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U.S. DISTRICT COURT
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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' REPLY BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs cannot get around the record evidence showing that they have meaningful access to voting, regardless of how narrowly they may try to define the inquiry. Their transparent attempts to escape the ExpressVote Machine only underscore their concession that it provides them with private and independent absentee voting—all their Amended Complaint pleaded they had been denied (notwithstanding their efforts to move the goalposts now) and all that they are entitled to under Title II of the ADA. Moreover, Plaintiffs lack standing to seek the sweeping relief they request, which seeks to expand internet voting to non-member voters with print disabilities (and potentially up to 3.1% of Alabama's population). Moreover, this broad relief would both subject the AEMs to undue burdens (in both cost and man-hours) to implement and would work a fundamental alteration by doing away with measures meant to deter and detect absentee fraud whilst simultaneously adopting federally recognized high-risk internet voting. And Plaintiffs' boundless view of the ADA presents significant federalism problems.

Plaintiffs' head-in-the-sand response to the substance of these arguments speaks volumes. The AEMs have provided multiple arguments—backed by record evidence—that dispose of Plaintiffs' ADA claim. Confronted with all these arguments and the substantial evidence dooming their claims, Plaintiffs' reply brief repeatedly chooses to ignore those problems or deny they exist altogether. But their refusal to engage does not prevent this Court from granting judgment as a matter of law. For the reasons in Defendants' initial brief and as explained further below, this Court should reject Plaintiffs' ADA claim.

II. FACTS

Plaintiffs' reply brief includes a Statement of Undisputed Facts and Procedural History in which they (1) reply to the AEMs' Response to Plaintiffs' Statement of Facts and (2) respond to the AEMs' Additional Undisputed Facts. *See* Doc. 76 at 8-19. The former does not comply with

the Court's Summary Judgment Appendix, which provides that "[t]he fact section of a reply submission, if any, **SHALL** consist of only the moving party's disputes, if any, with the non-moving party's additional claimed undisputed facts." The Court should thus strike that first section.

Of the sixty or so paragraphs Plaintiffs address across both sections, they dispute only two (both in part). *See* Doc. 76 at 16 ¶ 68, 17 ¶ 76.[1] Plaintiffs label other responsive paragraphs "Undisputed" but then often editorialize to ignore inconvenient facts in those paragraphs. *See, e.g.*, *id.* at 16 ¶¶ 66, 69; 17 ¶¶ 73, 78; 86; 18 ¶¶ 89, 96-1; 19 ¶ 105. *Cf., e.g.*, *id.* at 9 ¶ 21; 10 ¶¶ 26, 31; 11 ¶ 40; 12 ¶¶ 44, 48; 14 ¶ 58; 15 ¶ 59. Even if Plaintiffs intended to imply an "Otherwise disputed," that too does not comply with the Court's Appendix: "Any statements of fact that are disputed by the moving party must be followed by a specific citation to those portions of the evidentiary record upon which the disputation is based."[2]

Plaintiffs' "undisputes" cannot redefine the AEMs' facts. Where Plaintiffs employ this tactic in response to the AEMs' Additional Undisputed Facts, the Appendix and Rule 56(e)(2) deem those facts admitted. And where Plaintiffs employ the tactic in their reply to the AEMs' Response to Plaintiffs' Statement of Facts—to the extent their reply is not stricken—the Court should deem the AEMs' disputes (all of which are supported by citations to evidence) admitted.

III. ARGUMENT

A. Plaintiffs Lack Standing To Obtain The Injunctive Remedies They Seek.

Plaintiffs have further muddied the waters about who they are seeking relief for and their basis for doing so. As an initial matter, their cart-before-the-horse argument that the Court need

[1] The AEMs do not consider these disputes (or any of the disputes they raised in their Response to Plaintiffs' Statement of Facts) to preclude summary judgment for them.

[2] In similar circumstances, the AEMs usually either disputed in part (e.g., Doc. 67 at 6 ¶ 14) or noted the specific dispute with evidence after providing context to their lack of dispute (e.g., *id.* at 8 ¶ 31). In the limited instances where they do neither (*id.* at 6 ¶ 19; 7 ¶ 29), they otherwise admitted that paragraph.

not assure itself that it has jurisdiction to grant Plaintiffs' sweeping relief until *after* determining liability, *see* Doc. 76 at 21-22, flies in the face of Article III. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (quotations omitted)). But Plaintiffs cannot demonstrate standing for (1) non-member third parties; (2) NFB-AL's members; or (3) individual remedies for Clayton, Rissling, and Presley.

First, Plaintiffs cannot seek relief on behalf of non-member third parties. The amended complaint seeks electronic voting for all "people with vision and print disabilities for all future elections"—i.e., three countywide injunctions. Doc. 4 at 20.[3] And their briefing claims that all Plaintiffs have standing to obtain this relief. *See* Doc. 76 at 19 (heading); *cf. id.* at 17 ¶ 88 (not disputing that NFB-AL is seeking relief beyond its members). But Plaintiffs likewise disavow asserting third-party interests and claim to be vindicating only their own. *Id.* at 20. Contradictions aside, even associational standing cannot provide NFB-AL relief for non-members (which Plaintiffs don't dispute). *See Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999). Plaintiffs assert no basis for obtaining relief beyond themselves and NFB-AL's members and thereby fail to carry their burden to establish standing for each form of relief sought. *See Davis*, 554 U.S. at 734.

Next, NFB-AL's assertion of associational standing fails because they can't satisfy the first and third elements. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (outlining test). On the first element, it has failed to show that any of its members have "a real and immediate threat of future injury" that Plaintiffs' requested relief would redress. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1329 (11th Cir. 2013). Plaintiffs' conflation of standing with

[3] Of course, Plaintiffs haven't sued a defendant that could provide them relief beyond Jefferson, Mobile, and Tuscaloosa counties. And even within Jefferson County, they have only named the AEM for the *Birmingham* Division and so cannot get relief as to the AEM of the *Bessemer* Division—leading to potentially inconsistent absentee voting rules within the same county. *See* Doc. 4 at 8 ¶ 34.

the merits aside, *see* Doc. 76 at 20, the required injury must be "actual or imminent, not conjectural or hypothetical," *Lujan v. Defs of Wildlife*, 504 U.S. 555, 560 (citation modified). But Plaintiffs' injury argument—that the Individual Plaintiffs have been denied full and equal access to absentee voting, Doc. 76 at 20—rests on "ifs" and "whens." *See* Doc. 76 at 16 ¶ 69, 17 ¶ 73.

None of Plaintiffs' citations support that Clayton, Rissling, and Presley (who isn't an NFB-AL member and thus cannot help with associational standing) have a non-conjectural, immediate injury—defeating both their associational and individual standing arguments.[4] Abstract desire to vote absentee remotely isn't enough, especially when Clayton, Rissling, and Presley testified at their depositions that they do not presently and unconditionally intend to vote absentee in the future even if internet voting were available. *See* Doc. 67 at 24 (collecting citations). Plaintiffs' only engagement with these citations is claiming that they "reflect only the fact that … Individual Plaintiffs must vote in person or not at all." Doc. 76 at 21. But this *ipse dixit* doesn't carry Plaintiffs' burden to establish jurisdiction and ignores their own preference to vote in person using the ExpressVote Machine even if internet voting were an option. *See* Doc. 56-5 at 64:13-21; Doc. 56-4 at 88:5-89:3, 106:13-16; Doc. 56-3 at 45:11-16.

Nor can a survey conducted by NFB-AL, the Alabama Institute for the Deaf and Blind, and Secretary of State in 2020, Doc. 56-7 at 64:10-14, establish that NFB-AL members in 2025 have a redressable injury. *See* Doc. 76 at 22 (arguing such). First, all the citation supports is that 95 survey participants' top preference is to vote electronically; it doesn't establish that those

[4] Plaintiffs' first citation for Clayton is her testifying that absentee voting "should be accessible for the blind." Clayton—who isn't blind, *see* Doc. 76 at 8 ¶ 8 (not disputing such)—isn't talking about herself. *See* Doc. 56-5 at 73:2-14. And the second citation about her experience in the past doesn't establish a threat of future injury. *See id.* at 77:18-80:7. The first citation for Rissling is another "if" assuming Rissling could not get to the polls; it also refers to other blind voters. *See* Doc. 56-4 at 100:21-103:23. And the second is premised on the question "If you decide to take advantage of the program[.]" *Id.* at 107:21-108:16. Lastly, the two citations for Presley are about her wanting electronic voting "if [she] were homebound" and the current absentee system that she doesn't use. *See* Doc. 56-3 at 42:13-43:3, 45:11-46:11, 47:10-15.

participants have been denied full and equal access to absentee voting as Plaintiffs allege. Second, that exhibit doesn't establish who those participants are, that they are blind or have a print disability, that they intend to vote (either in-person or absentee), or even that they are NFB-AL members. The survey went out to more than just NFB-AL members, mainly people connected with AIDB. Doc. 56-7 at 64:21-66:2 (NFB-AL not knowing how many of the 338 participants were NFB-AL members and suggesting that their membership was much smaller than AIDB's); *see also* Doc. 58 at 11 ¶ 18 (Plaintiffs saying that the survey was "of blind people" generally). Regardless, the survey is unverifiable hearsay as to these unidentifiable individual respondents, which Plaintiffs attempt to (but cannot) use for the truth of the matter asserted. *See Yellowfin Yachts, Inc. v. Barket Boatworks, LLC*, 898 F.3d 1279, 1290 n.8 (11th Cir. 2018).

On the third element of associational standing, NFB-AL has not shown that its members' individual participation in this suit is unnecessary. This element requires not just that "the relief requested [does not] require[] the participation of individual members in the lawsuit" but also that "the claim asserted" doesn't either. *Hunt*, 432 U.S. at 343. Plaintiffs' singular citation in their initial brief to *National Parks Conservation Association v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003), *see* Doc. 58 at 21—like their new string cite, *see* Doc. 76 at 23—does not analyze this claim aspect of the test (let alone an ADA claim specifically). That individual members' participation is *usually* unnecessary for *relief* purposes because "the remedy, if granted, will inure to the benefit of those members of the association actually injured" says nothing about whether those members are required for *claim* purposes. *E.g.*, *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

At any rate, that authority isn't the panacea that Plaintiffs seem to think. The authority itself states that an injunctive-relief-only suit is not sufficient to meet this third element. *See Warth*, 422 U.S. at 515 ("it can reasonably be supposed"); *United Food & Com. Workers Union Loc. 751 v.*

Brown Grp., Inc., 517 U.S. 544, 546 (1996) ("'individual participation' is not normally necessary"); *Payan v. Los Angeles Cmty. Coll. Dist.*, No. 19-56111, 2021 WL 3743307, at *2 (9th Cir. Aug. 24, 2021) ("generally satisfied"). And the Supreme Court has denied associational standing on this third element despite the plaintiffs' seeking injunctive relief only. *See Harris v. McRae*, 448 U.S. 297, 304, 321 (1980) (requiring individual participation because the free-exercise claim at issue requires a plaintiff to show a law's coercive effect against the practice of his religion).

The Court shouldn't just assume that NFB-AL has non-party members who are "actually injured." *See* Doc. 67 at 22-23. And Plaintiffs fail to engage with the argument—supported by Plaintiffs' own representations, *see* Doc. 26 at 3, 20—that Plaintiffs' ADA claim involves inherently fact-specific factors that require individualized proof. Denying the relevance of undisputed variations among NFB-AL's members[5] doesn't cut it. *Contra* Doc. 76 at 23. That Plaintiffs have now abandoned about half of their members—if indeed the survey respondents are their members—whose top voting preference is apparently not electronic voting proves the AEMs' point that individual participation is necessary for Plaintiffs' fact-intensive ADA claims. *Id.* at 22 ("the participation of nearly 100 individual NFB-AL members").

B. The ADA Does Not Demonstrate Clear Congressional Intent To Preempt State Election Laws.

To start, the law-of-the-case doctrine does not excuse Plaintiffs' failure to engage with the AEMs' preemption arguments. Because the Court's denial of the AEMs' motion to dismiss "was not a final judgment," the Court is "free to reconsider its ruling on [preemption] at the summary judgment stage." *Vintilla v. United States*, 931 F.2d 1444, 1447 (11th Cir. 1991); *see FDIC v.*

[5] Or, for example, that some of its members (like Clayton) may not benefit from its proposed remedy because they either don't have or don't know how to use a computer. *See* Doc. 56-5 at 75: 10-20; Doc. 56-35 at 59:5-62:2.

Stahl, 89 F.3d 1510, 1514 n.7 (11th Cir. 1996) (concluding that the district court erred by applying the doctrine based on its ruling on a motion to dismiss). *United States v. Siegelman* is not to the contrary; the Eleventh Circuit applied the doctrine because of its previous final judgment in a related case. 786 F.3d 1322, 1327 (11th Cir. 2015). And the doctrine's supposed "second branch" mentioned in an unpublished decision in *Baker v. Paulison* contradicts *Vintilla*'s binding final-judgment requirement. No. 4:04-CV-2961, 2006 WL 8436602, at *3 (N.D. Ala. Jan. 30, 2006). Regardless, *Baker* characterizes the second branch as discretionary, subject to compelling reasons to depart from the original decisions. *See id.* The AEMs offered those compelling reasons in their summary-judgment briefing. *See* Doc. 67 at 25-30. Law of the case thus does not prevent the Court from revisiting any of its decisions from the motion-to-dismiss stage. *Contra* Doc. 76 at 26 (framing of program); *id.* at 36 (fundamental alteration).

Back on track, Plaintiffs do not dispute that the only issue is whether it was the "clear and manifest purpose of Congress" that the ADA preempt State election laws. *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 281, 230 (1947). Nor do Plaintiffs defend the Court's earlier conclusion that the presumption against preemption "applies only when the federal law at issue is ambiguous." Doc. 32 at 9. Instead, Plaintiffs devote a mere sentence of analysis to the question; claiming that a legislative finding that "discrimination against individuals with disabilities persists in such critical areas as … voting, and access to public services" demonstrates Congress's "intent to cover voting and elections[.]" Doc. 76 at 25 (quoting 42 U.S.C. § 12101(a)(3)).

But, again, whether the ADA could ever cover elections isn't the question. The question is whether Congress clearly intended to displace State election laws. The AEMs thus do not dispute that the ADA can require a wheelchair-accessible ramp at a polling place, *see generally Tennessee v. Lane,* 541 U.S. 509 (2004), but do dispute that the ADA can override duly enacted State statutes

governing elections. Regardless, Plaintiffs fail to engage with the Supreme Court's instruction that generalized language doesn't cut it for a clear statement—Congress "must be reasonably explicit about it." *Bond v. United States*, 572 U.S. 844, 858, 860 (2014) (citation modified). One legislative finding without a single provision specifically governing elections is not enough for this Court to be "absolutely certain" that Congress intended the ADA to upset the federal–state constitutional balance in the election context. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).[6]

C. Plaintiffs Fail To State An ADA Claim.

1. Plaintiffs still do not explain why voting should be considered communication.

Plaintiffs offer no explanation as to why voting should be considered a "communication[] … with participants," 28 C.F.R. § 35.160(a)(1), instead asserting it is because some sources say so. Doc. 76 at 29. But their citations either don't say so or likewise provide no analysis. Plaintiffs cite *Harris*, but they rely on the panel's quotation from an unappealed finding of the district court below; the Eleventh Circuit did not even consider whether voting was a communication. 647 F.3d at 1108. Plaintiffs' other nonbinding citations seem to assume that at least some part of the voting process may be a communication but provide no explanation as to why that would be. The act of balloting is not a communication because it does not exist to serve an "expressive function" or to allow voters to communicate political messages, but rather to winnow down and select candidates. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). Regardless, Plaintiffs have not shown that they have received ineffective communication from the AEMs, but instead simply complain about the

[6] None of Plaintiffs' other citations change this conclusion because not one finds that the ADA included a clear statement of Congressional intent to preempt State election law. Indeed, half of the citations in their string cite either involve a different statute (*Astralis* and *Quinones*) or involve the ADA outside the elections context (*Crowder*). *See* Doc. 76 at 24-25 (collecting cases). And neither *Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007), nor *American Association of People with Disabilities v. Harris*, 647 F.3d 1093 (11th Cir. 2011)—Plaintiffs' only potentially binding citations—even discuss preemption, so they are not precedential on a point that they did not address. *See Webster v. Fall*, 266 U.S. 507, 511 (1925).

"downstream consequences of communication difficulties, which could be remote, attenuated, ambiguous, or fortuitous" and which the ADA does not cover. *Silva v. Baptist Health S. Fla.*, 856 F.3d 824, 834 (11th Cir. 2017).

Having hung their hat on voting being a communication and having expressly disclaimed seeking a reasonable modification, Plaintiffs' claim fails at the outset. Although Plaintiffs state that there is "no dispute" that they have proposed a reasonable modification, Doc. 76 at 30, they provide no explanation as to why they expressly disclaimed seeking such in discovery, Doc. 62-2 at 5. And having waived the issue then, they cannot prevail on it now.

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

Plaintiffs' motion overly narrows the exclusion inquiry here in two separate ways: (1) they cannot now inject remoteness into the "private and independent absentee voting" framework they pleaded; and (2) even the pleaded framework is too narrow because the program at issue is voting generally rather than absentee voting specifically.

First, while acknowledging that the Court has already found the "proper analytic scope" here to be "[e]xclusion from private and independent absentee voting," Plaintiffs nonetheless double-down on their argument that the proper scope is *remote*, private, and independent absentee voting. *See, e.g.*, Doc. 58 (citing Doc. 32 at 15). But their Amended Complaint never alleged that the benefit they were denied was remoteness—only, as this Court acknowledged, "the benefit of voting privately and independently." Doc. 32 at 15; *see also, e.g.*, Doc. 4 at 1 ¶ 1, 3 ¶ 8, 12 ¶ 49. Plaintiffs' rebuttal first asserts that their Amended Complaint mentions RAVBM systems, but that conflates the relief sought with the rights asserted. *Compare* Doc. 4 at 20-21 (Prayer for Relief requesting RAVBM as remedy), *with id.* at 18 ¶ 89 (Count I, asserting that without injunction "Plaintiffs will be denied their right to vote privately and independently by absentee ballot"). And, as Plaintiffs point out themselves, deciding what relief to impose comes after a liability

determination. *See* Doc. 76 at 21-22. Plaintiffs also cite to other briefing and discovery responses, but these materials cannot retroactively amend their pleadings any more than their summary judgment motion can. *See* Doc. 67 at 32-33 (citing *Poer v. Jefferson Cnty. Comm'n*, 100 F.4th 1325, 1337-38 (11th Cir. 2024)). Having failed to amend their complaint, Plaintiffs cannot now surreptitiously shrink the inquiry to remote, private, and independent absentee voting.

At any rate, the record exposes Plaintiffs' attempts to move the goalposts. Plaintiffs' motion-to-dismiss response repeatedly describes their claims as "alleg[ing] here that they are not able to vote absentee privately and independently, as voters without disabilities can." Doc. 26 at 20. Similarly, Plaintiffs' interrogatories asked how "voters with print disabilities can vote absentee privately and independently." Doc. 82-1 at 7 (Interrogatory 6). And their discovery requests defined "accessible" as "a system that allows voters with print disabilities to register and vote absentee privately and independently just as nondisabled [] absentee voters are able to do." *See, e.g.*, *id.* at 5 ¶ 11. No mention of remote.

Plaintiffs likewise recognize that *absentee* voting is not synonymous with *remote* voting. They define "Absentee Voting Program" to include any "form of voting other than in-person voting at a voter's assigned polling place on Election Day." *See, e.g.*, *id.* at 5 ¶ 10. So in-person absentee voting at the AEM's Office is still absentee voting, even if it may not be remote voting. Of course, AEMs have sometimes travelled to absentee voters to assist them, which could also be considered a form of remote voting. Doc. 56-11 at 155:21-157:1. Plaintiffs' 30(b)(6) deposition topics also distinguished these concepts, asking first about methods of voting "absentee privately and independently, including Ballot Marking Devices and other auxiliary aids" (like the ExpressVote Machine) and then separately about the ability to offer "accessible, vote-by-mail ballots or RAVBM system ballots." Doc. 82-2 at 5-6 (Topics 6 and 7). In other words, absentee

voting allows those who must be absent from the polling place on Election Day to cast a ballot at some other time, whereas remote voting allows ballots to be submitted by some other means than in-person voting.

While these concepts may sometimes overlap, they are not the same. Just contrast Maryland's remote voting (available to all voters) with Alabama's absentee voting (available only to voters who cannot attend the polls on Election Day). Similarly, Plaintiffs' newfound argument that in-person absentee voting is "early voting" but not "absentee voting" conflates these two systems as well.[7] While sharing some similarities with early voting, the in-person absentee option is still only available to those individuals with a qualifying excuse.

That the ExpressVote Machine dooms Plaintiffs' claims does not entitle them to force the AEMs to play whack-a-mole as to what those claims are. The record contradicts Plaintiffs' newfound assertions that the proper analytic scope has always been remote, private, and independent absentee voting. Instead, and at *most*, their claims should be considered with respect to exclusion from private and independent absentee voting only. *See* Doc. 32 at 15.

Second, even considering only "private and independent absentee voting" narrows the inquiry too far, which should instead consider voting generally. Plaintiffs do not respond to the AEMs' explanation that absentee voting is itself an accommodation for those unable to attend the polls on Election Day. The benefit absentee voting confers is thus not remoteness (or even privacy or independence), but rather the ability to vote despite not attending the polls on Election Day as

[7] Plaintiffs misquote the transcript in contending that the AEMs "ignore[d]" that Dr. Appel supposedly referred to this arrangement as "not actually 'absentee voting' but, rather, 'early voting.'" Doc. 76 at 27 (citing Doc. 56-30 at 127:11-128:2). Rather, in that citation Dr. Appel explained that such a system may be called either "an early vote center" or "absentee in person." Doc. 56-30 at 127:19-21. And just a few lines before that, Plaintiffs' counsel asked: "So you would agree with me that the ExpressVote option is an accessible option offered to individuals to vote absentee if they appear in person. Right?" *Id.* at 127:11-14. Their attempt to redefine this process now lacks any reasonable basis.

all other voters are required to do by default. This broader definition also comports with the ADA's scope, which requires only meaningful access rather than an "identical result or level of achievement" compared to those without disabilities. *Cf. A.L. ex rel. D.L. v. Walt Disney Parks & Resorts U.S., Inc.*, 900 F.3d 1270, 1295 (11th Cir. 2018) (discussing *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013)).

Plaintiffs' citations do not move the needle. While Plaintiffs label the limited availability of absentee voting in Alabama "an irrelevant factual distinction" compared to Maryland, Doc. 76 at 27 n.5, the Fourth Circuit didn't see it that way when it expressly found this distinction "significant" to its analysis, *Nat'l Fed'n of the Blind v. Lamone* 813 F.3d 494, 504 (4th Cir. 2016). And Plaintiffs' attempt to distinguish *Harris*'s consideration of "Florida's voting program" generally on the basis that it did not consider absentee voting specifically is self-defeating. 647 F.3d at 1107.[8] And, if that's not enough, the Supreme Court likewise listed "voting" generally as an example of "public services, programs, and activities." *Tennessee v. Lane*, 541 U.S. 509, 525 (2004).

Plaintiffs also argue that programs should not be assessed for accessibility in their entirety, because only physical accessibility of facilities can be. Doc. 76 at 27 n.5. While true that a regulation dealing with facilities expressly uses that language, Plaintiffs provide no justification for why that same analytic lens should not likewise extend to all programs. Under Plaintiffs' view, programs could always be whittled down to their barest components to rig the inquiry. But it would

[8] Plaintiffs claim that the AEMs failed to respond to a string cite of authorities (*see* Doc. 58 at 29) where courts "ha[ve] correctly found that the Title II program at issue is inaccessible absentee voting." Doc. 76 at 27. But Plaintiffs cited these cases in a paragraph about effective communication—not the scope of the program. *See* Doc. 58 at 29. Regardless, their citations again conflate the relief granted (or agreed to by settlement) with the scope of the program asserted. Worse for Plaintiffs though, *Taliaferro v. North Carolina State Board of Elections*, 489 F. Supp. 3d 433, 437 (E.D.N.C. 2020), supports the AEMs' reading of *Lamone*, relying on it to explain that absentee voting "is a quintessential public activity … where a state has made such program available to all voters"—undercutting Plaintiffs' position as to scope.

be strange if Title II's single-sentence prohibition on disability discrimination (42 U.S.C. § 12132) allowed such differentiation: zero-tolerance for accessible alternatives to voting in some hyperspecific way but pragmatic consideration that not every door in a building need be handicap accessible.[9]

3. Plaintiffs can meaningfully access private and independent voting.

Plaintiffs' argument that they lack meaningful access depends on their misframing of the program.[10] As to the claim they actually pleaded, Plaintiffs ignore the relevant authorities and their own testimony showing they have meaningful access to private and independent absentee voting. *Id.* at 28-29. Plaintiffs don't (and can't) dispute that they can use ExpressVote Machines (and have enjoyed doing so). Doc. 67 at 12 ¶ 64; Doc. 76 at 16 ¶ 64.[11] And their respective abilities to get around town show they can get to their local courthouses at some point during the 55-day absentee voting window. *See* 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 10:7-15:20; Doc. 76 at 15 ¶ 63, 16 ¶¶ 75-76, 79. Plaintiffs' suggestion that they lack meaningful access to ExpressVote Machines because they don't "always have transportation" to get to them, Doc. 76 at 28, ignores the testimony cited above. This speculation is not even enough to support standing, let alone to

[9] Of course, under no circumstances can regulations be arbitrary, capricious, or otherwise contrary to the statute itself. *Harner v. Soc. Sec. Comm'n Adm'r*, 38 F.4th 892, 896 (11th Cir. 2022) (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). And, at any rate, while agency regulations may provide persuasive authority, they cannot bind this Court. *Glover v. Ocwen Loan Servicing, LLC*, 127 F.4th 1278, 1288 n.9 (11th Cir. 2025) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)). What Title II of the ADA requires is a question of law for this Court—not DOJ—to decide.

[10] If the "the challenged discrimination" is exclusion from the electronic return option under UOCAVA, *see id.* at 18 (heading), the AEMs do and did dispute that this alleged discrimination is not by reason of Plaintiffs' disabilities—it's because they are not overseas voters. *See, e.g.*, Doc. 76 at 47.

[11] Rissling's testimony that he has used an ExpressVote Machine in every election he's voted in since 2014 contradicts Plaintiffs' assertion that he has used the ExpressVote Machine only once. *Contrast* Doc. 56-4 at 65:7-11, *with* Doc. 76 at 16 ¶ 67.

establish the merits of this claim. *See Shotz v. Cates*, 256 F.3d 1077, 1081-82 (11th Cir. 2001) (speculative threat of future ADA issues insufficient to establish standing).

Even if Plaintiffs could show some trouble getting to a courthouse during the absentee voting window, that alone wouldn't suffice to show they lacked meaningful access. The Eleventh Circuit has held that a claimant may encounter difficulties when accessing a benefit or program and *still* have meaningful access to it. *Bircoll v. Miami-Dade County.*, 480 F.3d 1072, 1086 (11th Cir. 2007); *Ganstine v. Sec'y, Fla. Dep't of Corr.*, 502 F. App'x 905, 910 (11th Cir. 2012). At worst, Plaintiffs *might* face some inconvenience in getting to their local courthouses during the 55-day absentee voting period. But that's not enough to show they lack meaningful access to a means to independently and privately vote absentee. Because Plaintiffs have meaningful access to these ExpressVote Machines, they are entitled to nothing more. *Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1333 (N.D. Ga. 2017) ("[W]hen a[] [person] already has meaningful access to a benefit to which he or she is entitled, no additional accommodation, reasonable or not, need be provided by the governmental entity.") (citation modified). Plaintiffs failed to address any of these authorities.

The AEMs also disputed that Plaintiffs have not been excluded even from *remote*, private, and independent absentee voting. *See* Doc. 67 at 37-38; *contra* Doc. 76 at 29. The ADA is not so rigid as to allow only the accommodation that Plaintiffs prefer. As the AEMs have already explained, the ADA's regulations expressly contemplate that third-party assistance can be a proper auxiliary aid, 28 C.F.R. § 35.104 (defining "auxiliary aids"), and the availability of services at alternative locations can be a proper accessible alternative, *see* 28 C.F.R. § 35.150(b)(1). And Plaintiffs' citation to a regulation about bringing someone to interpret communications for them, which isn't at issue (*supra* § III.C.1), does not apply to this situation because Plaintiffs aren't bringing anyone anywhere when they vote absentee at home. 28 C.F.R. § 35.160(c)(1)(2).

Regardless, this regulation does not preclude assistance from the AEM, at either in office or a potential in-home visit. That someone may help Plaintiffs to complete an absentee ballot does not strip them of their rights to privacy and independence. *See* Doc. 67 at 37-38; *United States v. Exec. Comm. of Democratic Party of Greene Cnty.*, 254 F. Supp. 543, 546 (N.D. Ala. 1966). Plaintiffs' distaste for any accommodation other than internet voting does not entitle them to it when multiple reasonable alternatives are available.

4. Eligibility for absentee voting requires more than incorrectly checking a box.

It is decidedly *not* "undisputed" that Plaintiffs are qualified to vote absentee. *Contra* Doc. 76 at 28. Plaintiffs ignore that, as a matter of law, having a disability alone is not enough; only those individuals who are also unable to attend the polling place on Election Day may vote by absentee ballot. ALA. CODE § 17-11-3(a)(2); Doc. 56-16 ("I am unable to access my assigned polling place."). Otherwise, anyone with contacts or hypertension could vote absentee.

Plaintiffs' contention that "all that is required" is "[c]hecking the box" attesting to a specific excuse—apparently whether that person meets *all* requirements of that excuse or not—is circular. Doc. 76 at 28. That view would render the only limitation on absentee eligibility one's willingness to perjure themselves. True, AEMs do not typically conduct investigations into the disabilities of those who attest they meet a specific excuse; but that does not transform an unqualified absentee voter who incorrectly checks the box into a qualified absentee voter. And given Plaintiffs' well-documented history of getting to the polls to vote, they cannot carry their burden to show they qualify for absentee voting. *Contra* Doc. 76 at 28-29; *see also supra* § III.C.3. Their ADA claim thus fails.

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

As an initial matter, Plaintiffs abandon their arguments from their initial motion that the AEMs have waived or are otherwise barred from asserting these defenses. *Compare* Doc. 58 at 30, *with* Doc. 76 at 32. And, at any rate, Plaintiffs' repeated assertions that the AEMs have not cited evidence backing up their undue-burden or fundamental-alteration defenses wither under scrutiny. As explained in both the AEMs' initial brief and again below, the record demonstrates that thrusting internet voting upon Alabama's elections would be costly (in both dollars and man-hours) and would threaten not only the security of those elections, but also public confidence in them. Accordingly, Plaintiffs' claims fail as a matter of law.

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

Contrary to Plaintiffs' assertion, Doc. 76 at 32, *Schaw* sets the standard for determining whether a proposed accommodation constitutes an undue burden: balancing the benefits to Plaintiffs with the burdens on the AEMs, considering the program's basic purpose. *Schaw v. Habitat for Human. of Citrus Cnty., Inc.*, 938 F.3d 1259, 1267 (11th Cir. 2019); *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, 1217 (N.D. Ala. 2020) (applying this standard). *Schaw* is also consistent with and distills the factors set out in the *Olmstead* excerpt upon which Plaintiffs rely. *Olmstead* merely noted that the Rehabilitation Act regulation required examinining factors that bear directly on a defendant's administrative and financial capabilities and the nature of a requested accommodation. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 606 n.16 (1999) (discussing 28 C.F.R. § 42.511(c)). In other words, *Olmstead* and *Schaw* both hold that an undue burden exists if a proposed accommodation disproportionately stretches a defendant's administrative and budgetary capacities.

Nor have the AEMs devalued Plaintiffs' proposed accommodation in relation to their asserted need for it. Rather, as *Schaw* requires, the AEMs balanced Plaintiffs' need for their proposed accommodation against the burdens it would impose. And from that undertaking, Plaintiffs would experience little to no benefit if their proposed accommodation was implemented because they either don't need it to vote (even absentee) or have no interest in using it anyway. Doc. 56-4 at 88:5-89:3, 100:7-20, 104:8-105:5, 106:13-16; Doc. 56-3 at 29:2-30:3-13, 35:15-16, 47:11-12; Doc. 56-5 at 37:14-38:17, 66:5-67:9; Doc. 56-2 at 2:12-17, 13:8-19; Doc. 67 at 14 ¶¶75-77; Doc. 76 at 17 ¶¶75-78. Again, Plaintiffs fail to engage with these citations. *See* Doc. 76 at 21.

Measured against Plaintiffs' disinterest and lack-of-need are the shared burdens the AEMs will face if Plaintiffs' proposed program was foisted upon them. Contrary to Plaintiffs' assertions, the AEMs *have* cited significant testimonial evidence on that point. Plaintiffs' failure to contend with this evidence does not lessen its force. FED. R. CIV. P. 56(c)(1) (courts must consider, among other things, deposition testimony, when ruling on a motion for summary judgment). And Plaintiffs' citation to *National Association of the Deaf v. Florida*, 980 F.3d 763 (11th Cir. 2020), for the proposition a defendant can't prevail on an undue burden defense where it produces evidence of only "some cost or effort" overstates the holding. That appeal, from the motion-to-dismiss stage, merely recognized that defendants could martial additional evidence in support of an undue-burden defense and that they might later prevail on it at summary judgment—not that they had presented insufficient evidence. 980 F.3d at 773 ("Finally, if the cost or effort should prove to be prohibitively burdensome, the Defendants have available the affirmative defenses in Title II.").

On the administrative side, evidence shows that when the AEMs recently encountered an increase in absentee voting, they quickly felt overrun, worked well past ordinary hours to tally

votes, borrowed personnel from other state officials, and had to find new places to store ballots that came into their offices. Doc. 56-12 at 144:5-145:20, 154:11-155:22, 156:3-18; Doc 56-11 at 169:11-1; Doc. 56-13 at 32:15-18, 33:8-12, 151:20-14. Moreover, explaining online voting to individuals who may not be tech savvy and otherwise insulating it from user error pose significant burdens. *See supra* n.5; Doc. 56-35 at 59:5-62:2 (Plaintiffs' expert Dr. Selker acknowledging internet voting presents additional complications for such voters and will increase questions presented to election officials). And while it's hard to pin down how severe that burden will become if Plaintiffs prevail—particularly given the ever-shifting parameters of Plaintiffs' claim—the AEMs reasonably expect to face similar burdens based on Plaintiffs' requested relief.

The same holds true for the financial burden the AEMs would experience. History shows that increases in absentee voting caused at least one AEM to run out of money to pay herself and her employees, Doc. 56-11 at 59:2-61:2, and that their offices operate on negligible budgets, *e.g.,* Doc. 56-13 at 32:18-20, 149:23-151:3, 159:3-18. And despite Plaintiffs' assertions that AEMs have control over HAVA funds, their citations do not support it—AEM Anderson-Smith disclaimed control and Director of Elections Jeff Elrod explained that he did not know if AEMs even received those funds. *Contrast* Doc. 76 at 34-35, *with* Doc. 56-13 at 46:23-47:19 ("I have no input in that; [the probate judge] hires."), *and* Doc. 56-19 at 166:21-25. And each election official who has testified on this issue knew that the AEMs would incur added costs if they had to expand their current programs. *E.g.*, Doc. 56-19 at 178:7-25.

Plaintiffs' attempt to minimize these costs of their requested relief lacks record support. Likewise, the expansion of OmniBallot is not free. Based on nothing, Plaintiffs assert that the AEMs can just split the $60,000 per-election-cycle price tag with every other AEM in the State and so the cost would not be that bad. But this conjecture rests on at least two faulty premises:

(1) that every non-party AEM will *voluntarily* coordinate with the Defendant AEMs to adopt and pay for internet voting despite Alabama law to the contrary; and (2) that the costs would be evenly divided regardless of population anyway, *contra* Doc. 56-34 at 12:22-23 [redacted]. Regardless, a recurring $60,000 fee just for *access* to Plaintiffs' requested relief each election cycle—no matter how it might hypothetically be split—is alone an undue financial burden, particularly compared to the relative lack-of-benefit to Plaintiffs. And while OmniBallot is currently available to only overseas UOCAVA voters when a federal office is on the ballot, Plaintiffs' requested relief would extend it to State and local elections (such as special elections) accruing an additional $60,000 fee per each additional election cycle covered.

2. Plaintiffs' requested relief would fundamentally alter Alabama's elections.

Ignoring both the record and the substance of the AEMs' arguments, Plaintiffs' fundamental-alteration arguments miss the forest for the trees. The AEMs' concerns are not only enshrined in Alabama law but also backed up by testimony and other evidence regarding absentee voting fraud and the multiple security issues inherent to internet voting.[12] That Plaintiffs deny that the AEMs cited such evidence does not make it so. *Compare* Doc. 76 at 36 (claiming that the AEMs cite no evidence), *with* Doc. 67 at 44-51 (citing testimony from election officials, experts, Democracy Live, and NFB-AL as well as documentary evidence in support of their fundamental-alteration arguments). Regardless, the record shows that Plaintiffs' requested relief both increases

[12] Plaintiffs' passing attempt to recast "internet voting" as only "email voting" and thus not including so-called "secure portal" voting, Doc. 76 at 39, finds no support in the record and does not alter the analysis regardless. Both Dr. Appel and the CISA report make clear that both email and "portal" voting are forms of internet voting (i.e., "electronic return") and that both are still high-risk. Doc. 56-39 at 3-4 (defining "internet voting"); Doc. 62-4 at 2 (listing "web portal" as one means of electronic ballot return).

the potential for fraud in Alabama elections and eliminates essential tools used to detect it. Plaintiffs' response fails to rebut these explanations for multiple reasons.

First, Plaintiffs contend that whatever risks exist do not matter because they have already been accepted for UOCAVA voters. But this argument relies on treating different things alike. Providing voting services to UOCAVA voters outside the U.S. presents a host of difficulties that domestic voters (even those with print disabilities) do not face such as access to domestic mail, physical voting facilities such as the polling place or AEMs' office, or replacement ballots in the event of a mistake or other spoilation issues. Moreover, Plaintiffs appear to misstate the extent to which Alabama permits online voting, suggesting Alabama's appetite for risk is greater than it actually is. *See, e.g.*, Doc. 76 at 36 ("Defendants allow military and overseas voters to receive, mark, and return their ballots electronically[.]"). As the AEMs explained in their principal brief, Alabama allows only UOCAVA voters outside U.S. territorial bounds to return their ballot via internet. *E.g.*, Doc. 67 at 47. And, of course, the *AEMs* did not accept any risk themselves because they did not adopt the *State* laws or regulations permitting electronic voting even for overseas UOCAVA voters; they are required to implement them nonetheless.

At any rate, whatever risks the State "accepted" by adopting this program and offering this accommodation were done to bring Alabama's election system into compliance with UOCAVA, which Plaintiffs do not dispute. *See* Doc. 76 at 19 ¶ 104.[13] And, as the AEMs have already explained—and as this Court agreed in a previous case—complying with the express requirements of federal voting laws doesn't undermine the essential nature of its voting requirements, including paper ballots. Doc. 67 at 48. Otherwise, the ADA could always use the narrow commands of

[13] Plaintiffs gesture to a hardship exemption under UOCAVA as indication that the AEMs would not actually face hardship. But that the very entity that would grant such exemption (and to whom admission of noncompliance is required as a condition precedent) repeatedly sued Alabama for noncompliance suggests that such relief is illusory (if it even applies here). 52 U.S.C. § 20302(g); *see, e.g.*, *United States v. Alabama*, 778 F.3d 926 (11th Cir. 2015).

federal voting laws (like those of UOCAVA) as a means of hijacking States' elections, raising significant constitutional concerns. *See* Doc. 67 at 51-52.

Plaintiffs do not dispute that their arguments would ultimately entitle up to 3.1% of Alabama's population to internet voting, providing far more opportunities for fraudsters to exploit. In passing, they contend—without citation—that electronic return is allowed "for a much larger group of people than is at issue in this case." *See, e.g.*, Doc. 76 at 39. But only 1,349 voters in the 2024 General Election used internet voting. Doc. 56-41 at 3. And even putting aside the nebulous scope of Plaintiffs' relief (or their asserted standing), *see supra* § III.A, their sweeping arguments would apply to approximately 160,000 potential voters as well as however many others may have non-vision print disabilities. *See* Doc. 4 at 2 ¶ 2. As the AEMs have already explained—and Plaintiffs now ignore—these quantitative risks are not the same. *See* Doc. 67 at 50; Doc. 56-39 at 17-18 (comparing 1,349 UOCAVA electronic ballots with 43,987 returned by voters with disabilities or physical infirmities).

Second, Plaintiffs attempt to hand-wave away the significant evidence of absentee fraud in Alabama as only involving paper absentee ballots, which (they say) means internet voting is safer. *See* Doc. 76 at 38-39. But this conclusion does not follow because these security measures serve more than just a prophylactic function. The reason that this fraud was *detected* was the evidence embodied by these physical records, particularly the voters' and witnesses' signatures. By contrast, the internet voting that Plaintiffs seek would do away with these measures for detecting absentee fraud. On this basis alone, Plaintiffs' requested relief works a fundamental alteration.

Of course, as the AEMs already explained, detecting internet-based voting fraud is extremely difficult (if not impossible). Doc. 67 at 49-50. Plaintiffs do not dispute this inconvenient truth, instead ignoring it to fault the AEMs for lacking evidence of widespread internet-voting

fraud (before it has even been expanded). But in doing so they seek to saddle the AEMs with an unmeetable burden: detecting evidence of the undetectable. And Plaintiffs provide no response to the AEMs' citation to Supreme Court cases reaffirming public entities' ability to respond proactively rather than reactively to potential election threats. Doc. 67 at 50.

But even if the AEMs had nothing to go on but Alabama law, that should be enough. In the employment context, an employer's written job description listing the essential functions of the job is itself evidence of their fundamental character under the ADA. *See Lucas v. W.W. Grainger*, 257 F.3d 1249, 1258 (11th Cir. 2001). And here, the Alabama Legislature has declared that the witnessing requirement "goes to the integrity and sanctity of the ballot," and the Alabama Supreme Court has reaffirmed the extraordinary nature of this requirement. ALA. CODE § 17-11-10(b)(2); *Eubanks v. Hale*, 752 So. 2d 1113, 1158 (Ala. 1999). Affording deference to an employer's self-made job description but not a sovereign State's duly enacted statute (passed here pursuant to authority specifically delegated to the States by the Constitution's Elections Clause) would infringe upon federalism and raise serious constitutional concerns. *See* Doc. 67 at 51-52.

In sum, voting by mail or internet presents greater risks compared to in-person voting. Being physically present in the polling place and presenting a photo ID provides election workers with some assurance that the voter is who he says he is; voting then occurs at the same time and in the same place. By contrast, a ballot received by mail or internet—outside the usual in-person voting process—presents greater uncertainty as to the identity of the purported voters and the validity of the votes on the ballot. The signature requirements seek to make up for this irregularity by requiring multiple attestations as to the voter's identity, hopefully discouraging fraudsters prophylactically but also providing after-the-fact evidence for those bold enough to press forward with fraud anyway. Plaintiffs' proposed relief indisputably would do away with these measures

that mitigate the risks of absentee fraud affecting the election, thus constituting a fundamental alteration.

Third, Plaintiffs' attempts to downplay the risks of internet voting fall flat. Their sole refrain is that Democracy Live has mitigation measures in place. But they do not engage with Democracy Live's concession that [redacted] Doc. 56-21 at 163:23-164:2, 167:23-168:11. That's the ballgame.

Nor do Plaintiffs seriously engage with the documented issues regarding OmniBallot's use. They did not respond to the AEMs' factual paragraph dealing with those multiple separate issues, *see* Doc. 67 at 19 ¶ 108, which are thus deemed admitted. Their sole quibble is that the email from AEM Chris Priest documenting his receipt of multiple electronic ballots from a voter is irrelevant and inadmissible hearsay, Doc. 76 at 41 n.10; but AEM Priest has been disclosed as a witness to affirmatively testify about his experience (alleviating any hearsay problem, *see Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012)). Moreover, evidence of any OmniBallot issues is relevant to whether it would work an undue burden or fundamental alteration to expand it as Plaintiffs seek.

At any rate, Plaintiffs' focus on hypothetical mitigation fails too because internet voting is still high-risk even with all known measures in place. Plaintiffs do not dispute that the federal government has designated all forms of internet voting to be high-risk. Doc. 76 at 19 ¶ 105. They do not dispute that internet voting is inherently insecure, that multiple vectors of attack exist, and that with today's technology it is impossible to fully protect the voter's vote from being changed or the election official's computers from being hacked. *Id.* at 19 ¶ 106. And they do not engage with the federal government's and Dr. Appel's explanation that internet voting remains high-risk

even with all known mitigation measures in place. Indeed, as Plaintiffs point out themselves, [redacted] Doc. 76 at 11 ¶ 40; Doc. 56-20 at 0004761, 0004777. Forcing Alabama to expand use of indisputably high-risk internet voting would thus work a fundamental alteration.

Lastly, all together, these threats to election security and integrity themselves threaten the public confidence in the electoral system. Plaintiffs provide no response to the sweeping effects of their relief or the AEMs' explanations that public entities have compelling interests in protecting the public's confidence in the electoral system. *See* Doc. 67 at 44-45. And, as even Plaintiffs' own expert acknowledged, public confidence in voting systems relies on more than "technical issues alone" and that even when accessibility is at issue it still is fundamental to consider public legitimacy in a voting system. Doc. 56-35 at 35:18-37:9.[14] Plaintiffs' requested relief would threaten to shake the already-threatened public confidence in elections by simultaneously (1) doing away with absentee fraud prevention and detection measures; (2) requiring adoption of high-risk internet voting, increasing fraudsters' ability to alter ballots; (3) confusing voters by implementing different absentee voting methods in two counties and part of a third, flying in the face of state policy encouraging unity in elections procedures, *e.g.*, Ala. Code § 17-2-4(g); and (4) imposing a Court-crafted absentee program to allow some vaguely defined group of self-certified voters to vote outside the normal parameters of Alabama law.

For any of these reasons, let alone all of them together, Plaintiffs' requested relief would fundamentally alter Alabama's elections.

[14] A paper on this topic coauthored by Plaintiffs' expert Dr. Selker was more to the point, including a cartoon lampooning the safety of internet voting and advocating for paper ballots. Doc. 82-3 at 4. Although Dr. Selker disavowed that this paper represented his position, he nonetheless acknowledged that "a lot of people [] don't believe in software" and that he signed off on including the comic in the paper. Doc. 56-35 at 32:14-33:23.

E. Plaintiffs Do Not Engage With The Substance Of The AEMs' Constitutional Argument.

Plaintiffs' attempt to rebut the AEMs' constitutional argument misses the point. Indeed, they never argue that Title II of the ADA would be congruent and proportional as applied here. Doc. 67 at 51-52. Instead, they recount *Tennessee v. Lane* while acknowledging it held only that Title II was appropriate "under § 5 of the Fourteenth Amendment *in the context of access to the courts*." *See* Doc. 76 at 41 (citing 541 U.S. at 530-34) (emphasis added). Plaintiffs then pivot to an argument that the ADA's text applies to elections, but that says nothing about whether an application here requiring internet voting for those who indisputably can vote without it would be congruent and proportional. *Compare* Doc. 76 at 42, *with* Doc. 67 at 52. And they provide no response to the AEMs' explanation that the congruence-and-proportionality analysis under *Lane* "requires an application-by-application analysis rather than a one-size-fits-all assessment of the law." Doc. 67 at 52; *accord Lane*, 541 U.S. at 530 ("[N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole."). Plaintiffs' unresponsive arguments do not rebut the AEMs' points.

IV. CONCLUSION

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

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CERTIFICATE OF SERVICE

I certify that on June 17, 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
Counsel for Defendants