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

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

PEOPLE FIRST OF ALABAMA, et al.,

Plaintiffs,

v.

JOHN MERRILL, in his official capacity as the Secretary of State of Alabama, et al.,

Defendants.

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

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' TRIAL BRIEFS

Plaintiffs respectfully submit this response to the Trial Briefs of State Defendants, Doc. 186; the Mobile County Circuit Clerk and AEM, Doc. 189; Madison County Defendants, Doc. 191; and Lee, Lowndes, and Wilcox County Defendants, Doc. 188 (collectively, "County Defendants," together with State Defendants, "Defendants").

Defendants raise three primary arguments, each of which this Court has already decided in Plaintiffs' favor. Doc. 58 at 43, 61, 69, 75–76; Doc. 161 at 10–11, 15, 20, 25. *First*, *Purcell* does not foreclose the relief Plaintiffs request. At trial, Plaintiffs will show that an injunction against the Witness Requirement, the Photo ID Requirement, and Curbside Voting Ban (the "Challenged Provisions") would not result in voter confusion. And even if minimal confusion occurred, the benefit of eliminating the Challenged Provisions' burdens on Plaintiffs and other voters amid the COVID-19 crisis greatly outweighs Defendants' concerns. *Second*, Plaintiffs have standing; they have suffered an injury by being forced to comply with the Challenged Provisions. These injuries are traceable to Defendants and redressable by an order from this Court. *Third*, Plaintiffs are likely to prevail on the merits of their claims, as this Court previously decided.

I. The Requested Relief Is Not Foreclosed by *Purcell v. Gonzalez*.

Defendants rely on *Purcell v. Gonzalez* to argue it is too close to the upcoming election for this Court to issue any injunction. However, *Purcell* does not counsel

against providing the requested relief. The Court can eliminate the Challenged Provision with sufficient time ahead of the November election to avoid confusion to voters and election officials.

Defendants' disingenuous emphasis on the timing of the upcoming election would put Plaintiffs in a no-win situation, where Plaintiffs were simultaneously too early and are now too late to obtain the relief they seek. On May 14, Plaintiffs sought to enjoin the Challenged Provisions as to all 2020 elections. Doc. 58 at 12. At that time, State Defendants argued that Plaintiffs' injuries as to the July 14 election were too speculative and, "to the extent Plaintiffs [sought] an injunction that applies to November elections, their claims are even more speculative." Doc. 36 at 7–8. State Defendants claimed that seeking relief "50 days" before an election was too far in advance to establish a concrete injury. *Id*. at 13. The Court accepted their arguments as to the November election. Doc. 58 at 12. They must be barred by judicial estoppel from relying on *Purcell*. *See New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (doctrine applies where a party's current position is inconsistent with its previous position, which the court accepted, and the party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped").

State Defendants cannot have it both ways: 50 days ahead of an election cannot be too far in advance to warrant relief, while a trial scheduled 56 days ahead of the November election is too short a timeframe to provide relief. *See* Doc. 186 at

3. Defendants' insincere reliance on *Purcell* is highlighted by their consistent opposition to the expedited schedule in this case, *see, e.g.*, Proposed Pre-Trial Order, Aug. 28, 2020 at 71, even though the parties agreed to this schedule, s*ee* Doc. 68.

Defendants further incorrectly claim that Plaintiffs "amplified these [*Purcell*] problems by declining to move for a preliminary injunction as to the November election[.]" Doc. 186 at 4–5. But Plaintiffs *did* seek a preliminary injunction for November. Doc. 58 at 12. After the Court granted relief only to the July 14 runoff, Doc. 59, Plaintiffs were not required to seek another preliminary injunction to preserve their rights. Plaintiffs did not waive their rights, as Defendants suggest. Doc. 186 at 4–5. Rather, they sought expedited relief by asking for an August trial, Doc. 77, and moving for summary judgment, Doc. 169.

A. ***Enjoining the Challenged Provisions Will Not Lead to Confusion***.

Contrary to State Defendants' argument, Doc. 186 at 1, enjoining the Challenged Provisions ahead of the November election will not cause confusion among voters or local election officials. However, even if there is the remote possibility of some minimal voter confusion, it is greatly outweighed by the public interest in eliminating the significant burdens that the Challenged Provisions place on Plaintiffs and voters, particularly those who are at higher risk for serious illness and death from COVID-19. Doc. 58, at 75–76.

Plaintiffs will present evidence that the Court's preliminary injunction did not cause any confusion ahead of the July 14 election. To the contrary, many dozens of voters were able to vote pursuant to the Court's order. As was the case then, Defendants will have "time to clearly and succinctly communicate the changes" to voters before November, minimizing any potential confusion. Doc. 58 at 75.

Next, Defendants argue that an injunction that impacts only some, but not all, counties will lead to confusion—this misses the mark. Doc. 186 at 3. *First*, Plaintiffs seek statewide relief, applicable to all counties, if their ADA and VRA claims against the State succeed. *See, e.g.*, *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017) (ordering statewide relief in an organization's voting suit against a state); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1348 (11th Cir. 2014) (same against state official). *Second*, the mere possibility of Plaintiffs receiving relief against some, but not all, counties does not prohibit any relief at all in a constitutional challenge to voting laws. *See Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1310–11 (N.D. Fla. 2019), aff'd 950 F.3d 795, 833 (11th Cir. 2020) (entering an order against 8 of a state's 67 counties). To the extent there is a concern that an injunction will not apply to each Alabama county, it is of the State's own making. The State cannot use the structure it created, whereby county officials administer certain electoral provisions, to immunize itself *and* local election officials from accountability. *See United States v. Alabama*, 362 U.S. 602, 604 (1960) (explaining that Congress permitted voting suits

against states to address diffuse election structures). *Third*, Plaintiffs will show that before the stay, all three counties followed and implemented the Court's preliminary injunction in a practicable manner.

Moreover, Defendants' concern is belied by the fact that Alabama's election administration system is largely decentralized, and the State's 67 counties already have different processes and resources for administering elections. For example, only half of Alabama counties currently use e-poll books to verify voters' registration information at in-person polling locations. Doc. 34-1 ¶ 46. And counties regularly follow different election schedules and cycles. In July, only Mobile held a congressional primary election, and only Bibb, Chilton, and Shelby counties participated in an August special election. Defendants do not contend that this lack of uniformity results in confusion for voters or election officials.

Because the Court can order relief with even more time ahead of the November election than it did for the July 14 election, Defendants' reliance on *Purcell* should be afforded little weight. *See, e.g.*, *Frank v. Walker*, 574 U.S. 929 (2014) (vacating stay and thereby reinstating trial court's injunction against a voter ID law 26 days before an election); *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262 (11th Cir. 2019) (denying the stay of an injunction requiring changes to the absentee voting rules just 4 days before November 2018 election).

B. *An Injunction Will Not Unduly Burden Defendants.*

State Defendants' stated concerns over the hardship they may experience if the Challenged Provisions are enjoined are unwarranted. Notably, State Defendants have maintained that they have no role in implementing the Photo ID and Witness Requirements. Doc. 36 at 18–19. Yet State Defendants question, for example, the logistics for printing absentee ballot applications and how poll workers will know whether to count a ballot or not after an injunction is entered. Doc 186 at 3–4.

Plaintiffs will show that those counties who carried out the preliminary injunction for the July 14 election were able to do so without any burden. To the contrary, Defendants were only required to confirm that the absentee applications and ballots complied with the Court's order and announce the injunction.

State Defendants also argue that implementing curbside voting would be "difficult, if not impossible, even with unlimited time[.]" Doc. 186 at 4. But, as this Court concluded, "prohibiting the state from interfering with local election officials, if any, who choose to provide curbside voting that complies with state election laws imposes no burden on the defendants[.]" Doc. 58 at 75.

Further, Madison County Defendants' concern that curbside voting is not a reasonable accommodation is unwarranted. An order would merely allow counties—consistent with past practices federal and state law—to assist voters with disabilities. Madison County would not be obliged to provide it. Further, their contention is

undermined by the fact that multiple counties have offered curbside voting without any confusion or hardship. Doc. 169 ¶¶ 26–27, 31. These counties' efforts to provide the accommodation were only stopped because of Secretary Merrill's ban. *Id.* at ¶ 26. Moreover, at least two counties—Jefferson and Montgomery—would provide curbside voting as a reasonable accommodation in November but for the Secretary's ban. Doc. 181 ¶¶ 15-16 (Jefferson); Doc. 182 ¶¶ 14, 16 (Montgomery).

II. Plaintiffs' Injuries Are Traceable to County Defendants and Redressable.

Defendants continue to assert that Plaintiffs lack standing. This Court has already found that each Individual and Organizational Plaintiff has likely suffered an injury-in-fact by the State's decision to force Plaintiffs to comply with the Challenged Provisions in order to vote. Doc. 161 at 16–17 (quoting Doc. 58 at 18); Doc. 58 at 18 n.8. Plaintiffs and Organizational Plaintiffs' members reside in the County Defendants' respective counties. The Court has also found that Plaintiffs' injuries are traceable to Defendants and redressable by the Court: the Curbside Voting Ban can be attributed to the State Defendant and the probate judge Defendants, Doc. 58 at 21 & Doc. 161 at 11, and enforcement of the Witness and Photo ID Requirements can be traced directly to the State, probate judges, circuit clerks, and AEM Defendants. Doc. 58 at 19; Doc. 161 at 10, 12. And all of the Challenged Provisions are traceable to Alabama: the "invalidity of a [state] election statute [or policy] is, without question, fairly traceable to and redressable by the State

itself." *OCA-Greater Houston*, 867 F.3d at 613. A Court order against Defendants would redress Plaintiffs' claims. Doc. 58 at 22–27.

III. The Challenged Provisions Unconstitutionally Burden Voters.

Defendants argue that Plaintiffs can "safely meet the witness and photo ID requirements" and, therefore, Plaintiffs' claims fail on the merits. *See* Doc. 186 at 5. This is wrong. The Challenged Provisions present Plaintiffs with the impossible "option" of either "braving exposure to an illness from which they are at high risk of severe complications or dying, or foregoing their right to vote." Doc. 58 at 64.

To comply with the Challenged Provisions, Plaintiffs must interact with persons outside of their household, which necessarily involves a heightened risk in the context of a pandemic. "Such risks may be necessary to obtain food and other necessities, but the burden one might be forced to accept to feed oneself differs in kind from the burden that the First and Fourteenth Amendments tolerate on the right to vote." *League of Women Voters of Va. v. Va. State Bd. of Elecs.*, No. 20-00024, 2020 WL 4927524, at *9 (W.D. Va. Aug. 21, 2020) ("*LWVV*").

These severe burdens necessitate a statewide injunction requiring absentee election managers to accept absentee ballot applications that lack photo IDs (or letting high-risk voters select the existing photo ID exemption option) and informing absentee election officials that unwitnessed ballots must be counted. *See Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020),

aff'd S. Ct., 2020 WL 4680151 (U.S. Aug. 13, 2020) (suspending similar witness requirement for all voters amid pandemic); *LWVV*, 2020 WL 4927524 (same); *Thomas v. Andino*, 2020 WL 2617329, at * 24 (D. S.C. May 25, 2020) (same).

State Defendants dismiss these risks as merely Plaintiffs' lack of "creativity and initiative[.]" Doc. 186 at 5. Requiring high-risk voters to be "creative" with their health in order to vote is constitutionally intolerable. "Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote." *Common Cause R.I.*, 2020 WL 4579367, at *2; *see also* Doc. 161 at 16–17. By enforcing the unduly burdensome and dangerous Challenged Provisions in a pandemic, Defendants are violating Plaintiffs' fundamental right to vote.

Moreover, contrary to Defendants' argument, Plaintiffs will prove their poll tax claim at trial. Plaintiffs brought claims against the Witness Requirement, alleging that it constitutes an unconstitutional poll tax under the Fourteenth Amendment. State Defendants argue Plaintiffs' "wealth discrimination claim fail[s] as a matter of law and should be dismissed." Doc. 186 at 9. They are incorrect.

A State violates the Fourteenth Amendment "whenever it makes the affluence of the voter or payment of any fee an electoral standard." Doc. 161 at 23 (quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966)). Defendants take issue with the fact that "[n]owhere in the Amended Complaint do Plaintiffs allege that they or their members are unable to afford a potential $5 notary fee." Doc. 186

at 8. But Plaintiffs need not make a showing that they cannot afford the fee. Rather, the poll tax violation is quite simple: The franchise cannot be conditioned on a payment.[1] This is true "whether the citizen, otherwise qualified to vote, has [$5.00] in his pocket or nothing at all, pays the fee or fails to pay it." *Harper*, 383 U.S. at 668. The Fourteenth Amendment "bars a system which excludes those unable to pay a fee to vote or *who fail to pay*." *Id.* (emphasis added).

Further, State Defendants argue that providing signatures by two witnesses is a "free" alternative. Again, State Defendants are incorrect. As this Court has already found, "offering a free alternative does not automatically cure conditioning the right to vote on wealth or the payment of a fee." Doc. 161 at 25. This is particularly true where, as here, the rights of high-risk voters are conditioned on *either* a notary fee *or* risking exposure to a deadly virus. In such a case, the alternative is hardly "free."

Plaintiffs are "entitled to be heard and to try to prove" their Fourteenth Amendment poll tax claim at trial, Doc. 161 at 25, and will do so, including with expert testimony as to the fees charged by Alabama notaries.

[1] State Defendants address *Jones* at great length, but that District Court ruled in the plaintiffs' favor, and the case is pending on appeal. In any event, Florida's argument in *Jones* is premised solely on the fact that the plaintiffs there have felony convictions, and States may deny the franchise to persons with felony convictions. *See Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). But no Plaintiff in this case has a disqualifying felony conviction, therefore, *Jones* is inapposite.

DATED this 31st day of August 2020.

/s/Deuel Ross

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CERTIFICATE OF SERVICE

I hereby 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 counsel of record.

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