

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

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

**DEFENDANT JOJO SCHWARZAUER’S  
TRIAL BRIEF**

Defendant JoJo Schwarzauber, sued in her official capacity as Circuit Clerk of Mobile County (“Mobile AEM”), pursuant to paragraph 18 of the Court’s Scheduling Order (Doc. 93), files this trial brief for the Court’s consideration.<sup>1</sup> As explained below, no Plaintiff brings a claim against Mobile AEM which entitles her to relief in this suit.

**I. Summary of Plaintiffs’ Claims**

Plaintiffs challenge three laws relating to absentee voting in Alabama: (1) the requirement that voters provide an excuse to vote absentee (“the Excuse requirement”), Ala. Code § 17-11-3; (2) the requirement that a notary or two witnesses sign absentee ballots (“the Witness requirement”), Ala. Code § 17-11-

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<sup>1</sup> Due to the page limitations for this brief, Mobile AEM has limited its arguments herein and expressly reserves and does not waive any and all defenses not mentioned.

7(b); and (3) the requirement that absentee voters submit a copy of their photo ID with applications for absentee ballots (“the Photo ID requirement”), Ala. Code § 17-9-30(b). Doc. 75, ¶¶ 8-9, 15. Plaintiffs also challenge an alleged *de facto* ban on curbside voting by the Secretary of State (“the Curbside Voting ban”). Doc. 75, ¶ 16.

Although Plaintiffs pled claims from these requirements (and ban) into five counts, the Court recently dismissed many of them, including all claims based on the Excuse requirement and all claims against the defendant circuit clerks challenging the Curbside Voting ban. *See* Doc. 161 at 26. The claims that remain against Mobile AEM are (1) the as-applied challenges to the Photo ID requirement and Witness requirement as constitutional violations pursuant to 42 U.S.C. § 1983 under Count One; (2) the as-applied challenge to the Photo ID requirement as a violation of Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131, *et seq.*, under Count Two; (3) the as-applied challenge to the Witness requirement as a violation of § 2 of the Voting Rights Act (“VRA”), 52 U.S.C. § 10301, under Count Three; and (4) the challenge to the Witness requirement pursuant to 42 U.S.C. § 1983 as a violation of the Equal Protection Clause under Count Five. *See Id.* and Doc. 75 ¶¶ 188-233.

## **II. Plaintiffs cannot establish standing against this Defendant.**

To properly invoke this Court’s jurisdiction, the plaintiffs must have standing.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “[S]tanding is not dispensed in gross.” *Davis v. Federal Election Comm’n*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996)) (alteration omitted). Instead, “a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” *Id.* at 734 (internal quotations omitted). In multi-plaintiff cases, “[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, 1651 (2017).

#### **a. Individual Plaintiffs**

The individual plaintiffs in this lawsuit are Teresa Bettis, Eric Peebles, Howard Porter, Jr., Annie Carolyn Thompson, and Sheryl Threadgill-Matthews.<sup>2</sup> To establish standing, an individual Plaintiff must show: (1) he or she suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of this defendant; and, (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Based on the facts known at this time, *none* of the individual Plaintiffs in this case will be able to show that he or she suffered an injury in fact traceable to the Mobile AEM that can be redressed by a favorable decision from this Court. Plaintiffs Peebles and Threadgill-Matthews do not live in Mobile County and do not vote in

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<sup>2</sup> Plaintiffs Robert Clopton and Gregory Bentley previously withdrew as parties. Doc. 150.

Mobile County and, therefore, cannot assert any injury attributable to this Defendant. Plaintiffs Bettis, Porter, and Thompson each live in Mobile County but cannot show an injury in fact because they cannot show an inability to comply with the challenged laws in a reasonably safe manner.<sup>3</sup> Thus, none of the individual Plaintiffs can prove the injury they are asserting, *i.e.*, that as-applied during the COVID-19 pandemic the challenged requirements amount to a severe burden that virtually excludes them from voting. *Cf. Thompson v. Dewine*, 959 F.3d 804, 809-810 (6th Cir. 2020) (analyzing a challenge to Ohio’s signature requirement for ballot initiatives as-applied during the COVID-19 pandemic and concluding that Plaintiffs were not “excluded” from the ballot “just because procuring signatures is now harder”).

Additionally, even if Plaintiffs Bettis, Porter, and Thompson were able to show an injury in fact with respect to the Witness requirement, such injury is not traceable to the Mobile AEM and an injunction against the Mobile AEM would not redress any such injury. Although this Court has found otherwise in ruling on Co-Defendant Jones-Thomas’ Motion to Dismiss (Doc. 161 at 12), Mobile AEM maintains that she does not have sufficient authority or responsibility over the enforcement of the witness requirement such that an injunction against her alone would redress the plaintiffs’ alleged injury with respect to that requirement.

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<sup>3</sup> As explained in Mobile AEM’s Motion for Summary Judgment, Bettis, Porter, and Thompson either do not even challenge the Photo ID requirement at all, or are exempted from it. Doc. 163 at 9-12.

Regardless of how they are appointed, it is the election officials provided for in Ala. Code § 17-11-11 who examine each affidavit envelope to determine compliance with the Witness requirement. Ala. Code § 17-11-10(b); Ala. Code § 17-11-11(a). Alabama law prohibits those election officials from opening and counting an absentee ballot if the affidavit envelope is not properly witnessed. *Id.* Mobile AEM has no authority over the enforcement of that law or those appointed election officials, and an injunction against her would not preclude its effect.

#### **b. Organizational Plaintiffs**

The organizational plaintiffs in this lawsuit are People First of Alabama (“PFA”), Greater Birmingham Ministries (“GBM”), Alabama State Conference of the NAACP (“NAACP”), and Black Voters Matter Capacity Building Institute (“BVM”). For an organizational plaintiff to establish standing to bring suit on behalf of its members, it must show: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and, (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Greater Birmingham Ministries v. Sec’y of State for Alabama*, 966 F.3d 1202, 1219-20 (11th Cir. 2020).

Based on the facts known at this time, none of the organizational plaintiffs will be able to meet this standard. PFA and GBM have not identified a single member living or voting in Mobile County that is allegedly burdened by the

challenged requirements and, therefore, cannot assert any injury attributable to this Defendant. And, while NAACP and BVM might have members or affiliates in Mobile County, they cannot show that any of those members would otherwise have standing to sue in their own right.

### **III. Plaintiffs' claims against this Defendant fail on the merits.**

#### **a. Count One**

Constitutional challenges to state election laws are decided under a flexible standard outlined by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the *Anderson-Burdick* balancing test, the court:

must weigh the character and magnitude of the asserted injury to the rights ... that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

*Burdick*, 504 U.S. at 434 (internal citations omitted). “[T]he rigorousness of [the court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Id.* If the challenged law severely restricts the right to vote, then strict scrutiny applies, meaning the law must be narrowly drawn to serve a compelling state interest. *Id.* (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But if the challenged law “imposes only reasonable, nondiscriminatory restrictions upon the First and

Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (citing *Anderson*, 460 U.S. at 788-89) (internal quotations omitted).

Neither the Photo ID requirement nor the Witness requirement as-applied during the pandemic severely restrict the right to vote, even for older individuals and those with underlying health condition; each of those requirements can still be met in a reasonably safe manner without severe burden. A burden that is “merely inconvenient” as opposed to “virtually impossible” is not a severe burden. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 206 (2008) (J. Scalia, concurring) (citations omitted). “The Constitution is not offended simply because some groups find voting more convenient than do the plaintiffs because of a state’s mail-in ballot rules.” *Texas Democratic Party v. Abbott*, 961 F.3d 389, 405 (5th Cir. 2020) (citing *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 810 (1969)) (internal quotations omitted).

Nevertheless, even if the requirements did impose a severe burden on some specific individuals, that is not sufficient by itself to establish that strict scrutiny applies. *See Crawford*, 533 U.S. at 206. (noting that when determining whether strict scrutiny applies, the Supreme Court has looked at the burden on voters “categorically and did not consider the peculiar circumstances of individual voters or candidates”) (citations omitted). Finally, despite Plaintiffs’ claims otherwise, no

authority requires that strict scrutiny be applied where a severe burden does not otherwise categorically exist, merely because the impact of the challenged law may weigh differently on different groups of people.<sup>4</sup>

Because the challenged requirements impose only reasonable, nondiscriminatory restrictions (as will be supported by the evidence in this case), they are justified in light of the State's well-established legitimate interest in detecting and deterring voter fraud and safeguarding voter confidence. *Crawford*, 553 U.S. at 192-197 (plurality opinion); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009). Less than one month ago, the Eleventh Circuit reviewed Alabama's Photo ID law, including its applicability to absentee voting, and concluded that it does not violate the Fourteenth Amendment. *Greater Birmingham Ministries*, 966 F.3d at 1240.

#### **b. Count Two**

To prove a prima facie claim under Title II of the ADA, a plaintiff must show: (1) that he or she is a qualified individual with a disability; (2) that he or she was excluded from participation in or denied benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. *American Ass'n. of People with Disabilities v. Harris*, 647 F.3d

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<sup>4</sup> In making such claim Plaintiffs cite to *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020), but unlike here that case involved an equal protection claim.



1093, 1101 (11th Cir. 2011) (citing *Bircoll v. Miami–Dade Cnty.*, 480 F.3d 1072, 1083 (11th Cir. 2007)).

Even assuming Plaintiffs can show they are qualified individuals (which we do not concede), and that any has a claim in this lawsuit based on the Photo ID requirement, none that live in Mobile County can show that they are excluded from participating in absentee voting by reason of their disability. Plaintiffs with disabilities which prevent their appearance in person are already exempted from the Photo ID requirement. Ala. Code § 17-9-30(c). Of those Plaintiffs not exempted, but who could qualify as “disabled” under the ADA, each has the ability to print a copy of her photo ID in her own home or has a family member who could easily make a copy for her. Further, it is undisputed that the public libraries in Mobile are offering curbside services, including copying and scanning services, free of charge. Thus, no plaintiff living in Mobile County can claim that there is not a “readily accessible” way for them to obtain a copy of their photo ID. *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001).

**c. Count Three**

To prevail on a claim under § 2 of the VRA, the plaintiffs must prove: (1) the challenged law results in the denial or abridgment of their right to vote; and, (2) the denial or abridgment of their right to vote is on account of race or color. *Greater Birmingham Ministries*, 966 F.3d at 1233. “This analysis turns on whether, based on

the totality of the circumstances, the challenged law violates Section 2(a) because it deprives minority voters of an equal opportunity to participate in the electoral process and to elect representatives of their choice.” *Id.*

Even assuming Plaintiffs’ assertions that Black voters are *more likely* to be burdened by the effects of the witness requirement, the alleged cause of the denial or abridgment is not “on account of race or color,” but on account of the COVID-19 pandemic and the heightened risk it poses to older persons and persons with certain underlying health conditions. *Cf. Greater Birmingham Ministries*, 966 F.3d at 1233 (“Even though minority voters in Alabama are slightly more likely than white voters not to have compliant IDs, the plain language of Section 2(a) requires more.”). Absent a showing of evidence necessary to demonstrate a “sort of causal connection between racial bias and [the alleged] disparate effect,” Plaintiffs’ vote-denial claim fails. *Id.* at 1234 (*quoting Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1239 (11th Cir. 2005) (Tjoflat, J., specially concurring)). Moreover, Plaintiffs’ reference to the factors set forth by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) is inapposite, as that was a vote-dilution case not a vote-denial case which are fundamentally different. *See id.* at 1235.

#### **d. Count Five**

Mobile AEM adopts the arguments made by the State Defendants in their Trial Brief as to why the Plaintiffs’ Equal Protection Clause claim fails. Doc. 186 at 4-10.

Respectfully submitted,

s/ Todd D. Engelhardt

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### **Certificate of Service**

I certify that on August 24, 2020, I filed the foregoing via CM/ECF system which will provide notice thereof to all counsel of record.

s/ Todd D. Engelhardt

**Of Counsel**