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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-RDP

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT & RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

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I. INTRODUCTION

Plaintiffs claim the ADA entitles them to internet voting so they can vote privately and independently. But they concede that Alabama already has a ballot-marking device—the ExpressVote Machine—that accomplishes that goal. *See* Doc. 58 at 16 ¶¶ 49-50. The ExpressVote Machine is available both in polling places on Election Day and for 55 days beforehand in each county's Absentee Election Manager (AEM) office for in-person absentee voters. Because Plaintiffs have no trouble getting around town, this accommodation provides them all that they are entitled to under the ADA: meaningful access. Apparently discontent with that, Plaintiffs attempt to improperly replead their claim. While their Amended Complaint asserts that they are entitled to "vote privately and independently by absentee ballot," their motion expands that phrasing to include *remotely*. *Compare* Doc. 4 ¶ 1, *with* Doc. 58 at 27. But this bait-and-switch only spotlights Plaintiffs' concession on the claims they've pleaded.

What's more, Plaintiffs' attempt to expand internet voting in Alabama to some amorphous, self-certified group of print-disabled voters spells trouble. The financial and administrative burdens attendant with such, measured against the negligible benefits to Plaintiffs, create an undue burden for the AEMs. And the practical effect of their relief would necessarily eliminate essential features of the absentee voting process—such as the requirement that absentee ballots be signed and notarized—and would expose Alabama's elections to the dangers of internet voting (which the federal government has declared are high-risk even with all known mitigation measures in place). Moreover, Plaintiffs overlook that they lack standing to request such broad relief for parties not before the Court; and even that several individual Plaintiffs lack standing on their own given they don't intend to vote absentee in the future. Additionally, this suit reveals that the ADA cannot reach as far as Plaintiffs contend.

For any one (or more) of these reasons, Defendants are entitled to summary judgment.

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II. LEGAL STANDARD

Summary judgment is appropriate where "there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving bears the initial burden of demonstrating that there is no genuine dispute as to any material fact by identifying the portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (quotation omitted). "The movant may meet this burden by demonstrating that the nonmoving party has failed to present sufficient evidence to support an essential element of the case." *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1311 (11th Cir. 2018) (citation omitted). Once the moving party has met its initial burden, the non-moving party then assumes the burden to establish, by identifying matters outside the pleadings, that a genuine issue of material fact exists. *Id.* at 1311-12.

Factual assertions must be supported by admissible evidence. FED. R. CIV. P. 56(c)(2). Accordingly, "[t]he general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment." *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1290 n.8 (11th Cir. 2018) (quoting *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999)) (holding that an out-of-court statement relaying that "customers comment on and identify Yellowfin's sheer line" was inadmissible hearsay). A narrow exception to this rule exists for documents like affidavits where simply having the witness testify to the same matter at trial would cure the hearsay issue. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012). The mere "suggestion that admissible evidence might be found in the future" is not enough at the summary-judgment stage. *Id.* at 1294 (quoting *McMillan v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996).

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III. FACTS

A. RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

1-7. Undisputed.

8. Disputed to the extent Plaintiffs represent Clayton as a blind individual. *Compare* Doc. 58 ¶ 3 ("completely blind"), *with id.* ¶ 4; *see* Doc. 56-5 at 41:8-9, 74:16-75:4.

9. Undisputed that some individuals may use speech-to-text software. Disputed that Plaintiffs' citation demonstrates that all print-disabled individuals do.

10. Disputed. Plaintiffs' own expert, Dr. Ted Selker, testified that optical character recognition (OCR) technology can be used to translate imagery into computer-readable symbols and letters such that OCR could "be used to read a hard copy ballot that's scanned," "mark it, print it and return it." Doc. 56-35 at 51:14-52:5; *see also* Doc. 56-38 at 10.

11-13. Undisputed.

14. Disputed in part. NFB-AL does not keep information on whether its members are blind or low vision. Doc. 56-7 at 36:13-37:3.

15-18. Undisputed.

19. Undisputed that Defendants are AEMs of three of the largest counties in Alabama.

20. Disputed in part. The process of opening and reviewing ballots is done after the AEM delivers absentee ballots to the absentee poll workers appointed by the appointing board. *See, e.g.*, Doc. 56-14 at 18; ALA. CODE § 17-11-11(a). Second, this list omits duties related to in-person absentee voting, whereby an individual may apply for and vote an absentee ballot in-person at the AEMs' offices. *See, e.g.*, Doc. 56-12 at 77:15-79:15.

21. Disputed in part. Not all "people with disabilities" are eligible to vote absentee, only those who are unable to attend the polls on Election Day due to a disability. ALA. CODE § 17-11-3(a)(2).

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22. Disputed in part. Although a PDF copy of the absentee ballot application form is available online and could be completed using a computer before being printed and returned, voters cannot request an absentee ballot via "online application." *See, e.g.*, Doc. 56-12 at 106:8-10. Rather, all applications must be submitted "by mail, by hand delivery, or by commercial carrier." ALA. CODE § 17-11-3(a).

23. Disputed in part. The generic absentee ballot application available on the Alabama Secretary of State's website is a fillable PDF that may also be completed digitally, printed, and then returned in person, by mail, or by commercial carrier. *See* https://tinyurl.com/3a2a4xxx.

24. Disputed in part. UOCAVA voters can also complete the generic absentee ballot application, which (along with the UOCAVA-specific absentee ballot application) is available online and by request to the AEM for a copy by mail or in person. Doc. 56-14 at 10, 13.

25. Disputed as incomplete. AEMs also check registration and verify that their address matches the address on PowerProfile. *E.g.*, Doc. 56-11 at 113:24-15, 122:17-24.

26. Disputed in part. There are two checkboxes on the application that may apply to voters with disabilities. One which requires the voter to provide a copy of a photo ID, and one does not. *See* Doc. 62-1 (Absentee Ballot Application). Only disabled voters entitled to vote absentee in accordance with federal law are exempt. Doc. 56-14 at 9 (citing ALA. CODE § 17-9-30(d)).

27-28. Undisputed.

29. Undisputed that the AEMs rely on applicants' certification under penalty of perjury that they are qualified to vote absentee based on a disability that would prevent them from attending the polls on Election Day. *See* Doc. 62-1.

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30. Disputed. For example, individuals applying to vote electronically are checked for an overseas address because even UOCAVA voters within the territorial bounds of the United States are not eligible for electronic return. *See, e.g.*, Doc. 56-11 at 119:21-120:19.

31. Undisputed that *Defendants* have not personally encountered fraud, which is unsurprising because they rely on voters' certification under penalty of perjury, generally don't interact with the voter in person, and are not law enforcement investigators. Disputed to the extent this paragraph implies fraud in the absentee election process—including the completion of absentee ballot applications—hasn't occurred in Alabama. *See generally* Doc. 62-6; Doc. 62-7; Doc. 62-8; Doc. 62-9; Doc. 62-10 (Alabama cases involving allegations of fraudulent or otherwise improper absentee voting).

32. Disputed. Although a UOCAVA voter may *choose* to apply and vote absentee in a way similar to non-UOCAVA voters, federal law also mandates several differences. *See* 52 U.S.C. § 20302. Federal law provides special status to UOCAVA voters in many ways, including by requiring election officials to accept the Federal Post Card Application, *id.* § 20302(a)(4), to accept the federal write-in ballot, *id.* § 20302(a)(2), to exempt such voters from photo identification requirements, *id.* § 21083(b)(3)(C)(i), and to transmit electronic ballots to such voters, *id.* § 20302(f). Additionally, the second portion of this paragraph is legal argument unsupported by factual assertion. *Contra* FED. R. CIV. P. 56(c)(1).

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33. Undisputed.

34. Disputed in part. A voter must have *two* witnesses sign the affidavit envelope or have their signature on the envelope notarized. *See* ALA. CODE 17-11-10(b)(2). In addition to mail or hand delivery, a voter may return the ballot by commercial carrier. *See* ALA. CODE 17-11-3(a).

35. Disputed that erring at "any" step results in rejection. The rejection reasons referred to in Plaintiffs' citation are "[n]o signature, no witnesses, no reason checked, incomplete affidavit, or no affidavit at all"—not, for example, an improper trifold. Doc. 56-11 at 154:6-12.

36. Undisputed.

37. Disputed. Only UOCAVA voters physically located outside the U.S. can submit their ballots by internet. UOCAVA voters within the U.S. (i.e., active-duty military personnel serving in the U.S.) may *receive* a blank electronic ballot but must complete and mail that ballot. Doc. 56-14 at 13; *see also* ALA. CODE § 17-11-40(2).

38. Disputed in part. For the past four years, the *Alabama Secretary of State's Office* has contracted with Democracy Live. *See* Doc. 56-19 at 149:4-17.

39. Disputed that the AEMs "provided" this system. The AEMs have not contracted for, designed, paid for the system's use, or otherwise "provided" for it. *E.g.*, Doc. 56-11 at 108:6-25.

40. Disputed to the extent this paragraph implies these certifications and testing immunize the system from all cybersecurity issues or risks. *See generally* Doc. 56-39 (Appel Report); *see also, e.g.*, Doc. 56-21 at 167:23-168:11.

41. Undisputed that the Secretary of State's Office transmits information for voters who have chosen to receive their ballots electronically to Democracy Live through a daily report from PowerProfile (based on determinations made by AEMs), which Democracy Live uses to credential voters. This paragraph's references to "using verification features" is vague and ambiguous as to what it modifies. Disputed that Plaintiffs have identified multiple verification features.

42. Undisputed.

43. Disputed in part. Only voters outside the territorial limits of the United States can return the ballot by internet as discussed in response to ¶ 37 above.

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44. Disputed that these credentials "ensure the person voting is who they say they are." Doc. 56-30 at 89:17-21, 123:18-124:5; *see also, e.g.*, Doc. 56-21 at 167:23-168:11.

45-46. Undisputed.

47. Disputed in part. Only twelve states use statewide electronic return. Doc. 56-1 at 10-11.

48. Disputed. "Accessible" is a legal term of art. Plaintiffs' evidence doesn't establish that all print-disabled Alabamians cannot read or fill out paper forms or otherwise complete each step of the absentee-voting process without assistance given their varying degrees of disability. *E.g.*, Doc. 56-7 at 68:16-69:2; Doc. 56-5 at 41:10-12 (Clayton using a magnifying glass to vote).

49. Disputed. "Privately and independently" is a legal term of art. And whether an individual voter's remote voting experience is private and independent depends on that voter's particular circumstances. Regardless, even those voters who may require third-party assistance can do so privately and independently because the ADA's regulations contemplate that third-party assistance may be an appropriate auxiliary aid or service. *See* 28 C.F.R. § 35.104; *see also infra* § IV.C.3. Also disputed for the same reasons described in the previous paragraph.

50. Disputed that such voters "must" do so for the same reasons described in the previous paragraph, undisputed that otherwise qualified absentee voters *may* do so.

51. Disputed. Peebles can manipulate the screen to make selections. Doc. 56-2 at 87:10-90:23, 114:16-115:18. And inability to manipulate into the ExpressVote Machine or optical scanner doesn't render the voting experience inaccessible for him. *See id.*; *infra* § IV.C.3. In any event, ExpressVote Machines has sip-and-puff accessibility features as well. Doc. 56-2 at 106:8-9, 155:20-23, 157:4-15, 158:10-13, 159:14-17.

52. Disputed in part. Plaintiffs have 55 days within which to use the ExpressVote Machine located at the AEMs' offices, using the same methods of transport they already use. Their

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subjective concerns about the machines are speculative and irrelevant under the ADA. Moreover, NFB-AL's members can access and use the ExpressVote Machine. Doc. 56-7 at 60:19-23. And the AEMs help voters in need. *See* Doc. 56-11 at 155:21-156:8. Moreover, Plaintiffs don't have to "hope" if they call ahead. *See, e.g.*, Doc. 56-7 at 48:18-23.

53. Disputed in part. Plaintiffs have alternatives to relying on third-party assistance. Doc. 56-2 at 103:5-22 (Peebles using software to fill out the application); *cf.* Doc. 56-5 at 41:10-12.

54. Disputed. This paragraph is a legal argument and misstates Plaintiffs' rights. And the ExpressVote Machine allows Plaintiffs to vote privately and independently in person.

55. Undisputed that Peebles did so, disputed that he was "forced." *See* Doc. 56-2 at 87:3-9.

56. Disputed in part. Presley voted absentee before the ExpressVote Machine's implementation. Doc. 56-3 at 27:19-23.

57. Undisputed that she *did not* vote, disputed that she *could not*. *See* Doc. 56-5 at 38:5-12.

58. Disputed. What Plaintiffs refer to as "[m]any" is only "a couple" according to Manuel's testimony—herself and three others (based on hearsay or double hearsay) during the pandemic in 2020. *Compare* Doc. 58 at 18 ¶ 58, *with* Doc. 56-7 at 51:10-13. Ms. Manuel and Mr. Wilson ultimately voted privately and independently. Doc. 56-7 at 49:14-18, 54:5-7. NFB-AL is aware of no problems with using the ExpressVote Machine since 2020. *See id.* at 56:13-21.

59. Undisputed that NFB-AL has encouraged the ExpressVote Machine's use because it's a way for people to independently and privately vote. *Id.* at 61:8-17; *accord* Doc. 62-12 (Ms. Manuel stating that the ExpressVote Machine "is vital for our blind people to cast a private, independent, secure vote"). It even works with local elections officials to demonstrate how to use the ExpressVote Machine. Doc. 56-7 at 61:18-63:19. Disputed that its members have no option to vote privately, independently, and remotely; further, that conclusion relies on legal argument.

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60. Undisputed.

61. Disputed. Those efforts were not directed at the AEMs, who cannot change State law. And whether the UOCAVA system would provide equal opportunity is a legal conclusion.

62. The language of that decision speaks for itself, and the rest of this paragraph contains only legal conclusions. Otherwise disputed.

B. Additional Undisputed Facts

63. Each Plaintiff testified they have no issue getting around town. Doc. 56-4 at 32:21-33:3, 76:18-78:15; Doc. 56-3 at 36:3-38:9, 39:13-40:3; Doc. 56-5 at 21:16-22:3; Doc. 56-2 at 12:12-13.

64. Rissling, Presley, and Clayton understand how to use the ExpressVote Machine, enjoy it, and concede that it allows them to vote privately and independently. Doc. 56-4 at 64:4-14, 72:20-73:18; Doc. 56-3 at 48:1-6; Doc. 56-5 at 33:10-16.

65. Peebles quibbles with whether the ExpressVote Machine is an ideal accommodation because he can't insert and remove the ballot without spoiling his ballot, but he can use the machine to mark his choices on his own. Doc. 56-2 at 87:10-90:23, 114:16-115:18. His primary concern is that the person removing his ballot might become "nosey as all get-out" and glance at his choices, "not … that somebody would do that, but … the ability is there." *Id.* at 89:13-21.

66. Clayton, Peebles, and Presley each have associates they trust to assist them with marking their ballots. *See, e.g.*, Doc. 56-5 at 71:4-14 (Clayton's daughter); Doc. 56-2 at 91:10-21, 106:18-21 (Peebles's care worker and family); Doc. 56-3 (Presley's friend).

67. Rissling has voted in person and on election day in every local, state, and federal election since 2014, save for one. Doc. 56-4 at 57:7-10, 60:15-18. On that occasion, he went to the Tuscaloosa County Courthouse and used an ExpressVote Machine. *Id*. at 60:13-63:1. He enjoyed the experience and had no problem voting. *Id.* at 64:4-14.

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68. Rissling believes the ExpressVote Machine allows him to vote independently and privately, and he's *never* experienced a problem with one. *Id*. at 72:20-73:18.[1]

69. Rissling intends to always vote in person on Election Day. He testified unequivocally that he'd only vote absentee as an "absolute last resort," explaining that situation might arise if a tornado touched down in Tuscaloosa on Election Day or if he had an unavoidable out-of-town obligation. *Id.* at 88:5-89:3, 100:7-20, 104:8-105:5, 106:13-16.

70. Apart from this lawsuit, Rissling has never complained about anything related to ExpressVote Machine or Alabama's voting process. *Id.* at 82:18-22.

71. Presley has voted in person and on Election Day in every general and primary election since the 1976 presidential election. Doc. 56-3 at 22:2-13, 23:2-6, 26:23-27:23.

72. Since about 2010, Presley has used ExpressVote Machines to vote. *Id.* at p. 26:4-22. Like the other Plaintiffs, she believes the ExpressVote Machine allows her to vote privately and independently and has never had trouble using one. *Id.* at 30:14-32:23; 40:5-41:4.

73. Presley joined this suit *not* to ask for relief for herself, but for a class of people to which she doesn't belong; she identifies them as "homebound" people. *Id.* at 42:13-43:3. As Presley explained in her deposition, she isn't homebound and can get to and from her polling place with no issue. *Id.* at 29:2-30:3-13; 35:15-36. So, online voting wouldn't do anything for her. *Id.* at 47:11-12.

74. Clayton isn't blind. She has been diagnosed with "advanced glaucoma" and suffers from cataracts. Doc. 56-5 at 16:2-17:15. She can see certain things straight ahead, needs eyeglasses or

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[1] The only problem Mr. Rissling ever encountered with an ExpressVote Machine concerned a poll worker's unfamiliarity with the machine in a recent *municipal* election—which are administered by city workers rather than any of the AEMs. Even then, he cast his ballot with the ExpressVote Machine. Doc. 56-4 at 65:12-73:4.

a magnifier to read her mail, and uses large print on her cell phone to read messages. *Id.* at 22:18-23:16; 74:17-75:9.

75. Clayton and her husband go to work every day using Jefferson County's MAX bus service. *Id.* at 11:14-23; 48:13-49:13. They also use the bus to get to other places in the county by calling and booking a ride with as little as 24 hours' notice. *Id.* at 66:5-67:9.

76. While the MAX bus doesn't run on Sundays, Clayton relies on family, friends, her pastor, and rideshare apps to get around town and to her weekly church service. *Id.* at 21:16-22:3; 25:9-20. She sees her daughter, who lives a few minutes away in Hoover, weekly and her sister who lives in Roebuck nearly as often. *Id.* at 73:22-74:12, 22:18-23:16.

77. While she knows where her current polling place is and has voted in several elections, Clayton doesn't know when she's used an ExpressVote Machine. *Id.* at 69:2-21, 60:15-61:2.

78. Clayton conceded at her deposition that she could schedule a ride with the MAX bus with as little as 24 hours' notice to catch a ride to the courthouse to vote and that she simply didn't do that last election cycle. *Id.* at 37:14-38:17.

79. Peebles, like the other Plaintiffs, has no trouble getting around—he has his own vehicle and employees that drive him around town and who come to his house every day to help him with various tasks. Doc. 56-2 at 2:12-17, 13:8-19.

80. At his deposition, Dr. Peebles, recanted his claim that he was "unable" to vote in 2022. *See id.* at 91:22-92:8, 94:5-95:21, 108:6-11.

81. Ms. Barbara Manuel, NFB-AL President, likes the ExpressVote Machine because it allows her to cast her vote privately and independently. Doc. 56-7 at 45:21-46:17.

82. NFB-AL is aware of no problems with using the ExpressVote Machine since 2020. *See id.* at 56:13-21.

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83. Someone becomes a member of NFB-AL through a vote at a chapter meeting after expressing interest in becoming a member at a previous meeting. Doc. 56-7 at 30:12-18. Membership costs $20. *Id.* at 29:5-11.

84. A person doesn't have to be blind or have a vision disability to join NFB-AL. *See id.* at 31:1-9. Around five percent of NFB-AL's membership does not have a vision disability. *Id.* at 31:6-9. These members include family members and people who are "blind at heart"—people who are aware of the challenges blind people face and express support. *Id.* at 31:10-21.

85. NFB-AL doesn't keep statistics on the ways its members vote. Doc. 56-7 at 51:1-4. But it believes most members vote in person and one or two vote absentee. *Id.* at 50:19-23.

86. The survey NFB-AL conducted on blind individuals' voting-method preferences does not support the conclusion that blind individuals need (or even want) electronic voting. *See* Doc. 56-42. Of the 338 people surveyed, 57% most strongly preferred using the ExpressVote Machine on Election Day or voting absentee early. *See id.* at 2. Only 29.3% most strongly preferred electronic voting. *Id.* And 12.8% most strongly preferred a paper absentee ballot. *Id.* The cumulative vote (across participants' top three choices) for electronic voting was on par with voting by a paper absentee ballot—both of which trailed using the ExpressVote Machine. *See id.* at 3.

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87. There have been a few times where ride-share services offer vouchers to NFB members that they can use to vote on Election Day. *Id.* at 69:5-9.

88. NFB-AL is seeking relief for "[t]he blind, as well as print disabled individuals in the State of Alabama"—"not just [its] members[.]" *Id.* at 77:1-7.

89. NFB-AL believes that electronic voting is secure because it wouldn't be used in Alabama if it was not secure, other states do it, and banking and other private information exists online. *Id.*

at 83:20-84:9. It believes that electronic voting is more secure than paper voting because fewer humans are involved, but it is unaware if that's true. *Id.* at 86:11-87:10.

90. NFB-AL would not want electronic voting if it was not secure. *Id.* at 84:10-12.

91. NFB-AL is aware of these security concerns associated with electronic return. *See* Doc. 62-13 at 2. In 2023, it drafted a resolution at its annual convention, which stated: "because of security concerns, most jurisdictions do not permit the acceptance of ballots that are delivered electronically to be returned electronically or via email." *Id.*

92. The OmniBallot voting system is only available to UOCAVA voters in Alabama for elections in which a federal office is on the ballot. Doc. 56-19 at 148:13-16.

93. Absentee ballots cast via electronic return are printed, stuffed into secrecy envelopes, stored securely until Election Day, and then turned over to the absentee poll works to either be hand-counted or transcribed onto ballot stock that can be processed by the tabulators. Doc. 56-12 at 154:11-155:2, 156:3-18; Doc. 56-11 at 169:11-19, 174:14-23, 176:6-14.

94. The AEMs have no control over their negligible budgets—they are at the mercy of the County Commissions, which are not parties to this suit. *E.g.*, Doc. 56-13 at 158:7-159:4; Doc. 56-27 at 16:23-17:10; Doc. 56-11 at 171:3; Doc. 56-12 at 157:7-12; Doc. 56-26 at 52:23-53:10.

95. Expanding OmniBallot to disabled voters as Plaintiffs propose would cost at least $60,000, on top of the $119,500 that the Secretary of State's Office already pays Democracy Live to cover its use for UOCAVA voters. Doc. 56-40 at 3; *see also* Doc. 56-34 at 11:20-12:23, 15:12-16:3.

96. Expanding absentee voting as Plaintiffs propose would create many financial and administrative burdens for the AEMs. Program expansion will require additional resources and more personnel. Doc. 56-19 at 178:7-25; Doc. 56-12 at 144:5-145:20, 154:11-155:22, 156:3-18 (; Doc. 56-11 at 169:11-19, 176:6-14, 59:2-61:2; Doc. 56-13 at 149:23-151:3, 159:5-18.

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Additionally, expansion will result in more time spent aiding voters who have trouble with the system, *e.g.*, Doc. 56-12 at 121:10-13; *see also* Doc. 62-11 (detailing issues stemming from voter submitting multiple ballots via OmniBallot); hand-counting or transcribing votes cast by internet, Doc. 56-12 at 154:11-155:2, 156:3-18; Doc. 56-11 at 169:11-19, 174:14-23, 176:6-14; and training additional personnel and volunteers, Doc. 56-13 at 154:3-25.

96. Additional information discovered after an individual applies for or votes an absentee ballot is often used to challenge election outcomes or prosecute voter fraud. *See generally* Doc. 62-6; Doc. 62-7; Doc. 62-8; Doc. 62-9; Doc. 62-10 (Alabama cases involving allegations of fraudulent or otherwise improper voting).

97. Absentee fraud has been documented in Alabama through election contests and criminal proceedings. *See supra* ¶ 96.

98. The voter's and witnesses' signatures on the absentee ballot application or absentee ballot affidavit provides evidence that courts use to assess whether improper or fraudulent activity has occurred in the absentee voting process. *See, e.g.*, Doc. 62-8 at 6; Doc. 62-9 at 10; *Eubanks v. Hale*, 752 So. 2d 1113, 1159 (Ala. 1999).

99. In 2025, a candidate for Clay County Commission candidate pleaded guilty to one count of falsifying an absentee ballot and application. Doc. 62-6.

100. In 2017, the Mayor of Gordon was convicted in two cases of falsely notarizing absentee ballots without the voter present. Doc. 62-10.

101. In 2025, an individual was indicted on several counts relating to the fraudulent completion of an absentee ballot application on behalf of an incapacitated man. Doc. 62-7.

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102. A successful election contest in 2016 required the vacatur of the declared mayor of Brighton, Alabama because he procured a number of illegal absentee votes in his favor, many of which falsely listed his address as the address at which they regularly received mail. Doc. 62-8.

103. An election contest involving a 2018 Bessemer City Council race resulted in 27 votes being discounted because of irregularities in the balloting process. Doc. 62-9.

104. Alabama allows electronic return for UOCAVA voters to comply with UOCAVA's "tight deadlines." Doc. 56-19 at 183:25-184:8; *United States v. Alabama*, 778 F.3d 926 (11th Cir. 2015).

105. The federal government has declared internet voting to be "high risk," even with known mitigation measures in place. Doc. 62-4 at 1-2. The report—issued by CISA, NIST, the FBI, and the EAC—further concluded that "[s]ecuring the return of voted ballots via the internet while ensuring ballot integrity and maintaining voter privacy is difficult, if not impossible, at this time." *Id.*

106. Defendants' expert—Dr. Andrew Appel—explained at length the technical reasons why internet voting is inherently insecure. *See generally* Doc. 56-39. Multiple vectors of attack exist: threats can occur on the voter's end, on the election official's end, and in transit. With today's technology, it is "impossible to fully protect the voter's vote from being changed (by hacked software) between the time the voter indicates it on-screen and the time it is transmitted, and it is impossible to fully protect server computers (that collect ballots) from being hacked." *Id.* at 4.

107. Democracy Live's CEO, Bryan Finney, reached out to Defendants' expert following the vendor's 30(b)(6) deposition to inquire about "how [Democracy Live] could more securely transmit ballots to voters." Doc. 62-5 at 2.

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108. Problems have arisen regarding OmniBallot's use, including at least one situation where a voter submitted multiple ballots through the system, [redacted]. *See* Doc. 62-11; Doc. 56-21 at 110:12-111:4, 171:1-172:8.

C. Additional Disputed Facts

109. Defendants offer no additional disputed facts other than those set out in § III.A, *supra*.

IV. ARGUMENT

A. Plaintiffs Lack Standing To Pursue The Relief They Seek.

The Constitution requires a case or controversy to exist for a court to exercise its judicial power. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Id.* at 338. The "irreducible constitutional minimum" of standing requires: (1) injury in fact, (2) traceability, and (3) redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (2016). Because courts cannot dispense standing in gross, a plaintiff needs standing for each form of relief sought. *Davis v. FEC*, 554 U.S. 724, 734 (2008) (citations omitted). A plaintiff must carry their standing burden at summary judgment by setting forth specific facts supported by evidence—allegations no longer suffice. *Lujan*, 504 U.S. at 561.

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Plaintiffs have three standing problems. First, the Amended Complaint seeks relief requiring the AEMs to "implement[] a remote accessible vote-by-mail system … for people with vision and print disabilities for all future elections[.]" Doc. 4 at 20. But not all print-disabled people in Jefferson, Mobile, and Tuscaloosa counties are parties to this action. No Plaintiff has standing to obtain relief for all those non-parties, and Plaintiffs can't satisfy third-party standing requirements anyway. Next, NFB-AL lacks associational standing to obtain relief for its members or anyone else because: (1) it has not shown that it has a member with standing, and (2) the claim

asserted requires its members participation. Lastly, Rissling, Presley, and Clayton cannot establish standing because they neither need nor want the requested relief. Because Plaintiffs failed to show they have standing, the AEMs are entitled to summary judgment.

1. Plaintiffs lack standing to obtain countywide injunctions for all print-disabled voters.

Plaintiffs generally cannot rest their claim on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). "Without such limitation[] … courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions[.]" *Id.* at 500 (citations omitted). And this rule fits with the traditional scope of injunctive relief. *See Georgia v. President of the U.S.*, 46 F.4th 1283, 1303-04 (11th Cir. 2022). Courts should limit remedies "to the inadequacy that produced the injury in fact that the plaintiff has established," and those remedies should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Id.* (quoting *Gill v. Whitford*, 585 U.S. 48, 68 (2018); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)) (quotation marks omitted). Plaintiffs seek countywide relief in the AEMs' counties but offer no basis for obtaining relief beyond the named Plaintiffs or NFB-AL's members. Such relief goes beyond Plaintiffs' claimed injuries and would burden the AEMs beyond what is necessary to provide Plaintiffs with complete relief. Their requested countywide injunctions in Jefferson, Mobile, and Tuscaloosa counties are thus inappropriate.

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Plaintiffs cannot satisfy any basis for obtaining relief on behalf of third parties anyhow. *Kowalski v. Tesmer* provides only two avenues where third-party standing may be appropriate. 543 U.S. 125, 130 (2004). First, a case can be one where "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth*, 422 U.S. at 510 (collecting cases). But the AEMs' implementation of State law as to Plaintiffs and NFB-AL's members causes no collateral injury to third-party voters. Nor can Plaintiffs satisfy

Kowalski's second alternative, which requires them to show (1) they have a "close" relationship with these non-party, print-disabled voters; and (2) a sufficient "hindrance" to those voters' ability to assert their own interests. 543 U.S. at 130. There's no evidence of *any* relationship between Plaintiffs and unaffiliated third-party voters, and the fact of this lawsuit (and those in other jurisdictions) suggests those voters can sue on their own. Thus, Plaintiffs lack standing and aren't otherwise entitled to obtain their requested relief for unaffiliated third parties with print disabilities.

2. NFB-AL lacks standing to obtain relief for its members or anyone else.

Associational standing isn't the ticket here. NFB-AL's sole standing claim is associational standing through its members, which it asserts entitles it to countywide injunctions. *See* Doc. 58 at 19. But associational standing narrowly allows NFB-AL "to sue to redress injuries suffered" only "by its members[.]" *Doe v. Stincer*, 175 F.3d 879, 882. And they can't do that either.

An organization has standing to sue on behalf of its members only if: (1) "its members would otherwise have standing to sue in their own right," (2) "the interests it seeks to protect are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). NFB-AL doesn't meet the first or third elements.

First, NFB-AL hasn't shown that one of its members has or would have standing. NFB-AL devotes a mere sentence to establishing that its members have an injury in fact that electronic voting would redress. *See* Doc. 58 at 20. It principally relies on NFB-AL members Rissling and Clayton. *See id.* But for the reasons discussed *infra* § IV.A.3, the evidence shows they don't want electronic voting, don't intend to vote electronically if they could, or already can vote privately and independently using the ExpressVote Machine. NFB-AL also includes a string citation (without explanation) of passages from Ms. Manuel's deposition. *See* Doc. 58 at 20. But these passages in context either don't support that an NFB-AL member has standing or are inadmissible

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hearsay. *See Miccosukee Tribe of Indiana of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1229-30 (cautioning courts against "speculat[ing] concerning the existence of standing" and "imagin[ing] or piec[ing] together an injury sufficient to give plaintiff standing when it has demonstrated none"); *Yellowfin*, 898 F.3d at 1290 n.8 (holding that hearsay cannot be considered on summary judgment); FED. R. CIV. P. 56(c)(2).[2] And without a member with standing, NFB-AL lacks standing to assert its claims.

Second, NFB-AL's members must participate to advance their "highly fact-specific" ADA claims. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007). At the motion-to-dismiss stage, Plaintiffs harped on the need to "develop[] a factual record to assess the burdens facing Alabama's blind voters and voters with other print disabilities" and argued that the exclusion inquiry was "a fact-specific argument ill-suited for resolution on a motion to dismiss." Doc. 26 at 3, 20 (collecting cases). But they now implicitly argue that such a factual record is unnecessary for the non-party, print-disabled voters who may or may not even want (let alone need) the relief sought. Having failed to even discuss this first aspect of the third associational-standing element, they fail to carry their burden. *See* Doc. 58 at 14.

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The variations in degree of vision disability, required modification, and voting preferences among NFB-AL's members show why their individual participation is necessary. Using their

[2] The first citation (49:6-13) is about Ms. Manuel's experience voting absentee during the pandemic, but Ms. Manuel was able to vote absentee privately and independently a few days later. *See* Doc. 56-7 at 49:14-18. The second citation (50:19-23) is hearsay about unnamed, undisclosed individuals and merely states that one or two members have voted absentee—not that these members have had any issues. The third citation (68:6-15) is also hearsay about unnamed, undisclosed individuals that ignores the availability of the ExpressVote Machine as an option to vote absentee in person privately and independently. The same is true for the fourth (94:16-19) and fifth (94:20-95:15) citations, which also are about the post-voting process where privacy is not necessary or required. The final citation (108:11-15) is hearsay about named (but still undisclosed) individuals at least, but Plaintiffs again omit following context: Ms. Manuel admitting that she was speculating, that these individuals did not tell her about anything specific, and that she didn't know whether these individuals had even tried to vote absentee. *See id.* at 108:16-110:22.

estimate, about 5% of NFB-AL's members have no vision disability. *See* Doc. 56-7 at 31:1-9. Within the 95%, there are differing degrees of vision impairment. *Id.* at 68:16-20. Some members can vote absentee at home without assistance. *See id.* at 68:21-69:4. Some members—like Rissling—prefer to vote in person." Doc. 56-4 at 88:5-89:3; *see also* Doc. 56-42 (37% of those surveyed not listing electronic voting as one of their top three preferred voting methods). And some members—like Clayton—may need only a less expansive modification like a ballot with bigger print. *See* Doc. 56-5 at 22:18-23:3; 37:8-9. Yet NFB-AL asks this Court to assume that all its members are similarly situated: that all need electronic voting to meaningfully access private and independent absentee voting. These variations demonstrate why "any finding of an ADA violation requires proof as to each individual claimant," *Concerned Parents to Save Dreher Park v. City of W. Palm Beach*, 884 F. Supp. 487, 488 (S.D. Fla. 1994),[3] thus precluding NFB-AL from having associational standing.[4]

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3. Plaintiffs Rissling, Presley, and Clayton lack standing to bring claims even individually.

Article III requires a plaintiff to make "an additional showing when injunctive relief is sought." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1329 (11th Cir. 2013) A plaintiff must have "a real and immediate threat of future injury" in addition to past injury—speculation and hypotheticals will not do. *Id.*; *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) ("In ADA

[3] *Cf. Access for the Disabled, Inc. v. Rosof*, No. 805CV1413T30TBM, 2005 WL 3556046, at *2 (M.D. Fla. Dec. 28, 2005) ("In determining whether a plaintiff has adequately asserted a claim under Title III of the ADA, a plaintiff's particular disability and his or her encounter with the alleged barriers to access are relevant factors to be considered. Because these factors are inherently fact-specific and require individualized proof, claims brought under Title III of the ADA require the participation of individual members in the lawsuit."). *But see Alumni Cruises, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290, 1300-02 (S.D. Fla. 2013).

[4] The AEMs preserve the right to argue that the doctrine of associational standing "can[not] be squared with Article III's requirement that courts respect the bounds of their judicial power." *FDA. v. All. for Hippocratic Med.*, 602 U.S. 367, 405 (2024) (Thomas, J., concurring); Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, 91 U. CHI. L. REV. 1539 (2024) (explaining that the doctrine (1) allows plaintiff groups "to effectively craft their own classes without judicial approval or satisfying [Rule 23's] requirements," (2) violates Rule 17(a)'s real-party-in-interest requirement, and (3) permits a "backdoor method" for courts to issue inappropriate "defendant-oriented injunctions").

cases, courts have held that a plaintiff lacks standing to seek injunctive relief unless he alleges facts giving rise to an inference that he will suffer future discrimination by the defendant."). Rissling, Presley, and Clayton have offered no evidence showing that they will be deprived of an equal opportunity to vote absentee privately and independently without electronic voting.

That's because they have no plans to vote absentee in the future. Rissling prefers to vote in person on Election Day using the ExpressVote Machine, which allows him to vote privately and independently. Doc. 56-4 at 60:23-63:1, 64:4-14. He reserves absentee voting for "real, real, real rare seldom occasions"; it's his "last resort" for a situation like "a bad tornado outbreak." *Id.* at 88:5-89:3; 1-6:10-16. Presley also votes in person and on Election Day using the ExpressVote Machine, which she also believes allows her to vote privately and independently. Doc. 56-3 at 45:11-16. Her participation in this lawsuit is to benefit others: "those of us who are totally blind and could not get out to go vote[.]" *Id.* at 42:13-43:3; 47:10-15 (Presley explaining that she is not homebound but would want to vote electronically if she were). Lastly, Clayton "wouldn't mind … doing the absentee ballots" only if she wasn't able to get to the polls and use the ExpressVote Machine, which she can. Doc. 56-5 at 64:13-21, 48:13-49:13, 21:13-22:6. Because Rissling, Presley, and Clayton don't intend to avail themselves of absentee voting (and can otherwise vote absentee privately and independently using the ExpressVote Machine), they have not and cannot demonstrate a "real and immediate threat of future injury."

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No Plaintiff confers jurisdiction upon this Court to grant countywide injunctions. And because NFB-AL cannot establish associational standing, relief is only appropriate for the Individual Plaintiffs who have demonstrated an injury that electronic absentee voting would redress (at most, Peebles).

B. The ADA Cannot Preempt State Election Laws.

Except as UOCAVA requires, Alabama law requires that all ballots cast in elections be paper ballots. *See infra* § IV.D.2. But because the ADA does not preempt State law governing the conduct of elections, Plaintiffs' ADA claim fails. And while this Court rejected this argument at the motion-to-dismiss phase, Defendants respectfully ask that this Court reconsider that ruling for the reasons explained below.

For starters, that courts "have considered ADA claims in the context of elections", does not defeat the AEMs' argument. Doc. 32 at 8. "Questions which merely lurk in the record, … are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). While the Eleventh Circuit *has* previously applied the ADA in the election context, the parties did not raise the threshold question of *whether* the ADA preempted Florida law and thus the court did not rule upon it. *Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107 (11th Cir. 2011); *see id.* Br. of Appellant, 2008 WL 936736.[5] No binding precedent has held that the ADA preempts State election laws.

Writing on a clean slate, the proper inquiry requires this Court to answer two narrow questions. First, is the ADA a piece of Elections Clause legislation? Neither the Plaintiffs nor this Court claimed that it was at the motion-to-dismiss stage. *See* Doc. 26 at 4-11; Doc. 32 at 8-11. So next, was it the "clear and manifest purpose of Congress" that the ADA preempt State election law? *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 281, 230 (1947); *see* Doc. 26 at 6 (conceding that a clear-statement rule applies). That answer to this question is also "no," which this Court also did not dispute. *See* Doc. 32 at 8-11. Accordingly, the ADA cannot preempt Alabama law.

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[5] *Cf. Tennessee v. Lane*, 541 U.S. 509, 530-31 (2004) ("[T]he question presented in this case is *not* whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to … voting booths." (emphasis added)).

1. The ADA is not "Elections Clause legislation" and does not contain clear language manifesting Congress's intent to preempt State election law.

To determine whether federal law preempts State law in this context, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 13 (2013) (quoting *Rice*, 331 U.S. at 230); *Bond v. United States*, 572 U.S. 844, 858 (2014) ("It has been long settled … that we presume federal statutes do not … preempt state law."). "This plain statement rule—which is uniquely strong when the federal law would "override[] the 'usual constitutional balance of federal and state powers[,]" *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)—is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. Because the Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones," *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (Posner, J.), Congress must speak clearly to regulate elections in a way that conflicts with State law. *See United States v. Gradwell*, 243 U.S. 476, 485 (stating that the "clearly established … policy of Congress" is "to leave the conduct of the election of its members to state laws, administered by state officers.").[6]

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To be sure, Congress is not powerless to regulate elections. But when it undertakes to preempt state election laws, it must do so *specifically* in legislation targeting the conduct of elections. *See id.* ("by positive and clear statutes")*; see also, e.g.*, 52 U.S.C. § 20901, *et seq*. (Help

[6] Although true that *Gradwell* is not "a pre-emption case" and its reasoning does not apply to "Elections Clause legislation," *see Inter Tribal Council*, 570 U.S. at 13 & n.5, *Bond* explains 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).

America Vote Act). This occurs most naturally in "Elections Clause legislation," where the presumption against federal preemption plays no role. *Inter Tribal Council*, 570 U.S. at 13-15; *see* U.S. CONST. art. I, § 4, cl.1. This rule makes sense; when "Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Inter Tribal Council*, 570 U.S. at 14. In that context, Congressional intent to regulate elections is unmistakable.

But the ADA isn't Elections Clause legislation. *See* 42 U.S.C. § 12101(b)(4). So courts "must be absolutely certain that Congress intended such an exercise" before applying them to preempt State election law. *Gregory*, 501 U.S. at 464.

Nothing in the ADA manifests congressional intent to preempt State election laws. The Act—as part of its legislative findings—contains a single reference to "voting." *See* 42 U.S.C. § 12101 (recognizing that "discrimination against individuals with disabilities persists in such critical areas as … voting, and access to public services."). This generalized language "does not constitute a clear statement[.]" *See Bond*, 572 U.S. at 860. At best, it 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 without displacing State law. *See generally Tennessee v. Lane*, 541 U.S. 509 (2004). But just because the ADA may require polling places to be wheelchair accessible does 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 does not contain a clear statement that Congress intended to preempt the States' broad election authority.

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2. Ambiguity is not a precondition for the presumption against preemption to apply.

This Court at the motion-to-dismiss stage never found that the ADA had a clear statement. Instead, relying on *Inter Tribal Council*, *Bond*, and *Gregory*, it determined that the presumption against preemption "applies only when the federal law at issue is ambiguous." Doc. 32 at 9. But that would turn the clear-statement rule on its head. The "ambiguity" that the presumption examines is the ambiguity about a statute's preemptive scope. *Cf. Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) ("Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005))). That's the ambiguity the AEMs identify and challenge here. *Contra* Doc. 32 at 9. Regardless, none of these isolated quotations impose an ambiguity limitation.

First, *Inter Tribal Council*. It held that the NVRA's mandate that a State "accept and use" the federal voter registration form was *unambiguous*.[7] *See generally Inter Tribal Council*, 570 U.S. 1; *see id.* at 22 (Kennedy, J., concurring) ("[T]he Court is correct to conclude that the [NVRA] is unambiguous in its pre-emption of Arizona's statute."). Even still, this Court's previous quotation from *Inter Tribal Council* was not from the section where the Supreme Court discusses the presumption—in which the Supreme Court does not announce an ambiguity limitation. *Compare id.* at 10, *with id.* at 13-15. And the Supreme Court held that the presumption did not apply because the NVRA *was* Elections Clause legislation, so it would not make sense for the Court to have narrowed the presumption's application. *See id.*

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[7] Although that language "*[t]aken in isolation*" could have been "fairly susceptible of two interpretations," the Supreme Court had no trouble determining "the fairest reading of the statute" after considering surrounding context. *Id.* at 10-13, 15 (majority op.) (emphasis added).

Second, *Bond.* It did not involve ambiguity-*qua*-ambiguity. The ambiguity was not derived from the text but "from the improbably broad reach of the key statutory definition given the term—'chemical weapon'—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism." *Bond*, 572 U.S. at 860; *see id.* at 870 (Scalia, J., concurring) (explaining that the majority held that a statute's "disruptive effect on the 'federal-state balance' of criminal jurisdiction" can "cause[] the text, even if clear on its face, to be ambiguous"). This Court's previous quotation from *Bond* isn't directly connected to the presumption against preemption; there, the Supreme Court was interpreting the *substantive* scope of the federal law—not its preemptive scope. *See id.* at 859-60 (majority op.). And, again, *Bond* does not articulate an ambiguity limitation when it states the principle. *See id.* at 858.

Third, *Gregory*. It also was not interpreting a federal law's preemptive scope. *See generally Gregory*, 501 U.S. 452. The question—as a matter of statutory interpretation—was whether a judge was an "appointee at the policymaking level" as to be excluded from the definition of "employee" in the ADEA. *Id.* at 466-67. The ambiguity arose not from the broad definition of "employee," *id.* at 467 ("The ADEA plainly covers all state employees except those excluded by one of the exceptions."), but instead from Congress's "clear exclusion of most important public officials[.]" *Id.* at 470. The Supreme Court recognized that including judges within the policymaking-level exemption was "an odd way for Congress to exclude judges" but emphasized that it "w[ould] not read the ADEA to cover state judges unless Congress has made it clear that judges are *included." Id.* at 467. So *Gregory* is a clear-statement case, but it doesn't involve the presumption against preemption. It thus could not have established an ambiguity precondition.

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These three cases do not hold that the presumption against preemption applies only where substantive ambiguity exists. Nor does *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008). In a concurring opinion, Judge Barkett rejected the existence of the presumption against preemption in the context of implied preemption entirely. *Id.* at 1179 n.13. She did not state that the presumption applies only where substantive ambiguity exists at the threshold. *Contra* Doc. 32 at 9-10. It also isn't surprising that *Browning* rejected the presumption's application; *Browning* involved HAVA, which *is* Elections Clause legislation. *Colon-Marrero v. Velez*, 813 F.3d 1, 19 (1st Cir. 2016) (citing H.R. Rep. 107-329, pt. 1, at 57, 2001 WL 1579545, at *57); *Tex. Voters All. v. Dallas County*, 495 F. Supp. 3d 441, 467 (E.D. Tex. 2020).

* * *

Congress knows how to preempt state laws to address the important issue of discrimination in voting. It has done so numerous times such as though a statute explicitly addressing this issue: the Voting Accessibility for the Elderly and Handicapped Act, 52 U.S.C. § 20101, *et seq.* But the ADA contains no reasonably explicit statement indicating that Congress clearly and manifestly intended to displace State election laws. This Court should thus find that the ADA's preemptive scope does not extend to Alabama election law in this context.

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C. Plaintiffs Fail To State An ADA Claim.

Title II of the ADA provides in full: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To prevail on an ADA claim at summary judgment, a plaintiff must provide evidence to prove three elements: (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise

discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability. *Bircoll*, 480 F.3d at 1083; *see also Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1327-28 (N.D. Ga. 2017) (collecting authorities). But the ADA does not require public entities to employ "any and all means," "but only to make 'reasonable modifications'" that would not create an undue burden or fundamental alteration. *Bircoll*, 480 F.3d at 1082-83 (citing *Lane*, 541 U.S. at 531-32).

Plaintiffs' claims fail at the outset. As explained below, their strained attempt to cast voting as a communication, their bait-and-switch to reframe their claim around remote voting (instead of private and independent voting) and otherwise overly narrow the program, and the record evidence showing that Plaintiffs have meaningful access to vote privately and independently using the ExpressVote Machine each doom their claims. Accordingly, Defendants are entitled to summary judgment on the merits.

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1. Voting is not communication, which is all Plaintiffs purport to seek.

Plaintiffs' claims fail at the outset because the act of voting is not a communication with the disabled person as the ADA contemplates. *See* 28 C.F.R. § 35.160(a)(1) ("A public entity shall …. ensure that communications with … participants … are as effective as communications with others."). Plaintiffs base their claims around the concept of entitlement to "equally effective communication in Defendants' absentee election program," going so far as to expressly disavow any claims "for reasonable accommodations," as "irrelevant to this case." Doc. 62-2 at 5 (Plaintiffs' RFP Responses). Reading this request together with Plaintiffs' Amended Complaint makes clear that the communication that they are talking about is the ability to "vote by absentee ballot." Doc. 4 ¶ 91.

But Plaintiffs provide no explanation for their strained contention that voting is communication with the disabled person. To the contrary, their key case (*Lamone*) refused to reach

that question. *National Fed'n of the Bind v. Lamone*, 813 F.3d 494, 505 n.7 (4th Cir. 2016). And the Supreme Court has long rejected the notion that casting a ballot is a forum for communicating. In *Burdick v. Takushi*, a voter brought a First Amendment challenge to his inability to cast an effective "protest vote" because of Hawaii's prohibition on write-in votes. 504 U.S. 428, 438 (1992). But the Court rejected his "flawed premise[]" that ballots "provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].'" *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)). "The function of the election process is to 'winnow out and finally reject all but the chosen candidates,'" not to allow for a "generalized expressive function." *Id.* Because voting is an activity rather than a communication, Plaintiffs cannot maintain their claims premised only on effective communication.

Moreover, Plaintiffs' disavowal of any request for reasonable accommodations proves fatal to their suit. The ADA's reasonable modification rule applies even where requests for communications are involved, *see Bircoll*, 480 F.3d at 1082-83, and Plaintiffs bear the burden of demonstrating that a reasonable modification exists, *see A.L. ex rel. D.L. v. Walt Disney Parks & Resorts U.S., Inc.,* 900 F.3d 1270, 1292 (11th Cir. 2018) (Title III); *Reed v. Heil Co.*, 206 F.3d 1055, 1062 (11th Cir. 2000) (Title I). Having failed to ever request reasonable modifications from the AEMs and having now expressly disclaimed them, Plaintiffs cannot carry their initial burden under the ADA. Their claims are dead on arrival.

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2. Plaintiffs frame the programs and benefits at issue too narrowly.

Plaintiffs' motion cannot escape their concession that the ExpressVote Machine offers a means of private and independent voting by moving the goalposts now to further narrow the benefit the Amended Complaint claims they are denied. Parties can't "raise new claims at [] summary judgment" or amend their complaint through briefing; they must seek leave to amend their complaint pursuant to Rule 15. *Poer v. Jefferson Cnty. Comm'n*, 100 F.4th 1325, 1337-38 (11th

Cir. 2024) (citation omitted). So, while Plaintiffs' motion asserts that the "relevant benefit" is "the opportunity to participate ***remotely*** in the absentee voting programs," Doc. 58 at 27, their Amended Complaint does not. It asserts only a "right to vote privately and independently by absentee ballot"—not privately, independently, and *remotely*. *Compare* Doc. 4 ¶ 1, *with* Doc. 58 at 27. Plaintiffs' Amended Complaint uses some variation of the phrase "privately and independently" over twenty times, but it tellingly never adds the word "remote."

Plaintiffs previously argued (and this Court ultimately agreed) that "[e]xclusion from private and independent absentee voting is a proper analytic scope for [their] claims," Doc. 32 at 15 (citing Doc. 26 at 20), estopping them from changing course now. The Court's limitation of this scope to "private and independent absentee voting" does not support Plaintiffs' attempt to further narrow the inquiry to "remote, private, and independent" absentee voting. *Contra* Doc. 58 at 24 (citing Doc. 32 at 15). Having conceded that the ExpressVote Machine at the AEMs' offices provides a means of voting absentee privately and independently, Doc. 58 at 16 ¶¶ 49, 50, it appears that Plaintiffs' attempt to inject this new issue of remoteness to keep this suit alive. *See* Doc. 58 at 27-28; *see also infra* § IV.C.3. But Plaintiffs cannot replead their claims now as a denial of remoteness when their Amended Complaint identifies only privacy and independence in absentee voting as the benefits at issue.[8]

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But even defining the inquiry by reference to absentee voting—as opposed to the voting program generally—treats the inquiry too narrowly. While true that the subject at issue should not

[8] Relatedly, to the extent Plaintiffs attempt to retroactively mount a challenge to the absentee application forms, they cannot do that either. Their Amended Complaint challenges only the accessibility of "read[ing] or mark[ing] their ballots secretly, privately and independently." Doc. 4 ¶¶ 45, 82; *but see Poer*, 100 F.4th at 1337-38. At any rate, such challenge would fail because (1) unlike voting a ballot, Alabama does not guarantee secrecy in *applying* for one, *see* Ala. Code § 17-6-34; (2) the internet voting system Plaintiffs propose only provides for transmission of ballots, not applications; and (3) AEMs are not responsible for the applications' design regardless, which State law entrusts only to the Secretary of State, *id.* § 17-11-4(a).

be defined so as to "effectively den[y] … "meaningful access" to otherwise qualified individuals, *Alexander v. Choate*, 469 U.S. 287, 301 (1985), "[b]ecause title II evaluates programs, services, and activities *in their entirety*, public entities have flexibility in addressing accessibility issues," 28 C.F.R. Pt. 35, App. A (emphasis added)[9]; *cf.* 28 C.F.R. § 35.150(a) (requiring, in context of physical accessibility, that "the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities (emphasis added)). In other words, the scope should not also be defined so narrowly as to effectively guarantee an ADA plaintiff's success. This guidance supports considering the voting program holistically rather than whittling off subparts to scrutinize in a vacuum.

Limiting the program at issue here to absentee voting overly narrows the program from which Plaintiffs claim to have been excluded. The "participation" Plaintiffs are entitled to is participation in Alabama's electoral process. Votes count the same whether cast in person or absentee, on paper or online, with assistance or without. Plaintiffs ultimately want to *vote*—electronic absentee voting is simply *how* they prefer to access the program. The Court need not define the program more narrowly because this definition does not "effectively den[y] otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Alexander*, 469 U.S. at 301; *see infra* § IV.C.3.

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Absentee voting is not a standalone program, but rather itself an accommodation within the broader voting program. And it's available *only* for those who cannot attend the polling place on Election Day. *See* ALA. CODE § 17-11-3(a)(2). That distinguishes this case from *Lamone*. There, the Fourth Circuit found "significant for [its] analysis of the proper scope of review …, that Maryland allows *any* voter to vote by absentee ballot." *Lamone*, 813 F.3d at 504. It was thus "far

[9] Dep't of Justice, Appendix A to Part 35—Guidance To Revisions To ADA Regulation On Nondiscrimination On The Basis Of Disability In State And Local Government Services, https://tinyurl.com/ts6w4epk.

more natural to view absentee voting—rather than the entire voting program—as the appropriate object of scrutiny." *Id.* By that same token though, *Lamone* is unpersuasive here because Alabama provides absentee ballots only "to a limited set of voters with a demonstrated need." *Id.* Only a limited group of voters with a qualifying excuse for their inability to attend the polls on Election Day may vote by absentee ballot, *see* ALA. CODE § 17-11-3, and only an even more limited subset of those voters—those who qualify under the federal UOCAVA statute and are outside the U.S.—may vote by electronic absentee ballot, *id.* § 17-11-42.

Thus, the proper inquiry here is whether Plaintiffs have been excluded from *voting* as a general matter, not from absentee voting, "private and independent" absentee voting, or "private, independent, and remote" absentee voting. *See Harris*, 647 F.3d at 1107 ("As a public program, disabled citizens must be able to participate in the County's *voting program*." (emphasis added)). But even if Plaintiffs' narrower (pleaded) definition of the program—i.e., private and independent absentee voting—were correct, they still have meaningful access and fail to state an ADA claim.

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3. Plaintiffs can meaningfully access private and independent voting.

Plaintiffs contend they lack meaningful access to a means to privately and independently vote absentee. *See, e.g.*, Doc. 7 ¶¶ 47-49. But their own testimony proves that isn't the case. They concede that the ExpressVote Machine available both at AEMs' offices and in the polling place on Election Day provides an accessible means of voting privately and independently. Doc. 58 at 16 ¶¶ 49, 50. And because each Plaintiff can meaningfully access this independent and private means to vote absentee—for a period of 55 days in advance of Election Day—their demand for declaratory and injunctive fails and Defendants are entitled to judgment as a matter of law.

An ADA claimant is entitled to nothing more than "meaningful access" to the benefit at issue. *Alexander*, 469 U.S. at 301. "Reasonable accommodations in the grantee's program or benefit" can "assure meaningful access." *Id.* And "[t]he hallmark of a reasonable accommodation

is effectiveness." *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 189 (2d Cir. 2015) (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002)). If the accommodation is effective, it "need not be 'perfect' or the one 'most strongly preferred'" by the plaintiff. *Id.* (citation omitted).

While Plaintiffs don't have to show that they've been "completely prevented from enjoying" a benefit, mere difficulty accessing it doesn't suffice. *Shotz*, 256 F.3d at 1080; *Todd*, 236 F. Supp. 3d at 1329; *see also Bircoll*, 480 F.3d at 1086 (difficult but "not so ineffective" communications left plaintiff on "equal footing" with non-disabled individuals); *Ganstine v. Sec'y, Fla. Dep't of Corr.*, 502 F. App'x 905, 910 (11th Cir. 2012) (plaintiff's ability to get where he needed to "most of the time" and assistance from others defeated his claim). Crucially, "when an individual already has meaningful access to a benefit to which he or she is entitled, no additional accommodation, reasonable or not, need be provided[.]" *Todd*, 236 F. Supp. 3d at 1333 (cleaned up).

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The record shows Plaintiffs have meaningful access to a way to vote privately and independently through the ExpressVote Machine stationed both in the AEMs' offices and at polling places. Each testified they have no issue getting around town. Doc. 56-4 at 32:21-33:3, 76:18-78:15; Doc. 56-3 at 36:3-38:9, 39:13-40:3; Doc. 56-5 at 21:16-22:3; 25:9-20; 37:14-38:17; Doc. 56-2 at 12:12-13. Rissling, Presley, and Clayton understand how to use the ExpressVote Machine, enjoy it, and concede that it allows them to vote privately and independently. Doc. 56-4 at 64:4-14, 72:20-73:18; Doc. 56-3 at 48:1-6; Doc. 56-5 at 33:10-16. And while Peebles quibbles with whether the ExpressVote Machine is an ideal accommodation because he cannot physically insert and remove the ballot from the machine without spoiling his ballot, he can use the machine to mark his choices on his own. Doc. 56-2 at 87:10-90:23, 114:16-115:18. His real concern is that the

person removing the ballot might become "nosey as all get-out" and glance at his choices, "not … that somebody would do that, but … the ability is there." *Id.* at 89:13-21. But his speculation that someone might do something improper does not show that this process fails to satisfy the ADA. *Cf. Shotz*, 256 F.3d at 1081 (speculative threat of future discrimination insufficient to establish standing). Regardless, Plaintiffs' proposed remedy would not cure this concern—an election worker in the AEMs' offices would have the same ability to improperly compare a voter's information with their printed ballot when accessing the OmniBallot portal and printing ballots. *See* Doc. 56-11 at 130:14-131:12. The ExpressVote Machine defeats Plaintiffs' claims.

Voting with help from a third party also provides meaningful access. The concepts of privacy and independence are not all-or-nothing; they are matters of degree. Indeed, the ADA's regulations expressly define "auxiliary aids and services" to include qualified interpreters or readers as well as any "other effective methods of making visually delivered materials available to individuals who are blind or have low vision." *See* 28 C.F.R. § 35.104. Because the ADA contemplates third-party assistance as a valid means of ensuring meaningful access, Plaintiffs cannot discard the possibility that either their own trusted associates or the AEM could assist them with completing their ballots, in full compliance with the ADA. *See* Doc. 56-11 at 150:23-151:19.

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At bottom, Plaintiffs are in no different position than the many voters who require assistance to cast ballots—whether in person or absentee—because of a disability, lack of education, or any other reason. While Alabama law protects the secrecy of a voter's ballot, *see* ALA. CODE § 17-6-34, that must be construed in harmony with a voter's right under Alabama law to receive assistance in completing those ballots, *see, e.g.*, ALA. CODE § 17-9-13. As this Court has recognized, "the right to a secret ballot provided by the State of Alabama is subject to certain practical limitations where such secrecy is impossible, as in the case of an illiterate asking

assistance or a person voting by absentee ballot." *United States v. Exec. Comm. of Democratic Party of Greene Cnty.*, 254 F. Supp. 543, 546 (N.D. Ala. 1966). Any entitlement to a secret ballot under Alabama law must occasionally yield to the reality of such practical limitations—as in Plaintiffs' situations here. In other words, Alabama does not offer a program of *absolutely* secret voting under any circumstances. That Plaintiffs may use third-party assistance does not mean that they have been denied equally effective access to voting generally or to absentee voting specifically.

Plaintiffs aren't confronting a barrier that denies them meaningful access to vote or otherwise impedes their ability to access an accommodation to do so.[10] Rather (at worst), they *might* encounter some inconvenience finding a ride to the AEM's office or finding time with a trusted friend, neighbor, or assistant to help them vote. But mere speculative inconvenience isn't enough to establish a lack of meaningful access. In short, Plaintiffs have meaningful access to vote privately and independently through the ExpressVote Machine. For this reason, their claims fail and Defendants are entitled to summary judgment.

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4. Because Plaintiffs can attend the polls, they are not eligible to vote absentee.

Plaintiffs are not qualified to vote absentee, dooming their claims. As they recognize, Alabama law extends the opportunity to vote by absentee ballot to a registered voter who "has any physical illness or infirmity which prevents his or her attendance at the polls." ALA. CODE § 17-11-3(a)(2); *see also* Doc. 62-1 at 2 ("I am physically incapacitated and will not be able to vote in person on election day."). In other words, Alabama law does not allow all voters with disabilities to vote absentee, but only those voters whose disabilities *prevent* their attendance at the polls.

[10] It's no answer, moreover, for any Plaintiff to say they lack meaningful access if they haven't tried accessing the accommodation available to them in the first place. *See, e.g.*, *Todd*, 236 F. Supp. 3d at 1330 ("[Plaintiff] has not shown she has meaningfully explored these options or that they are unavailable to her.").

Otherwise, many individuals who face no difficulties in attending the polls could vote absentee, bloating Alabama's absentee voting program beyond recognition. And although AEMs typically rely on an individual voter's self-certification under penalty of perjury to determine whether that individual qualifies to vote absentee, that does not mean that an individual who certifies *incorrectly* meets the legal qualifications to vote absentee.

Because the evidence elicited in discovery shows that Plaintiffs are able to attend the polls, they are not qualified to vote by absentee ballot. Far from being prevented, Plaintiffs can get around town just fine and have asserted no difficulties accessing their polling places. Indeed, several Plaintiffs have voted in person on Election Day and some outright prefer it. To be sure, they would still be able to vote using the ExpressVote Machine available in the polling places on Election Day or to ask for assistance from a qualified third party there if they choose. But because Plaintiffs can get to the polls, they do not qualify to vote absentee. Accordingly, their ADA challenge fails.

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D. Plaintiffs' Requested Relief Would Impose An Undue Burden On The AEMs And Fundamentally Alter Alabama's Elections.

As an initial matter, Plaintiffs' arguments that the AEMs' undue burden and fundamental arguments are waived or otherwise forfeited lack merit. First, Plaintiffs' argument that the AEMs did not plead these defenses is belied by their own interrogatories, which ask Defendants to provide information about "each affirmative defense raised" in Defendants' Answer, "including [Defendants'] claims that providing absentee ballots to voters with disabilities would pose an undue burden, would fundamentally alter [Defendants'] programs or services, or that implementing an accessible absentee voting system is not feasible." Doc. 62-3 at 14 (Interrogatory 16). Regardless, these defenses are not waived because Plaintiffs were indisputably on notice of these defenses and suffer no prejudice from their assertion even were they not. *See Proctor v. Fluor Enter., Inc.*, 494 F.3d 1337, 1350-51 (11th Cir. 2007) (holding that the district court abused its

discretion by finding waiver of affirmative defense despite plaintiff's notice of its assertion). The parties briefed these defenses at the motion-to-dismiss stage, took extensive discovery on them, and Plaintiffs have now affirmatively briefed them in their own motion. Plaintiffs' waiver argument fails.

Next, Plaintiffs assert that the AEMs cannot assert these defenses because they have not done so in a written statement. Doc. 58 at 30 (citing 28 C.F.R. § 35.164). But Plaintiffs cite no authority supporting that the written-statement requirement imposes such a burden or even applies to litigation at all (as opposed to a written request before litigation, which Plaintiffs did not make to the AEMs). *See Am. Council of Blind of Indiana v. Indiana Elec. Comm'n*, No. 1:20-cv-03118, 2022 WL 22881983, at *21 (S.D. Ind. 2022) (rejecting this argument on that ground). And even if it did apply to litigation, Plaintiffs do not explain why the AEMs' interrogatory answers (*see, e.g.*, Doc. 56-40; Doc. 62-3 at 14-15) or even this brief itself are inadequate written statements.

Plaintiffs cannot rely on these grounds to escape either the fundamental-alteration or undue-burden arguments. And, as explained further below, each shows that they are not entitled to relief.

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1. Plaintiffs' requested relief would impose undue financial and administrative burdens.

Public entities need not adopt proposed accommodations that would fundamentally alter an essential aspect of a program or service they offer or impose upon them undue financial or administrative burdens. *Schaw v. Habitat for Human. of Citrus Cnty., Inc.*, 938 F.3d 1259, 1266 (11th Cir. 2019). To determine whether a proposed accommodation is unduly burdensome, courts "weigh the respective costs and benefits of the accommodation to the parties, performing a balancing of the parties' needs[]" while keeping in mind the program's "basic purpose." *Schaw*, 938 F.3d at 1267. As discussed below, Plaintiffs' proposal to expand online voting would unduly burden the AEMs financially and administratively.

Expanding online voting would substantially increase the costs the AEMs bear to facilitate electronic absentee voting. For starters, Plaintiffs wrongly suggest that the AEMs haven't contemplated the financial burden their proposed accommodation would entail. *Contra, e.g.*, Doc. 56-12 at 158:6-19, 159:3-5 (AEM Potts describing factors needed to consider when forecasting the costs of expanded online voting). The problem with providing concrete and definite figures on that point is two-fold. The first is due to the nebulous nature of Plaintiffs' requested relief. Apart from demanding online voting akin to what overseas UOCAVA voters receive, Plaintiffs have not specified what form their relief would take or who would be eligible for it, leaving the AEMs guessing. And when given the chance to clarify this point, they ducked the question. *See* Doc. 56-7 at 80:10-81:9. But, by Plaintiffs' lights, up to 3.1% of Alabama's population should be eligible for internet voting. *See* Doc. 7 ¶ 2; Doc. 56-7 at 77:1-78:14.

The second concern is that the AEMs have negligible budgets over which they have no control. *E.g.*, Doc. 56-13 at 158:7-159:4; Doc. 56-27 at 16:23-17:10; Doc. 56-11 at 171:3; Doc. 56-12 at 157:7-12; Doc. 56-26 at 52:23-53:10. The AEMs lack the ability to sway any decisionmaker with the power of the purse to anticipate and address those financial concerns. And the most obvious financial burden the AEMs face is that expanding absentee voting as Plaintiffs propose would cost at least $60,000 just for OmniBallot access (in addition to the $119,500 already covered by the Secretary of State's Office for UOCAVA voters). Doc. 56-40 at 3; *see also* Doc. 56-34 at 11:20-12:23, 15:12-16:3. But the AEMs lack the funds to cover such an expenditure themselves.

Other burdens abound. Among other things, Mr. Elrod—the Director of Elections in the Secretary of State's Office—and each AEM explained that allowing Plaintiffs' contemplated accommodation would require them to hire additional employees and acquire additional

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administrative resources. Doc. 56-19 at 178:7-25; Doc. 56-12 at 144:5-145:20, 154:11-155:22, 156:3-18; Doc. 56-11 at 169:11-19, 176:6-14, 59:2-61:2 (working without pay during increase in absentee voting); Doc. 56-13 at 149:23-151:3, 159:5-18. And compounding these financial concerns is the near-certain rise in administrative burdens the AEMs will endure. Those burdens can be best characterized as a need for more people and more time. The AEMs anticipate that this system's expansion will lead to added time corresponding with voters who have trouble with the system, *e.g.,* Doc. 56-12 at 121:10-13; *see also* Doc. 62-11; more time and hands to physically count ballots that come in (which are either hand-counted or transcribed onto scannable ballots), Doc. 56-12 at 154:11-155:2, 156:3-18; Doc. 56-11 at 169:11-19, 174:14-23, 176:6-14; and more time to train new volunteers. Doc. 56-13 at 154:3-25. For example, Ms. Anderson-Smith relayed that the rise of absentee voting that occurred in Jefferson County in the 2020 elections during the pandemic, she felt that her office was caught in a "tsunami" of absentee ballots requiring scarce personnel and space to store ballots. *Id.* at 32:7-20, 33:23-34:5; *see also* Doc. 56-12 at 55:24-56:25.

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Weighing on the opposite side of the equation and against the burdens the AEMs would face and the purpose behind Alabama's absentee voting requirements is Plaintiffs' disinterest in the actual system they've proposed. *Schaw*, 938 F.3d at 1267. As discussed already, three of the Individual Plaintiffs have failed to produce any substantial evidence showing they would vote online in any upcoming election cycle even if their proposed system were approved. *See supra* § IV.A.3. In other words, the equation's current formulation shows that the financial and administrative toll on the AEMs would not be offset by any benefit to Plaintiffs. That's an undue burden.

2. Plaintiffs' requested relief would fundamentally alter Alabama's elections by discarding essential requirements of absentee balloting and injecting the risks of expanding online voting.

The ADA doesn't require public entities to "accommodate a [plaintiff] in any manner in which that [plaintiff] desires." *Schaw*, 938 F.3d at 1265 (alteration in original) (quoting *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997)). For this reason, plaintiffs can't demand a public entity to fundamentally alter an aspect of a service, program, or activity it provides. *Id.*; *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1217 (N.D. Ala. 2020) (quoting *Lane*, 541 U.S. at 531-32). A proposed accommodation fundamentally alters a program or service if it "eliminates an essential aspect of the relevant activity." *Schaw*, 938 F.3d at 1266. And an aspect is essential if it relates to "the basic purpose of the rule or policy at issue." *Schaw*, 938 F.3d at 1266. The ADA requires only accommodations like "saddling a camel," not transformations like "removing its hump." *Id.* at 1265.

Plaintiffs' proposed relief asks this Court to craft an entirely new absentee voting program with custom requirements and to open Alabama's election to additional unacceptable risks from expanding internet voting. As the AEMs explained before, laws and regulations underlying Alabama's voting system show that the paper ballot is essential for ensuring election integrity and security. *See* Doc. 18 at 12-15. Those authorities show that requirements for absentee voting—especially those concerning witness signatures or a notarization appearing alongside a paper ballot—are essential for the same reasons. *Id*. Additionally, allowing some broad swath of self-certified print-disabled voters to vote by internet voting would inject unacceptable risk into Alabama's elections. Either of these reasons independently would fundamentally alter Alabama's elections, let alone both together.

Starting with Alabama's election requirements, the reasons underpinning them—passed into law—aren't mere unsupported policy declarations. The witnessing requirement is the most

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crucial of those that Plaintiffs' requested relief would eliminate. An absentee ballot must be accompanied by an affidavit envelope signed by the voter, which then must be attested by the signatures of two witnesses or a notary. ALA. CODE § 17-11-10(b)(2). This witnessing requirement "goes to the integrity and sanctity of the ballot." *Id.* And the Alabama Supreme Court has reinforced the extraordinary nature of this requirement. Unlike other absentee requirements—even those otherwise considered "essential"—even "substantial compliance" with the requirements that a voter both sign the ballot and have that signature witnessed (or notarized) will not suffice. *See Eubanks v. Hale*, 752 So. 2d 1113, 1158 (Ala. 1999). Any "irregularity" as to these requirements "would require that the ballot be excluded." *Id.*

This Court itself has already recognized the essential nature of the witness requirement. *See People First of Ala.*, 467 F. Supp. 3d at 1219. But the election officials here have further explained why these requirements are crucial to the system's functioning and for bolstering voter confidence. Doc. 56-19 at 174:17-175:19 (explaining that online voting "inherently" features insecurities and that secrecy and security is what's most important in an election); *Id.* at 183:9-21 (witness requirement provides greater security than certificate does); Doc. 56-12 at 150:5-14 (lack of witness verification in online voting would sacrifice essential criterion); *Id.* at 151:3-10, 153:1-17; Doc. 56-11 at 161:1-162:7; *id*. at 175:16-177:6 (lack of identity verification and increased opportunities for voter fraud could occur through expanded online voting,); Doc. 56-13 at 144:7-21, 148:21-149:10.

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Ferreting out the essentiality of these requirements is not difficult—they help to both deter and detect fraud in the absentee voting process. A public entity has an "indisputably … compelling interest in preserving the integrity of its election process." *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (citation omitted). And confidence in election integrity "is essential to the functioning of our

participatory democracy." *Id.* But voter fraud threatens our democracy by driving "honest citizens out of the democratic process," "breed[ing] distrust of our government," and leaving voters "feel[ing] disenfranchised" for fear that "legitimate votes will be outweighed by fraudulent ones." *Id.* To that end, the signature and witnessing requirements provide a crucial means of combatting fraud by requiring corroboration of an absentee voter's identity under penalty of perjury, which in turn provides evidence that can be (and has been) used to examine irregularities after the fact by comparing signatures.

Although Alabama is not required to wait until widespread fraud occurs before it acts, absentee ballot fraud *has* occurred in Alabama and elsewhere—and not just with the ballots, but with the applications too. The Eleventh Circuit has recognized the existence of such schemes:

> [I]n the mid-1990s, Alabama grappled with some recent, high-profile, and well-documented cases of absentee voter fraud that captured the public attention of Alabamians. These instances of voter fraud were summarized by a July 1996 article in The Birmingham News.
>
> Various citizen groups formed to spread the word about the need for a photo ID law to combat voter fraud. Alabama and the federal government worked together to investigate and prosecute cases of voter fraud in absentee voting. The investigation uncovered that, for example, voters would sign absentee ballot-related paperwork without ever marking the ballot, and, in a handful of instances, the voters were not involved in the process at all and their signatures were forged. Sometimes voters would be convinced, threatened, or bribed to give up their ballot materials and sometimes voters would sign the absentee ballot affidavits without marking the ballots. One investigation also revealed there were people at the polls on election day with a list of voters whose ballots had been fraudulently cast and they would chase away these voters when they came to the polls to cast their ballots.

Greater Birmingham Ministries v. Sec'y of State for State of Ala., 992 F.3d 1299, 1305 (11th Cir. 2021) (footnotes omitted); *see also Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 284 F. Supp. 3d 1253, 1257 (N.D. Ala. 2018) (e.g., "voter brokers following mail trucks and removing absentee ballots from mailboxes," intimidating poor and elderly voters, and pressuring

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and solicitation of nursing home patients); *Ala. State Conf. of NAACP v. Alabama*, 612 F. Supp. 3d 1232, 1305 n.51 (M.D. Ala. 2020) (discussing several instances of absentee fraud).

Of the many cases that arose (both through criminal prosecutions and election contests), fraud exists both in completing the absentee ballots and the absentee ballot applications. *See, e.g.*, *Eubanks*, 752 So. 2d 1113 (recognizing several instances of absentee ballot applications fraudulently signed in election contest); *Evans v. State*, 794 So. 2d 415, 425-29 (Ala. Crim. App. 2000) (affirming multiple convictions for fraudulent absentee ballot applications); *Wilder v. State*, 401 So. 2d 151, 162 (Ala. Crim. App. 1981) (affirming illegal voting convictions and recounting testimony that defendant brought a voter an absentee ballot application and told her she would "fix the paper" but voter "did not sign anything for them or mark any ballot"); *United States v. Smith*, 231 F.3d 800, 805 n.2, 822 (11th Cir. 2000) (affirming multiple counts of application fraud against two defendants).

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And voter fraud isn't a thing of the past. Convictions and successful election contests premised on absentee ballot fraud have been maintained in recent years in Alabama. For example, a successful election contest in 2016 required the vacatur of the declared mayor of Brighton, Alabama because he procured a number of illegal absentee votes, many of which falsely listed the mayor's own address. *See* Doc. 62-8 (Final Order, *Cooper v. Dean*). Similarly, an election contest involving a 2018 Bessemer City Council race resulted in 27 votes being discounted because of irregularities in the balloting process: signature mismatches, residency problems, and improper witnessing of applications from nursing home residents. *See* Doc. 62-9 (Final Order on Election Contest, *Porter v. Alexander*).

Criminal proceedings have been instituted as well. Most recently, a Clay County Commission candidate pleaded guilty to one count (of a seven-count indictment) of falsifying an

absentee ballot and application. *See* Doc. 62-6 (*State v. Heflin* Indictment, Guilty Plea, & Explanation of Rights). In 2017, the Mayor of Gordon was convicted of falsely notarizing absentee ballots without the voter present. *See* Doc. 62-10 (*State v. Melton*, Indictments and Verdicts). And just this year in Mobile County, an individual was indicted on several counts relating to the fraudulent completion of an absentee ballot application on behalf of an incapacitated man. *See* Doc. 62-7 (*State v. Toomey*, Indictment). These examples are not exhaustive; they cover only a few of the documentable cases of voter fraud in Alabama in recent years. They (necessarily) do not capture those instances of voter fraud that went undetected or unproven for one reason or another.

Additionally, the Supreme Court has recognized "that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that not only is the risk of voter fraud real but that it could affect the outcome of a close election." *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194 (2008) (lead opinion). And eliminating witness requirements would only better enable fraudsters to carry out these schemes by eliminating an essential tool used to both deter fraud in the first place and detect it after the fact.

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It's no answer for Plaintiffs to insist that their proposed accommodation wouldn't fundamentally alter Alabama's voting system since a sliver of its population—overseas UOCAVA voters—enjoy some degree of online voting now. *E.g.*, *Nat'l Fed'n of 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. Only certain military and overseas voters can vote electronically."). Alabama allows electronic return for this limited subset voters to comply with UOCAVA's "tight deadlines." Doc. 56-19 at 183:25-184:8. And the United

States has sued Alabama in the past (and won) to enforce these federal statutory deadlines, including as to runoff elections. *See, e.g.*, *United States v. Alabama*, 778 F.3d 926 (11th Cir. 2015).

As this Court has already recognized, compliance with federal voting laws cannot undermine the essential nature of a public entity's requirements. *People First of Ala. v. Merrill*, 479 F. Supp. 3d 1200, 1212 (N.D. Ala. 2020). Otherwise, States would always face "not … much of a choice": compromising their programs or "openly defying federal voting laws." *Id.* To adopt Plaintiffs' proposed accommodation would expand Alabama's absentee voting regime from one that does what it must to comply with federal law into one that would erode its interest in maintaining a paper balloting system at all—even beyond the ADA context—if *any* voter 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 …, taking into consideration the extent to which those justifications required the burden to plaintiffs' rights.").

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Further, Plaintiffs' sought-after expansion of internet voting exposes the State's election system to significant cybersecurity risks. The federal government—in a collaborative report from the CISA, EAC, FBI, and NIST—have declared internet voting to be "high risk," even with known mitigation measures in place. Doc. 62-4 at 2-3. At bottom, "[s]ecuring the return of voted ballots via the internet while ensuring ballot integrity and maintaining voter privacy is difficult, if not impossible, at this time." *Id.* at 3. Defendants' expert—Dr. Andrew Appel—explained at length the technical reasons why internet voting is inherently insecure. *See generally* Doc. 56-39. Multiple vectors of attack exist: threats can occur on the voter's end, on the election official's end, and in transit. With today's technology, it is "impossible to fully protect the voter's vote from being

changed (by hacked software) between the time the voter indicates it on-screen and the time it is transmitted, and it is impossible to fully protect server computers (that collect ballots) from being hacked." *Id.* at 4.

Even the Chief Technology Officer of Democracy Live, provider of the OmniBallot system used currently in Alabama's elections acknowledged limitations in their security practices. [redacted] Moreover, Democracy Live's CEO even reached out to Defendants' expert after his deposition to inquire about "how [they] could more securely transmit ballots to voters." Doc. 62-5 at 2. And problems have arisen in Alabama regarding OmniBallot's use, including at least one situation in which a voter submitted multiple ballots through the system. *See* Doc. 62-11 at 2-3. In sum, while Democracy Live's system may attempt to mitigate some risks posed by internet voting, Democracy Live admits that it does not (and cannot) mitigate them all.

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Plaintiffs' response that no issues of fraud in internet voting have been discovered misses the point. The nature of internet voting makes fraud extremely difficult (if not impossible) to detect. Unlike with online banking, for example, in which an individual could detect fraudulent activity perpetrated against them by reviewing their bank statements, the nature of secret balloting means that voters have no opportunity to review their ballot once submitted to confirm that the ballot received and then printed by election officials accurately reflects the choices made by the voter.

See Doc. 56-39 at 17. This lack of an opportunity to verify distinguishes online voting from paper absentee voting, in which the piece of paper submitted by the voter (and available for their review) is the same piece of paper ultimately reviewed by election officials. And Plaintiffs' head-in-the-sand view runs counter to the numerous Supreme Court decisions recognizing that public entities may "respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); *accord Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 686 (2021) ("[A] State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.").

Forcing the AEMs and the State to assume the federally designated high risks of internet voting for many new voters is itself a fundamental alteration. By Plaintiffs' count, up to 3.1% of Alabama's population may have vision disabilities that would make them eligible for internet voting. Doc. 7 ¶ 2; *see also* 56-7 at 77:1-78:14 (NFB-AL reaffirming that it is seeking relief for "[t]he blind, as well as print disabled individuals in the State of Alabama"). Compared to the much smaller percentage of UOCAVA voters voting by electronic ballot—just 0.059% (1,349 total) in the 2024 General Election—expanding internet voting to self-certified print-disabled voters is a much greater risk. *See* Doc. 56-39 at 17-18; Doc. 56-41 at 3. And, again, that the State made internet voting available to UOCAVA voters, does not mean that it likewise assumed the risks of expanding internet voting to up to thousands (or tens of thousands) more. Expanding internet voting as Plaintiffs seek would fashion an entirely new voting program with entirely new requirements and entirely new risks. The ADA does not require such fundamental alteration.

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In short, eliminating the paper ballot and associated requirements for absentee voting would throw out essential elements of Alabama's election system that are designed to ensure

security and instill voter confidence. That change would fundamentally alter the absentee voting process. This Court should follow the example set by others and refuse to grant Plaintiffs this relief. *Cf. Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979) (under RHA, institution wasn't required to adopt "substantial modification" of its curriculum where testimony showed it merely implemented "customary ways" of preparing students for profession); *Albert v. Ass'n of Certified Anti-Money Laundering Specialists, LLC*, 130 F.4th 1322, 1327 (11th Cir. 2025) (proposed open-book exam undermined the existing closed-book test's objective and thus was a fundamental alteration).

E. The ADA Cannot, Consistent With The Constitution, Require Public Entities To Provide Online Voting To Voters Who Do Not Need It To Vote.

While Congress may "enact prophylactic legislation" pursuant to § 5 of the Fourteenth Amendment "to remedy or prevent unconstitutional discrimination" under the Fourteenth Amendment, this "power is not … unlimited." *Lane*, 541 U.S. at 520. Rather, such legislation must "exhibit[] 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520). Legislation that is disproportional or otherwise seeks to do more than "enforce the guarantees of the Fourteenth Amendment" is thus invalid as it exceeds Congress's authority by "work[ing] a 'substantive change in constitutional protections.'" *Id.* at 520-21 (citing *Boerne*, 521 U.S. at 529 (finding that the Religious Freedom and Restoration Act was "out of proportion")); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Patent Remedy Act's "apparent aim" was to provide uniform patent infringement remedy rather than "to enforce the guarantees of the Fourteenth Amendment"); *Garrett v. Bd. of Regents of Univ. of Ala.*, 531 U.S. 356 (2001) (holding that Title I of the ADA exceeded congressional § 5 authority as applied to public employment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (finding that the ADEA

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exceeded § 5 authority); *United States v. Morrison*, 529 U.S. 598 (2000) (finding that the Violence Against Women Act exceeded § 5 authority).

An application of the ADA that would require the adoption of online voting programs for Plaintiffs who are already indisputably able to vote is not congruent or proportional. *Lane* makes clear that the analysis requires an application-by-application analysis rather than a one-size-fits-all assessment of the law. It's true that Congress considered the exclusion of disabled voters from voting in Title II, including the inaccessibility of polling places and disenfranchisement on grounds of mental illness "without regard to individual capacity." *Id.* at 524-25 & n.13. But Congress's broad consideration of absolute exclusion from voting when enacting the ADA cannot justify Plaintiffs' highly specific demand premised on a right to absolute secrecy in remote absentee voting. Such relief is simply not congruent and proportional to the sorts of problems that Congress considered in passing the ADA. The ADA can constitutionally require many things from public entities, but not that.

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In any event, because there are—at the very least—"competing plausible interpretations of" the ADA that would not extend the statute to the lengths Plaintiffs would have it go, this Court should embrace "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

V. CONCLUSION

For the reasons discussed above, this Court should enter summary judgment in favor of Defendants and against Plaintiffs as to all remaining claims.

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CERTIFICATE OF SERVICE

I certify that on June 3, 2025, I electronically filed the foregoing notice with the Clerk of the Court using the CM/ECF system, which will send notice to all counsel of record.

/s/ Brenton M. Smith
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