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

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

PEOPLE FIRST OF ALABAMA, et al.,

Plaintiffs,

v.

JOHN MERRILL, et al.,

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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The nation and the State of Alabama are caught in the worst pandemic of the last century. COVID-19 has killed more than 181,000 people nationwide, including over 2,000 Alabamians.[1] In Alabama, 96% of those who lost their lives are people who—like Plaintiffs Eric Peebles, Howard Porter, Annie Carolyn Thompson, Teresa Bettis, and Sheryl Threadgill-Matthews—had underlying conditions that placed them at higher risk of death or serious illness from COVID-19 ("high-risk" people).[2] More than 40% of Alabamians who have died from COVID-19 are Black.[3] Given this reality, it is unsurprising and undisputed that the individual Plaintiffs and the members of the organizational plaintiffs People First of Alabama, Greater Birmingham Ministries ("GBM"), the Alabama NAACP, and Black Voters Matter Capacity Building Institute ("BVM") are taking extraordinary steps to avoid contact with people outside of their homes.

Plaintiffs are not alone. A majority (51.4%) of Alabamians are "very closely" following the Governor's order to avoid contact with others.[4] High-risk voters are taking even greater care to follow the Governor's order. In the Birmingham-area, for

[1] Centers for Disease Control & Prevention, CDC COVID Data Tracker, *United States COVID-19 Cases and Deaths by State*, https://covid.cdc.gov/covid-data-tracker/ (last visited Aug. 31, 2020).
[2] Ala. Dept. of Public Health, Characteristics of Laboratory Confirmed Cases of COVID-19 (Aug. 31, 2020), https://www.alabamapublichealth.gov/covid19/assets/cov-al-cases-083120.pdf.
[3] *Id.*
[4] Katherine Ognyanova, Rutgers University et al., *The State of the Nation, A 50-State COVID-19 Survey, Report No. 4* at 26 tbl. 6.2 (June 2020), https://www.kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%20JUNE%202020.pdf

example, significant portions of high-risk residents are having less or no contact with neighbors and cancelling important errands, like doctors' appointments. Doc. 170-2 at 6. Yet, people over age 65 or with disabilities, and people of color in Alabama are also more likely to live alone, have underlying conditions, and lack the technology necessary to safely satisfy the Witness and Photo ID Requirements. *See id.* at 6-7.

Indeed, in the July 14 primary runoff, Individual Plaintiffs, Organizational Plaintiffs' members, and other Alabamians either did not vote or had to go to extremes to vote safely due to the Witness and Photo ID Requirements, and the Curbside Voting Ban (the "Challenged Provisions"). And, before the stay, about 150 voters in Jefferson, Lee, and Mobile Counties voted under the Court's preliminary injunction and swore under penalty of perjury that they were unable to safely satisfy the Witness and Photo ID Requirements. In contrast, there is no evidence that this injunction was difficult to implement, led to voter confusion, or resulted in any fraud.

Accordingly, Plaintiffs seek statewide relief for all Alabama voters from these onerous provisions under the U.S. Constitution,[5] the Voting Rights Act ("VRA"), and the Americans with Disabilities Act ("ADA"). Defendants, meanwhile, insist that the Challenged Provisions' enforcement takes precedence over people's safety; they attempt to shift responsibility to each other; recycle rejected procedural

[5] Although the Court dismissed Plaintiffs' Constitutional claims for statewide relief against the Secretary, Plaintiffs continue to maintain that the Secretary is a proper Defendant for those claims.

arguments; and even try to blame Plaintiffs for the significant burdens that the Challenged Provisions place on the right to vote. But Plaintiffs have, at a minimum, raised material, triable disputes of fact with respect to the issues raised in Defendants' summary judgment motions. For the reasons below, this Court should deny Defendants' motions for summary judgment. Docs. 160, 163, 165, 167, 168.

ARGUMENT

I. Plaintiffs Have Standing and The Severity of Plaintiffs' Burdens is a Factual Dispute.

Standing requires Plaintiffs to have suffered an injury-in-fact, fairly traceable to Defendants and redressable by a decision in Plaintiffs' favor. *Ga. Latino All. For Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1257 (11th Cir. 2012). This Court already found that the individual Plaintiffs have standing. Doc. 58 at 27. And this Court noted that the Organizational Plaintiffs likely satisfy both associational and organizational standing. Doc. 58 at 18 n.8; *see also Greater Birmingham Ministries v. Sec'y of State*, 966 F.3d 1202, 1219–20 (11th Cir. 2020) ("*GBM*") (finding that the plaintiffs had associational standing).

Likewise, this Court has repeatedly ruled that Plaintiffs' injuries are traceable to and redressable by Defendants. The *de facto* ban on curbside voting is attributable to the Secretary of State and the probate judges. *See* Doc. 58 at 21; Doc. 161 at 11. State law is clear that the Witness and Photo ID Requirements are enforced by those Defendants who serve as probate judges, absentee election managers ("AEMs"), and

circuit clerks (collectively, the "County Defendants"). *See* Doc. 58 at 19; Doc. 161 at 10, 12. And the State lacks immunity from VRA and ADA suits. Doc. 161 at 6. An injunction against Defendants would plainly redress Plaintiffs' injuries. Doc. 58 at 22–27; Doc. 161 at 10–11. Thus, standing is not an issue here.

Nevertheless, Defendants argue that the Court should reconsider its prior findings on standing. These arguments are misguided.

First, Defendants presume that, if Plaintiffs can overcome the impediments to their voting rights, those impediments could not have caused Plaintiffs' injury. This misses the point. Plaintiffs "need not have the franchise wholly denied to suffer injury." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) ("*Cox*"). Defendants are conflating the merits of the case (which requires a ruling on whether the Challenged Provisions impose a significant burden) with standing (which merely asks whether the Challenged Provisions injure Plaintiffs).

Whether Plaintiffs can vote despite these provisions is irrelevant for standing. *See* Doc. 58 at 14, 16 (citing *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009)). Instead, the severity of Plaintiffs' burdens goes to the merits and is a material factual dispute. Yet, even accepting Defendants' mischaracterizations of the burdens on Plaintiffs' right to vote as "extremely slight," Doc. 160 at 15, the purported "slightness" of a burden is "not dispositive" for the standing analysis since "a small injury, 'an identifiable trifle,' is sufficient to confer standing." *Common*

Cause, 554 F.3d at 1351. Even "slight" burdens give Plaintiffs standing. *Id*. at 1345.

Second, Defendants argue that there is no causation because Defendants "did not cause the pandemic, and they are attempting to make voting as safe as practicable in light of this novel threat." Doc. 160 at 25. But to establish causation for standing purposes, "a plaintiff need only demonstrate, as a matter of fact, a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Cox*, 408 F.3d at 1352 (internal quotations omitted). As the Court previously explained, Plaintiffs need not prove that they "will contract COVID-19, or even that they will be forced to take a serious risk of contracting COVID-19" to establish an injury. Doc. 58 at 16. They are injured just by the burden of having "to comply with the [Challenged Provisions] in order to vote absentee" or in person. *Id.*

Accordingly, each of Defendants' arguments attacking standing fail. As explained further below, Plaintiffs have suffered concrete harm due to the Challenged Provisions; their injuries are traceable to Defendants; and their harms would be redressed by a court order. Likewise, as explained below, Plaintiffs have, at minimum, raised material factual disputes as to whether the Challenged Provisions substantially and unconstitutionally burden the fundamental right to vote.

a. The Individual Plaintiffs

Individual Plaintiffs are voters, and voters always have standing to challenge state laws that require them to do some act to vote. *See Common Cause*, 554 F.3d at

1351–52. Defendants cannot bypass this rule by charging voters to exercise a "bit of creativity and initiative" in casting their ballots or by insisting that the burden of compliance is "extremely slight." Doc. 160 at 15.

Voting is a fundamental right, not an ingenuity challenge. Creativity and initiative are irrelevant. So is the magnitude of harm; even "a small injury . . . is sufficient to confer standing." *Common Cause*, 554 F.3d at 1351. It is immaterial for the standing analysis that some Plaintiffs successfully cast absentee ballots in the July primary runoff election. "Even though they were ultimately not prevented from voting, an injury like theirs is sufficient to confer standing." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014). Therefore, the Individual Plaintiffs plainly have standing and have raised material factual disputes as to whether the Challenged Provisions violate their rights under the Constitution, VRA or the ADA.

i. Eric Peebles

Like the other individual plaintiffs, Dr. Peebles is a lawfully registered voter who must satisfy the Witness and Photo ID Requirements to vote absentee. Peebles Dep. (Doc. 170-16) at 33:13–18, 71:23–72:2. While he usually votes—and would prefer to vote—in person, he cannot do so safely because of the Curbside Voting Ban. *See id*. at 34:7–36:2, 40:23–41:4, 53:15–20, 64:3–7. This is sufficient to confer standing. Doc. 58 at 16.

On the merits, Dr. Peebles has presented a triable dispute as to whether the

Witness Requirement and Curbside Voting Ban impose unconstitutional burdens on his right to vote. Dr. Peebles has cerebral palsy, which places him at substantial risk of serious illness or death from COVID-19. *Id*. at 28:7–29:4, 54:9–15. Because of this risk, he has not left his home except to run medically or legally necessary errands. *Id*. at 43:20–48:17, 78:18-82:12. Dr. Peebles has limited his in-person interaction to his in-home healthcare workers who are regularly screened for COVID-19 or its symptoms. *Id*. at 17:8–20:7, 20:22–26:2, 27:15–18. These workers visit Dr. Peebles in individual shifts—meaning that no two healthcare workers are in his home at a time. *Id*. at 25:7–22. He is significantly burdened by the Witness Requirement because he has no safe and reliable way to ensure two adults can witness his signature simultaneously, *id*. 55:22–59:20, and may not be able to pay a virtual notary to do so, *id*. 61:4–9.

Defendants ignore these severe obstacles and instead conjure up other ways Dr. Peebles might satisfy the Witness Requirement, like asking friends to witness his ballot from outside his home, through a car window, or from six feet away. *See* Doc. 160 at 20–21. Defendants' arguments minimize the nature of Dr. Peebles's considerable health risks. They also ignore that the critical issue that "even with the available arsenal of conceivable precautions one could take to reduce risk of contracting the virus, many[,] [including Dr. Peebles,] [are] dissuaded from exercising their [right to] vote both because of the risk of illness and the efforts

involved in mitigating that risk." *League of Women Voters of Va. v. Va. State Bd. of Elections*, --- F. Supp. 3d ---, No. 20-cv-00024, 2020 WL 4927524, at *9 (W.D. Va. Aug. 21, 2020). Those burdens "are much more unusual and substantial than those [burdens] that voters are generally expected to bear. Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote." *Common Cause R.I. v. Gorbea*, --- F.3d ---, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020).

Dr. Peebles is likewise significantly burdened by the Curbside Voting Ban. If he cannot safely satisfy the Witness Requirement, he will be left with the impossible choice of risking his life to vote in person or being forced not to vote. Peebles Dep. 66:6–67:18. Dr. Peebles would use curbside voting if it were available to him because he believes it is a safer option. *Id*. 40:10–41:4. Indeed, the Centers for Disease Control agrees that curbside voting, which would limit a voter's interactions with others, is a safer option than traditional in-person voting. *See* Doc. 58 at 49.

Nonetheless, Defendants suggest that summary judgment is proper because Dr. Peebles—and other Plaintiffs—could not describe the logistics of how curbside voting would work in Alabama. Doc. 160 at 24. This argument is meritless. Curbside voting is *already* occurring in Alabama. *See* Doc. 169 ¶¶ 25–27, 31. Defendants' interrogatories reveal that curbside voting has occurred in Chilton, Hale, Perry, and Lowndes counties. Exs. 1, 2. Plaintiffs will show that it has also occurred in Wilcox

and other counties. *See, e.g.*, Doc. 169 ¶ 31. And, if permitted, Jefferson and Montgomery Counties are willing to offer curbside voting in November. *See* Doc. 181; Doc. 182. In their motion for partial summary judgment, Plaintiffs have already described how curbside voting might work (and has already worked) in Alabama in compliance with state and federal law. *See* Doc. 169 at 24–27. To seek relief, the Individual Plaintiffs—none of whom are attorneys—are not required to testify to the legal intricacies of how curbside voting might work. Rather, it is left to this Court to decide whether and how Defendants could reasonably and legally offer curbside voting as an option for voters with disabilities in the pandemic or otherwise.

ii. Annie Carolyn Thompson

This Court has already found that Ms. Thompson is a lawfully registered voter who has standing to challenge all three Challenged Provisions. *See* Doc. 58 at 16-17.

Nonetheless, on the merits, Defendants argue that Ms. Thompson could satisfy the Witness Requirement by having a family member witness her ballot from a distance. Doc. 160 at 6–7. But Ms. Thompson lives alone and has been strictly socially distancing since April 1. Thompson Dep. (Doc. 164-5) 78:19–79:12. She also lacks the technology to engage a virtual notary. *Id*. 84:8–86:11. The only person that she interacts with is her adult daughter who is currently self-isolating after recently contracting COVID-19. *Id.* at 78:19–79:12. COVID-19 spreads easily and

people can be asymptomatic. Doc. 58 at 6. If Ms. Thompson had heeded Defendants' advice and asked her daughter and another person to witness her ballot, she likely would needlessly endanger her health and that of others to vote.

Defendants also misconstrue the facts with respect to Ms. Thompson's decision to vote in person on July 14. She voted in person because her absentee ballot did not arrive at her house in time. Thompson Dep. 48:1–49:1. She was only able to vote in person because she knew a poll worker who contacted her and alerted her when the polling place was nearly empty so that she could vote without being around a crowd or waiting in line. *Id.* Otherwise, except for essential groceries or medical errands, Ms. Thompson has not been outside her home in public since April 1. *Id.* at 38:7–14. Because turnout in November will undoubtedly be much higher, voting in person is unlikely to be an option for Ms. Thompson.

If she cannot satisfy the absentee requirements, Ms. Thompson would consider voting curbside. *Id*. 100:1–5. And, if the Challenged Provisions remain in place, Ms. Thompson may refrain from voting at all in November. *Id*. 99:20–100:5.

iii. Howard Porter, Jr.

Mr. Porter is a lawful voter who desires to use curbside voting. This Court has previously held that he has standing to challenge the Secretary's ban. Doc. 58 at 17.

On the merits, Mr. Porter suffers from Parkinson's disease and asthma and has difficulty walking. *See* Porter Dep. (Doc. 170-17) Tr. 23:4–12, 25:9–26:9,

28:10–15. He is at high risk for contracting COVID-19 because of his age and underlying medical conditions. *See id.* 25:12–28:23. Mr. Porter has not left his home since March 13, except for doctor visits, during which he followed social distancing guidelines and wore a mask. *Id.* 34:20–35:9. Because he is at high risk, Mr. Porter plans to stay at home for the foreseeable future even after the "Safer at Home" order is lifted. *Id*. 94:22–95:8. He completed an application to vote absentee in the July 14 election, but his absentee ballot never arrived. *Id.* 30:13–34:10. Because he is high risk and did not feel safe voting in person, Mr. Porter did not vote and was disenfranchised in the primary. *Id.*

Defendants mischaracterize Mr. Porter's disenfranchisement as "not actually return[ing] a ballot." Doc. 160 at 5. But Mr. Porter has testified that he never received a ballot. Porter Dep. at 30:13–34:10. Because of his negative experience with his attempt to absentee voting in the primary election, Mr. Porter wishes to vote in person and vote curbside in the November election.[6] *See id.* 30:19–32:11. His injuries confer standing, and his substantial burdens create a triable factual dispute.

iv. Teresa Bettis

Ms. Bettis is a lawfully registered voter who must satisfy the Witness Requirement to vote absentee or desires to vote in person curbside but cannot do so

[6] Mr. Porter concedes that he is exempt from the Photo ID Requirement because of his disabilities and thus is not pursuing his challenge to that requirement.

because of the Curbside Voting Ban. This is sufficient to confer standing.

On the merits, the Challenged Provisions create substantial barriers to Ms. Bettis's voting safely in November. Ms. Bettis is at higher risk of having severe complications from COVID-19 because of her diabetes and hypertension. Bettis Dep. (Doc. 170-18) 26:11–37:5. Since the start of the pandemic, Ms. Bettis has been practicing social distancing, including limiting her visits outside of the house, wearing a mask when she does leave her home, and keeping a distance from other individuals when outside of the home. *Id.* at 46:19–48:20. She has primarily worked from home, except for occasional business meetings in which rigorous social distancing is practiced that only rarely involved more than one other person. *Id.* at 48:21–59:5.

Ms. Bettis has no safe way to ensure two adults can witness her ballot simultaneously without unnecessarily risking exposure to COVID-19. Because she lives with only one other adult, Ms. Bettis would have to venture outside of her home to have her ballot notarized or to identify another adult to witness. *Id*. 130:8–131:4.

Defendants nonetheless insist Ms. Bettis could satisfy the Witness Requirement through options she "has but has not explored." Doc. 160 at 20. Besides the fact that these so-called "options" are themselves extra burdens that confer standing, none of them allows Ms. Bettis to satisfy the Witness Requirement without risking her health. To the contrary, all of them would require her to come into close

contact with other people. *See, e.g.*, Bettis Dep. 132:5–135:23 (work colleagues, bank staff). As Defendants recognize, Ms. Bettis worries that this is "an invasive process," *id*. 160:4–19—one made dangerous by the ongoing pandemic. Three of Ms. Bettis's close friends have COVID-19. *Id.* 39:22–41:21. If Ms. Bettis (or others like her) followed Defendants' advice of making the "effort" to ask such friends for help, she may have unknowingly exposed herself to the virus. This demonstrates why the Witness Requirement is unconstitutionally restrictive. It leaves Ms. Bettis with the untenable choice of putting her health at risk or not voting at all. *Id*. 114:6–115:1.

Further, Defendants' incorrect suggestion that Ms. Bettis "could not decide whether she wanted to vote absentee or curbside" likewise changes nothing. Doc. 160 at 24 n.15. Ms. Bettis actually said she would vote absentee unless curbside voting were available. *See* Bettis Dep. 113:22–114:5 (Bettis will attempt to vote absentee "unless there are some other options afforded to [her], such as curbside"). But because of the Witness Requirement and Curbside Voting Ban, neither option is reasonably available to her. The significance of her burdens creates a triable dispute.

v. Sheryl Threadgill-Matthews

Ms. Threadgill-Matthews is a lawfully registered voter who desires the option of voting curbside during the pandemic and therefore has standing to challenge the Curbside Voting Ban. Doc. 58 at 17. She faces a higher risk of contracting and

having severe complications from COVID-19 because of her age and hypertension, Matthews Dep. (Doc. 164-10) 19:2–3, and has been told by her doctor to stay home as much as possible, *id.* at 22: 10–11. Given the pandemic, curbside voting is her only safe in-person voting option. *Id*. 110:10–18.

Ms. Threadgill-Matthews also testified that "any time [she has] the option not to be around a lot of people, [she takes] that option." *Id*. 25:20–22. However, she also "take[s] pride in going to the poll to vote" because her family has a long history in the civil rights movement. *See id.* 35:18–36:6 (explaining that her grandfather "lived to be a hundred and three years old, and he always wanted to go to the poll").

b. The Organizational Plaintiffs Have Standing.

An organization establishes associational standing "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 181 (2000). It shows organizational standing "when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia*, 772 F.3d at 1341. The Organizational Plaintiffs have standing under both theories here.

Defendants argue that Organizational Plaintiffs lack associational standing

because they identified only 40 voter-members who could not comply with the Challenged Provisions. Doc. 160 at 27–28. But "the rule in this Circuit is that organizational plaintiffs need only establish that at least *one* member faces a realistic danger of suffering an injury." *Arcia*, 772 F.3d at 1342 (emphasis added, internal quotations omitted). The Organizational Plaintiffs have offered evidence that they have numerous members impacted by the Challenged Provisions.[7] *See*, *e.g.*, Ex. 1; *see also* Albright Dep. (Doc. 173-9) 64:7–13, 154:18-155:15; Douglas Dep. (Doc. 170-20) 24:15–25:9; Ellis Dep. (Doc. 170-19) 54:11–55:19; Simelton Dep. (Doc. 170-21) 30:10–32:23. This is sufficient to confer standing. *See GBM*, 966 F.3d at 1219–20 (holding that similar facts were sufficient in challenge to a photo ID law).

Defendants also protest that Organizational Plaintiffs lack their own standing because they could not quantify precisely how much time they spent responding specifically to the Challenged Provisions. Doc. 160 at 28. But a precise accounting

[7] In opposition to Plaintiffs' motion for partial summary judgment, State Defendants argue that the Organizational Plaintiffs' testimony is inadmissible hearsay. Doc. 206 at 2, 13-15. This is incorrect. An organization's testimony about its membership is admissible at summary judgment. Fed. R. Evid. 803(b); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007) (relying on an affidavit from an organizational leader about its members in granting summary judgment for the organization); *Arcia*, 772 F.3d at 1341 (same). GBM, for example, keeps detailed records on its membership, including age, race, voting records, and socioeconomic status. Douglas Dep. 12:22-13:19, 15:17-16:7, 37:9-38:14. Further, testimony concerning the action organizations took—including diverting resources—in response to the Secretary's ban and members' concerns is plainly admissible. *Id*. 24:13-25:14, 60:5-61:13, 64:3-12. The same is true of testimony that, if the Court permitted counties to offer curbside voting, the Organizational Plaintiffs would no longer need to divert resources to address this issue. *Id*. 121:3-10.

of the monetary resources spent or diverted is not necessary; it is enough to show that "they will have to divert personnel and time to educating potential voters on compliance with the laws and assisting voters." *Arcia*, 772 F.3d at 1341.

Here, after the Governor's Safer at Home Order and the Secretary's expansion of the absentee voting, the leaders of the Organizational Plaintiffs each testified that voters began contacting them about the burdens of satisfying the Challenged Provisions and the organizations responded by expending resources to assist these voters. *See, e.g.*, Douglas Dep. 42:4–50:10, 56:14–72:2, 119:19–121:13 (explaining that, in response to inquiries, GBM operated a series of clinics to assist people with meeting the Challenged Provisions, and began advocating and collecting petition signatures in support of reforms); Albright Dep. 70:11–20, 113:21–119:11 (testifying that, in response to member inquiries, BVM began training members and partners to navigate the Challenged Provisions); Ellis Dep. 23:8–24:8, 58:21–61:11, 74:2–76:13 (similar); Simelton Dep. 33:1–35:16, 89:20–93:5, 186:14–187:13, 205:17–206:13, 246:21–248:19 (because of a large increase in inquiries about the Challenged Provisions, the NAACP began educating members and the public about these provisions and advocating for their removal). This redirection of resources to counteract the provisions' burdens confers organizational standing. *Arcia*, 772 F.3d at 1341–42.

Finally, Defendants claim that, if Plaintiffs win, Organizational Plaintiffs may

need to expend resources to educate voters about the remedy. Doc. 160 at 28. This misconstrues their testimony. *See, e.g.*, Douglas Dep. 120:18–121:10 (testifying that, if Plaintiffs win, GBM would no longer need to divert its resources toward helping overcome the Challenged Provisions); Simelton Dep. 246:21–248:1 (same); Albright Dep. 117:21–119:11 (if the Court were to eliminate the Challenged Provisions, BVM could put its resources toward simply encouraging people to vote without expending the additional resources needed to educate voters about the Challenged Provisions);); Ellis Dep. 74:16–75:6 (the Challenged Provisions make absentee voting "more complex"). If Plaintiffs win, the organizations may expend any number of resources—but they will expend them on their *own projects* and *not* on counteracting the Challenged Provisions' burdens. *See Arcia*, 772 F.3d at 1341.

The interests in this case are germane to the organizations' purposes, *See, e.g.*, Albright Dep. 126:23-128:11, and their members need not participate in the lawsuit directly in order to facilitate the claims asserted or the relief requested. The organizations also have standing in their own right because Defendants' acts require them to divert resources from its own projects to addressing the concerns of their members, constituents, and partners raised by the Challenged Provisions, including providing support at in-person polling sites. *E.g.*, *id*. 124:8-128:11.

II. Plaintiffs' Injuries Are Traceable to Defendants.

The Court previously found that Plaintiffs met the traceability requirements

for standing as to each of the present Defendants. Doc. 161 at 10–12; Doc. 58 at 18–21. The State Defendants make the conclusory argument that they did not cause the pandemic and cannot be held to account for Plaintiffs' injuries. Doc. 160 at 25. But, as the Court already held, the pandemic "d[id] not cause the legal injury[;]" rather, "the state's decision to force the individual plaintiffs to comply with the complained-of requirements for voting" caused Plaintiffs' injury and, of course, can be traced back to the State Defendants. Doc. 58 at 18–19, 21.

The State Defendants argue that Plaintiffs' injuries are solely traceable to and redressable by the County Defendants. Doc. 160 at 25–27. Not so. Plaintiffs are suing Alabama under the VRA and ADA, which abrogate sovereign immunity. Doc. 161 at 6–7. Because Plaintiffs are challenging the validity of state election laws, their injuries are, "without question, fairly traceable to and redressable by the State itself." *OCA-Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) (discussing a VRA claim).

The Court has also repeatedly held that Plaintiffs' injuries are traceable to the County Defendants because of their statutory roles in processing and canvassing absentee ballots, training and appointing poll workers, and polling place administration render them the parties responsible for Plaintiffs' injuries. Doc. 161 at 10–11; Doc. 58 at 18–21. Clay Helms, Deputy Chief of Staff to the Alabama Secretary of State who oversees the County Defendants. Helms Dep. (attached as Ex. 2) 16:2–19. Mr. Helms testified that the County Defendants are *precisely* the

individuals to whom Plaintiffs' injuries can be traced. Doc. 34-1 ¶¶ 1–3, 41(a)–(f). State law also plainly establishes that the County Defendants are the proper parties. Doc. 161 at 10. It is irrelevant that the County Defendants are enforcing state law or lack discretion in whether to enforce state law. *See, e.g.*, *Jones v. Governor of Fla.*, 950 F.3d 795, 832–33 (11th Cir. 2020) (enjoining some, but not all counties from enforcing generally applicable state voting laws); *United States v. Dallas Cty.*, 850 F.2d 1433, 1435 (11th Cir. 1988) (same); *Dillard v. Crenshaw Cty.*, 831 F.2d 246, 247 (11th Cir. 1987) (same).

Nonetheless, the County Defendants also appear to suggest that the Organizational Plaintiffs' inability to identify a member impacted by each Challenged Provision in each county shows no traceability. *See* Doc. 163 at 18–23. This is incorrect. First, the Individual Plaintiffs' injuries are traceable to the County Defendants because they reside in Mobile, Lee, and Wilcox Counties. Doc. 75 ¶¶ 30, 31, 32, 53, 55. The injuries of the Organizational Plaintiffs' members who reside in Lee, Madison, and Mobile Counties are likewise traceable to the present County Defendants. Ex. 1; *see also* Ellis Dep. 36:14–37:7 (People First has active chapters in Mobile County and members in Madison County); Douglas Dep. 129:7–13 (GBM has donors who are members in Lee County); Simelton Dep. 30:10–16 (NAACP has members affected in Lee, Madison, and Mobile Counties, among other counties).

Second, the Organizational Plaintiffs are injured because they must divert

their resources to assist and educate voters in Lee, Lowndes, Madison, Mobile, Wilcox Counties and elsewhere about the Challenged Provisions. For example, BVM has worked to inform or assist voters in Lee, Lowndes, Madison, Mobile, and Wilcox Counties who are worried about the Challenged Provisions. Albright Dep. 77:7-22, 161:2-162:9, 163:11-164:6. People First, GBM, and the NAACP have also diverted their resources to educating voters statewide about the Challenged Provisions and diverted resources to advocate for their elimination for all voters. *See* Ellis Dep. 165:3-10; Douglas Dep.57:2-58:19, 60:1-62:2, 62:3-64:22, 64:23-70:21, 57:2-69:2; Simelton Dep. 33:1–14, 33:23–34:12. This diversion of resources is, in part, traceable to the County Defendants. If the Court barred the County Defendants from enforcing the Challenged Provisions in their counties, the Organizational Plaintiffs would no longer have to divert resources to helping voters in those places.

Third, and in any event, Plaintiffs do not need to show traceability or redressability as to the County Defendants to succeed on statewide claims under the VRA and ADA against the State. *See Arcia*, 772 F.3d at 1348 (enjoining a statewide policy in a suit brought by individuals and organizations against state officials); *Cox*, 408 F.3d at 1354 (same). At most, Plaintiffs need only identify one member in the state impacted by each Challenged Provision. *See Arica*, 772 F.3d at 1342. Plaintiffs have done so. Ex. 1. This is sufficient. *See GBM*, 996 F.3d at 1219–20 (holding that organizational plaintiffs had standing to seek relief in a statewide challenge to the

photo ID requirement); *Common Cause*, 554 F.3d at 1349–1351 (same). And, collectively, the four Organizational Plaintiffs represent many thousands of voters statewide—many of whom are high risk—thus there is a "high probability" that "at least one of [those] members" would be impacted or disfranchised by the Challenged Provisions. *Arcia*, 772 F.3d at 1342.

III. Plaintiffs' Injuries Are Redressable by this Court.

The Court has already found that Plaintiffs' injuries can be redressed through Court orders. Doc. 58 at 22–27 & Doc. 161 at 10–11. Plaintiffs will not repeat their arguments here but will highlight the fact that "while redressability must not be speculative, it need only be likely, not certain." *Alabama-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1256 (11th Cir. 2003). An injunction against the Challenged Provisions is "likely" to minimize the unconstitutional burdens Plaintiffs face if they must satisfy the Challenged Provisions or vote in person any upcoming elections. Defendants' motions for summary judgment on standing should be denied.

IV. The Court Should Reject Jurisdictional and Pleading Arguments.

a. The Court Should Reject Defendants' Unsupported Due Process Arguments.

Without citing to any specific constitutional or legal authority, Defendants argue that this Court's Scheduling Order threatens their "procedural due process

rights." Doc. 165 at 3.[8] Not so. The expedited timeline serves as a necessary exercise of this Court's discretion to set trial and briefing deadlines, appropriately accommodates Defendants, and allows for adequate time to respond, particularly given Defendants' awareness of the statewide implications of this case.

The Court's Scheduling Order lies well within the Court's discretion to "achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 631 (1962). That is particularly true here, where this Court must ensure a timely trial before the November general election. As this Court has explained, "this case has a certain urgency to it," and "the accelerated timeline is necessary" to "allow the defendants as much time as possible to adjust to any relief the court orders," including by filing a timely appeal. Doc. 126 at 1.

The Court's timeline complies with federal rules that codify courts' authority to set case-specific trial and briefing timelines. The Court can order alternate dates for responses to pleadings. *See* Fed. R. Civ. P. 15(a)(3) ("*Unless the court orders otherwise*, any required response to an amended pleading must be made within the time remaining . . . .") (emphasis added). It can modify the timing of required and supplemental disclosures. Fed. R. Civ. P. 16(b)(3)(B)(i). And it can waive certain notice requirements. *See*, *e.g.*, Fed. R. Civ. P. 6(c)(1)(C) (including an exception for

[8] The Lee, Lowndes, and Wilcox County election officials also re-assert their objections to the scheduling order and join Barger and Kizer's procedural due process arguments. Doc. 167 at 7–9.

hearing notice rules "when a court order . . . sets a different time"). Defendants do not and cannot argue that the Court's Scheduling Order exceeds the procedural discretion the Federal Rules confer.

Further, Defendants Barger and Kizer present a misleading picture of the timeline and any supposed prejudice to them, let alone unfair prejudice sufficient to raise due process issues. For one, after Plaintiffs filed their amended complaint on July 6, and contacted Madison's County Attorney on July 8 to provide him with the Amended Complaint. Ex. 3. The Madison County Attorney responded to the email on July 10. But it was not until July 20—twelve days after receiving the Amended Complaint—that Barger and Kizer waived service. *Id.* While Barger and Kizer contend that July 20 was the date when motions to dismiss were due, this Court considered motions filed as late as August 5. *See* Doc. 140. Indeed, Plaintiffs informed Barger and Kizer's counsel on July 15 that Plaintiffs had consented to (and the Court had allowed) motions to be filed on August 4 and would do so for Barger and Kizer. Ex. 3. Yet they never requested this option. Defendants Barger and Kizer's lost opportunities are not a failure of due process but of their own failure to seek extensions. They attempt to shoehorn their arguments about Plaintiffs' pleading into a summary judgment motion. But the Court should not allow them to raise out-of-time arguments. The Court deemed later-added Defendants to have joined in the responsive pleading of other Defendants and encouraged the later-added Defendants

to coordinate with the original Defendants. *See* Doc. 126 at 2. But many later-added Defendants decided to file repetitive motions. That was Defendants' choice. But that time could have been better spent. Their inefficiency is a problem of their own making. It is not a due process violation.

b. Defendants' Shotgun Pleading Claim is Untimely and Unsupported.

Defendants Kizer and Barger contend that the Amended Complaint is a "shotgun" pleading. Doc. 165 at 14–18. At the outset, the Court should reject this argument as untimely. Defendants' argument concerns the sufficiency of Plaintiffs' pleading and not the sufficiency of the evidence, and this should have been raised through a Rule 12(b)(6) motion to dismiss. A summary judgment motion is not a proper vehicle through which to raise this argument. *See* Fed. R. Civ. P. 12(h)(2).

Moreover, the Amended Complaint sufficiently puts each Defendant on notice of the challenged conduct. While a pleading must give defendants adequate notice of the claims against them and the ground upon which each claims rest, asserting claims collectively against multiple defendants is permissible as long as a complaint gives "adequate notice of the claims" and the "allegations that support those claims." *See Weiland v. Palm Beach Cty. Sheriff Office*, 792 F.3d 1313,1321–23 (11th Cir. 2001) (finding that a complaint was sufficient even though the different

plaintiffs, different causes of actions, and different facts were presented together).[9]

So too, here. The Amended Complaint makes allegations against County Defendants collectively. This is because Plaintiffs are making the same claims based on the same factual allegations against similarly situated Defendants. The Amended Complaint alleges "Debra Kizer . . .in [her] official capacit[y] as . . . circuit clerk[ ] and/or the absentee ballot manager[ ] for federal, state, and county elections in . . . Madison. . . . [is] charged with enforcing the Excuse, Witness and Photo ID Requirements, processing and distributing absentee ballot applications, appointing and training poll workers, and issuing, validating and canvassing absentee ballots." Doc. 75 ¶ 61. Similarly, it alleges "Frank Barger . . . in [his] official capacit[y] as . . . the probate judge[ ] for federal, state, and county elections in . . . . Madison count[y]. . . . [is] charged with enforcing the Challenged Provisions, including, but not limited to serving as the chief election official[ ] of [his] count[y], appointing and training poll workers, and validating and canvassing election returns and ballots." *Id.* ¶ 62. The Amended Complaint also alleges five clear counts with the specific factual support provided and explains that each count is brought against all Defendants. *See id*. ¶¶ 188- 66–77.

[9] None of the other cases cited by Defendants present any circumstances comparable to the Amended Complaint. For example, Defendants cite *Jackson v. Bank of America*, 898 F.3d 1348 (11th Cir. 2018). But the court in that case dismissed as insufficient a complaint that it concluded was part of a scheme to delay or prevent foreclosure judgment and conclude there had been an abuse of process. *Id.* at 1352. That ruling has no bearing on the Amended Complaint's sufficiency.

These detailed allegations are sufficient to identify the acts for which Defendants are alleged to be responsible. There is no need to repeat the same claim and the same factual allegations over and over again as attributed to each Defendant individually. Defendants Kizer and Barger had adequate notice of the claims brought against them specifically and the grounds upon which they rest.[10]

V. Rule 19 Does Not Permit Dismissal for Failure to Join All Counties.

Several of the County Defendants also raise arguments under Federal Rule of Civil Procedure 19(b), contending that Plaintiffs' failure to sue each and every probate judge and AEM in the State means that not all necessary parties have been joined, and because joinder is not feasible at this stage, the Court should dismiss them. Doc. 165 at 21–23, Doc. 167 at 16–17. These arguments miss the mark.

At the outset, like the shotgun pleading argument, summary judgment motion is not a proper vehicle through which to raise an improper joinder argument. *See* Fed. R. Civ. P. 12(h)(2). Putting that aside, the primary case relied upon as authority by Barger and Kizer actually undermines their argument. In *Lacasa v. Townsley*, the district court held that because of the role of state election officials in the plaintiffs'

[10] Moreover, the fact that the Amended Complaint meets this standard is evidenced by the numerous other county officials filing timely motions to dismiss. *See* Docs. 129, 130, 136, 138 and 140. In these papers, no other Defendant alleged that the Amended Complaint was a "shotgun" pleading. They were able to understand the nature of the claims and factual allegations adequately enough to raise arguments related to the specific nature of the claims. Furthermore, this Court understood the nature of the claims well enough to mostly deny these motions. *See generally* Doc. 161.

claims, the failure to join those officials was grounds for denying a preliminary injunction. No. 12-22432-CIV, 2012 WL 13069990, at *2 (S.D. Fla. July 13, 2012).

Here, however, Plaintiffs have sued the relevant state official, as well as several county officials in the counties where the individual Plaintiffs live or the Organizational Plaintiffs have business. Doc. 75 ¶¶ 59–62. Importantly, and again, Plaintiffs are also suing Alabama itself for statewide relief against all Challenged Provisions under their VRA and ADA Claims. *See* Doc. 161 at 6-7, 26. This means that not suing every county does not prevent Plaintiffs from receiving complete relief and that any difference in voting rules between counties can be avoided by the Court granting statewide relief on those claims.

Moreover, the "second part of Rule 19(a) focuses on possible prejudice either to the absent party, Rule 19(a)(2)(i), or the present litigants, Rule 19(a)(2)(ii)." *Challenge Homes, Inc. v. Greater Naples Care Ctr., Inc.*, 669 F.2d 667, 670 (11th Cir. 1982). The County Defendants fail to assert, let alone show, that they will be prejudiced because Plaintiffs did not sue election officials in every county. It is not as if these other counties are joint tortfeasors, and the named county officials will share more of the burden of a judgment without those other county officials as defendants. Any judgment against County Defendants will necessarily apply to them only within the bounds of their jurisdictions, making the presence or absence of other counties irrelevant for their purposes. *See Jones v. Governor of Fla.*, 410 F. Supp.

3d 1284, 1310–11 (N.D. Fla. 2019), *aff'd*, 950 F.3d 795, 833 (11th Cir. 2020) (enjoining only eight of a state's 67 counties from enforcing a statewide voting law).

VI. State Defendants' Sovereign Immunity Arguments Have Been Resolved.

Finally, the State contends that sovereign immunity bars all of Plaintiffs' claims against it, solely relying on its motion to dismiss in support. But the Court has twice correctly ruled—following recent Eleventh Circuit precedent—that sovereign immunity does not protect any Defendant as to Plaintiffs' VRA and ADA claims. *See* Doc. 58 at 30; Doc. 161 at 6–7 (citing *Nat'l Ass'n of the Deaf v. Florida*, 945 F.3d 1339 (11th Cir. 2020); *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647 (11th Cir. 2020)). Because Defendants cannot change that conclusion, the Court should again reject all sovereign immunity defenses as to the VRA and ADA claims.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motions for summary judgment.

DATED this 31st day of August 2020.

Respectfully submitted,

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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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