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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' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiffs ask this Court to use the ADA not as a shield from discrimination but as a sword for imposing policy preferences. Because Plaintiffs cannot show that the State excludes them from Alabama's elections, the ADA is unnecessary to protect their ability to participate in the political process. Indeed—instead of seeking nuanced, individualized relief—they ask this Court to use the ADA to overhaul Alabama law to the supposed benefit of hypothetical voters not before this Court. But the ADA and Rehabilitation Act do not provide sweeping authority to preempt and thereby rewrite Alabama law.

Plaintiffs' Response is a futile attempt to muddy the legal waters enough to make it to discovery. But the face of the Amended Complaint and Alabama law (both properly considered at the motion-to-dismiss stage) make apparent that Plaintiffs have failed to state a claim.

I. Under *Twombly* and *Iqbal*—not the abrogated *Conley*—granting Defendants' Motion is proper.

From the get-go, Plaintiffs mistake even the relevant legal standard for motions to dismiss. They appeal to the now-abrogated standard from *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See* doc. 26 at 2 (citations omitted). But "*Twombly* retired the *Conley* no-set-of-facts test" seventeen years ago. *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) ("We could go on, but there is no need to pile up further citations to show that *Conley's* 'no set of facts' language has been questioned, criticized, and explained away long enough.").

Regardless of how often 12(b)(6) motions are granted, they must always be granted when—accepting the truth of a plaintiff's well-pleaded factual allegations, not conclusory or legal assertions—the complaint fails to state a claim to relief that is plausible on its face. *Ashcroft*, 556 U.S. at 678. That's the case here. And because a motion to dismiss based on failure to state a claim "always presents a purely legal question[,]" *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997), no factual development is necessary.

II. The ADA and Rehabilitation Act do not preempt State election laws.

This Court need not decide whether the ADA could ever apply to *some* aspects of election conduct to conclude that it does not preempt contrary State law. Plaintiffs' arguments either misunderstand or strawman Defendants' position. *Compare* doc. 26 at 4, 9, *with* doc. 18 at 8. Rather, the preemption inquiry here consists of only the following two narrow questions: (1) Is the ADA Elections Clause legislation?; and (2) if not, was it the "clear and manifest purpose of Congress" that the ADA preempt State election law?

The answer to both questions is a resounding "no." Indeed, Plaintiffs did not and cannot dispute that the ADA and Rehabilitation Act are not Elections Clause legislation. Thus, moving to the second question, they cannot prevail unless the preemption of State election law is the "clear and manifest purpose of Congress." *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 281, 230 (1947); *see also* doc. 26 at 6 (conceding that a clear-statement rule applies).

Congress did not demonstrate its manifest intent in the ADA to preempt State election laws.[1] "It has been long settled . . . that we presume federal statutes do not . . . preempt state law." *Bond v. United States*, 572 U.S. 844, 858 (2014). And this presumption is especially strong whether the federal law would "override[] the

[1] Plaintiffs fail to argue that the Rehabilitation Act shows Congress's manifest intent to preempt State law.

'usual constitutional balance of federal and state powers[,]'" *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). To preempt State law in this context, Congress "must be reasonably explicit about it." *Id.* (cleaned up). Generalized language "does not constitute a clear statement[.]" *See id.* at 860.

Plaintiffs cannot point to any "reasonably explicit" statement indicating that Congress intended the ADA to preempt State election laws. Their sole citation to the statute itself is to a legislative finding that "discrimination against individuals with disabilities persists in such critical areas as . . . voting, and access to public services." Doc. 26 at 6 (quoting 42 U.S.C. § 12101). But after acknowledging the correct rule, they conflate Congress's manifest purpose *to preempt* with "its intent to *cover* voting and elections." *See id.* (emphasis added). Again, whether the ADA applies to elections is not the question at issue.[2]

Regardless, this passing reference to voting at most indicates that Congress understood the ADA to affect voting generally. For example, the ADA might require making a polling place more accessible, which could reduce discrimination against individuals with disabilities. *See generally Tennessee v. Lane*, 541 U.S. 509 (2004).[3] Just because the ADA may require polling places to be wheelchair accessible does

[2] For this reason, Defendants do not respond to Plaintiffs' discussion of legislative history, DOJ guidance, or other caselaw to support the irrelevant point. Doc. 26 at 8–11.

[3] Indeed, Plaintiffs' irrelevant (to the preemption question) appeals to legislative history about then-Senator Biden's constituent who desired a wheelchair-accessible polling place, doc. 26 at 8, proves the point.

not mean it overhauls State statutory regimes governing absentee voting. That "the 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), confirms that the ADA certainly does not contain a clear statement that Congress intended to preempt States' broad authority over the conduct of elections.

As discussed in Defendants' motion, the Supreme Court's decisions in *Bond*; *United States v. Gradwell*, 243 U.S. 476 (1917); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), all support that the ADA does not preempt State election law. As an initial matter, Plaintiffs entirely ignore Defendants' discussion of *Bond*, which is directly applicable here as it held that a broad provision "d[id] not constitute a clear statement that Congress meant the statute" to regulate an area traditionally regulated by the States. 572 U.S. at 860.

Bond also explains why cases not technically about federal preemption of State laws—Plaintiffs' chief complaint about Defendants' reliance on *Gradwell*, doc. 26 at 6—are helpful. 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).

As for Plaintiffs' gripes about *Gladwell*, the majority opinion in *Arizona* quite clearly discusses it, *contra* doc. 25 at 6 ("only the dissent in *Arizona* discusses *Gradwell*"). It devotes a lengthy footnote to it, which Plaintiffs' brief directly quotes. 570 U.S. at 13 n.5 (quoted by doc. 26 at 6). As Defendants explained, doc. 18 at 7 n.3, *Arizona* states that *Gradwell* "says nothing . . . about how to construe statutes (like the NVRA) in which Congress has *indisputably* undertaken to 'regulate such elections.'" 570 U.S. at 13 n.5 (emphasis in original). But *Arizona* did not cast doubt on (and thus tacitly reaffirmed) *Gradwell*'s application to statutes like the ADA that are not "Elections Clause legislation."

Plaintiffs attempt to distinguish *Gregory v. Ashcroft* on the ground that it involved an exception from federal law, doc. 26 at 7, but that distinction has nothing to do with *Gregory*'s application. Relevant here, the point of *Gregory* is that the Supreme Court "w[ould] not read the [Age Discrimination in Employment Act] to cover state judges unless Congress has made it clear that judges are *included*." 501 U.S. at 467 (emphasis in original). Just as Congress did not make clear that the ADEA's preemptive scope covered judicial qualifications, Congress did not make clear that the ADA's preemptive scope covered State election statutes. That the ADEA's text was seemingly broad did not indicate that it preempted an area

traditionally regulated by the States. Just the opposite: the language was "sufficiently broad that" the Supreme Court could not "conclude that the statute plainly cover[ed] appointed state judges." *Id.* So too here. The ADA's broad text alone does not constitute a clear statement of Congress's intent to preempt State election laws.

Congress knows how to address the important issue of discrimination in voting, and it has done so numerous times—including in the Voting Accessibility for the Elderly and Handicapped Act, 52 U.S.C. § 20101. But there is no reasonably explicit statement indicating that Congress clearly and manifestly intended to displace State election laws when it passed the ADA. Therefore, this Court should find that the ADA and Rehabilitation Act do not preempt Alabama election law in this context and dismiss the Amended Complaint for failure to state a claim.

III. Taking Alabama's elections online would alter its essential eligibility requirements for voting and would fundamentally alter its elections.

Despite Plaintiffs' attempts to conflate them, Defendants make two distinct (but related) arguments: (1) that Plaintiffs are not qualified individuals because, by voting domestically by electronic means, they would fail to meet the essential eligibility requirements for domestic voting; and (2) that Plaintiffs' requested modification is not reasonable because it would fundamentally alter Alabama's elections. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1081–82 (11th Cir. 2007).

First, whether Plaintiffs are "qualified individual[s]" is a necessary component of Plaintiffs' prima facie claim. *See* 42 U.S.C. §§ 12132, 12131(2). A

"qualified individual with a disability" is one who "without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements" for participation in the program. *Id.* The definition's satisfaction is independent of the reasonable-accommodation analysis. *Cf. People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, 1219 (N.D. Ala. 2020) ("[E]ssential eligibility requirements are not subject to reasonable modifications[.]"). So, yes, "Defendants *do* . . . dispute that Plaintiffs are *qualified* individuals with disabilities." *Contra* doc. 26 at 20 (emphasis added).

Neither the ADA nor the Rehabilitation Act "require States to compromise their essential eligibility criteria for public programs." *Lane*, 541 U.S. at 531–32. A paper ballot is an essential eligibility criterion to domestic voting in Alabama. *Cf. Nat'l Fed'n of the Blind of Ala. v. Allen*, 661 F. Supp. 3d 1114, 1119 (N.D. Ala. 2023) ("In short, Alabama law does not allow domestic voters to submit electronic absentee ballots; they must use paper ballots."). This argument is not just a "conclusory claim[]," doc. 26 at 12; rather, Plaintiffs just fail to engage with Defendants' discussion of the many State laws that show that paper ballots are essential to Alabama's elections. Doc. 18 at 13–14. And this Court *at the motion-to-dismiss stage*[4] has held that one of these requirements—the witness requirement,

[4] Plaintiffs apparently ignore Defendants' citation to this Court's opinion granting the State's motion to dismiss in *People First*, instead citing only to this Court's opinion denying a preliminary

ALA. CODE § 17-11-10—is an essential eligibility requirement. *People First*, 479 F. Supp. 3d at 1211–12. Likewise, that Alabama law permits electronic voting for overseas voters to comply with federal law does not undercut the essential nature of paper ballots for domestic voting. *Accord id.* at 1211.[5] The ADA does not provide Plaintiffs with the authority to second-guess the State's discretion to choose reasonable essential eligibility requirements.

Next, Plaintiffs' requested relief—allowing Plaintiffs and others like Plaintiffs to vote by electronic ballot—would also fundamentally alter Alabama's elections. That is obvious from the face of the Amended Complaint and thus appropriate to determine at the motion-to-dismiss stage. *See, e.g.*, *LeFrere v. Quezada*, 582 F.3d 1260, 1263 (11th Cir. 2009) ("If the complaint contains a claim that is facially subject to an affirmative defense, that claim may be dismissed under Rule 12(b)(6).").[6] Defendants' discussion of Alabama law's incompatibility with

injunction (on the same grounds) to argue that the case does not support adjudicating this issue at the motion-to-dismiss stage. *Compare* doc. 18 at 14 (citing *People First of Ala. v. Merrill*, 479 F. Supp. 3d 1200, 1212 (N.D. Ala. 2020) (motion to dismiss opinion)), *with* doc. 26 at 13 (citing *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1219 (N.D. Ala. 2020) (preliminary injunction opinion)).

[5] Even if electronic absentee voting were considered a separate program, Plaintiffs would not meet the essential eligibility requirement for that program either—voting pursuant to UOCAVA.

[6] Indeed, the Eleventh Circuit has concluded that courts can adjudicate the reasonability of a proposed accommodation and the applicability of a fundamental-alteration defense at the motion-to-dismiss stage. *See Unger v. Majorca At Via Verde Homeowners Ass'n, Inc.*, No. 21-13134, 2022 WL 4542348, at *3–4 (11th Cir. Sept. 29, 2022). Although that case involved a claim under the Fair Housing Act, courts "look to case law under the RA and the ADA for guidance on what is reasonable under the FHA[,]" *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1220 (11th Cir. 2008), which likewise makes sense in reverse.

electronic voting (i.e., that Plaintiffs' requested relief would result in Defendants' non-compliance with numerous State laws), *see* doc. 18 at 13–14, requires no further evidence to show that Plaintiffs' requested relief would work a change *in kind* to Alabama's electoral system.

Plaintiffs entirely ignore the eventual implications of their requested relief: it would transform Alabama's electronic absentee balloting program from a narrow program 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 ballot system at all, leaving that system 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."). Again, Plaintiffs cannot use Defendants' narrow compliance with UOCAVA to justify expansion under the ADA; otherwise, the State must always choose between compromising its essential eligibility criteria and openly defying federal voting laws. Doc. 18 at 15 (citing *Lane*, 541 U.S. at 532).

Accordingly, Plaintiffs' claims should be dismissed for requiring the State to compromise its essential eligibility requirements or, alternatively, for imposing relief that would fundamentally alter Alabama's elections.

IV. Plaintiffs have not been "excluded" under the ADA.[7]

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.* "The 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).

Plaintiffs' exclusion argument depends entirely on their attempt to overly narrow the program to absolutely secret electronic absentee voting. *See* doc. 26 at 15–18. Yet Plaintiffs fail to seriously engage with Defendants' argument that defining the program at issue here as "voting generally" is more appropriate. Again, the "participation" Plaintiffs seek is voting in Alabama's electoral process whereas

[7] As a threshold matter, it is entirely appropriate for this Court to decide this argument at the motion-to-dismiss stage. As is proper, the argument assumes the truth of the Amended Complaint's factual allegations to argue that Plaintiffs have nonetheless failed to allege exclusion from the relevant program. Out-of-circuit decisions about the fact-intensive nature of adjudicating fraud-based claims are irrelevant. *See* doc. 26 at 20 (citations omitted).

absolutely secret electronic absentee voting "is simply *how* they prefer to access the program." Doc. 18 at 17. And it's inappropriate to limit the program as Plaintiffs seek because absolutely secret electronic absentee voting is not widely available—it's limited to UOCAVA voters. *Id.* at 18–19. Plaintiffs' limited engagement with these points consists of manufacturing a false choice for blind voters to make between not voting at all and lacking absolute secrecy in casting their vote. Doc. 26 at 17, 23. Aided by their artificial framing, Plaintiffs ignore that "handicap-accessible voting devices, which enable them to 'vote privately and independently[,]' are available when they vote in person.[8] Doc. 18 at 3; *see also* ALA. CODE § 17-2-4(c).

Plaintiffs' framing is designed to guarantee that the only acceptable accommodation is the one that they "most strongly prefer," *Dean*, 804 F.3d at 189, and must accordingly be rejected. Regardless of Plaintiffs' preferred outcome, the Eleventh Circuit in a similar case agreed that defining the relevant program as "voting generally" is appropriate. *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

[8] Those machines are accessible (1) on Election Day at the polls—like all registered voters are eligible to do—or (2) at any County Absentee Election Office on any weekday between one and fifty-five days before Election Day—like all qualified absentee voters are eligible to do. ALA. CODE §§ 17-11-12, 17-11-18(a).

added)). Because Plaintiffs admit that they are able to vote and have voted in the past, doc. 4 ¶¶ 14, 18, 23, 27, they have not been excluded from voting generally; they just want to vote some other way.[9]

Plaintiffs can also participate in absentee voting, which is itself an accommodation. As with in-person voting, *see* ALA. CODE § 17-9-13, Plaintiffs can receive assistance in filling out their absentee ballots, ALA. CODE § 17-9-13(a). That assistance is an equally effective means of participating in elections, which the Eleventh Circuit has blessed. *Harris*, 647 F.3d at 1108 (quoting the district court with approval). That this assistance accommodation exists shows that under Alabama law, there is no program of secret voting under all circumstances. Whether this accommodation would violate Ala. Code § 17-6-34's secret-ballot requirement is irrelevant, and this Court lacks jurisdiction to address it, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). *See also Harris*, 647 F.3d at 1097 ("The Florida constitution requires that all votes be cast in a 'direct and secret' manner. The [district] court . . . found that third-party assistance was consistent with casting a 'direct and secret' ballot.").

[9] Plaintiffs' response often invokes the impact on persons other than the Plaintiffs themselves, but this Court lacks jurisdiction to adjudicate the hypothetical circumstances of hypothetical persons not before the Court. Such arguments thus do not prevent dismissal. As just one example, Plaintiffs argue that "[m]any voters with such disabilities are physically unable to vote in person[,]" doc. 26 at 17, but their Amended Complaint makes no allegation that *Plaintiffs* are physically unable to vote in person.

Plaintiffs cannot render these accommodations irrelevant by defining the program so narrowly. "[W]hen viewed in its entirety," the State's voting program "is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). Plaintiffs have not been excluded from voting; indeed, the Amended Complaint's references to the effective, reasonable accommodations that they can take (and have taken) advantage of confirms it. *See* doc. 18 at 20–21 (citing doc. 1).

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 January 29, 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.

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