

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

PEOPLE FIRST OF ALABAMA, et  
al.,

Plaintiffs,

v.

JOHN MERRILL, et al.,

Defendants.

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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION  
FOR A PRELIMINARY INJUNCTION**

## TABLE OF CONTENTS

	<b>PAGE(S)</b>
FACTUAL BACKGROUND.....	2
I. The COVID-19 Pandemic .....	2
II. Public Health Guidance Regarding COVID-19 .....	3
III. The Effect of COVID-19 in Alabama .....	3
IV. Alabama’s Upcoming Elections .....	5
V. The Risks Posed by the Challenged Provisions in the COVID-19 Crisis .....	5
A. The Witness Requirement .....	5
B. The Photo ID Requirement .....	6
C. Curbside Voting Prohibition .....	8
D. The Racial Impact of the Challenged Provisions and COVID-19 .....	8
VI. Injuries and Irreparable Harm to Plaintiffs.....	10
ARGUMENT .....	11
I. Plaintiffs Are Likely to Prevail on the Merits .....	12
A. The Witness Requirement is Unlawful amid the COVID-19 Crisis.....	12
1. The Witness Requirement violates the Constitution. ....	12
a. The Witness Requirement will disenfranchise thousands.....	14
b. The Witness Requirement is not narrowly tailored. ....	17

2.	The Witness Requirement violates Section 201 of the VRA. ....	20
3.	The Witness Requirement violates Title II of the ADA. ....	21
B.	The Photo ID Requirement violates the Constitution and ADA.....	23
1.	The Photo ID Requirement severely burdens voter’s rights.....	23
2.	The Photo ID law should be construed to protect lives. ....	25
C.	The Curbside Voting Prohibition Unlawfully Burdens Voters.....	27
1.	The Curbside Voting Prohibition is unconstitutional. ....	27
2.	The Curbside Voting Prohibition Violates the ADA.....	28
II.	The Threat of Irreparable Harm and Balance of Equities Merit Relief ...	29
	CONCLUSION .....	30

## TABLE OF AUTHORITIES

## PAGE(S)

## CASES

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	12, 25
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	12, 28
<i>Charles H. Wesley Educ. Found v. Cox</i> , 324 F. Supp. 2d 1358 (N.D. Ga. 2004), <i>aff'd</i> 408 F.3d 1349 (11th Cir. 2005).....	27, 30
<i>Common Cause Ga. v. Kemp</i> , 347 F. Supp. 3d 1270 (N.D. Ga. 2018).....	30
<i>Democratic Exec. Comm. of Fla. v. Lee</i> , 915 F.3d 1312 (11th Cir. 2019) .....	<i>passim</i>
<i>Disabled in Action v. Bd. of Elec. in City of N.Y.</i> , 752 F.3d 189 (2d. Cir. 2014) .....	32, 39, 42
<i>Esshaki v. Whitmer</i> , No. 20-cv-10831, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020).....	13
<i>Fla. Democratic Party v. Scott</i> , 215 F. Supp. 3d 1250 (N.D. Fla. 2016) .....	13, 17, 28
<i>Frank v. Walker</i> , 819 F.3d 384 (7th Cir. 2016) .....	26
<i>Ga. Coal. for the People's Agenda, Inc. v. Kemp</i> , 347 F. Supp. 3d 1251 (N.D. Ga. 2018).....	14, 24,
<i>Ga. Coal. for the Peoples' Agenda, Inc. v. Deal</i> , 214 F. Supp. 3d 1344 (S.D. Ga. 2016) .....	13-14

**TABLE OF AUTHORITIES**  
(CONTINUED)

**PAGE(S)**

**CASES**

<i>Garbett v. Herbert</i> , No. 2:20-cv-245-RJS, 2020 WL 2064101 (D. Utah Apr. 29, 2020) .....	13
<i>Gun S., Inc. v. Brady</i> , 877 F.2d 858 (11th Cir. 1989) .....	30
<i>Hollis v. Davis</i> , 941 F.2d 1471 (11th Cir. 1991) .....	12
<i>Jones v. Governor of Fla.</i> , 950 F.3d 795 (11th Cir. 2020) .....	12, 14, 17, 29
<i>League of Women Voters of Fla., Inc. v. Detzner</i> , 314 F. Supp. 3d 1205 (N.D. Fla. 2018) .....	26
<i>League of Women Voters of Okla. v. Ziriox</i> , No. 118,765, __ P.3d __, 2020 WL 2111348 (Okla. May 4, 2020) .....	20
<i>League of Women Voters of Va. v. Va. State. Bd. of Elec.</i> , No. 6:20-cv-0024, __ F. Supp. 3d __, 2020 WL 2158249 (W.D. Va. May 5, 2020) .....	<i>passim</i>
<i>Libertarian Party of Ill. v. Pritzker</i> , No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) .....	13, 24
<i>Lodge v. Buxton</i> , 639 F.2d 1358 (5th Cir. 1981), <i>aff'd sub nom. Rogers v. Lodge</i> , 458 U.S. 613 (1982) .....	21
<i>N.C. State Conf. of NAACP v. Cooper</i> , No. 18-cv-1034, 2019 WL 7372980 (M.D.N.C. Dec. 31, 2019) .....	30

**TABLE OF AUTHORITIES**  
(CONTINUED)

**PAGE(S)**

**CASES**

<i>N.W. Austin Mun. Util. Dist. No. One v. Holder</i> , 557 U.S. 193 (2009).....	20
<i>Nat’l Ass’n of the Deaf v. Florida</i> , 945 F.3d 1339 (11th Cir. 2020) .....	21-22, 23
<i>Nat’l Fed. of the Blind v. Lamone</i> , 813 F. 3d 494 (4th Cir. 2016) .....	22, 23
<i>O’Brien v. Skinner</i> , 414 U.S. 524 (1974).....	17, 21
<i>Obama for Am. v. Husted</i> , 697 F.3d 423 (6th Cir. 2012) .....	27
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970) (opinion of Harlan, J.).....	21
<i>Price v. N.Y. State Bd. of Elec.</i> , 540 F.3d 101 (2d Cir. 2008) .....	14
<i>Thakker v. Doll</i> , No. 1:20-cv-480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020).....	30
<i>Tolman v. Doe</i> , 988 F. Supp. 582 (E.D. Va. 1997) .....	15
<i>U.S. Airways, Inc. v. Barnett</i> , 535 U.S. 391 (2002).....	22
<i>U.S. ex rel. Osheroff v. Humana, Inc.</i> , 776 F.3d 805 (11th Cir. 2015) .....	12

**TABLE OF AUTHORITIES**  
(CONTINUED)

**PAGE(S)**

**CASES**

*United States v. Alabama*,  
691 F.3d 1269 (11th Cir. 2012) .....30

*United States v. Ward*,  
349 F.2d 795 (5th Cir. 1965) .....21

**STATUTES**

28 U.S.C. § 1746 .....19

42 U.S.C. § 12131(2) .....22

42 U.S.C. § 12132 .....22

52 U.S.C. § 10310 .....21

52 U.S.C. § 10501 .....20, 21

52 U.S.C. § 10508 .....28

Ala. Code § 12-21-83 .....19

Ala. Code § 13A-10-109 .....19

Ala. Code §§ 17-9-1 et seq. ....8, 29

Ala. Code § 17-9-30 .....*passim*

Ala. Code § 17-10-2(a)(3) .....7

Ala. Code § 17-11-4 .....18

Ala. Code § 40-29-115 .....19

Ala. Code § 17-11-7 .....*passim*

Ala. Code § 17-11-9 .....1, 6, 18

Ala. Code § 17-11-10 .....*passim*

**TABLE OF AUTHORITIES**  
(CONTINUED)

**PAGE(S)**

**STATUTES**

Ala. Code § 17-17-24.....19

Ala. Code § 36-20-74.....17, 19

**OTHER AUTHORITIES**

28 C.F.R. § 35.108 .....23

28 C.F.R. § 35.130(b)(7).....22

28 C.F.R. § 35.150(b) .....29

Fed. R. Evid. 201(b)(2) .....12

S. Rep. 103-6, 1993 WL 54278 (1993).....19



Our country is in an unprecedented pandemic. COVID-19 has infected over one million people. Alabama alone has over 10,000 confirmed COVID-19 cases and over 400 deaths. This crisis is likely to last for many months or longer.

In these extraordinary circumstances, multiple provisions of Alabama law pose direct and severe obstacles to voting: (1) the requirement that an absentee ballot include an affidavit that is either notarized or signed by the voter in the presence of two adult witnesses, Ala. Code §§ 17-11-7 to 17-11-10 (“Witness Requirement”); (2) the requirement that copies of a voter’s photo ID accompany absentee ballot applications, *id.* § 17-9-30(b), or absentee ballots, *id.* §§ 17-11-9 and 17-11-10(c) (“Photo ID Requirement”); and (3) the prohibition on curbside voting (“Curbside Voting Prohibition”) (collectively, the “Challenged Provisions”).

Plaintiffs seek to enjoin the Witness Requirement for all voters because it violates the fundamental right to vote under the U.S. Constitution, Section 201 of the Voting Rights Act (“VRA”), and the Americans with Disabilities Act (“ADA”). Plaintiffs People First of Alabama, Porter, and Thompson seek an injunction against the Photo ID Requirement that, as interpreted by Secretary Merrill, Governor Ivey, and State of Alabama (collectively, the “State Defendants”) and as applied to elderly or disabled voters who are most vulnerable to COVID-19, violates the U.S. Constitution and ADA. And Plaintiffs seek to enjoin the Curbside Voting Prohibition because it violates the U.S. Constitution and ADA by denying voters a reasonable

and safe means of voting in person.

To ensure voters remain safe during the pandemic, the Centers for Disease Control and Prevention (“CDC”) recommends that states “[e]ncourage voters to use voting methods that minimize direct contact with other people” and permit “drive-up voting.” Ex. 1. The Challenged Provisions flout this guidance and pose a risk to the lives of Plaintiffs and many thousands of other voters who seek a safe method of exercising their right to vote in the July 14, 2020 primary runoff elections. Moreover, the burdens of the Witness Requirement and Curbside Voting Prohibition fall more heavily on Black voters, who are more likely to live alone and have a disability and are afflicted by and die from COVID-19 at starkly disproportionate rates. Ex. 2.

Because at least tens of thousands of Alabama voters are at risk of being disenfranchised, Plaintiffs ask that the Court enjoin the Challenged Provisions.

## **FACTUAL BACKGROUND**

### **I. The COVID-19 Pandemic**

As Plaintiffs’ expert Dr. Arthur Reingold explains: COVID-19 is a disease caused by the novel coronavirus SARS-CoV-2, which spreads mainly from person-to-person through close contact and respiratory droplets when an infected person coughs or sneezes. Reingold Decl. ¶¶ 6-7 (Ex. 3). People infected may transmit the virus without showing symptoms themselves. *Id.* ¶ 10.

COVID-19 can cause severe consequences, including long-term illness and

death. Ex. 3 ¶ 6; *see also* Ex. 5. It is ten times deadlier than the flu. Ex. 4. Anyone can get COVID-19, but it is particularly fatal for older people and people with certain medical conditions. Reingold Decl. ¶ 6. WHO data shows a 3.6% mortality rate for people age 60-69 and an 8% rate for those age 70-79. Ex. 6.

## **II. Public Health Guidance Regarding COVID-19**

No vaccine currently exists and one will likely not be available for over a year. Ex. 3 ¶ 9. Social distancing is the only effective means of protecting against COVID-19 infection. *Id.* Governor Ivey has emphasized that “a 6-foot distance between one another is paramount.” Ex. 7. But virus particles may spread 16 feet from a cough or 26 feet from a sneeze. Ex. 9. The Alabama Department of Public Health (“ADPH”) has told the public “to spend as much time as possible at home.” Ex. 8.

The CDC has issued guidelines concerning voting during the COVID-19 pandemic, encouraging “voters to use voting methods that minimize direct contact with other people [,]” including “drive-up voting” and “mail-in methods of voting.” Ex. 1. There is no evidence that the virus is spread via the mail. Ex. 10. The medical risks of widespread in-person voting during the pandemic are increasingly clear. *See, e.g.,* Ex. 11, Ex. 12. For example, Wisconsin has identified 52 people who participated in-person in its April 7 primary and have now tested positive. Ex. 13.

## **III. The Effect of COVID-19 in Alabama**

Governor Ivey declared a State of Emergency on March 13, 2020. Ex. 14.

Beginning March 19, she issued various orders limiting the operation of public facilities and businesses, culminating in the amended May 8th “Safer-at-Home” order effective until May 22. Ex. 15 (March 19 order); Ex. 16 (March 26 order); Ex. 17 (April 2 order); Ex. 18 (April 3 order); Ex. 19 (April 28 order); Ex. 20 (May 8 “Safer-at-Home” order). The State of Emergency will last until July 12. Ex. 21.

Under the Safer-at-Home order, some businesses may open, subject to social distancing rules. Ex. 19 at 2-5. But all Alabamians, “especially vulnerable persons”—*i.e.*, those above 65 or with certain conditions—are encouraged to stay home and stay six feet apart from people outside of their household. *Id.* at 2.

Still, the number of COVID-19 cases are rising throughout Alabama. Mobile County, which has a July 14 primary runoff in the First Congressional District, is one of the counties hardest hit by COVID-19. Ex. 22; *see also* Dkt. 1 ¶ 74. As of May 11, Mobile County had 1,478 confirmed cases of COVID-19. Ex. 23.

Moreover, community transmission of COVID-19 is expected to persist until the widespread use of a vaccine. Ex. 3 ¶ 11. Alabama’s top health officer has also stated that this pandemic’s “end is not yet in sight.” Ex. 24. The rate of transmission in Alabama may have increased after the Governor lifted the strict stay-at-home order and adopted the more relaxed Safer-at-Home order on April 30. Ex. 25. On April 30, the seven-day average of new cases was 177, and the 14-day average of new cases was 194. Ex. 26. By May 5, the seven-day average of new cases was 241,

and the 14-day average was 222. *Id.* As of May 11, the ADPH reported 1,245 hospitalizations; 10,009 infections; and 401 deaths from COVID-19. Ex. 2; Ex. 27.

#### **IV. Alabama's Upcoming Elections**

Throughout 2020 in Alabama, there are major statewide elections on July 14, Ex. 30, and November 3, and dozens of local elections set for August 25. Ex. 28. Secretary Merrill initially dismissed inquiries about a COVID-19 related safety plan, including curbside voting, for the July 14 primary runoff. Ex. 29; *see also* Doc. 1 ¶ 86. But, on March 28, Secretary Merrill issued an emergency rule that permits every Alabamian to vote absentee, but this rule maintains the Witness and Photo ID Requirements. Ex. 31. When a voter publicly asked Secretary Merrill how a person without a copier at home could satisfy the Photo ID Requirement in the pandemic, the Secretary sarcastically dismissed the question. Ex. 32; *see* Dkt. 1 ¶¶ 123-124.

On March 19 and April 17, Plaintiffs requested that Secretary Merrill remove the Witness Requirement and allow curbside voting to protect the safety of voters in upcoming elections. Ex. 33; Ex. 34. Secretary Merrill did not respond to this request.

On April 8, Secretary Merrill wrote to the U.S. Election Assistance Commission requesting over \$6 million in funds to pay for an anticipated significant increase in absentee voting and other voting changes due to COVID-19. Ex. 35.

#### **V. The Risks Posed by the Challenged Provisions in the COVID-19 Crisis**

##### **A. The Witness Requirement**

The Witness Requirement compels voters to sign an affidavit accompanying

their absentee ballot before either a notary or two adult witnesses, Ala. Code §§ 17-11-7 to 17-11-10. But thousands of voters do not live with two other adults, and so cannot satisfy this requirement without violating social distancing protocols.

Of the 3.8 million Alabamians of voting age, about 1.57 million adults live alone or with only one other person. Cooper Decl. ¶ 13 (Ex. 36). Over 14% (555,330) of adult Alabamians live alone, and 38.9% (215,966) of them are age 65 and older. *Id.* ¶ 7. Around 30% of Alabamians over 18 and 44% of Alabamians over 65 both live alone and have a disability. *Id.* ¶ 8. These numbers are similar in the First Congressional District. *Id.* ¶¶ 19-20.

Of the 980,850 Black Alabamians of voting age, 19% (186,497) live alone. *Id.* ¶ 9. And 29.7% (55,388) of Black Alabamians over age 18 who live alone have a disability. *Id.* ¶ 11. Of all Black households (*i.e.*, not individuals), 37.1% are people who live alone, while 27.5% of White households are people who live alone. *Id.* ¶ 16(d). And 14.1% of all Black and 3.8% of White households are headed by women who live alone with children under 18 (*i.e.*, not legally competent witnesses). *Id.*

## **B. The Photo ID Requirement**

The Photo ID Requirement requires persons submitting an absentee ballot application (and some absentee ballots) to include a copy of their photo ID. Ala. Code. §§ 17-11-9 and 17-9-30. A voter who fails to provide ID with the application cannot receive an absentee ballot. *Id.* § 17-9-30(b). Those voters who must return ID

with their absentee ballot must do so, *id.* § 17-10-1(c), or their ballot will be rejected if they do not provide ID pursuant to a provisional ballot process. *Id.* § 17-10-2(a)(3).

Given the Safer-at-Home order and social distancing guidelines, many offices, county courthouses, public libraries, schools, and businesses remain closed. Yet, many voters lack access to the technology needed to make copies at home: 12.8% (over 200,000) of all Alabama households lack a computer, smartphone, or tablet. Attach. A-2 to Cooper Decl., at 9. Even if such a voter could find an open store to copy their IDs, over 6% of all Alabamians lack a vehicle, and may need to take public transit, increasing the risk of infection for themselves and others. Ex. 9.

Moreover, tens of thousands of Alabama voters lack photo ID and now cannot get one. Since March 23, nearly every photo ID-issuing office in Alabama, including the Alabama Law Enforcement Agency (“ALEA”) offices and county courthouses, are closed. Ex. 37; Ex. 38 at 1; Ex. 39; Ex. 40 at 1. To the extent ALEA continues to operate any photo ID-issuing offices, it discourages vulnerable persons from visiting driver license locations. Ex. 37. And there is no evidence that Secretary Merrill has deployed “mobile ID units” to issue IDs since at least April 3. Ex. 41.

Yet Secretary Merrill’s emergency rule instructs voters that the Photo ID Requirement remains in effect, and he does not interpret the existing exemption to the Photo ID Requirement in Alabama Code § 17-9-30(d) to apply to voters with conditions that put them at a higher risk from COVID-19 infection. Ex. 31; Ex. 32.

### **C. Curbside Voting Prohibition**

No provision of Alabama law known to Plaintiffs expressly prohibits curbside or drive-thru voting. *See generally* Ala. Code § 17-9-1 to § 17-9-15. Nonetheless, Secretary Merrill prohibits election officials from offering curbside voting. For example, on November 8, 2016, Secretary Merrill ordered a polling place that was offering curbside voting to voters with disabilities to immediately stop. Dkt. ¶ 129; Ex. 42. The county complied. *Id.* Secretary Merrill has not indicated he will permit curbside voting in the pandemic. Ex. 29. Yet the CDC “[e]ncourage[s] drive-up voting,” Ex. 1, and the Governor has also encouraged “drive-in” gatherings to protect individuals, particularly vulnerable persons, from COVID-19. Ex. 19 at 2.

A majority of states permit curbside voting. Ex. 43 at 63. Additional states have used curbside voting as a safety accommodation to voters during the pandemic, including Arkansas (Ex. 44), Ohio (Ex. 45), Wisconsin (Ex. 46), and Wyoming. Ex. 47. Nothing indicates that curbside voting in these states led to fraud or other issues.

### **D. The Racial Impact of the Challenged Provisions and COVID-19**

Nationally, the COVID-19 pandemic has had a particularly devastating effect on Black people. Ex. 48 at 459. Sadly, these racially disparate patterns of illness and mortality due to COVID-19 exist in Alabama as well. As of May 11, Black people in Alabama represent 38.4% of reported COVID-19 cases and 45.5% of related deaths, despite making up just 27% of the state’s population. Ex. 2. In Mobile



County, as of May 11, Black people accounted for 44.2% of infections, 59.1% of hospitalizations, and 52.9% of COVID-19 deaths, despite being only 36% of the county's population. Ex. 23. For this reason, Dr. Karen Landers of the ADPH has directly urged Black people to “stay at home” and practice social distancing. Ex. 49.

Plaintiffs' expert, Dr. Courtney Cogburn, explains that racial disparities in serious illness and death due to COVID-19 are inextricably tied to discrimination in healthcare, housing, and employment. Cogburn Decl. ¶¶ 6-15 (Ex. 50). This includes discrimination in healthcare, the rationing of COVID-19 testing and care, and the increased risk of underlying diseases linked to segregation. *Id.* The CDC agrees that racial disparities related to COVID-19 result from “institutional racism.” Ex. 51.

Racial discrimination in Alabama has resulted in similar inequalities. In Alabama, 20.7% of Black and 13.7% of Whites people work in “essential” service jobs forcing them to leave home and face increased exposure to COVID-19. Cooper Decl. ¶ 16(c). By contrast, 39.1% of White people versus only 26.2% of Black Alabamians hold “white collar” jobs that are much more likely to allow them to work safely at home. *Id.* Black Alabamians are also more likely than Whites to lack health insurance (11.5% vs. 8.1%), *id.* ¶ 16(f); have a disability (among people over 65, 42.7% vs. 38.1%), *id.*; lack a high school degree (16.6% vs. 11.4%), *id.* ¶ 16(b); and live below the poverty line (27.7% vs. 11.3%), *id.* ¶ 16(a). Similar racial disparities exist in the First Congressional District. *Id.* ¶ 17. And Alabama's Black Belt region

will likewise be hit hard by COVID-19. Elope Decl. ¶¶ 9-14 (Ex. 67).

## **VI. Injuries and Irreparable Harm to Plaintiffs**

Plaintiffs Robert Clopton, Eric Peebles, Howard Porter, Jr., and Annie Carolyn Thompson are lawfully registered Alabama voters who plan to vote in the upcoming 2020 elections. Clopton Decl. ¶ 3 (Ex. 52); Peebles Decl. ¶¶ 3, 5, 11 (Ex. 53); Porter Decl. ¶ 1 (Ex. 54); Thompson Decl. ¶¶ 3, 5, 15 (Ex. 55). Plaintiffs Clopton, Porter, and Thompson are over 65 years of age, and eligible to vote on July 14. Ex. 52 ¶¶ 1, 3; Ex. 54 ¶¶ 1, 4; Ex. 55 ¶¶ 3, 15. All four individual Plaintiffs have disabilities recognized by the ADA; are highly vulnerable to COVID-19; and usually vote in person. Ex. 52 ¶¶ 1, 3, 4-6; Ex. 53 ¶¶ 6, 10; Ex. 54 ¶¶ 5-6, 13; Ex. 55 ¶¶ 3, 6, 14-16. But, to avoid exposure to COVID-19, they must vote absentee in 2020 elections. Ex. 52 ¶ 13; Ex. 53 ¶ 17; Ex. 54 ¶ 14; Ex. 55 ¶ 24.

Plaintiffs Clopton, Peebles, and Thompson live alone or with one other person and cannot comply with the Witness Requirement without endangering their health. Ex. 52 ¶¶ 8-10; Ex. 53 ¶ 15; Ex. 55 ¶ 21. They will be forced to make a choice between their health and their vote. Ex. 52 ¶ 14; Ex. 53 ¶ 17; Ex. 55 ¶¶ 16, 24. Ms. Thompson cannot safely comply with the Photo ID Requirement, because she does not have copying technology at her home. Ex. 55 ¶¶ 18-19. Mr. Porter may be unable to comply with this requirement since he is not certain that he can afford to maintain his printer through July. Ex. 54 ¶¶ 14-15.

If given the option, Plaintiffs Clopton, Peebles, Porter, and Thompson would consider curbside voting to minimize the threat of infection. Ex. 52 ¶ 14; Ex. 53 ¶ 16; Ex. 54 ¶ 16; Ex. 55 ¶ 23. They do not intend to vote in a way that puts them at risk of infection. Ex. 52 ¶ 14; Ex. 53 ¶¶ 12, 15, 17; Ex. 54 ¶ 17; Ex. 55 ¶¶ 16, 21, 24.

Plaintiffs People First of Alabama (“People First”), Greater Birmingham Ministries (“GBM”), and the NAACP (collectively, “Organizational Plaintiffs”) have members who are registered voters and plan to vote in the July 14 election but are at higher risk of serious complications from COVID-19. Ellis Decl. ¶¶ 8-9 (Ex. 56); Douglas Decl. ¶ 9 (Ex. 57); Simelton Decl. ¶ 9 (Ex. 58). They have members who live alone or with one other adult and so are unable to comply with the Witness Requirement. Ex. 56 ¶¶ 10-11; Ex. 57 ¶¶ 9-11; Ex. 58 ¶¶ 9-10. Members also include voters who lack access to the technology needed to satisfy the Witness and Photo ID Requirements. Ex. 56 ¶ 12; Ex. 57 ¶ 9; Ex. 58 ¶ 9. If curbside voting were available, members with medical or physical disabilities or who need help to vote would use it. Ex. 56 ¶ 13; Ex. 57 ¶¶ 10-11; Ex. 58 ¶¶ 9-10. If the Challenged Provisions remain in place, these members will be disenfranchised. Ex. 56 ¶¶ 12-13; Ex. 57 ¶ 10; Ex. 58 ¶¶ 9-10. Organizational Plaintiffs have diverted their resources to address the Challenged Provisions. Ex. 56 ¶ 14; Ex. 57 ¶ 7; Ex. 58 ¶¶ 5-6.

## **ARGUMENT**

A preliminary injunction is warranted if Plaintiffs show: (1) a likelihood of

success on the merits; (2) likelihood of suffering irreparable harm; (3) the balance of hardships favor them; and (4) the injunction serves the public interest. *Jones v. Governor of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020). The Court can take judicial notice of census data, voting statistics, public health reports, and newspapers. Fed. R. Evid. 201(b)(2); *see generally U.S. ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 811 (11th Cir. 2015); *Hollis v. Davis*, 941 F.2d 1471, 1474 (11th Cir. 1991).

## **I. Plaintiffs Are Likely to Prevail on the Merits**

### **A. The Witness Requirement is Unlawful amid the COVID-19 Crisis**

#### **1. The Witness Requirement violates the Constitution.**

The First and Fourteenth Amendments do not allow a state to make voters choose between protecting their health or forfeiting their fundamental rights. Any burden on the right to vote must be balanced against the alleged state interest supporting the burden. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). Yet, together and separately, the Challenged Provisions will deprive Plaintiffs and thousands of others of their right to vote. They will do so by imposing restrictions on the franchise that are at odds with public health guidance expected to remain in place for the foreseeable future.

The *Anderson-Burdick* test requires the Court to “weigh the character and magnitude” of the asserted constitutional injury against Alabama’s justifications for the burdens imposed by the challenged rules, “taking into consideration the extent to which those justifications require the burden to plaintiffs’ rights.” *Democratic*

*Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (“*Lee*”).

Once Plaintiffs show that the Challenged Provisions seriously burden the right to vote, they must survive strict scrutiny. Defendants must then prove that they are “narrowly drawn to serve a compelling state interest.” *Id.* But, “even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden.” *Id.* at 1318-19.

In the current crisis, courts have applied strict scrutiny to similar witness requirement and ballot-access laws that conflict with social distancing rules to severely burden the right to vote. *See League of Women Voters of Va. v. Va. State Bd. of Elec.*, No. 6:20-cv-0024, \_\_ F. Supp. 3d \_\_, 2020 WL 2158249, at \*7-8 (W.D. Va. May 5, 2020) (“*LWVV*”) (finding witness requirement’s “substantial” burdens outweighed any countervailing state interests); *Garbett v. Herbert*, No. 2:20-cv-245-RJS, 2020 WL 2064101, at \*6-8 (D. Utah Apr. 29, 2020) (finding in “extraordinary circumstances” of this crisis, a ballot access law “imposes a severe burden”); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687, at \*4 (N.D. Ill. Apr. 23, 2020) (same); *Esshaki v. Whitmer*, No. 20-cv-10831, 2020 WL 1910154, at \*1 (E.D. Mich. Apr. 20, 2020) (same). Courts have also applied strict scrutiny in other emergencies. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (holding a registration deadline “severe[ly] burden[ed]” right to vote where a hurricane prevented registration in final week); *Ga. Coal. for the*

*Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345-46 (S.D. Ga. 2016) (same).

In addition, strict scrutiny is appropriate where the effects of the Challenged Provisions bear more heavily on specific groups—like racial minorities, low-income people, the elderly, or people with disabilities. *See Jones*, 950 F.3d at 822; *Ga. Coal. for the People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (“*Kemp*”).

a.) *The Witness Requirement will disenfranchise thousands.*

Forcing thousands of people to put their health on the line or face disenfranchisement imposes a severe burden on the right to vote. *See, e.g., Price v. N.Y. State Bd. of Elec.*, 540 F.3d 101, 107 n.8 (2d Cir. 2008) (noting that for “voters who are . . . housebound” the burden of a lack of absentee voting opportunity “could be quite significant”). The breadth and severity of the Witness Requirement’s burdens merit strict scrutiny because they needlessly force voters to make unconstitutional choices. The greater the burden that a challenged law places on the right to vote, “the stricter the scrutiny” the law must survive. *Lee*, 915 F.3d at 1319.

The Witness Requirement asks the 1.57 million adults in Alabama who live alone or with only one other person, *supra* at 6, to make the impossible “choice between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—and,

indeed, their civic duty—to vote in an election.” *LWVV*, 2020 WL 2158249, at \*8.

Under the Governor’s “Safer at Home” order, all Alabamians—but, in particular, “vulnerable persons,” like Plaintiffs—are ordered to limit travel outside the home. *See supra* at 4. And public health guidance directs people who do leave their homes to maintain at least six feet of distance from others. *See supra* at 3-4. The CDC also encourages as many voters as possible “to use voting methods that minimize direct contact with other people.” Ex. 1. The CDC’s views are “authoritative.” *Tolman v. Doe*, 988 F. Supp. 582, 586 (E.D. Va. 1997).

“Requiring individuals to have one or more people they are not otherwise being exposed to come into close enough proximity to witness their ballot would place them at increased risk of infection.” Ex. 3 ¶ 18. This risk is even greater for disabled or elderly people, like Plaintiffs, *supra* at 10, who “are at the greatest risk of severe cases, long-term impairment, and death.” Ex. 3 ¶ 6.

Even in normal circumstances, the Witness Requirement causes election officials to reject the ballots of a significant number of absentee voters. In the 2018 elections, 1,368 Alabama voters had their absentee ballots rejected. Ex. 59 at 29. About a quarter of these ballots were rejected because of the Witness Requirement. Ex. 60. But in that election, only 57,832 people or 3.4% of all voters cast mail-in absentee ballots. Ex. 59 at 29. Voters then did not face COVID-19 related restrictions on obtaining witnesses to vouch for them on those ballots. And Secretary Merrill

predicts absentee voting to increase greatly in 2020 because of COVID-19. Ex. 35.

The burdens imposed by the Witness Requirement will disproportionately fall on members of populations at heightened risk of death or severe complications from COVID-19. As noted, 14.6% of Alabamians live alone and, of those adults, many of them are also seniors or people with disabilities. *See supra* at 6. Black Alabamians are also much more likely to live alone or live only with children. *Id.*

Plaintiffs' individual circumstances highlight how the Witness Requirement acts as a significant barrier to voters. Plaintiffs Thompson and Peebles live alone, and Plaintiff Clopton lives with only one other person. *See supra* at 10. To satisfy the Witness Requirement, these voters would need to closely interact with one or more people from outside their households. Further, Plaintiffs also have medical conditions that make them more susceptible to death or serious illness from COVID-19. *Id.* Plaintiffs cannot both follow the guidance to stay isolated at home and obtain two witnesses as demanded by the Witness Requirement.

A voter can also have their absentee ballot notarized to satisfy the Witness Requirement. But this alternative is no less risky or burdensome. Traditional notarization would still require a voter's personal interaction with a person outside their home in violation of social distancing rules. Although Governor Ivey issued an executive order permitting notarization of documents via videoconferencing in lieu of personal appearance, Ex. 17, not all voters (or notaries) have access to



videoconferencing technology. *See supra* at 7. Black Alabamians are nearly two times more likely than White people to lack videoconferencing technology. Cooper Decl. ¶ 16(g). Further, a notary may also require the payment of a \$5.00 fee to notarize the absentee ballot affidavit. Ala. Code § 36-20-74. Yet, it is unconstitutional to make “the affluence of the voter or payment of any fee an electoral standard.” *Jones*, 950 F.3d at 821 (citation omitted).

When, as here, a law endangers the health of thousands of voters, the most exacting level of scrutiny is required. Plaintiffs are effectively “disabled from voting” because they cannot safely “go to the polls on election day” or meet the Witness Requirement due to the COVID-19 crisis and public health rules. *See O’Brien v. Skinner*, 414 U.S. 524, 527, 530-31 (1974) (enjoining an absentee ballot law as-applied to eligible voters in jail). Even if the Witness Requirement did not usually burden many voters, which it does, “these are not ordinary times.” *LWVV*, 2020 WL 2158249, at \*8. Alabama cannot impose this requirement when doing so endangers voters’ lives. *See Fla. Democratic Party*, 215 F. Supp. 3d at 1258.

b.) *The Witness Requirement is not narrowly tailored.*

Because the Witness Requirement places voters in significant danger, it is subject to strict scrutiny. Even if a lesser level of scrutiny applied, the risks to voters far outweigh any nominal benefits to Alabama from enforcing this requirement.

Alabama law states that the Witness Requirement “goes to the integrity and

sanctity of the ballot and election.” Ala. Code § 17-11-10(b). But this requirement does not meaningfully protect the integrity of an absentee ballot. Witnesses are not required to identify themselves by legibly printing their name. Ala. Code §§ 17-11-7, 17-11-9 & 17-11-10. Nor are Alabama election officials required to follow up with witnesses to confirm their identity, their age, or that they indeed witnessed the signing of the voter’s affidavit. *Id.* § 17-11-10. Instead, officials merely confirm the affidavit contains the witness signatures and is otherwise correct; then the ballot is counted. *Id.* § 17-11-10(b). While instances of fraud are very rare,<sup>1</sup> a person determined to falsely submit an absentee ballot and risk imprisonment could just as easily forge the two witnesses’ signatures.

By contrast, several provisions of Alabama law do serve the State’s interest in election integrity. First, the absentee ballot application is required to “contain sufficient information to identify the applicant.” Ala. Code § 17-11-4. The current absentee ballot application requires a voter to submit either their driver’s license number or the last four digits of their social security number, which allows election officials to verify the voter’s identity even before they send the absentee ballot. Ex. 63. Second, the affidavit requires an absentee voter to swear that the information is

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<sup>1</sup> The Heritage Foundation—which is committed to “[p]reventing, deterring, and prosecuting election fraud”—identifies about a dozen Alabama election fraud cases concerning absentee voting in the past 20 years. Ex. 61. None of these cases plausibly could have been stopped by the Witness Requirement. In the same period, over 29 million ballots were cast. Ex. 62 at 4-9.

true and warns that it is a criminal offense to knowingly give false information to illegally vote absentee. Ala. Code § 17-11-7. Finally, it is a felony to willfully falsify an absentee ballot application or verification documents. *Id.* § 17-17-24(a).

Given these alternative methods of protecting election integrity, the additional step of requiring the voucher of a notary or two witnesses offers no real protection against fraud. “For the fraudster who would dare to sign the name of another qualified voter at the risk of being charged with [a felony], writing out an illegible scrawl on an envelope to satisfy the witness requirement would seem to present little to no additional obstacle.” *LWVV*, 2020 WL 2158249, at \*9. In federal and state law, there is a “long practice of relying on the threat of penalty of perjury to guard against dishonesty and fraud.” *Lee*, 915 F.3d at 1323; *see, e.g.*, 28 U.S.C. § 1746; Ala. Code §§ 13A-10-109, 12-21-83 & 40-29-115. And, when Congress eliminated all witness requirements for absentee voter registration, it found that “warnings of penalties” were sufficient to deter fraud. S. Rep. 103-6, 1993 WL 54278, at \*13 (1993).

In fact, in 2017, Secretary Merrill stated that a bill that added the Photo ID requirement and removed the Witness Requirement would strengthen the absentee voting law. Ex. 64. While Plaintiffs seek to enjoin the Witness Requirement, they do not seek a blanket injunction against the Photo ID Requirement. *See supra* at 1. Further, “a significant majority of the states have chosen other means to combat voter fraud.” *LWVV*, 2020 WL 2158249, at \*9 n.13; *see also* Ex. 65. And, amid this

crisis, other courts have ruled that similar witness requirements are no more effective at preventing voter fraud than self-executed affidavits made under penalty of perjury. *See LWVV*, 2020 WL 2158249, at \*9 (finding injunction against witness requirement would not increase fraud); *League of Women Voters of Okla. v. Ziriaux*, No. 118,765, \_\_ P.3d \_\_, 2020 WL 2111348, at \*1 (Okla. May 4, 2020) (allowing self-executed affidavits—rather than notarization—to meet a witness requirement).

The Witness Requirement places an unnecessary and dangerous burden on elderly, disabled, Black, and other voters who must choose between their health and their vote. “The Constitution does not permit a state to force such a choice on its electorate.” *LWVV*, 2020 WL 2158249, at \*8. It cannot survive any level of scrutiny.

## **2. The Witness Requirement violates Section 201 of the VRA.**

Section 201 mandates that “[n]o citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any . . . election.” 52 U.S.C. § 10501(a). Section 201 bars any “test or device” that requires any voter to “prove his qualifications by the voucher” of another person. *Id.* § 10501(b)(4). “All literacy tests and similar voting qualifications were abolished” by Section 201. *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198 (2009).

Under the Witness Requirement, an absentee ballot that “is not witnessed by two witnesses 18 years of age or older . . . will not be counted.” Ala. Code § 17-11-7. Witnesses must vouch for a voter’s identity by “certify[ing] that that the [voter] is

known (or made known) to [the witnesses] to be the identical party he or she claims to be.” *Id.* Under the plain text of the VRA, it is *per se* illegal: it is a “prerequisite for voting” that demands that a voter “prove his qualifications by the voucher” of another. 52 U.S.C. § 10501(b); *see also id.* § 10310(c)(1) (defining “voting” in the VRA to include “all action necessary to make a vote effective”). The Witness Requirement is a banned test for all voters or, at least, as-applied to those vulnerable persons who must vote absentee in this crisis. *Cf. O’Brien*, 414 U.S. at 530.

The Witness Requirement allegedly “goes to the integrity and sanctity of the ballot and election.” Ala. Code § 17-11-10(b). But that justification, cannot overcome the VRA’s clear text, which reflects Congress’s judgment that prohibited tests and devices “unduly lend themselves to discriminatory application, either conscious or unconscious.” *Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (opinion of Harlan, J.). Before the VRA, other “supporting witness” requirements were defended as necessary to identify a voter. *See, e.g., United States v. Ward*, 349 F.2d 795, 799 (5th Cir. 1965). Whatever the state interest, these tests are presumptively discriminatory. *See Lodge v. Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981), *aff’d sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982). And, while proof of discrimination is irrelevant under Section 201, the racial impact here is clear. *See supra* at 6.

### **3. The Witness Requirement violates Title II of the ADA.**

The ADA seeks to address the “pervasive unequal treatment” of people with

disabilities in numerous areas, including voting. *Nat'l Ass'n of the Deaf v. Florida*, 945 F.3d 1339, 1351 (11th Cir. 2020). 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. . . .” 42 U.S.C. § 12132.

To prevail under the ADA, Plaintiffs need prove only that (1) they are qualified persons with a disability; (2) they were excluded from participation in or denied the benefits of a public entity’s services or activities; and (3) the exclusion or denial of the benefit was by reason of the plaintiff’s disability. *See Nat'l Fed. of the Blind v. Lamone*, 813 F. 3d 494, 502-03 (4th Cir. 2016). “Plaintiffs need not, however, prove that they have been disenfranchised or otherwise ‘completely prevented from enjoying a service, program, or activity’ to establish discrimination” in violation of the voting rights protected by the ADA. *Disabled in Action v. Bd. of Elec. in City of N.Y.*, 752 F.3d 189, 198 (2d. Cir. 2014) (citation omitted).

Once Plaintiffs prove that a Challenged Provision prevents them from voting, Plaintiffs 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). A modification to a rule is reasonable if it will not cause “undue hardship.” *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-03 (2002). The burden of showing that a modification is reasonable is “not a heavy one” and it “is enough for the plaintiff to suggest the existence of a plausible accommodation.” *Nat'l Fed. of the Blind*, 813 F.3d at 507-08. The

determination of reasonableness is “fact-specific.” *Id.* at 508.

As described *supra* at 10-11, Plaintiffs are otherwise qualified persons with disabilities, which include medical vulnerabilities that place them at extremely high risk of serious bodily injury or death should they leave the confines of their homes. *See* 28 C.F.R. § 35.108. Plaintiffs are also eligible to vote and would do so with reasonable accommodations. Absent a modification to the Challenged Provisions, Plaintiffs will be prevented from voting and completely denied their “right to participate in the democratic process.” *Nat’l Ass’n of the Deaf*, 945 F.3d at 1349.

As explained above at 18-20, there are numerous other ways for voters with disabilities, as well as others, to confirm their identity in the absence of the Witness Requirement. Defendants have no valid reason to refuse to accommodate voters by allowing self-executed affidavits in lieu of this requirement. *See Nat’l Fed. of the Blind*, 813 F.3d at 509 (holding that a state violated the ADA where it failed to show that accommodating voters with disabilities would compromise election integrity).

## **B. The Photo ID Requirement Violates the Constitution and ADA**

### **1. The Photo ID Requirement severely burdens voters’ rights.**

The Photo ID Requirement demands nearly every voter to submit a photocopy of their photo ID with either their absentee ballot or the application. But, under existing state law, a voter who is entitled to vote absentee pursuant to the “the Voting Accessibility for the Elderly and Handicapped Act . . . shall not be required to

produce identification.” Ala. Code § 17-9-30(d). Interpreting this provision, the absentee ballot application exempts from the Photo ID requirement any voter who is over 65 or has a disability *and* is “unable to access [their] assigned polling place due to . . . life-altering disorder that affects [their] ability to perform manual tasks, stand for any length of time, walk unassisted, see, hear or speak[.]” Ex. 63.

But Secretary Merrill does not interpret this exemption to apply to Plaintiffs Porter and Thompson, and People First’s members. Rather, he has told such voters to leave home in violation of social distancing protocols to make copies. Ex. 32. Thus, given the lack of an exemption for people who are most vulnerable to COVID-19, the Photo ID Requirement “go[es] beyond the merely inconvenient” to severely burden the right to vote. *Kemp*, 347 F. Supp. 3d at 1264 (citation omitted).

The Photo ID Requirement demands that these vulnerable voters, particularly those who lack a copier or photo ID, do the opposite of what public health officials have advised them to do. They must leave home; congregate in person at a public space; and touch potentially contaminated surfaces like copiers, counters, and doors. Otherwise, they must forego their right to vote. For voters who cannot copy their IDs at home, the Photo ID Requirement is a “nearly insurmountable hurdle” because it requires voters to risk their health. *See Libertarian Party of Ill.*, 2020 WL 1951687, at \*4 (finding a candidate signature requirement unconstitutional as applied in the current crisis). And while it “is a ‘basic truth that even one disenfranchised voter—



let alone several thousand—is too many,” *Lee*, 915 F.3d at 1321 (citation omitted), over 200,000 households lack the computer needed to copy photo IDs. *Supra* at 7.

Given the serious burdens that the Photo ID Requirement places on thousands of voters in the current crisis, the Constitution demands that this requirement face strict scrutiny review, which it cannot survive. *See LWVV*, 2020 WL 2158249, at \*7-8. Due to the lack of any substantial state interest in applying the Requirement to vulnerable voters during this crisis, it also cannot survive a lesser level of scrutiny.

## **2. The Photo ID law should be construed to protect lives.**

Defendants cannot claim a discernible interest in compelling citizens to leave home to copy photo IDs or to vote in person amid a pandemic. While the risk of contagion remains, Defendants cannot state an interest that makes the Photo ID Requirement “necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789.

Nor is the Photo ID Requirement “narrowly drawn” to achieve any asserted interest, as is needed to satisfy strict scrutiny. *Lee*, 915 F.3d at 1318. Only Arkansas and Wisconsin also require photo ID for absentee voters. A photo ID law for absentee voting makes little sense since a voter mails in copies of their photo ID and so never shows their face to elections official for a comparison.

Even if the Photo ID Requirement might usually be useful in combating fraud (which it is not), Defendants cannot show that refusing to include vulnerable voters in the existing exemption, is narrowly tailored in the pandemic. Plaintiffs “accept

the propriety of requiring photo ID from persons who already have or can get it with reasonable effort, while endeavoring to protect the voting rights of those who encounter high hurdles.” *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016). But for many voters—especially the elderly and those at greatest risk of hospitalization or death if they contract the virus—the only way to limit exposure to COVID-19 is through “self-isolation.” Ex. 3 ¶ 9; *see supra* at 3. But, given the “substantial burden” imposed by attempts to both obtain or copy photo ID and avoid infection, Plaintiffs and many other elderly or disabled voters will be dissuaded from voting. *See supra* at 10-11. The Constitution requires the Court to offer relief to those voters who face serious barriers to satisfying even an otherwise valid law. *Frank*, 819 F.3d at 387. Defendants’ “countervailing” interests in election integrity are not sufficient to uphold in the Photo ID Requirement. *LWV*, 2020 WL 2158249, at \*8.

To cure this constitutional violation, Defendants could simply construe the existing exemption, Ala. Code § 17-9-30(d), to authorize those voters who are most vulnerable to COVID-19 to vote absentee without providing copies of their photo IDs. But Defendants have rejected a construction that would exempt voters like Plaintiffs Porter and Thompson, opting instead to severely burden their rights.

The Court can address this constitutional harm: “a federal court can review a state official’s interpretation of—or gloss over—state law when it is alleged to violate the United States Constitution.” *League of Women Voters of Fla., Inc. v.*

*Detzner*, 314 F. Supp. 3d 1205, 1213 (N.D. Fla. 2018). Accordingly, the Court should “enjoin[] the state from enforcing [its] laws as a violation of the First and Fourteenth Amendments.” *Id.*; accord *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (similar); *Charles H. Wesley Educ. Found v. Cox*, 324 F. Supp. 2d 1358, 1366-68 (N.D. Ga. 2004) (similar), *aff’d* 408 F.3d 1349 (11th Cir. 2005) (“*Cox*”). Further, as Plaintiffs are protected by the ADA, *supra* at 10, Defendants must interpret the Photo ID Requirement in a manner that protects their right to vote.

### **C. The Curbside Voting Prohibition Unlawfully Burdens Voters**

Despite the clear danger linked to congregating at polling stations, Secretary Merrill prohibits curbside voting. The Curbside Voting Prohibition flouts the CDC’s and Governor’s support for drive-up service at public gatherings. *See supra* at 3-4.

While some vulnerable voters may normally vote in person, the Curbside Voting Prohibition makes it significantly and needlessly more dangerous now. *Cf. Disabled in Action*, 752 F.3d at 198-99 (explaining state cannot force voters with disabilities to cast absentee ballots, thus robbing them of option of voting in person).

#### **1. The Curbside Voting Prohibition is unconstitutional.**

The insides of polling locations are a “prime area for increased transmission” of COVID-19. Ex. 3 ¶ 16. Curbside voting is important because it will minimize a person’s close contacts at polling locations. *Id.* ¶ 17. Without curbside voting, vulnerable voters, like Plaintiffs, must leave their vehicles to vote in person at a place

where there is a substantially increased risk of contracting COVID-19.

Although absentee voting offers an option for some voters, other voters—including Organizational Plaintiffs’ members—must vote in person to receive assistance. *See supra* at 11. People with physical disabilities or low literacy are more likely to need assistance from poll workers in voting. Black voters are also more likely to be disabled and to be undereducated. *See supra* at 6, 9. The VRA requires that disabled or low literacy voters receive assistance. 52 U.S.C. § 10508.

Given the burden of the Curbside Voting Prohibition it must be narrowly drawn to support a compelling state interest. *Burdick*, 504 U.S. at 434. Secretary Merrill has indicated the Curbside Voting Prohibition prevents “voting irregularities.” Ex. 42. But he has not explained why or how curbside voting risks voter fraud. Most states offer curbside voting and four other states have expanded curbside voting due to COVID-19. These states are not overrun with fraud. *See supra* at 8; *accord Fla. Democratic Party*, 215 F. Supp. 3d at 1257 (finding it relevant that “[m]any other states” had voluntarily undertaken the requested remedial action).

The Curbside Voting Prohibition places vulnerable persons who need help to vote or cannot safely vote absentee because of the Photo ID or Witness Requirements in an untenable position: risk their health to vote inside of a polling site, or forego their right to vote. This prohibition severely burdens voters and cannot stand.

## **2. The Curbside Voting Prohibition violates the ADA.**

As discussed above at 10-11, Plaintiffs meet the definition of disabled under the ADA and, therefore, Defendants are required to accommodate them to vote safely amid this crisis. But the Curbside Voting Prohibition excludes Plaintiffs and their members with disabilities from participating in elections, violating the ADA.

The State Defendants must reasonably modify processes at in-person polling places to permit “delivery of services at alternate accessible sites.” 28 C.F.R. § 35.150(b). The ADA regulations “explicitly prohibit [Alabama] from denying individuals with disabilities access to its services because its ‘facilities are inaccessible to or unusable’ by people with disabilities. *Disabled in Action*, 752 F.3d at 197 (quoting 28 C.F.R. § 35.149). COVID-19 effectively makes every poll site inaccessible to vulnerable voters. And courts have ordered similar relief in much less dire circumstances. *See id.* at 201-02 (ordering the relocation of polling places).

Such an accommodation would be consistent with Alabama law, which does not expressly prohibit curbside voting. *See generally* Ala. Code §§ 17-9-1 to 17-9-15. The CDC also encourages drive-up voting amid this crisis, Ex. 1, and the ADA requires curbside voting where, as here, poll sites are “inaccessible.” Ex. 66.

## **II. The Threat of Irreparable Harm and Balance of Equities Merit Relief**

“The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm.” *Jones*, 950 F.3d at 828. Here, Plaintiffs face an unconscionable risk to their safety and the safety of others if they

are compelled to vote under the Challenged Provisions. There “can be no injury more irreparable” than “serious, lasting illness or death.” *Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at \*4 (M.D. Pa. Mar. 31, 2020). A preliminary injunction provides the only effective means of protecting Plaintiffs’ and others’ rights to vote.

Organizational Plaintiffs also are “irreparably harmed when the right to vote is wrongfully denied or abridged—whether belonging to [their] membership or the electorate at large.” *See N.C. State Conf. of NAACP v. Cooper*, No. 18-cv-1034, 2019 WL 7372980, at \*24 (M.D.N.C. Dec. 31, 2019); *Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1295 (N.D. Ga. 2018). Moreover, Organizational Plaintiffs are irreparably harmed by the diversion of resources. *See supra* at 11. All Plaintiffs’ harms will continue until July 14. Ex. 3 ¶¶ 13, 15; Ex. 67 ¶ 17.

Further, the “protection of the Plaintiffs’ franchise-related rights is without question in the public interest.” *Cox*, 408 F.3d at 1355. “Frustration of federal statutes and prerogatives are not in the public interest,” and Defendants suffer “no harm from the state’s nonenforcement of invalid legislation.” *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012). An injunction also promotes the “paramount government interest” in the “protection of the public’s health and safety.” *Gun S., Inc. v. Brady*, 877 F.2d 858, 867 (11th Cir. 1989).

## CONCLUSION

For the reasons above, Plaintiffs request that the Court grant their motion.

DATED this 14th day of May 2020.      Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of May 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to all counsel of record.

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