

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

PEOPLE FIRST OF ALABAMA, et
al.,

Plaintiffs,

v.

JOHN MERRILL, et al.,

Defendants.

Case No.: 2:20-cv-00619-AKK

**PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANTS' MYRICK, DAVIS, JONES-ALEXANDER, AND LOVE'S
MOTIONS TO DISMISS**

Plaintiffs oppose the motions to dismiss certain claims under Rules 12(b)(1) and 12(b)(6) filed by Defendants Lashandra Myrick, Britney Jones-Alexander, Don Davis, and J.C. Love III (collectively, “Probate Judge Defendants”).¹ In their motions, Probate Judge Defendants erroneously assert that each of them, “has no authority [as a Probate Judge] under Alabama law to provide redress for [Plaintiffs’] injuries.” Doc. 129 ¶ 2; Doc. 130 ¶ 2; *see also* Doc. 136 ¶ 6, Doc. 140 at 5–8. But the Amended Complaint contains factual allegations and requests for relief that implicate Probate Judge Defendants’ continuing roles in enforcing and administering the Challenged Provisions in Lowndes, Wilcox, Mobile, and Montgomery counties and thus satisfies the Article III inquiry. Further, contrary to these Defendants’ arguments, Plaintiffs have adequately pled facts showing a causal connection between their actions and the alleged injuries.

FACTUAL BACKGROUND

Plaintiffs are organizations and individuals who—because of age, disabilities including medical conditions, and race—are at higher risk of serious illness or death from COVID-19 (“high-risk voters”) and seek to vote safely in the pandemic. Doc. 75 ¶¶ 188–233. Plaintiffs also seek relief from the Curbside Voting Ban and Witness

¹ Probate Judge Defendants filed similar motions to dismiss or incorporated by referenced each other’s motions, Docs. 129, 130, 136, 140. As the arguments raised in the motions are similar or overlapping, Plaintiffs file this opposition in response to all four Motions.

Requirement outside of the pandemic. *Id.* ¶¶ 181, 187, 207, 219, 228, 232; *see also* Doc. 134 at 7–9, 13–15. They are seeking to protect their rights and have standing to assert their sufficiently alleged claims under the U.S. Constitution, the Voting Rights Act of 1965 (“VRA”), and the American with Disabilities Act of 1990 (“ADA”) against all Defendants.

Plaintiffs seek to enjoin all Defendants—including Probate Judge Defendants—from enforcing the Witness, Photo ID, and Excuse Requirements for absentee voters, and the Curbside Voting Ban (collectively, the “Challenged Provisions”). On June 15, 2020, this Court found that Plaintiffs are likely to succeed on the merits of their constitutional and ADA claims, held that Plaintiffs have standing, and granted their preliminary injunction, thereby confirming—at a minimum—the sufficiency of the pleadings at this stage. Doc. 58.

Argument

I. The Court Has Subject-Matter Jurisdiction over Claims Against Defendants Myrick, Davis, Jones-Alexander, and Love.

To assert Article III standing, Plaintiffs must have (1) suffered an injury in fact, (2) that is fairly traceable to the defendant, and (3) that is likely to be redressed by a favorable decision. *See Common Cause Ga. v. Billups*, 554 F.3d 1340, 1349–50 (11th Cir. 2009) (citations omitted). Probate Judge Defendants do not contest that

Plaintiffs have suffered an injury,² but rather argue that this Court lacks subject matter jurisdiction because Plaintiffs’ challenges are not traceable to these Defendants or redressable by them. Specifically, the Probate Judge Defendants argue that they do not perform functions related to absentee ballot administration. Doc. 129 ¶ 2; Doc. 130 ¶ 2; Doc. 136 ¶ 6. They assert that Alabama law dictates that the duties pertaining to absentee management are carried out by the absentee election manager, who performs them pursuant to the directions by the Secretary of State. Doc. 129 ¶ 2 (citing Ala. Code § 17-11-2); Doc. 130 ¶ 2 (same).³

To establish traceability, the plaintiff must show “a causal connection between her injury and the challenged action of the defendant—*i.e.*, the injury must be fairly traceable to the defendant’s conduct, as opposed to the action of an absent third party.” Doc. 58 at 18 (citations omitted). Traceability is distinct from proximate cause, *see Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014), and is satisfied where a defendant’s actions might have a “coercive effect” on—*i.e.*, constrain or influence—the conduct of third parties, *see Alabama-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1254 (11th Cir. 2003) (quoting

² The Court has already concluded that Plaintiffs have alleged an injury-in-fact sufficient to satisfy Article III standing. Doc. 58 at 14–18.

³ Defendants cite an Alabama Attorney General Opinion, Ala. Op. Atty. Gen. No. 2012-037 (Feb. 15, 2012), in support of their argument. But this opinion deals solely with voter registration. *Id.* The Opinion does not address absentee or curbside voting requirements.

Bennett v. Spear, 520 U.S. 154, 168-69 (1997)). Moreover, the causation and redressability requirements of Article III standing are easily satisfied where the facts alleged indicate a “fairly traceable” link to the defendants’ conduct and the potential for redress of the injury. *See Ga. Latino All. For Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1257 (11th Cir. 2012).

Contrary to what Probate Judge Defendants argue, they are charged with absentee ballot administration in a manner that is “fairly traceable” to Plaintiffs’ injuries. *Id.* While Secretary of State Merrill has statewide authority over election management, Alabama law also identifies probate judges as the chief election officials of their counties, Ala. Code § 17-1-3(b), which includes serving as the chair of the board that appoints poll workers, *id.* §§ 17-1-3(b), 17-8-1, serving on the canvassing board that counts ballots, *id.* §§ 17-1-2(6), 17-10-2(f), and being the official charged with training poll workers, *id.* § 17-8-9. Indeed, probate judges are the only officials with a role in each of the nine election duties required by law.⁴

The probate judge is charged with the selection and the training of the poll workers who count absentee ballots. *See* Ala. Code §§ 17-8-1, 17-8-9 (providing that the probate judge and others must provide poll worker trainings and that the probate

⁴ *See* Alabama Election Handbook, Chapter 12, Judge of Probate, *available at* http://lsa.alabama.gov/PDF/ALI/election_handbook/Elect_Hndbk_19th_ed/chapters/FINAL%20-%20Chapter%2012.pdf (last visited Aug. 6, 2020).

judge notifies poll workers of this training); *see also id.* §§ 17-11-10, 17-11-11 (describing the existing process whereby poll workers count absentee ballots). Probate judges also are members of the county canvassing board that oversees the final process of election results certification, including deciding whether to count provisional and absentee ballots. *Id.* §§ 17-1-2, 17-12-15. Therefore, probate judges play an indispensable role in the process of absentee ballot administration, including in enforcing the Photo ID and Witness Requirements.

Because Probate Judge Defendants enforce the Challenged Provisions, an injunction against them satisfies redressability and traceability. *See, e.g., Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1159 & n.9 (11th Cir. 2008); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 & n.3 (11th Cir. 2005). An injunction barring Probate Judge Defendants from enforcing the Challenged Provisions—which necessarily involves counting ballots that are unwitnessed or lack photo ID, certifying returns that include such ballots, Doc. 58 at 20–21 (citing Doc. 34-1 at 2), training poll officials to accept such ballots, and training poll workers on the implementation of curbside voting—is “likely” to substantially or, at least, partially redress Plaintiffs’ injuries. *Norton*, 338 F.3d at 1256. The Amended Complaint specifically seeks this relief. *See* Doc. 75 at 77–80 (requesting that these Defendants be ordered to “instruct . . . election officials that curbside, drive-thru, and/or drive-up voting at in-person polling sites is permitted”

and “instruct[] . . . election officials . . . to count otherwise validly cast absentee ballots that are missing a specific excuse for voting absentee, witness signatures, and copies of photo ID”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (holding that redressability does not require complete relief); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310 (11th Cir. 2001) (partial relief is sufficient for standing purposes).

Indeed, given probate judges’ various duties, several other Defendants have previously asserted that the probate judges (not them) are the proper parties. *See* Doc. 36 at 12 n.10; Doc. 112 at 3. Thus, despite this Court’s prior admonishment, Defendants continue to try to “turn[] standing into a shell game.” Doc. 58 at 20.

Finally, Probate Judge Defendants are correct insofar as Plaintiffs’ challenge to the Curbside Voting Ban is largely directed at Secretary Merrill, who is specifically alleged to have stopped previous efforts to offer curbside voting. Doc. 75 ¶¶ 177–80. Nonetheless, the Amended Complaint also alleges that the probate judges are responsible for decisions of whether to allow and to implement curbside voting. Doc. 75 ¶¶ 62, 179–81; *see also* Nolan Crane, *Alabama probate judges considering curbside voting for July primary*, WAFF48, June 29, 2020, <https://www.waff.com/2020/06/29/alabama-probate-judges-considering-curbside-voting-july-primary> (“The probate judge in every county will be announcing if registered voters can cast their ballot while staying inside your vehicle.”). Plaintiffs,

therefore, have adequately alleged traceability and redressability as to Probate Judge Defendants.

II. Plaintiffs Have Sufficiently Alleged a Causal Connection Between Defendants' Actions and Alleged Injuries.

Probate Judge Defendants also argue that all claims brought by Plaintiffs under 42 U.S.C. § 1983 should be dismissed because Plaintiffs have not adequately alleged a causal connection between one or more of Probate Judge Defendants' actions and Plaintiffs' alleged injuries. Doc. 129 ¶ 4; Doc. 130 ¶ 4. But as this Court has recognized, Doc. 58, and as Plaintiffs explain elsewhere, Doc. 134, the Amended Complaint alleges sufficient facts to meet the motion to dismiss standard, which requires it to contain sufficient factual matter to state a plausible claim for relief. *See Ala. State Conf. of NAACP v. City of Pleasant Grove*, 372 F. Supp. 3d 1333, 1338 (N.D. Ala. 2019).

First, Defendants claim there is no causal connection because Defendants have no authority over the Challenged Provisions. Doc. 129 ¶ 4; Doc. 130 ¶ 4; Doc. 140 at 5–8. As explained above, Defendants do have significant authority over the Challenged Provisions.

Second, Defendants assert there is no causal connection because there are no specific allegations against Defendants. Not so. The Amended Complaint alleges that “Don Davis . . . Lashandra Myrick . . . J.C. Love III, and Britney Jones-

Alexander . . . in their official capacities as the probate judges for federal, state, and county elections in . . . their respective counties [] are charged with enforcing the Challenged Provisions, including, but not limited to serving as the chief election officials of their counties, appointing and training poll workers, and validating and canvassing election returns and ballots.” Doc. 75 ¶ 62. Plaintiffs assert these allegations on behalf of the individual Plaintiffs who reside in Mobile, Montgomery, Lowndes, and Wilcox Counties and Organizational Plaintiffs’ members who reside there. *See id.* ¶¶ 26, 31, 32, 39, 44, 53, 55.

Plaintiffs, therefore, have alleged specific actions on the part of Defendants that are involved with enforcing the Challenged Provisions, which Plaintiffs allege are causing their injuries. These allegations must be taken as true. *See, e.g., Speaker v. U.S. Dep’t of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). And Defendants Myrick, Davis, Jones-Alexander, and Love are clearly identified in the Amended Complaint as part of the collective Defendants whom Plaintiffs alleged are “failing to take adequate steps to protect the fundamental right to vote.” Doc. 75 ¶ 1; *see also id.* ¶¶ 22, 41, 46, 186, 194, 202.

Accordingly, it is immaterial that Defendants lack discretion under Alabama statutes to decide whether to enforce the Challenged Provisions or not. Rather, the issue is whether these Defendants are statutorily charged with enforcing the

Challenged Provisions (they are) and whether an injunction against them would redress Plaintiffs' injuries (it would). *See* Doc. 58 at 19–20 (holding that the circuit clerks and absentee election managers—who are likewise statutorily charged with the nondiscretionary duty to enforce the Challenged Provisions—are proper parties); *see also Ga. Latino All.*, 691 F.3d at 1260 & n.5 (finding traceability and redressability where state officials had no discretion in their enforcement of the challenged law).

At this stage, Plaintiffs' allegations are “sufficient to survive 12(b)(6) scrutiny.” *Pleasant Grove*, 372 F. Supp. 3d at 1341.

Conclusion

Plaintiffs respectfully ask that this Court deny Probate Judge Defendants' motions.

DATED this 6th Day of August 2020. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to counsel of record. Additionally, I certify that foregoing was mailed via first class mail to the Defendants not receiving CM/ECF notifications.

/s/ Sarah Brannon

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