

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

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| PEOPLE FIRST OF ALABAMA <i>et al.</i> , |) | |
| |) | |
| |) | |
| v. |) | CASE NO. 2:20-cv-00619-AKK |
| |) | |
| JOHN MERRILL, in his official |) | |
| capacity as Secretary of State of |) | |
| Alabama <i>et al.</i> , |) | |

DEFENDANT MARY B. ROBERSON’S MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), Defendant Mary B. Roberson, in her official capacity as Circuit Clerk of Lee County, Alabama, (“Mrs. Roberson”) moves to dismiss all of Plaintiff’s claims against her.¹ Despite naming Mrs. Roberson in her official capacity as circuit clerk, Plaintiffs’ allegations focus solely on Mrs. Roberson’s role as absentee election manager (“AEM”) for Lee County. Plaintiffs seek to enjoin certain actions under the control of AEMs or of other officials that are not parties to this suit. However, as the Court already knows, Mrs. Roberson has opted not to serve as Lee County’s AEM for the remainder of 2020, the relevant time period in Plaintiffs’ complaint. *See, e.g.*, [Doc. 1 at 53–54; Doc. 37-1 at 2, 6–8]. Otherwise, none of the claims in Plaintiffs’

¹ Consistent with the Court’s standing order regarding motions under Rule 12(b)(6), the undersigned conferred, by telephone and by electronic mail, with counsel for Plaintiffs regarding the perceived deficiencies in Plaintiffs’ Complaint. Despite cordial discussions, the Parties did not reach an agreement regarding the sufficiency of the pleadings.

complaint, even if successful, implicate Mrs. Roberson's other duties as circuit clerk (or any other position). Because Mrs. Roberson is powerless to provide the relief Plaintiffs seek, the Court should dismiss Plaintiffs' claims against Mrs. Roberson as failing to state a plausible claim or lacking subject-matter jurisdiction.

To the extent Plaintiffs asserted any claims against Mrs. Roberson in her official capacity as AEM for Lee County, the Court should substitute Lee County's new AEM. *See* Fed. R. Civ. P. 25(d).

Factual and Procedural Background

Plaintiffs filed the present suit against the State of Alabama, the Governor, the Secretary of State, several circuit clerks, and an AEM seeking injunctive and declaratory relief relating to three "Challenged Provisions" of Alabama election law for remaining elections in 2020: (1) the witness requirement for absentee ballots, *see* Ala. Code §§17-11-7 to 17-11-10; (2) the photo ID requirement for absentee ballots, *id.* at §§ 17-9-30(b), 17-11-9, 17-11-10(c); and (3) to compel the use of curbside voting. *See, e.g.*, [Doc. 1 at 3, 52–54]. Plaintiffs also moved for a preliminary injunction for these Challenged Provisions for the upcoming July 14, 2020, primary runoff elections. *See generally* [Docs. 15, 20-1]. Mrs. Roberson was served with process on May 19, 2020, and she responded to the motion for preliminary injunction and informed the Court she was no longer serving as Lee County's AEM. *See generally* [Docs. 29, 37-1, 38, 41].

Argument

I. Mrs. Roberson is no longer the AEM, her successor should be substituted, and Mrs. Roberson is due to be dismissed in her official capacity as circuit clerk.

a. James Majors should be substituted for Mary Roberson.

Lee County's new AEM is due to be substituted for Mrs. Roberson. The Court need not dismiss Plaintiffs' claims against Lee County's AEM just because Mrs. Roberson is no longer in that role. *See* Fed. R. Civ. P. 25(d). Her successor is automatically substituted, and his name should be added to the proceedings. *See id.*; *Hawthorne v. McCarthy*, No. 5:18-cv-00689-MHH, 2020 WL 2811467, at *1 n.2 (N.D. Ala. May 29, 2020) (citing Rule 25(d) and automatically substituting Ryan McCarthy in place of Mark Esper as Secretary of the Army). Mrs. Roberson elected not to serve as Lee County's AEM for the remainder of 2020, Lee County's appointing board named James Majors as the new AEM, and Mr. Majors's information is available on the Secretary of State's website. [Doc. 37-1 at 2]; *Absentee Election Manager*, Ala. Sec'y of State, <https://www.sos.alabama.gov/city-county-lookup/absentee-election-manager> (last visited June 8, 2020) (Exhibit A); Notice of Appt. (May 30, 2020) (Exhibit B). Accordingly, the Court should substitute Mr. Majors for Mrs. Roberson.

- b. Plaintiffs’ complaint fails to state any claim against Mrs. Roberson outside of her former role as AEM.

In addition to bringing Mr. Majors in, the Court should let Mrs. Roberson out—completely. Plaintiffs’ suit names Mrs. Roberson in her official capacity as Circuit Clerk of Lee County, yet the allegations within the complaint relate solely to Mrs. Roberson’s former duties as the previous AEM. Nowhere in the four corners of the complaint do Plaintiffs allege any claims against Mrs. Roberson in her remaining duties as circuit clerk. This deficiency demands dismissal.

A Rule 12(b)(6) motion tests “the facial sufficiency of the plaintiff’s statement of claim for relief.” *Davis v. Home Buyers Warranty Corp.*, No. 2:10-CV-1815-SLB, 2011 WL 3489886, at *1 (N.D. Ala. Aug. 8, 2011) (citing *Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1367 (11th Cir.1997)). Although Plaintiffs need not plead every allegation with precise detail, the complaint must contain some allegations touching each element of a valid claim. *See id.* (quoting *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir.2001)). “The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss. The well-pled allegations must nudge the claim ‘across the line from conceivable to plausible.” *Id.* at *2 (internal quotations omitted) (quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260–61 (11th Cir. 2009)).

Plaintiff asks the Court to enjoin the Defendants, including Mrs. Roberson, from effectuating the Challenged Provisions. As circuit clerk, Mrs. Roberson has no authority over any of these provisions, and Plaintiffs do not allege otherwise—because they cannot prove otherwise. To be sure, Mrs. Roberson is named in the suit in her official capacity as Circuit Clerk of Lee County. *E.g.*, [Doc. 1 at 1] (case caption). The opening paragraph, which mentions Mrs. Roberson as circuit clerk, only describes the relief sought, but the remainder of complaint does not establish that Mrs. Roberson can provide the relief. *See* [Doc. 1 at ¶ 1]. The paragraph identifying Mrs. Roberson, the other circuit clerks, and the Mobile County AEM begins with a non-sentence merely listing names and titles, but the following sentences show the nexus of these defendants to the case:

Each one serves as the absentee ballot manager for federal, state, and county elections in their respective Alabama counties. As the absentee ballot managers, they are charged with enforcing the Witness and Photo ID Requirements, processing and distributing absentee ballot applications, and validating and canvassing absentee ballots.

Id. at ¶ 40 (emphasis added). After this paragraph, neither Mrs. Roberson’s name nor the word “clerk” appears in the remainder of the Complaint.

The circuit clerk has some duties relating to elections other than the option to serve as AEM. *See, e.g.*, Ala. Code § 17-1-2(1), (6) (serves as member on the appointing board and the canvassing board for non-primary elections); *see also id.*

at § 17-11-2 (circuit clerk may decline to serve as AEM). However, the circuit clerk has no involvement with the Challenged Provisions.

The circuit clerk does not enforce the witness requirement. At noon on the day of the election, the AEM collects received absentee ballots, which are still in their affidavit envelopes, and provides them to other appointed election officials, and the election officials “examine each affidavit envelope to determine if the signature of the voter has been appropriately witnessed.” *Id.* at § 17-11-10(b). After the election officials determine the witness requirement is met, they place the absentee ballots in the ballot box for counting. *Id.* Prior to turning over the absentee ballots, the AEM collects the absentee ballots and records having received them, but she is not to break the seal of the affidavit envelope. *Id.* at § 17-11-10(a).

The AEM’s and the board of registrars’s duties, not the circuit clerk’s, touch on the photo ID requirement. The AEM receives absentee ballot applications and determines, based on a checklist of statutorily defined parameters, whether the voter needs to provide a copy of photo identification to vote by absentee. *Id.* at §§ 17-9-30(b), 17-10-2(c). If the AEM determines that the application requires photo ID but the voter does not timely provide it, the AEM can issue a provisional absentee ballot. *Id.* at §§ 17-9-30(c), 17-10-2(c)(1). The board of registrars, of which the circuit clerk is not a member, certifies provisional ballots for counting

by confirming the identity of the voter. *See id.* at §§ 17-10-2(f), (g). Only after the board of registrars certifies and approves a provisional ballot for counting does the canvassing board, on which circuit clerk sits for non-primary elections, count the approved provisional ballots. *Id.* at §§ 17-1-2(6), 17-10-2(f). A plain reading of the statute makes clear that Mrs. Roberson—as circuit clerk on the canvassing board for a non-primary—has no discretion but to tabulate provisional ballots certified by the board of registrars. *See id.* at § 17-10-2(f) (“[T]he canvassing board . . . shall tabulate provisional ballots which have been certified by the board of registrars as cast by registered and qualified voters . . .”). Again, the circuit clerk has no role in enforcing the photo-ID requirement, only counting certified provisional ballots that other officials certify.

Finally, the circuit clerk has no ability to approve curbside voting. The county commission establishes polling places and assigns voting machines for precincts and polling places. *See id.* at §§ 17-6-3, 17-6-4. Also, the probate judge is the chief election official of the county, and he oversees the administration of voting procedures and trains poll workers. *See id.* at § 17-8-9. State law does not provide the circuit clerk authority to establish these procedures.

Not only does the circuit clerk not have the enforcement power over the challenged provisions, Plaintiffs have failed to plead otherwise. The complaint is clear that Plaintiffs are seeking a Court order relating to duties of AEMs, not

circuit clerks. The parties named in the suit indicate a focus on AEMs because Plaintiffs named the AEMs of Jefferson, Lee, and Mobile Counties, yet they did not separately name the circuit clerk of Mobile County. This leads to the conclusion that Plaintiffs did not join the Mobile County circuit clerk because the Plaintiffs' focus is on AEMs and not circuit clerks. Given a circuit clerk's role, in large part, as a non-discretionary vote counter, this makes perfect sense.

With the substitution of Mr. Majors into the suit, the Plaintiffs have their public official to continue with the case. Plaintiffs should not be permitted to bind Mrs. Roberson to the case when they have not made any allegations pleading any claim, let alone a plausible one. Plaintiffs have failed to plead or show that Mrs. Roberson, as circuit clerk, could effect the changes they seek, and the Court should dismiss the claims against Mrs. Roberson.

II. The Court lacks subject-matter jurisdiction over the claims against Mrs. Roberson because of issues relating to standing and immunity.

For reasons like those above, the Court also lacks subject-matter jurisdiction over Plaintiffs' claims against Mrs. Roberson as circuit clerk. No longer the Lee County AEM and only the circuit clerk, Mrs. Roberson cannot enforce the challenged provisions, thus Plaintiffs' alleged injuries are not traceable to any action by Mrs. Roberson or redressable by an order against her. Moreover, as an officer not charged with enforcing the Challenged Provisions, Mrs. Roberson is protected by Eleventh Amendment immunity.

Eleventh Amendment immunity is jurisdictional in nature, and it prohibits suits against states or against state officials when the state is the real party in interest. *See Edelman v. Jordan*, 415 U.S. 651, 678 (1974); *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999) (citations omitted). “[T]he Eleventh Amendment bars suits against state officials in federal court seeking retrospective or compensatory relief, but does not generally prohibit suits seeking only prospective injunctive or declaratory relief.” *Summit Med.*, 180 F.3d at 1337 (emphasis added) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). However, a state officer who does not have responsibility for enforcing a challenged provision cannot be stripped of this immunity. *See id.* at 1341 (citation omitted). As shown through this motion, Mrs. Roberson does not enforce the Challenged Provisions, thus she should retain her immunity and be dismissed.

Additionally, while not passing judgment on Plaintiffs’ standing against other defendants in this case, Plaintiffs do not have standing to sue Mrs. Roberson in her role as circuit clerk. Plaintiffs bear the burden of proving the requisite elements of standing.² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). “The Art. III doctrine that requires a litigant to have

² For the sake of streamlining the arguments for the Court, Mrs. Roberson only addresses the causation and redressability prongs of the standing calculus. However, Mrs. Roberson does not concede that Plaintiffs’ have presented a concrete or particularized injury-in-fact. *See Lujan*, 504 U.S. at 560 (citations omitted).

“standing” to invoke the power of a federal court is perhaps the most important of these doctrines [that pertain to the case-or-controversy requirement]. “An individual plaintiff has standing under the Constitution’s case-or-controversy limitation in Art. III, § 2, when ‘(1) [the plaintiff] has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’” *Hossfeld v. Compass Bank*, No. 2:16-CV-2017-VEH, 2017 WL 5068752, at *2 (N.D. Ala. Nov. 3, 2017) (quoting *Friends of the Earth v. Laidlaw Envt’l Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

“Article III standing requires a ‘causal connection between the injury and the conduct complained of’—in other words, the injury must be ‘fairly traceable to the challenged action of the defendant.’” *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1271 (11th Cir. 2019) (quoting *Lujan*, 504 U.S. at 560–61). The challenged action must stem from the defendant, not a third party outside of the suit. *See id.* (citations omitted).

Fair traceability and redressability seemingly overlap and have been described as two facets of causation. *See Allen*, 468 U.S. at 753 n.19 (citing C. Wright, *Law of Federal Courts* § 13, p. 68, n. 43 (4th ed. 1983)). “To the extent there is a difference, it is that [traceability] examines the causal connection

between the assertedly unlawful conduct and the alleged injury, whereas [redressability] examines the causal connection between the alleged injury and the judicial relief requested.” *Id.* Where the persons or entities that can take the effective action(s) are not parties to the suit, the Court cannot redress the alleged wrong. *See Lujan*, 504 U.S. at 568–69 (Court’s order would not have been effective because it would not bind non-parties).

Mrs. Roberson is a circuit clerk, a state constitutional officer. Ala. Const. § 160(b). Yet, as discussed above, Mrs. Roberson has no authority to effect change to, enforce, or apply any of the challenged provisions. No longer the AEM, she does not inspect absentee ballot applications for photo ID, and the board of registrars certifies any photo-ID-deficient provisional ballots for counting. *See, e.g.*, Ala. Code §§17-10-2(c), (f), (g). As circuit clerk, Mrs. Roberson does not inspect or enforce the witness requirements for absentee ballots, other election officials do. *See id.* at § 17-11-10. Finally, Mrs. Roberson cannot establish voting procedures, such as curbside voting, in Lee County; that is left up to other officials not parties to this suit. *See id.* at §§ 17-6-3, 17-6-4 (county commission); § 17-8-9 (probate judge). Ultimately, all the Challenged Provisions fall under the purview of other officials, including third parties not in this lawsuit.

Thus, as only circuit clerk, Mrs. Roberson has no connection to enforcing the challenged provisions, and she is entitled to Eleventh Amendment immunity.

See Summit Med., 180 F.3d at 1341. Because of her lack of authority, purported negative effects of the challenged provisions cannot be fairly traced to Mrs. Roberson. *See Cordoba*, 942 F.3d at 1271 (quoting *Lujan*, 504 U.S. at 560–61). Finally, if the Court did order Mrs. Roberson to take some action, that relief would be inadequate because Mrs. Roberson does not enforce the challenged provisions—other non-party officials do. *See Lujan*, 504 U.S. at 568–69. In sum, the Court lacks subject-matter jurisdiction because Plaintiffs have not overcome Mrs. Roberson’s Eleventh Amendment immunity or established they have standing to bring the claims against Mrs. Roberson, and the Court should dismiss Mrs. Roberson from this suit.

Conclusion

For these reasons, Mrs. Roberson asks the Court to dismiss her from this action because there is no plausible or justiciable claim levied against her.

/s/ Robert J. Sewell
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CERTIFICATE OF SERVICE

I certify that on June 9, 2020, I filed the foregoing document electronically the CM/ECF system, which will automatically serve all counsel of record.

/s/ Robert J. Sewell
OF COUNSEL