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

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

DAVID RISSLING, *et al.*,

Plaintiffs,

v.

MAGARIA BOBO, *et al.,*

Defendants.

No. 7:23-cv-1326-LSC

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs are eligible for absentee voting in Alabama because they have vision and print disabilities. Defendants—the Absentee Election Managers for Tuscaloosa, Mobile, and Jefferson Counties—provide absentee voting through an electronic system that should be accessible to voters with vision and print disabilities, but do not allow those voters to use it. Instead, Defendants only allow voters who are overseas or in the military to use the accessible electronic voting system. Plaintiffs seek only what Defendants already offer to overseas and military voters—accessible electronic ballots. Such access is required to provide voters with vision and print disabilities the same private and independent voting offered to voters without disabilities, as required by Title II of the Americans with Disabilities Act ("ADA"),

42 U.S.C. § 12131 *et seq*., 28 C.F.R. Part 35, and Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794 *et seq*.

II. LEGAL STANDARD

District courts rarely dismiss a complaint under 12 (b)(6), and do so "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Powell v. United States*, 945 F.2d 374, 375–76 (11th Cir. 1991) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)); *see also Wright v. Newsome,* 795 F.2d 964, 967 (11th Cir.1986) ("[W]e may not affirm unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief."). To defeat such a motion, a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S.544, 570 (2007). A claim is facially plausible when "'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct.'" *Doe v. Samford Univ.*, 29 F.4th 675, 685–86 (11th Cir. 2022) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). The Court in *Twombly* explained that "[f]actual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." 550 U.S. 544, at 545.

A violation of Title II of the ADA is established if a qualified plaintiff proves that he or she was not provided equal access to or benefits from a public entity's programs, including through eligibility criteria or administration methods that disfavor or filter out people with disabilities. 28 C.F.R.§ 35.130(b). A violation is also established when a public entity disallows reasonable modifications to policies, practices, and procedures or fails to provide auxiliary aids or services necessary to provide equally effective communication with people with disabilities. 28 C.F.R. § 35.130(b)(7)(i); 28 C.F.R. § 35.160. Section 504 of the Rehabilitation Act imposes the same requirements on recipients of federal financial assistance. 29 U.S.C. § 794; 28 C.F.R. § 42.503. Plaintiffs have alleged a plausible claim that Defendants' absentee voting program violates these prohibitions. *See* Amended Compl. 15-17.

It would be premature to dismiss these claims before developing a factual record to assess the burdens facing Alabama's blind voters and voters with other print disabilities. *See, e.g.*, *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020), *appeal dismissed sub nom. People First of Alabama v. Sec'y of State for Alabama*, No. 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), and *appeal dismissed sub nom. People First of Alabama v. Sec'y of State for State of Alabama*, No. 20-13695-GG, 2020 WL 7028611 (11th Cir. Nov. 16, 2020) (reaching decision on ADA voting claim on basis of record of agreed facts); *Schaw v. Habitat*

for Human. of Citrus Cty., Inc., 938 F.3d 1259, 1266 (11th Cir. 2019) ("Whether a particular aspect of an activity is 'essential' will turn on the facts of each case.").

While creative, none of Defendants' arguments should stand and the motion to dismiss should be denied in full.

III. ARGUMENT

A. The ADA and Section 504 preempt contrary to Alabama election law.

Defendants wrongly claim that the ADA does not apply to elections and, therefore, does not preempt state law governing elections, even where state law discriminates against voters with disabilities. Def. Br. 6-11. But the ADA's and Section 504's requirements are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Alabama law must give way "to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 388 (2000); *see also Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016) ("[D]efendants' argument—that the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination—cannot be correct.").

And under the Supremacy Clause, circuit courts have consistently ruled that federal disability rights laws, including the ADA, preempt conflicting state laws, including in the area of voting. *See, e.g.*, *Hindel* v. *Husted*, 875 F.3d 344, 349 (6th Cir. 2017) (state election law did not stand in the way of ADA requirements because "[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does"); *Lamone*, 813 F.3d 494,at 508 ("The Constitution's Supremacy Clause establishes that valid federal legislation can pre-empt state [voting] laws"); *Astralis Condo. Ass'n v. HUD*, 620 F.3d 62, 69–70 (1st Cir. 2010) (Fair Housing Amendments Act preempted any application of Puerto Rican law that would permit discrimination based on disability); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (ADA required modifications to Hawaii's animal quarantine law to extent it interfered with use of guide dogs); *Quinones v. City of Evanston*, 58 F.3d 275, 279–80 (7th Cir. 1995) (Age Discrimination in Employment Act's prohibition on aged-based discrimination prevailed over state law denying pensions to public employees hired after a certain age).

Defendants cite *United States v. Gradwell*, a case from 1917, to argue that Congress cannot regulate elections unless it does so through legislation specifically targeting the conduct of elections. 243 U.S. 476, 485 (1917). They further insist that the Supreme Court "tacitly reaffirmed" this requirement in *Arizona v. Inter Tribal*

Council of Arizona, Inc., 570 U.S. 1 (2013). Def. Br. 7 n.3. Defendants misunderstand these cases. *Gradwell* held only that a federal law against defrauding the United States did not cover election fraud. There, "the provision at issue was adopted in a tax-enforcement bill," and "Congress had enacted but then repealed *other* criminal statutes specifically covering election fraud." *Arizona*, 570 U.S. 1 at 13 n.5 (citing *Gradwell*, 243 U.S. 476, at 485). Defendant also ignores that only the dissent in *Arizona* discusses *Gradwell* and the majority opinion expressly explained that it "sa[id] nothing at all about pre-emption," and "indeed, it was not even a pre-emption case." 570 U.S. 1 at 13 n.5.

Moreover, even when the presumption against preemption applies (*i.e.*, when Congress legislates pursuant to something other than the Elections Clause) it can be defeated by a clear statement that Congress intends to preempt state law. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congress provided such a statement in the ADA, showing its intent to cover voting and elections. The ADA's findings specifically state: "discrimination against individuals with disabilities persists in such critical areas as . . . voting, and access to public services." 42 U.S.C. § 12101(a)(3). The ADA thus explicitly identifies voting as a critical area in which the discrimination it intends to eliminate persists. *See* 42 U.S.C. § 12101. Further, the ADA "prohibits all discrimination" on the basis of disability "by a public

entity, regardless of the context." *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (quoting *Bledsoe v. Palm Beach Cnty. Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998)). When Congress enacted the ADA, one of its express purposes was combating discrimination in voting against people with disabilities.[1]

Defendants' reliance on *Gregory v. Ashcroft*, 501 U.S. 452 (1991) is similarly misplaced. There, the Court held that the Age Discrimination in Employment Act ("ADEA") did not preempt a Missouri state constitutional provision setting a mandatory retirement age for judges. The Court noted that by its text, "[t]he ADEA plainly covers all state employees *except* those excluded by one of the exceptions." *Id.* at 467 (emphasis added). The ADEA went on to exclude from its coverage "appointees at the policymaking level," which the Court interpreted to encompass state judges. *Id.* at 467. Here, Defendant points to no analogous exceptions to the ADA that might encompass voting and elections—and none exist.

[1] Further, the Supreme Court has applied the ADA even in contexts not mentioned in its text. "Assuming [the ADA did not mention prisons], and assuming further that it proves, as petitioners contend, that Congress did not 'envision that the ADA would be applied to state prisoners', in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

The ADA's legislative history also demonstrates that Congress intended it to apply to voting and elections. During hearings on the ADA, then-Senator Biden read a letter from one of his constituents encouraging Congress to pass the legislation: "Personally, I look forward to the day when I can have an accessible polling place that will accommodate my electric wheelchair. Crawling or hiring an ambulance (as I did during the last general election) isn't really my style." 135 Cong. Rec. S.10765-01, S.10793, 1989 WL 183216 (daily ed. Sept. 7, 1989) (statement of Sen. Joseph Biden; Americans with Disabilities Act, Proceedings and Debates of the 101st Congress, First Session). Senator Harkin added that the ADA was necessary because, as it stood, federal law did not provide protections for people with disabilities who were being "denied access to voting places for State and local elections and other rights and opportunities made available by State and local governments." 135 Cong. Rec. S.4979-02, S.4985, 1989 WL 175277 (daily ed. May 9, 1989) (statement of Sen. Tom Harkin).

Guidance from the U.S. Department of Justice ("DOJ") also applies the ADA to voting. The "ADA Checklist for Polling Places" states that "[t]he ADA's provisions apply to all aspects of voting." U.S. Dep't of Justice, *ADA Checklist for Polling Places* (2016), https://www.ada.gov/votingchecklist.pdf. Another DOJ publication specifically identifies the ADA as a federal law that protects the right to

vote. U.S. Dep't of Justice, *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities* (2016), https://www.justice.gov/file/69411/download (last visited Jan. 16, 2024). In addition to reiterating that the ADA applies to all aspects of voting, it emphasizes that the ADA "requires state and local governments ('public entities') to ensure that people with disabilities have a full and equal opportunity to vote." *Id.*

Finally, Defendants' assertion that the ADA does not apply to elections and voting is at odds with cases from courts in this circuit and across the country. *See*, *e.g.*, *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076, 1160 (N.D. Ala. 2020) (evaluating plaintiffs' prima facie case that curbside voting ban violated the ADA), *appeal dismissed sub nom. People First of Alabama v. Sec'y of State for Alabama*, No. 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), *and appeal dismissed sub nom. People First of Alabama v. Sec'y of State for State of Alabama*, No. 20-13695-GG, 2020 WL 7028611 (11th Cir. Nov. 16, 2020); *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1237 (N.D. Cal. 2013) (considering voting as a "service, program, or activity" covered by the ADA); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (construing "the ADA's broad language as bringing within its scope anything a public entity does."); *cf. Tennessee v. Lane*, 541 U.S. 509, 524 (2004) (noting that the ADA was enacted

against a backdrop of state laws that "categorically disqualified 'idiots' from voting, without regard to individual capacity"); *id.* at 525 (citing *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001), and *People of New York ex rel. Spitzer v. County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000), as examples of discrimination against individuals with disabilities in elections).

The Eleventh Circuit in *American Association of People with Disabilities v. Harris*, 647 F. 3d 1093 (11th Cir. 2011), held that the Florida Secretary of State did not violate the ADA by failing to provide accessible voting machines to Florida voters with disabilities after the 2000 general election. *Id.* at 1107–08. The court noted that its "conclusion that voting machines are not 'facilities' does not leave voters with disabilities in the lurch. As a public program, citizens with disabilities must be able to participate in the County's voting program." *Id.* at 1107. If the ADA did not, in fact, apply to elections at all, not only would the *Harris* holding make no sense, but the *Harris* plaintiffs would have been left without recourse.

This court, consistent with the Eleventh Circuit in *Harris*, has also applied the ADA to election administration. *See People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, (N.D. Ala. 2020). Other district courts in the Eleventh Circuit have agreed: "there is no question that elections are a public program." *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1157 (N.D. Fla. 2022), *aff'd in part,*

vacated in part, rev'd in part sub nom. League of Women Voters of Fla. Inc. v. Fla. Sec'y of State, 66 F.4th 905 (11th Cir. 2023).

Defendants have not and cannot point to any authority suggesting that the clear non-discrimination mandates of Title II and Section 504 do not preempt state law and Plaintiffs' claims should not be dismissed on the basis of claimed conflicts with Alabama law.

B. Defendants' assertion that providing voters with print disabilities accessible absentee ballots is an undue burden or fundamental alteration is an affirmative defense they must prove, not a basis for dismissal.

Defendants attempt to re-package their unproved affirmative defense as Plaintiffs' pleading deficiency. Def. Br. 18 ("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 arguing that Plaintiffs fail to meet an essential eligibility criterion of being able to use paper ballots, Defendants are really arguing that it would be a fundamental alteration of their voting program to offer non-paper ballots to voters with print disabilities.

But whether Defendants might be able to prove after discovery that extending the pre-existing electronic provision of ballots to voters with print disabilities is a fundamental alteration of Alabama's absentee voting system is not a basis for

dismissal. *Hindel v. Husted*, 875 F.3d 344, 348 (6th Cir. 2017) ("Without proof that the proposed ADA accommodation is unreasonable or incompatible with [the state's] election system, defendant's affirmative defense based on allegation, alone, is insufficient."); *see also Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997) (Under Title III of the ADA, which, like Title II, requires reasonable modifications, defendant bears the burden of pleading and proving a requested accommodation would fundamentally alter the nature of the program.).

Defendants' repeated unsupported and conclusory claims that complying with the ADA and Rehabilitation Act will "override" and "compromise[e] an essential eligibility requirement," Def. Br. 12, 16, of "using a paper ballot," and would "bloat Alabama's electronic absentee balloting program beyond recognition," Def. Br. 16, is not sufficient proof of such a fundamental alteration affirmative defense and is, therefore, an inappropriate basis on which to grant a motion to dismiss. *Hindel*, 875 F.3d at 347–48.

Moreover, Plaintiffs have not asked Defendant counties to offer electronic voting to all voters eligible to vote by mail or even to all voters with disabilities. They ask only that Defendants extend to voters with print disabilities who cannot use a paper ballot and who are eligible to vote by mail an electronic system that already exists. This limited exception to what "Alabama law contemplates," Def. Br.

12, with regard to ballot format does not undermine the purpose of the state election code any more than Alabama's current exceptions for overseas voters. Ala. Code § 17-11-40 *et seq.*

Nor does *People First of Alabama*, 467 F. Supp. 3d at 1219, require a different conclusion at the Motion to Dismiss stage. That denial of a preliminary injunction found that the plaintiffs had not yet established a sufficient record to support a substantial likelihood of success on the merits of their claim that the notarized witness requirement for absentee ballots violated the ADA, necessary to support immediate injunctive relief.*Id*. Not only is the witness requirement not the subject of the ADA challenge here, the burden of proving the affirmative defense Defendants assert as a basis for dismissal is on Defendants. And as the court noted in *Merrill*, "[a] public entity cannot merely state that the discriminatory 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." *Id.* at 1216.

In their Motion, Defendants attempt to bypass this burden by characterizing Alabama's preference and past use of paper ballots as an "essential" voter eligibility criterion. Def. Br. 5, 11-16. But this ignores Title II's clear statement that "[a] public entity shall not impose or apply eligibility criteria that screen out or tend to screen

out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity *unless such criteria can be shown to be necessary* for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8) (emphasis added). Defendant "bears the heavy burden of showing that the criteria are necessary." *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1310 (M.D. Ala. 2012); *see also Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 478 (D.N.J. 1998); *Steimel v. Wernert*, 823 F.3d 902, 916 (7th Cir. 2016). At this stage where Plaintiffs' factual allegations are to be regarded as true, and Plaintiffs have alleged that Alabama already permits overseas voters to use electronic ballots, Defendants cannot satisfy their heavy burden of showing that paper is "essential."

As discussed above, "reliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause," *Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1233 (10th Cir. 2009), and circuit courts have consistently resolved conflicts between federal disability rights laws, including the ADA, and state laws in favor of the federal mandate. *See e.g.*, *Astralis Condo. Ass'n v. HUD*, 620 F.3d 62, 69–70 (1st Cir. 2010); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996); *Quinones v. City of Evanston,* 58 F.3d 275, 279–80 (7th Cir. 1995).

In *Lamone* and *Hindel*, the state had not yet officially approved the proposed accessible electronic systems' security. *See Lamone*, 813 F.3d at 500–01; *Hindel*, 875 F.3d at 346. And even *without* that certification, the *Lamone* court held that Maryland must implement the system unless it could prove the system was actually insecure. 813 F.3d at 509–10. The fundamental alteration defense is even weaker here. Alabama has already approved Defendant counties' electronic system for overseas voters. Since the tool has "already been developed," Defendants cannot point to "any substantial cost or implementation burden that would need to be borne by [the counties] to make the tool available for use." *Lamone*, 813 F.3d at 508. Alabama law is not, in and of itself, a defense to noncompliance with the requirements of the ADA and Section 504, and mere recitations of it here do not warrant dismissal.

C. Plaintiffs, like their fellow Alabamians, have a right to vote secretly and by absentee ballot.

Under Alabama's current absentee voting system, there is no way for a voter who is blind or has a print disability to cast the secret ballot for which Alabama law itself provides, as voters without disabilities can do. Ala. Elec. Code § 17-6-34 ("Every voter in Alabama shall have the right to vote a secret ballot and that ballot shall be kept secret and inviolate.").

A voter who is blind or has a print disability is unable to cast a ballot in secrecy because he or she requires assistance completing the ballot (*i.e.*, reviewing items and then physically filling in the ovals corresponding to their selections). Requiring that these voters receive assistance to complete their ballots also requires that they forego their right to cast a "secret ballot," unlike all other voters without such disabilities.[2] It also requires that these voters entrust the integrity of their ballot to whomever is providing assistance; there is no way for voters who are blind or have print disabilities to ensure that an assistant is in fact filling out the ballot consistent with the voter's wishes.

Not only does depriving voters who are blind or have print disabilities from casting a "secret ballot" violate Alabama law as noted above, Ala. Elec. Code § 17-6-34, the Supreme Court has underscored the importance of the secret ballot to a fair and functioning elections system. In *Burson v. Freeman*, 504 US. 191 (1992), the Supreme Court discussed at length the reasons and rationale behind provisions ensuring secrecy of the ballot. It referenced a long history of voter intimidation, fraud, and countless other types of abuses which necessitates the use of a secret balloting system, one in which the voter is not required as a prerequisite to

[2] For purposes of this discussion, a "secret ballot" is one in which the voter is able to cast a ballot without disclosing to a third party who they are voting for.

participation, to subject themselves to such concerns. As the Court noted, the "right to vote freely for the candidate of one's choice is of the essence of a democratic society," (quoting *Reynolds v Sims*, 377 U.S. 533, 555 (1964)), and that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic are illusory if the right to vote is undermined." *Id.* at 199 (quoting *Wesberry v Sanders*, 376 US 1, 17 (1964)).

Many voters with such disabilities are physically unable to vote in person. Therefore, absentee voting is the only effective way that such individuals can participate in the electoral process. Faced with such a choice, the voter is left with two options: not vote at all or give up their guaranteed right to cast a secret ballot. Only by allowing electronic marking of a ballot as already available to military and overseas voters, can such a voter be able to participate while simultaneously ensuring that their choice of candidate is not disclosed.

Defendants cite three cases to support their contention that depriving Plaintiffs of their right to a secret ballot does not violate the ADA. Def. Br. 22-23. But each contains a fatal distinction from this blanket proposition. First, *United States v. Exec. Comm. of Democratic Party of Greene Co*., 254 F.Supp. 543 (N.D. Ala. 1966), does not support the Defendants' argument that where it is practically impossible for

an "illiterate voter," *id*. at 546, to cast an absentee ballot, one is not required. Two significant changes have occurred in the nearly 60 years since that case was decided. First, the ADA was enacted to prevent precisely the type of discrimination this case allowed by ensuring persons with disabilities to public programs such as voting. Second, technology has developed that would allow such a voter to vote secretly—and indeed Defendants already employ this technology for overseas and military voters.

Defendants' reliance on *Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093 (11th Cir. 2011), and *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999) is also misplaced. In *Harris* plaintiffs' ADA claim was denied where there was *another* accessible ballot option available for blind voters. 64 F.3d at 1098, n.10 (noting that what plaintiffs were really asking for was a "voting-machine fleet comprised entirely of touchscreen machines" rather than a method to ensure a secret ballot). And *Nelson* is an out of circuit case which contradicts Eleventh Circuit and Supreme Court precedent; accordingly, it is not persuasive authority for this court.

D. Plaintiffs have sufficiently alleged an ADA violation.

Plaintiffs have squarely addressed the Title II pleading requirements in their Complaint by alleging: (1) that they are qualified individuals with a disability; (2) that they were "excluded from participation in or denied the benefits of a public

entity's services, programs, or activities, or w[ere] otherwise discriminated against by the public entity"; and (3) that the exclusion, denial of benefit, or discrimination was "by reason of" their disability. *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1081 (11th Cir. 2007) (citing *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001)).

i. Plaintiffs are qualified individuals.

Mr. Peebles, Ms. Clayton, Ms. Pressley, and Mr. Rissling, as well as the members of National Federation of the Blind of Alabama, are qualified to participate in the program of absentee voting in Mobile, Tuscaloosa, and Jefferson Counties. Because they are citizens over the age of 18 who are Alabama residents and registered to vote; and because they have vision disabilities, they are permitted to vote absentee under Alabama law. Ala. Const. art. VIII, § 177; Ala. Code §§ 17-3-30, 17-11-3(a), 17-11-3.1; Compl. ¶ 40-44. Defendants do not contest any of these allegations, but instead seek to say that Alabama's "essential eligibility requirements" extend beyond the individual qualified voter to cover, also, the very discriminatory practice which Plaintiffs challenge—the insistence that absentee voters who are blind or have print disabilities nevertheless receive only a paper ballot. Def. Br. 11-16. But none of the fact-finding necessary to ascertain whether this obstacle is an essential eligibility requirement has taken place—and proving it

is Defendants' burden at trial, not Plaintiffs' burden in the pleadings. *See infra* Part III.C.

ii. Plaintiffs have been excluded from the program of absentee voting.

Defendants do not dispute that Plaintiffs are qualified individuals with disabilities; nor do they dispute that absentee voting is a public activity that Plaintiffs are entitled to access. Instead, Defendants argue that Plaintiffs' exclusion from Alabama's absentee voting program does not violate federal law because Plaintiffs can still vote in person. *See* Def. Br. 2, 20.

As a threshold matter, this is a fact-specific argument ill-suited for resolution on a motion to dismiss. *See, e.g.*, *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Secs.*, *LLC*, 797 F.3d 160, 186 (2d Cir. 2015); *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938–39 (9th Cir. 2008).

In addition, this Court has already held that "based on the ADA's broad remedial purpose, if a state provides voters with a choice between in-person and absentee voting, then the ADA mandates that both options be accessible to voters with disabilities." *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076, 1158 (N.D. Ala. 2020). Plaintiffs have all alleged here that they are not able to vote absentee privately and independently, as voters without disabilities can, and that it is their preference to have the option of doing so in future elections. Compl. ¶¶ 11-

29. This is sufficient under this court's articulation in *People First* and because "[a] violation of Title II […] does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity." *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001).

The availability of in-person voting does not, as Defendants argue, excuse the violation of federal law in absentee voting. Defendants' argument that in-person voting is still available to Plaintiffs would mean that they are free to exclude people with disabilities from the absentee voting program that was extended to them in recognition of the accessibility barriers they faced with in-person voting. Courts, including this one, have roundly rejected this reasoning because "[t]he ADA is not so narrow that the plaintiffs' rights only extend to voting 'at some time and in some way." *People First of Alabama*, 467 F. Supp. 3d at 1222 n.46 (); *accord Disabled in Action v. Bd. of Elections in N.Y.*, 752 F.3d 189, 198–99 (2d Cir. 2014) ("[T]o assume the benefit is . . . merely the opportunity to vote at some time and in some way [] would render meaningless the mandate that public entities may not 'afford [ ] persons with disabilities services that are not equal to that afforded others.'" (alteration in original) (quoting *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir. 2003))); *United Spinal Ass'n v. Bd. of Elections in N.Y.*, 882 F. Supp. 2d 615, 623–24 (S.D.N.Y. 2012) ("It is abundantly clear that Defendants are obligated to

provide a level of access to their voting program beyond the simple assurance that voters with disabilities are able to cast a ballot in some way, shape, or form."); *Hernandez v. N.Y. State Bd. of Elections*, 479 F. Supp. 3d 1, 13 (S.D.N.Y., 2020) ("[I]t would be intolerable and legally incorrect to conclude that the relevant service, program, or activity is voting generally and not absentee voting particularly."); *Am. Council of the Blind of Ind. v. Ind. Election Comm'n*, 2022 WL 702257, at *8 (S.D. Ind. 2022) ("It is not enough to say that voters with print disabilities have *some* method of casting a private and independent vote. Instead, for purposes of this injunction, the relevant program or benefit is absentee voting.").

Indeed, 42 U.S.C. § 12101 explains in detail why a federal statute such as the ADA was necessary, and explains in the text of its findings what goal was to be accomplished by enactment. 42 U.S.C. § 12101(a)(7) provides, "The Nation's proper goals regarding individuals with disabilities are to assure *equality of opportunity, full participation*, . . . [and] (8) the continued existence of unfair and unnecessary discrimination and prejudice denies people with disabilities to compete on an *equal basis* . . ." (emphasis added). What Plaintiffs are requesting for voters who are blind or have print disabilities is exactly that: full participation on an equal basis to the most basis of rights, the right to vote. What Defendants propose is exactly the opposite: partial and unequal access to a program. As long as Alabama provides

the opportunity for some of its population to vote by absentee ballot, it must provide an equal and full opportunity for access to all of its citizens eligible to vote absentee. Defendants' attempt to characterize the "program" as "the right to vote in some form" completely excludes a substantial portion of their citizens who cannot vote without assistance. For a subset of those individuals who need assistance, (voters who are blind or have print disabilities) offering no accommodation to ensure that they can vote secretly, as all other voters may, denies an equal and full opportunity to participate.

This Court should thus "proceed cautiously to avoid defining a public program so generally that [it] overlook[s] real difficulties" faced by people with disabilities attempting to vote in person.[3] *Lamone*, 813 F.3d at 503-504 (noting Title II "is not limited only to public 'programs'; it applies to 'services, programs, or activities'" and rejecting defendants' focus on voting generally because it was "overbroad and would undermine the purpose of the ADA and its implementing regulations.").

Defendants contend in the alternative that Plaintiffs have not been completely excluded from absentee voting because they can still receive third-party assistance

[3] Alabama state law also recognizes the specific significance absentee voting has for people with disabilities and has deemed them eligible to do so because in-person voting is so difficult for them. Ala. Code §§ 17-11-3, 17-11-3.1.

in reading and marking their ballots. Def. Br. 21-22. But requiring Plaintiffs to obtain assistance to vote by mail "at best provides these individuals with an inferior voting experience 'not equal to that afforded others' . . . [because] [b]lind and visually impaired voters are forced to reveal a political opinion that others are not required to disclose." *Cal. Council of the Blind*, 985 F. Supp. 2d at 1239 (quoting 28 C.F.R. § 35.130(b)(1)(ii)). Forcing people with disabilities "to rely on the honesty and carefulness of sighted individuals" violates federal law. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1270 (D.C. Cir. 2008). And under similar circumstances, the Fourth Circuit had "little trouble concluding . . . that Maryland's absentee voting program does not provide disabled individuals an 'opportunity to participate . . . equal to that afforded others.'" *Lamone*, 813 F.3d at 506 (quoting 28 C.F.R. § 35.130(b)(1)(ii)). As the court explained, even if there were no "standalone right to vote privately and independently without assistance," having provided such a right to sighted voters, the state could not deny it to the blind. *Id.*

Finally, Defendants cite a 1993 letter from the Department of Justice to argue that privacy and independence are not prerequisites for ensuring effective communication to voters with disabilities. But that letter addressed effective communication in the context of "electronic systems of voting by telephone" and concluded that voting by telephone did not "meet the security requirements

necessary for casting ballots." Letter of Findings from the Chief of the Coordination and Review Section, Civil Rights Division, U.S. Dep't of Justice at 2 (Aug. 25, 1993), https://www.justice.gov/crt/foia/file/670616/download. The letter in no way addresses the present-day technology Plaintiffs are requesting here; technology that Alabama has already deemed secure enough to employ for overseas and military voters.[4] Defendants' arguments that Plaintiffs have not been excluded from absentee voting are thus unavailing.

iii. Plaintiffs have been excluded because of their disability.

Defendants do not dispute that Mr. Peebles has cerebral palsy; they do not dispute that Mr. Rissling, Ms. Clayton, Ms. Pressley, and the members of NFB-AL are blind. Nor do they dispute that paper ballots are inaccessible to voters with blindness or print disabilities. As discussed in part III.C, *supra*, because of their disabilities Plaintiffs are unable to avail themselves of their right to a secret ballot when voting absentee on paper ballots because they need assistance to complete one,

[4] Unlike the current ADA Title II regulations, the 1993 regulations did not specify that auxiliary aids and services were required to "protect the privacy and independence of the individual with a disability," 28 C.F.R. § 35.160(b)(2). *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999), on which Defendants rely, was decided under the previous regulation that did not contain this requirement and *Harris*, 647 F.3d at 1108, which Defendants also cite dealt with a lower court decision under the pre-2010 regulations which did not include the subsequently amended requirements for privacy and independence.

a fact that Defendants have also conceded. Thus, there is no basis for finding Plaintiffs have not sufficiently alleged that they have been excluded from absentee voting because of their disabilities.

E. Plaintiffs have sufficiently alleged a Section 504 claim.

Defendants take issue only with Plaintiffs' failure to plead with the talismanic word that they were "solely" discriminated against based on their disability. Def. Br.. 25-26. But recitation of the word "solely" is not a requirement for stating a claim under Section 504. Plaintiffs' allegations make clear that Defendants are discriminating against Plaintiffs solely by reason of their disabilities as Section 504 prohibits, *i.e.*, that it is only because of their disabilities that Plaintiffs are unable to vote absentee privately and independently as other voters without disabilities are able to do.

Specifically, Plaintiffs allege that "to vote privately and independently by absentee ballot, [they] and other voters with vision and print disabilities need an accessible electronic ballot that they can read and mark on their own computers or smart devices, using their own assistive technology." Compl. ¶ 5. Plaintiffs further allege that "Defendants' exclusive reliance on paper ballots for non-overseas and military voters prevents voters who are blind or have print disabilities in Jefferson, Tuscaloosa, and Mobile Counties from participating in absentee voting with the

privacy and independence afforded to voters without disabilities. The Defendants' absentee voting programs provide no alternatives to accommodate blind and print disabled individuals." Compl. ¶ 7.

These are factual allegations sufficient to state a claim under Section 504: first, that Plaintiffs' need for accessible electronic ballots is "solely because of" their vision and print disabilities, and second, that Defendants' paper-based absentee ballot system excludes them from voting privately and independently "solely because of" those vision and print disabilities. Adding the word "solely" to these allegations would just be a "[t]hreadbare recital" of a purported element of a Section 504 claim, which unlike the factual allegations actually pleaded, is not sufficient to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The applicable regulations implementing Section 504 specify what constitutes a violation of the requirement to provide equally effective communication. Those regulations provide that a violation occurs when a covered entity fails to provide appropriate auxiliary aids "where a refusal to make such provision would discriminatorily impair or exclude the participation of [qualified persons with disabilities] in a program or activity receiving Federal financial assistance." 28 C.F.R. § 42.503(f). That is what Plaintiffs have alleged here—that their request for an auxiliary aid (accessible electronic ballots) has not been met and that the failure

to provide that auxiliary aid—which they require solely because of their vision and print disabilities—has prevented them from voting privately and independently. Compl. ¶¶ 65, 105 (alleging the refusal), ¶¶ 14, 20, 24-25, 28,107 (alleging the discriminatory impact of that refusal on the Plaintiffs). There is no higher pleading standard, including the one Defendants gesture at: "that Defendants' actions were 'solely' to discriminate against [Plaintiffs]." Def. Br. 26. The implication that Section 504 requires an intent or purpose to discriminate in order to state a claim is incorrect. Plaintiffs' Section 504 claim does not require that Defendants refused the auxiliary aid solely with the *purpose* of discriminating against individuals with disabilities, it is that the refusal had the effect of "discriminatorily impair[ing] or exclud[ing] the[ir] participation" in absentee voting, 28 C.F.R. § 43.503(f), as Plaintiffs have alleged it has.

There is no suggestion in the Complaint, nor have Defendants pointed to one, that anything other than Plaintiffs' vision and print disabilities prevents them from voting absentee privately and independently and Plaintiffs have thus stated a claim under Section 504.

CONCLUSION

Because Defendants' legal arguments lack merit, they misapply pleading standards, and ignore the supporting facts pled in Plaintiffs' complaint, the Court should deny Defendants' motion to dismiss in full.

Respectfully submitted this 16th day of January, 2024:

/s/ William van der Pol

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system which provides electronic notice of filing to all counsel of record.

This the 16th day of January, 2024.

/s/ William van der Pol