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

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

PEOPLE FIRST OF ALABAMA, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	**Civil Action Number**
v.	)	**2:20-cv-00619-AKK**
	)	
JOHN MERRILL, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

"Voting is the beating heart of democracy. It is a fundamental political right, because it is preservative of all rights."[1] One group that consistently exercises this right at higher rates of participation is persons 65 or older.[2] It is also a group that is at substantially higher risk during the current COVID-19 pandemic. The individual plaintiffs in this case are generally over 65,[3] have underlying medical conditions, and qualify as individuals with disabilities under the Americans with Disabilities Act. The plaintiffs assert that Alabama's election laws—specifically, the requirement that a notary or two witnesses must sign absentee ballots, the requirement that absentee voters must submit a copy of their photo ID, and the state's de facto ban on curbside voting—run afoul of the

[1] *Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019) (citation omitted).

[2] *Voting Rates by Age*, https://www.census.gov/library/visualizations/2017/comm/voting-rates-age.html, (last visited June 15, 2020).

fundamental right to vote and violate federal law in light of the COVID-19 pandemic. To ensure that the individual plaintiffs and those similarly situated to them can continue to exercise their fundamental political right to vote without jeopardizing their health during this pandemic, the plaintiffs filed this lawsuit on May 1 seeking relief.

COVID-19 is a novel respiratory disease that can cause severe complications, including respiratory failure and death, and it has spread rapidly around the world, resulting in more than 115,000 deaths in the United States alone and leading to numerous restrictions ordered by states to try to curb this extraordinary public health crisis. Although COVID-19 presents risks to the entire population, people who have underlying medical conditions, such as diabetes or hypertension, or who are over 65, African-American, or disabled have substantially higher risk of developing severe cases or dying of COVID-19. The individual plaintiffs are in those high-risk groups, and to protect their health, these plaintiffs have complied with relevant public health guidelines by self-isolating or limiting their interactions with others to reduce their exposure to COVID-19. The plaintiffs contend that the challenged election laws force them and similarly-situated voters to choose between jeopardizing their health by leaving their homes and engaging in person-to-person contact they would not otherwise have or sacrificing their right to vote during the COVID-19 pandemic. And, because we are in the middle of a pandemic that, at least at this juncture, has no end in sight, the plaintiffs seek a

preliminary injunction barring the defendants from enforcing these requirements so that they can exercise their right to vote by absentee ballot or by curbside voting from the safety of their cars in those jurisdictions, if any, that are willing to implement this practice.

On the other hand, the defendants contend that the challenged laws are necessary to preserve the legitimacy of upcoming elections by preventing voter fraud and safeguarding voter confidence. But, the plaintiffs have shown that Alabama has other election law provisions that are effective at preventing fraud and safeguarding voter confidence, including laws requiring all absentee voters to identify themselves by providing a driver's license number or the last four digits of their social security number and to submit an affidavit signed under penalty of perjury verifying their identity. And, Alabama already waives the photo ID requirement for absentee voters 65 or older who also have a physical infirmity that renders them unable to access their assigned polling place. As to the photo ID requirement, the individual plaintiffs w

voting), or that, in light of other provisions of state election law, will not undermine the state's interest in preventing voter fraud (waiver of the witness requirement). Therefore, because the plaintiffs have shown that the challenged laws will likely dissuade some citizens from voting and "even one disenfranchised voter . . . is too many,"[4] the court finds that the burdens imposed by the challenged election laws on voters at high risk of severe complications or death from COVID-19 are not justified by the state's interests in enforcing the laws.

As a result, and for the reasons explained below, the court will grant the plaintiffs' motion for a preliminary injunction in part, and, as to the July 14 runoff election, the court will enjoin: (1) the witness requirement for absentee ballots for voters who cannot safely obtain the signatures of two witnesses or a notary public due to the COVID-19 pandemic; (2) the photo ID requirement for absentee voters who are over the age of 65 or disabled and who cannot safely obtain a copy of their photo ID due to the COVID-19 pandemic; and (3) the state's de facto ban on curbside voting to permit jurisdictions willing to implement such a practice, if any, to do so.

This opinion is divided as follows. Part o vilenged

Id.

go out in public. *Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html, (last visited June 15, 2020). Given how easily the virus can spread, the CDC

apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7, (last visited June 15, 2020).

Alabama has also taken a number of actions in response to COVID-19

votes to be counted, all absentee voters must return with their absentee ballot an affidavit that is signed by a notary public or two adult witnesses who witnessed the voter sign the affidavit. Ala. Code § 17-11-7(b). However, because "person-to-person contact increases the risk of transmitting COVID-19," Governor Ivey issued a rule permitting notaries to witness the signing of absentee affidavits through videoconferencing. Doc. 16-17 at 2-3.

The plaintiffs in this lawsuit include four individual plaintiffs—Robert Clopton, Eric Peebles, Howard Porter, and Annie Carolyn Thompson. Doc. 1 at 9–12. All four are at higher risk of contracting a severe case of the virus due to their age, race, or underlying medical conditions, and for that reason each plaintiff has thus far exercised great lengths to self-isolate and limit his or her exposure to the virus. *Id.* at 9–12. Though each plaintiff is registered and intends to vote, the plaintiffs maintain that complying with Alabama's election laws would force them to increase their exposure to the virus. *Id.*

The individual plaintiffs all say they would prefer to vote absentee. But Clopton, Peebles, and Thompson allege that they cannot comply with the witness requirement without leaving their home or bringing in someone outside of their household. Doc. 16-45 at 2–10, 17–21. And Thompson tells the court that she cannot comply with the photo ID requirement without going to a business to make

The organizational plaintiffs allege that they have many members who are in the same predicament as the individual plaintiffs—they are eligible to vote and would like to, but they are afraid that complying with Alabama's witness and photo ID requirements would force them to violate social-distancing protocol. *Id.* at 8, 12–14. These members would also prefer to vote curbside, rather than inside the polling place, if they cannot vote absentee. *Id.* The organizational plaintiffs further allege that given the heightened interest in absentee voting due to expanded eligibility and fear of viral exposure at polling places, Alabama's election laws are forcing them to divert resources away from their usual get-out-the-vote expenditures and towards educating their members about and helping them to comply with absentee voting procedures. *Id.*

Based on these allegations, the individual and organizational plaintiffs move the court to enjoin three election practices in Alabama—the witness requirement, the photo ID requirement, and the state's de facto ban on curbside voting. Doc. 15. The plaintiffs allege that these election practices violate (1) the individual plaintiffs' and the organizational plaintiffs' members' right to vote under the First and Fourteenth Amendments, (2) Title II of the Americans with Disabilities Act ("ADA"), and (3) for the witness requirement only, § 201 of the Voting Rights Act ("VRA"). *Id.* The plaintiffs bring these claims against the following defendants in their official capacity: Governor Kay Ivey; Secretary of State John Merrill; Alleen Barnett, the absentee ballot manager for Mobile County; Jacqueline Anderson-

questions. With the exception of Governor's Ivey claim to immunity, the court

Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9 (1977).

In this case, the plaintiffs seek three injunctions: (1) to suspend the enforcement of the photo ID requirement for absentee voters; (2) to suspend the enforcement of the witness requirement; and (3) to lift the ban on curbside voting. The court will thus consider whether the plaintiffs have established an injury for each form of relief sought.

a.

For the photo ID requirement, Plaintiffs Porter and Thompson, both registered voters who intend to vote in the runoff election on July 14, claim that the requirement burdens their right to vote. Docs. 16-45 at 12–20. Their injury is a given and should not be challenged. After all, it is settled law that when plaintiffs "are required to obtain photo identification before they can vote, [t]he imposition of that burden is an injury sufficient to confer standing regardless of whether [the plaintiffs] are able to obtain photo identification." *Common Cause v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009). In fact, even if Porter and Thompson already had a copy of their IDs available, they would still have standing to challenge the requirement. The Eleventh Circuit explained why:

> Even if [the plaintiffs] possessed an acceptable form of photo identification, they would still have standing to challenge the statute that required them to produce photo identification to cast an in-person ballot. . . . Requiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional

mid-July.[7] This argument mischaracterizes the alleged injury. The injury is not that Porter or Thompson will contract COVID-19, or even that they will be forced to take a serious risk of contracting COVID-19. The injury is that they will have to comply with the state's photo ID requirement in order to vote absentee. This injury is not speculative; it is "certainly impending," since they intend to vote in the election on July 14. , 568 U.S. 398, 409 (2013).

b.

The injury analysis for the witness requirement is the same. Plaintiffs Clopton and Thompson claim that the witness requirement burdens their right to vote. Docs. 16-45 at 2–5, 17–20. As registered voters who intend to vote in the runoff election on July 14, *id.*, they have standing to challenge the witness requirement. The requirement that these plaintiffs must find two adult witnesses or a notary public in order to vote absentee is itself an injury sufficient to confer standing. *See Common Cause*, 554 F.3d at 1351. The defendants' arguments that the injury is too speculative and not particularized enough to confer standing are rejected for the same reasons explained above.

c.

For the ban on curbside voting, e

To summarize, the individual plaintiffs have suffered an injury for standing purposes for each form of relief sought.[8] The court thus proceeds to the second element of standing: traceability.

2.

To establish traceability, the plaintiff must show "a causal connection between her injury and the challenged action of the defendant—*i.e.*, the injury must be fairly traceable to the defendant's conduct, as opposed to the action of an absent third party." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (en banc) (citations omitted).

Before evaluating traceability for the claims discretely, the court first responds briefly to the defendants' general argument that the plaintiffs' injury is caused by the virus, not the state. This argument again mischaracterizes the injury. The injury alleged is the state's decision to force the individual plaintiffs to comply with the complained-of requirements for voting. The virus might make the injury severe—because complying with the requirements might expose the plaintiffs to serious health risks—but it does not cause the legal injury. With that said, the

[8] Because the court has identified a plaintiff with standing for each form of relief sought, the court need not address the defendants' arguments about whether the organizational plaintiffs lack standing. But the organizational plaintiffs likely do have standing under existing precedent. *See Common Cause*, 554 F.3d at 1350–51 (finding that the NAACP had standing to challenge Georgia's photo ID requirement because it would have to divert resources to educate and assist voters with complying); *Arci* , 772 F.3d 1335, 1342 (11th Cir. 2014) (finding that organizational plaintiffs had standing to sue on behalf of their members).

'absentee election manager,' who shall fulfill the duties assigned by this chapter."). In this capacity, the AEMs "conduct or oversee the absentee ballot process." Doc. 34-1 at 2. For this reason, the affidavit that the witnesses are required to sign is

and they are not even selected until 15 to 20 days before the election.[11] Furthermore, according to the state, the AEMs also count the absentee ballots "in conjunction with other local officials." Doc. 34-1 at 2. Based on that representation, it appears that the AEMs may also check the absentee ballots for witness signatures.

In the end, the court is satisfied that the AEMs—as the officials in charge of the absentee voting process who oversee the counting of absentee ballots—are proper defendants for a claim challenging the requirement that an absentee ballot must be witnessed to be counted.

c.

The ban on curbside voting can easily be traced to Secretary Merrill. As the defendants acknowledge, state law does not prohibit curbside voting. Instead, Secretary Merrill took it upon himself, "on at least two occasions," to shut down county efforts to establish curbside voting operations, because he believes such operations do not comply with other election laws. Doc. 34-1 at 21. To the extent a ban exists, it exists because of Secretary Merrill, and the injury can thus be fairly traced to him.

[11] *See* Ala. Code § 17-8-1 (providing that absentee election officials shall be appointed by the appointing board "not more than 20 nor less than 15 days before the holding of any election").

3.

Finally, to establish redressability, a decision in the plaintiffs' favor must "significantly increase the likelihood" that the plaintiffs' injury will be redressed. *Lewis*, 944 F.3d at 1296 (citation omitted). Furthermore, "it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses

In fact, the Fifth Circuit, in almost precisely the same context, adopted this theory of redressability.[15] However, the Eleventh Circuit—which this court is of course bound to follow—recently rejected a similar theory. *See Jacobson v. Fla.* , 957 F.3d 1193, 1207–12 (11th Cir. 2020). In *Jacobson*, the plaintiffs challenged "the order in which candidates appear on the ballot in Florida's general elections." *Id.* at 1197. The court determined that the plaintiffs alleged injury "is neither fairly traceable to [Florida's Secretary of State] nor redressable by a judgment against her because she does not enforce the challenged law." *Id.* at 1198. Instead, "Florida law tasks" the local Supervisor of Elections for each of Florida's 67 counties "with placing candidates on the ballot in the correct order." *Id.* at 1199. These supervisors are independent of the Secretary. *Id.* at 1207. Thus, "[a]n injunction ordering the Secretary not to follow the ballot statute's instructions for ordering candidates cannot provide redress, for neither she nor her agents control the order in which candidates appear on the ballot." *Id.* at 1208. And any judgment the court issued would not be binding against the

The Eleventh Circuit rejected the idea that "the Secretary's position as the chief election officer of the state" established standing, because nothing connected the Secretary specifically to the order of candidates on the ballot. *Id.* (citation

if the court enjoined Secretary Merrill from banning otherwise lawful curbside voting operations, counties would be free to provide them, if they are so inclined, and the ban would be lifted.

* * *

In conclusion, the plaintiffs have demonstrated that they likely have standing to pursue each of their claims. The court thus proceeds to the defendants' other arguments regarding the case's justiciability.

B.

The defendants assert that they are each entitled to sovereign immunity. The doctrine of state sovereign immunity "prohibits suits against state officials where the state is, in fact, the real party in interest." *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999). However, there is an exception for "suits against state officers seeking prospective equitable relief to end continuing violations of federal law." *Id.* (citing *Ex parte Young*, 209 U.S. 123 (1908)). The *Young* doctrine thus permits "the exercise of the judicial power of the United States where a plaintiff seeks to compel a state officer to comply with federal law." *Id.* But the *Young* doctrine does not apply "unless the state officer has some responsibility to enforce the statute or provision at issue." *Id.* at 1341; *Ex parte Young*, 209 U.S. at 157 ("[I]t is plain that such officer must have some connection with the enforcement of the act.").

The analysis for whether a state official has "some connection" to the

challenged statute is similar to the analysis for whether a state official is a proper defendant for the purposes of traceability and redressability. *See Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013). But they are still "separate issues." *Jacobson*, 957 F.3d at 1210. The Eleventh Circuit suggested that the standard for qualifying as a proper defendant under *Ex parte Young* is less exacting:

naming the governor as a defendant." , 323 F.3d 937, 949 (11th Cir. 2003).[17] Similarly, the Governor's emergency powers do not supply the requisite connection. Otherwise, the Governor would be a proper defendant in virtually every suit challenging a state statute. Accordingly, Governor Ivey is due to be dismissed from the case.

The plaintiffs also named the state as a defendant. The only claims the plaintiffs bring against the state are under the VRA and the ADA. Because Congress validly abrogated states' sovereign immunity for claims brought under the VRA and the ADA, the state is not entitled to sovereign immunity. *Ala. State Conference of the NAACP v. Alabama*, 949 F.3d 647, 655 (11th Cir. 2020) (finding that the VRA abrogated state's sovereign immunity);

Florida, 945 F.3d 1339, 1351 (11th Cir. 2020) (finding that the ADA abrogated state's sovereign immunity).

C.

Defendant Roberson, the Circuit Clerk for Lee County, argues that the claims against her are moot because she no longer serves as the AEM for Lee County. In a nutshell, the circuit clerk of each county serves as the AEM unless he or she declines, in which case the appointing board selects a replacement. Ala. Code § 17-11-2. Here, after learning of this suit, Roberson opted to decline to serve as AEM, doc. 41 at 1–2, and promptly argued that the claims against her are

[17] The Supreme Court long-ago reached the same conclusion. *See Fitts v. McGhee*, 172 U.S. 516, 529–30 (1899).

moot as a result. But the plaintiffs sued Roberson in her official capacity as circuit clerk through which she was presumptively serving as the AEM of Lee County. And, when a party sued in her official capacity resigns, the official's "successor is automatically substituted as a party." Fed. R. Civ. P. 25(d). Accordingly, when the appointing board selects a replacement AEM, the successor AEM for Lee County will automatically be substituted. The claim is not moot.

D.

Finally, in a footnote, the defendants urge the court to dismiss the claims as non-justiciable political questions. Doc. 36 at 21 n.16. Doing so would result in the court abdicating from its role to address disputes that arise under the Constitution or federal statutes. This is precisely what the plaintiffs seek in this case—*i.e.*, they ask the court to decide whether the challenged provisions run afoul of the Constitution, the VRA, or the ADA. The court agrees with the Fifth Circuit, which easily dismissed the contention that a similar claim was a non-justiciable political question by noting that the "standards for resolving such claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rights." *Texas Democratic Party*, -- F.3d --, 2020 WL 2982937 (5th Cir. 2020). ` h ï

vote is sacrosanct, and "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

When deciding a constitutional challenge to state election laws, district courts apply a flexible standard outlined by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the *Anderson-Burdick* balancing test, the court must "weigh the character and magnitude of the burden the State's rule imposes on [First and Fourteenth Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citation omitted). "[T]he rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. If the challenged law severely restricts the right to vote, then strict scrutiny applies, meaning the law must be narrowly drawn to serve a compelling state interest. *Id.* (citation omitted). If the challenged law "imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (citation omitted). 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." *Lee*

Thus, the plaintiffs ask the court to enjoin this requirement for all voters. Doc. 1 at 44; 20-1 at 9.

a.

To evaluate the plaintiffs' likelihood of success on this claim, the court must first decide whether the witness requirement imposes a burden on the right to vote that is severe enough to trigger strict scrutiny. *See Lee*, 915 F.3d at 1319. First of all, there is no doubt that the witness requirement imposes some burden on the right to vote. After all, when Governor Ivey issued the emergency rule allowing notaries to witness affidavits by videoconference, she explained that the rule was necessary because "person-to-person contact increases the risk of transmitting COVID-19," effectively acknowledging that the witness requirement increases absentee voters' exposure to the virus. Doc. 16-17 at 2–3. Exposure to a deadly virus is a burden.

To show that the witness requirement severely burdens the right to vote, the plaintiffs point to evidence that approximately 1.3 million adults in Alabama live with only one other person, and more than 555,000 Alabamians live alone, including approximately 215,000 who are 65 or older and 186,000 black Alabamians, who are at higher risk of COVID-19 complications. Docs. 20-1 at 22–23; 16-37 at 4–5. The court accepts that the COVID-19 pandemic and resulting social-distancing recommendations will undoubtedly make it more difficult for many of these individuals to satisfy the witness requirement to vote

absentee. But, the demographic evidence does not establish that the witness requirement imposes a severe burden on the right to vote sufficient to trigger strict scrutiny. The demographic statistics do not indicate whether voters living alone or with only one other person regularly interact with individuals outside of their household who could serve as witnesses. Moreover, it is possible for a voter to obtain the required witness signatures without violating the CDC's social-distancing guidelines. For example, the voter and witnesses could wear masks and gloves and remain more than six feet apart outdoors, or be physically separated from one another by a window or open doorway. To be sure, observing social-distancing guidelines does not eliminate the risk of contracting COVID-19, but it does substantially mitigate the risk. The ability of many voters to comply with social-distancing protocol and to satisfy the witness requirement lessens the severity of the burden on voters' right to vote.

Even so, satisfying the witness requirement could impose a more significant burden on some voters who live alone and who are at heightened risk of severe COVID-19 complications due to age, disability, pre-existing conditions, and race. *See* doc. 16-4 at 8. For example, Peebles lives alone and has been self-isolating since mid-March because he is at high risk of complications from COVID-19 due

because their shifts do not overlap, and he only interacts with one caregiver at a time. *Id.*[19]

Another plaintiff, Clopton, lives with only his wife. *Id.* at 4. Since mid-March, Clopton has left his home only for a medical appointment and to shop for groceries during "senior hours" because he is at high risk from COVID-19 due to his age, underlying conditions, medical history, and race. *Id.* at 3-4. The Cloptons have not allowed visitors into their home since mid-March, with the exception of Mrs. Clopton's sister who has been in their home's entryway on two occasions. *Id.* at 4. And, Clopton is not comfortable with the risk of inviting a second witness to his home even if the witness remains outside. *Id.* at 4-5.

Finally, People First, GBM, and the Alabama NAACP have members who live alone, are at high risk from COVID-19 complications, and prefer to vote by absentee ballot to minimize their risk from exposure to the virus. *Id.* at 24-25, 31, 36. These plaintiffs maintain that their affected members will not be able to comply with the witness requirement without risking their health by engaging in person-to-person contact in contravention of current health guidelines. *Id.* at 24–26, 31.

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Based on the record, it is clear that the plaintiffs are rightly concerned about the risk of COVID-19 and minimizing their potential exposure to the virus. However, even if the witness requirement imposes a significant burden on some individual plaintiffs and members of the organizational plaintiffs, that is not sufficient at this juncture to establish that strict scrutiny applies. *See Crawford*, 553 U.S. at 206 (J. Scalia, concurring) (nothing that when determining whether strict scrutiny applies, the Court has looked at the burden on voters "categorically and di not consider the peculiar circumstances of individual voters or candidates") (citations omitted).

This finding does not end the analysis, however. The plaintiffs have shown that satisfying the witness requirement presents some risk of COVID-19 exposure to voters who do not regularly come into contact with at least two adults simultaneously, even if these voters follow social-distancing guidelines. *See* doc. 16-4 at 4–5, 8. And, this burden is not "exceedingly light" as the defendants

slight burden on the right to vote, this burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (citation omitted). Thus, the court turns to the "precise interests put forward by the State as justifications f

Plaintiff[s'] rights.'" *St* , 774 F.3d 689, 694 (11th Cir. 2014) (quoting *Anderson*

on the absentee ballot applications, falsifying absentee ballot applications or verification documents is a felony. Ala. Code §§ 17-11-7; 17-17-24(a); doc. 16-46 at 19.

The defendants do not dispute that these laws and requirements provide an effective deterrent to voter fraud. *See* doc. 36. In fact, Secretary Merrill has acknowledged that a bill proposing to eliminate the witness requirement for absentee ballots and add a photo ID requirement would strengthen absentee voting laws in Alabama. *See* doc. 16-46 at 23–24.[24] In light of the state's current photo ID requirement for absentee voter applications—which will remain in place for most absentee voters, *see* note 25, *supra*—Secretary Merrill's statement undermines the legitimacy of the State's interest in maintaining the witness requirement to prevent fraud. In addition, the defendants' acknowledgement that persons who are essentially unknown to a voter, such as a "mail delivery person, grocery or food delivery person, police officer or sheriff's deputy," can serve as witnesses, doc. 34-1 at 20, also undermines the legitimacy of the witness requirement as an effective means of deterring fraud. Moreover, as the Western District of Virginia recently observed, "[f]or the fraudster who would dare to sign

[24] The bill, introduced by state Senator Rodger Smitherman, would have eliminated the requirement that voters give a reason to vote absentee and the witness requirement for absentee voters, and would have added a requirement that absentee voters include a copy of a photo ID with their application for an absentee ballot. Doc. 16-46 at 23. According to an article about the bill, Secretary Merrill's office suggested that Sen. Smitherman propose the changes in the absentee ballot law, and Secretary Merrill "said he believed it would strengthen the absentee voting law." *Id.* at 23–24.

the name of another qualified voter at the risk of being charged with [a] felon[y] [], writing out an illegible scrawl on an envelope to satisfy the witness requirement would seem to present little to no additional obstacle—at least on the record before the [c]ourt." *League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 2158249, at *9 (W.D. Va. May 5, 2020). While the state has a legitimate interest in preventing voter frau

homes and risk exposure to the virus.

the risk of potential exposure to COVID-19 is itself a burden. This burden is not

of a photo ID would deter that individual. In sum, based on the record before the court, the state's interest in requiring this limited class of voters to comply with the photo ID requirement is fairly minimal.

Weighed against this interest, the burden on that group of voters is significant. The defendants do not dispute the plaintiffs' evidence that some members

ID. Thus, the plaintiffs have shown a substantial likelihood of success on this claim.[30]

3.

The defendants do not directly dispute that contention, but instead state that "every voter in Alabama can vote absentee." *See* doc. 36 at 27. And, the defendants contend that "mandating curbside voting raises a host of practical concerns," including how the state could find enough poll workers to cover inside and curbside voting at almost 2,000 polling places, control lines of traffic at the polls, and preserve the privacy of ballots. *Id.* at 36 at 9, 26–27. But, this contention misunderstands the plaintiffs' claim, and the defendants' concerns do not address the issue at hand.

The plaintiffs seek an order preventing the state from prohibiting local election officials from providing curbside voting—not an order requiring the state to provide curbside voting. Docs. 1; 20-1 at 35–37. The defendants identify no fraud-prevention interest that justifies prohibiting local election officials from

Code § 17-9-

an individual cannot meet an essential eligibility requirement, "the only possible accommodation is to waive the essential requirement itself . . . [but] [w]aiving an essential eligibility standard would constitute a fundamental alteration in the nature of the . . . program [at issue]." *Pottgen v. Missouri State High School Activities Ass* , 40 F.3d 926, 930 (8th Cir.1994).[32] Therefore, a plaintiff who does not meet an essential eligibility requirement is not qualified to state a claim under the ADA. The question then becomes: is the requirement essential for eligibility in the program? "[W]hether an eligibility requirement is essential is determined by

requirement is essential to the fundamental nature of the activity at issue—it must provide evidence that the procedural requirement is necessary to the substantive purpose undergirding the requirement. *See Schaw v. Habitat for Humanity*, 938 F.3d 1259, 1266–67 (11th Cir. 2019) ("Whether a particular aspect of an activity is

itself, a violation of the ADA. *See Bircoll*, 480 F.3d at 1088. Instead, a plaintiff must show that the failure to accommodate created an injury. *Id.*

If a plaintiff makes a prima facie case of discrimination, she must then propose a reasonable modification to the challenged requirement or provision. This remedy should be a "proportionate and reasonable modification of a service that is already provided, and it [should] not change the nature of the service." *Na Ass of the Deaf v. Fla.*, 945 F.3d 1339, 1351 (11th Cir. 2020). Certain public offerings cannot be made meaningfully accessible, while others would demand prohibitively high cost and effort. Accordingly, a successful ADA claim requires plaintiffs to "propose a reasonable modification to the challenged public program that will allow them the meaningful access they & ` th oتي]l

A public entity need not "employ any and all means to make judicial services accessible to persons with disabilities." *Lane*, 541 U.S. at 531–32. Rather, the entity must make "reasonable modifications that would not fundamentally alter the nature of the service provided . . . [or] impose an undue financial or administrative burden." *Id*. (citations omitted). A "public entity has the burden of proving that compliance with this subpart would result in a 'fundamental' alteration." *Hindel v. Husted*, 875 F.3d 344, 348 (6th Cir. 2017) (citing 28 C.F.R. § 35.164); *see also Schaw*, 938 F.3d at 1267. Without evidence that the proposed modification is "unreasonable or incompatible" with the state's program, a defendant cannot succeed in the affirmative defense. *Hindel*, 875 F.3d at 348. The reasonable-modification inquiry in Title II–ADA cases is "a highly fact-specific inquiry [and] terms like reasonable are relative to the particular circumstances of the case." *Bircoll*, 480 F.3d at 1085. This inquiry entails assessing whether the proposed modification "would eliminate an/ḥ den."

The plaintiffs contend that each of the challenged provisions violate the ADA and submit recommendations for purportedly reasonable modifications. Docs. 1; 20-1. The defendants dispute the plaintiffs' prima facie case and assert that the c

'right to participate in the democratic process.'" Doc. 20-1 at 31 (citing

, 945 F.3d at 1349).

The individual plaintiffs' eligibility is not in contention. All four are registered voters in Alabama and plan to vote in the 2020 elections. Doc. 16-45 at 2–20. And, all four have ADA-eligible disabilities that render them highly vulnerable to COVID-19, and Clopton, Porter, and Thompson are eligible to vote in the runoff election on July 14, 2020. *Id.*

Each of the individual plaintiffs usually votes in person, but each intends to vote absentee in 2020 to avoid exposure to COVID-19. *Id.* All four contend that the witness requirement serves to exclude them from voting absentee based on their disabilities because they live alone or with only one other person and do not generally interact with at least two adults simultaneously. In addition, the organizational plaintiffs contend they have members who live alone and will not be able to comply with the witness requirement without risking their health because doing so would require person-to-person contact in contravention of current health guidelines. Doc. 16-45 at 24–26, 31.

At this stage, the defendants do not dispute "that the individual Plaintiffs' allegations each meet the ADA's definition of disability." Doc. 36 at 22 n.26. Their quarrels with the plaintiffs' prima facie case are three-fold: (1) that the plaintiffs are not "qualified individuals because the witness requirement is an essential eligibility requirement of having an absentee ballot," doc. 36 at 28, (2)

that the plaintiffs are not excluded because the witness requirement does not present a "concrete barrier," *id*. at 29, and (3) that any exclusion the plaintiffs face is not a result of their disabilities, but rather "stem[s] from [their] own choices," *id*. The court respectfully disagrees with the defendants' second and third contentions.[36] However, the court agrees that at this stage, the plaintiffs have not shown a likelihood of success that they can meet the essential eligibility requirements of the Alabama voting regime.

The defendants assert that the witness requirement is an essential eligibility requirement because it "goes to the integrity and sanctity of the ballot and election." *Id*. (citing Ala. Code § 17-11-10(b)).[37] The plaintiffs counter that the witness requirement "does not meaningfully protect the integrity of the absentee ballot," noting that (1) the current regulations do little to ensure the integrity of the requirement, and (2) several other provisions of Alabama law sufficiently protect

[36] *See* part III.B.a.2, *supra*.

[37] The relevant section reads:

> No poll worker or other election official shall open an affidavit envelope if the voter's affidavit signature or mark is not witnessed by the signatures of two witnesses or a notary public, or other officer, including a military commissioned officer, authorized to acknowledge oaths, and no ballot envelope or ballot therein may be removed or counted. The provision for witnessing of the voter's affidavit signature or mark in Section 17-11-7 goes to the integrity and sanctity of the ballot and election. No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter's affidavit signature or mark is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public, or other officer, including a military commissioned officer, authorized to acknowledge oaths, prior to being delivered or mailed to the absentee election manager.

Ala. Code § 17-11-10.

election integrity. Doc. 20-1 at 26–28. But even if the witness requirement is functionally useless in securing the "integrity and sanctity of the ballot and election," Ala. Code § 17-11-10(b), and other extant measures may be sufficient to confirm absentee voter identity, *see* Ala. Code §§ 17-11-4; 17-11-7; 17-17-24(a); doc. 16-46 at 18–20, the court cannot find the waiver requirement nonessential at this stage. The plaintiffs are generally correct that the defendants' bald assertion of the requirement's essential nature is insufficient to block the plaintiffs' claim. Doc. 46 at 8. The defendants are not alone in asserting this point, however; both the Alabama legislature and the Alabama Supreme Court have clearly indicated that the requirement is essential under Alabama law.[38] *See Eubanks v. Hale*, 752 So. 2d 1113, 1157–58 (Ala. 1999) (citing Ala. Code § 17-11-10); *Compare Mary Jo C.*, 707 F.3d at 160 (finding the challenged provision non-essential where the state regularly granted waivers and extensions of the provision). Because the witness requirement is deemed a condition precedent to eligibility under state law, and essential eligibility requirements are not subject to reason12 0 674a(e)-151(t)17(eno3(d)-

that the photo ID requirement is an essential eligibility requirement,[41] *id.* at 31 n.35. More importantly, Alabama does not designate the photo ID requirement as essential, allowing the individual plaintiffs a clearer path to establishing their qualifications. *See generally* Ala. Code § 17-9-30.

Turning next to the "excluded . . . by reason of . . . disability" elements of the prima facie case, *see* 42 U.S.C. § 12132, the court finds the plaintiffs succeed here as well. The defendants again claim that the individual plaintiffs are not excluded because the photo ID requirement does not present a "concrete barrier," doc. 36 at 29, and that any exclusion they face is the result of their "own decisions," *id*. The court sees no persuasive value in this point. The Eleventh Circuit has recognized that plaintiffs are excluded when an offering is not "readily accessible." *Shotz*, 256 F.3d at 1080 (citing 28 C.F.R. § 35.150). Physical barriers are not the only means by which to impede accessibility. The plaintiffs have provided evidence that Thompson and some members of People First who are at risk of severe complications from COVID-19 do not have the capability to copy their IDs in their homes. Docs. 20-1 at 18–19, 32. As Secretary Merrill has indicated, voters may need to go to "Walmart or Kinko's" to make a copy of their IDs in order to apply for an absentee ballot. *See* doc. 16-33 at 3.

the defendants suggest that the individual plaintiffs could find a person who could help them obtain a copy of their ID. *See* doc. 36 at 25

causes their alleged exclusion." Doc. 36 at 30. To support this contention, the defendants first cite an unpublished Fifth Circuit case finding a Title II claimant was not excluded in the meaning of the ADA because her exclusion "appear[ed] to be, at least in part, a product of [their] own choices." *Id.* (citing *Greer v. Richardson Independent School Dist.*, 472 F. App'x 287, 295 (5th Cir. 2012). In *Greer*, the court dismissed the plaintiff's complaint that her seating location at an entertainment venue was subpar because the plaintiff did not ask to be reseated. *Greer*, 472 F. App'x at 295. In this case, the plaintiffs are presented with the nBT/F4 14.0

justiciable. Moreover, the individual plaintiffs' fear of serious complications of contracting COVID-19 are hardly subjective.[43]

Finally, the defendants' implication that the plaintiffs are barred from making a claim against the state because they have already "compromise[ed] the strict isolation they claim prevents them from complying" with the photo ID requirement, *see* doc. 36 at 30, is unavailing. It is not clear from the record that the plaintiffs have in fact compromised their strict isolation, *see* doc. 16-45 at 8, 18, but even assuming that they had, this purportedly imperfect compliance does not absolve the defendants of ADA violations. The ADA does not require the plaintiffs to prove that they are completely unable to "enjoy[] a service, program, or activity," but rather that such participation is not "readily accessible." *Shotz*, 256 F.3d at 1080 (citing 28 C.F.R. § 35.150). Demanding that the plaintiffs expose themselves to COVID-19 when they otherwise would not impedes their ability to readily access the state's voting program. That the plaintiffs have some ability to interface with others for medical appointments, grocery runs, and sporadic interactions with their children and grandchildren or in-home care workers, *see*

doc. 16-45 at 8, 18, does not permit the defendants to condition the plaintiffs' exercise of their voting rights on violating self-isolation guidelines.

Turning now to the reasonable modification inquiry, the court finds the plaintiffs' proposed modification is facially reasonable. *See Schaw*, 938 F.3d at 1267. The plaintiffs' request is merely to extend an existing exemption to the photo ID requirement to a limited group of voters. *See* doc. 20-1 at 15. The defendants assert that the proposed expansion is "at odds with its purpose to preserve the sanctity and integrity of the ballot and election" and therefore "would be a fundamental alteration to Alabama elections," doc. 36 at 31–32, but they provide no evidence to establish this claim, *see generally id*. This statement alone

accessible sites." Doc. 20-1 at 37 (citing 28 C.F.R. § 35.150(b)). The plaintiffs state a prima facie case[46] and have proposed a reasonable modification. As stated previously, the defendants seem to misunderstand the plaintiffs' case. *See* doc. 36 at 32. The plaintiffs are not requesting that the defendants "implement[] curbside voting at 1,980 voting sites in fewer than 50 days," *id.*, but rather they are asking that the defendants refrain from blocking counties that choose to offer the accommodation, *see* docs. 1; 20-1 at 35–37. Beyond this misunderstanding, the only argument the defendants present against the modification is

defendants' contention that such a disruption is "likely," *id*., is insufficient to rebut the plaintiffs' proposed modification. Here again, the p

district court panel. The defendants are correct that the statute allows the Attorney General to initiate a civil action "[w]henever the Attorney General has reason to believe that a State or political subdivision . . . has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of" § 201, and that when the Attorney General brings such an action, it "shall be heard and determined by a court of three judges" in federal district court. 52 U.S.C. § 10504. However, the st

> achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

52 U.S.C. § 10501(b). Alabama's witness requirement does not qualify as a "test or device" under the statute's first three provisions, as it is not a literary test, it is not an educational test, and it is not a moral character requirement. The issue is whether the witness requirement forces an absentee voter to "prove his qualifications by the voucher of registered voters or members of any other class . . . as a prerequisite for voting." *Id.*

Congress included the voucher requirement as a "test or device" in response to election practices used to discriminate against African-Americans. For example, in at least one county in Alabama, in order to register to vote, an applicant had to produce a "supporting witness" who "must affirm that he is acquainted with the applicant, knows that the applicant is a bona fide resident of the county, and is aware of no reason why the applicant would be disqualified from registering." *United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965); *see also* S. Rep. No. 89-162, 1965 U.S.C.C.A.N. 2508, 2549–50 (1965) (citing the *Logue* case as justification for the inclusion of the "voucher requirement" in the Voting Rights Act of 1965).[49]

[49] Originally, the "test or device" ban applied only to jurisdictions subject to preclearance, *see* 52 U.S.C. § 10303(b), but Congress extended the ban to apply nationwide in 1970, *see* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 315 (1970), and it made the ban permanent in 1975, *see* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400, 400 (1975).

Alabama's current witness requirement is less onerous. It requires only that an absentee voter "have a notary public (or other officer authorized to

July 28, 2018). For its part, this court is concerned about the consequences of a rule that so long as the state offers one method of voting that passes statutory muster, the state is free to offer another method that violates the statute.

In this case, however, the plaintiffs do not make any arguments about whether the notary-specific certification, as opposed to the witness requirement generally, is a prohibited voucher requirement under § 201. For this reason, the plaintiffs have not established that they are likely to succeed on the merits of their VRA claim at this time.

IV.

In addition to showing a likelihood of success on the merits, the plaintiffs must also show a likelihood of irreparable harm in the absenc100(ab)4ius, 7-4parablh(h)-3-11

423, 435 (6th Cir. 2012); *Christi* , 453 F.3d 852, 859 (7th Cir. 2006).

The balance of equities and the public interest also tip in the plaintiffs' favor. While an order enjoining the witness and photo ID requirements results in some burden to the defendants, who will have to quickly communicate the changed

groups who wish to vote absentee or by curbside voting during the COVID-19 pandemic outweighs the competing burden on the defendants.

Next, all voters have a "strong interest in exercising the 'fundamental political right' to vote.'" *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation omitted). "The public interest therefore favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437. As a result, the court finds that granting injunctive relief in this case is in the public interest, and that the plaintiffs have established they are entitled to a preliminary injunction.

V.

"Crafting a preliminary injunction is an exercise of discretion and judgment." , 137 S. Ct. 2080, 2087 (2017) (citation omitted). "I