

**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-RDP

PLAINTIFFS' CORRECTED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Beverly Clayton, Eric Peebles, Gillie Presley, and David Rissling (collectively, “Individual Plaintiffs”) and Organizational Plaintiff National Federation of the Blind of Alabama (“NFB-AL”) have print disabilities that interfere with their ability to see, mark, and manipulate paper ballots. They seek the opportunity to vote absentee remotely, privately, and independently—just as absentee voters without disabilities are able to do. Although Defendants already offer an accessible electronic absentee voting system to military and overseas voters, Defendants refuse to extend that system to voters with print disabilities. Because Defendants only provide ***paper-based*** absentee voting for domestic absentee voters, Plaintiffs are denied equal access to Defendants’ remote absentee voting programs.

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs file this motion for summary judgment because there are no genuine disputes of material fact regarding Defendants’ unlawful disability discrimination under Title II of the Americans with Disabilities Act (“ADA”). Nor are there any genuine disputes of material fact regarding Defendants’ defenses. *Rissling v. Bobo*, No. 7:23-CV-01326-LSC, 2024 WL 3106897, at *6 (N.D. Ala. June 24, 2024).

STATEMENT OF UNDISPUTED FACTS AND PROCEDURAL HISTORY

I. Individual Plaintiffs

1. Each of the Individual Plaintiffs have “print disabilities,” which interfere with their ability to read, mark, and/or handle printed paper documents. *See* ECF No. 56-1, Ex. 1, Expert Rep. of Lou Ann Blake (“Blake Rep.”), at 6.¹

2. Print disabilities include vision disabilities, such as blindness and low vision, and manual dexterity disabilities, such as cerebral palsy. *See id.*; ECF No. 56-2, Ex. 2, Dep. of Dr. Eric Peebles (“Peebles Dep.”) at 71:10–23.

¹ The term “print disability/disabilities” refers to all disabilities that require an individual to employ alternative methods to access, read, and complete forms.

3. Ms. Presley and Mr. Rissling, both of whom reside in Tuscaloosa County, are completely blind. *See* ECF No. 56-3, Ex. 3, Dep. of Gillie Presley (“Presley Dep.”) at 12:19; ECF No. 56-4, Ex. 4, Dep. of David Rissling (“Rissling Dep.”) at 16:1.

4. Ms. Clayton lives in Jefferson County and has advanced glaucoma, which has eliminated her peripheral vision and left her remaining vision blurry. *See* ECF No. 56-5, Ex. 5, Dep. of Beverly Clayton (“Clayton Dep.”) at 12:10; 18:16–17; 19:6–8.

5. These three Plaintiffs’ vision disabilities substantially limit the major life activities of seeing, reading, driving, and accessing any content on paper. *Id.* at 21:2–25:20; ECF No. 56-4, Ex. 4, Rissling Dep., at 16:1–21:3, 32:21–33:3, 48:12–49:3; ECF No. 56-3, Ex. 3, Presley Dep., at 33:1–35:8; 38:2–9.

6. Dr. Peebles, who lives in Mobile County, has cerebral palsy. *See* ECF No. 56-2, Ex. 2, Peebles Dep., at 8:15–16, 16:1–4.

7. Dr. Peebles’ disability substantially limits the major life activities of performing manual tasks and writing (including typing), among others. *Id.* at 40:2–41:11, 44:7–45:16, 46:11–18, 66:3–7, 69:5–72:17, 78:13–80:13.

8. Plaintiffs use assistive technology, which allows them to perform many activities of daily living independently. Many blind individuals, including Ms. Clayton, Ms. Presley, and Mr. Rissling, use screen reader software—technology that transmits textual information on a computer into an audio output or refreshable Braille display—to read, navigate, and complete electronic forms on computers, tablets, or smartphones. *See, e.g.,* ECF No. 56-4, Ex. 4, Rissling Dep., at 16:5–21:3; ECF No. 56-3, Ex. 3, Presley Dep., at 33:1–35:8; ECF No. 56-1, Ex. 1, Blake Report, at 6.

9. Individuals with print disabilities who are sighted, like Dr. Peebles, use speech-to-text software to engage with electronic information and documents. *See* ECF No. 56-2, Ex. 2, Peebles Dep., at 39:9–46:18; 45:7–13; ECF No. 56-1, Ex. 1, Blake Rep., at 8.

10. To work with these assistive technologies, materials must be “accessible,” meaning the document is navigable, readable, and fillable using assistive technology. *See* ECF No. 56-1, Ex. 1, Blake Rep., at 1 n.1.

II. Organizational Plaintiff

11. Plaintiff NFB-AL is the Alabama affiliate of the National Federation of the Blind (“NFB”). *See* ECF No. 56-6, Ex. 6, Pls.’ Resp. to Defs.’ Interrog. No. 19.

12. NFB-AL is a non-profit corporation duly organized under the laws of the State of Alabama and the oldest and largest national organization of blind persons within the state. *See id.*

13. NFB-AL currently has around 180 members. *See* ECF No. 56-7, Ex. 7, Barbara Manuel, NFB-AL President, 30(b)(6) Dep. (“Manuel Dep.”), at 29:12–14.

14. More than 95 percent of NFB-AL’s members are blind or low-vision. *See id.* 31:8–9. Ms. Clayton and Mr. Rissling are both NFB-AL members. *See* ECF No. 56-6, Ex. 6, Pls.’ Resp. to Defs.’ Interrog. No. 18.

15. NFB-AL works to “educate the public on blindness” and “create better opportunities for the blind communities within the State of Alabama and beyond.” ECF No. 56-7, Ex. 7, Manuel Dep., at 23:18–24:1. *See* ECF No. 56-6, Ex. 6, Pls.’ Resp. to Defs.’ Interrog. No. 19.

16. NFB-AL’s core activities involve helping its members lead independent, socially integrated lives. NFB-AL’s activities are determined by “issues that its members have raised with the organization that they’re experiencing in the community.” ECF No. 56-7, Ex. 7, Manuel Dep, at 92:14–17.

17. For example, in 2024, NFB-AL organized a “resource fair” as “an opportunity for blind and low vision [people] to come out and just connect with the various resources around the City.” *Id.* at 63:23–64:4. These include issues with voting privately and independently, whether absentee or on election day. *See id.* 61:8–16; ECF No. 56-8, Ex. 8, at NFBAL 000002; ECF No. 56-9, Ex. 9, at NFBAL 000029–31; ECF No. 56-10, Ex. 10, NFBAL 000009–10.

18. In 2020, NFB-AL conducted a survey regarding the voting preferences of blind people. ECF No. 56-7, Ex. 7, Manuel Dep, at 64:10–14.

III. Defendants' Absentee Voting Programs

19. Defendants are the three Absentee Election Managers (“AEMs”) responsible for administering absentee voting in Alabama’s largest counties: Defendant Magaria Bobo is the AEM for Tuscaloosa County, ECF No. 56-11, Ex. 11, Dep. of Magaria Bobo (“Bobo Dep.”), at 35:12–18; Defendant Susan Potts is the AEM for Mobile County, ECF No. 56-12, Ex. 12, Dep. of Susan Potts (“Potts Dep.”), at 25:8–15; and Defendant Jacqueline Anderson-Smith is the AEM for Jefferson County, ECF No. 56-13, Ex. 13, Dep. of Jacqueline Anderson-Smith (“Anderson-Smith Dep.”), at 29:23–30:3.

20. Defendants are responsible for processing their counties’ voter applications; maintaining a list of absentee voters; sending absentee ballots either through the mail or electronically; and receiving and verifying all returned absentee ballots before they are counted. ECF No. 56-11, Ex. 11, Bobo Dep., at 35:19–45:13; ECF No. 56-12, Ex. 12, Potts Dep., at 32:2–36:15; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 30:4–31:8, 38:22–47:24; *see also* ECF No. 56-14, Ex. 14, at D. Smith 000119.

21. Citizens seeking to vote absentee must meet one of eight eligibility criteria. Ala. Code, § 17-11-3(a)(1)–(8). Those eight eligibility criteria include people with disabilities, members of the armed forces (and their spouses and dependents), and overseas voters who are eligible to vote absentee pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 (“UOCAVA”). *See* ECF No. 56-15, Ex. 15, Alabama Law Inst., *Alabama Election Handbook*, at D. Potts 000158–59 (21st ed. 2023–2024); Ala. Code, § 17-11-3(a)(1)–(8).

22. To vote absentee, voters must request an absentee ballot from an AEM using a paper or online application. *See* ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 54:21–22; 62:6–20, 65:11–21; ECF No. 56-12, Ex. 12, Potts Dep., at 45:15–24; ECF No. 56-11, Ex. 11, Bobo Dep., at 67:3–9, 73:10–20.

23. Absentee voters apply in one of three ways: 1) request and complete an application in person at the AEM's office in the circuit court; 2) request an application over the phone, receive it by mail, complete it on paper, and return it in person or by mail; or 3) download an application from the Alabama Secretary of State website or, if available, a county website, complete it on paper, and return it in person or by mail. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 52:11–54:20, 62:6–63:2, 63:19–64:19, 65:10–67:24; ECF No. 56-11, Ex. 11, Bobo Dep., at 67:3–69:13, 73:10–19; ECF No. 56-12, Ex. 12, Potts Dep., at 45:15–46:18.

24. UOCAVA voters can either submit a UOCAVA-specific absentee ballot application provided online or they can submit a Federal Post Card Application form to their county's AEM. ECF No. 56-11, Ex. 11, Bobo Dep., at 110:8–113:23; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 105:11–107:22; ECF No. 56-12, Ex. 12, Potts Dep., at 105:1–106:10.

25. Defendants review applications, confirm that they are fully completed and signed, and if required, that a photocopy of the voter's ID has been provided. ECF No. 56-11, Ex. 11, Bobo Dep., at 67:3–23; ECF No. 56-12, Ex. 12, Potts Dep., at 59:14–61:16, 119:25–120:15; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 60:9–63:2.

26. Voters who are applying to vote absentee pursuant to UOCAVA or by reason of physical disability are exempt from the photo ID requirement. *See, e.g.*, ECF No. 56-16, Ex. 16, at D. Potts 000690.

27. Once an absentee voter is approved, Defendants update the voter's information in PowerProfile, the counties' voter tracking system. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 66:3–68:14; ECF No. 56-11, Ex. 11, Bobo Dep., at 42:6–13, 57:4–11, 69:14–70:11, 80:13–82:18, 121:17–123:13; ECF No. 56-12, Ex. 12 Potts Dep., at 35:2–36:4, 46:19–48:14.

28. Absentee voters must indicate which absentee voter eligibility requirement they meet on their applications. ECF No. 56-12, Ex. 12, Potts Dep., at 50:16–54:10; ECF No. 56-11, Ex. 11 Bobo Dep., at 73:21–74:1; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 70:18–72:16; *accord* ECF No. 56-16, Ex. 16, at D. Potts 000690–91; ECF No. 56-17, Ex. 17, at D. Potts 000981; ECF No. 56-18, Ex. 18, at D. Potts 000965.

29. For individuals who indicate they are voting absentee by reason of disability, no steps are taken to confirm a person's disability. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 72:17–23; ECF No. 56-11, Ex. 11, Bobo Dep., at 82:19–83:4; ECF No. 56-12, Ex. 12, Potts Dep., at 61:17–62:6.

30. The same is true for UOCAVA voters. ECF No. 56-11, Ex. 11, Bobo Dep., at 117:9–17; ECF No. 56-12, Ex. 12, Potts Dep., at 106:11–22.

31. Even so, Defendants have never encountered instances of self-certification resulting in fraud. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 77:19–79:15, 120:7–121:9; ECF No. 56-11, Ex. 11, Bobo Dep., at 84:19–85:17, 121:17–123:18; ECF No. 56-12, Ex. 12, Potts Dep., at 61:23–62:24, 107:16–108:3.

32. Although the process by which eligible absentee voters apply and are approved to vote absentee is substantively the same, ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 107:9–22, the process by which they are allowed to vote differs in key respects.

A. Absentee Voting Generally

33. Once approved, absentee voters have two options: 1) vote early in person at the AEM's office; or 2) receive a paper absentee ballot by mail. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 64:20–65:9, 72:24–73:9, 75:1–15; ECF No. 56-11, Ex. 11, Bobo Dep., at 42:6–43:5, 49:1–16, 88:24–91:13; ECF No. 56-12, Ex. 12, Potts Dep., at 47:4–7, 77:7–79:5.

34. Mail absentee voters must complete the ballot according to instructions written on paper; physically mark their selections by filling in bubbles with black ink; trifold the ballot; place it inside a secrecy envelope; place the secrecy envelope inside an affidavit envelope; complete the affidavit envelope by reading and signing it and having a witness sign it; and either hand deliver it to the AEM office or affix postage and send it by mail. *See* ECF No. 56-11, Ex. 11, Bobo Dep., at 67:12–21; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 64:22–65:5; ECF No. 56-12, Ex. 12, Potts Dep., at 78:14–22.

35. An error at any of these steps results in rejection. *See* ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 65:4–5 (“[W]e are very specific with what we want you to do in order

to return that ballot.”); ECF No. 56-11, Ex. 11, Bobo Dep., at 154:6–155:1 (discussing various rejection errors).

B. Absentee Voting for UOCAVA Voters

36. UOCAVA voters, however, have access to a remote accessible vote-by-mail (“RAVBM”) system that provides voters with ballots electronically. ECF No. 56-1, Ex. 1, Blake Rep., at 7.

37. Alabama’s current RAVBM system allows UOCAVA voters to both receive and submit their ballots electronically. *See e.g.*, ECF No. 56-12, Ex. 12, Potts Dep., at 103:21–104:19; ECF No. 56-15, Ex. 15, at D. Potts 000099.

38. For the past four years Alabama has contracted with Democracy Live to administer its RAVBM system, OmniBallot. *See* ECF No. 56-19, Ex. 19, 30(b)(6) Dep. of Jeff Elrod (“Elrod Dep.”), at 50:4–15, 61:2–5.

39. Defendants have provided OmniBallot to UOCAVA voters for four years (two federal election cycles). *Id.* at 146:9–148:19.

40. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

41. Once a UOCAVA voter’s information is entered into PowerProfile, the Secretary of State’s Office transmits to Democracy Live the information for voters who have chosen to receive their ballots electronically using verification features. ECF No. 56-19, Ex. 19, Elrod Dep., at 50:11–52:19, 59:6–60:3; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 115:15–116:8; ECF No. 56-11, Ex. 11, Bobo Dep., at 123:14–124:7; ECF No. Ex. 12, Potts Dep., at 56-12, 111:11–112:25; ECF No. 56-21, Ex. 21, Pinnick Dep., at 18:16–19:20, 30:7–31:9, 32:13–33:1, 45:6–46:22.

42. Democracy Live then sends the voters a link to its OmniBallot platform through which voters access their electronic ballots. ECF No. 56-21, Ex. 21, Pinnick Dep., at 19:21–20:6, 50:16–52:15.

43. Voters can access their ballots, make their selections, review their choices remotely, and return the ballot electronically. *Id.*

44. [REDACTED]

45. Once absentee ballots are submitted through OmniBallot, Defendants receive an email notification, print the ballots themselves, and transfer them to the election workers responsible for counting them. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 116:9–119:12; ECF No. 56-11, Ex. 11, Bobo Dep., at 128:22–133:19, 137:9–14; ECF No. 56-12, Ex. 12, Potts Dep., at 115:15–118:11, ECF No. 56-21, Ex. 21, Pinnick Dep., at 23:8–28:21.

IV. Defendants' Absentee Voting Programs Do Not Offer an Accessible, Remote Absentee Option to Voters with Print Disabilities.

46. OmniBallot is accessible to users who, like Plaintiffs, rely on assistive technology. *See* ECF No. 56-22, Ex. 22, Blake Dep. 40:23–17; ECF No. 56-23, Ex. 23, Expert Rep. of Kennedy Zimnik (“Zimnik Rep.”), at 4; ECF No. 56-24, Ex. 24, Dep. of Kennedy Zimnik (“Zimnik Dep.”), at 100:4–18; ECF No. 56-21, Ex. 21, Pinnick Dep., at 34:3–20, 49:9–25, 71:20–72:10; ECF No. 56-20, Ex. 20, at Democracy Live 0004759–60, 0004762, 0004764.

47. Many jurisdictions and states across the county provide RAVBM systems to voters with print disabilities in addition to UOCAVA voters. *See* ECF No. 56-1, Ex. 1, Blake Rep. 7–8, 10–11. Defendants do not. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 103:4–17; ECF No. 56-12, Ex. 12, Potts Dep., at 97:20–22; ECF No. 56-11, Ex. 11, Bobo Dep., at 79:1–6.

48. For voters with print disabilities living in Alabama (including Plaintiffs and NFB-AL members) who cannot read and/or fill out paper forms without assistance, each step of the current process for absentee voting beginning with the application is inaccessible. ECF No. 56-23, Ex. 23, Zimnik Rep., at 3–5, 7; ECF No. 56-25, Ex. 25, Suppl. to Expert Rep. of Kennedy

Zimnik (“Zimnik Suppl. Rep.”), at 3–7; ECF No. 56-1, Ex. 1, Blake Rep., at 6; ECF No. 56-4, Ex. 4, Rissling Dep., at 47:4–8, 48:12–49:3, 93:8–17, 94:20–95:7; ECF No. 56-5, Ex. 5, Clayton Dep., at 19:9–21, 22:18–23:21; ECF No. 56-3, Ex. 3, Presley Dep., at 33:1–35:8, 38:2–9; ECF No. 56-2, Ex. 2, Peebles Dep., at 40:2–41:11, 44:7–45:16, 46:11–18, 66:3–7, 69:5–72:17, 78:13–80:13; ECF No. 56-7, Ex. 7, Manuel Dep., at 112:3–15; ECF No. 56-6, Ex. 6, Pls.’ Ans. to Defs.’ Interrog. Nos. 4, 6, 7.

49. If voters with print disabilities want to vote privately and independently, they cannot do so remotely. ECF No. 56-4, Ex. 4, Rissling Dep., at 47:4–8, 48:12–49:3, 93:8–17, 94:20–95:7; ECF No. 56-5, Ex. 5, Clayton Dep., at 19:9–21, 22:18–23:21, 32:21–33:22; ECF No. 56-3, Ex. 3, Presley Dep., at 33:1–35:8, 38:2–9; ECF No. 56-2, Ex. 2, Peebles Dep., at 40:2–41:11, 44:7–45:16, 46:11–18, 66:3–7, 69:5–72:17, 78:13–80:13; ECF No. 56-7, Ex. 7, Manuel Dep., at 112:3–15; ECF No. 56-6, Ex. 6, Pls.’ Ans. to Defs.’ Interrog. Nos. 4, 6, 7.

50. Instead, they must do so in person using the ExpressVote machine² before election day at Defendants’ offices or on election day at their polling place. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 64:20–65:9, 72:24–73:9, 75:1–15; ECF No. 56-11, Ex. 11, Bobo Dep., at 42:6–43:5, 49:1–16, 88:24–91:13; ECF No. 56-12, Ex. 12, Potts Dep., at 47:4–7, 77:7–79:5.

51. Even ExpressVote is not an option for all voters with print disabilities who, like Dr. Peebles, cannot independently manipulate the physical ballot into the ExpressVote machine, independently manipulate the screen to make selections, or, once the ballot is printed, independently manipulate it into the optical scanner. ECF No. 56-2, Ex. 2, Peebles Dep., at 87:10–89:21. ECF No. 56-19, Ex. 19, Elrod Dep., at 41:11–15; ECF No. 56-12, Ex. 12, Potts Dep., at 134:12–135:3; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 52:11–55:18; ECF No. 56-11, Ex. 11, Bobo Dep., at 141:13–144:3.

² ExpressVote machines are ballot marking devices that are accessible to blind and low vision voters using earphones and a keypad. ECF No. 56-12, Ex. 12, Potts Dep., at 134:12–135:25; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 57:17–58:8; ECF No. 56-11, Ex. 11, Bobo Dep., at 141:13–19.

52. To vote in person either before or on election day, Plaintiffs must arrange for travel to and from the courthouse or polling place, navigate inside, trust that the ExpressVote machine is working, and hope that the poll workers know how to use it. ECF No. 56-4, Ex. 4, Rissling Dep., at 61:2–9, 65:7–69:14; ECF No. 56-5, Ex. 5, Clayton Dep., at 29:19–33:9; ECF No. 56-3, Ex. 3, Presley Dep., 30:4–6; ECF No. 56-7, Ex. 7, Manuel Dep., at 51:5–52:11.

53. Although Plaintiffs can vote in person at Defendants’ offices in the 55 days before election day, they must still rely on the assistance of a third party to complete their absentee application and the affidavit accompanying their ballots. *See e.g.*, ECF No. 56-11, Ex. 11, Bobo Dep., at 141:20–143:9; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 52:11–22 (discussing absentee in-person voters having to “fill [] out” their paper absentee applications); ECF No. 56-4, Ex. 4, Rissling Dep., at 60:23–61:9.

V. Defendants’ System Forces Plaintiffs to Sacrifice Their Right to Vote Remotely, Privately, and Independently.

54. By requiring Plaintiffs to vote in person or at home with the assistance of a third party, Defendants force Plaintiffs to sacrifice their right to vote remotely, privately, and independently. *See* ECF No. 56-5, Ex. 5, Clayton Dep., at 49:23–50:6; ECF No. 56-2, Ex. 2, Peebles Dep., at 113:6–8, 113:20–21; ECF No. 56-3, Ex. 3, Presley Dep., at 27:5–13; ECF No. 56-4, Ex. 4, Rissling Dep., at 64:15–19.

55. Dr. Peebles voted by mail from his home and was forced to reveal his choices to a sighted assistant. *See* ECF No. 56-2, Ex. 2, Peebles Dep., at 86:8–21.

56. Ms. Presley and Mr. Rissling went in person to vote “absentee” (i.e., at their local courthouses rather than a polling place) and were also forced to enlist sighted assistance. Ms. Presley told her selections to a friend, who filled out her ballot. *See* ECF No. 56-3, Ex. 3, Presley Dep., at 27:7–16. Mr. Rissling had a friend fill out his absentee application and was then led to an ExpressVote machine. ECF No. 56-4, Ex. 4, Rissling Dep., at 60:19–62:16.

57. Ms. Clayton, on at least one occasion, could not vote at all. ECF No. 56-5, Ex. 5, Clayton Dep., at 37:5–20.

58. Many NFB-AL members have had similar experiences. *See* ECF No. 56-7, Ex. 7, Manuel Dep., at 50:19–23, 51:5–22, 61:1–7.

59. NFB-AL has encouraged members voting in person to use Alabama’s ExpressVote machine, but no such option is available for NFB-AL members to cast a private, independent vote *remotely*. *See id.* at 61:8–16, 68:6–11, 74:14–75:10.

60. In response, NFB-AL has engaged in various forms of advocacy, including devoting 80 hours at the state level and filing a complaint with the U.S. Department of Justice. *See id.* at 56:22–57:2, 58:16–59:9, 79:5–12, 90:23–92:20, 95:16–106:17, 111:1–13.

61. Despite these efforts, Defendants have refused voters with print disabilities access to a system that would provide them equal opportunity to vote remotely, privately, and independently, even though Defendants offer such a system to overseas and military voters. ECF No. 34, Defs.’ Ans. ¶ 55; ECF No. 18, Defs.’ Mot. Dismiss 12–13.

62. To remedy this harm and achieve equal access, as required by Title II of the ADA, Plaintiffs brought suit in 2023 against Alabama’s then-Secretary of State, Wes Allen. *See Nat’l Fed’n of Blind of Ala. v. Allen*, 661 F. Supp. 3d 1114 (N.D. Ala. 2023). The court dismissed that case, finding that the “AEMs, not the Secretary, are in charge of administering absentee ballots—paper or electronic” and thus the AEMs “would have to implement Plaintiffs’ requested relief.” *Id.* at 1123.

STANDARD OF REVIEW

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The reviewing court must assess the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party’s favor. *See Poer v. Jefferson Cnty. Comm’n*, 100 F.4th 1325, 1335 (11th Cir. 2024). Still, “inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion.” *Id.*

ARGUMENT

Plaintiffs are entitled to judgment as a matter of law on their Title II claim and on Defendants’ affirmative defenses. As a threshold matter, Organizational Plaintiff NFB-AL has established associational standing that entitles it to the relief it seeks. On the merits, there is no genuine dispute of material fact that Individual Plaintiffs and NFB-AL’s members are qualified individuals with disabilities who, because of their disabilities, are excluded from Defendants’ remote absentee voting services. Similarly, there is no genuine dispute that allowing Plaintiffs to utilize the RAVBM system Defendants afford to military and overseas voters would provide Plaintiffs with equal access to the remote absentee voting program afforded to other absentee voters without disabilities. Conversely, because Defendants rely on pure speculation and conjecture, not *facts*, no reasonable juror could find that providing equal access to Plaintiffs would result in an undue burden or fundamentally alter Defendants’ remote absentee voting programs.

I. NFB-AL Has Associational Standing Through Its Members to Obtain the Injunctive Remedies It Seeks.

“[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Greater Birmingham Ministries v. Sec’y of State for State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021); *White’s Place, Inc. v. Glover*, 222 F.3d 1327, 1330 (11th Cir. 2000).

A. NFB-AL Members Have Standing to Sue in Their Own Right.

First, to have standing in their own right, at least one of NFB-AL’s members must have standing—i.e., injury in fact, causation, and redressability—to bring an ADA claim. *See Schalamar Creek Mobile Homeowner’s Ass’n, Inc. v. Adler*, 855 F. App’x 546, 552 (11th Cir. 2021) (citations omitted). Indeed, “organizational plaintiffs need not establish that all of their members are in danger of suffering an injury. Rather, the rule in this Circuit is that organizational

plaintiffs need only establish that ‘at least one member faces a realistic danger’ of suffering an injury.” *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014) (quoting *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1163 (11th Cir. 2008)).

NFB-AL’s blind and low-vision members, including two of the Individual Plaintiffs, have been denied “full and equal” access, on the basis of their disability, to Defendants’ remote absentee voting programs, and thus cannot vote remotely, privately, and independently as voters without disabilities are able to do. ECF No. 56-5, Ex. 5, Clayton Dep., at 37:5–20; ECF No. 56-4, Ex. 4, Rissling Dep. 60:19–62:16; ECF No. 56-7, Ex. 7, Manuel Dep., at 49:6–13, 50:19–23, 68:6–15, 94:16–18, 94:20–95:15, 108:11–15; accord *Schalamar*, 855 F. App’x at 552 (holding at summary judgment that an organization with members who had been denied “full and equal” access to a covered facility under Title III of the ADA had suffered an injury in fact).

Furthermore, this denial of equal access is “fairly traceable to the challenged action,” *Polelle v. Florida Secretary of State*, 131 F. 4th 1201, 1222 (11th Cir. 2025)—the failure to provide a remote, accessible voting option, ECF No. 56-7, Ex. 7, Manuel Dep., at 49:6–13, 68:6–11, 74:21–75:10; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 103:4–17; ECF No. 56-12, Ex. 12, Potts Dep., at 97:20–22; ECF No. 56-11, Ex. 11, Bobo Dep., at 79:1–6.

Finally, Defendants would be the parties to “implement Plaintiffs’ requested relief.” *Allen*, 661 F. Supp. 3d at 1123; see also *Polelle*, 131 F. 4th at 1222 (noting the causation and redressability requirements “often travel together”). Because at least some NFB-AL members have standing to sue, Plaintiff NFB-AL meets the first prong of associational standing.

B. This Litigation Protects Interests Germane to NFB-AL’s Purpose.

Second, NFB-AL seeks to protect interests germane to its purpose. This second prong of associational standing is “‘undemanding’ and requires ‘mere pertinence’ between the litigation at issue and the organization’s purpose.” *Schalamar*, 855 F. App’x at 553 (quoting *Ass’n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010)). The Eleventh Circuit has consistently found that litigation by organizations challenging

discriminatory practices on behalf of members facing discrimination is germane to those organizations' representative purposes. *Schalamar*, 855 F. App'x at 553 (finding a homeowners association's litigation regarding accessibility for disabled residents was germane to its purpose of acting as all residents' representative); *Greater Birmingham Ministries*, 992 F.3d at 1316 (finding the Alabama NAACP and Greater Birmingham Ministries' litigation regarding state voter identification laws was germane to their purposes of ensuring "equal opportunity for minority voters").

Plaintiff NFB-AL "promotes the general welfare of the blind by assisting the blind in their efforts to integrate themselves into society on terms of equality and by removing barriers that result in the denial of opportunity to blind persons in virtually every sphere of life, including . . . the ability to participate in elections." ECF No. 56-6, Ex. 6, Pls.' Resp. to Defs.' Interrog. No. 19; *see* ECF No. 56-7, Ex. 7, Manuel Dep. 23:19–24:1. NFB-AL's challenge here to its members' exclusion from Defendants' absentee voting programs is germane to its purpose as a representative organization of Alabamians who are blind and low-vision that promotes equality of access and non-discrimination. *Id.* at 63:23–64:4, 91:2–18.

C. No Additional NFB-AL Members Are Needed to Advance the Claim or Fashion the Relief

Third, neither the claims asserted nor the relief requested in this case require participation of additional NFB-AL members because they are unnecessary "to advance" the ADA claim "or to fashion the sort of prospective injunctive relief sought"—the extension of an RAVBM system to voters with print disabilities. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003). RAVBM system relief, "if granted, will inure to the benefit" of all blind and low-vision NFB-AL members who are currently unable to remotely vote absentee privately and independently. *Id.*

II. Defendants Have Violated Title II of the ADA by Denying Plaintiffs an Equal Opportunity to Vote Absentee Remotely, Privately, and Independently.

The ADA imposes a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1081 (11th Cir. 2007) (quoting 42 U.S.C. § 12101(b)(1)). Title II prohibits state and local government entities, such as Defendants, from discriminating against people with disabilities in their services, programs, or activities. *Id.*; 42 U.S.C. § 12132. In other words, Defendants must afford individuals with disabilities an equal opportunity to access the same benefits enjoyed by people without disabilities who participate in the programs. 28 C.F.R. § 35.130(b)(1)(ii)–(iii).

In providing any aid, benefit, or service, a public entity may not, on the basis of disability, among other things:

- Afford a qualified individual with a disability an *opportunity to participate* in or benefit from the aid, benefit, or service *that is not equal to that afforded others*;
- Provide a qualified individual with a disability with an aid, benefit, or service that is *not as effective in affording equal opportunity* to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
- Deny a qualified individual with a disability “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity”;
- Fail to “take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others”; or
- Fail to “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.”

28 C.F.R. § 35.130(b)(1)(ii)–(iii) (emphasis added); 28 C.F.R. § 35.160(a)(1), (b)(1), & (b)(7)(i); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir. 2003).

“Accessible electronic and information technology” is specifically included in the Title II regulation’s definition of “auxiliary aids and services.” 28 C.F.R. § 35.104. Defendants’ duty to provide appropriate auxiliary aids and services to ensure equally effective communication must be accomplished in a manner that protects “the privacy and independence of the individual with a disability” and that does not require such individuals to enlist third-party assistance. *Id.* §§ 35.160(b)(1)–(c)(2).

Defendants’ remote absentee voting programs offer privacy, independence, and convenience to eligible voters *without* print disabilities that it does not offer to Plaintiffs *with* print disabilities. *See Rissling*, 2024 WL 3106897, at *6. Defendants violate Title II by preventing Plaintiffs, who are otherwise qualified to do so, from voting absentee in a manner that affords them the same access to, and benefits of, voting remotely. *See Karantsalis v. City of Miami Springs, Fla.*, 17 F.4th 1316, 1322 (11th Cir. 2021).

A. Plaintiffs Are Qualified Individuals with Disabilities.

A qualified individual with a disability is one “who, with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2).

Each Individual Plaintiff has an impairment that substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(1)–(2); 28 C.F.R. § 35.108(a)–(c). Ms. Presley and Mr. Rissling are completely blind. *See* ECF No. 56-3, Ex. 3, Presley Dep., at 12:19; Ex. 4, Rissling Dep., at 16:1. Ms. Clayton’s advanced glaucoma has eliminated her peripheral vision and permanently damaged her remaining vision. *See* ECF No. 56-5, Ex. 5, Clayton Dep., at 12:10, 18:16–17, 19:6–8. Their disabilities substantially limit the major life activities of seeing, reading, and writing. *Id.* at 21:2–25:20; ECF No. 56-4, Ex. 4, Rissling Dep., at 16:1–21:3, 32:21–33:3, 48:12–49:3; ECF No. 56-3, Ex. 3, Presley Dep., at 33:1–35:8; 38:2–9. Dr. Peebles has cerebral palsy, a disability that, according to the applicable regulations, “substantially limits brain

function.” 28 C.F.R. § 35.108(d)(2)(iii)(G). *See* ECF No. 56-2, Ex. 2, Peebles Dep., at 8:15–16, 74:19–76:9. Likewise, the vast majority of NFB-AL’s members are blind. *See* ECF No. 56-7, Ex. 7, Manuel Dep., at 31:8–9.

Moreover, each Individual Plaintiff meets the Defendants’ absentee voting eligibility requirements. They are U.S. citizens at least eighteen years old, have not been convicted of a felony involving moral turpitude, are mentally competent, and have resided in Alabama “for the time provided by law.” Ala. Const. art. VIII, § 177. Qualified voters with permanent disabilities, such as Plaintiffs, are eligible to vote absentee remotely. *See* Ala. Code § 17-11-3(a)(2) (including as eligible absentee voters are individuals with “any physical illness or infirmity which prevents his or her attendance at the polls, whether he or she is within or without the county on the day of the election.”); ECF No. 56-15, Ex. 15, at D. Potts 000158.

B. There is No Genuine Dispute of Material Fact that Defendants Have Denied Plaintiffs an Equal Opportunity to Vote Absentee Remotely.

The ADA entitles Plaintiffs to vote absentee in a remote, private, and independent manner equal to that enjoyed by Alabama absentee voters who are not disabled. *See Rissling*, 2024 WL 3106897, at *6 (“Exclusion from private and independent absentee voting is a proper analytic scope for Plaintiffs’ claims.”). Equal enjoyment means Defendants must administer remote absentee voting programs that provide Plaintiffs with the equal benefit of “vot[ing] absentee without third-party assistance.” *Id.*; *see also Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 987 (N.D. Fla. 2021) (“To establish an exclusion for purposes of Title II,” the plaintiffs need only show “that voting [in that manner] is not ‘readily accessible’ to them.”) (quoting *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1159 (N.D. Ala. 2020) (“*People First II*”) (modifications in original)). This includes providing an RAVBM system to voters with print disabilities where it is already provided to other voters without disabilities. *See Johnson v. Callanen*, 608 F. Supp. 3d 476, 487 (W.D. Tex. 2022) (finding Plaintiffs were entitled “to vote privately and independently without assistance, like sighted active military or overseas individuals” and that “Defendants’ argument that a reasonable accommodation already exists

simply because Plaintiffs may instead vote in person misses the mark.”). Accordingly, Defendants must ensure that individuals with print disabilities are able to vote remotely, accessibly, privately, and independently.

1. Plaintiffs have no accessible means to vote remotely, privately, and independently.

There is no genuine dispute that Plaintiffs must rely on third-party assistance in order to participate in Defendants’ remote absentee voting programs. ECF No. 56-4, Ex. 4, Rissling Dep., at 47:4–8, 48:12–49:3, 93:8–17, 94:20–95:7; ECF No. 56-5, Ex. 5, Clayton Dep., at 19:9–21, 22:18–23:21; ECF No. 56-3, Ex. 3, Presley Dep., at 33:1–35:8; 38:2–9; ECF No. 56-2, Ex. 2, Peebles Dep., at 40:2–41:11, 44:7–45:16, 46:11–18, 66:3–7, 69:5–72:17; 78:13–80:13; ECF No. 56-7, Ex. 7, Manuel Dep., at 112:3–15; ECF No. 56-6, Ex. 6, Pls.’ Ans. to Defs.’ Interrog. Nos. 4, 6, 7. Moreover, Defendants, and all other county representatives, agreed that voting with assistance is not voting privately and independently. ECF No. 56-11, Ex. 11, Bobo Dep., at 152:1–153:2; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 141:10–143:13; ECF No. 56-26, Ex. 26, Dep. of Mallory Donald Davis (Mobile Cnty.) (“Davis Dep.”), at 48:8–21; ECF No. 56-27, Ex. 27, Dep. of James P. Naftel (Jefferson Cnty.) (“Naftel Dep.”), at 40:25–42:11; ECF No. 56-28, Ex. 28, Dep. of Dan Medders (Tuscaloosa Cnty.) (“Medders Dep.”), at 21:20–23:12; *see also* ECF No. 56-12, Ex. 12, Potts Dep., at 134:17–136:20 (testifying that the ExpressVote machine allowed for private voting because voters could use it independently without assistance).

Every step of the current vote-by-mail process is inaccessible to voters with print disabilities. Applications for absentee ballots are only available in paper or inaccessible PDFs. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 62:6–19, 65:11–21; ECF No. 56-12, Ex. 12, Potts Dep., at 45:15–24; ECF No. 56-11, Ex. 11, Bobo Dep., at 67:3–9, 73:10–20. Paper forms are inaccessible to voters with print disabilities, who either cannot read and fill them because of blindness or cannot manipulate and fill them because of manual dexterity limitations. ECF No. 56-1, Ex. 1, Blake Rep., at 6; ECF No. 56-22, Ex. 22, Blake Dep., at 34:5–7; ECF No. 56-5, Ex.

5, Clayton Dep., at 49:23–50:6; ECF No. 56-3, Ex. 3, Presley Dep., at 27:5–13; ECF No. 56-4, Ex. 4, Rissling Dep., at 64:15–19; ECF No. 56-2, Ex. 2, Peebles Dep., at 66:3–13; 79:7–80:19, 86:7–21; ECF No. 56-7, Ex. 7, Manuel Dep., at 68:6–15, 107:9–108:15, 112:3–15. Inaccessible PDFs cannot be read or completed by screen reader assistive technology on which voters with print disabilities rely. *See* ECF No. 56-23, Ex. 23, Zimnik Rep., at 5–6; ECF No. 56-25, Ex. 25, Zimnik Suppl. Rep., at 3–5, 7.³

Even if Plaintiffs could complete the application, the paper absentee ballots themselves are also inaccessible to voters with print disabilities. As Lou Ann Blake noted in her expert report, “[e]ven if a blind or low-vision voter had access to a scanner that could read aloud the printed text, that individual would have no way to locate and fill in the bubble that appears next to a preferred candidate’s name.” ECF No. 56-1, Ex. 1, Blake Rep., at 6. In addition, “paper ballots cannot be filled out privately and independently by a print-disabled voter with manual dexterity limitations, i.e., who is unable to handle a pen and paper.” *See* ECF No. 56-1, Ex. 1, Blake Rep., at 6. By refusing to offer an accessible means to apply for and vote absentee remotely, Defendants have excluded Plaintiffs from participating equally in and obtaining the benefits of voting privately and independently in their remote absentee programs. *See* ECF No. 56-2, Ex. 2, Peebles Dep., at 86:8–21; ECF No. 56-3, Ex. 3, Presley Dep., at 27:7–16; ECF No. 56-4, Ex. 4, Rissling Dep., at 60:19–62:16; ECF No. 56-5, Ex. 5, Clayton Dep., at 37:5–20.

Defendants and their expert put forth no evidence or argument that voters with print disabilities can access the current system privately and independently as absentee voters without disabilities are able to do. ECF No. 56-11, Ex. 11, Bobo Dep., at 152:1–153:2; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 141:10–143:13; ECF No. 56-26, Ex. 26, Davis Dep., at 48:8–21; ECF No. 56-27, Ex. 27, Naftel Dep., at 40:25–42:11; ECF No. 56-28, Ex. 28, Medders Dep., at 21:20–23:12; ECF No. 56-12, Ex. 12, Potts Dep., at 77:25–78:23, 134:17–136:20; *see also*

³ Dr. Peebles was able to complete an online application not because it was accessible, but because he is sighted and does not require accessible formatting for online fillable forms. *See* ECF No. 56-2, Ex. 2, Peebles Dep., at 103:9–16.

ECF No. 56-29, 56-30, 56-31, 56-32, Ex. 29, Dep. of Andrew Appel (“Appel Dep.”), at 78:2–79:7 (conceding that relying on a person for assistance marking a ballot is “different from a voter who can mark a paper ballot by hand . . . without assistance”).

Forcing voters with print disabilities to enlist third-party sighted assistance excludes them from the private and independent benefits of the programs enjoyed by absentee voters without disabilities. *See id.* (“Defendants do not appear to dispute that . . . many Alabama voters without such disabilities vote absentee without third-party assistance”); *accord Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269–70 (D.C. Cir. 2008) (rejecting argument that plaintiffs’ reliance on a third party of their choosing ensured meaningful access). It also violates state and federal law. Ala. Code § 17-6-34 (guaranteeing that Alabama voters’ ballots “shall be kept secret and inviolate.”); *Paulson*, 525 F.3d at 1269–70 (“[T]he enjoyment of a public benefit is not contingent upon the cooperation of third persons.”); *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1239 (N.D. Cal. 2013) (finding that “requiring blind and visually impaired individuals to vote [remotely, absentee] with the assistance of a third party. . . at best provides [them] with an inferior voting experience ‘not equal to that afforded others.’”) (quoting 28 C.F.R. § 35.130(b)(1)(ii)).

2. In-person absentee voting does not provide benefits equal to remote absentee voting.

Requiring voters with print disabilities to vote in person in order to do so privately and independently excludes them from the benefit of voting remotely that is available to absentee voters without disabilities. *See Rissling*, 2024 WL 3106897, at *6 (offering “in-person accommodations” is insufficient to comply with Defendants’ independent obligation to provide equal benefits to individuals with disabilities in absentee voting); *Paulson*, 525 F.3d at 1269–70. Use of the in-person ExpressVote machines is no substitute for access to remote, private, and independent absentee voting. The relevant benefit is the opportunity to participate *remotely* in the absentee voting programs as their counterparts without disabilities can do. *See Rissling*, 2024 WL 3106897, at *6–7; *accord Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 506 (4th Cir.

2016) (evaluating whether Maryland provided the same private, independent, remote absentee voting to disabled voters as it did to voters without disabilities and finding it did not).

III. Extending Access to Defendants' Existing RAVBM System Would Provide Equal Access to the Benefits of Voting Remotely, Privately, and Independently.

Title II promises Plaintiffs equal access to the benefits and services of Defendants' remote absentee voting programs as those without disabilities. 28 C.F.R. § 35.130(b)(1)(ii)–(iii). Equal access requires equally effective communication. 28 C.F.R. § 35.160(a)–(b), including the provision of “appropriate auxiliary aids,” such as accessible electronic and information technology, to facilitate that communication. 28 C.F.R. § 35.160(b)(1)–(2). In selecting auxiliary aids, Defendants must “give primary consideration to the requests of individuals with disabilities,” and protect those individuals’ “privacy and independence.” 28 C.F.R. §§ 35.104, 35.160(b)(2); *accord* 28 C.F.R. Pt. 35, App. A.

Plaintiffs want an accessible option to vote absentee remotely, privately, and independently. ECF No. 56-4, Ex. 4, Rissling Dep., at 78:16–79:16; ECF No. 56-2, Ex. 2, Peebles Dep., at 86:7–21, 99:2–100:9; ECF No. 56-5, Ex. 5, Clayton Dep., at 79:4–80:7; ECF No. 56-3, Ex. 3, Presley Dep., at 42:13–43:3; ECF No. 56-7, Ex. 7, Manuel Dep., at 68:6–15, 75:2–15, 90:14–91:18. It is undisputed that an RAVBM system, such as OmniBallot, or a similar alternative, would provide equally effective (i.e., accessible) communication through Plaintiffs’ assistive technology. ECF No. 56-1, Ex. 1, Blake Rep., at 5, 7–9, 11 (discussing many screen reader accessible RAVBM system options). OmniBallot itself has already been “universally” verified as screen reader accessible by the “reputable and independent” accessibility experts who have tested it. ECF No. 56-23, Ex. 23, Zimnik Rep., at 8 (discussing VPAT testing completed by the Accessible Design and Innovative Inclusion, the Blind Institute of Technology, and the University of Washington’s Center for Technology and Disability Studies); *see also* ECF No. 56-21, [REDACTED]

[REDACTED] Plaintiffs’ experts agreed, and Defendants did not rebut, that the Individual Plaintiffs and NFB-AL members could use their

screen reader devices privately and independently to review, complete, and submit their absentee ballots using OmniBallot or a similar RAVBM system. ECF No. 56-24, Ex. 24, Zimnik Dep., at 106:2–23; ECF No. 56-22, Ex. 22, Blake Dep., at 40:23–42:1.

Extending an accessible system Defendants already use to voters with print disabilities is precisely the “appropriate step[] to ensure that communications” with these voters “are as effective as communications with” voters without disabilities. 28 C.F.R. § 35.160(a)(1). In recognition of this, courts across the country have approved and ordered implementation of RAVBM systems to provide equal access to remote absentee voting. *See e.g., Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 510 (4th Cir. 2016) (affirming decision ordering implementation of accessible ballot marking system in Maryland); *Hernandez v. N.Y. State Bd. of Elecs.*, No. 1:20-CV-4003, 2022 WL 1025426, at *1 (S.D.N.Y. Apr. 5, 2022) (approving settlement agreement for an accessible RAVBM system in state of New York); *Johnson v. Callanen*, No. SA-22-CV-00409-XR, 2023 WL 4374998, at *12 (W.D. Tex. July 6, 2023) (granting request for permanent injunction for provision of an accessible RAVBM system in Bexar County, Texas to “achiev[e] the ADA’s broad mandate to eliminate discrimination against disabled individuals”); *Taliaferro v. N.C. State Bd. of Elecs.*, Civil Case No. 5:20-cv-4 11 -BO ECF NO. 61, ¶ 2 (E.D.N.C. June 15, 2021) (ordering the North Carolina State Board of Elections to implement an accessible RAVBM system); *Powell v. Benson*, Case No. 20-11023 ECF No. 31 (E.D. Mich. May 19, 2020) (entering judicially ordered consent decree for the provision of an accessible RAVBM system in Michigan).

Accordingly, there is no genuine dispute of material fact that an effective auxiliary aid is available that would satisfy Defendants’ Title II obligations.

IV. There is No Evidence that Extending Defendants’ Current RAVBM System Would Result in Undue Burden or a Fundamental Alteration.

The relief requested here is simple: extending a system Defendants have successfully administered for the past four years to voters with print disabilities. Undue

burden and fundamental alteration are affirmative defenses to be pled and proven by Defendants. 28 C.F.R. § 35.164.

At the outset, Defendants have waived their undue burden and fundamental alteration affirmative defenses by failing to plead either as required by Federal Rule of Civil Procedure 8(c). ECF No. 34, Defs.' Ans. at 11–13, ECF No. 34 (pleading 14 other affirmative defenses); *accord Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1077 (11th Cir. 2003) (citing *Am. Nat'l Bank of Jacksonville v. FDIC*, 710 F.2d 1528, 1537 (11th Cir. 1983) (“The pleading of an affirmative defense is mandated by Federal Rule Civil Procedure 8(c) to be presented in a responsive pleading, and a party waives its right to advance an affirmative defense by failing to assert it in such.”)).

Even if they had, Defendants cannot meet the prerequisite to assert an undue burden or fundamental alteration affirmative defense. “The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be *accompanied by a written statement of the reasons for reaching that conclusion*.” 28 C.F.R. § 35.164. It is undisputed that Defendants have produced no such written statement.

Assuming Defendants had pled these affirmative defenses (they have not) and had documented the reasons in writing (they have not), Defendants have not identified evidence from which a reasonable juror could conclude that allowing Plaintiffs to use the existing RAVBM system would pose any burden on them—let alone an undue one. Defendants posit two *theories* to avoid their legal mandate under the ADA: (1) undue financial costs; and (2) administrative burdens. Defendants have no facts to support those theories, entitling Plaintiffs to judgment as a matter of law.

A. Defendants Have Not Marshalled Any Evidence to Prove that Allowing Print Disabled Voters to Use the RAVBM System Would Result in Undue Burden.

Determining whether affording Plaintiffs equal access to remote absentee voting would pose an undue burden, requires a “case-by-case analysis” of factors including: “(1)[t]he overall size of the recipient’s program with respect to number of employees, number and type of facilities, and size of budget; (2)[t]he type of the recipient’s operation, including the composition and structure of the recipient’s workforce; and (3)[t]he nature and cost of the accommodation needed.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 606, n.16 (1999).⁴ Thus, in “weigh[ing] the respective costs and benefits,” *Schaw v. Habitat for Human. of Citrus Cnty., Inc.*, 938 F.3d 1259, 1267 (11th Cir. 2019), courts look first to whether Plaintiffs have established their right to a modification ensuring equal access and then to whether Defendants can demonstrate providing such equal access would pose an undue burden based on these factors, including Defendants’ own budget.

An undue burden defense must be based on **facts**—not conjecture. *Rissling*, 2024 WL 3106897, at *5 (acknowledging that whether Defendants can prove their defenses “will turn on the facts”); *Lamone*, 813 F.3d at 509 (affirming grant of permanent injunction ordering provision of RAVBM system to voters with print disabilities where “on the record before [the court] defendants simply have not established their premise, that is, that use of the online ballot marking tool degrades the integrity of Maryland’s voting processes.”). That burden lies with Defendants—a burden they cannot meet on this record.

1. No reasonable juror could conclude that the limited financial cost of expanding Defendants’ RAVBM system would pose an undue burden.

A burden will be considered undue if Defendants can demonstrate it is “prohibitively burdensome.” *Nat’l Ass’n of the Deaf v. Florida*, 980 F.3d 763, 773 (11th Cir. 2020). Extending

⁴ The Supreme Court explained that Title II’s regulations “‘shall be consistent with’ the regulations in part 41 of Title 28 of the Code of Federal Regulations implementing § 504 of the Rehabilitation Act.” *Olmstead*, 527 U.S. at 606, n.16 (citing 42 U.S.C. § 12134(b)). It enumerated the above factors consistent with “undue hardship” as defined under Section 504’s regulations. *Id.* (citing 28 C.F.R. § 42.511(c) (1998); 45 C.F.R. § 84.12(c) (1998) (same)).

an existing system is not cost-prohibitive just because it might involve *some* “cost or effort.” *Id.*; accord *Olmstead*, 527 U.S. at 606, n.16 (citing 42 U.S.C. § 12134(b), 28 C.F.R. § 42.511(c), and 45 C.F.R. § 84.12(c)). And where, as here, the necessary tool is already developed and deployed, “there does not appear to be any substantial cost or implementation burden that would need to be borne” by Defendant to make it available for use. *Lamone*, 813 F.3d at 508.

Defendants have not even considered the cost of expanding their RAVBM system. Two Defendants referenced potential cost but had no knowledge of what it would be. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 159:19–25; ECF No. 56-12, Ex. 12, Potts Dep., at 156:1–158:19. When the third was asked if she had “been involved in any conversations about the costs that would potentially attend extending the electronic ballot to blind and print-disabled people,” her response was “I have not.” ECF No. 56-11, Ex. 11, Bobo Dep., at 168:22–171:3.

Nor have Defendants’ respective counties considered such costs. ECF No. 56-26, Ex. 26, Davis Dep., at 54:14–55:5; ECF No. 56-27, Ex. 27, Naftel Dep., 20:9–21:6; ECF No. 56-28, Ex. 28, Medders Dep., 11:23–13:14 (stating the absentee manager, Defendant Bobo, was the person with knowledge on this—but as noted above, she stated that “kn[e]w nothing about the budget” (ECF No. 56-11, Ex. 11, Bobo Dep., at 168:22–169:5)); ECF No. 56-33, Ex. 30, 30(b)(6) Dep. of April Hoffman (Tuscaloosa Cnty.), at 9:2–8, 25:5–26:5 (stating that as the Tuscaloosa County Commission Chief Financial Officer she had never been a part of any conversation about the cost of providing electronic absentee ballots to voters with disabilities or asked to run any numbers regarding the same).

Similarly, Defendants and their county representatives could not provide any information on what the absentee voting budgets actually are or how they would be impacted by extending the current RAVBM system to voters with print disabilities. ECF No. 56-11, Ex. 11, Bobo Dep., at 168:22–171:3; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 149:6–16, 158:7–159:4; ECF No. 56-12, Ex. 12, Potts Dep., at 14:9–19, 156:9–157:3 (only knowledge of budgets was the office one she submitted to cover staff and supplies); ECF No. 56-28, Ex. 28, Medders Dep., at 11:23–13:14; ECF No. 56-27, Ex. 27, Naftel Dep., at 16:23–19:8; ECF No. 56-26, Ex. 26, Davis

Dep., at 52:25–55:5, 62:22–65:2. No reasonable juror could conclude, based on this total lack of evidence, that expanding the RAVBM system is a cost prohibitive remedy.

2. Defendants’ administrative burden defense similarly relies on pure conjecture.

Defendants’ claim that administrative burdens justify denying Plaintiffs equal access to their remote absentee system similarly fails for at least four reasons.

First, Defendants are already successfully administering this RAVBM system to military and overseas voters without issue. ECF No. 56-21, Ex. 21, Pinnick Dep., at 89:16–90:21. Defendants all described a process that they either handle completely on their own or with minimal clerical assistance from one other staff member. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 116:11–119:12; ECF No. 56-11, Ex. 11, Bobo Dep., at 128:22–134:11; ECF No. 56-12, Ex. 12, Potts Dep., at 115:15–118:11.

Second, Defendants pointed only to *hypothetical* administrative burdens. For example, they claimed that expanding the RAVBM system could result in “more paperwork.” ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 149:8–13. Yet this “burden” was based on Defendant Anderson-Smith’s unfounded concern that she would need to segregate electronically returned absentee ballots submitted by voters with print disabilities from those submitted by overseas voters. *Id.* at 149:17–151:3. There is no basis for believing such segregation would be required, let alone that it would be burdensome. Defendants also claimed that an administrative burden could be “the possibility of lawsuits[.]” *Id.* at 151:4–16. But Defendant Anderson-Smith could not identify the potential claims in such hypothetical litigation that would necessitate segregating these ballots, *Id.* at 150:16–152:24. Ultimately, Defendant Anderson-Smith conceded that if her office were able to print absentee ballots from voters with print disabilities separately through the Democracy Live OmniBallot platform she would be “very happy to work with that situation.” *Id.* at 156:19–158:6.

As another unfounded concern, two Defendants stated they may need to hire more staff, ECF No. 56-12, Ex. 12, Potts Dep., at 154:11–20; ECF No. 56-13, Ex. 13, Anderson-Smith Dep.,

at 149:6–10, but could not articulate how many staff would be needed or for what tasks that are not already part of the workflow for military and overseas ballots. ECF No. 56-12, Ex. 12, Potts Dep., at 156:1–18 (noting she would “feel the need to hire more people” but had not had “any conversations with anyone” about it); ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 151:4–152:24 (discussing needing “additional people” only in the context of dealing with a prior lawsuit). Moreover, the record reflects that Defendants already rely on grant funding under the Help America Vote Act (“HAVA”) for staffing needs. *Id.* at 46:23–47:19 (noting the probate county judge hires staff for her office with HAVA grant funding); *see also* ECF No. 56-19, Ex. 19, Elrod Dep., at 165:25–166:23.

Third, there is no credible evidence that the number of electronic absentee voters would increase to the point that processing their ballots would be prohibitively burdensome. [REDACTED]

[REDACTED]

[REDACTED] *see also* ECF No. 56-19, Ex. 19, Elrod Dep., at 80:11–19 (testifying that **total** absentee voters make up only 3 to 5 percent of voters across the state). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; ECF No. 56-35, Ex. 32, Selker Dep., at 90:10–91:5, 114:20–115:1 (stating the number of voters with print disabilities using RAVBM systems in a given jurisdiction is in the hundreds not thousands); ECF No. 56-42, Ex. 39, Voting Accessibility Preferences Survey Results (indicating that only a small number of voters surveyed by NFB-AL responded that they preferred voting remotely, further suggesting that such an influx is unlikely).

Fourth, other jurisdictions have extended both pre-existing and new systems to voters with print disabilities without significant hurdles. One state rolled out an *entirely new* accessible system, using Democracy Live’s technology, in as little as several weeks before elections. ECF No. 56-1, Ex. 1, Blake Rep., at 9 (citing Massachusetts example). In Alabama, [REDACTED]

Thus, there is no genuine dispute of fact demonstrating any undue financial or administrative burden, entitling Plaintiffs to judgment as a matter of law on Defendants’ unsupported undue burden defense.

B. Defendants’ Remote Absentee Voting Programs Would Not Be Fundamentally Altered if Voters with Print Disabilities Were Allowed to Use the RAVBM System.

A modification creates a “fundamental alteration” only if it would “eliminate an essential aspect of the . . . program” not just “simply inconvenience it.” *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1217, 1221 (N.D. Ala. 2020) (“*People First I*”) (quoting *Schaw*, 938 F.3d at 1266). Whether an “eligibility requirement is essential is determined by consulting the importance of the requirement to the program in question.” *Id.* at 1215–16 (citing *Mary Jo C. v. N.Y. State & Loc. Ret. Sys.*, 707 F.3d 144, 159 (2d Cir. 2013)).

In determining whether an aspect is “essential” or “fundamental,” courts ask, ‘What is the basic purpose of the rule or policy at issue?’” *Schaw*, 938 F.3d at 1266. Defendants “cannot merely state that the discriminatory requirement is essential to the fundamental nature of the activity at issue—[they] must provide evidence that the procedural requirement is necessary to the substantive purpose undergirding the requirement.” *People First I*, 467 F. Supp. 3d at 1216

(citing *Schaw*, 938 F.3d at 1266–67); accord *Hindel v. Husted*, 875 F.3d 344, 348 (6th Cir. 2017) (same).

Defendants have not established that use of a paper ballot is an essential aspect of voting absentee, or that any other paper-based process, including the witnessed affidavit envelope, is an essential aspect of voting absentee. Nor have Defendants established facts that providing Plaintiffs with access to an already successfully deployed RAVBM system would result in a security risks that would fundamentally alter their remote absentee programs.

1. As a matter of law, paper ballots and paper return processes are not essential aspects of voting absentee.

The only eligibility criteria specified under Alabama law are citizenship, age, no felony convictions for crimes involving moral turpitude, mental competency, and residency. Ala. Const. art. VIII, § 177. The only absentee voting eligibility requirement is one of the self-certifying eight categories of qualified absentee voters under Alabama Code § 17-11-3(a)(1)–(8), including individuals with disabilities, *id.* § 17-11-3(a)(2); see also ECF No. 56-16, Ex. 16, at D. Potts 000690–91 (General Absentee Ballot Application requirements). Thus, Alabama law does not specify paper ballots as the only manner by which qualified absentee voters can participate in that program. Even if it did, state law cannot “run counter to the ADA’s broad remedial purpose by allowing states to insist that whatever legal requirements they may set are never subject to reasonable modification under Title II of the ADA.” *Mary Jo C.*, 707 F.3d at 160.⁵

⁵ The Court in this case has already rejected Defendants’ arguments that it cannot provide a reasonable modification that conflicts with provisions of the Alabama elections code. *Rissling*, 2024 WL 3106897 at *3 (“Though styled as a preemption defense, Defendants essentially argue that compliance with Alabama law shields them from ADA liability. This Court is unpersuaded.”) The Court also made clear that the Eleventh Circuit has “applied the ADA to voting,” *i.e.*, regardless of conflicting state law provisions, and that this court will do so here. *Id.* at *10–11. Thus, there is no fundamental alteration defense premised on the requested modification’s perceived or actual conflict with state law, which is preempted by the ADA. See *Johnson*, 608 F. Supp. 3d at 487 (“If the Election Code conflicts with Title II of the ADA, then federal law would preempt state law.”) (citing *Arizona v. United States*, 567 U.S. 387, 399 (2012)); see also *Lamone*, 813 F.3d at 508 (“[D]efendants’ argument—that the mere fact of a state statutory requirement

Further, paper ballots “cannot, as a logical matter” be a fundamental aspect of voting absentee where some absentee voters are already permitted by law to vote electronically. *Johnson*, 2023 WL 4374998, at *8 n.14 (finding paper ballots were not essential where Defendants, pursuant to federal and state law, “already offer[] [absentee] electronic voting to a subset of [Alabama] voters (service members”). Reading an additional substantive requirement into the law for absentee ballots contradicts the legislature’s express provision for electronic voting. *See e.g.*, Ala. Code § 17-11-42 (setting out requirements for electronic voting); Ala. Code § 17-11-43(4)(c) (setting out information to request from overseas voters including “[a]n electronic mail address, if the overseas voter requests that the ballot be transmitted pursuant to electronic mail”).

Nor is paper ballot return an essential eligibility requirement for absentee voting. As discussed, *supra*, the actual eligibility requirements are set out by statute. But even if there were a paper return *requirement* under law, Alabama has created an exception for overseas voters, who are permitted to return their ballots electronically. *See* Ala. Code § 17-11-45; ECF No. 56-19, Ex. 19, Elrod Dep., at 151:23–153:1 (noting overseas UOCAVA voters can return ballots electronically). Where a program requirement already has an established exception, courts have found it is not essential to the program. *See, e.g., Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1224 (11th Cir. 2008) (finding that low turnover was not an essential aspect of the zoning scheme for certain residential district where the zoning ordinances already permitted multi-family dwellings in that district, which were not subject to the occupancy-turnover limits); *Mary Jo C.*, 707 F.3d at 160 (finding New York States waivers and extensions of the filing deadline for disability retirement benefits “for certain classes of individuals” indicated the deadline was not an essential requirement of that program).

insulates public entities from making otherwise reasonable modifications to prevent disability discrimination—cannot be correct.”). *Campbell v. Univ. City Dev. Partners, Ltd.*, 72 F.4th 1245, 1258 (11th Cir. 2023) (quoting *Belevich v. Thomas*, 17 F.4th 1048, 1053 (11th Cir. 2021)) (“Congress passed a sweeping law [the ADA] to prohibit discrimination” and allowing a state to “unilaterally nullify the ADA by enacting a state law requiring discrimination . . . can’t be right.”).

Following this logic, the Court in *People First I* found Alabama’s voter photo ID requirement (Alabama Code § 17-9-30) was not essential where Alabama law already “provide[d] multiple exemptions” to it, including for “voters who are eligible to vote absentee pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, the Voting Accessibility for the Elderly and Handicapped Act; or any other federal law.” 467 F. Supp. 3d at 1222 n.44 (citing Ala. Code § 17-9-30(d)); *see also People First II*, 491 F. Supp. 3d at 1164 (finding after a bench trial that “because absentee voters provide information in their absentee ballot application that allows county officials to verify their identities without a photo ID . . . the requirement is not an essential eligibility requirement”).

Alabama law similarly provides exceptions to the witness requirement for paper absentee ballot affidavit envelopes, for military and overseas voters. ECF No. 56-19, Ex. 19, Elrod Dep., at 63:16–17, 151:23–153:1. Instead, overseas voters submit an attestation under oath. Ala. Code § 17-11-46 (“Overseas voter certificate”); ECF No. 56-19, Ex. 19, Elrod Dep., 151:23–153:1. Accordingly, where Alabama law already provides exceptions to the use of paper ballots and paper return, neither are essential aspects of voting absentee.

2. Defendants have not established facts from which a reasonable juror could find that paper ballots are essential to vote absentee.

“[T]he question is not whether Alabama law contemplates the use of paper ballots, nor even whether paper ballots are required; the question is whether that requirement is ‘essential.’” *Rissling*, 2024 WL 3106897, at *5. In arguing that paper ballots and return are essential, Defendants cannot rely on “mere citation to Alabama statutes governing elections procedure,” but must instead point to actual facts. *Id.* Here, there are none.

When asked, Defendants could not identify any essential aspect of their Counties’ absentee voting programs that would be fundamentally altered by allowing voters with print disabilities to cast their votes electronically. *See, e.g.*, ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 148:12–20 (“Q . . . Do you have a position whether individually and on behalf of the County as to whether there would be any essential eligibility criteria that would be sacrificed if

individuals who are blind or have print disabilities could access the same electronic voting system that UOCAVA voters overseas can access? . . . A No.”); ECF No. 56-12, Ex. 12, Potts Dep., at 147:23–148:8 (stating “I’m not really in a position to answer that.”); ECF No. 56-11, Ex. 11, Bobo Dep., at 165:3–166:11 (stating “I really don’t know what you mean by—other than following the guidelines and the laws on what—how I issue absentee ballots. But that’s it.”)

The only essential aspect *one* Defendant suggested was “the lack of witnessing” for the paper return affidavit envelope. ECF No. 56-12, Ex. 12, Potts Dep., at 150:5–14. Even so, Defendant Potts acknowledged that there were other ways to satisfy the purpose of the witnessing requirement, including requiring absentee voters with print disabilities to submit a sworn certification as overseas voters currently do. *Id.* at 150:15–152:3. None of the Defendants could point to any examples of the certification for electronically returned UOCAVA absentee ballots resulting in fraud or other election-compromising issues.⁶ ECF No. 56-11, Ex. 11, Bobo Dep., at 168:8–16; 56-12, ECF No. 56-12, Ex. 12, Potts Dep., at 161:25–163:12; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 119:13–121:9. The State has already allowed for this exception and determined it is sufficient. ECF No. 56-19, Ex. 19, Elrod Dep., at 153:3–154:5. Such a certification thus fulfills the “substantive purpose undergirding the procedural [witnessing] requirement” by “preserv[ing] the sanctity and integrity of the ballot.” *People First I*, 467 F. Supp. 3d at 1222; *see also People First II*, 491 F. Supp. 3d at 1149 (finding after bench trial that the witness requirement only “marginally serves the State’s interest in preventing voter fraud”).

The absentee ballot statistics underscore how non-essential paper ballots and paper return are to the Counties’ absentee voting programs. In the 2024 general election alone 2,125 voters

⁶ Indeed, self-certification is already accepted without issue throughout the absentee voting process including, as noted *supra*, in certifying eligibility to vote absentee both (1) by reason of disability— ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 72:17–23; ECF No. 56-11, Ex. 11, Bobo Dep., at 82:19–83:4; ECF No. 56-12, Ex. 12, Potts Dep., at 61:17–62:6—and (2) as a UOCAVA voter— ECF No. 56-11, Ex. 11, Bobo Dep., at 117:9–17; ECF No. 56-12, Ex. 12, Potts Dep., at 106:11–22. Defendants agreed this has not led to concerns about or actual issues with fraud. ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 77:19–79:15, 120:7–121:9; ECF No. 56-11, Ex. 11, Bobo Dep., at 84:19–85:17, 121:17–123:18; ECF No. 56-12, Ex. 12, Potts Dep., at 61:23–62:24, 107:16–108:3; *see also* ECF No. 56-35, Ex. 32, Selker Dep., at 71:17–72:2.

received their ballots electronically, and 1,349 returned them electronically. ECF No. 56-40, Ex. 38, at DEFENDANTS 0000002. As discussed *supra*, the witnessing requirement was waived for all 1,349 of the electronically returned ballots, as it is in every election, without issue.

Moreover, the facts establish that electronic receipt and return of absentee ballots through OmniBallot, and other comparable RAVBM systems, preserve the essential aspects of absentee voting: privacy, independence, and the opportunity to review and verify selections. ECF No. 56-21, Ex. 21, Pinnick Dep., at 22:16–28:21, 50:6–52:15; ECF No. 56-38, Ex. 35, Selker Rep., at 6–7 (noting the key steps of the return process that are satisfied by OmniBallot); ECF No. 56-35, Ex. 32, Selker Dep., at 37:10–38:3, 133:7–136:9; ECF No. 56-1, Ex. 1, Blake Rep., at 7–10 (describing the process of voting and submission with an RAVBM system with electronic return). Defendants also all described printing and storing electronically submitted ballots so that they can be counted on election day as with paper absentee ballots. ECF No. 56-12, Ex. 12, Potts. Dep., at 115:16–117:21; ECF No. 56-11, Ex. 11, Bobo Dep., at 127:9–131:12, 138:2–24; ECF No. 56-13, Ex. 13, Anderson-Smith Dep. 116:11–119:12. [REDACTED]

[REDACTED] see also ECF No. 56-22, Ex. 22, Blake Dep., at 61:1–21. Defendants have not even considered this option. *See, e.g.*, ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 118:17–24, ECF No. 56-12, Ex. 12, Potts Dep., at 133:3–8.

3. Defendants cannot prove that security concerns would fundamentally alter their remote absentee voting programs.

Courts across the country have rejected hypothesized security risk arguments in remote accessible absentee voting cases under Title II. *E.g. Johnson*, 2023 WL 4374998, at *9 (“Without evidence of the likelihood of a security threat and its expected costs, the Court cannot countenance arguments that merely gesture toward threats to election or data security, real or imagined.”); *Lamone*, 813 F.3d at 501–02, 508–09 (affirming lower court’s finding that an

electronic ballot tool was “reasonably secure” *even where* “there was no evidence at trial that the online ballot marking tool had been tested against intentional attempts to infiltrate or hack [it]”).

No speculative security risk was significant enough to justify not approving and deploying an RABVM system to military and overseas voters, as the State of Alabama and Defendants have already done., *See, e.g.*, ECF No. 56-36, Ex. 33, at Democracy Live 004728 (certification by Alabama Secretary of Information Technology authorizing use of OmniBallot).

The parties’ experts agreed that whatever risks may exist, Alabama and Defendants have already accepted them by contracting for an RABVM system and have mitigated them by imposing security requirements under that contract. ECF No. 56-29, 56-30, 56-31, 56-32, Ex. 29, Appel Dep., at 59:13–22, 101:17–25; ECF No. 56-37, Ex. 34, Rebuttal Rep. of Ted Selker (“Selker Reb. Rep.”), at 2; ECF No. 56-19, Ex. 19, Elrod Dep., at 162:8–20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Defendants have provided no evidence that extending this same system to voters with print disabilities would create new or different risks. Indeed, the parties and their experts agreed that the purported security *risks* have never actually resulted in a security *issue* in the years that RABVM systems have been used across the country. ECF No. 56-38, Ex. 35, Selker Rep., at 2 (no system in “dozens of years” of use has ever “been found to be exploited for fraudulent purposes”); ECF No. 56-39, Ex. 36, Rep. of Andrew Appel, at 8–9 (discussing several states’ use of OmniBallot since 2020); ECF No. 56-37, Ex. 34, Selker Reb. Rep., at 1 (noting that Dr.

Appel's expert's report "points to no actual instances of such breaches"). When pressed for examples of RAVBM security breaches, Dr. Appel, Defendants' expert, could provide none. ECF No. 56-29, 56-30, 56-31, 56-32, Ex. 29, Appel Dep, at 48:2–18 ("A And you're asking now do I know of any specific instances of corruption of election servers that receive electronic votes over the internet? Q Yes. A I'm not aware of any."); *see also id.* 48:19–49:1 (admitting that Dr. Appel knew of no instances where a person's vote was changed or altered due to malware on a computer).

Democracy Live's un rebutted success in administering secure elections belies Defendants' argument. ECF No. 56-20, Ex. 20, at Democracy Live 0004759–60, 0004762, 0004764; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Indeed, Democracy Live could handle even Defendants' hypothesized influx of voters.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, Defendants overlook that there are inherent risks with paper return of absentee ballots that all voting systems similarly accept. ECF No. 56-38, Ex. 35, Selker Rep., at PLAINTIFFS 0000029, 0000031–32 (describing examples of compromised paper absentee ballot return); ECF No. 56-35, Ex. 32, Selker Dep., at 80:8–14; 90:4–95:8; 98:20–100:2. And, as both experts agreed, there are inherent risks with Defendants’ current practices of remaking or hand counting absentee ballots. Absentee ballots returned by mail on non-ballot stock and those returned electronically that are then printed on non-ballot stock are both ripe for human error. ECF No. 56-11, Ex. 11, Bobo Dep., at 128:22–131:12; ECF No. 56-13, Ex. 13, Anderson-Smith Dep., at 110:3–112:4, 116:11–119:25; ECF No. 56-12, Ex. 12, Potts Dep., at 144:22–145:8; ECF No. 56-35, Ex. 32, Selker Dep., at 135:12–15, 137:15–19; ECF No. 56-29, 56-30, 56-31, 56-32, Ex. 29, Appel Dep., at 135:10–137:21. These undisputed facts demonstrate that paper is neither essential nor inherently secure, and that any purported safety risks with expanding the RAVBM system that Alabama already accepts as having some inherent risk to absentee voters with print disabilities would not fundamentally alter Defendants’ remote absentee voting system.

The question posited by this Court at the outset remains: “[W]hat is that interest? What is Alabama’s purpose behind maintaining a paper balloting system?” *Rissling*, 2024 WL 3106897, at *6. As they were in June 2024, those questions are left unanswered. Because Defendants have not offered any factual support for their hypothetical worst-case security scenarios, this Court should grant summary judgment in favor of Plaintiffs on Defendants’ fundamental alteration defense.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment on their Title II claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2025, 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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