU staff member, faculty member, or
6 student will find a way to make the Kindle DX accessible using other applications. In
7 addition, Amazon will be receiving feedback from participating institutions and students.
8 (Ex. 1 at ¶¶8 and 9; Ex. 2 at ¶5.) With feedback from the pilot, Amazon will have a
9 better understanding of the potential market for the device, and will have reason to invest
10 in accessibility. Why not let the pilot proceed and encourage the parties to work together
11 to address the accessibility issues?

12 **C. The Balance of Equities Clearly Favors the Defendants.**

13 The equities favor permitting the pilot to proceed. In balancing the hardships, the
14 Court must assess the damage to each party. *See Stormans Inc.*, 2009 WL 1941550 *23.
15 ASU has put substantial effort into the pilot: Dr. Humphrey proposed and designed the
16 pilot; ASU entered into an agreement with Amazon; Amazon has provided ASU with
17 some of the Kindle DX devices; ASU has purchased some of the Kindle DX devices;
18 students have registered and been advised of their participation in the pilot; ASU has
19 hired a teaching assistant to assist with technical issues; ASU has designed training and
20 planned to train the participating students on the Kindle DX; and students have planned
21 to attend the Kindle DX training taking place a few days before the semester begins. (Ex
22 1 at ¶5 and Ex. 2 at ¶11.)

23 No Plaintiff will suffer any hardship if the pilot continues. Not a single blind
24 student is affected by the pilot. The plaintiff organizations would continue to wage battle
25 against the other universities conducting Kindle DX pilots even if ASU's Kindle DX
26 pilot is enjoined.

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D. An Injunction Would Serve No Public Interest.

A court weighs “the public interest in light of the likely consequence of the injunction. Such consequences must not be too remote, insubstantial, or speculative and must be supported by the evidence.” *Stormans, Inc.*, 2009 WL 1941550 *25. The likely consequence of granting Plaintiffs’ request for an injunction is only that the Kindle DX pilot at ASU will be enjoined. This Court cannot order Amazon to add accessible menus to the Kindle DX, which is the public interest that the Plaintiffs really promote. The Plaintiffs have not even sued Amazon. This Court also cannot stop Amazon and other universities from continuing the Kindle DX pilot in other jurisdictions without interruption. There is no benefit to Arizonans at large in excluding their university from the pilot.

Further, there is no public interest to be served in granting Plaintiffs’ motion for an injunction. Plaintiffs’ motion merely cites the general proposition that the public interest is served by preventing disability discrimination. Since there is no discrimination, there is no public interest being served. Stopping ASU from conducting an experiment designed to test the effectiveness of a new method of delivering texts to students does not promote the public interest.

There is, however, a strong public interest in permitting the Kindle DX pilot to proceed because of the device’s potential ability to assist other disabled students. Although ASU agrees that the Kindle DX is not currently accessible to blind students without personal assistance from a sighted individual, the Kindle DX could be a boon to many students with other disabilities. For example, the Kindle DX’s ability to display enlarged text and the text-to-voice feature can be very beneficial to students with low vision, limited motor movement, or dyslexia. (Ex. 3 at ¶11.) ASU also takes Amazon at its word that it is planning to introduce accessible menus in the future. (Ex. 1 at ¶10.) All of these factors will also be considered by ASU in making future decisions about the

1 potential uses of Kindle DX. (Ex. 1 at ¶11.) The public interest thus supports the
2 development and testing of this new technology.

3 **IV. CONCLUSION.**

4 This case is so clear that no hearing is required to deny Plaintiffs' motion. Rule
5 65 does not require an evidentiary hearing. *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d
6 1172, 1175 (3d Cir. 1990). The court has discretion to decide whether to hold a hearing.
7 6 James Wm. Moore et al, *Moore's Federal Practice* ¶ 10.22(6)(a) (3d ed. 1999).

8 "...[P]reliminary injunctions are denied without a hearing, despite a request therefor by
9 the movant, when the written evidence shows the lack of a right to relief so clearly that
10 receiving further evidence would be manifestly pointless." 11A Charles Alan Wright,
11 Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2949 (2009).

12 For the foregoing reasons, Defendants respectfully request that the Court deny
13 Plaintiffs' motion for a preliminary injunction.

14 Respectfully submitted this 24th day of July, 2009.

15 Terry Goddard
16 Attorney General

17 s/ Lisa K. Hudson
18 Lisa K. Hudson
19 Assistant Attorney General
Attorney for Defendants

20 I certify that I electronically
21 transmitted the attached document
22 to the Clerk's Office using the
23 CM/ECF System for filing and
24 transmittal of a Notice of Electronic
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registrants, and mailed a copy of
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