

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

PEOPLE FIRST OF ALABAMA, et
al.,

Plaintiffs,

v.

JOHN MERRILL, et al.,

Defendants.

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

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs move for partial summary judgment under Federal Rule of Civil Procedure 56 on their claims challenging Defendant Alabama Secretary of State John Merrill's enforcement of a *de facto* ban on curbside voting (the "Curbside Voting Ban"), which violates the rights of Plaintiffs and other voters with disabilities under Title II of the Americans with Disabilities Act ("ADA"). 42 U.S.C. §§ 12131 *et seq.*

There are no material facts in dispute regarding the Curbside Voting Ban. Individual Plaintiffs and members of Organizational Plaintiffs include registered voters with ambulatory or other disabilities who are qualified to vote in Alabama elections. Mem. Op., Doc. 58, at 9-10. Before and after the pandemic, the Curbside Voting Ban has denied voters, like Plaintiffs, with ambulatory disabilities access to the vote. And, in the pandemic, the Centers for Disease Control and Prevention ("CDC") recommends that election officials offer curbside voting as an in-person voting option for high-risk voters, like Plaintiffs Peebles and Porter, and to voters with COVID-19 symptoms, like the members of the Organizational Plaintiffs, as a safe option for voting in person during the COVID-19 pandemic. *Id.* at 49. The Secretary's Curbside Voting Ban, however, denies Plaintiffs their right under the ADA to the "delivery of services at alternate accessible sites." 28 C.F.R. § 35.150(b).

The Secretary admits that he lacks authority to prevent probate judges from providing curbside voting so long as they do not violate Alabama law. Nonetheless, the Secretary has twice interfered with election officials' efforts to implement curbside voting. Doc. 58 at 17. He also promises to do so in the future, even if election officials were to offer curbside voting in a manner that is consistent with federal and state law and his own deputy's testimony about a permissible process. Merrill Dep. 54:3-15; 56:10-62:8 (attached as Ex. F).

The Curbside Voting Ban denies voters the assistance that they are afforded under federal and state law. Accordingly, Plaintiffs respectfully request that this Court grant their partial motion for summary judgment and enjoin the Secretary from prohibiting election officials from providing curbside voting in a manner that complies with state law.

STATEMENT OF UNDISPUTED FACTS

1. The United States and the State of Alabama are in the midst of an ongoing public health emergency due to the exponential spread of COVID-19, the respiratory disease caused by the novel coronavirus SARS-CoV-2. COVID-19 is a highly infectious virus spread through respiratory droplets and aerosols which can be transmitted by persons who are asymptomatic. *See* Reingold Report ¶¶ 10, 13 (Attached as Ex. A).

2. As of August 17, 2020, the United States has confirmed nearly 5.5 million cases of COVID-19 and reported 169,350 deaths due to COVID-19 and counting.¹ As of August 13, Alabama had reported over 100,000 confirmed COVID-19 cases, more than 1,800 Alabamians have died because of the virus, and 96.4% of the Alabamians who have died from COVID-19 were people with underlying medical conditions.²

3. COVID-19 poses a significantly higher risk of death or serious illness for people with certain medical conditions, including immunological conditions, hypertension, heart conditions, lung diseases (asthma and chronic obstructive pulmonary disease), diabetes mellitus, obesity, and chronic kidney disease. Reingold Report ¶ 8.

4. In Alabama, 33.8% of residents have been diagnosed as obese, 41.9% have hypertension or high blood pressure, 12.7% have diabetes, and 10.4% have asthma. Burch Report at 10-11 (attached as Ex. B). Data suggests that 40–80% of Alabamians may be at high risk for severe illness from COVID-19. Burch Report at 23.

¹ Ctrs. for Disease Control & Prevention, *Cases in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated Aug. 17, 2020).

² Ala. Dep't of Pub. Health, Characteristics of Laboratory Confirmed Cases of COVID-19, Aug. 13, 2020, <https://www.alabamapublichealth.gov/covid19/assets/cov-al-cases-081320.pdf>.

5. Alabama State Health Officer Dr. Scott Harris has stated that “[c]hronic diseases factors are a real risk for dying from this disease, and chronic diseases are found in about a third of [Alabama] citizens.”³ (attached as Ex. C).

6. In Alabama, there are 454,092 persons of voting age with an ambulatory disability, which is defined by the U.S. Census Bureau as “having serious difficulty walking or climbing stairs.” Corrected Cooper Report ¶¶ 13-15 (attached as Ex. D).

7. The population of Hale County is 59% Black, Perry County is 69.4% Black, and Wilcox County is 69.7% Black. Corrected Cooper Report at 16, Fig. 2. Half or significantly more of the African Americans aged 65 and over in Hale (48.9%) and Perry (65.8%) counties have disabilities. Corrected Cooper Report ¶ 40.

8. With no known effective treatment or vaccine, public health officials have urged the public to practice “social distancing” and to avoid close contact with others.⁴ (attached as Ex. E). For purposes of social distancing, the CDC recommends that people stay at least six feet away from others and “avoid crowded places.”⁵

³ Leada Gore, *Alabama’s Coronavirus Peak: ‘Clearly the State Can’t Stay Shut Down’, ADPH’s Dr. Scott Harris Says*, AL (Apr. 20, 2020), <https://www.al.com/news/2020/04/alabamas-coronavirus-peak-clearly-the-state-cant-stay-shut-down-adphs-dr-scott-harris-says.html>.

⁴ Lisa Lockerd Maragakis, Johns Hopkins Univ., *Coronavirus, Social Distancing and Self-Quarantine*, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine> (last visited June 25, 2020).

⁵ Ctrs. for Disease Control & Prevention, *Social Distancing*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last updated July 6, 2020).

9. On March 13, 2020 Governor Kay Ivey declared a State of Emergency in Alabama. Doc. 58 at 7. Since March 19, the Governor and State Health Officer have issued a series of “Safer at Home” Orders, which recommend rigorous social distancing. *Id.* Each of the Safer at Home Orders have the “force and effect of law and shall be executed and enforced by the same courts, bodies, officials, agents and employees as in the case of health laws.” Ala. Code § 22-2-2(6).

10. The current Safer at Home Order was adopted on July 29, 2020 and is in effect through at least August 31, 2020.⁶ That order “encourage[s]” that “all individuals—and especially vulnerable persons—. . . exercise personal responsibility in slowing the spread of COVID-19 by,” among other things, “[m]inimizing travel outside the home, especially if sick.”⁷ The Safer at Home Order defines “vulnerable persons” as “individuals 65 years and older or individuals with serious underlying health conditions, including high blood pressure, chronic lung

⁶ See, e.g., Scott Harris, *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19* (Apr. 3, 2020), <https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf> (summarizing and extending measures); see also Scott Harris, *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19* (May 21, 2020), <https://governor.alabama.gov/assets/2020/05/Safer-at-Home-Order-FINAL-5.21.2020.pdf>; Scott Harris, *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19* (July 29, 2020) <https://governor.alabama.gov/assets/2020/07/Safer-at-Home-Order-Final-7.29.20.pdf>.

⁷ *Id.* at 2

disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.”⁸

11. The Safer at Home Order “strongly encourage[s]” the use of curbside pickup services for restaurants and senior centers.⁹

12. It also requires people to wear masks or facial-coverings to prevent against the spread of COVID-19, but the requirement does not apply to “[a]ny person who is voting, though wearing a face covering is strongly encouraged.”¹⁰

13. Secretary Merrill has stated that neither poll workers nor voters are required to wear masks to polling places for the August and November 2020 elections. *See* Merrill Dep. 77:2-19, 79:1-4.

14. On July 14, 2020, Alabama held primary runoff elections throughout the State.

15. Plaintiff Thompson timely requested an absentee ballot. Application for Absentee Ballot of Annie Carolyn Thompson, AEM004622 (attached as Ex. G). Plaintiff Porter mailed an absentee ballot application postmarked on July 8, 2020. Application for Absentee Ballot of Howard Porter, Jr., AEM004628 (attached as Ex. H). Neither Plaintiffs Porter nor Thompson received an absentee ballot before the

⁸ *Id.*

⁹ *Id.* at 10.

¹⁰ *Id.* at 3.

July 14 primary run-off. Porter Dep. 31:6-10 (attached as Ex. Q) and Thompson Dep. 50:14-17 (attached as Ex. I).

16. The Alabama Secretary of State has since received a letter from the United States Postal Service warning the state that “it cannot guarantee all ballots cast by mail for the November election will arrive in time to be counted.”¹¹ (attached as Ex. J); *see also* Letter from Thomas J. Marshall, General Counsel and Executive Vice President, to Hon. John H. Merrill, Alabama Secretary of State (July 29, 2020) (attached as Ex. K).

17. During the July 14 election, Secretary Merrill learned of voters without masks appearing at precincts. His office intervened to ensure that persons without masks were permitted to enter the polling places and vote. Merrill Dep. 79:5-81:16.

18. In the city of Piedmont, at least one poll worker who worked on Alabama’s July 14, 2020 primary run-off election was hospitalized within three days of the election, after testing positive for COVID-19. Reingold Rep. ¶ 21.

19. Among other elections, there are municipal elections across Alabama on August 25, 2020 and runoffs on October 6, 2020, a statewide general election on

¹¹Associated Press, *Report: Post Office warns 46 states, including Alabama, about mail voting delays*, KRG News 5, Aug. 14, 2020, 5:55 PM CDT), <https://www.wkrg.com/news/report-post-office-warns-46-states-including-alabama-about-mail-voting-delays/>.

November 3, 2020, special elections on November 17, 2020 and January 19, 2021, and major municipal elections in 2021 on March 2, August 3, and August 24.¹²

20. The virus will continue to spread until the development and widespread use of a vaccine and/or herd immunity develops. Reingold ¶ 14. Herd immunity occurs when approximately 70-95% of a population is immune to a disease, depending on the infectiousness of the agent. *Id.* ¶ 16. No vaccine currently exists for COVID-19, nor is one expected to be FDA-approved and available for use until at least Spring 2021. *Id.* ¶¶ 14–15.

21. Plaintiffs’ expert studied in-person voting following the Wisconsin primary election on April 7, 2020 and concluded that counties which had more in-person voting per location had a higher rate of positive COVID-19 tests following the elections than did counties with relatively fewer in-person voters. *See* Corrected Cotti Report at 3 (attached as Ex. L). This study, which controlled for other “county characteristics and local behaviors that are potentially related to COVID-19 spread,” estimated that more than 700 COVID-19 cases in Wisconsin were related to voting in the primary. *Id.*

22. The CDC has issued specific guidelines concerning voting during the pandemic to reduce the spread of COVID-19. It recommends that states “offer

¹² *See* Ala. Sec’y of State, *Upcoming Elections*, <https://www.sos.alabama.gov/alabama-votes/voter/upcoming-elections> (last visited Aug. 17, 2020).

alternative voting methods that minimize direct contact and reduce crowd size at polling locations” including “drive-up voting for eligible [high risk] voters” and for “sick voters” with COVID-19 a means of limiting personal contact during in-person voting.¹³

23. A significant portion of the registered voters in Alabama (36.2%) would like to use curbside voting for the November 3, 2020 election. Ex. N (cited in Burch Report at 14 n.43).¹⁴ Nearly the same percentage of Alabama voters (37.2%) desire to use absentee voting. Burch Report at 14 & n.42. A majority of voters aged 18-30 (50.4%) want to vote curbside. *Id.*

24. Alabama law does not prohibit curbside or drive-thru voting, nor does it give the Secretary of State the authority to do so. *See* Resp. of State Defs. to Pls.’ First Set of Interrogs. No. 9 (“The Secretary of State has no authority on his own to require a local jurisdiction to offer ‘curbside’ voting or to prevent it from doing so provided that the voting method fully complies with State law.”) (attached as Ex. M).

25. Nevertheless, on at least two occasions, Secretary Merrill has intervened to stop curbside voting initiated by local election officials, including curbside voting

¹³ Ctrs. for Disease Control & Prevention, *Considerations for Election Polling Locations and Voters: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated June 17, 2020).

¹⁴ *See* Topline Results for AUM Poll: July 2-9, 2020, http://www.aum.edu/sites/default/files/AUM_Topline_Results_July2020_Final.pdf

offered to assist voters with disabilities. *See* Decl. of Clay S. Helms at ¶ 43, Doc. 34-1; Resp. of State Defs. to Pls.’ First Set of Interrog. No. 9; Merrill Dep. 31:16-3:12, 45:10-47:1.

26. In 2016, the Hale County Probate Judge permitted curbside voting. The judge allowed poll workers to bring ballots to voters with disabilities while the voters sat in their cars. When the Secretary learned of this, he directed the probate judge to cease and desist, threatening to call the local sheriff to interfere with the county’s voter assistance efforts. *See* Merrill Dep. 45:10-47:1.

27. In 2018, the Secretary of State’s office learned that a poll worker in Perry County delivered a ballot to the car of a voter with limited mobility so that she could vote. Resp. of State Defs.’ to Pls.’ First Set of Interrog. No. 9. The Secretary’s office informed the probate judge that poll workers could not take a ballot out from the polling place to the vehicle because it was against state law. Merrill Dep. 31:16-34:12.

28. The Secretary testified that he did not know what disabilities the voters who needed assistance voting may have had, nor did he care. *Id.* at 44:4-7 (“Q: Do you know if it was for voters who had disabilities [in Hale County]? A: I do not know and I do not care today and I did not care then.”); *id.* at 34:17-19 (“Q: Do you know what disability the [Perry County] voter had? A: No, ma’am. And I really don’t care.”).

29. The Secretary did not know whether these polling places were accessible to people with ambulatory or other disabilities. *Id.* at 35:5-8, 44:10-13.

30. Nor did the Secretary have any evidence that election officials in Hale or Perry County violated any Alabama statute in permitting curbside voting. In an interrogatory response, the Secretary asserts that Alabama law requires that a voter sign the poll book. Resp. of State Defs. to Pls.’ First Set of Interrogs. No. 5 (citing Ala. Code § 17-17-15). But Secretary Merrill had no evidence that curbside voters had not signed the poll book in Hale or Perry County. Merrill Dep. 47:8-48:4. And, even if poll workers had signed the book for voters, under Alabama law, an election official may write a voter’s name on a poll book if the voter “because of a physical disability, is unable to write his or her own name.” Ala. Code § 17-9-11.

31. Plaintiff Sheryl Threadgill-Matthews is “aware of several instances in which the Wilcox County circuit clerk came down and allowed people with mobility issues to curbside vote. The last time [she] can remember this happening is at least two years ago.” Pls.’ Resps. To State Defs.’ First Set of Interrog. No. 1 (attached as Ex. O).

32. Secretary of State Merrill does not know whether all Alabama polling places are accessible to voters with ambulatory disabilities. Merrill Dep. 44:20-45:9.

33. Under Alabama law, an election official may write a voter's name on a poll book if the voter "because of a physical disability, is unable to write his or her own name." Ala. Code § 17-9-11.

34. Alabama law also provides that voters "who wish[] to have assistance voting may receive assistance from any person the voter chooses," including from a poll worker, so long as the person providing assistance is not "voter's employer, an agent of the employer, or an officer or agent of the voter's union. The voter is not required to state a reason for requesting assistance." Ala. Code § 17-9-13.

35. Section 208 of the Voting Rights Act similarly provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508.

36. Plaintiff Eric Peebles is a registered voter who has cerebral palsy and uses a wheelchair. Peebles Dep. 28:7-29:4, 33:2, 33:13-15 (attached as Ex. P). Dr. Peebles is at high risk for severe complications from COVID-19 because of his cerebral palsy. *Id.* 29:16-30:8. Dr. Peebles typically votes in-person and requires assistance operating the machines. *See id.* at 34:7-36:2; 39:11-18. Dr. Peebles would prefer to vote curbside, because he usually votes in person and, during the pandemic, curbside

is “as closely as [he] can safely enter the poll.” Peebles Dep. at 53:15-20; *see also* 40:23-41:4.

37. Plaintiff Thompson is a registered voter who is over 65 and at higher risk of contracting and having severe complications from COVID-19 because of her age and preexisting conditions, including diabetes and high blood pressure. *See* Thompson Dep. at 20:13–15, 22:10–19, 22:23–23:5. She would like to vote curbside so that she can vote “comfortably” without the fear of contracting COVID-19. *Id.* at 75:1-12.

38. Plaintiff Porter is a registered voter at high risk for contracting COVID-19 because of his age and asthma, and he also has Parkinson’s Disease and difficulty ambulating. *See* Porter Dep. at 23:4–8, 25:9–26:2, 28:10–15; 29:13–30:7. Plaintiff Porter would like to vote curbside because he fears that Alabama will be overwhelmed by absentee voting, whereas with curbside voting his “vote would be counted on the same day that [he] vote[s].” Porter Dep. 44:23-45:4; *see also id.* 44:9-11.

39. Plaintiff Teresa Bettis is a registered voter at high risk for contracting COVID-19 because of her diabetes and hypertension. Bettis Dep. at 26:11–37:5, 91:1-2 (attached as Ex. R). Bettis would prefer to vote curbside because she has “some concern about the postal system and absentee ballots arriving on time[.]” *Id.* at 115:6-19. Bettis would prefer curbside voting because she “could vote in realtime

and have [her] vote counted[.]” while also taking “proper precautions . . . to keep everybody safe.” *Id.*

40. Organizational Plaintiffs People First, Alabama State Conference of the NAACP (“Alabama NAACP”), and Greater Birmingham Ministries (“GBM”) have members who are registered with pre-existing conditions which put them at high risk for contracting COVID-19. These members include high risk voters who might be unable to vote absentee because they cannot comply with the Photo ID and Witness Requirements. Ellis Dep. 77:5–99:3 (attached as Ex. S); Douglas Dep. 88:15–89:17 (attached as Ex. T); Simelton Dep. at 30:17–23 (attached as Ex. U); *see also* Pls.’ Resps. to State Defs.’ First Interrog. Nos. 2, 3.

41. People First, GBM, and Alabama NAACP members include registered voters who use wheelchairs and voters with physical disabilities who have trouble entering their polling places. Ellis Dep. at 69:5–13; 77:5–99:3; Douglas Dep. at 83:19–84:10; 100:12–101:1; Simelton Dep. at 122:123:6. For example, a GBM member had difficulty ambulating to her polling place on July 14, and had to walk a long distance from the parking lot to her polling place. Douglas Dep. at 83:19–84:10.

42. Alabama NAACP members include registered voters who require in-person assistance at the polls and thus are unable to utilize absentee voting. See Ex. 58 to Mem. of Law in Supp. of Pls.’ Mot. for a Prelim. Inj., Simelton Decl. at ¶ 9, Doc. 16–45.

43. GBM and the NAACP also include members who have or have had COVID-19. Douglas Dep. 103:9-12; Simelton Dep. 165:6-166:1.

44. Plaintiffs Peebles, Porter, and Thompson, and members of Plaintiffs People First, Alabama NAACP, and GBM would use curbside voting if it were available. Porter Dep. at 32:8-11; Peebles Dep. at 40:23-41:4; Thompson Dep. 100:1-5; Douglas Dep. 88:1-97:23; Simelton Dep. 151:8-152:3, 157:23-158:12, 160:4-161:6.

45. At least two counties—Jefferson and Montgomery—would provide curbside voting but for the Secretary of State’s Curbside Voting Ban. Proposed Consent Order (Jefferson County), Doc. 144-1, ¶ 16 (“[I]f this Court enters an injunction . . . permitting curbside voting, the Jefferson County Defendants agree to . . . identify the potential polling locations for curbside voting in any future elections, including the November 3, 2020 election[.]”); *see also id.* ¶ 15; Proposed Consent Order (Montgomery County), Doc. 161-1, ¶¶ 14, 16 (same).

46. Plaintiff GBM is located in Jefferson County and its members are predominantly located in and around Jefferson County. Douglas Dep. 28:23-29:1. Numerous GBM members are at high-risk for COVID-19 due to conditions such as diabetes, hypertension, and asthma, and others have ambulatory disabilities. Pls.’ Resps. to State Defs.’ First Interrog. No. 2. Plaintiffs People First and Alabama NAACP have statewide memberships, which include members in Jefferson and Montgomery Counties. Pls.’ Resps. to State Defs.’ First Interrog. Nos. 2, 3. These

Organizational Plaintiff members would use curbside voting if Jefferson and Montgomery counties made it available. *Id.*; *see also* Simelton Dep. 157:23-158:12; Ellis Dep. 83:17-84:9.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 56(a), “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact,” and “the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “An issue of fact is ‘material’ if, under the applicable substantive law, it might affect the outcome of the case.” *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259 (11th Cir. 2004) (citation omitted). A dispute of fact is “genuine” only if “the record taken as a whole could lead a rational trier of fact to find for the nonmoving party,” *id.* at 1260, that is, only if “the evidence presents a sufficient disagreement to require submission to a jury.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Under Rule 56(a), a “party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a); *see also* Fed. R. Civ. P. 56 advisory comm.’s note to 2010 amendment. This allows issue-narrowing adjudication in a motion that may not dispose of a claim in its entirety. *See, e.g., Scott v. United States*, 825 F.3d 1275, 1278 (11th Cir. 2016).

Plaintiffs seek partial summary judgment on their claim that Defendant's Curbside Voting Ban violates the ADA. To succeed, Plaintiffs must demonstrate that: (1) they are qualified individuals with a disability, (2) they were excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, and (3) the exclusion or denial was by reason of Plaintiffs' disability. *See* Doc. 58 at 51-52 (citing *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001)).

Plaintiffs are qualified individuals under the ADA if they “meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” *United States v. Georgia*, 546 U.S. 151, 153–54 (2006) (quoting 42 U.S.C. § 12131(2)). To establish the remaining two prongs, “Plaintiffs need not [] prove that they have been disenfranchised or otherwise ‘completely prevented from enjoying a service, program, or activity.’” *Disabled in Action v. Bd. of Elec. in City of N.Y.*, 752 F.3d 189, 198 (2d Cir. 2014) (citation omitted). Plaintiffs need only show that voting “is not readily accessible.” Doc. 58 at 62 (quoting *Shotz*, 256 F.3d at 1080).

Once Plaintiffs establish this prima facie case, they must offer “a reasonable modification to the challenged requirement or provision.” Doc. 58 at 55 (citing *Nat’l Ass’n of the Deaf v. Florida*, 945 F.3d 1339, 1351 (11th Cir. 2020)). A modification is reasonable if it will not cause “undue hardship.” *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–03 (2002).

If Plaintiffs’ proposed modification is reasonable, the burden shifts to the defendant, who may raise the affirmative defense that the accommodation would nonetheless result in a fundamental alteration. *See Hindel v. Husted*, 875 F.3d 344, 347-48 (6th Cir. 2017); An accommodation only causes a fundamental alteration “if it would eliminate an essential aspect of the relevant activity.” *Cf. Schaw v. Habitat for Human. of Citrus Cty., Inc.*, 938 F.3d 1259, 1266 (11th Cir. 2019) (internal citation and quotation marks omitted).

ARGUMENT

I. Plaintiffs are Entitled to Summary Judgment on their Claim that the Curbside Voting Ban Violates the Americans with Disabilities Act.

Based on the record before the Court, there is no genuine dispute of material fact that Defendant’s Curbside Voting Ban discriminates against Plaintiffs in violation of the ADA. Individual plaintiffs and members of People First, the NAACP, and GBM are qualified voters entitled to reasonable accommodations under Title II of the ADA. *See* ¶¶ 36-44 of Plaintiffs’ statement of facts, *supra*.¹⁵ Indeed, as this Court recognized, “[D]efendants d[id] not contest the plaintiffs’ prima facie case for their curbside voting claim” at the preliminary injunction phase, Doc. 58 at 68 n.46, and there is no evidence in the record that would permit them to do so now.

¹⁵ Henceforth, references to the statement of facts will be cited as “¶¶ __ - __.”

A. The Undisputed Evidence Establishes that Plaintiffs Are Qualified Individuals for Whom Voting Is Not Readily Accessible.

Individual Plaintiffs and members of organizational Plaintiffs are qualified individuals within the meaning of the ADA who are eligible to vote in Alabama. *See* ¶¶ 36-44. However, doing so would expose them to significant and unnecessary risk without the availability of curbside voting, and not every polling place in Alabama is accessible to voters with ambulatory disabilities.

It is undisputed that the individual Plaintiffs' health conditions constitute disabilities that qualify them for protection under the ADA. State Defs. Opp. To Pls. Mot. for Prelim. Inj. at 22, n.26, Doc 36. Plaintiff Eric Peebles, who has cerebral palsy and uses a wheelchair, is at high risk for severe complications from COVID-19. *See* ¶ 36. Plaintiff Thompson is over 65 at higher risk of contracting and having severe complications from COVID-19 because of her age and preexisting conditions, including diabetes and high blood pressure. *See* ¶ 37. Plaintiff Porter is at high risk for contracting COVID-19 because of his age and asthma, and he also has Parkinson's Disease. *See* ¶ 38. If not prohibited by the Secretary, Plaintiffs would utilize curbside voting in the upcoming Alabama elections. *See* ¶ 44.

Organizational Plaintiffs People First, the Alabama NAACP, and GBM also have members who have ambulatory disabilities or pre-existing conditions that put them at high risk for contracting COVID-19. ¶ 40. Many members also cannot vote absentee because they cannot comply with the witness and photo ID requirement for

voting absentee. *Id.* People First and GBM members also include voters who use wheelchairs and voters with physical disabilities who are less able to access the inside of their polling place. *See* ¶ 41. Alabama NAACP members also include individuals who require in-person assistance at the polls and thus are unable to utilize absentee voting. *See* ¶ 41. GBM and the NAACP also include members who have or have had COVID-19 and are disabled within the meaning of the ADA. *See* ¶ 46; *see also Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 289 (1987) (holding that highly infectious diseases are disabilities within the meaning of the ADA). Plaintiffs Peebles, Porter, and Thompson, and members of Plaintiffs People First, Alabama NAACP, and GBM would use curbside voting if it were available. *See* ¶ 44.

Given the risk of contracting COVID-19, especially for Alabamians with disabilities, the Governor’s Safer at Home order includes urging the use of curbside services by restaurants and senior centers to reduce the spread of COVID-19. *See* ¶ 11. This aligns with the CDC’s recommendations that states offer alternative voting methods, such as “drive-up voting,” for high risk voters and voters with COVID-19 to limit personal contact and reduce crowds at polling locations. *See* ¶ 22.

Though Plaintiffs and Organizational Plaintiffs’ members are qualified individuals under the ADA, they have been excluded from delivery of services at alternate accessible sites. The Secretary has refused to provide curbside voting as a

reasonable accommodation to voters such as Plaintiffs. He has done so even though the Secretary of State's Office has admitted that the Secretary has no authority to prevent Alabama election officials from providing curbside voting that is administered in compliance with Alabama law. *See* ¶ 24. Nevertheless, the Secretary has prohibited such accommodations in the past. *See* ¶¶ 25-27.

In Hale County, the Secretary threatened to send the local sheriff to the polling precinct if the probate judge continued to provide curbside voting to voters who needed assistance voting. *See* Merrill Depo. Tr. 45:10–47:1; Resp. of State Defs. to Pls.' First Set of Interrogs. 10. Secretary Merrill did this despite no indication that the probate judge was violating Alabama law, ¶ 30, but instead was complying with federal and state in providing voters with the necessary assistance in voting. Further, Secretary Merrill testified that he did not know what disabilities the voters had before denying them the accommodation. *See* ¶ 28.

The Secretary of State's office also prohibited curbside voting in Perry County when a voter with a disability needed such assistance. *See* ¶ 26; Resp. of State Defs. to Pls.' First Set of Interrogs. No. 9. Similar to Hale County, there was no indication that the election official was violating Alabama law. *See* ¶ 30. To the contrary, election officials were following existing state and federal law by providing the voter necessary assistance. And again, Secretary Merrill did not know what disabilities the

voter had before deciding the voter could not be provided curbside voting as an accommodation. *See* ¶ 28.

The Secretary has confirmed that he will continue his practice of thwarting curbside voting for voters with disabilities, including Plaintiffs, in the future despite the fact that he does not know whether all polling places in Alabama are accessible to people with ambulatory disabilities and despite the risk posed by COVID-19. *See* ¶ 32; *see also* Merrill Dep. 29:23-30:3. People with underlying medical conditions are at a higher risk of experiencing severe illness or death because of from COVID-19. Approximately 96.2% of Alabamians who have died from COVID-19 had underlying health conditions. *See* ¶ 2. They must therefore take precautions during the pandemic, including avoiding crowds. *See* ¶¶ 8, 22. By prohibiting curbside voting under these circumstances, the Secretary “excludes [Plaintiffs] from voting in person based on their disability, thereby ‘fail[ing] to provide[] [them] with meaningful access to the benefit that [it] offers.’” Doc. 58 at 68 n.46 (quoting *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 199 (2d Cir. 2014)).

B. There Is No Dispute of Material Fact that Curbside Voting Is a Reasonable Accommodation under the ADA.

Curbside voting is a reasonable accommodation that would minimize the risk of exposure to COVID-19 for Plaintiffs and other high-risk voters. Corrected Mem. of Law in Supp. of Pls.’ Mot. for a Prelim. Inj. at 27-28, Doc. 20-1. Indeed, this

Court has found curbside voting to be facially reasonable. Doc. 58 at 68. The Secretary has presented no facts to raise a genuine dispute about whether curbside voting is a reasonable accommodation.

The only argument the Secretary has presented against the accommodation is his contention that “mandated curbside voting would likely also be a fundamental alteration to Alabama elections.” Doc. 36 at 32; State Def. First Rog Resp. 4. However, as this Court recognized “there is no evidence that curbside voting—mandated or otherwise—would fundamentally alter Alabama law.” Doc. 58 at 68 n. 46. The Secretary’s simple assertion that such a disruption is “likely,” without more, is insufficient to rebut the Plaintiffs’ proposed modification. Doc. 58, 68-69.

Moreover, contrary to the Secretary’s assertion, not every eligible voter can vote absentee, *see* Merrill Depo. 26:8-20, and the Secretary’s temporary expansion of the absentee excuse requirements does not negate the need for curbside voting as an accommodation, *see* Merrill Depo. 26:8-20. Although in the pandemic voters have the option to vote absentee, the evidence demonstrates that voters with physical disabilities or low literacy, for example, will need assistance from poll workers. *See* ¶¶ 36, 41-42. Further, some voters may not receive their absentee ballot on time in order to vote absentee, or may be unable to fulfill the Witness and Photo ID requirements. *See* ¶¶ 15, 41. Moreover, as this Court recognized, the “ADA is not so narrow that the plaintiffs’ rights only extend to voting ‘at some time and in some

way.’” Doc. 58 at 68 n.46 (quoting *Disabled in Action*, 752 F.3d at 199). The Plaintiffs have the right to participate fully in Alabama’s election, including through in-person curbside voting. *Id.*

Not only is curbside voting a reasonable accommodation under the ADA, it is required by longstanding federal voting law and Alabama law governing assistance to voters with disabilities.

As the Secretary admits, ¶ 24, and as this Court previously found, Doc. 58 at 68 n.46, no state law prohibits curbside voting in Alabama. Quite to the contrary. Alabama law and Section 208 of the Voting Rights Act use nearly coterminous language to provide a broad right to assistance for voters with disabilities. *See* 52 U.S.C. § 10508 (“Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”); Ala. Code 17-9-13(a) (“Any person who wishes assistance in voting may receive assistance from any person the voter chooses except the voter’s employer, an agent of the employer, or an officer or agent of the voter’s union. The voter is not required to state a reason for requesting assistance.”); *id.* § 17-9-11 (affording voter assistance in signing poll book if necessary where the voter, “because of a physical disability, is unable to write his or her own name”).

Further, the Voting Rights Act provides that disabled voters are entitled to assistance in any “action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly,” including help with navigating the polling location and communicating with election officials. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 614-15 (5th Cir. 2017) (quoting 52 U.S.C. § 10310(c)(1)). This includes assistance for disabled voters in completing or dropping off ballots. *See Priorities USA v. Nessel*, No. 19-13341, 2020 WL 2615766, at *14 (E.D. Mich. May 22, 2020). The Secretary cannot restrict this federally guaranteed right. *See OCA-Greater Houston*, 867 F.3d at 615 (holding Texas’s limitation on the term “to vote” “impermissibly narrow[ed] the right guaranteed by Section 208 of the VRA”).

Moreover, the Voting Accessibility for the Elderly and Handicapped Act requires that “all polling places for Federal elections” be “accessible to handicapped and elderly voters.” 52 U.S.C. § 20102(a). In Alabama, a number of polling locations are inaccessible to people with disabilities because they have not been modified to accommodate people with certain disabilities, such as mobility issues or low vision. *See* ¶ 41. Even outside the context of the COVID-19 pandemic, this inaccessibility persists, excluding people with certain disabilities from voting.

Offering curbside voting at these polling locations would make them accessible. Accordingly, the U.S. Department of Justice has stated that the ADA requires curbside voting as an “equally effective opportunity” for disabled people to

cast their vote in person where, as here, the “only suitable polling site[s] in a precinct might be an inaccessible building.” *See* Doc. 16-48.

Far from fundamentally altering the administration of the election, ending the Curbside Voting Ban would help bring Alabama into compliance with longstanding federal and state law and gives election officials the opportunity to restore past practices used to accommodate disabled voters. Given the expansive assistance voters are afforded—including assistance in signing a poll book (a prerequisite to voting), completing a ballot, or dropping it off—the Secretary’s previous actions in Hale and Perry County were contrary to federal and state law. An injunction against the Secretary would ensure this violation of federal and state law does not continue.

Moreover, as this Court has recognized, the Defendant’s own witness, Clay Helms, has identified methods for making curbside voting feasible. Doc. 58 at 68-69 n.47.

In his declaration, Mr. Helms stated that curbside voting would require electronic poll books to allow for the transport of polling lists from inside the polling place to the curb. Electronic poll books are already available in 35 of 67 counties and all Alabama counties will have electronic poll books before the November 3, 2020 election. Merrill Dep. 38:10-17. Mr. Helms also stated additional tabulation machines and poll workers would be necessary to assist in preserving ballot secrecy. Decl. of Clay S. Helms at 22-23, Doc. 34-1. The evidence demonstrates that counties

would similarly be able to implement these suggestions. Jefferson and Montgomery Counties, for example, have stated that they would comply with Mr. Helm's suggestions and implement curbside voting if not prevented by the Secretary. *See* ¶ 45.

And as this Court previously noted, county election officials can adopt procedures that can overcome any logistical concerns associated with curbside voting implementation. Doc. 58 at 68 n.47. Those procedures are not limited to only those Mr. Helms's suggestions. Rather, there are several ways curbside voting can be lawfully implemented for voters who need assistance. As delineated in the U.S. Department of Justice, polling precincts can ensure compliance with the ADA by instructing voters about the option of voting curbside, the location of the curbside voting, and how the voter may notify poll officials before or when they arrive at the polling place. Doc. 16-48 at 4. Thus, poll officials need not remain outside the entire day, but once the official becomes aware of the voter, the official could provide timely delivery of the same services that the voter is provided with inside the polling place. *Id.*

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their Motion for Summary Judgment be granted, and that this Court enter an order enjoining

Secretary of State John Merrill from prohibiting curbside voting and permit counties to provide curbside voting in compliance with the ADA and other applicable laws.

DATED this 17th day of August 2020.

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CERTIFICATE OF SERVICE

I hereby 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 counsel of record.

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