

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

PEOPLE FIRST OF ALABAMA,)	
<i>et al.</i> ,)	
)	
<i>Plaintiffs</i> ,)	
)	
v.)	Civil Action No. 2:20-cv-00619-AKK
)	
JOHN H. MERRILL, Secretary)	
of State, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	

STATE DEFENDANTS' REPLY TO OPPOSITION TO MOTION TO DISMISS

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Plaintiffs’ opposition, doc. 134, lays bare Plaintiffs’ intent to use this pandemic as a pretense to fundamentally alter voting well beyond the instant emergency. Plaintiffs’ claims are overbroad and misplaced, and this Court should dismiss the claims cited in State Defendants’ motion to dismiss.

Plaintiffs’ Newly Pleaded Facial Claims Are Untimely.

State Defendants moved to dismiss Plaintiffs’ one-line facial challenge to the challenged provisions, noting that Plaintiffs framed their lawsuit as a pandemic-based concern and alleged no facts—let alone sufficient facts—indicating what their facial challenge to these matters is. In response, Plaintiffs now unveil their true intent in this lawsuit is to change Alabama voting practices permanently. They seek relief for “as long as the pandemic continues to present a danger to Plaintiffs and other voters,”¹ a period they say now extends through at least the “major elections in March and August 2021.”² Next, they claim that they are alleging that the curbside voting “ban” violates the ADA and the VRA “outside of the pandemic,” and seek for the first time to plead how this issue burdens them. Doc. 134 at 8-10.

¹ Although the amended complaint sought relief for all 2020 elections “or as long as the pandemic continues to present a danger to Plaintiffs and other voters,” it clearly portrayed their request as extending only through the 2020 elections. The amended complaint repeatedly noted that their concern was with “2020 elections,” not beyond. *See* Doc. 75 at ¶¶ 1, 6, 8, 10, 18, 20, 22, 24, 27, 31, 32, 35, 36, 39, 41, 49, 52, 54, 56, 58, 126, 132, 170, 206.

² The only election scheduled in March 2021 is the municipal election in Tuscaloosa. The only elections scheduled in August 2021 are municipal elections in Dothan, Birmingham, and Mobile. Of these cities, only Mobile is alleged to be home to any individual plaintiff.

This Court should reject Plaintiffs’ attempt to tie State Defendants’ hands for an indeterminate period. State Defendants have expanded absentee voting for all 2020 elections and even into 2021,³ but neither Plaintiffs nor this Court can predict the course of the pandemic throughout 2021. Moreover, Plaintiffs offer no way of defining when the pandemic “no longer presents a danger.”⁴ Plaintiffs filed this suit on May 1, and only now—five weeks from trial—do they truly seek facial relief. Laches should bar expansion of this lawsuit on the eve of the election. *See Perry v. Judd*, 471 F.App’x 219, 228 (4th Cir. 2012) (finding laches made it “too late in the day to grant [the] requested emergency relief” for candidate petitions).

This Court should also reject Plaintiffs’ attempt to plead now—in an opposition to a motion to dismiss—the facial claim they failed to plead in their original or amended complaint. On a motion to dismiss, the “scope of the review must be limited to the four corners of the complaint.” *Speaker v. U.S. Dep’t of Health & Human Servs. CDC*, 623 F.3d 1371, 1379 (11th Cir. 2010). For the first time, Plaintiffs’ opposition asserts the curbside voting “ban” violates the VRA and ADA “regardless of the pandemic.” Doc. 134 at 8. But the amended complaint clearly

³ See ALA. ADMIN. CODE r. 820-2-3-.06-.05ER (July 24, 2020) (expanding absentee voting for the Special Elections in House District 33). This continued expansion of absentee voting further illustrates the mootness of Plaintiffs’ challenge to the excuse requirement.

⁴ Are Plaintiffs asking the relief to end when the World Health Organization characterizes coronavirus as no longer a pandemic? When the President and/or Governor declare that a state of emergency no longer exists? When the number of new cases or deaths per day drops to a certain level? When these new cases or deaths hit zero and stay there? When a vaccine is widely available?

alleged challenges specific to the context of the COVID-19 pandemic. This Court should limit Plaintiffs’ facial challenge to the four corners of the complaint, and accordingly should dismiss their factually unsupported facial challenge.⁵

The State Has Not Waived Sovereign Immunity.

Plaintiffs do not respond to the State’s waiver arguments. *Compare* Doc. 134 at 7, *with* Doc. 112 at 6 n.4. Instead, Plaintiffs misconstrue *Lapides v. Board of Regents of University of Georgia*, 535 U.S. 613 (2002), which—as the State already explained—considered only “when a state removes a suit from state court to federal court after having waived its immunity in state court,” doc. 112 at 6 n.4. Plaintiffs cannot coerce a sovereign immunity waiver by suing the State and then using the State’s appeal of an order against it to assert that waiver has occurred.

The Challenged Provisions Do Not Violate Section 2 of the VRA.

Plaintiffs did not sufficiently plead that any alleged burden is on account of race. They merely alleged that Black citizens are disproportionately affected by COVID-19; are more likely to have underlying conditions that raise the risk of virus complications; and trail white citizens in socioeconomic factors. This is different from alleging that any voter had greater difficulty voting *on account of race*.

⁵ The fact that Plaintiffs are now seeking to force a fundamental change to Alabama’s voting laws not only for 2020 but permanently further demonstrates that this Court’s scheduling order compressing discovery, dispositive motions, and trial preparation into an eight-week period does not permit a record necessary for such a sweeping lawsuit. The State Defendants thus renew their objection to the scheduling order.

Plaintiffs now attempt to save this claim by arguing that two otherwise identically situated people are not at equal risk for serious COVID-19 complications—in other words, a 65-year-old white voter with diabetes is not in the same position as a 65-year-old Black voter. They cite no evidence to support this remarkable assertion, merely noting that Black Alabamians suffer diabetes at a greater rate than whites and generally suffer greater effects from COVID-19. But that does not change the fact that *anyone* with such medical conditions is at greater risk from COVID-19, and thus the challenged provisions do not affect individuals *on account of race*. A young, healthy Black person is relatively safe from serious COVID-19 risks; an elderly white person with underlying medical issues is not.⁶

Plaintiffs Have Not Sufficiently Pled an ADA Violation.

This Court has already found that the witness requirement constitutes an essential eligibility requirement for voting. Doc. 58 at 60. Applying the same framework that this Court used, it is clear that the same is true for the photo ID requirement. In any event, Plaintiffs' opposition makes clear that they are challenging the entirety of the challenged provisions under the ADA. Even if one could reasonably argue that altering any one of these provisions did not constitute a fundamental alteration, certainly altering all of them would qualify as such.

⁶ As noted in State Defendants' motion to dismiss, *all* Alabamians face some degree of risk from COVID-19 and should want to avoid the virus; thus, *all* prospective voters are impacted by the pandemic. Plaintiffs do not address this point in their opposition.

The Witness Requirement is Not a Poll Tax

Plaintiffs allege that the witness requirement is a poll tax because even though witnessing is free generally, voters who *choose* to use the notary option may have to pay a modest fee.⁷ Plaintiffs cite *Harman v. Forssenius*, 380 U.S. 528 (1965), for this proposition, but *Harman* is simply inapposite. The Court there held that the option Virginia gave voters between paying a poll tax and filing a certificate of residence did not nullify the constitutional problems with the poll tax because the certificate of residence was a “material requirement”—in part because the Court found that it “is not entirely clear how one obtains the necessary certificate,” and in part because the certificate was required to be filed six months before the election. *Id.* at 541-42. Even during the pandemic, the witness requirement involves no such cumbersome steps. Even for voters who live alone, it is literally as easy as asking a relative, neighbor, delivery worker, or other adult to come watch the voter sign the form, in a socially distanced manner. And again, any voter who cannot muster up the ability to satisfy this simple requirement is welcome to vote in person.⁸

⁷ Plaintiffs fail to note that many voters could obtain notarization of their ballots for free. For instance, it is common knowledge that many banks offer notary services free to customers, and nothing prohibits a notary from providing this service through a drive-through banking window. In addition, the only authority Plaintiffs cite for the proposition that any applicable notary fees may constitute a poll tax is *Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973), which revolved around neither notary fees nor poll taxes, but merely the question of whether a series of voting measures—most notably the primary election date—impermissibly burdened the plaintiffs’ right to vote.

⁸ The existence of alternatives for satisfying a voting requirement cures potential VRA issues that any one of the alternatives may have. See *Greater Birmingham Ministries v. Sec’y of State for Ala.*, —F.3d—, 2020 WL 4185801, at *26-28 (11th Cir. July 21, 2020).

Respectfully submitted,

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Certificate of Service

I hereby certify that on August 5, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such to all counsel of record.

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