

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

PEOPLE FIRST OF ALABAMA, *et al.*,
Plaintiffs,

v.

JOHN MERRILL, *et al.*,
Defendants.

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

PLAINTIFFS' TRIAL BRIEF

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	1
A. The Plaintiffs	1
B. The Defendants.....	2
C. The Challenged Provisions and the Claims	2
III. PLAINTIFFS’ CLAIMS AND EXPECTED PROOF AT TRIAL	3
A. Count One: The Challenged Provisions violate the Constitution.	3
1. The Challenged Provisions severely burden the right to vote.....	3
2. The Challenged Provisions are not tailored to state interests.	5
B. Count Two: The Photo ID Requirement and Curbside Voting Ban violate Title II of the Americans with Disabilities Act.	6
C. Count Three: The Challenged Provisions violate the VRA.....	8
D. Count Five: The Witness Requirement conditions voting on a fee.	9
IV. CONCLUSION.....	9

I. INTRODUCTION

COVID-19 has infected 107,483 Alabamians and resulted in the deaths of nearly two thousand, greatly increasing the burdens of safely navigating every aspect of life, including complying with voting requirements. At trial, Plaintiffs will show that Alabama’s voting restrictions force citizens into the impossible choice between their health and their vote. The Constitution, Americans with Disabilities Act (“ADA”), and Voting Rights Act (“VRA”) forbid Alabama from forcing voters to make that choice.

II. STATEMENT OF FACTS

A. The Plaintiffs

Plaintiffs Porter, Thompson, Bettis, and Threadgill-Matthews are all Black Alabama registered voters at high risk for COVID-19 due to age, race, and/or underlying health conditions (“high risk voters”). Plaintiff Peebles is a white Alabama registered voter at severe risk for COVID-19 due to cerebral palsy. All are committed voters, and all wish to vote in the November 3, 2020 general election.

People First of Alabama, Greater Birmingham Ministries, Alabama NAACP and Black Voters Matter Capacity Building Institute (the “Organizational Plaintiffs”) have many thousands of members across Alabama and a significant number of those members include high risk voters or voters who have COVID-19 or its symptoms. Each Organizational Plaintiff has diverted resources from other priorities to advocate against or educate voters regarding Alabama’s voting

requirements during the COVID-19 pandemic.

B. The Defendants

Plaintiffs bring claims against the State of Alabama; Alabama Secretary of State Merrill, in his official capacity, Defendants Anderson-Smith, Burks, Davis-Posey, Ishman, Kizer, Majors, King, Schwarzsauer, Roberson, and Thomas, in their capacities as circuit clerks and/or absentee ballot managers (“AEMs”) in their counties; and Defendants Friday, Naftel, Davis, English, Myrick, Barger, Love, and Jones-Alexander, in their capacities as the probate judges for their counties.

C. The Challenged Provisions and the Claims

Plaintiffs challenge three aspects of Alabama law (the “Challenged Provisions”):

- **Witness Requirement:** Absentee ballot affidavits must be signed in the presence of either a notary or two adult witnesses.¹
- **Photo ID Requirement:** An application for an absentee ballot must include a copy of the voter’s photo ID or the voter must return a copy of the ID with the absentee ballot if the AEM decides that it is required.²
- **Curbside Voting Ban:** Alabama law does not prohibit curbside voting.³ But Secretary Merrill has a policy of prohibiting counties from allowing voters, including those with disabilities, to vote in their vehicles.

Plaintiffs will prove the following four counts at trial:

- **Count I:** Plaintiffs bring claims under the First and Fourteenth Amendments, 42 U.S.C. § 1983, against all Challenged Provisions.
- **Count II:** Plaintiffs bring claims under Title II of the ADA, 42 U.S.C. §

¹ Ala. Code §§ 17-11-7 through 17-11-10.

² *Id.* §§ 17-11-9 & 17-9-30.

³ *See generally Id.* § 17-9-1 to § 17-9-15.

12132, against the Photo ID Requirement and Curbside Voting Ban.

- **Count III:** Plaintiffs bring claims against all Challenged Provisions under Section 2 of the VRA. 52 U.S.C. § 10301.
- **Count V:** Plaintiffs assert that the Witness Requirement violates the Fourteenth Amendment, 42 U.S.C. § 1983, because it conditions the right to vote on wealth or the payment of a fee.

III. PLAINTIFFS' CLAIMS AND EXPECTED PROOF AT TRIAL

A. Count One: The Challenged Provisions violate the Constitution.

Courts considering a challenge to a state election law must balance the character and magnitude of the injury to Plaintiffs' fundamental right to vote against the State's rationale for infringing upon it. *See Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019). Laws that severely restrict the right to vote are subject to strict scrutiny, meaning that the contested law must be narrowly drawn to serve a compelling state interest. *Id.* at 1318. Plaintiffs will show that the Challenged Provisions severely burden Alabamians' fundamental right to vote in the pandemic by forcing voters to choose between voting or their health (and the health of others), and that these burdens are not justified by a legitimate state interest.

1. *The Challenged Provisions severely burden the right to vote.*

Complying with the Witness and Photo ID Requirements conflicts with the "Safer at Home" Order, which has the force of law and advises high risk voters to stay home and *requires* voters with COVID-19 or its symptoms to quarantine.⁴ A

⁴ Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19, Amended July 29, 2020,

majority of Alabama registered voters are “very closely” following the Safer at Home Order: 61.7% of voters are “very closely” following the rule to avoid public places and 51.4% are “very closely” following the rule to avoid contact with others.⁵ The Witness Requirement forces absentee voters who do not live with at least two adults to make contact adults outside their homes in the pandemic. About 1.8 million adults in Alabama live alone or with only one other adult. Virtual notarization is not an option for Alabamians who lack the technology to videoconference or are unable to pay the \$5.00 or more that notaries charge. Over 200,000 Alabamian households lack a computer at home. Among Alabama citizens 65 and over, nearly 300,000 individuals lack a computer or internet access and 86% of notaries in Alabama do not use videoconferencing. That same lack of technology also makes many Alabama voters unable to copy their photo ID at home, forcing them to make contact with the public to copy their ID. The Curbside Voting Ban further burdens voters who wish to vote in person, need help to vote, or cannot vote absentee because of the Witness and Photo ID requirements by requiring them to enter indoor polling places. The CDC recommends curbside voting to reduce contacts between poll workers and voters.⁶ And over a third (36.2%) of Alabama registered voters wish to vote curbside

<https://governor.alabama.gov/assets/2020/07/Safer-at-Home-Order-Final-7.29.20.pdf> (last visited 8/6/2020).

⁵ Katherine Ognyanova, et al., The State of the Nation: A 50-State COVID-19 Survey Report #4, June 7, 2020, <https://www.kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%20JUNE%202020.pdf>.

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

rather than absentee in the upcoming November election.⁷

Exacerbating the burden, the Challenged Provisions work together to place successive barriers to Plaintiffs' ability to vote. For example, Plaintiff Peebles lives alone, is high risk, and observes social distancing guidelines, and thus cannot satisfy the Witness Requirement. The Witness Requirement forces him to vote in person, but the Curbside Voting Ban bars any possibility of staying safely in his vehicle.

2. *The Challenged Provisions are not tailored to state interests.*

Defendants have asserted a state interest in the "integrity and sanctity of the ballot and election." Ala. Code § 17-11-10(b). But other provisions of Alabama election law sufficiently protect the integrity of absentee ballots.⁸ While the state has a legitimate interest in preventing voter fraud, that interest does not justify the burdens imposed by the Challenged Provisions in the pandemic. Doc. 58 at 43. The Challenged Provisions do not meaningfully advance a compelling state interest:

- **Witness Requirement:** Election officials do not verify witness identity, confirm their information, or verify that they saw the voter sign the affidavit. *See* Ala. Code §§ 17-11-7, 17-11-9 & 17-11-10; *see Common Cause v. Gorbea*, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (elimination of a similar requirement would not result in fraud).
- **Photo ID Requirement:** Voters mail in copies of their photo ID but election officials never see their faces for comparison. Voters are already required to enter identifying information, like their driver's license number or last four digits of their Social Security number, on

⁷ Topline Results for AUM Poll: July 2-9, 2020, http://www.aum.edu/sites/default/files/toplines_07172020.pdf.

⁸ *See* Ala. Code §§ 17-11-4, 5, 7; §§ 17-17-14, 24, 26.

the absentee application and ballot.⁹ Certain disabled and elderly voters are already exempted from the Photo ID Requirement,¹⁰ demonstrating that it is not necessary to prevent voter fraud and is especially unwarranted during this pandemic that puts voters at risk.

- **Curbside Voting Ban:** Defendants have not articulated a compelling state interest except for a vague assertion that the ban “ensures voter privacy” and the “confidentiality and integrity of ballots.” But state and federal law already give all voters the right to broad assistance with competing their ballots. While curbside voting has repeatedly be used in Alabama, there is no evidence that it has ever resulted in any fraud.

B. Count Two: The Photo ID Requirement and Curbside Voting Ban violate Title II of the Americans with Disabilities Act.

Under the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.” 42 U.S.C. § 12132. To state a claim, a plaintiff must demonstrate they: (1) are a qualified individual who has or is “perceived” to have a disability; (2) who is discriminated against; (3) by reason of such disability. *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001); *see also Lewis v. City of Union City*, 934 F. 3d 1169, 1183–84 (11th Cir. 2019). Plaintiffs must offer a “reasonable accommodation” that does not cause “undue hardship.” *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). Even if a voter has a choice between absentee or in person voting, the ADA requires both options to be accessible. *See Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016).

⁹ Ala. Form AV-R1, *Application for Absentee Ballot*, <https://www.sos.alabama.gov/sites/default/files/voter-pdfs/absentee/RegularAbsenteeAppFillable.pdf> (revised Sept. 3, 2019).

¹⁰ Ala. Code § 17-9-30(d).

First, Plaintiffs are high risk voters and the Organizational Plaintiffs' members include high risk voters and voters with COVID-19 or its symptoms who are or are perceived to be disabled. Second, due to their disabilities Plaintiffs cannot satisfy the Photo ID Requirement or enter a polling place without violating the Safer at Home Order or endangering their own health or the health of others. Over 96% of Alabamians who have died from COVID-19 had underlying health conditions.¹¹ Indoor areas, like polling places, are prime locations for aerosol transmission, and Alabama does not require masks to vote.¹² Many high risk voters, including some Plaintiffs, lack photocopying technology at home. Fulfilling the Photo ID Requirement thus requires contact with people outside their homes. Third, the Photo ID Requirement and Curbside Voting Ban severely burden or deny Plaintiffs the ability to vote safely. For Plaintiffs with disabilities, including high risk voters or those with COVID-19 or symptoms, the ability to vote curbside would mitigate the risk of voting in person.

The requested accommodations are also reasonable. Defendants allege that the Photo ID Requirement and Curbside Voting Ban protect the integrity of elections—but these rules are ineffective at preventing fraud. Doc. 58 at 66-69. The

¹¹ Ala. Pub. Health Dept., Characteristics of Laboratory Confirmed Cases of COVID-19, <https://www.alabamapublichealth.gov/covid19/assets/cov-al-cases-082020.pdf> (last visited Aug. 20, 2020).

¹² Safer at Home Order, *supra* at 4.

Photo ID Requirement is not an “essential eligibility requirement.” Doc. 161 at 14–15. It already contains an exemption for voters eligible to vote absentee under “any [] federal law.” Ala. Code § 17-9-30(c); *see, e.g.*, 52 U.S.C. § 20101 *et seq.*; 52 U.S.C. § 10502(d). Defendants can and should exempt high risk voters or voters with COVID-19 symptoms. Doc 58 at 44 n.25.

C. Count Three: The Challenged Provisions violate the VRA.

To demonstrate a Section 2 violation, a plaintiff must show that: 1) the challenged provisions have a disparate impact and 2) that disparate impact is the result of sociohistorical conditions and racial discrimination. Doc. 161 at 18–19. The Challenged Provisions violate Section 2 because they place a disproportionate burden on Black, Latino and other minority voters. Minorities are more likely to have preexisting health conditions that put them at high risk of serious illness from COVID-19. For example, Black people account for 40% of COVID-19 related deaths,¹³ but only 27% of Alabama’s population. This burden stems from Alabama’s long history of state-sponsored discrimination, including in voting, education, housing, and employment. These reduced resources contribute to a higher proportion of preexisting health conditions, and racial discrimination in healthcare has led to worse outcomes for minorities.¹⁴ Because minorities are more likely to be at high

¹³ Ala. Pub. Health Dept., Characteristics of Laboratory Confirmed Cases of COVID-19, *supra*.

¹⁴ *See* CDC, Health Equity Considerations and Racial and Ethnic Minority Groups (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race->

risk for COVID-19, to have ambulatory disabilities, and to follow social distancing rules than whites, minorities have a greater need for curbside voting. Black voters are also more likely to live alone or with only one other adult, so Black voters must disproportionately risk their health to comply with the Witness Requirement. Due to discrimination, minorities are also less likely to have the means to afford notaries or the technology for video notarization or to make copies of their photo ID at home.

D. Count Five: The Witness Requirement conditions voting on a fee.

The Fourteenth Amendment bars States from making “the affluence of the voter or payment of any fee an electoral standard.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966). Because the Witness Requirement demands that Plaintiffs have their absentee ballot notarized or witnessed by two adults, it illegally conditions the right to vote on “the affluence of the voter.” *Id.* About 90% of notaries charge fees to witness absentee ballots. The two-witnesses option is also unconstitutional because it places a “material” requirement on voters seeking to exercise their constitutional right not to pay fees, particularly in the pandemic. Doc. 161 at 24-25.

IV. CONCLUSION

At trial, Plaintiffs will show that the Challenged Provisions violate federal law because they severely burden the rights of high risk and other voters across Alabama.

ethnicity.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html.

DATED this 24th day of August 2020. Respectfully submitted,

/s/ Deuel Ross

Deuel Ross*
Natasha C. Merle*
Liliana Zaragoza*
Mahogane Reed*
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
Tel.: (212) 965-2200
dross@naacpldf.org

/s/ William Van Der Pol

William Van Der Pol [ASB-211214F]
Jenny Ryan [ASB-5455-Y84J]
ALABAMA DISABILITIES
ADVOCACY PROGRAM
Box 870395
Tuscaloosa, AL 35487
P: (205)348-4928
wvanderpoljr@adap.ua.edu

Sarah Brannon*, ++
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005-2313
202-675-2337
sbrannon@aclu.org

T. Alora Thomas-Lundborg*
Davin M. Rosborough*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2693
athomas@aclu.org

/s/ Caren E. Short

Caren E. Short (ASB-0646-P48N)
Nancy G. Abudu*
SOUTHERN POVERTY LAW CENTER
PO Box 1287
Decatur, GA 30031
P: (404) 521-6700
F: (404) 221-5857
caren.short@splcenter.org

/s/ Randall C. Marshall

Randall C. Marshall (ASB-3023-A56M)
ACLU FOUNDATION
OF ALABAMA, INC.
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 420-1741
rmarshall@aclualabama.org

/s/ Katrina Robson

Katrina Robson*
O'MELVENY & MYERS LLP
1625 Eye Street NW, Suite 1000
Washington, DC 20006
Phone: (202) 383-5300
Fax: (202) 383-5414
krobson@omm.com

*Admitted *pro hac vice*

++ Not admitted in DC; DC practice
limited to federal court only.

Attorneys for Plaintiffs

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/ Deuel Ross