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

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

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

STATE DEFENDANTS' RESPONSE TO
PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The State of Alabama and Secretary of State John Merrill ("State Defendants") provide this Court with this briefing to explain why Plaintiffs are not entitled to the relief they seek in their motion for summary judgment. *See* Doc. 169. Plaintiffs have not established by admissible, undisputed evidence that they have made out a prima facie ADA case or that permitting or requiring curbside voting would not cause an undue burden and fundamentally alter Alabama's elections. State Defendants will show that disputes of material facts on these points, in fact, remain.[1] Further, State Defendants will explain that the ADA does not entitle Plaintiffs to the remedy they seek. This Court should deny Plaintiffs' motion for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate where "there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving for summary judgment bears the burden to demonstrate that there is no genuine dispute as to any material fact by identifying the portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate

[1] And although genuine disputes of material fact preclude summary judgment for the Plaintiffs as discussed here, State Defendants raised different arguments in their motion for summary judgment and thus no such genuine disputes of material fact would preclude summary judgment for the State Defendants. *See* Doc. 160.

the absence of a genuine issue of material fact." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (quotation omitted).

However, "[t]he general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment." *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1290 n.8 (11th Cir. 2018) (quoting *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999)) (holding that out-of-court statement relaying that "customers comment on and identify Yellowfin's sheer line" was inadmissible hearsay). A narrow exception to this rule exists for documents like affidavits where simply having the declarant testify to the same matter at trial would cure the hearsay issue. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293–94 (11th Cir. 2012).

But the mere "suggestion that admissible evidence might be found in the future" is not enough at the summary judgment stage. *Id.* at 1294 (quoting *McMillan v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996). "The possibility that unknown witnesses will emerge to provide testimony . . . is insufficient to establish that the hearsay statement could be reduced to admissible evidence at trial." *Id.* at 1294. And a court may not consider hearsay statements where a declarant has given sworn deposition testimony contradicting those statement. *Id.*

If the moving party meet its initial burden of demonstrating there is no genuine dispute as to any material fact, the nonmoving party then assumes the burden to establish, by identifying matters outside the pleadings, that a genuine issue of

material fact exists. *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1311–12 (11th Cir. 2018). In deciding whether summary judgment is appropriate, this Court "must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (citation omitted). If the record, taken as a whole, "could not lead a rational trier of fact to find for the non-moving party," then there is no genuine dispute as to any material fact and the court must grant summary judgment. *Hornsby-Culpepper*, 906 F.3d at 1311 (citation omitted).

III. RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

1. Undisputed except as to COVID-19's spread being described as "exponential." Plaintiffs' own experts concede that new cases in Alabama are actually declining. Reingold Dep. at 44:15–49:17 (attached as Ex. 1); Elopre Dep. at 66:25–71:11 (attached as Ex. 2).

2. Undisputed that those cumulative statistics were accurate as of the days cited. Disputed that cumulative statistics are the proper way to view the current state of the pandemic, as opposed to metrics that allow for comparison over time such as the 7-day average of new cases.

3. Undisputed.

4. Undisputed as to the first sentence. Disputed that data shows that up to 80% of Alabamians are at high risk for severe illness from COVID-19. Dr. Burch's

basis for this statement appears to be an ongoing study that suggests that up to 80% of *Birmingham*-area residents may be at high risk for severe illness. *See* Burch Report (Pls.' Ex. B) at 29. Dr. Burch concedes that she does not have estimates for Alabama as a whole other than the CDC and Census data suggesting a much lower percentage of Alabamians may be at high risk for severe illness from COVID-19. Burch Dep. at 68:3–14 (attached as Ex. 3); Burch Report at 29.

5. Undisputed.

6. Undisputed.

7. Undisputed as to accuracy, disputed as to relevance.

8. Undisputed.

9. Undisputed.

10. Undisputed, except that a new Safer at Home Order was adopted on August 27, 2020 and will remain in effect through October 2, 2020 (attached as Ex. 4). The language Plaintiffs quote in this paragraph remains in the new Safer at Home Order verbatim.

11. Undisputed, except as qualified in ¶ 10 above.

12. Undisputed, except as qualified in ¶ 10 above.

13. Undisputed that Secretary Merrill has stated this. However, this statement appears to have been an error, as the Safer at Home order makes an exception only for voters, not for poll workers. Aug. 27, 2020 Safer at Home Order

at § 2(d)(i). Further, voters cannot be arrested while going to, present at, or returning from the polls except for "treason, felony, or breach of the peace" or for committing an election-related crime that day. ALA. CODE § 17-17-1.

14. Undisputed.

15. Undisputed that Thompson timely requested an absentee ballot and that Plaintiff Porter mailed an absentee ballot application postmarked on July 8, 2020. Disputed to the extent Porter implies that he should have received an absentee ballot, as the application deadline for the July 14 election was July 9 and Porter's application was received on July 10. His application was clearly late. Disputed to the extent that Thompson implies she did not receive an absentee ballot at all and disputed that she has presented any evidence that the absentee ballot was not actually delivered prior to July 14. *See* Thompson Dep. at 50:14–17. The Absentee Roster and notes of the Mobile County AEM's Office reflect that Thompson's ballot was mailed the same day her application was received: July 8. (Attached as Ex. 5). Further disputed that the time it takes the postal service to deliver absentee ballots or applications is relevant to, has been pleaded, or is traceable to any Defendant in this case.

16. Disputed that the letter from the United States Postal Service contains the language Plaintiffs quote. Rather, that language appears in the AP article that Plaintiffs also cite. *See* Pls.' Ex. J. The letter from the United States Postal Service

recommends that voters be aware of the risk that comes with waiting until the last minute to request or mail an absentee ballot. In particular, the USPS stated: "if state law requires ballots to be returned by Election Day, voters should mail their ballots no later than Tuesday, October 27." Pls.' Ex. K at 3. The USPS also stated: "To be clear, the Postal Service is not purporting to definitively interpret the requirements of your state's election laws, and also is not recommending that such laws be changed to accommodate the Postal Service's delivery standards." *Id.* Further disputed that the time it takes the postal service to deliver absentee ballots or applications is relevant to, has been pleaded, or is traceable to any Defendant in this case.

17. Undisputed.

18. Undisputed that a poll worker in Piedmont, Alabama tested positive for COVID-19 and was hospitalized three days after the election. Disputed that the poll worker contracted COVID-19 at the polling place and that any COVID-19 infection has been traced to the polling place. *See* Reingold Dep. at 103:2–107:2, 188:5–19.

19. Undisputed.

20. Disputed. Although the virus may continue to spread at *some* rate prior to development of a vaccine or herd immunity, the rate of spread can be decreased through implementation of mitigation measures such as masking, social distancing, and increased awareness of and response to early signs of infection by the public.

Elopre Dep. at 69:12–71:11; Reingold Dep. at 44:3–49:17. Further, herd immunity for COVID-19 may develop when as little as forty percent of a population has been infected and developed immunity. Reingold Dep. at 39:18–41:6. The population assessed for herd immunity is framed narrowly to "the geographic location where [one] live[s] and work[s] and travel[s]." Reingold Dep. at 40:11–14. Areas that have already experienced high levels of infections, such as some areas of New York City, may have already reached the threshold required for herd immunity. *See* Reingold Dep. at 41:7–42:3. Lastly, a COVID-19 vaccine may be available as early as January 2021. Reingold Dep. at 38:6–39:17.

21. Undisputed that Dr. Cotti made such conclusions with respect to the April 5, 2020 Wisconsin election. Disputed that his conclusions are correct. *See* Reingold Dep. at 90:12–101:17; Kidd Report at 3–4, 8–10 (attached as Ex. 6). Disputed also that his findings have any relevance to Alabama's November election. Dr. Cotti admitted that he had no information about the safety measures that will be in place at Alabama polling places or the rates of infection that may exist at that time. See Cotti Dep. at 22:11–25:3, 29:13–31:15, 32:9–33:6 (attached as Ex. 7). No empirical evidence suggests that Alabama's planned method of conducting elections during the pandemic will lead to a surge in COVID-19 cases. Kidd Report at 15.

22. Undisputed that the CDC has offered such guidance. Disputed that they are anything more than recommendations or that they represent the only safe way to administer an election.

23. Undisputed that polls exist where respondents apparently expressed such preferences. Disputed that federal law requires a State to restructure its elections to accommodate every voter's preferred methods, or that a voter's preference for one method says anything about the legality of another method.

24. Disputed. This paragraph offers a legal conclusion rather than a statement of fact. Regardless, although Alabama law does not specifically address "curbside or drive-thru voting," *see generally* ALA. CODE §§ 17-1-1, *et seq.*, that does not mean that it is permitted. State Defendants will address this point in more detail in the Argument section. *See infra* Section IV.A.

25. Disputed that Plaintiffs have presented admissible evidence that the incidents in question involved voters with disabilities. Disputed to the extent that this paragraph implies that Secretary Merrill has any authority to enforce election law or supervise local election officials. Otherwise undisputed.

26. Undisputed that curbside voting occurred in Hale County in 2016, but disputed as to Plaintiffs' characterization of this event. Although curbside voting was happening, the Hale County Probate Judge has no authority to "permit[]" curbside voting because it is not permitted under Alabama law and because the

specific methods used violated specific provisions of Alabama law, such as those requiring voters to sign the poll book and those requiring ballot privacy. Further, Plaintiffs cite no evidence that the voters taking part in this incident had disabilities, rather it appears that it was being offered as "a courtesy." *See* Merrill Dep. (Pls.' Ex. F) at 45:19–47:8. Additionally, Secretary Merrill did not "direct[]" Judge Crawford to do anything. Rather, Secretary Merrill called Judge Crawford, who he knows personally, "to assist Judge Crawford, not to intimidate or hurt Judge Crawford's feelings. That's the reason I gave him the option to stop the practice, and he did. I just knew that if he needed some help, then I'd make sure that he got the help he needed." Merrill Dep. at 49:3–9. Nor does Secretary Merrill have any means of enforcing state law. Like any other citizen, Secretary Merrill's only recourse if Judge Crawford did not decide to stop would be to call law enforcement.

27. Disputed that Plaintiffs have presented admissible evidence that the voter in question actually had limited mobility. Otherwise undisputed.

28. Undisputed that the Secretary did not know what disabilities the voters in these situations may have had. Disputed that Plaintiffs have presented any admissible evidence that any of those voters actually had disabilities. Disputed that whether or not they had disabilities would have been relevant to whether curbside voting would have been permissible in those instances and that Secretary Merrill's statement that he "did not care" meant anything more than that. Plaintiffs cite to only

half of Secretary Merrill's answer, conveniently omitting citation to his explanation that: "The only thing I cared about was whether or not they were following the law, which they were not." *See* Merrill Dep. at 44:4–9.

29. Undisputed that Secretary Merrill did not personally know whether these polling places were accessible to people with ambulatory or other disabilities. Disputed that Plaintiffs have provided any evidence that these polling places were, in fact, inaccessible to people with ambulatory or other disabilities. Further disputed to the extent that this paragraph implies that Secretary Merrill makes no effort to ensure that polling places are accessible. Plaintiffs, again, omit citation to the entirety of Secretary Merrill's answers:

> Q. Okay. So you wouldn't know whether it was accessible to people who use mobility devices, then?
> A. No, ma'am. I will say this, though, I think it's important for you to note, that we indicate to all sixty-eight probate judges in all sixty-seven counties that any polling site that is approved by the county commission in that county should adhere to all requirements related to ADA standards, so that any voter that chooses to vote in person on election day can gain access through their own initiative to the polling site without an incumbrance.
> Q: So as far as you are aware, all Alabama polling places are accessible to people who use mobility devices, for example?
> A: That is our understanding. And if it's ever introduced to us that that is not the case, it's our intention that that be remedied immediately.

Merrill Dep. at 35:19–36:2; *see also id.* at 44:10–19 (". . . I've already stated for you, and I could restate if you'd like, that our intention is to ensure that every one of our

one thousand nine hundred and eighty polling sites in the state are ADA compliant and meet the standards as specified by the law.").

30. Undisputed that Secretary Merrill had no evidence regarding whether the curbside voters had signed the poll book in those instances. Otherwise disputed, as this paragraph offers legal conclusions rather than a statement of fact.

31. Disputed. Ms. Threadgill-Matthews testified that she was aware of only one such instance. Threadgill-Matthews Dep. at 70:21–71:2 (attached as Ex. 8).

32. Disputed. *See supra* ¶ 29.

33. Undisputed, although this is a legal conclusion rather than a statement of fact.

34. Undisputed, although this is a legal conclusion rather than a statement of fact.

35. Undisputed, although this is a legal conclusion rather than a statement of fact.

36. Disputed that Peebles would prefer to vote curbside. Peebles is unwilling to attempt to get his absentee ballot notarized at the bank because of the potential that he *might* have to wait in a line of cars. Peebles Dep. (Pls.' Ex. P) at 102:4–104:16. As such, it is difficult to imagine how curbside voting could be appealing to him. Additionally disputed to the extent that this paragraph implies that

Dr. Peebles always votes in-person, as he has voted by absentee ballot in Alabama before. *Id.* at 37:18–38:1. Otherwise undisputed.

37. Disputed that curbside voting is the only option by which Thompson could vote "'comfortably' without fear of contracting COVID-19." Doc. 169 at ¶ 37 (citing Thompson Dep. (Pls.' Ex. G) at 75:1-12). Thompson stated she has not left her home since April 1 unless she "absolutely, one hundred percent had to," but has done grocery shopping, taken her dog to the groomer twice and the veterinarian once, and visited her daughter and granddaughter about once a week socially, in addition to voting in person in July. Thompson Dep. at 33:22–38:14, 42:22–50:13, 58:18–64:1, 65:12–69:9. She could just as safely have an absentee ballot witnessed as undertake any of these trips, and had planned to have two neighbors witness her ballot in July. *See id.* at 55:3–56:12, 78:7–83:9, 100:6–102:6, 110:19–111:4. Additionally, she qualifies for an exemption to the photo ID requirement. *Id.* at 52:16–55:2, 71:17–72:4, 86:12–87:5, 104:3–107:7. Otherwise undisputed.

38. Disputed to the extent that Porter implies that timely mailed and otherwise validly cast absentee votes will not be counted. Otherwise undisputed.

39. Disputed that Bettis would prefer to vote curbside. *Compare* Bettis Dep. at 114:6–115:1 ("My first preference would be absentee . . . ."), *with id.* at 115:2–19 ("I would probably choose the curbside."), *and id.* at 127:3–129:19 ("I would feel equally comfortable doing either one."). Further disputed to the extent

that Bettis implies that timely mailed and otherwise validly cast absentee votes will not be counted. Otherwise undisputed.

40. Disputed that the organizational Plaintiffs have presented any admissible evidence, as opposed to inadmissible hearsay, regarding any members who are unable to vote absentee because they cannot comply with the photo ID or witness requirements. Otherwise undisputed.

41. Disputed that the organizational Plaintiffs have presented any admissible evidence, as opposed to inadmissible hearsay, to support these allegations.

42. Disputed that the organizational Plaintiffs have presented any admissible evidence, as opposed to inadmissible hearsay, to support these allegations.

43. Disputed that the organizational Plaintiffs have presented any admissible evidence, as opposed to inadmissible hearsay, to support these allegations.

44. Disputed as to Peebles for the reasons discussed in ¶ 36. Disputed that Thompson or Porter need to use curbside voting or that it would be safer for either of them than complying with the absentee ballot requirements. *See supra* ¶ 37; Porter Dep. at 14:31–15:14, 19:18–20, 21:7–12, 31:3–13, 33:16–34:6, 47:10–49:18, 56:23–57:17, 77:21–80:16; Reingold Dep. at 134:6–135:13.

45. Undisputed that the Jefferson County and Montgomery County Defendants agreed with Plaintiffs to the entry of proposed consent orders containing the quoted language. Disputed that curbside voting could actually be implemented in those counties. Disputed that "the Secretary of State's Curbside Voting Ban" exists, and that any action by Secretary Merrill is a "but for" cause of counties (including Jefferson County and Montgomery County) not offering curbside voting, as opposed to independent legal obstacles and the massive financial and administrative burdens that would accompany curbside voting. *See* Judge Davis Dep. at 55:9–58:18, 68:6–8, 80:18–81:1, 95:19–21, 107:22–108:1 (attached as Ex. 9); Judge English Dep. at 114:18–117:1, 119:20–120:12, 121:10–20, 128:2–133:16, 134:18–136:22, 172:10–173:15 (attached as Ex. 10).

46. Undisputed that Plaintiff GBM is located in Jefferson County and that its members are predominantly located in and around Jefferson county. Otherwise disputed that the organizational Plaintiffs have presented any admissible evidence, as opposed to inadmissible hearsay, to support these allegations.

IV. ARGUMENT

Not only have Plaintiffs failed to show undisputed material facts that would allow the Court to enter summary judgment on their behalf, they have failed to establish enough facts to even show they have established a prima facie ADA case. The record establishes that each individual Plaintiff has an available means of

voting, and thus has not been excluded from voting at all. Further, and contrary to Plaintiffs' view, Title II of the ADA does not entitle them to any modifications they desire. It is instead a remedy of "limited" scope—public entities need not "employ any and all means to make [public] services accessible" and "in no event" must they "undertake measures that would impose an undue financial or administrative burden" or fundamentally alter the nature of the service. *Tennessee v. Lane*, 541 U.S. 509, 531–32 (2004).

Further, State Defendants did, in fact, contest Plaintiffs' prima facie ADA case as to *all* their claims even at the preliminary injunction phase. *See* Doc. 36 at 21–26. State Defendants explained there, as they will again here, that Plaintiffs have not been excluded from voting and that any difficulties they face are not by reason of their disabilities—this explanation is not limited to any particular subset of their ADA claim. Plaintiffs fail to establish a prima facie case under the ADA: full stop.

As a threshold matter, the organizational Plaintiffs cannot rely on their statements regarding the difficulties their members allegedly face to support their motion for summary judgment. Inadmissible hearsay cannot be considered at summary judgment. *See Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1290 n.8 (11th Cir. 2018) (quoting *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999)). Each organization offered statements on their members for the truth of the matter asserted—i.e., the proposition that those members actually face

difficulties in voting. But the organizational Plaintiffs have not produced admissible evidence in any form that any of these members do in fact face difficulties in voting. None of these statements can be cured by simply having the declarant who made them (here, the organizations' representatives) testify to the same at trial, nor is the possibility that they may suddenly appear to testify at trial sufficient to cure the issue. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293–94 (11th Cir. 2012). Because organizational Plaintiffs have not presented admissible evidence about their members, these allegations cannot be relied on in support of summary judgment.

A. Curbside voting is not permitted by Alabama law.

Although Alabama law contains no express, specific prohibition against "curbside or drive-thru voting," *see generally* ALA. CODE §§ 17-1-1, *et seq.*, that does not mean that it is permitted. For example, Alabama law would have been silent as to absentee balloting until a statute was adopted implementing it, but that does not mean a voter could have mailed in their ballot and lawfully had it counted prior to adoption of that statute. To suggest that the State must anticipate and list every method of conducting an election that is *not* allowed, rather than merely providing for those methods that *are* allowed is absurd.

Moreover, it violates basic principles of statutory construction. Where a legislature provides for "a discrete exception to a general rule," courts may not "imply additional exceptions absent a clear direction to the contrary." *United States*

v. Alabama, 778 F.3d 926, 934 (11th Cir. 2015) (citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980). Also known as the omitted-case canon of construction, this rule provides that it is not the role of courts to "elaborate unprovided-for exceptions to a text." *Samak v. Warden, FCC Coleman-Medium*, 766 F.3d 1271, 1289 (11th Cir. 2014) (W. Pryor, J., concurring) (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 9, at 93 (2012)).

Here, the general rule that the Alabama legislature provided is traditional in-person voting. The limited exception to this rule is voting by absentee ballot for those voters who meet one of the reasons specifically listed by the legislature. *See* ALA. CODE § 17-11-3. Other methods of voting are not allowed, regardless of whether they are mentioned or not. For example, even though *theoretically* a voter could provide a digital signature by email or authorize a poll worker to sign a poll book on their behalf over the phone, that does not mean that voting by email or over-the-phone is permitted in Alabama. Curbside voting is no different.

Alternatively, the negative-implication canon could be applied to show that the Alabama legislature, in laying out only two ways to vote, intended for these to be the only two ways. This canon, sometimes referred to as *expressio unius*, provides that "[t]he expression of one thing implies the exclusion of others." *Estate of Cummings v. Davenport*, 906 F.3d 934, 942 (11th Cir. 2018) (quoting Scalia & Garner, *supra* § 10, at 107). In other words, when the legislature provides a list,

anything not on that list is not covered by the statute. *See id.* Here, the Alabama legislature has provided two methods to vote: traditional in-person and absentee. Because curbside voting is not on that list, it is not a permitted method.

Whether framing traditional in-person voting and absentee voting as a general rule and an exception or as the exclusive list of permissible voting methods in Alabama, statutory construction principles reveal that curbside voting is not within the Alabama Legislature's limited grant of authority for election officials. Further, no Alabama court has ever addressed this issue. Because Alabama courts "are the final arbiters of state law," anything this Court writes as to the issue would be written "in faint and disappearing ink." *LeFrere v. Quezada*, 582 F.3d 1260, 1262 (11th Cir. 2009) (quoting *Sultenfuss v. Snow*, 35 F.3d 1494, 1504 (11th Cir. 1994) (Carnes, J., dissenting)). This Court should defer to Alabama to interpret Alabama law.

B. Plaintiffs have failed to point to any undisputed facts that show they have established a prima facie case under the ADA.

In fact, the evidence actually shows the opposite: no Plaintiff has been excluded from voting at all, let alone by reason of their disabilities or in a way that can be connected to curbside voting. Title II of the ADA states that "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 prima facie case then, a plaintiff must demonstrate that they (1) are a "qualified individual with a disability;" (2) who

was "'excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity;'" (3) and that the exclusion, denial of benefits, or discrimination was "'by reason of such disability.'" *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting 42 U.S.C. § 12132).[2]

Mere difficulty in accessing a benefit is not, by itself, sufficient to state a prima facie case. *See Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1088 (11th Cir. 2007) (quotation omitted). Whether an individual has suffered an exclusion must be determined by viewing the service, program, or activity "in its entirety." *Shotz*, 256 F.3d at 1080. As such, the proper inquiry is whether an individual is excluded from *voting*, rather than whether any particular or preferred method is available to the plaintiff. As long as plaintiffs are "able to participate in [the] voting program," they have not been excluded and their "rights under the ADA have not been abused." *Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107–08 (11th Cir. 2011).

The record shows that Plaintiffs have viable methods of voting, even during the COVID-19 pandemic. As discussed extensively in State Defendants' Motion for

[2] Plaintiffs may meet the first element as to forms of voting that would be presumably conducted in-person, such as curbside voting. But they do not meet the essential eligibility requirements for absentee balloting for the reasons discussed in State Defendants' Partial Motion to Dismiss. *See* Doc. 112 at 13–16.

Summary Judgment, Plaintiffs have not even suffered an injury sufficient to establish standing. *See* Doc. 160 at 15–25. It would be redundant to rehash all of that discussion here, but to briefly summarize: every individual Plaintiff that challenges the witness requirement has reasonable options to fulfill that requirement (while maintaining social distancing or otherwise commensurate with their personal self-isolation practices) and every individual Plaintiff that challenges the photo ID requirement qualifies for an exemption. *See id.* at 19–24 (exhaustively citing to the Plaintiffs' deposition testimony). Further, Plaintiffs have not presented any admissible evidence that any polling place in Alabama is not accessible to any voter—let alone any individual before this Court—with an ambulatory disability. As the Plaintiffs have methods that allow them to "participate in [the] voting program," they have not been excluded from voting and their prima facie ADA case fails.

Even to the extent any Plaintiff faces difficulties voting, those difficulties are not "by reason of" their disabilities. 42 U.S.C. § 12132. To establish this third element of a prima facie ADA case, a plaintiff must show a "causal connection" between his or her disability and the alleged exclusion. *Bircoll*, 480 F.3d at 1081 n.11. In the cases Plaintiffs cite, this causal connection is obvious. In *Shotz v. Cates*, the Eleventh Circuit held that plaintiffs with ambulatory disabilities challenging the physical accessibility of a courthouse had stated a plausible claim. 256 F.3d at 1080. In *Disabled in Action v. Board of Elections in City of New York*, the Second Circuit

upheld an injunction obtained by mobility and visually impaired individuals who faced "physical barrier[s] to access. . . . including those relating to ramps, entryways, pathways, interior spaces at poll sites, and missing or misplaced signage." 752 F.3d 189, 192–93, 206 (2d Cir. 2014).

Here, no causal connection exists between Plaintiffs' disabilities and either the lack of curbside voting or the difficulties they face in voting. It is true that Plaintiffs, as a result of their disabilities, may face some increased risk of severe complications *if* they contract COVID-19. But Plaintiffs' disabilities do not put them at any greater risk for contracting COVID-19 and their behavior reveals that they already take risks comparable to those required to have an absentee ballot signed. The fact that Plaintiffs will go to the grocery store or the dog groomer, but refuse to find two people to witness their ballot or to attempt to have it notarized in the bank drive through reveal that it is their own choices, not their disabilities, that cause their difficulties. *See Greer v. Richardson Indep. Sch. Dist.*, 472 F. App'x 287, 295 (5th Cir. 2012). Nor has the absence of curbside voting in Alabama prior to the pandemic caused any Plaintiff difficulty in voting; in fact, they largely assert that they preferred traditional in-person voting. *See, e.g.*, Doc. 169 ¶ 36; *supra* ¶ 36; *see also* Peebles Dep. at 103:19–104:4 (". . . [t]here's also times where I'm very easily able to park in the handicap space that's right next to the door of the [polling place].").

Plaintiffs have failed to show undisputed evidence to support their prima facie case. Viewing the facts in the light most favorable to State Defendants, it is clear that Plaintiffs have not carried their burden to show that no dispute of material fact exists as to whether they have made out a prima facie ADA case. Plaintiffs are not entitled to summary judgment.

C. Curbside voting is not a reasonable modification.

Even if Plaintiffs have made out a prima facie ADA case, their request for curbside voting is not a reasonable modification. When a plaintiff proves a prima facie case, they then must offer "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.130(b)(7)." This remedy is "nevertheless a limited one." *Lane*, 541 U.S. at 532. Public entities need not "employ any and all means to make [public] services accessible" and "in no event" must they "undertake measures that would impose an undue financial or administrative burden" or fundamentally alter the nature of the service. *Id.* at 531–32 (2004).

1. Alabama law already provides Plaintiffs with reasonable modifications.

Alabama law already provides some disabled Plaintiffs with an effective remedy to alleviate many of their concerns. Any voter who is "mobility disabled" or over the age of 70, who so requests, may move to the front of the line at the polling place. ALA. CODE § 17-9-13(c). This accommodation removes much of the potential exposure Plaintiffs fear, in accordance with the ADA.

Further, Secretary Merrill has already provided Plaintiffs with a reasonable modification because of the COVID-19 pandemic. Secretary Merrill promulgated an emergency rule allowing any Alabama voter who determines it would be impossible or unreasonable to vote at their polling place because of COVID-19 to vote by absentee ballot. ALA. ADMIN. CODE r. 820-2-3-.06-.04ER (July 17, 2020). In doing so, Secretary Merrill has provided Plaintiffs—and many other Alabama voters—with an additional means of voting and, in effect, early voting as voter can vote by in-person absentee starting on September 9. Davis-Posey Dep. at 105:21–106:25 (attached as Ex. 11). By increasing the availability of voting, Secretary Merrill has already provided a reasonable modification. It is unreasonable to implement *every* modification requested, when the ones already made remedy the issues presented.

2. The modification that Plaintiffs request is unreasonable.

Exactly what Plaintiffs are asking for in their curbside voting claim is murky. Several Plaintiffs acknowledged that they did not know what curbside voting would entail exactly: how voters would show an ID, sign a poll book, and receive, complete, and return a ballot. They often maintained that curbside voting would be as safe or safer than the absentee voting option available to them, even though it would involve direct contact with at least two poll workers. Porter Dep. at 44:14–

45:18; Peebles Dep. at 64:3–66:5; Thompson Dep. at 87:6–92:10, 111:16–113:13.[3] But Plaintiffs' own expert opined that curbside voting would likely be less safe than voting by absentee ballot. Reingold Dep. at 134:6–135:13.

Moreover, it is unclear even from Plaintiffs' own summary judgment motion whether they seek curbside be mandated or simply allowed. *Compare* Doc. 169 at 26 ("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."[4]), *with id.* at 27–28 ("Plaintiffs respectfully request . . . 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.).

Whether the modification Plaintiffs request is framed as mandating or simply permitting curbside voting, it is not reasonable. Unfortunately, at the outset of this analysis it bears emphasis that Plaintiffs continue to misrepresent the Declaration of Clay Helms as "identif[ying] methods for making curbside voting feasible." Doc. 169 at 28. Mr. Helms's Declaration in fact has an entire section helpfully titled in bold: "**Why Curbside Voting Cannot Work**." Doc. 34-1 at 21. He goes on to say

[3] Threadgill-Matthews is not sure whether she joins the curbside voting claim. Threadgill-Matthews Dep. at 76:23–78:16. Bettis could not decide whether she wanted to vote absentee or curbside. *See supra* ¶ 39; Bettis Dep. at 112:23–115:19, 127:3–129:19.

[4] Plaintiffs misconstrue these statutes. If statutes that require simply that voters who ask for assistance with voting receive such assistance can be construed as requiring that polling places affirmatively offer curbside voting, then they would require essentially anything a voter asks.

specifically: "Moreover, implementation of 'curbside' voting would be completely *unfeasible* for the July 14, 2020 primary runoff election or any 2020 election." *Id.* at 22, ¶ 44 (emphasis added). There is no reasonable way to interpret Mr. Helms's declaration as endorsing curbside voting's feasibility.

If Plaintiffs' request is for mandated curbside voting, that would be patently unreasonable. It is impossible to overstate the financial and administrative burdens that would accompany planning, implementing, and effectively executing mandated curbside voting in a way that is safer than the current options available to voters (whether in the context of the pandemic or outside it), that does not create significant traffic issues around polling places that might deter voters from waiting or otherwise threaten motorists, and that protects important interests such as the secrecy of the ballot and election integrity. *See supra* ¶ 45; Judge Davis Dep. at 55:9–58:18, 68:6–8, 80:18–81:1, 95:19–21, 107:22–108:1; Judge English Dep. at 114:18–117:1, 119:20–120:12, 121:10–20, 128:2–133:16, 134:18–136:22, 172:10–173:15. Plaintiffs' own expert admitted that curbside voting is likely less safe than voting by absentee ballot. Reingold Dep. at 134:6–135:13. And Plaintiff Peebles admitted that, even in the absence of curbside voting, his polling place—located inside a hotel—sometimes has cars backed up into the street. Peebles Dep. at 102:12–103:18.

Even if Plaintiffs are asking only that voting simply be allowed by counties that wish to do so in a way that complies with all other Alabama election laws, such

a modification would unreasonably undercut the State's interest in conducting elections uniformly and would unduly increase the financial and administrative burdens that would accompany monitoring such a patchwork system and ensuring that those counties that do adopt curbside voting implement it in a way that otherwise complies with State law. Additionally, it is likely less safe for voter than voting by absentee ballot, *see* Reingold Dep. at 134:6–135:13, and it may actually be more difficult to assist voters with disabilities curbside as voting aids cannot be placed curbside, *see* Judge Davis Dep. at 95:15–21.

Further, the probate judges of the two counties that are home to the individual Plaintiffs would not offer curbside voting even if Secretary Merrill is enjoined from "prohibiting" it. *See supra* ¶ 45; Judge Davis Dep. at 55:9–58:18, 68:6–8, 80:18–81:1, 95:19–21, 107:22–108:1; Judge English Dep. at 114:18–117:1, 119:20–120:12, 121:10–20, 128:2–133:16, 134:18–136:22, 172:10–173:15. Moreover, it would not be legal for them to do so, as local officials have only the authority specifically vested in them by the Alabama Legislature. *See* ALA. CONST. art. IV, § 44; *Robbins v. Cleburne Cty. Comm'n*, —So.3d—, 2020 WL 502541, at *2 (Ala. Jan. 31, 2020) (invalidating contract where county commission did not have statutory authority to enter into such contract, even where such contract was not prohibited by law). Individual Plaintiffs thus would still not be able to vote curbside

even if their motion for summary judgment is granted. Plaintiffs' requested relief is not a reasonable modification regardless of framing.

3. Curbside voting would fundamentally alter Alabama elections.

Even if the modifications would be reasonable, the public entity need not make them if they would "fundamentally alter the nature of the service, program, or activity." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (quoting 28 C.F.R. § 35.130(b)(7)). States have significant leeway as to whether a proposed modification is a fundamental alteration. *Id.* at 605. For example, the State may show that "immediate relief for the plaintiffs would be inequitable" given "the allocation of available resources" and the State's responsibility for "a large and diverse population" of others participating in the service, activity, or program. *Id.* at 604.

Either mandating or permitting curbside voting would fundamentally alter Alabama elections. Curbside voting has never been permissibly conducted in Alabama. Nor could it be, as it is not permitted under State law. *See supra* Section IV.A. Additionally, it would be inequitable to grant the "immediate relief" that Plaintiffs seek when Alabama's responsibility to its electorate as a whole to conduct a secure election would be undermined by the relief they seek. Particularly given the importance and increased turnout that come with a presidential election, the State should not have to divert precious resources to ensuring that a method of voting that itself violates State law is not implemented in a way that violates other State laws.

Further, having the same election conducted in ways that elections have never been conducted before and that are not uniform across the State would fundamentally alter Alabama's election system. The Alabama legislature envisioned and intended that all matters pertaining to voting should be conducted uniformly. *See* ALA. CODE §§ 17-1-3 ("The Secretary of State . . . shall provide uniform guidance for election activities."); 17-2-4 (providing for a "uniform polling system"); 17-3-11 cmt. (noting that subsection (d) was "repealed to make the law uniform throughout each county in the state."); 17-3-52 (providing for a "uniform" application for voter registration); 17-4-33 (providing for "a nondiscriminatory, single, uniform, official, centralized, interactive computerized statewide voter registration list") 17-6-3 (providing that voting precincts "shall be named and designated . . . in a manner that shall be uniform statewide"); 17-6-23 (providing for "[u]niform ballots at each polling place"). Straying from that clear policy mandate here would undermine the "significant leeway" that the State must be afforded in determining whether curbside voting would be a fundamental alteration. *Olmstead*, 527 U.S. at 605. It is clear that it would.

D. If the ADA requires curbside voting, then it is unconstitutional in that application.

If the ADA can be read to provide Plaintiffs with the relief they seek here, by overriding nondiscriminatory and facially valid State laws regulating elections, it is unconstitutional in that application. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*,

531 U.S. 356, 374 (2001). Legislation passed pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment must be a "congruent and proportional" remedy to the conduct they seek to prohibit. As with all Fourteenth Amendment legislation, the central concept underpinning its purpose is that "all persons similarly situated should be treated alike." *Lane*, 541 U.S. at 521 (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). Congress passed the ADA to prohibit irrational disability discrimination. *Lane*, 541 U.S. at 521–23 (2004).

Here, Plaintiffs' claim boils down to an argument that the onset of the virus made the challenged provisions unlawful under the ADA. But obviously in passing the ADA, Congress did not consider any historical evidence about inequality in providing services during a pandemic. Resolving the difficulties that *might* arise because an individual with disabilities *might* contract a virus that *might* cause serious health consequences—which also *might* cause serious health consequences for individuals *without* disabilities—just is not what the ADA was designed to do.

Even stretching this idea further, the ADA simply was not passed to remedy the difficulties that accompany responding to disasters. Plaintiffs' difficulties arose without the State taking any new action. And a risk of serious consequences from COVID-19 faces not only individuals with disabilities, but also the entire population. In other words, "all persons similarly situated [are] be[ing] treated alike." *See Lane*, 541 U.S. at 521 (quoting *Cleburne*, 473 U.S. at 439). If the ADA reaches here—

where there is no new State action and no evidence of discrimination—to implement a completely new system of voting that also violates Alabama law, then the ADA exceeds Congress's constitutional authority in this application.

V. CONCLUSION

Plaintiffs do not know exactly what curbside voting is, or how it would be implemented, but they *know* that it is reasonable. Their contention defies logic. As State Defendants have pointed out extensively above, a number of material facts remain in dispute as to whether Plaintiffs even have a prima facie ADA case, the reasonability of implementing or allowing curbside voting, and its impact on Alabama's elections if permitted. Beyond just that, it remains unclear how Plaintiffs would even receive any tangible relief as a result of their motion for summary judgment being granted given that the Probate Judges of the individual Plaintiffs' counties will not be independently implementing curbside voting, as is likely the case for a number of other Probate Judges across the State as well. Plaintiffs' continued insistence that they cannot vote without curbside voting is not supported by any evidence in the record. This Court should deny Plaintiffs' motion for summary judgment.

Respectfully Submitted,

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Certificate of Service

I certify that on August 31, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record.

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