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

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

DAVID RISSLING, et al., *Plaintiffs,* vs. MAGARIA BOBO, *in her official capacity as Absentee Election Manager of Tuscaloosa County, Alabama*, et al., *Defendants.*	)	Case No. 7:23-cv-01326-LSC

DEFENDANTS' MOTION TO DISMISS

Plaintiffs claim that Alabama must provide them with Internet-based voting. Unlike some States, Alabama law does not give every voter the option of absentee voting. But it does allow disabled voters—including Plaintiffs here who allege they have certain "vision and print disabilities"—the option of voting absentee. Alabama also provides specific accommodations (including special machines and third-party assistance from a poll worker or other preferred individual) to help visually impaired voters vote in person. But Plaintiffs demand more. Because they do not wish to ask for assistance to complete an absentee ballot, they say that the Americans with Disabilities Act and the Rehabilitation Act require Alabama to offer them their preferred voting method: a special "electronic ballot delivery" system. And because Alabama does not offer them the opportunity to vote on the Internet, Plaintiffs claim

that the State is discriminating against them on the basis of their disability. Plaintiffs are wrong.

The Amended Complaint fails to state a claim for several reasons. As a threshold matter, the ADA does not preempt Alabama election law because it does not do so *explicitly*, as is required for federal law to preempt State election law. And even if the ADA applies at all, the ADA does not require States to sacrifice essential criteria when administering public services, and the use of a paper ballot is essential as a matter of Alabama law. What's more, Plaintiffs do not allege that they have been excluded from *voting*, and whether plaintiffs can vote—not whether they can vote *absentee*—is the decisive inquiry under the ADA. Plaintiffs' Rehabilitation Act claim fails for these reasons and more.

Alabama law does not permit Plaintiffs to vote by remote electronic ballot, and federal law does not require it. The Amended Complaint therefore is due to be dismissed for failing to state a claim.

I. Legal Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility requires "more than a sheer possibility that a defendant has acted unlawfully" and more than labels, conclusions, "formulaic

recitation of the elements," or "naked assertions." *Id.* (citing *Twombly*, 550 U.S. at 555–57). On a motion to dismiss, a court accepts the plaintiff's factual allegations as true. *Id.* at 678. "However, conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Airlines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).

II. Background

According to the allegations in the Amended Complaint, Plaintiff National Federation of the Blind of Alabama is a non-profit corporation comprised of Alabama residents that promotes "the general welfare of the blind." Doc. 4 ¶ 30. Three other plaintiffs—Beverly Clayton, David Rissling, and Gilley Pressley, who are blind—are NFB members. *Id.* ¶ 31. The fourth individual plaintiff, Eric Peebles, has cerebral palsy and quadriplegia—which "make it difficult for him to read printed text and handle printed materials." *Id.* ¶¶ 11–12. All the individual plaintiffs are eligible to vote absentee because of their disabilities. *Id.* ¶ 79.

Plaintiffs acknowledge that handicap-accessible voting devices, which enable them to "vote privately and independently[,]" are available to blind voters when they vote in person. *See, e.g., id.* ¶ 23; *see also* ALA. CODE § 17-2-4(c); ALA. ADMIN. CODE r. 820-2-1-.02(2)(f), (3)(c)–(d). Plaintiff Pressley "has previously voted in person without assistance." *Id.* ¶ 27. Plaintiff Rissling "has voted in person using the Ballot Marking Device (BMD) at his polling place" "[i]n most previous elections."

Id. ¶ 23. And Plaintiff Clayton "has voted in person exclusively to date" using "assistive technology in her polling place" when available (and the assistance of poll workers when such technology was allegedly unavailable). *Id.* ¶ 20.[1] Plaintiffs Peebles, Rissling, and Pressley have successfully voted absentee as well. *Id.* ¶¶ 14, 24, 28. The individual plaintiffs claim that they *prefer* "to be able to vote absentee privately and independently in Alabama elections" by means of electronic ballot delivery and return. *Id.* ¶ 79.

In September 2019, Plaintiff NFB first demanded then-Secretary of State Merrill administer an "electronic ballot delivery system." *Nat'l Fed'n of the Blind of Ala. v. Allen*, No. 2:22-cv-721-CLM (N.D. Ala.) (ECF No. 1 ¶ 64) (hereinafter, "*NFB*"). When Plaintiff NFB again demanded a change to Alabama law in 2022, Secretary Merrill "did not commit to implementing an electronic ballot delivery system." *Id.* ¶ 65. It thus filed suit in June 2022—along with Plaintiff Peebles—which the district court dismissed in March 2023 for lack of standing against the Secretary of State (by that time, Secretary Wes Allen). *See* doc. 4 ¶¶ 66–68. As with the previous suit, Plaintiffs bring two claims: one under the Americans With Disabilities Act, *see id.* ¶¶ 69–91, and another under the Rehabilitation Act, *see id.* ¶¶ 92–109.

[1] Plaintiff Peebles did not vote in person in the 2022 General Election because he did not verify his polling location prior to Election Day. *See id.* ¶ 15.

Under both counts, Plaintiffs demand a new voting system featuring "electronic delivery and return of ballots[] for people with vision and print disabilities for all future elections" as well as declaratory relief and an award of fees and costs. *Id.* at 20–21. And this time Plaintiffs apparently demand that the Absentee Election Managers of three Alabama counties create, distribute, and manage such a specialized electronic voting system, even though Plaintiffs acknowledge that the Defendant AEMs only implement what the Legislature dictates. *See id.* ¶¶ 32–34.

III. Argument

The Amended Complaint fails to state a claim for several reasons: (1) the ADA and Rehabilitation Act do not regulate election-related conduct, (2) using paper ballots in elections is an essential eligibility criterion under Alabama law, and (3) there is no allegation that Plaintiffs have been excluded *from voting*.[2] Independently, Plaintiffs' claim under the Rehabilitation Act is due to be dismissed because the Amended Complaint contains no allegation of discrimination based *solely* on disability.

[2] As relevant to these arguments, the same framework applies to claims brought under the ADA and Rehabilitation Act. *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000). Accordingly, Plaintiffs' Rehabilitation Act claim is due to be dismissed for the same reasons as the ADA claim are as set out in Sections A–C.

A. The ADA and Rehabilitation Act do not preempt Alabama election law because the ADA and Rehabilitation Act do not specifically regulate elections.

Except as specifically required by the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20302, Alabama law requires that all ballots cast in elections be paper ballots. *See infra* § III.B; doc. 1 ¶ 42. Because the ADA and Rehabilitation Act do not specifically regulate elections, they do not preempt Alabama laws governing the conduct of elections. Plaintiffs therefore fail to state a claim, and the Amended Complaint must be dismissed.

To determine whether federal law preempts State law in this context, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 13 (2013) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Because the Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones," *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (Posner, J.), Congress must speak clearly to regulate elections in a way that conflicts with State law.

Consider *United States v. Gradwell*, 243 U.S. 476, 485 (1917). There, the Supreme Court held that a federal statute making it a federal crime "to defraud the United States in any manner for any purpose" did not reach election fraud. *Id.* at 480. Notwithstanding the statute's broad language, the Court explained that the "clearly established . . . policy of Congress" is "to leave the conduct of the election of its members to state laws, administered by state officers." *Id.* at 485. And when Congress "has assumed to regulate such elections[,] it has done so by positive and clear statutes." *Id.* at 485.[3] A general statute criminalizing fraud against the United States "in any manner for any purpose" did not satisfy this requirement. *Id.*

To be sure, Congress is not powerless to regulate the times, places, and manner of elections. But when it undertakes to regulate elections, it must do so *specifically* in legislation targeting the conduct of elections. *See id.*; *see also, e.g.*, 52 U.S.C. § 20101, *et seq.* (Voting Accessibility for the Elderly and Handicapped Act). This occurs most naturally in "Elections Clause legislation," where the presumption against federal preemption plays no role. *Arizona*, 570 U.S. at 13–15;

[3] Although the Supreme Court more recently rejected *Gradwell*'s application to Elections Clause legislation—i.e., as to "how to construe statutes (like the NVRA) in which Congress has *indisputably* undertaken 'to regulate such elections'"—that decision tacitly reaffirms *Gradwell*'s application to all other legislation. *See Arizona*, 570 U.S. at 13 & n.5. In other words, *Gradwell* stands for the proposition that legislation does not reach elections unless it clearly and specifically undertakes to do so.

see U.S. CONST. art. I, § 4, cl.1.[4] This rule makes sense; because when "Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it necessarily displaces some element of a pre-existing legal regime erected by the States." *Arizona*, 570 U.S. at 14. In that context, Congressional intent to regulate elections is unmistakable.

Importantly, the ADA and Rehabilitation Act are not Elections Clause legislation. In the ADA, Congress invoked "the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). "[T]he ADA does not include even a single provision specifically governing elections." *Lightbourn v. County of El Paso*, 118 F.3d 421, 430 (5th Cir. 1997). The Act—as part of its legislative findings—contains a single reference to "voting." *See* 42 U.S.C. § 12101. So too the Rehabilitation Act, *see* 29 U.S.C. § 701, which Congress enacted under its Spending Clause power, *see Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 217–19 (2022). It should be undisputed that Congress did not enact the ADA and Rehabilitation Act pursuant to its authority under the Elections Clause.

[4] The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators."

Because these laws were not enacted under the Elections Clause, courts "must be absolutely certain that Congress intended such an exercise" before applying them to preempt State election law. *Gregory*, 501 U.S. at 464. In *Gregory*, the Supreme Court considered a challenge under the Age Discrimination in Employment Act to a provision of the Missouri Constitution that provided a mandatory retirement age for judges. *Id.* at 455. As a matter of statutory interpretation, the question was whether a judge was an "appointee at the policymaking level" as to be excluded from the definition of "employee." *Id.* at 466–67. The Supreme Court admitted that including judges within the policymaking-level exemption was "an odd way for Congress to exclude judges" but emphasized that it "w[ould] not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Id.* at 467. Applying this plain-statement rule, the Court ruled that judges were "appointee[s] at the policymaking level" as to be exempted from ADEA's scope. *Id.* at 464. Even though a natural reading of ADEA would have included state-court judges within its scope, the Supreme Court refused to interpret ADEA in a way that intruded into an area that States traditionally regulated.

Similarly, in *Bond v. United States*, 572 U.S. 844, 857–58 (2014), the Supreme Court considered whether a federal criminal law criminalizing the use of "toxic chemicals" for a non-"peaceful purpose" applied to a woman's use of a toxic chemical to harm her husband's lover. *Id.* at 856–57. The Court explained that,

notwithstanding the law's seemingly broad scope, courts must "refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 859. Importantly, though the text seemingly applied to the alleged crime involved, "the ambiguity derive[d] from the improbably broad reach of the key statutory definition given the term" at issue. *Id.* at 860. In those circumstances, the Court "insist[ed] on a clear indication that Congress meant to reach purely local crimes[] before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Id.*[5]

The Court's analysis in *Bond* is instructive here. Like the criminal law at issue in *Bond*, the ADA includes terms with language so broad that courts understand it to include *everything* a government entity does. *See Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007). The Supreme Court in *Bond* held that a similarly broad provision "d[id] not constitute a clear statement that Congress meant the statute" to regulate an area traditionally regulated by the States. *Bond*, 572 U.S. at 860. This Court should do the same here. Even if a natural reading of the ADA and Rehabilitation Act might include the conduct of elections within its scope, it

[5] *Bond* also highlights why cases not technically about federal preemption of State laws—including *Gradwell*—are still helpful. In *Bond*, the Supreme Court explained that several doctrines—including the presumption that federal law does not preempt State law—are "grounded in the relationship between the Federal Government and the States under our Constitution." 572 U.S. at 857–58. "Closely related to these [doctrines] is the well-established principle that 'it is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Id.* at 858 (quoting *Gregory*, 501 U.S. at 460).

cannot be said that it was the "manifest purpose of Congress" to do so. *Rice*, 331 U.S. at 230. Congress knows how to regulate State elections and preempt State election laws. *See Arizona*, 570 U.S. at 13-15. It did not do so here. Plaintiffs' claims thus fail as a matter of law.[6]

B. Neither the ADA nor the Rehabilitation Act requires Alabama to fundamentally alter voting or otherwise compromise an "essential eligibility" requirement by foregoing the use of a paper ballot.

To state a claim under the ADA, a plaintiff must allege facts that could establish three elements: (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability. *Bircoll*, 480 F.3d at 1083. A "qualified individual with a disability" is "an individual with a disability who, with or without

[6] No binding precedent exists that requires the Court to hold that the ADA regulates the conduct of elections. Although the Eleventh Circuit has previously applied the ADA in the election context and stated there that "disabled citizens must be able to participate in the County's voting program[,]" the parties did not raise the issue of the ADA's general applicability to elections. *Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107 (11th Cir. 2011); *see id.* Br. of Appellant, 2008 WL 936736; *cf. Tennessee v. Lane*, 541 U.S. 509, 530–31 (2004) ("[T]he question presented in this case is *not* whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to . . . voting booths." (emphasis added)). And "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999).

reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements" for the public action in question. 42 U.S.C. § 12131(2).

The ADA and Rehabilitation Act "do[] not require States to employ any and all means to make [public] services accessible to persons with disabilities, and [they] do[] not require States to compromise their essential eligibility criteria for public programs." *Lane*, 541 U.S. at 531–32. "[They] require[] only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for service." *Id.* at 532. "And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden . . . or effect a fundamental alteration in the nature of the service." *Id.*

Plaintiffs fail to state a claim under either the ADA or Rehabilitation Act because their requested relief would override Alabama's essential eligibility requirements for voting and fundamentally alter Alabama's elections. In Alabama, using a paper ballot is a key requirement for having one's vote counted. As explained further below, multiple statutory references make clear that Alabama law contemplates only the use of paper ballots, including requirements for their print and design, their handling, and other requirements that would not make sense (and could not be satisfied) with intangible electronic ballots. And just because federal law forces Alabama to make exceptions to these requirements for uniformed and

overseas voters—pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, *see* 52 U.S.C. § 20302—does not mean they are not essential requirements in all other contexts.

All elections in Alabama "shall be by official ballot prescribed by law." ALA. CODE § 17-6-20. These prescriptions include several design requirements. For example, Ala. Code § 17-6-24 governs the "Printing and design" of the ballots, including specifics as to how the columns of the ballot are to be laid out and what emblems may appear. Ala. Code § 17-6-26 expands further, providing that ballots "shall be of the size and design required by the precinct ballot counters and may be *printed* upon one or more separate pages or cards." *Id.* (emphasis added). Other sections reaffirm that the Code requires paper ballots as an essential feature of voting—governing how they may be packaged, *see* ALA. CODE § 17-6-43; requiring that they feature a numbered, detachable stub, *id.*; and requiring that the probate judge of each county "have printed, at the expense of the county, ballots . . . and other stationery or blank forms necessary in the conduct of elections," ALA. CODE § 17-6-47. None of these requirements make sense as applied to electronic ballots, showing that paper ballots are a key feature of the elections process under Alabama law.

Even the provisions of Alabama law governing absentee ballots underscore the essential nature of paper ballots. Absentee ballots "shall be in the same form as

the official regular ballots for the election, except that they shall have printed thereon the words, 'Official Absentee Ballot.'" ALA. CODE § 17-11-6. The return of absentee ballots may be done only "by mail, by hand delivery, or by commercial carrier"—not electronically. ALA. CODE § 17-11-3(a). And all absentee ballots must be submitted in an affidavit envelope signed by the voter and either two witnesses or a notary public. ALA. CODE § 17-11-10. No envelope may be opened—and thus no ballot counted—unless it bears these signatures because they "go[] to the integrity and sanctity of the ballot and election." *Id.*

In *People First of Alabama v. Merrill*, this Court found that plaintiffs—including Plaintiff Peebles—failed to state an ADA claim against this requirement as a matter of law "[b]ecause the witness requirement is deemed a condition precedent to eligibility under state law" and thus was an essential eligibility requirement. 467 F. Supp. 3d 1179, 1219 (N.D. Ala. 2020) (finding no likelihood of success on the merits for preliminary injunction on this grounds); *see also People First of Ala. v. Merrill*, 479 F. Supp. 3d 1200, 1212 (N.D. Ala. 2020) (granting a motion to dismiss regarding this claim). Yet again, none of these requirements make sense as applied to electronic ballots, which shows the essential nature of paper ballots to Alabama's election system. "In short, Alabama law does not allow domestic voters to submit electronic absentee ballots; they must use paper ballots." *NFB*, 2023 WL 2533049, at *3 (N.D. Ala. Mar. 15, 2023).

That federal legislation forces the State to offer electronic ballots to overseas voters does not undermine the essentiality of the paper-ballot requirement. The Uniformed and Overseas Absentee Voting Act, 52 U.S.C. § 20302(7), requires Alabama to "establish procedures for transmitting by mail and electronically blank absentee ballots" to uniformed and overseas voters.[7] That Alabama has made an exception to comply with explicit federal law cannot undermine an eligibility requirement's essentiality, which this Court recognized as a "valid" point in *People First of Alabama*. *See* 479 F. Supp. 3d at 1212. Otherwise, the State must always choose between either "compromis[ing] [its] essential eligibility criteria for public programs[,]" *Lane*, 541 U.S. at 532, or openly defying federal voting laws—prompting suit from the United States.[8] This situation is a far cry from *Mary Jo C. v. New York State & Local Retirement System*, 707 F.3d 144 (2d Cir. 2013), where New York *voluntarily* chose to "waive[] or extend[] the filing deadline for disability retirement benefits." *Id.* at 160. Plaintiffs cannot rely on the forced exception made for overseas voters to force further exceptions.[9]

[7] *Compare* 52 U.S.C. § 20310(5) (providing federal definition of "overseas voter"), *with* ALA. CODE § 17-11-40(2) (providing substantially similar definition of "overseas voter").

[8] The United States has sued Alabama multiple times to enforce the Uniformed and Overseas Citizens Absentee Voting Act. *See, e.g.*, *United States v. Alabama*, 778 F.3d 926 (11th Cir. 2015).

[9] An exception that, by the way, comes with numerous additional requirements for those overseas voters who qualify for electronic *return* of ballots to compensate for the security risk of not returning a paper ballot. *See* ALA. CODE § 17-11-42; ALA. ADMIN. CODE r. 820-2-10-.06.

Forcing Alabama to allow Plaintiffs—and others like them—to vote by electronic ballot would bloat Alabama's electronic absentee balloting program beyond recognition. The program would expand from a narrow one available only to overseas voters (as required by UOCAVA) to one required for *any* domestic voter who can show difficulty in voting without assistance due to *any* disability. This forced expansion threatens to erode the State's interests in maintaining a paper balloting system at all, leaving that system more vulnerable to challenge as an unconstitutional burden on voting if *any* voter—disabled or not—feels burdened by voting via paper ballot. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) ("[T]he *Anderson-Burdick* test . . . requires [courts] to weigh the character and magnitude of the asserted . . . injury against the state's proffered justifications for the burdens imposed by the rule, taking into consideration the extent to which those justifications required the burden to plaintiffs' rights.").

In sum, Plaintiffs fail to state a claim under either the ADA or the Rehabilitation Act because their requested relief goes too far. Whether framed as compromising an essential eligibility requirement—i.e., a condition precedent for having a ballot counted—or as causing a fundamental alteration to its system of elections, neither statute can provide the relief Plaintiffs seek as a matter of law. Alabama law requires the use of only paper ballots in elections except as otherwise

expressly mandated by UOCAVA. Accordingly, this Court should dismiss Plaintiffs' suit for failure to state a claim.

C. Plaintiffs have not been excluded from voting generally or even absentee voting or secret voting specifically.

Even if Plaintiffs could bypass the essential eligibility requirements for voting in Alabama, they have still failed to state a claim because Alabama has not excluded them from participation in or denied them the benefits of *voting*. *See Bircoll*, 480 F.3d at 1083. Plaintiffs are entitled to nothing more than "meaningful access to the benefit that the grantee offers." *Alexander v. Choate*, 469 U.S. 287, 301 (1985). "Reasonable accommodations in the grantee's program or benefit" can "assure meaningful access." *Id.* And "[t]he hallmark of a reasonable accommodation is effectiveness." *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 189 (2d Cir. 2015) (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002)). If the accommodation is effective, it "need not be 'perfect' or the one 'most strongly preferred'" by the plaintiff. *Id.* (citation omitted).

As an initial matter, Plaintiffs attempt to overly narrow the service, program, or activity from which they claim to have been excluded. The "participation" Plaintiffs seek is participation in Alabama's electoral process. Votes count the same whether cast in-person or absentee, on paper or online, with assistance or without. Plaintiffs ultimately want to *vote*—electronic absentee voting is simply *how* they prefer to access the program. The Court need not define the program more narrowly

because this definition does not "effectively den[y] otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Alexander*, 469 U.S. at 301.

The Fourth Circuit's decision in *National Federation of the Blind v. Lamone*, 813 F.3d 494, 504 (4th Cir. 2016), does not change this reasoning. *Lamone* relied on the "significant" fact "that Maryland allows *any voter* to vote by absentee ballot." Alabama's absentee voting system is far more limited. That distinction allowed the *Lamone* Court to conclude that "it [wa]s far more natural to view absentee voting—rather than the entire voting program—as the appropriate object of scrutiny." *Id.* *Lamone* is unpersuasive because Alabama *does* only provide absentee ballots "to a limited subset of voters with a demonstrated need," *id.* Only those voters with a qualifying excuse may vote by absentee ballot, *see* ALA. CODE § 17-11-3, and only a limited subset of those voters—those who qualify under the federal UOCAVA statute—may vote by electronic absentee ballot, *id.* § 17-11-42.

Electronic absentee voting is not widely available in Alabama, so it is not the appropriate vehicle to reference when analyzing Plaintiffs' ADA and Rehabilitation Act claims. *Cf. Hernandez v. N.Y. St. Bd. of Elections*, 479 F. Supp. 3d 1, 12 (S.D.N.Y. 2020) ("The Fourth Circuit has held, and this Court agrees, that where, as here, a challenge is lodged to the accessibility of a widely-available absentee voting

program, the 'relevant public service or program at issue' is not the 'voting program in its entirety' but rather the 'absentee voting program.'" (citations omitted)).

Thus, the proper inquiry here is whether Plaintiffs have been excluded from *voting* as a general matter, not from absentee voting, secret voting, or absolutely secret absentee voting. *See Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107 (11th Cir. 2011) ("As a public program, disabled citizens must be able to participate in the County's *voting program*." (emphasis added)). But even if Plaintiffs' narrower definition of the program, service, or activity were correct, they have not been excluded from any of those programs either.[10]

[10] Moreover, if the ADA even covers voting programs at such a level of granularity, then it is unconstitutional. While Congress may "enact prophylactic legislation" pursuant to § 5 of the Fourteenth Amendment "to remedy or prevent unconstitutional discrimination" under the Fourteenth Amendment, this "power is not . . . unlimited." *Lane*, 541 U.S. at 520. Rather, such legislation must "exhibit[] 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520). Legislation that is either disproportional or otherwise seeks to do more than "enforce the guarantees of the Fourteenth Amendment" is thus invalid as it exceeds Congress's authority by "work[ing] a 'substantive change in constitutional protections.'" *Id.* at 520–21 (citing *Boerne*, 521 U.S. at 529 (finding that the Religious Freedom and Restoration Act was "out of proportion"); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Patent Remedy Act's "apparent aim" was to provide uniform patent infringement remedy rather than "to enforce the guarantees of the Fourteenth Amendment"); *Garrett v. Bd. of Regents of Univ. of Ala.*, 531 U.S. 356 (2001) (holding that Title I of the ADA exceeded congressional § 5 authority as applied to public employment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (finding that the Age Discrimination in Employment Act exceeded § 5 authority); *United States v. Morrison*, 529 U.S. 598 (2000) (finding that the Violence Against Women Act exceeded § 5 authority). It's true that Congress considered the exclusion of disabled voters from voting in Title II, including the inaccessibility of polling places or disenfranchisement on grounds of mental illness "without regard to individual capacity." *Id.* at 524–25 & n.13. But Congress's broad consideration of absolute exclusion from voting when enacting the ADA cannot justify Plaintiffs' granular relief focused on absolute secrecy in absentee voting. Such relief is simply not congruent and proportional to the sorts of problems that Congress considered in passing the ADA. Accordingly,

First, there is no allegation that Plaintiffs have been or will be excluded from voting generally. Plaintiffs admit that not only are they able to vote and have voted in the past, doc. 4 ¶¶ 14, 18, 23, 27, but also that Alabama makes specific accommodations for blind and print disabled voters, *id.* ¶¶ 40, 41, 44. Indeed, Plaintiffs make clear that they "intend to vote in future elections" and that their "*preference*"—not a requirement for them to vote—"is to vote absentee." *See, e.g.*, *id.* ¶ 16.

Plaintiffs' own allegations show that they have not been excluded from voting; they just want to vote some other way. *Cf. McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807–08 (1969) (rejecting pretrial detainees' claim that denying them absentee ballots violated the Equal Protection Clause because "the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise"). Because Plaintiffs are "able to participate in [Alabama's] voting program," they have not been excluded from that program and thus they fail to state a prima facie claim under either the ADA or Rehabilitation Act. *Harris*, 647 F.3d at 1107.

if the ADA were construed to reach programs narrower than voting generally, it would exceed Congress's § 5 enforcement powers and thus would be unconstitutional as applied.

Nor have Plaintiffs been excluded from absentee voting more specifically. In fact, Alabama law allows all voters with disabilities, including Plaintiffs, to vote absentee. ALA. CODE §§ 17-11-3, 3.1. Plaintiffs have the same access to absentee ballot voting as any other qualified absentee voter, which the Amended Complaint acknowledges. *See, e.g.*, doc. 4 ¶ 103 (alleging that each Plaintiff is eligible to vote absentee).

Providing third-party assistance to voters is an equally effective means of participating in elections. The Eleventh Circuit concluded that the use of "third-party assistance to disabled voters" affords "an equal opportunity to participate in and enjoy the benefits of voting." *Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1108 (11th Cir. 2011) (quoting the district court with approval). And the United States Department of Justice's Civil Rights Division also has expressly rejected Plaintiffs' interpretation of the ADA and Rehabilitation Act in a 1993 findings letter to Pinellas County, Florida:

> Although providing assistance to blind voters does not allow the individual to vote without assistance, it is an effective means of enabling an individual with a vision impairment to cast a ballot. Title II requires a public entity to provide equally effective communications to individuals with disabilities, but "equally effective" encompasses the concept of equivalent, as opposed to identical, services. Poll workers who provide assistance to voters are required to respect the confidentiality of the voter's ballot, and the voter has the option of selecting an individual of his or her choice to provide assistance in place of poll workers. The Supervisor of Elections is not, therefore, required to provide Braille ballots or electronic voting in order to enable individuals with vision impairments to vote without assistance.

Letter of Findings from the Chief of the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice (Aug. 25, 1993), https://www.justice.gov/crt/foia/file/670616/download. The same reasoning applies here. Whether Plaintiffs receive assistance at the polls or in their homes, they are receiving the equally effective service of *voting.*

Plaintiffs are in no different position than the many voters who require assistance to cast ballots—whether in person or absentee—either because of a disability, lack of education, or any other reason. While Alabama law protects the secrecy of a voters' ballots, *see* ALA. CODE § 17-6-34, it also authorizes voters to receive assistance in completing those ballots, *see, e.g.*, ALA. CODE § 17-9-13. The Alabama Supreme Court has never considered whether tension exists between such provisions, but this Court recognized over half a century ago that "the right to a secret ballot provided by the State of Alabama is subject to certain practical limitations where such secrecy is impossible, as in the case of an illiterate asking assistance or a person voting by absentee ballot." *United States v. Exec. Comm. of Democratic Party of Greene Cnty.*, 254 F. Supp. 543 (N.D. Ala. 1966). Plainly, any entitlement to a secret ballot under Alabama law must occasionally yield to the reality of such practical limitations—as in Plaintiffs' situations here.[11] In other

[11] And to the extent that the scope of Alabama's ballot secrecy provisions remains unclear, this Court may certify a question to the Supreme Court of Alabama. Importantly, Plaintiffs do not

words, Alabama does not offer a program of *absolute* secret voting under all circumstances. That Plaintiffs may not be able to vote an absentee ballot without third-party assistance does not mean that they have been denied equally effective access to voting generally or to absentee voting specifically.

The Eleventh Circuit recognized as much in *Harris*. 647 F.3d at 1107–08. There, plaintiffs challenged the lack of voting machines in Florida that would allow them to cast a ballot without assistance, thus claiming that their right to cast a direct and secret ballot had been violated. *Id.* at 1096–98. But the Eleventh Circuit, although vacating the district court's injunction, concluded that the unappealed finding that third-party assistance "afforded [plaintiffs] an equal opportunity to enjoy the benefits of voting" showed that the plaintiffs' "rights under the ADA have not been abused." *Id.* at 1108.

And the Sixth Circuit recognized the same in affirming dismissal of claims similar to those here. *See Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999). There, the Sixth Circuit rejected plaintiffs' contention that they were entitled to "absolute secrecy from everyone in all instances" by reading the Michigan Constitution's right to a secret ballot in harmony with Michigan statutes providing that voters may receive assistance to complete their ballots. *Id.* at 651–53; *see also id.* at 650

allege that Defendants are in violation of Alabama law related to ballot secrecy. Nor could they. This Court does not have jurisdiction to order State officials to follow State law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

("Appellants essentially must show that the Michigan legislature, by providing blind voters with third-party voting aid, rather than unassisted voting aid, has violated the Michigan Constitution's mandate that it 'enact laws to . . . preserve the secrecy of the ballot,' MICH. CONST. art. 2, § 4."). Thus, the Sixth Circuit held that "refusing to provide [plaintiffs] with voting assistance other than that already extended to them under [the Michigan voter assistance statute] does not discriminate against them in violation of the ADA and/or the RA." *Id.* at 653.

As a result, Plaintiffs are not excluded from voting or any of the other narrower "programs" they may contend require federal intervention. They may vote in-person either with or without assistance or by absentee ballot with the assistance of a person of their choosing. It bears repeating that neither the ADA nor the Rehabilitation Act "require States to employ any and all means to make [public] services accessible to persons with disabilities." *Lane*, 541 U.S. at 531–32. The ADA and Rehabilitation Act thus certainly do not require States to reach some bar higher than accessibility. Yet Plaintiffs' claims at the end of the day are not that voting is not accessible, but rather that they cannot vote by their preferred method—a method unavailable to all Alabamians except as UOCAVA's narrow scope requires. But because Alabama's administration of voting (and even of absentee voting) is accessible to Plaintiffs, they have not been excluded as required to state a prima facie

case under either the ADA or Rehabilitation Act. Accordingly, Plaintiffs' claims fail as a matter of law and should be dismissed.

D. Plaintiffs' claim under the Rehabilitation Act is due to be dismissed because there is no allegation of discrimination based solely on disability.

To state a claim under the Rehabilitation Act, a plaintiff must allege facts establishing four elements: he (1) is disabled under the Rehabilitation Act, (2) was "otherwise qualified" for a program or activity, (3) was excluded from the program or activity solely because of the disability, and (4) sought to use a program or activity "operated by an agency that receives federal financial assistance." *Harris v. Thigpen*, 941 F.2d 1495, 1522 (11th Cir. 1991).

"Discrimination claims under the ADA and the Rehabilitation Act are governed by the same standards." *J.S., III v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979, 985 (11th Cir. 2017). "Cases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa." *Cash v. Smith*, 231 F.3d 1301, 1305 n.2 (11th Cir. 2000). However, there are differences between the two Acts; as relevant here, Rehabilitation Act plaintiffs must show that they were discriminated against "*solely* by reason of [their] disability," 29 U.S.C. § 794(a) (emphasis added), while the ADA requires only the lesser "but for" standard of causation. *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008). In other words, it's not enough to show even that some challenged action "was based partly on [a plaintiff's]

disability" under the Rehabilitation Act; rather, it must be the *sole* reason. *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005). Thus, a plaintiff fails to state a Rehabilitation Act claim where some alternative basis supports the defendant's action in whole or in part. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1300 (11th Cir. 2005) ("Hospice is not withholding nutrition and hydration 'solely by reason of' [plaintiff's] medical condition, but rather because it is complying with a court order and the instructions of her guardian.").

Here, the Amended Complaint makes no allegation—let alone a plausible factual allegation—that Plaintiffs were discriminated against *solely* by reason of their disability. Nor could they. That Defendants do not permit Plaintiffs to vote online via electronic ballot has nothing to do with Plaintiffs' disability status, but rather because State law forbids accepting non-paper ballots from *any* non-UOCAVA voter. *See, e.g.*, *NFB*, 2023 WL 2533049, at *3. Indeed, even if Plaintiffs had specifically pleaded that Defendants' actions were "solely" to discriminate against them, such allegations would not even cross the necessary threshold of plausibility because Defendants' compliance with State law provides an "obvious alternative explanation" for the refusal to accept electronic ballots from Plaintiffs (or anyone else). *Ashcroft*, 556 U.S. at 682. That the *effects* of such action may impact Plaintiffs more than other voters is insufficient to show that such action has been

undertaken solely by reason of their disability. Accordingly, Plaintiffs' claim under the Rehabilitation Act is due to be dismissed for these additional reasons.

CONCLUSION

For the foregoing reasons, Defendants respectfully ask that this Court dismiss Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

s/ Benjamin M. Seiss
Counsel for Defendants