

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

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|----------------------------|---|------------------------------------|
| 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' MOTION FOR SUMMARY JUDGMENT

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STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the State of Alabama and Secretary of State John Merrill ("State Defendants") respectfully move this Court to enter judgment in their favor on all claims because there is no genuine issue as to any material fact and they are entitled to a judgment as a matter of law.

I. BACKGROUND

State Defendants have previously filed a motion to dismiss in this matter (doc. 112), which remains pending before this Court. Likewise, State Defendants' motion to stay discovery and other Rule 26 obligations remains pending before this Court. Given this, and given the unusually expedited nature of the Court's scheduling order,¹ this motion necessarily focuses on the undisputed facts uncovered thus far that show Plaintiffs lack standing, or alternatively, any burden on the Plaintiffs' right to vote is slight under the balancing test outlined in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), and Plaintiffs have not been excluded from voting by reason of their disabilities, *see* 42 U.S.C. § 12132. State Defendants incorporate by reference the legal arguments it made in their motion to dismiss concerning Plaintiffs' other claims.

¹ In this case, discovery—which began only about six weeks ago—will not even close out for one week. The majority of depositions scheduled in this case have not even taken place yet, and the first expert deposition took place today. This motion can only address the factual matters that have been established thus far, based primarily on Plaintiffs' deposition testimony.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where “there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). The party moving for summary judgment bears the initial burden of demonstrating that there is no genuine dispute as to any material fact by identifying the portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (quotation omitted). “The movant may meet this burden by demonstrating that the nonmoving party has failed to present sufficient evidence to support an essential element of the case.” *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1311 (11th Cir. 2018) (citation omitted). Once the moving party has met the initial burden of demonstrating there is no genuine dispute as to any material fact, the non-moving party then assumes the burden to establish, by identifying matters outside the pleadings, that a genuine issue of material fact exists. *Id.* at 1311-12. To avoid summary judgment, the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In deciding whether summary judgment is appropriate, this Court “must view all evidence and make all reasonable inferences in favor of the party opposing

summary judgment.” *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (citation omitted). If the record, taken as a whole, “could not lead a rational trier of fact to find for the non-moving party,” then there is no genuine dispute as to any material fact and the court must grant summary judgment. *Hornsby-Culpepper*, 906 F.3d at 1311 (citation omitted). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient [to avoid summary judgment]; there must be evidence on which the jury could find for the plaintiff.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

III. STATEMENT OF UNDISPUTED RELEVANT MATERIAL FACTS

1. In this lawsuit, Plaintiffs challenge four Alabama voting requirements or practices in the context of the COVID-19 pandemic:² 1) The “excuse requirement,” i.e., that a qualified elector who wishes to apply for an absentee ballot must certify that he or she meets at least one of eight requirements, ALA. CODE § 17-11-3(a); 2) The “witness requirement,” i.e., that absentee ballots must either be signed by two witnesses or notarized to be opened and counted, ALA. CODE § 17-11-10(b); 3) The “photo ID requirement,” i.e., that absentee voters must include a copy of any one of a number of types of photo ID when applying for an absentee ballot,

² To the extent that Plaintiffs’ amended complaint and opposition to State Defendants’ motion for summary judgment raise a facial claim to the challenged provisions, State Defendants maintain that dismissal or summary judgment in their favor of these facial challenges is appropriate, for the reasons outlined in their motion to dismiss and reply to Plaintiffs’ opposition.

unless meeting an exemption for a voter who has a physical illness or infirmity which prevents his or her attendance at the polls, ALA. CODE § 17-9-30; and 4) The curbside voting “ban,” i.e., the lack of voting in Alabama done in person but outside of a poll site without leaving one’s car. *See generally* doc. 75 ¶¶ 8-16.

2. The emergence of the novel coronavirus strain that causes COVID-19 led Alabama Governor Kay Ivey to declare a state of emergency on March 13, 2020, after two confirmed cases of the virus were reported within the State. Doc.34-1, pp. 6, 37-39.³ As a result of this state of emergency, the Governor delayed the primary runoff election scheduled for March 31, 2020 to July 14, 2020. *Id.* at pp. 7-9, 53-58.

3. On the same day the primary runoff election was delayed, Secretary Merrill filed an emergency rule permitting any qualified voter who determines it is impossible or unreasonable to vote at his or her voting place for the runoff election to apply for an absentee ballot using the preprinted excuse, “I have a physical illness or infirmity which prevents my attendance at the polls.” *Id.* at pp. 9-10, 59-60.

4. Secretary Merrill later issued emergency rules extending the same absentee voting opportunity for ensuing elections, including the November general election and the House District 33 special election, the general election for which is set for January 2021. Doc. 34-2, pp. 1-14; Doc. 107, pp. 1-14; Ex. 1, pp. 1-2.

³ Page references to documents previous filed through CM/ECF refer to the page number at the top of each page. Page and line number references to depositions refer to the documents as annotated by the court reporter.

5. State officials have undertaken other measures to make voting easier and safer during the pandemic. For example, Governor Ivey issued emergency proclamations permitting notarization using videoconferencing, thereby satisfying the witness requirement. Doc. 34-1, pp. 65-67; Doc. 34-2, pp. 6-11.

6. Alabama's primary runoff election took place on July 14, 2020. While data is not yet publicly posted for this election, Secretary Merrill testified that the runoff election marked a "record breaking turnout," indicating that voters felt safe voting in person for this election. Merrill depo., Ex. 12 at 73:10-76:12. Polling sites employed measures such as encouraging mask wearing, providing face masks, availability and use of hand sanitizer and disinfecting materials, encouraging social distancing, and use of disposable pens. *Id.* at 73:10-80:21.

7. Howard Porter is one of five individual plaintiffs remaining in this lawsuit. He, like all Plaintiffs, is now eligible to vote absentee for the remainder of the 2020 elections, and he applied to vote absentee for the July 14 primary runoff election, though he did not actually return a ballot. Porter depo., Ex. 2 at 31:3-33:15. Porter lives with his wife and adult son, so he has two witnesses in his household. *Id.* at 19:18-20, 21:7-12, 48:4-9. Porter also has a working multifunction printer in his house but testified that he could not confirm if it has run out of ink or paper. *Id.* at 14:21-15:14, 48:17-49:18, 87:7-91:3, 99:1-102:16. For his July absentee application, Porter chose the option for voters with disabilities that does not require

a copy of a photo ID, and he will remain eligible for this exemption in future elections. *Id.* at 33:16-34:6, 56:23-57:17, 77:21-80:16.

8. Plaintiff Eric Peebles suffers from cerebral palsy.⁴ Peebles depo., Ex. 3 at 28:7-33:7. He does not challenge the photo ID requirement. Pls.' First Answers to Interrogs., Ex. 8, p. 18; Ex. 3 at 63:23-64:2. Even without the emergency rule, Peebles' disability qualifies him to vote absentee, without submitting a copy of his photo ID. *Id.* at 53:21-55:21, 97:19-100:15. Although he has multiple medical care workers at his home every day, Peebles alleges he cannot safely satisfy the witness requirement. *Id.* at 17:1-24:1.⁵ He has the means at home to utilize remote notarization. *Id.* at 11:12-12:1. Peebles did not vote in July, as his party did not have a runoff election in his county. *Id.* at 40:2-6.

9. Plaintiff Annie Carolyn Thompson can also vote absentee in November. She applied for an absentee ballot for the July 14 election, but voted in person. Thompson depo., Ex. 4 at 48:22-49:1. Thompson suffers from medical

⁴ This Court's protective order (doc. 128) instructs the parties to follow the procedures outlined in the order to designate and protect confidential information contained in discovery materials. Counsel for Plaintiffs has previously outlined an expectation that information such as health records be designated as confidential information and protected accordingly. This motion contains general information about Plaintiffs' medical conditions that Plaintiffs have already disclosed in the amended complaint and other public filings. However, out of an abundance of caution, State Defendants are filing the underlying depositions by individual and organizational Plaintiffs (Exs. 2, 3, 4, 5, 6, 7, 9, 10, and 11) under seal, as the expedited schedule has not allowed State Defendants the opportunity to consult with Plaintiffs about specific material they designate as confidential.

⁵ Peebles voted absentee in 2017 with two of his care workers witnessing his ballot nonsimultaneously; however, here he takes the position that two witnesses must sign his absentee ballot while together. Ex. 3 at 37:18-39:2.

conditions and is eligible to vote absentee even apart from the emergency rule. *Id.* at 76:8-78:6. She has a sister, niece, and granddaughter in the local area and has neighbors she could ask a favor of, including witnessing her ballot. *Id.* at 30:2-31:13. In fact, when she applied for her July absentee ballot, she planned to have two neighbors witness her ballot outdoors while standing six feet apart from her. *Id.* at 55:3-56:12. She also has the means at home to utilize remote notarization. *Id.* at 12:6-8, 13:2-15. Thompson checked the box on her July absentee ballot application that did not require her to provide a copy of her ID, and she expects to continue to qualify for this exemption. *Id.* at 52:16-55:2, 84:8-87:5.

10. Plaintiff Sheryl Threadgill-Matthews voted absentee in July under the Secretary's emergency rule, and she agreed she can also vote absentee in November under this rule. Threadgill-Matthews depo., Ex. 5 at 33:7-34:7, 52:15-58:18. Thus, she has achieved the relief she sought in this lawsuit concerning the excuse requirement. *Id.* at 62:1-21, 92:16-93:17. For July, her husband and niece witnessed her ballot at her home, an option that remains for her in November. *Id.* at 59:2-19, 62:22-64:4, 93:18-94:3. Thus, she does not personally challenge the witness requirement. *Id.* at 63:23-64:4. Threadgill-Matthews also has the means at home to utilize remote notarization. *Id.* at 10:17-11:10. She does not personally challenge the photo ID requirement, as she has a working copier at home and used it to include a copy of her ID when she voted absentee in July. Pls.' Ex. 8, p. 19; Ex. 5 at 34:8-10,

64:5-66:8. Threadgill-Matthews is not over the age of 65 and the only medical issue she noted (hypertension) is controlled with medication and does not keep her from engaging in normal activities. *Id.* at 18:21-23:3.

11. The final individual plaintiff, Teresa Bettis, is also not over the age of 65, and her only two medical conditions do not require medication, are controlled, and do not keep her from engaging in normal activities. Bettis depo., Ex. 6 at 26:11-37:22. Bettis received an absentee ballot for the July election using the Secretary's emergency rule, though she made an error in completing the ballot and thus voted in person. *Id.* at 93:17-95:7, 96:6-97:8. Bettis, like the other individual Plaintiffs, can vote absentee in November; thus, she does not seek any other relief with regard to the excuse requirement beyond what the Secretary has supplied. *Id.* at 102:4-106:22. Bettis had her July absentee ballot witnessed by her husband and her husband's nephew, and this remains an option for her in November. *Id.* at 95:8-96:5, 131:5-132:4, 154:12-22. A long-time resident of Mobile County, Bettis has "a bunch" of relatives nearby plus coworkers and friends, including several who she sees during the pandemic, who could serve as witnesses. *Id.* at 24:12-26:10, 58:16-23, 132:5-135:23, 138:10-139:22. Bettis also has the means at home for remote notarization. *Id.* at 10:20-11:10. In July, she used a photocopier she brought home from work to copy her ID, and she does not challenge the photo ID requirement. Ex. 8, p. 19; Ex. 6 at 107:22-110:22, 146:7-147:4.

12. All individual Plaintiffs have engaged in some amount of interaction with people outside their households during the pandemic. Porter has been to three doctor's appointments, and his wife and son regularly do errands in public. Ex. 2 at 35:3-38:5, 38:12-19, 39:11-40:6, 42:20-41:13. Peebles has multiple health care workers in his condo each day, has had four doctor's appointments (with two more upcoming), and went to a Birmingham law office to have evidence extracted from his phone in an unrelated suit against Auburn University. Ex. 3 at 25:2-27:13, 43:20-45:20, 47:10-48:17, 78:18-81:17. Thompson stated she has not left her home since April 1 unless she "absolutely, one hundred percent had to," but has done grocery shopping, taken her dog to the groomer twice and the veterinarian once, and visited her daughter and granddaughter about once a week socially, in addition to voting in person in July. Ex. 4 at 33:22-38:14, 42:22-50:13, 58:18-64:1, 65:12-69:9. Threadgill-Matthews leaves her house at least once a week to shop for groceries, drive through the bank service window, or visit the doctor or the pharmacy, and she physically goes to her workplace about every other week where she interacts with coworkers, in addition to having service workers enter her home. Ex. 5 at 38:13-46:20, 101:17-103:17. In addition to voting in person in July, Bettis regularly goes to the grocery store (even though social distancing at her grocery stores can be

difficult),⁶ the bank drive-thru window, and the post office, and has also been to the dentist (twice), the pharmacy, shopping for home maintenance items and shoes/clothing, to visit family and friends and has hosted both her sister-in-law and a Father's Day gathering in her yard with about eight people. Ex. 9 at 47:2-48:20, 49:5-59:5, 60:16-79:4, 79:20-80:15, 96:6-101:12, 172:8-173:21.

13. Each individual Plaintiff has stated they are asserting the purported injuries of other unnamed individuals. Ex. 2 at 47:10-48:1; Ex. 3 at 121:21-122:4; Ex. 4 at 75:1-76:7; Ex. 5 at 64:21-65:2; Ex. 6 at 105:3-12, 164:9-165:8.

14. In terms of organizational Plaintiffs, People First of Alabama ("People First") stated it is not aware of any barriers or injuries the excuse requirement (as modified by the emergency rule extension) would cause its members. People First depo., Ex. 7 at 24:9-25:14. The injury People First alleges its members suffer as a result of the witness and photo ID requirements is the potential exposure of some members to the virus, but as to curbside voting, the injury to People First's members was explained as: "it's easier for our members to drive up to the poll than it is to go through the routine of absentee balloting." *Id.* at 24:15-28:3, 29:5-14. People First identified seven members it asserted could not safely comply with the challenged provisions. *Id.* at 54:11-56:11; Ex. 8, pp. 13-14. However, four of these seven people

⁶ Asked why she did not use curbside pickup service her grocery stores offer, Bettis said her "preference" is to select her own produce and other items. Ex. 6 at 150:23-151:16.

are in their early 40s or younger with no medical conditions that heighten their risk from COVID-19, two others either do or might qualify to vote absentee without providing a copy of a photo ID, and the seventh has a copier in her home. The extent to which these seven people have had contact with people outside their household was unknown, though all have likely left their houses for one reason or another during the pandemic. Ex. 7 at 79:13-99:17. People First did not allege in the amended complaint that it has had to divert any resources to educate voters as a result of the challenged provisions (doc. 75 ¶¶ 26-28), but testified it will have to divert resources to train its members on navigating the election system during the pandemic. Ex. 7 at 74:2-7. However, People First has not engaged in voter education in 2019 or 2020; it keeps no reports on training it conducts, persons helped with electoral issues, or time spent developing training materials; and it has not sent any educational materials to its members about voting during the pandemic. *Id.* at 58:21-76:13, 141:7-143:17. In any event, People First concedes that it would have to develop and conduct training to help its members navigate the election system during the pandemic regardless of what requirements are in place. *Id.* at 74:8-75:6, 149:11-17.

15. Plaintiff the Alabama State Conference of the NAACP (“NAACP”), alleged injuries both on behalf of its members and because of diversion of resources. Doc. 75 ¶¶ 37-41. It identified nine individuals injured or burdened by the challenged provisions. Ex. 8, pp. 8-10. Of these nine, at least three are under age 65

with no underlying medical conditions of note (Stafford, Brinkley, and Wahl); at least four others have the capacity to satisfy the witness requirement through remote notarization if not otherwise (Clopton, Harrington, Hendricks, and Qualls); and the remaining two (Booker and Bryant) are eligible to vote absentee regardless of the pandemic without providing a photo ID copy. NAACP depo., Ex. 9 at 144:23-169:10. Regarding diversion of resources, the NAACP alleged that it has had to: 1) assess who will be unable to safely comply with the excuse and witness requirements; 2) increase efforts to educate voters about the excuse and witness requirements; and 3) advocate for the adoption of measures like no-excuse absentee voting and curbside voting. Doc. 75 ¶ 40. With regard to the first diversion of resources allegation, the NAACP does not have any reports or statistics showing how much time it has spent assessing who could not safely comply with the challenged provisions, and the sum total of the NAACP's President's efforts amounted to talking to five members of the executive committee and asking local organizations to canvas their members without reporting back. Ex. 9 at 106:10-115:6. Regarding the second diversion of resources allegation, the NAACP has not held any events specific to the challenged provisions, and the communications it has had about the challenged provisions have come in the context of communications it was already having about other matters (including discussing this lawsuit). *Id.* at 117:22-123:13. Regarding the third diversion of resources allegation, the NAACP

has contacted two State lawmakers to discuss the challenges of voting in a pandemic generally plus other unrelated matters and has not written anyone, circulated petitions, or taken other similar measures. *Id.* at 129:12-134:9. Overall, the NAACP has not spent any money to train voters in response to the challenged provisions, cannot quantify how voting questions it has fielded in 2020 compare to other major election years, has not held educational events specific to the challenged provisions, and has not had to hire more staff to conduct educational efforts. *Id.* at 81:12-93:5, 94:19-95:17, 95:22-106:9, 134:10-138:19, 205:12-206:23, 227:11-229:16.

16. Plaintiff Greater Birmingham Ministries (“GBM”) alleges injuries both on behalf of individuals and through diversion of its resources. Doc. 75 ¶¶ 33-36. GBM has engaged in some education and assistance efforts during the pandemic, such as outdoor clinics that educated voters on absentee voting and assisted voters by providing copies of IDs and witnessing absentee ballots. GBM depo., Ex. 10 at 42:4-50:10. It has also engaged in other efforts, such as sending emails about absentee voting generally and collecting petition signatures online. *Id.* at 59:10-64:22. However, it could not quantify the time or money spent on these efforts, it acknowledged that it has cut back on other in-person efforts just because of the pandemic, it acknowledged that inquiries it normally fields about in-person voting have tailed off this year, and it admitted that some of its efforts are more broadly aimed at educating voters about absentee voting rather than specifically aimed at the

challenged provisions. *Id.* at 39:21-56:13, 59:10-74:19, 77:4-80:7. GBM identified 14 people impacted by the lack of curbside voting, five impacted by the witness requirement, and five impacted by the photo ID requirement. Of these 24 people, 14 voted in July (often with some assistance from GBM), GBM did not know if eight voted in July, and one applied for an absentee ballot that allegedly did not come early enough to return on time. *Id.* at 87:11-108:7.⁷

17. Plaintiff Black Voters Matter Capacity Building Institute (“BVM”) did not specifically allege injury on behalf of any of its members, and in fact, it works through “partner organizations” rather than having members. Doc. 75, ¶¶ 42-52; BVM depo., Ex. 11 at 62:6-76:17. Instead, BVM alleges it has been injured through diversion of resources. Doc. 75 at ¶ 52. However, BVM cannot quantify how much (if any) its costs or manpower expenditures have increased, and its education efforts have been minimal and at least partly consist of what it would do in any election year. Ex. 11 at 80:22-84:20, 89:4-92:13, 109:12-100:5. BVM has not investigated any concerns about the challenged provisions—contrary to its allegations in the amended complaint—and BVM could provide no estimate of the number of people who have contacted BVM with concerns about any of the challenged provisions. *Id.* at 131:12-138:17; Doc. 75 ¶ 52. BVM also asserted that by receiving *relief* through

⁷ GBM provided unclear information as to whether the remaining person was able to vote in July. Ex. 10 at 100:12-101:20.

the Secretary's emergency rules, BVM has had to divert resources to explain absentee voting. Ex. 11 at 32:19-38:9.

IV. ARGUMENT

A. Plaintiffs have not suffered an injury in fact from any of the challenged provisions. Alternatively, any burden on their right to vote is slight and they have not been excluded from voting.

The depositions of the five individual Plaintiffs remaining in this case reveal that Plaintiffs' main complaint is not that the challenged provisions force them to choose between exercising their right to vote and endangering their health. Rather, their complaint is that the challenged provisions require them to exercise the slightest bit of creativity and initiative to satisfy these nondiscriminatory, reasonable requirements. *Cf. Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020) (rejecting a challenge to Ohio's signature requirement for ballot initiatives during the pandemic, noting that "just because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot.") Plaintiffs have not been injured and do not face the prospect of injury. Even if they face some burden on their right to vote, such a burden is extremely slight and does not warrant judicial intervention in upcoming elections.

1. Excuse requirement

The undisputed material facts revealed thus far demonstrate that Plaintiffs' excuse requirement complaint is at once moot regarding the remaining 2020

elections, and unripe regarding any later elections. No Plaintiff could articulate any injury caused by the excuse requirement now that Secretary Merrill has extended the emergency rule through the 2020 elections and into early 2021. Many Plaintiffs agreed that they no longer suffer any injury by the excuse requirement thanks to the Secretary's actions. Ex. 4 at 76:8-78:6; Ex. 5 at 52:14-58:18, 62:1-21, 92:16-93:17; Ex. 6 at 102:4-106:22. Of those who attempted to maintain that some injury remains, their complaints center on elections well beyond 2020 (Ex. 3 at 41:5-17, 53:21-54:8; Doc. 7 at 109:12-110:18), or a vague claim that voters might be deterred from taking advantage of the Secretary's emergency rule because they might not believe the Secretary's representation that they could use the excuse outlined to vote absentee, (Ex. 9 at 36:10-46:21, 52:9-53:16, 177:19-180:21; Ex. 10 at 108:15-110:10).

Mootness and ripeness—along with standing—represent the “[t]hree strands of justiciability doctrine.” *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1241 (11th Cir. 1998).⁸ Mootness is a jurisdictional limit mandating dismissal when a case

⁸ While this section focuses on mootness and ripeness, the third strand of justiciability doctrine—ripeness—also dictates summary judgment in State Defendants' favor on the excuse requirement claim is appropriate. Because several Plaintiffs qualify to vote absentee even without the emergency rule, they are not harmed by the excuse requirement in the first place. In addition, as noted in State Defendants' motion to dismiss, while the Secretary passed emergency rules expanding absentee voting, that does not mean that State officials *enforce* such rules, or that, in a normal election, they would determine whether a voter falls within one of the excuses that allows her to vote absentee. Alabama law provides that an Absentee Election Manager (“AEM”) shall submit an absentee ballot to voters who comply with the requirements for such voting, including the “excuse” provisions. ALA. CODE § 17-11-5(a). Further, an AEM “may require additional proof of a voter's eligibility to vote absentee when there is evidence of continuous absentee voting.” *Id.*

“no longer presents a live controversy with respect to which the court can give meaningful relief.” *Fla. Ass’n of Rehab. Facilities, Inc. v. Fla. Dep’t of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000) (internal quotation omitted). The ripeness doctrine “protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes.” *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997).

To establish standing, a plaintiff must demonstrate, *inter alia*, an injury in fact that is both concrete and particularized and actual or imminent, not conjectural or hypothetical. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (en banc). Voting is a protected right, but “States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Thus, “[t]he Supreme Court has rejected a ‘litmus-paper test’ for ‘[c]onstitutional challenges to specific provisions of a State’s election laws’ and instead has applied a ‘flexible standard.’” *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Anderson*, 460 U.S. at 789 and *Burdick*, 504 U.S. at 434). This *Anderson-Burdick* test requires a court to balance the burden of a regulation upon voters against the State’s interests served by the regulation. “Reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters are generally justified by “the State’s

important regulatory interests.” *Burdick*, 504 U.S. at 434.⁹ Further, Title II of the ADA requires only that qualified individuals with a disability not be “excluded” or otherwise denied public services by reason of their disability. 42 U.S.C. § 12132.

The Secretary has effectively eliminated any harm from the excuse requirement for all elections during the next several months by allowing any voter who determines it is impossible or unreasonable to vote in person due to COVID-19 to vote absentee. The Secretary initially promulgated such an emergency rule for the July runoff election, and as the pandemic has continued to impact Alabama, he has extended it incrementally to the point where it now stretches through January 2021. The Secretary has shown that he is responding to facts as they develop, and Plaintiffs simply do not present a live, actual controversy when their only remaining claim concerning the excuse requirement is that they *might* not be able to vote in later 2021 elections and beyond,¹⁰ based on the course that COVID-19 *might or might not* take

⁹ The State Defendants do not agree that it is appropriate to look at unique burdens borne by certain individuals. Burdens should be assessed “categorically,” not based on “the peculiar circumstances of individual voters or candidates.” *Crawford v. Marion Cty Election Bd.*, 553 U.S. 181, 206 (2008) (Scalia, J., concurring in the judgment). While it may appear that the three-Justice opinion authored by Justice Stevens differs in this respect from the three-Justice opinion authored by Justice Scalia, Justice Stevens never said that examining unique burdens by certain groups was the right approach, only that the record did not allow the Court to do so because the burden was not quantifiable when there was insufficient evidence of how many people lacked a photo ID.

¹⁰ The only elections that appear on the Secretary of State’s public calendar for 2021 are municipal elections in the cities of Tuscaloosa, Dothan, Birmingham, and Mobile. <https://www.sos.alabama.gov/alabama-votes/voter/upcoming-elections> (last visited Aug. 17, 2020). The only Plaintiff who lives in one of these jurisdictions that is holding elections in 2021

between now and then.¹¹ This Court should grant summary judgment for State Defendants with regard to the excuse requirement claim.¹²

2. Witness requirement

No individual Plaintiff is without an option to safely get their ballot witnessed or notarized, and their claims truly boil down to a failure of creativity and initiative on their part. Two of the five individual Plaintiffs do not challenge the witness requirement: Porter, who has two adults in his household and admitted that the witness requirement is “not really” an impediment to him (Ex. 2 at 19:18-20, 21:7-12, 31:3-13, 47:10-48-9), and Threadgill-Matthews, who voted had her husband and a niece witness her July absentee ballot at home, an option that remains for her in November. Ex. 5 at 33:7-34:7, 58:19-59:19, 62:22-64:4, 93:18-94:3.

The remaining three individual Plaintiffs have perfectly reasonable and safe options available to obtain witnesses for their absentee ballots, should they choose to vote this way. Thompson has multiple family members in the local area, including a daughter she sees regularly. Ex. 4 at 30:1-31:1, 38:15-39:9. She planned to have

is Porter, and he qualifies to vote absentee due to his physical disability. Ex. 4 at 12:17-19, 14:21-15:14, 33:16-34:6, 48:17-49:18, 56:23-57:17, 77:21-80:16.

¹¹ Public information shows that new cases per day in Alabama has dropped in recent weeks. Daily hospitalization rates have plateaued, while the percentage of positive tests has fallen. *Alabama’s COVID-19 Data & Surveillance Dashboard*, ALA. DEP’T OF PUBLIC HEALTH, <https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7> (last visited Aug. 17, 2020).

two neighbors witness her July ballot in an outdoors and socially distanced way, a plan she said may also be an option in November. *Id.* at 55:3-56:12, 78:7-83:9, 100:6-102:6, 110:19-111:4. Thompson has also signed paperwork that workers handed her and has willingly engaged in other activities such as interacting up close with dog groomers. *Id.* at 34:14-38:14, 58:18-64:1, 39:19-40:21, 64:2-65:11.

Bettis has lived in her home for 46 years and has relatives and friends in the area who could serve as witnesses in addition to her husband. Ex. 6 at 13:2-10, 24:12-26:10. Among the other options Bettis has but has not explored are: co-workers she interacts with (including a board president who she already brought paperwork to sign), the post office staffed by two workers where she visits regularly, a bank she visits regularly, church members, two “second mothers” she visits, or a mentee and her family in the area. *Id.* at 58:16-21, 69:1-71:2, 75:20-77:8, 132:5-135:23, 138:10-139:22, 144:4-146:6. Bettis completed (but did not mail in) an absentee ballot in July, using her husband and his nephew as witnesses without leaving her house. *Id.* at 95:8-96:5, 154:12-22.

Peebles likewise has options to have his ballot safely witnessed; he simply refuses to consider or even acknowledge those options. He has multiple care workers come to his home daily. Their shifts do not overlap, and Peebles said he would not ask two workers to be simultaneously present for even a minute to witness a ballot, out of concern one might not be paid for that minute. Ex. 3 at 55:22-57:3. However,

Peebles also has neighbors and friends he could ask to witness his ballot. His reasons why he cannot comply with the witness requirement do not withstand scrutiny. *Id.* at 57:4-19, 109:16-113:3, depo. Ex. 1 (asserting that someone could not watch him sign through a window because a hedge obstructed it, though a photograph showed the window was not obstructed); 57:20-58:5 (asserting he could not have someone witness through a car window because the windows may or may not be tinted); 58:6-59:6, 104:18-108:3 (asserting that having his ballot witnessed from six or more feet away outside is not viable because the witnesses might not be able to see his signature from this distance and it would take “a lot of coordination”); 108:4-109:15 (asserting he could not ask friends to witness his ballot because their work schedules are not predictable); 62:7-63:17 (stating that having personnel at one of his medical appointments sign his ballot is “outside of the normal scope of practice for a medical professional” and the office “may” charge a fee for this act).

Each individual Plaintiff also can have a ballot notarized, including through remote means. Each has the devices and internet access at home necessary for videoconferencing, and each used these means to conduct their depositions from home. Ex. 2 at 14:6-20, 22:14-23:3, 26:3-14; Ex. 3 at 11:22-12:1, 12:8-11; Ex. 4 at 12:6-8, 13:2-15; Ex. 5 at 10:17-11:10; Ex. 6 at 10:20-11:10. In addition to this option, some Plaintiffs are visiting their banks’ drive-thru windows during the pandemic but have not explored whether the banks offer notarization service on a

drive-thru basis. Peebles said he would rather vote curbside than utilize drive-thru notarization at his bank because there might be a line of cars at the bank (Ex. 3 at 102:4-104:16), while Bettis said she would not necessarily take advantage of drive-thru notary service at the bank she frequents even if it was free, because it is “invasive” to have to get a notary or witness signatures (Ex. 6 at 159:19-161:10).

Plaintiffs have not suffered an injury from the witness requirement, and even if they have, any burden on their right to vote requires them to exercise only the slightest bit of effort and resourcefulness to safely meet this requirement. Instead of exploring options to safely comply with the witness requirement, Plaintiffs erect roadblocks, such as Peebles’ assertion about a nonexistent hedge blocking his window. Some Plaintiffs had their July ballots witnessed without any apparent ill effects, and all Plaintiffs can satisfy the requirement without violating health protocols. They are not injured, meaningfully burdened, or excluded by this minimal requirement supporting the State’s interest in preventing and deterring fraud.¹³

3. Photo ID requirement

The individual Plaintiffs’ claim regarding the photo ID requirement is even more tenuous than their witness requirement claim. No individual Plaintiff lacks the

¹³ Alabama has a weighty and legitimate interest in detecting and deterring voter fraud and safeguarding voter confidence. *Crawford*, 553 U.S. at 192-97 (Stevens, J., lead plurality); *Little v. Reclaim Idaho*, __ S.Ct __, 2020 WL 4360897, at *1-2 (Jul. 30, 2020); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009). The State is not required to produce evidence of these interests. *Common Cause/Ga.*, 554 F.3d at 1353.

ability to safely make a copy of a photo ID, and several do not even need to exercise *any* creativity or initiative to do so. Peebles, Threadgill-Matthews, and Bettis do not challenge the photo ID requirement because they have copiers at home and/or qualify for the exemption to not provide a photo ID. Ex. 8, pp. 18-19. Ex. 3 at 12:4-7, 54:9-55:21, 63:23-64:2, 97:19-100:15; Ex. 5 at 11:11-18, 34:8-10, 64:5-66:8; Ex. 6 at 107:22-110:22, 146:7-147:4. Additionally, Thompson qualified for the photo ID exemption in July and expects to remain eligible for this exemption in future elections. Ex. 4 at 52:16-55:2, 71:17-72:4, 86:12-87:5, 104:3-107:7.

That leaves Porter. Porter has a working multifunction printer, he was exempt from providing a photo ID in July, and he will remain eligible to check that box going forward. Ex. 2 at 14:21-15:14, 33:16-34:6, 48:17-49:18, 56:23-57:17, 77:21-80:16. Still, he challenges the photo ID requirement based on the *possibility* that his machine *might* be out of ink or paper or run out in the future. However, Porter could not say that his copier was not working during the deposition, he declined to even get up from his seat during the deposition to see if he could make a copy, and his wife or son could make a copy for him when they run errands (although his medical conditions dictate that he does not need a copy). *Id.* at 87:7-91:3, 99:1-102:16.

No extended analysis of this point is necessary. All five individual Plaintiffs do not challenge the photo ID requirement and/or are exempt from the requirement. Even setting aside the fact that each individual Plaintiff has people assisting them

who could make a copy and has failed to explore other options to safely obtain a photocopy (such as at a drive-thru window of a bank), no individual Plaintiff has been injured, burdened, or excluded by the photo ID requirement.¹⁴

4. Curbside voting

Plaintiffs' curbside voting claim is murky. Generally, both individual and organizational Plaintiffs sought the option to engage in "curbside voting," but failed to consistently define that term. Several individual Plaintiffs acknowledged that they did not know what that would entail exactly: how voters would show an ID, sign a poll book, and receive, complete, and return a ballot. They often maintained that curbside voting would be as safe or safer than the absentee voting option available to them, even though it would involve direct contact with at least two poll workers. Ex. 2 at 44:14-45:18; Ex. 3 at 64:3-66:5; Ex. 4 at 87:6-92:10, 111:16-113:13.¹⁵

In terms of organizational Plaintiffs, People First alleged merely that the organization's members were injured by the lack of curbside voting because it is allegedly easier than absentee voting. Ex. 7 at 29:5-14. NAACP and GBM envisioned curbside voting as a mix of in-person voting and a way of delivering

¹⁴ The Eleventh Circuit has recently held that the photo ID requirement imposes a "minimal burden on Alabama's voters and is supported by legitimate state interests," and thus presents no unconstitutional burden on the right to vote. *Greater Birmingham Ministries v. Sec'y of State for Ala.*, __ F.3d __, 2020 WL 4185801, at *13 n.32 (11th Cir. Jul. 21, 2020).

¹⁵ Threadgill-Matthews stated she is not sure whether she joins the curbside voting claim. Ex. 5 at 76:23-78:16. Bettis could not decide whether she wanted to vote absentee or curbside. Ex. 6 at 112:23-115:19, 127:3-129:19.

absentee ballots. Ex. 9 at 50:14-51:23; Ex. 10 at 21:14-25:16. Overall, organizational plaintiffs failed to specify how they were injured by the lack of curbside voting, and the members they identified were largely able to vote absentee in July (and will remain able to do so in November). Thus, no Plaintiff has established that they have been injured, burdened, or excluded by the lack of curbside voting.

B. Plaintiffs fail to show that any injury is traceable to State Defendants.

In order to demonstrate standing, Plaintiffs must also demonstrate a causal connection between any injury and the challenged actions; in other words, their purported injuries must be fairly traceable to the State Defendants’ conduct, as opposed to the action of an absent third party. *Lewis*, 944 F.3d at 1296.

State Defendants did not cause the pandemic, and they are attempting to make voting as safe as practicable in light of this novel threat. They did not cause Plaintiffs’ injuries merely by enforcing already-existing voting provisions in State law.¹⁶ Rather than recap arguments already made on this point to this Court in State Defendants’ motion to dismiss and opposition to the preliminary injunction motion,

¹⁶ See *Mays v. Thurston*, No.4:20-cv-341, 2020 WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020) (“Any injury caused by Plaintiffs’ failing to take advantage of . . . available avenues to exercise their rights to vote are not caused by or fairly traceable to the actions of the State, but rather are caused by the global pandemic.”); *Clark v. Edwards*, __ F.Supp.3d ___, 2020 WL 3415376, at *11 (M.D. La. June 22, 2020) (“[I]n a situation where judicial intervention is disfavored as a matter of law, and the state authorities, to whom the Constitution delegates the authority to determine the ‘Times, Places, and Manner’ of elections, have undertaken a Virus-related *expansion* of voting opportunities, this Court finds that Plaintiffs have not plausibly alleged an injury to their right to vote.”) (emphasis in original).

one account from Secretary Merrill particularly illustrates how State Defendants are assisting Alabama voters in satisfying the challenged provisions, not injuring them:

Well, let me just give you an example. When we have people that really need help, they call the office. Now, I already told you earlier, a lot of people in this state have my cell phone number because I give it out frequently, because I work for the people. I've already told you that, so I want to be helpful to people.

And I had a situation just a couple weeks ago where a person said: I want to vote absentee but I can't vote absentee. And I said: Do you have a printer? First of all, I said: Do you have a computer? And they said: Yes. I said: Do you have a printer? They said: No. We don't have a printer. I said: Okay. I was going to tell you you could download the application on our website, and it's actually fillable, but they couldn't do that.

So I said: Well, let me ask you this, do you have a phone? Yes. Well, I called you on my phone. I said: Well, that's great. I said: Do you have the capability on your phone to take a picture? And they said: Yes. I said: Well, that's great. I said: You have a driver's license? Oh, yes, I have a driver's license. I said: Well, then do this. If you'll take a picture of your driver's license, and you will text it to me at this number, this is what I will do for you. I will print your picture of your driver's license out, I'll give you a couple of copies, I will send you a[n] absentee application, and I will send you a self-addressed stamped envelope that you can put in the mail and send to your absentee election manager, and all you've got to do is fill out your form and mail it in to them with your ID, and then they'll mail you the ballot, and then you can vote. They said: You would do that for me? I said: Of course I'll do it for you. I've done it for multiple people. That's what we call good customer service in our office.

So I've done that, my Chief of Staff has done that, my personal assistant has done that. I don't know how many times they've done it in the Elections Division. And we have encouraged registrars, circuit clerks, probate judges to do that where they are. Now, we can't control them because we're not with them. But I can tell you this, in our office, the people that work in our office, all thirty-nine of them, know that if there's a constituent that calls, that has an issue like I described, or one

that may be a little bit different, we're going to do whatever we have to to meet their needs.

Merrill depo., Ex. 12 at 100:3-102:13. Secretary Merrill has taken steps to mitigate the effects of the pandemic, not exacerbate them. He has not caused any injury Plaintiffs have suffered or will suffer, and neither has the State.

C. Any injury to Plaintiffs is not redressable by State Defendants.

For the reasons outlined in their motion to dismiss, State Defendants move for summary judgment concerning Plaintiffs' witness requirement and photo ID requirement claims, on the grounds that Plaintiffs' alleged injuries can only be redressed by county officials—to the extent they can be redressed at all. Additionally, State Defendants request summary judgment in the State's favor concerning the curbside voting claim against the State itself. *See* doc. 112 at 9-10.¹⁷

D. Organizational Plaintiffs similarly lack standing.

Space does not permit a full treatment of why each organization lacks standing. Generally speaking, three of the four organizations assert both member and organizational injuries. Between the three organizations that assert member injuries,

¹⁷ Although this Court relied on the “one-plaintiff rule” in its preliminary injunction opinion’s analysis of standing, (doc. 58 at 13-14, 18 n.8), “[a]t least one plaintiff must have standing to seek *each form* of relief requested in the complaint.” *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1647 (2017) (emphasis added). Here, because plaintiffs challenge varying combinations of provisions and different county-level defendants would provide the relief, at least one plaintiff in each county, at minimum, must show standing to properly invoke Article III jurisdiction. *See id.* at 1650-51. Regardless, the one-plaintiff rule is likely not a proper exercise of federal jurisdiction. *See id.* (recognizing that plaintiffs must have a “personal stake in the outcome of the controversy” to satisfy Article III standing (citation omitted)).

they identified a total of 40 voters (out of Alabama's 3,623,371 registered voters) who could not safely comply with the challenged provisions. Of these 40, the vast majority found a way to safely vote absentee in July, and retain similar options to comply with the witness and photo ID requirements in November. In terms of diversion of resources, no organizational Plaintiff could quantify how much time (if any) it had spent in response to the challenged provisions, and in general terms, the efforts they took largely were in response to the pandemic, not specifically in response to the challenged provisions. *See, e.g.*, Ex. 7 at 74:8-75:1. In addition, Plaintiffs' complaint ignores a rather obvious point: if Plaintiffs are successful in obtaining relief in this lawsuit, their burden will likely *increase* instead of decrease, as they will have to educate voters at the last moment about the momentous changes in voting procedures they seek. In fact, two organizational Plaintiffs acknowledged as much. *Id.* at 149:1-17; Ex. 11 at 32:19-38:9.

E. Sovereign immunity bars Plaintiffs' claims against State Defendants.

As raised in their motion to dismiss, State Defendants are protected by sovereign immunity. "[T]he Eleventh Amendment prohibits suits against [S]tate officials where the [S]tate is, in fact, the real party in interest." *Summit Med. Assoc., P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999). *Ex parte Young* allows litigation against State officials to nonetheless proceed for prospective, injunctive relief to end violations of federal law. *Summit Med. Assoc., P.C.*, 180 F.3d at 1336-37. However,

the *Ex parte Young* exception to sovereign immunity does not apply where the defendant “has no authority to enforce the challenged statute.” *Id.* at 1341-42.

For the reasons outlined in the motion to dismiss, State Defendants have not waived sovereign immunity with respect to any of Plaintiffs’ claims. Additionally, as State Defendants noted in their motion to stay discovery and associated proceedings (doc. 148), Eleventh Circuit precedent requires this Court to stay these proceedings until ruling on the jurisdictional matters State Defendants have raised. *See, e.g., Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009) (“Inasmuch as the complaint was insufficient as a matter of law to establish a *prima facie* case that the district court had jurisdiction, the district court abused its discretion in allowing the case to proceed and granting discovery on the jurisdictional issue.”); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004) (“The defense of sovereign or qualified immunity protects government officials not only from having to stand trial, but from having to bear the burdens attendant to litigation, including pretrial discovery.”); *Howe v. City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017) (“immunity is a right not to be subjected to litigation beyond the point at which immunity is asserted,” so an official raising a claim of immunity is entitled to a stay of all discovery pending a ruling on the immunity defense). To the extent that this Court wishes to issue a ruling in this matter in the near future, before the election, a preliminary injunction is the proper vehicle for doing so.

V. CONCLUSION

Judicial intervention in State management of elections is disfavored. This principle is all the more relevant now, as officials are attempting the difficult task of managing a major election just over two months away in the midst of a changing pandemic. The Supreme Court has granted State officials deference in conducting elections during the pandemic.¹⁸ The expedited discovery to date demonstrates that there is no genuine issue of material fact and State Defendants are entitled to a judgment as a matter of law. Thus, State Defendants respectfully request that the Court grant their motion for summary judgment.

Respectfully Submitted,

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¹⁸ *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ___, No. 19A1016 (Apr. 6, 2020) (blocking an order that had extended the deadline for absentee ballots to be submitted, and emphasizing that lower federal courts should ordinarily not alter the election rules on the eve of an election); *Tex. Democratic Party v. Abbott*, 591 U.S. ___, No. 19A1055 (June 26, 2020) (declining to reinstate a District Court ruling that would have allowed all eligible voters in Texas to vote by mail for the 2020 election cycle); *Little v. Reclaim Idaho*, ___, S.Ct ___, 2020 WL 4360897, at *1-2 (Jul. 30, 2020) (granting a stay of a District Court order that required the State to loosen ballot initiative requirements, noting that the State, “under extraordinary time pressures,” must make “discretionary judgments about how to prioritize limited state resources across the election system as a whole”); *Clarno v. People Not Politicians*, No 20A21 (Aug. 11, 2020) (order) (staying a preliminary injunction that would have required the State to relax its requirements for getting a proposed State constitutional amendment on the ballot); *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28 (Aug. 13, 2020) (order) (declining to block a District Court order that approved a consent decree regarding the State’s witness requirement for the November election). As this Court is aware, the Supreme Court also stayed this Court’s grant of a preliminary injunction in this matter. *Merrill v. People First of Ala.*, No. 19A1063 (Jul. 2, 2020) (order).

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Certificate of Service

I certify that on August 17, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record.

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