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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITE STATES DISTRICT COURT
FOR THE NORHTERN DISRICT OF ALABAMA
SOUTHERN DIVISION

PEOPLE FIRST OF ALABAMA, ROBERT CLOPTON, ERIC PEEBLES, HOWARD PORTER, JR. ANNIE CAROLYN THOMPSON, GREATER BIRMINGHAM MINISTRIES, ALABAMA STATE CONFERENCE OF THE NAACP, BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, TERESA BETTIS, SHERYL THREADGILL-MATTHEWS, and GREGORY BENTLEY, Plaintiffs, v. JOHN MERRILL, in his official capacity as the Secretary of State of Alabama, et al., Defendants.	)	Case No. 2:20-cv-00619-AKK

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, OF DEFENDANTS FRANK BARGER AND DEBRA KIZER

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Defendants Frank Barger and Debra Kizer, the Probate Judge and Absentee Election Manager of Madison County, Alabama, respectively, move the Court pursuant to Fed. R. Civ. P. 12(b)(1) and (6) to dismiss the claims against them, or in the alternative, move for summary judgment as to all such claims pursuant to Fed. R. Civ. P. 56.[1] In support of this motion, Defendants Barger and Kizer state as follows:

I. Defendants Barger and Kizer Object to this Court's Order Preventing them from Answering or Moving to Dismiss and Object to the Extreme Schedule in this Case, Which Violates Their Rights to Procedural Due Process

Defendants Barger and Kizer were added as defendants to the above-referenced lawsuit through the filing of an amended complaint on July 6, 2020. (Doc. 75). Summonses were not issued for these defendants until July 9, 2020. (Doc. 83). The very next day, which was before these defendants had been served or appeared in the case, the Court set this matter on an extremely expedited schedule. The Court's Scheduling Order of July 10, 2020 provides that trial is set for September 7, 2020; that all parties were to provide initial disclosures by July 1, 2020 (a date that had passed at the time of entry of the Order and that predated the filing of the amended complaint); and that the defendants were to answer the complaint by July 20, 2020.

[1] Defendants Barger and Kizer also move to dismiss, in the alternative, pursuant to Fed. R. Civ. P. 19 for failure to join necessary parties.

(Doc. 93). Further, the Order provided that **"EXTENSIONS FOR THE DEADLINES SET FOR DISCOVERY CUTOFF AND DISPOSITIVE MOTIONS WILL NOT BE EXTENDED ABSENT EXTRAORDINARY CAUSE SHOWN."** (Id.) (emphasis in original) (footnote omitted).

Defendants Barger and Kizer ultimately were asked, and agreed, to waive service of process. (Docs. 114, 115). Waivers were signed on July 20, 2020, and by virtue of the Federal Rules of Civil Procedure, answers of these defendants are not due until September 13, 2020 – approximately one week *after* the trial date established by the Court's scheduling order. Defendants Barger and Kizer first appeared through counsel on July 23, 2020 (well before they were required to pursuant to the waiver of service they executed), and discovered that depositions and discovery were already underway. Even if counsel for said Defendants had been able to hastily assemble ill-informed written discovery requests to the plaintiffs seeking information relevant to the claims against them on the very first day they appeared of record as counsel, the responses to that discovery (under this Court's expedited discovery schedule) would have come due *after* the completion of all depositions of the plaintiffs, all of which had been unilaterally set by the State defendants before undersigned counsel even appeared. In fact, counsel for Defendants Barger and Kizer literally had less than 24 hours from the time they appeared in this case until

they were to depose the first plaintiff, Eric Peebles. Because of the fact that depositions in this case were scheduled in a double-stacked manner, with multiple parties being deposed at the same time, Defendants Barger and Kizer have not even been able to view all depositions, much less meaningfully assist their counsel in preparing to litigate this extremely significant case.

All of this to say, by the time these Defendants appeared, multiple other defendants had filed objections to the Scheduling Order (Docs. 74, 95, 123, 125). Before Defendants Barger and Kizer had the opportunity to join in these objections and requests for relief, the Court entered an order (on July 24, 2020) overruling the objections and providing that the Court would "deem [newly added defendants] to have joined in either the motion to dismiss, doc. 112, or answer, doc. 113, filed by some of the other defendants in this case." (Doc. 126, at 2).

While Defendants Barger and Kizer appreciate the Court's decision to consider them to have joined in certain previously filed motions – and hereby expressly adopt and incorporate the arguments in the answers and motions to dismiss filed by those other defendants – this remedy is not sufficient to protect the procedural due process rights of Defendants Barger and Kizer. [2] For instance, the

[2] Like many other defendants, Defendants Barger and Kizer object to the expedited schedule in this case. Defendants note that if emergency relief was necessary from the perspective of the plaintiffs, those parties could have sought temporary or

previous motions fail to address the fact that the amended complaint includes no allegations whatsoever about Defendants Barger and Kizer and constitutes a shotgun pleading. Documents 112 and 113 also do not address the duplicative nature of the claims against Defendants Barger and Kizer. These additional and other grounds for dismissal not already asserted in the two documents cited by the Court, should, in justice and fairness, be considered insofar as the claims against Defendants Barger and Kizer are concerned. Accordingly, Defendants Barger and Kizer hereby move to dismiss the amended complaint, or, in the alternative, request the entry of for summary judgment, not only on grounds already raised but also on additional grounds as stated herein. Defendants request the Court to consider each of these arguments, and also move the Court to stay any pending deadlines and first address whether the first amended complaint is an impermissible shotgun pleading, as argued below.

II. Defendants Barger and Kizer Adopt the Arguments of Defendant J.C. Love, III

preliminary injunctive relief. Having elected against doing so, Defendants should be entitled to the procedural protections and other privileges of the Federal Rules of Civil Procedure. As it stands, the Court's order contemplates defendants being deposed and put to trial on a shotgun pleading, all without even answering or being able to receive an amended complaint that complies with the Rules of Civil Procedure by giving them fair notice of the allegations against them.

In addition to the arguments incorporated by virtue of this Court's order overruling the objections to the Scheduling Order, Defendants Barger and Kizer adopt and incorporate each of the arguments asserted in the motion to dismiss of Defendant J.C. Love, III, Probate Judge of Montgomery County, Alabama. (Doc. 140). As noted therein, under Alabama law, a probate judge has no assigned duties with respect to absentee voting. See, e.g., Ala. Op. Atty Gen. No.2012-037, 2012 WL 679218 at *2 (Feb. 15, 2012)("The [probate] judge and his or her staff are authorized to perform most functions within the voter registration system, *with the exception of voter registration or absentee management*") (emphasis supplied). Similarly, under Alabama law, an absentee election manager has no duties with regard to voting at polling places, nor does the AEM have any authority to implement curbside voting. As to *both* absentee and "curbside voting," the probate judge and AEM are not the source of the complaints raised in the complaint, nor are they the election officials who can change the policies to which plaintiff objects.

It is the Secretary of State who is the "chief elections official in the state" and it is the Secretary of State who "shall provide uniform guidance for election activities." Ala. Code 17-1-3.[3] It is the Secretary of State who is alleged to have

[3] It is the County Commission which selects polling places. Ala. Code Sec. 17-6-4.

created and enforced the prohibitions at issue in this case, and the Secretary of State has in fact testified that he has threatened to call law enforcement on any probate judge who defies his direction to refrain from permitting curbside voting. (Deposition of John Merrill, attached as 12 to State Defendants' Motion for Summary Judgment, at p. 46:3-23) ("If you want me to call . . .Sheriff Kenneth Ellis, who is sheriff in Hale County, if you want me to call him and get him to go over there and make sure that this is stopped, or send a deputy, I said, I'll be happy to do that. . . . Is that what you want me to do?").

Accordingly, relief in this case is properly sought *not* from either Defendant Barger or Defendant Kizer, but from Secretary Merrill and the State of Alabama itself. See, e.g., Texas Democratic Party v. Abbott, 961 F.3d 389, 399 (5th Cir. 2020) (noting that a suit challenging vote by mail requirements was properly addressed to Texas Secretary of State, "who serves as the chief election officer of the state," notwithstanding the role local clerks play in reviewing mailed in ballots); cf. Harman v. Forssenius, 380 U.S. 528, 537 n.14 (1965) (finding that "the State Board of Elections' power to supervise and to insure 'legality in the election process'" rendered the state board the proper party to the litigate against pursuant to Fed. R. Civ. P. 19, as opposed to the local registrars, who perform ministerial roles); see also Lopez v. Monterey Cty., Cal., 519 U.S. 9, 193 (1996) ("The District Court also

joined the State as an indispensable party, based on the State's argument that the County was doing nothing more than administering a state statute that required countywide elections, rather than administering its own county ordinance.").[4] Accordingly, the traceability and redressability requirements of standing are not met as to the claims against defendants Barger and Kizer as to **any** claim asserted against them. Concerned Parents To Save Dreher Park Ctr. v. City of W. Palm Beach, 884 F. Supp. 487, 490 (S.D. Fla. 1994) ("There must be clear links in the chain of causation between the challenged government conduct and the asserted injury in order to establish standing.").

[4] A similar issue was addressed by Judge Coogler in Greater Birmingham Ministries v. Alabama, 2017 WL 782776 at *4 (March 1, 2017), *affirmed*, Greater Birmingham Ministries v. Sec'y of State for Alabama, No. 18-10151, 2020 WL 4185801 (11th Cir. July 21, 2020), where the plaintiffs sought to enjoin the Governor, the Attorney General, the ALEA Secretary, and the Secretary of State from enforcing the Alabama Photo ID Law. Judge Coogler held as follows: "Plaintiffs have Article III standing to pursue their claims against only the Secretary of State but not the other officer defendants. Plaintiffs seek an injunction prohibiting 'Defendants' from 'conducting any elections using the Photo ID Law'…It is the Secretary of State who is 'the chief elections official in the state' and is required to 'provide uniform guidance for election activities'…The Photo ID Law makes him, and not the other officer defendants, the officer with 'rule making authority for the implementation of [the Photo ID Law] under the Alabama Administrative Procedure Act." 2017 WL 782776, at * 4. The same reasoning employed by Judge Coogler in connection with the Photo ID law applies directly to the absentee voting requirements and *de facto* curbside voting ban, both of which are enforced and elucidated by the Secretary of State, not by probate judges or absentee election managers.

Relatedly, plaintiffs have failed to allege sufficient facts to state claims for declaratory or injunctive relief as to Defendants Barger and Kizer. There is no evidence (nor even any allegations) establishing whether Defendants Barger or Kizer would have refused to implement curbside voting or taken positions adverse to the plaintiffs on the identification, attestation, and excuse requirements in the event that the Secretary of State had not prohibited curbside voting or lifted currently applicable restrictions; and there is no evidence to back up the idea that, absent current restrictions, these defendants would engage in conduct violative of the plaintiffs' rights in a way that would create a justiciable controversy or subject the plaintiffs to imminent harm. (Doc. 140, at 8-11). Indeed, as this Court has already found, "[t]he practice [of curbside voting] is only prohibited because Secretary Merrill has acted to shut down curbside voting operations when counties have attempted to provide them." (Doc. 58, at 26). "Thus, if the court enjoined Secretary Merrill from banning otherwise lawful curbside voting operations, counties would be free to provide them, if they are so inclined, and the ban would be lifted." (Id., at 27).

III. Defendants Barger and Kizer Adopt the Arguments of Defendant Lashandra Myrick

For the same reasons, Defendants Barger and Kizer adopt and incorporate the arguments asserted in the motion to dismiss of Defendant Lashandra Myrick. As

argued in more detail by Defendant Myrick, all claims brought pursuant to 42 U.S.C. 1983 against Defendant Barger and Kizer are due to be dismissed because plaintiffs have failed to allege or establish any causal connection between the actions of these defendants and their alleged injuries, all of which are attributable (under their own allegations and evidence) to the actions of the Secretary of State. (Doc. 129, at 4-5).

An example of this lack of connection is evident when one examines plaintiff's decision to sue Judge Barger and AEM Kizer under Title II of the Americans with Disabilities Act relating to the curbside voting ban. That claim is contained within Count II of the complaint; it purports to levy a claim under Title II of the ADA against all defendants (even including Defendant Kizer, who only administers absentee balloting) without differentiating between them. (Doc. 75, at para. 195 et seq.). Count II hedges as to whether the basis for the claim is the current pandemic (id. at para. 201-07), or, more broadly, a contention that the Americans with Disabilities Act *always* requires curbside voting. (Id. at para. 207). But in either event, the complaint ignores the fact that under Alabama law, neither Defendant Kizer (the AEM) nor Defendant Barger (the Probate Judge) have any authority whatsoever with regard to selecting polling sites or evaluating the accessibility of those sites under the Americans with Disabilities Act. In reality, Ala. Code Sec. 17-6-4 provides that "the county governing bodies shall designate the places of holding

elections in the precincts established" by state law. Id. The statute goes on to make very clear that no voting shall take place at any location other than those locations established by the county governing body, which in this case would be the Madison County Commission. Id.

To find that the plaintiffs here are entitled to a reasonable accommodation consisting of curbside voting, the Court would necessarily have to find that (a) the current voting locations, which were not selected by any defendant who is a party to this lawsuit, are inaccessible; (b) that the current defendants are responsible for the current inaccessibility; and (c) that the current defendants have the power or authority to change the polling locations from those selected by the Madison County Commission, *i.e.*, that the request is "reasonable." Todd v. Carstarphen, 236 F. Supp. 3d 1311, 1327 (N.D. Ga. 2017) (plaintiff must establish public entity refused to provide reasonable accommodation, despite need); Alboniga v. Sch. Bd. of Broward Cty. Fla., 87 F. Supp. 3d 1319, 1338 (S.D. Fla. 2015) (Title II requires plaintiff to establish that failure to modify was "because of" named public entity's actions); Concerned Parents To Save Dreher Park Ctr. v. City of W. Palm Beach, 884 F. Supp. 487, 490 (S.D. Fla. 1994) ("There must be clear links in the chain of causation between the challenged government conduct and the asserted injury in order to establish standing."). In addition, plaintiffs would have to overcome any claimed

"undue hardship" proffered by the defendants, Alboniga, 87 F. Supp. 3d at 1338, and the Court would need to ignore the fundamental prohibition on a plaintiff being permitted to choose the accommodation, rather than permitting the defendant to choose the accommodation. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86 (11th Cir. 1997) (explaining a qualified individual with a disability is not entitled to the accommodation of his choice).

Here, none of these requirements are met. Defendants Barger and Kizer do not select polling sites, nor can they change the location of voting once the County Commission selects the sites; they are thus not responsible for any claimed inaccessibility. Furthermore, the evidence in this case points to an obvious undue hardship if they were to be confronted with an order to *move* polling sites or implement major changes to those polling sites so close to an election. For one thing, as just mentioned, these Defendants lack the authority to change the location of voting. Ala. Code Sec. 17-6-4(a). For another, the testimony will show that most polling sites in Madison County are churches without room for lengthy car lines full of voters, thus ensuring that curbside voting would create major traffic hazards and possibly suppress the vote even further than plaintiffs claim would occur without curbside voting. And finally, Alabama law also provides that "whenever places of voting are once designated and established as required by this chapter, the voting

places for precincts shall not be changed within three months before an election is to be held." Id. a 17-6-4(d). So even if these Defendants *could* change polling sites, they clearly cannot do it right now, less than three months before the election. See also Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

Of course, the same is to be said with regard to Defendants Barger's and Kizer's alleged liability – under the ADA as well as the Voting Rights Act and the Fourteenth and Twenty Fourth Amendment – for Alabama's voter identification, attestation, and excuse requirements. These Defendants did not establish these requirements and have no ability to change them.[5] Thus, demanding that they do so would both be inconsistent with the standards of liability established under federal law and inconsistent with the fundamental requirements of standing. The complaint itself identifies the *state laws* that give rise to these requirements, and plaintiffs identify no way in which these requirements can either be attributed to Defendants Barger and Kizer nor ignored by them. As the State of Alabama and Secretary

[5] Defendant Barger has nothing whatsoever to do with these requirements cannot be sued given his lack of connection to these prerequisites.

Merrill have explained in their separate briefing, which is incorporated by this reference in full, these requirements of Alabama law constitute essential eligibility requirements for absentee voting, all of which are independently valid and lawful. See, e.g., Black Voters Matter Fund v. Raffensperger, No. 1:20-CV-01489-AT, 2020 WL 4597053, at *27 (N.D. Ga. Aug. 11, 2020) (rejecting similar poll tax challenge to absentee balloting requirements); Greater Birmingham Ministries v. Sec'y of State for Alabama, No. 18-10151, 2020 WL 4185801, at *1 (11th Cir. July 21, 2020) (affirming Alabama's voter identification requirements). These Defendants did not create these requirements and they have no choice but to implement and adhere to them. It is thus inappropriate to sue them for injunctive relief.

IV. Defendants Barger and Kizer Adopt the Arguments of Defendant Mary B. Roberson

Defendants Barger and Kizer also adopt and incorporate the arguments of Defendant Mary B. Roberson. (Doc. 54). As noted above, the Secretary of State is the proper defendant in this case, not these local election officials. Texas Democratic Party v. Abbott, 961 F.3d 389, 399 (5th Cir. 2020) (noting that a suit challenging vote by mail requirements was properly addressed to Texas Secretary of State, "who serves as the chief election officer of the state," notwithstanding the role local clerks play in reviewing mailed in ballots); Greater Birmingham Ministries v. Alabama, 2017 WL 782776 at *4 (March 1, 2017), *affirmed*, Greater Birmingham

Ministries v. Sec'y of State for Alabama, No. 18-10151, 2020 WL 4185801 (11th Cir. July 21, 2020) (holding that Alabama Secretary of State was proper defendant in respect to enforcement of photo ID requirements).

As articulated in the motion to dismiss of Defendant Roberson, even if the probate judges and AEMs in this litigation are otherwise properly sued, the presence in this litigation of both the State of Alabama and the Secretary of State (who is the state's chief elections official with broad regulatory authority) means that the probate judges and AEMs should be entitled to Eleventh Amendment immunity as state officers *not* charged with enforcement of the challenged restrictions and regulations. (Doc. 54, at 8-13); see also Foster v. Etowah Cty. Clerk's Office, No. 4:14-CV-0687-AKK-HGD, 2015 WL 4999667, at *2 (N.D. Ala. Aug. 21, 2015) (noting that the circuit clerk is a state officer); Ala. Code Sec. 12-1-2 (noting that the judicial power of "the state is vested exclusively in a unified judicial system which shall consist of a Supreme Court . . . a probate court," etc., thus rendering probate judges state judicial officers).

V. The Amended Complaint is an Incomprehensible Shotgun Pleading that Makes No Substantive Allegations Against Defendants Barger and Kizer, Incorporates Factual Allegations Senselessly, and Lumps Defendants Together in Violation of Eleventh Circuit Precedent

In addition to the arguments made by the other defendants in this case, Defendants Barger and Kizer seek dismissal because the complaint, as amended,

constitutes a shotgun pleading multiple times over. (Doc. 75). Defendants specifically object to being put to trial on this shotgun complaint without any adequate notice of the allegations against them.

One of the four types of shotgun complaints condemned by the Eleventh Circuit is a complaint which "assert[s] multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions." See Weiland v. Palm Beach Cnty. Sheriff's Office, 792 F.3d 1313, 1323 & n.14 (11th Cir. 2015) (citing, e.g., Magluta v. Samples, 256 F.3d 1282, 1284 (11th Cir. 2001), and Ebrahimi v. City of Huntsville Bd. of Educ., 114 F.3d 162, 164 (11th Cir. 1997) (*per curiam*)). Put another way, a complaint that is "replete with allegations that 'the defendants' engaged in certain conduct, making no distinction among the [multiple] defendants charged," fails to adhere to the requirements of Federal Rule of Civil Procedure 8. See Ebrahimi, 114 F.3d at 164 (disapproving of pleadings offering "vague and conclusory factual allegations in an effort to support a multiplicity of . . . claims leveled against [multiple] defendants"). Thus, where a complaint repeatedly fails to make any effort to distinguish as to which acts were attributable to which defendant, that complaint "fail[s]. . . to give defendants adequate notice of the claims against them and the grounds upon which each claim rests." Weiland, 792 F.3d at 1323; Marchelletta v. Bergstrom, 1:14-CV-02923-ELR,

2016 WL 10537558, at *6-7 (N.D. Ga. Feb. 25, 2016) (dismissal appropriate where "references to Defendants as a collective group permeate" the complaint "without specifying which Defendant is responsible for which acts and/or omissions").

The complaint here does precisely that, saying nothing specific about Defendants Barger and Kizer except to list their titles and to allege, at the most extreme level of generality, that they are sued "for failing to take adequate steps to protect the fundamental right to vote ahead of all upcoming 2020 elections." (Doc. 75, at para. 1). What those steps are, what these Defendants failed to do, and how the conduct of these Defendants is distinct from that of other defendants, is entirely unclear. The complaint asserts its causes of action indiscriminately against all of the defendants, without identifying the conduct for which each defendant is sued. Fundamentally, then, the amended complaint violates Rule 8 of the Federal Rules of Civil Procedure in that it fails to provide Defendants Barger and Kizer fair notice of what acts or omissions for which ***they*** are sued. Perhaps even more notably, the complaint – with its very specific allegations about what the Secretary of State did and prohibited – totally fails to explain how Defendants *Barger and Kizer* could have *defied* those prohibitions of the State's chief election official to act in the manner plaintiffs evidently desire.

In addition, the complaint in this case constitutes a shotgun pleading for another reason. It is well established that the incorporation of all allegations of a complaint into each successive count for relief renders the complaint an "incomprehensible shotgun pleading." Jackson v. Bank of America, N.A., 898 F.3d 1348, 1356 (11th Cir. 2018) (describing as an "incomprehensible shotgun pleading" a complaint which alleges numerous "claims and incorporates by reference all of its factual allegations into each claim, making it nearly impossible for Defendants and the Court to determine with any certainty which factual allegations give rise to which claims for relief."); Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1359 n. 9 (11th Cir. 1997) (describing complaint "which incorporates by reference all forty-three paragraphs of factual allegations" of the complaint into the first sentence of each count of the complaint as "an all-too-typical shotgun pleading"); Silverthorne v. Yeaman, 668 Fed. Appx. 354, 356 (11th Cir. 2016) (affirming dismissal of "shotgun complaint" in which plaintiff "continued to reference the entire facts section rather than only the relevant portions" in each count of her complaint). Such a shotgun pleading renders it "virtually impossible to know which allegations of fact are intended to support which claim(s) for relief" and "does not comply with the standards of Rules 8(a) and 10(b)." Kabbaj v. Obama, 568 F. App'x 875, 879 (11th Cir. 2014).

The complaint in this case does this multiple times over, rendering the entire document an "incomprehensible" mess. (Doc. 75, at para. 188; 195; 210; 221; 229). The Eleventh Circuit has clearly instructed defendants on the receiving end of such a complaint not to answer the complaint but to instead point out the shotgun nature of the complaint to the Court and request dismissal or repleader. Anderson v. District Bd. of Trustee of Cent. Florida Community College, 77 F.3d 364, 367 (11th Cir. 1996). Likewise, "the Eleventh Circuit has repeatedly warned district courts of their duty and obligation to screen shotgun pleadings at various stages of litigation prior to appeal." Benson v. Gordon Cty., Georgia, No. 4:09-CV-143-RLV, 2011 WL 13193005, at *2 (N.D. Ga. Dec. 22, 2011) (noting that the court had "no choice" but to order repleader even while acknowledging that the court "should have ordered such repleading at a much earlier time in this litigation"). Defendants Barger and Kizer hereby comply with the Eleventh Circuit's requirements, move the court to dismiss the first amended complaint, and object to being put to trial without a legitimate opportunity to understand the claims asserted against them.

VI. The Claims Against Defendant Kizer are Duplicative and Must be Dismissed Pursuant to *Kentucky v. Graham*

Even if the complaint complied with the shotgun pleading rules, the claims in this case against Defendant Kizer are subject to dismissal for yet another reason.

Defendant Kizer is a state official sued in her official capacity.[6] "Official-capacity suits ... 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Alabama State Conference of NAACP v. City of Pleasant Grove, 372 F. Supp. 3d 1333, 1338–39 (N.D. Ala. 2019) (citing Kentucky v. Graham, 473 U.S. 159, 165 (1985). Official capacity suits against multiple state officials or a state official and the entity that the official represents, as is the case here, are impermissibly duplicative. This is true both in the context of 42 U.S.C. 1983 and under the Voting Rights Act. Id.; see also, e.g., Hallman v. Bibb Cty. Corr. Facility, No. 714CV02315AKKJEO, 2015 WL 5278794, at *2 (N.D. Ala. Sept. 9, 2015) (Kallon, J.) ("As a claim against Bibb County Correctional Facility is the same as a suit against Warden Toney in her official capacity, the court has considered the

[6] The fact that Defendant Kizer is a state official is beyond dispute. This Court has affirmatively held that a circuit clerk is a state official. See Foster v. Etowah Cty. Clerk's Office, No. 4:14-CV-0687-AKK-HGD, 2015 WL 4999667, at *2 (N.D. Ala. Aug. 21, 2015) ("To the extent the plaintiff sues Cassandra Johnson as the Etowah County Circuit Clerk, in her official capacity, she is one and the same with the Etowah County Circuit Clerk's Office. Under Alabama law, circuit court clerks' offices are considered state agencies."); see also Ala. Code § 12–17–80 ("Clerks . . . of the circuit court shall be paid by the state."); Young v. Jefferson Cty., Alabama, No. 2:15-CV-01605-JEO, 2016 WL 4180864, at *4 (N.D. Ala. Aug. 8, 2016) ("It is readily apparent that Jefferson County has no authority or control over the circuit court clerk's office. The Jefferson County circuit court clerk's office is a state agency; the circuit court clerk is a state employee. . . ."); Jefferson Cty. v. Swindle, 361 So. 2d 116, 118 (Ala. 1978) (noting that counties are not responsible for Social Security taxes of circuit clerks, who are state officials).

plaintiff's naming of both Bibb County Correctional Facility and Warden Toney duplicative.").

Here, the State of Alabama, the governmental entity of which Defendant Kizer is an officer, is also a defendant to this cause. (Id. at para. 60). While Ex parte Young, 209 U.S. 123 (1908) permits official capacity suits against state officials in their official capacity as an exception to the Eleventh Amendment bar, there is still impermissible redundancy here to the extent that the State of Alabama is susceptible to suit. Jie Liu Tang v. Univ. of S. Fla., No. 8:05CV572T17MAP, 2005 WL 2334697, at *2 (M.D. Fla. Sept. 23, 2005) (noting that "[a]lthough Plaintiff is technically permitted to sue a state official in his or her official capacity for prospective or injunctive relief" without violating the Eleventh Amendment, such a claim would still be "duplicative" of another claim against the entity itself). Furthermore, Secretary of State John Merrill is already sued in his official capacity pursuant to Ex parte Young. (Id. at para. 59). Not only that, Secretary of State Merrill is *the* state official who is both responsible for promulgating, and who actually did promulgate, the relevant rules and regulations that led to this lawsuit. Given that *both* the State of Alabama *and* the Secretary of State – another state official and the "chief elections official in the state," Greater Birmingham Ministries v. Alabama, 2017 WL 782776 at *4 (March 1, 2017) – have already been sued, and given that there are no

allegations whatsoever of any particular conduct of Defendant Kizer, her presence in the case is impermissibly redundant.

VII. Dismissal is Required Because Plaintiffs Have Failed to Join Multiple Necessary Parties

Fed. R. Civ. P. 19 requires that persons be joined as parties to a lawsuit where "in that person's absence, the court cannot accord complete relief among existing parties" or where "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede that person's ability to protect the interest." Id. As noted above, Defendants Barger and Kizer – being local election officials in Madison County with ministerial duties and no power to change or defy the instructions imposed upon them by the State of Alabama and the Secretary of State – contend they are not appropriate defendants in this cause. That said, to the extent the Court somehow disagrees, it must examine why it is that plaintiffs have chosen to seek relief affecting *all* elections in the State of Alabama without joining *all* local election officials – *i.e.*, the judges of probate and absentee election managers of all counties within this State.

In Lacasa v. Townsley, No. 12-22432-CIV, 2012 WL 13069990, at *2 (S.D. Fla. July 13, 2012), the United States District Court for the Southern District of Florida granted a Rule 19 motion filed by local election officials who were sued for

what the court described as their "ministerial" role in election procedures, after finding that certain non-parties, including the Florida Secretary of State and Elections Canvassing Commission, were the actual agencies charged with the duties at issue in the case. Id. at * 2. Here, of course, the procedural posture of Lacasa is somewhat distinct – in that the plaintiffs *have* already (appropriately) sued the Secretary of State and State of Alabama. But the holding of Lacasa nevertheless applies to the extent this Court finds that local officials are otherwise properly sued. Stated differently, if *any* local officials are properly sued as playing some role in local elections that is more than merely ministerial, *all* such local officials have "interests [which] could be detrimentally affected by the outcome of the action," and thus constitute necessary parties under Rule 19. Id.

Indeed, if the plaintiffs were to prevail, all local election officials in Alabama would be faced with a federal court order finding that curbside voting is federally required, or that absentee voting sans certain existing procedural safeguards is permitted, or both. Clearly, *if* any such local officials are properly sued, *all* such have a right to speak to that topic, and to share the specific concerns and conditions applicable to their local situations. They have a right, fundamentally, to be heard. That is especially true given that plaintiffs argue that curbside voting and relief from the absentee voting requirements are types of reasonable accommodation, a legal

analysis that cannot be properly completed without input from the government officials who must implement the proposed accommodation and explain the level of burden that would be presented.

Defendants Barger and Kizer recognize that this Court intends to proceed to trial in this case in short order, and that it may believe it is too late to add these necessary parties. Rule 19 speaks to what the Court should do in such an event. "If it is not feasible to join a necessary party, it is then up to the court to determine whether, 'in equity and good conscience,"' the action can still proceed, or whether it must be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(7) and 19(b) because the necessary party is indispensable." Osprey Special Risks Ltd. v. Ocean Ins. Mgmt., Inc., No. 8:10-CV-862-T-30AEP, 2010 WL 11506956, at *2 (M.D. Fla. June 21, 2010). If it is too late to add all necessary parties because plaintiffs made a conscious and considered decision to sue some but not all county election officials, the action simply must be dismissed.

VIII. Defendants Barger and Kizer Adopt the Summary Judgment Motions, Briefs, and Evidentiary Submissions of All Other Defendants

This case has already been to the Supreme Court of the United States. Defendants Barger and Kizer are newcomers to this litigation, having been added in late July and forced to attempt to get up to speed before even filing an answer or motion to dismiss or having a fair opportunity to participate in discovery. The

schedule in this case has worked a serious and undue hardship on these defendants as they attempted to comply with discovery demands, determine their role in the case, and prepare appropriate filings. To the extent not expressly stated above and to the extent not *inconsistent* with the arguments asserted above, Defendants Barger and Kizer adopt the forthcoming and previously filed summary judgment motions and briefs of all other defendants to this cause, many of whom have been in this case since the beginning, and request that the Court consider them to have joined in each of these motions.[7]

s/ David J. Canupp
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s/ J. Jeffery Rich
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[7] Defendants Barger and Kizer appreciate the extreme toll this case has taken on judicial economy as well, and express their gratitude for this Court's attention to this matter in an unprecedented time for our courts and our society. In no way should the Defendants' arguments be taken as any sort of affront to the Court, which has done yeoman's work to adjudicate this case. Rather, Defendants' arguments are intended to point out the sheer impossibility and impracticability of these Defendants responding to a poorly drafted shotgun pleading and preparing this case for trial on a timeline essentially mandated by plaintiffs' last minute litigation and decision not to seek temporary or preliminary injunctive relief as contemplated by the Rules of Civil Procedure.

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CERTIFICATE OF SERVICE

I certify that I have filed the foregoing with the Clerk of the Court using the ECF System, which will send notification of such filing to those parties of record who are registered for electronic filing, and further certify that those parties of record who are not registered for electronic filing have been served by mail by depositing a copy of the same in the United States mail, first class postage prepaid and properly addressed to them as follows:

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On this the 17th day of August, 2020.

s/ David J. Canupp
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