FILED
2024 May-20 PM 05:51
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

ALABAMA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs,

v.

STEVE MARSHALL, in his official capacity as Attorney General of Alabama, *et al.*,

Defendants.

Case No. 2:24-cv-420-RDP

DEFENDANTS' MOTION TO DISMISS

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May 20, 2024

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I. INTRODUCTION

Any "government whose essential character is republican … must have the power to protect the elections on which its existence depends from violence and corruption." *The Ku Klux Cases*, 110 U.S. 651, 657-58 (1884). Without "this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." *Id.* at 658. Alabama has exercised this power in several ways. For example, the State prohibits vote buying. ALA. CODE § 17-17-34. "With payments being made for voting, voters who might otherwise not have voted are brought into the electoral pool; the voters who are paid are subject to manipulation by the parties who paid them," and the election devolves into "a spending contest with the candidate most willing and able to make such payments having the greatest chance of winning." *United States v. Bowman*, 636 F.2d 1003, 1012 (5th Cir. Feb. 9, 1981).

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More recently, in light of the long history of abuses of absentee voting, the State enacted SB1, codified at ALA. CODE § 17-11-4, which safeguards the absentee ballot applications process. It is easy for a voter who is eligible to vote absentee to request an application, and the recent reforms ensure that the process is driven by voters, not unduly influenced by interested parties. Applications must be submitted by the applicant (unless a disabled voter requires assistance). Prefilling an application is prohibited, which among other things, cuts down on potential fraud (e.g., through mass applications) and confusion (e.g., when voters receive misaddressed or unsolicited forms). And SB1 prohibits absentee ballot application buying. No one may knowingly provide or "receive a payment or gift for distributing, ordering, requesting, collecting, completing, prefilling, obtaining, or delivering a voter's absentee ballot application." ALA. CODE § 17-11-4(d)(1)-(2). No federal law or constitutional provision forbids these commonsense safeguards for the franchise.

Plaintiffs respond with a sprawling 6-count, 71-page, 173-paragraph complaint that fails first as a shotgun pleading, and second for failing to state a claim. First, Plaintiffs' complaint is a

classic shotgun pleading. Each count incorporates all "relevant allegations contained in the preceding paragraphs." *See, e.g.*, Doc. 1, ¶ 121. And many of Plaintiffs' factual allegations are irrelevant anyway; most notably, the complaint features a lengthy discussion of racial discrimination despite featuring no racial discrimination claim. *See, e.g.*, Doc. 1, ¶¶ 36-45. Each problem alone (and certainly combined) make Plaintiffs' complaint an impermissible shotgun pleading.

On the merits, each of Plaintiffs' claims fails. *First*, Plaintiffs' free speech rights are not violated by the ballot harvesting ban because the statute they challenge does not regulate their speech. While prefilling, distributing, or collecting absentee ballot applications might sometimes accompany Plaintiffs' speech, that does not transform the prohibited conduct into speech, any more than the State's ban on paying a potential voter (or absentee ballot applicant). *Second*, Plaintiffs' freedom of association claim likewise fails because the ballot harvesting ban does not impose any significant constraint on Plaintiffs' associational rights. *Third*, Plaintiffs assert that the law is unconstitutionally vague, but establish only "that close cases can be envisioned." *United States v. Williams*, 553 U.S. 285, 305 (2008). *Fourth*, Plaintiffs' First Amendment overbreadth claim fails because the law does not prohibit speech, and even if it did, it still has a plainly legitimate sweep. *Fifth*, Plaintiffs assert that the law is preempted by Section 208 of the Voting Rights Act, which provides: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. But subsection (e) of the ballot harvesting ban includes the same language. Moreover, § 208 allows a disabled voter to select "a" person of her choice, not "any" person, and thus does not preempt SB1's targeted restriction on paid operatives distributing, completing, and collecting ballot appli-

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cations. *Finally*, Plaintiff Alabama Disabilities Advocacy Program claims that the ballot harvesting ban violates the Help America Vote Act (HAVA) because that statute grants ADAP money to "ensure full participation in the electoral process for individuals with disabilities." 52 U.S.C. § 21061(a). But HAVA does not provide ADAP a cause of action to sue Defendants or provide judicially administrable standards. Accordingly, Defendants move to dismiss Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. BACKGROUND

A. Statutory Framework

While every citizen qualified to vote in Alabama "shall be entitled to register and to vote at any election by the people," ALA. CODE § 17-3-30, a registered voter in Alabama "may apply for and vote an absentee ballot" only "if he or she makes application in writing and meets one or more of [eight] requirements," *id.* § 17-11-3(a). Absentee voting is an accommodation for those who cannot vote in person on election day, not a general vote-by-mail alternative.

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A voter is legally qualified to vote absentee only if he or she: (1) plans to be out of the county or state on election day; (2) has an illness or infirmity that prevents in-person attendance at the polls; (3) has a work shift of at least ten hours that coincide with the hours at his polling location; (4) is "a student at an educational institution located outside the county of his or her personal residence, attendance at which prevents his or her attendance at the polls;" (5) is a service member or qualified relative of a service member pursuant to "the federal Uniformed and Overseas Citizens Absentee Voting Act;" (6) is an election official or volunteer at polling place other than his own polling place; (7) the person is a qualified family caregiver; or (8) is incarcerated and has not been convicted of a felony involving moral turpitude. ALA. CODE § 17-11-3(a)(1)-(8). "[A]ny person who willfully aids any person unlawfully to vote an absentee ballot, any person who knowingly

and unlawfully votes an absentee ballot, and any voter who votes both an absentee and a regular ballot at any election" is guilty of a Class C felony. *Id.* § 17-17-24(a).

The absentee ballot application has two pages: one for the applicant's personal information and the other specifying crimes of moral turpitude and penalties for unlawful absentee voting. https://www.sos.alabama.gov/alabama-votes/voter/absentee-voting (General Absentee Application). Absentee applications for all 67 counties in Alabama are publicly available on the Secretary of State's website. *See* https://www.sos.alabama.gov/alabama-votes/absentee-ballot-application-by-county. Anybody without access to a printer may request that an application be sent to them. https://www.sos.alabama.gov/contact/absentee_application_request.

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On March 20, 2024, Governor Kay Ivey signed Senate Bill 1 into law, which amended the section of the Alabama Code that governs the absentee ballot application process. SB1 clarifies that the absentee application issued by the Secretary of State shall require "[t]hat the applicant submit sufficient information to identify the applicant," a declaration that the applicant is not barred from voting, and "[a]n explanation of penalties for violations of this section." *id.* § 17-11-4(a). Consistent with existing law, "any applicant may receive assistance in filling out the application as he or she desires," but each applicant signs their own application "under penalty of perjury," *id.* § 17-11-4(b)(1). If the applicant signs by mark, "the application shall also include the name of the witness and the witness's signature." *Id.*

SB1 then creates four new election offenses related to absentee applications. Under the Prefilled-Application Provision, "[i]t shall be unlawful for any person to knowingly distribute an absentee ballot application to a voter that is prefilled with the voter's name or any other information required on the application form." *Id.* § 17-11-4(b)(2). Under the Submission Provision, "it shall be unlawful for an individual to submit a completed absentee ballot application to the absentee

election manager other than his or her own application," except in cases where a voter requires emergency medical treatment "within five days before an election." *Id.* § 17-11-4(c)(2). Lastly, the Compensation Prohibition criminalizes trafficking absentee ballot applications, specifying different offenses for the two different actors in the transaction. It is a Class C felony for "a third party to knowingly receive a payment or gift for distributing, ordering, requesting, collecting, prefilling, obtaining, or delivering a voter's absentee ballot application." *Id.* § 17-11-4(d)(1). It is a Class B felony "for a person to knowingly pay or provide a gift to a third party to distribute, order, request, collect, prefill, complete, obtain, or deliver a voter's absentee ballot application." *Id.* § 17-11-4(d)(2).

SB1 provides an accommodation for disability voting assistance identical to federal law: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by an individual of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." *Compare id.* § 17-11-4(e), *with* 52 U.S.C. § 10508 (same).

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B. Voter Fraud in Alabama

Although Alabama is not required to wait until widespread fraud occurs before it acts, fraud arising from absentee balloting and ballot harvesting *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) (emphasis added); *see also Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 284 F. Supp. 3d 1253, 1257 (N.D. Ala. 2018) (discussing same instances in more detail, including "voter brokers following mail trucks and removing absentee ballots from mailboxes," intimidating poor and elderly voters, and pressuring 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 voter fraud involving absentee ballots).

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Of the many cases that arose (both through criminal prosecutions and election contests), several concerned not just fraud involving the absentee ballots, but the absentee ballot *applications* as well. *See, e.g.*, *Eubanks v. Hale*, 752 So. 2d 1113 (Ala. 1999) (recognizing several instances of absentee ballot applications fraudulently signed in election contest); *Evans v. State*, 794 So. 2d 415, 425-429 (Ala. Crim. App. 2000) (affirming multiple convictions for illegal absentee voting premised on 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 voter an absentee ballot application and told her she would "fix the paper" for her to which voter did not object "because she did not know what it was all about" but "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 all but one conviction of one defendant on nine counts related to fraudulent absentee ballot applications).

Nor is voter fraud a thing of the past in Alabama. Both convictions and successful election contests have been maintained in the last several years in Alabama premised on absentee ballot fraud. For example, a successful election contest required the vacatur from office of Brandon Dean—who had been declared mayor of Brighton, Alabama in 2016—upon finding that he procured a number of illegal absentee votes in his favor, many of which falsely listed Dean's own address as the address at which they regularly received mail. *See* Final Order, *Cooper v. Brown*, No. 68-CV-2016-900602.00 (Jefferson Cnty. Cir. Ct. Sept. 25, 2017) (Doc. 246).[1] Similarly, an election contest involving a 2018 Bessemer City Council race seat resulted in 27 votes being discounted upon finding a number of irregularities in the balloting process including signature mismatches, residency problems, and improper witnessing of applications from nursing home residents. *See* Final Order on Election Contest, *Porter v. Alexander*, No. 68-CV-2018-900776.00 (Jefferson Cnty. Cir. Ct. Sept. 3, 2021) (Doc. 294). Criminal prosecutions have occurred as well, such as the 2017 convictions of Gordon Mayor Elbert Melton for falsely notarizing absentee ballots without the voter present. *See State v. Melton*, No. 38-CC-2017-1469 & -1467 (Houston Cnty. Cir. Ct. Jan. 16, 2019).[2] These examples are not exhaustive; they cover only a few of the documentable cases of voter fraud in Alabama in recent years, and do not (definitionally) capture those instances of voter fraud that could not be detected or proved for one reason or another.

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[1] A copy of this order, as well as the other State court orders referenced in this section, are attached as exhibits to this motion. The Court can take judicial notice of these orders and the judicial acts they represent. *See* FED R. EVID. 201(c)(2); *McGuire v. Marshall,* 50 F.4th 986, 994 n.8 (11th Cir. 2022).

[2] Melton's charges came in three separate cases; the indictments and verdicts from the two cases ending in conviction are attached to this motion as an exhibit. The third case was dismissed on the State's motion due to the death of the victim. *See State v. Melton*, No. 38-CC-2017-1471 (Houston Cnty. Cir. Ct. Jan. 16, 2019) (Doc. 23).

Fraud involving absentee ballots and applications occurs not just in Alabama, but in other States as well. In *League of Women Voters of Florida Inc. v. Florida Secretary of State*, where challengers questioned Florida's motivations for election security laws, the Eleventh Circuit found that "the record includes undisputed evidence of fraud—including vote-by-mail fraud in Florida." 66 F.4th 905, 26 (11th Cir. 2023). Such evidence included "ballot brokers" who exploited elderly voters, voted other persons' ballots, and "harassed and pressured elderly voters." *Id.* And in North Carolina, the State Board of Elections called for a new congressional election after uncovering pernicious ballot harvesting.[3] There, Republican congressional candidate Mark Harris hired McCrae Dowless to operate a ballot harvesting operation. Dowless paid workers to collect and submit absentee by mail request forms, some of which were fraudulent, and to collect absentee by mail ballots, some of which were unsealed and unvoted. All such applications and ballots were delivered to Dowless. *Id.* at 13-25. They forged witness signatures, voted the blank ballots, and admitted that they "pushed" votes for the Republican candidate. *Id.*

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Again, these are just a few examples. 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

[3] The North Carolina State Board of Election's Order can be found at https://dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf. This Court can take judicial notice of the Order because it is an official document of an independent agency created by North Carolina law. *See* FED R. EVID. 201(c)(2); *McGuire v.,* 50 F.4th at 994 n.8. The State Board has the authority to "investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district, and shall report violations of the election laws to the State Bureau of Investigation for further investigation and prosecution." N.C. Gen. Stat. Ann. § 163-22.

a close election." *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194 (2008) (lead opinion).

III. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "Plaintiffs must plead all facts establishing an entitlement to relief with more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The "allegations must permit the court based on its 'judicial experience and common sense … to infer more than the mere possibility of misconduct.'" *Kornegay v. Baretta USA Corp.*, 614 F. Supp. 3d 1029, 1033-34 (N.D. Ala. 2022) (quoting *Iqbal*, 556 U.S. at 679).

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IV. ARGUMENT

A. Plaintiffs' Complaint Is An Impermissible Shotgun Pleading.

"Shotgun pleadings 'are flatly forbidden by the spirit, if not the letter, of" Rule 8(a)(2) and 10(b) of the Federal Rules of Civil Procedure. *Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021). Rule 8(a)(2) requires complaints to give "a short and plain statement of the claim showing that the pleader is entitled to relief." And Rule 10(b) requires a party to "state its claim or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." "The 'self-evident' purpose of these rules is 'to require the pleader to present his claims discreetly and succinctly, so that[] his adversary can discern what he is claiming and frame a responsive pleading.'" *Barmapov*, 986 F.3d at 1324 (quoting *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015)) (alteration in original). "These rules were also for the benefit of the court, which must be able to determine 'which facts support which claims,' 'whether

the plaintiff has stated any claims upon which relief can be granted' and whether evidence introduced at trial is relevant." *Id.*

A shotgun pleading undermines these foundational aspects of litigation "because they are 'calculated to confuse the enemy, and the court,'" to mask some aspect of the case to the prejudice of an opponent. *Id.* "Such a pleading is never plain because it is impossible to comprehend which specific factual allegations the plaintiff intends to support which of his causes of action, or how they do so." *Est. of Bass v. Regions Bank, Inc.*, 947 F.3d 1352, 1358 (11th Cir. 2020). Moreover, they "waste scarce judicial resources, inexorably broaden the scope of discovery, wreak havoc on appellate court dockets, and undermine the public's respect for the courts." *Barmapov*, 986 F.3d at 1324. Courts thus "have 'little tolerance' for them." *Id.*

The Eleventh Circuit has identified four rough categories of shotgun pleading, two of which are relevant here. *See id.* at 1324-25. The first type is a complaint with multiple counts that adopt and incorporate allegations *en masse*—including those contained within previous counts—causing uncertainty as to which factual allegations support which claims. The second type is a complaint "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action." *Id.* Ultimately, "[t]he unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland*, 792 F.3d at 1323.

Plaintiffs' complaint implicates the first category of shotgun pleading by, in each separate count, "realleg[ing] and incorporat[ing] by reference the relevant allegations contained in the preceding paragraphs, as if fully set forth herein." Doc. 1, ¶¶ 121, 134, 143, 151, 158, 167. Though this language varies slightly from the classic shotgun complaint formulation—which adopts *all*

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preceding allegations, regardless of their purported relevance—it offers no more clarity. Both Defendants and the Court still face the onerous task of sifting through Plaintiffs' 71-page, 173-paragraph complaint to "determin[e] which fact(s) are relevant to which count(s)." *Dugas v. 3M Co.*, Case No: 3:14-cv-1096-J-39JBT, 2014 WL 12618701, at *1 (M.D. Fla. Nov. 20, 2014) (rejecting *sua sponte* proposed amended complaint that incorporated "by reference … all relevant allegations" as impermissible shotgun complaint); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1359 n.9 (11th Cir. 1997) ("[A] reader of the complaint must speculate as to which factual allegations pertain to which count.").[4] It also remains possible that each count incorporates all or some of the counts that came before (a reader can only guess whether Plaintiffs consider allegations within preceding counts to be "relevant"), resulting in the last count being some "combination of the entire complaint." *Weiland*, 792 F.3d at 1321. Moreover, determining which allegations are relevant becomes even more difficult when large swaths of the complaint aren't relevant at all.

To that point, Plaintiffs' complaint also implicates the second category of shotgun pleading by alleging many "conclusory, vague, and immaterial facts" that don't align with their claims. *Id.* at 1322. Most prominently, it levels accusations of racial discrimination throughout—in varying degrees of directness—despite not raising any claim to which race is relevant. *See, e.g.*, Doc. 1,

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[4] For instance, Plaintiffs' Count III specifically identifies only the "Payment and Gift Provisions" as "unconstitutionally vague laws," without reference to any other provisions of SB1. Doc. 1, ¶ 146. But a preceding section of the complaint titled "SB 1's Vague Provisions Do Not Sufficiently Protect Disabled, Blind, or Low Literacy/Illiterate Voters," *id.* at 48, criticizes the clarity of the Submission Restriction, Prefilling Restriction, and the Disability Provision, in addition to the "Payment and Gift Provisions," *id.* ¶¶ 106-114. An even earlier section about "Vague and Overbroad Provisions," *id.* at 38, takes issue with the word "submit," *id.* ¶ 86, which first appears in § 17-11-4(a)(1). Have Plaintiffs alleged that virtually the entirety of SB1—from subsection (a) to (e)—is incomprehensible? Readers are left to speculate.

¶¶ 1, 3, 5, 36-45, 51, 87, 97-98, 104-05.[5] Similarly, discriminatory intent or impact (whether racial or otherwise) is not relevant to any of Plaintiffs' claims, rendering wholly unnecessary any discussion of Alabama's history or the legislative history of the challenged provisions. *See, e.g.*, *id.* ¶¶ 36-61 (Sections I and II of Plaintiffs' "Factual Allegations" starting at page 22). "A substantial number" of voters protected by SB1 surely "are Black or Latino," *id.* ¶ 87, but they share in the same free speech rights and disability voting protections enjoyed by *all* voters—regardless of race. Conclusory factual and legal allegations also abound. *See, e.g.*, *id.* ¶ 80 (asserting that the statute criminalizes "core political speech, noncommercial expressive conduct, and conduct which impacts the right to vote"). Any of these categories of problematic allegations alone would warrant striking Plaintiffs' complaint as a shotgun pleading, let alone all of them together.

The sheer scope of Plaintiffs' complaint compounds these problems. The document consists of 71 pages with 173 separately numbered paragraphs (not counting the prayer for relief). It names 44 separate defendants, 43 of whom Plaintiffs did not need to sue to get the relief they sought. Indeed, Plaintiffs quickly agreed to voluntarily dismiss all 42 of the district attorney defendants. The only defendant necessary to enjoin criminal enforcement of Alabama law is the Attorney General. *See Doe v. Pryor*, 344 F.3d 1282, 1287 (11th Cir. 2003) (citing *Graddick v.*

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[5] Racializing a case without a race-based claim is not a new strategy for at least several of Plaintiffs' attorneys. *See Hudson v. Ivey*, SC-2022-0836, 2023 WL 2620607, at *6-8 (Ala. Mar. 24, 2023) (Mitchell, J., concurring) ("[R]epeated references to [race, sex, and gender identity] characteristics are made throughout [plaintiff's] filings in this case, for no apparent reason other than to make an ideological point. I caution attorneys practicing in our courts not to repeat these tactics in future cases."). Further, Plaintiffs' assertion that "[a] direct line can be traced from" Jim Crow-era racial discrimination to SB1 cheapens the repugnant practices in "Alabama's history." *See* Doc. 1, ¶ 51. Moreover, their insinuation that "the right to vote" would be "an empty promise" for minority voters unless someone else provides, fills out, and submits their voter forms sends the demeaning message that minority voters lack the sophistication to participate in the democratic process. *See id.* ¶ 5.

Galanos, 379 So. 2d 592, 594 (Ala. 1980)); ALA. CODE § 36-15-14.[6] Moreover, Secretary Allen has no enforcement power here and thus is not even a proper defendant (let alone a necessary one). *See infra* Section IV.B. Adding numerous unnecessary defendants imposes significant burdens on defense counsel, but also implicates other aspects of the case such as venue and potential conflicts for counsel or the Court.

In sum, Plaintiffs' complaint is more press release than pleading. Exacerbated by opaque claims, immaterial factual allegations, and the sheer breadth of the filing, the effort required to determine where Plaintiffs' legal claims begin and where their posturing ends requires exertion well beyond that tolerated by Rules 8(a)(2) and 10(b). It should not fall to Defendants and the Court to unravel Plaintiffs' mess. Instead, this Court should dismiss Plaintiffs' complaint as a shotgun pleading, with leave to refile a new complaint that cures the problems identified above.

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B. Plaintiffs Cannot Establish Standing To Sue Secretary Allen.

"[T]he irreducible constitutional minimum of standing contains three elements": (1) injury, (2) traceability; (3) redressability. *Defs. of Wildlife v. Lujan*, 504 U.S. 555, 560 (1992). Plaintiffs cannot establish that their alleged injury is either traceable to or redressable by Secretary Allen.

Starting with traceability, "the relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). Plaintiffs frame their alleged injury as fear of prosecution; indeed, the injunctive relief sought is to prohibit "enforcing the Challenged Provisions of SB1." Doc. 1, p. 69 ¶ B. But Plaintiffs' only allegations regarding Secretary Allen's

[6] Indeed, at least one of the organizations representing Plaintiffs have not always adhered to the view that they need all 42 district attorneys to get effective relief. *See, e.g.*, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-450-MHT-KFP (M.D. Ala. filed July 31, 2023) (ECF No. 1); *but see W. Ala. Women's Center v. Marshall*, 2:23-cv-451-MHT-KFP (M.D. Ala. filed July 31, 2023) (ECF No. 1) (marked as a related case and subsequently consolidated with *Yellowhammer Fund*).

connection to the challenged provisions is that he "has the authority, and indeed the obligation, to tell election officials how to implement election laws." *Id.* ¶ 35. Regardless, Secretary Allen has no authority to prosecute violations of the challenged provisions and thus Plaintiffs' alleged injury is not traceable to him. Even Secretary Allen's general rulemaking authority does not establish causation because Secretary Allen lacks any authority to force local election officials to follow those rules. *See Nat'l Fed'n of the Blind of Ala. v. Allen*, 661 F. Supp. 3d 1114, 1121-22 (N.D. Ala. 2023). Either way, Plaintiffs cannot show that their supposed injuries have been caused by any "allegedly unlawful conduct" of Secretary Allen.

Similarly, Secretary Allen cannot redress Plaintiffs' alleged injury because he has no authority to carry out the relief they request. Redressability requires considering whether a favorable decision significantly increases the likelihood that plaintiffs "would obtain relief that directly redresses the injury" alleged. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc). Additionally, "'it must be *the effect of the court's judgment on the defendant*'—not an absent third party—'that redresses the plaintiff's injury, whether directly or indirectly.'" *Id.* (quoting *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015)). Redressability thus cannot be established when another party bears responsibility for enforcing the challenged statute. *See Jacobson v. Fla. Sec'y of State,* 974 F.3d 1236, 1255 (11th Cir. 2020); *Nat'l Fed'n of the Blind of Ala.*, 661 F. Supp. 3d at 1122-23. Plaintiffs' request that this Court enjoin enforcement of the statute would accomplish nothing as to Secretary Allen given his lack of enforcement authority. Plaintiffs thus lack standing to sue Secretary Allen, and the claims against him should be dismissed for lack of subject-matter jurisdiction.

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C. SB1 Does Not Violate Plaintiffs' Free Speech Rights (Count I).

The First Amendment protects the freedom of speech and the press. SB1 abridges neither. Instead, it targets conduct; specifically, the ballot harvesting kind. While some "speechless" symbolic acts—like burning an American flag or draft card in protest, sleeping in a public place in protest, wearing a black armband to school in protest, or performing a "sit-in" in protest—enjoy a degree of First Amendment protection, ballot harvesting does not. No "particularized message," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), is communicated by a third party "distributing, ordering, requesting, collecting, completing, prefilling, obtaining, or delivering a voter's absentee ballot application." ALA. CODE §§ 17-11-4(d)(1), (2). Because these ballot harvesting actions are no more "inherently expressive" than paying applicants to request ballots, their regulation does not infringe First Amendment rights. *Rumsfeld v. Forum for Acad. & Inst. Rights ("FAIR")*, 547 U.S. 47, 66 (2006). But even assuming SB1 does, the law furthers important and substantial state interests sufficient to justify any "incidental restriction on alleged First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Plaintiffs fail to state a free speech claim as a matter of law. *See Sykes v. McDowell*, 786 F.2d 1098, 1103 (11th Cir. 1986) ("Whether certain activity or speech is protected by the first amendment is a question of law….").

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1. SB1 does not abridge speech.

SB1 does not abridge speech in any way. It does not directly target "the written or spoken word," *Johnson*, 491 U.S. at 406, nor does it "proscribe particular conduct *because* it has expressive elements," *id.*, nor does it indirectly burden "speech by restricting conduct that helps produce it," *Lichtenstein v. Hargett*, 83 F.4th 575, 587 (6th Cir. 2023) (citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). Because SB1 does not target speech in any way, it does not trigger strict scrutiny and Plaintiffs' claims premised on its abridgment of speech fail as a matter of law.

i. SB1 does not directly target political speech.

Plaintiffs do not allege that SB1 prohibits them from communicating, either orally or in writing, their "core message that Black voters and voters from other marginalized groups are fully entitled to participate in the political process." Doc. 1,¶ 5. But SB1 unquestionably does not suppress any actual speech. *Cf. Citizens United v. FEC*, 558 U.S. 310, 337 (2010) (holding unconstitutional a federal law "outright ban[ning]" corporations from funding "electioneering communications"). Plaintiffs remain free to "communicate the importance of voting through voter participation drives and civic engagement outreach." Doc. 1, ¶ 69. And "nothing in [SB1] in any way restricts the Plaintiffs' actual oral or written speech about the 'benefits' of absentee voting." *Lichtenstein*, 83 F.4th at 586. SB1 does not directly target speech.

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ii. SB1 is content neutral.

A State "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95 (1972). Such "content-based regulations of speech" must overcome "strict scrutiny." *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015); *see also Johnson*, 491 U.S. at 406 (A "law directed at the communicative nature of conduct must, like a law directed at speech itself" satisfy strict scrutiny). But Plaintiffs do not allege that SB1's proscriptions of specific ballot harvesting actions show "hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). For good reason—SB1's prohibitions are content neutral. For example, sending a voter a prefilled absentee ballot application is illegal no matter who does it or why it's done. *See* ALA. CODE § 17-11-4(b)(2). And submitting someone else's completed application (with limited exceptions) is prohibited whether as a favor, a paid service, an attempt to boost a party's absentee voter rolls, or anything in between. *See id.* § 17-11-4(c)(2). SB1 targets "action[s]," not "ideas." *R.A.V.*, 505 U.S. at 385. Plaintiffs' options dwindle further.

iii. SB1 does not indirectly target political speech.

Some laws will trigger strict scrutiny because they burden "actual oral or written speech by restricting conduct that helps produce it." *Lichtenstein*, 83 F.4th at 587. Asserting that SB1 is such a law, Plaintiffs rely on *Meyer v. Grant*, where the Supreme Court held unconstitutional a Colorado statute that criminalized paying people to circulate petitions. 486 U.S. 414, 416-17 (1988). The Court found that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22. To get there, the Court recalled that "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," and "that without solicitation the flow of such information and advocacy would likely cease." *Id.* at 422 n.5 (quoting *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)). Thus, forbidding the payment of petition circulators would have "the inevitable effect of reducing the total quantum of" the circulators' speech. *Id.* at 423. And even though the plaintiffs "remain[ed] free to employ other means to disseminate their ideas," the Court emphasized that the First Amendment protects advocacy as well as the right to select what the advocate "believe[s] to be the most effective means for so doing." *Id.* at 424.

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In the same vein, the Supreme Court has subjected to strict scrutiny a federal law that restricted monetary contributions to political campaigns, reasoning that the law necessarily "restrict[ed] the voices of people and interest groups who have money to spend." *Buckley v. Valeo*, 424 U.S. 1, 13, 17 (1976). And in *Buckley v. American Constitutional Law Foundation*, the Court applied strict scrutiny to a Colorado statute that required petition circulators to be registered voters because it "cut[] down the number of message carriers in the ballot-access arena without impelling cause." 525 U.S. 182, 197 (1999). Those laws throttled speech by targeting the resources needed to create speech: money and people.

Plaintiffs, in turn, allege that (1) "providing absentee ballot application assistance to promote civic engagement is core political speech," Doc. 1, ¶¶ 5, 73, 127; (2) "absentee ballot activities are characteristically intertwined with informational and persuasive speech," *id.* ¶¶ 74, 125; and (3) SB1 "diminishes the effectiveness of [their] speech," *id.* ¶¶ 68-69. These allegations do not trigger strict scrutiny. *Lichtenstein v. Hargett* from the Sixth Circuit shows why.

In *Lichtenstein*, plaintiffs brought a free speech challenge against a Tennessee law making "it a crime for anyone other than election officials to distribute the State's official form for applying to vote absentee." 83 F.4th at 579. The Sixth Circuit affirmed the dismissal of the complaint on the pleadings, holding that Tennessee's law prohibits "conduct, not speech," and thus did not encroach upon First Amendment rights. *Id.* While accepting that "the Plaintiffs' underlying get-out-the-vote activities—that is, their speech to convince voters to vote absentee—qualifies as 'core political speech,'" the court rejected the idea that restricting distribution of absentee ballot applications "in any way restricts the Plaintiffs' actual oral or written speech about the 'benefits' of absentee voting." *Id.* at 586. Unlike in *Meyer*, reasoned the court, where Colorado targeted the money used "to create oral speech," Tennessee targets the distribution of a form, which is not "something that the Plaintiffs use to speak." *Id.* at 586.[7]

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The *Lichtenstein* court rejected a second *Meyer* argument that strict scrutiny applies whenever a law bans conduct that "is 'intertwined' with or 'involves' … actual political speech." *Lichtenstein*, 83 F.4th at 586. Such an "amorphous" test, reasoned the court, would "call into doubt many of the Supreme Court's expressive-conduct cases because conduct often accompanies

[7] The court noted, in contrast, that if "Tennessee barred the Plaintiffs from paying their employees to promote absentee voting, they may have a strong case for strict scrutiny." *Lichtenstein*, 83 F.4th at 587. Neither Tennessee's nor Alabama's law prohibits Plaintiffs from "host[ing] voter participation drives and promot[ing] absentee voting." Doc. 1, ¶ 79.

speech." *Id.* at 587 (asking, to illustrate the problems with the test, "How much 'intertwinedness is necessary? How is it measured?"). Further, *Meyer* teaches that the appropriate question is whether the regulation of conduct "burdens" speech by inevitably "reducing the total quantum of it," not whether it is "'intertwined' with actual speech." *Id.* at 586-87. The *Lichtenstein* plaintiffs did not allege that the distribution ban would "have any 'effect' on the 'quantum' of their oral or written speech encouraging absentee voting." *Id.* at 586. Thus, the law did not elicit strict scrutiny. *Id.*

Finally, the *Lichtenstein* court refused to apply strict scrutiny despite the plaintiffs' lament that the law would make "it harder to achieve their *bottom-line goal* of increasing absentee voting," 83 F.4th at 587—in other words, that the law "diminishe[d] the effectiveness of [their] speech," Doc. 1, ¶¶ 68-69. The court found no support for this theory in Supreme Court precedent, *Meyer* notwithstanding. The rule in *Meyer* that the First Amendment protects the right "to select what [one] believe[s] to be the most *effective* means" "to advocate [one's] cause," 83 F.4th at 424 (emphasis added), "applies only to laws that target speech," *Lichtenstein*, 83 F.4th at 588. It simply reiterates that a State "may not avoid strict scrutiny for a speech restriction on the ground that it leaves open *other* ways to convey a message." *Id.*[8] And an effects-based argument for strict scrutiny would have "no stopping point." *Lichtenstein*, 83 F.4th at 587. Myriad laws restricting conduct reduce the effectiveness of speech, like "[o]rdinary speed limits," which "increase the time it takes

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[8] *See also Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996) ("But *Meyer* does not require us to subject a state's initiative process to strict scrutiny in order to ensure that the process be the most *efficient* or *affordable*. Absent some showing that the initiative process substantially restricts political discussion of the issue [the plaintiff] is seeking to put on the ballot, *Meyer* is inapplicable.") (emphasis added).

speakers to travel in between venues and so reduce their speech's reach and its chances of achieving a desired result." *Id.* Such laws impose, if anything, an incidental burden on speech and do not trigger strict scrutiny.

Here, Plaintiffs echo the same arguments rejected in *Lichtenstein*. First, they allege that by banning ballot harvesting conduct, SB1 burdens their "core political speech" of "assisting a voter in filling out an absentee ballot application during a voter engagement event." Doc. 1, ¶¶ 70, 73, 82, 85. But prefilling, transporting, or completing someone else's ballot application is not "core political speech." And beyond that prohibited conduct, SB1 permits "[a]ny applicant [to] receive assistance in filling out the application as he or she desires." ALA. CODE § 17-11-4(b)(1); *see also infra* IV.G; *cf. Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 225 (M.D.N.C. 2020) (finding that North Carolina's interests in preventing fraud would justify its criminalization of assisting another voter complete his absentee ballot application). More fundamentally, SB1 does not limit the supply of money (*Meyer* and *Buckley*) or people (*American Constitutional Law Foundation*) used by Plaintiffs to create "core political speech." *Id.* at 586. Those resources remain untouched. For example, unlike money used to fund a petition circulator's speech, distributing a prefilled application or submitting another voter's completed application do not create speech. *Compare Meyer*, 486 U.S. 422-23, *with* ALA. CODE. §§ 17-11-4(b)(2), (c)(2). And while the Payment and Gift Prohibitions target money, they do not target money *used for speech* (like in *Meyer*), but rather money used for ballot harvesting *conduct*.

Further, Plaintiffs' general allegations that their "absentee ballot activities are characteristically intertwined with informational and persuasive speech" are insufficient to trigger strict scrutiny, Doc. 1, ¶¶ 74, 125, because they do not plausibly allege that SB1 would "reduc[e] the total quantum" of their actual speech. *Meyer*, 486 U.S. at 423. And because SB1 targets conduct, not

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speech, Plaintiffs' allegations that the law "diminishes the effectiveness of [their] speech," fall flat. Doc. 1, ¶¶ 68-69; *see Lichtenstein*, 83 F.4th at 587. Were it otherwise, then paying voters to hand over their ballot applications would implicate the payor's free speech rights. That is not the law.

In sum, SB1 is a content-neutral law crafted to prohibit and deter ballot harvesting *conduct*. Plaintiffs remain as free today as they were before SB1 was enacted to educate voters one-on-one, encourage them to vote absentee, guide voters through the absentee ballot application process, and generally spread the "good news" about voting absentee. Because SB1 does not target speech in any way, it does not trigger strict scrutiny and Plaintiffs' claims premised on its abridgment of speech fail as a matter of law.

2. SB1 does not abridge expressive conduct either.

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Laws directly burdening speech, proscribing conduct because of its expressive elements, or targeting the resources used to create speech all trigger strict scrutiny. *Supra* Section IV.C.1. SB1 is not one of those laws. Nevertheless, Plaintiffs allege that SB1 restricts "inherently expressive conduct," *FAIR*, 547 U.S. at 66; if so, SB1 must satisfy the "relatively lenient standard" provided in *United States v. O'Brien* and *Texas v. Johnson*. Under that test, conduct qualifies as "inherently expressive" if (1) the actor intended "to convey a particularized message" and (2) "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404, 407.[9] At this stage of the proceedings (at which the complaint's allegations must

[9] In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court commented that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock," etc. 515 U.S. 557, 569 (1995). The Courts of Appeals are split regarding the effect *Hurley*'s statement had upon the *O'Brien* test. *See Cressman v. Thompson*, 798 F.3d 938, 955-56 (10th Cir. 2015) (collecting cases). The Eleventh Circuit has attempted to reconcile the two by asking whether "the reasonable person would interpret [the conduct] as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004). *But see Church*

be taken as true), Defendants do not dispute that Plaintiffs' allegations would satisfy the first element. But Plaintiffs have not plausibly alleged that their ballot harvesting conduct communicates even some message to the reasonable viewer.

Nothing banned by SB1 is inherently expressive. Plaintiffs generally allege that their "absentee voter assistance activities are … reasonably understood as promoting civic participation, generally, and the utilization of inclusive methods of voting, including absentee voting, specifically." Doc. 1, ¶ 75; *see also id.* ¶¶ 129-30. Maybe so, but nowhere do Plaintiffs allege that any *specific conduct* prohibited by SB1 exhibits a great likelihood of being understood by a reasonable viewer as communicative. For example, Plaintiffs fail to identify the message supposedly understood by the recipient of a blank or pre-filled absentee ballot application or by a voter whose application was completed, collected, and submitted by a third party. *See* ALA. CODE § 17-11-4(b)(2), (c)(2).[10] If an Alabama resident opened his mailbox to find only an absentee ballot application, the message conveyed by the piece of paper would be entirely unclear. Does it mean he's eligible to vote absentee, that he has a legal obligation or civic duty to vote, that voting absentee is preferable to voting in person, or that the mailer simply had the wrong address?

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As other federal courts have recognized, the sort of conduct SB1 prohibits is unlikely to be understood as conveying any message. *See, e.g.*, *Knox v. Brnovich*, 907 F.3d 1167, 1180 (9th Cir. 2018) (concluding that the plaintiff failed to demonstrate that "the conduct of collecting ballots

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of Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 205 n.6 (2d Cir. 2004). Defendants proceed under binding circuit precedent while preserving their right to challenge its correctness on appeal, if necessary.

[10] It "is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies," and Plaintiffs have not met that obligation here. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Plaintiffs' complaint contains no factual allegations going to the five contextual factors identified by the Eleventh Circuit as relevant when conducting the "inherently expressive conduct" inquiry. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1242-43 (11th Cir. 2018).

would reasonably be understood by viewers as … conveying a symbolic message of any sort"); *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1057, 1084 (9th Cir. 2016) (same); *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1234-35 (N.D. Okla. 2020) ("completing a ballot request for another voter, and collecting and returning ballots of another voter, do not communicate any particular message"); *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1300-01 (N.D. Ga. 2020) ("delivering absentee ballot requests is not expressive conduct"); *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 767 (M.D. Tenn. 2020) ("the recipient [of an absentee-ballot application] most likely would perceive it as a mere means of facilitating the (absentee) voting the speaker has been encouraging"); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013) (regulating "the receipt and delivery of completed voter-registration applications" does "not in any way restrict or regulate … any communicative conduct"); *Voting for Am. v. Andrade*, 488 F. App'x 890, 898 (5th Cir. 2012) (same); *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008) ("the collection and handling of voter registration applications is not inherently expressive activity").

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To hurdle this wall of caselaw, Plaintiffs try to color all of their relevant conduct as expressive by conflating it with the "speech that accompanies it" at their voter participation drives. *FAIR*, 547 U.S. at 66. Although "context matters," *Fort Lauderdale*, 901 F.3d at 1237, "the drives themselves cannot be amalgamated into protected 'expressive conduct,'" *Steen*, 732 F.3d at 391. The "conduct itself" must create Plaintiffs' expression. *FAIR*, 547 U.S. at 66. If "explanatory speech is necessary for the reasonable observer to perceive a message from the conduct," then the conduct, by definition, is not *inherently* expressive. *Fort Lauderdale*, 901 F.3d at 1244 (emphasis omitted). Put simply, "non-expressive conduct does not acquire First Amendment protection whenever it is combined with another activity that involves protected speech." *Steen*, 732 F.3d at 389.

Here, Plaintiffs repeatedly lump together their non-expressive ballot harvesting conduct with their voter participation drives involving protected speech. *See* Doc. 1, ¶¶ 20, 25, 69, 70, 77, 131. But without "explanatory speech," the "point" of distributing prefilled or blank absentee ballot applications would not be "overwhelmingly apparent" to the viewer. *FAIR*, 547 U.S. at 66 (quoting *Johnson*, 491 U.S. at 406). In other words, the recipient of an application has "no way of knowing" why he was given the application without some further explanation. *Id.* Plaintiffs do not allege otherwise. *Cf.* Doc. 1, ¶¶ 75, 139. Because their allegations attribute no communicative value to their discrete ballot harvesting activities, they fail to state a claim under the First Amendment. This must be so, because if "combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *FAIR*, 547 U.S. at 66.

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3. Even if SB1 imposes some incidental burden on Plaintiffs' First Amendment rights, it easily meets the applicable and "relatively lenient"* O'Brien *standard.

Assuming Plaintiffs have sufficiently alleged that their ballot harvesting conduct is inherently expressive, they still fail to state a claim under the operative *O'Brien* test.[11] In contrast to a law targeting speech, a law imposing an incidental burden on First Amendment freedoms must satisfy only *O'Brien*'s "less demanding" standard, *Johnson*, 491 U.S. at 407, which asks whether

[11] Although the *Anderson-Burdick* balancing test is often employed in election law challenges, it does not apply here because Plaintiffs do not bring voting rights or ballot access claims. Rather, they bring a pure free speech claim, which "leaves no room for balancing." *Lichtenstein*, 83 F.4th at 593. The Eleventh Circuit has never extended the *Anderson-Burdick* test to a free speech claim like Plaintiffs' here, opting instead to employ it in the "ballot access" and "voting rights" contexts. As the Sixth Circuit recognized, the "*Anderson-Burdick* balancing test has historically applied to claims that an election law interferes with the right of *voters* to vote or *political parties* to associate with voters—not the right of *speakers* to speak." *Id.* at 590-91 (collecting Supreme Court cases). *See also, e.g.*, *Bell v. Sec'y of State for Ga.*, 2024 WL 1299927, at *7 (11th Cir. 2024) (ballot access); *Curling v. Raffensperger*, 50 F.4th 1114, 1121 (11th Cir. 2022) (right to vote). But even if *Anderson-Burdick* were to apply, Plaintiffs' allegations fail to plausibly show that SB1 would fail it for the same reasons discussed in this section.

the law "furthers an important or substantial governmental interest" and "is no greater than is essential to the furtherance of that interest."[12] *O'Brien*, 391 U.S. at 377. SB1 easily satisfies this test.

An "incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985); *accord FAIR*, 547 U.S. at 67; *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 762-63 (11th Cir. 2011) (en banc). This does not require a "least restrictive means analysis." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 301-02 (2000) (plurality op.); *accord Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994). And "proposed alternative methods" of pursuing these interests "are beside the point." *Rumsfeld*, 547 U.S. at 67.

SB1 furthers several "general interests that are obviously important," *Lichtenstein*, 83 F.4th at 597, including combatting voter fraud, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194 (2008) (lead opinion), maintaining "public confidence in the integrity of the electoral process," *id.* at 197, and "protecting voters from confusion and undue influence," *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *see also Jenness v. Fortson*, 403 U.S. 431, 442 (1971). No "evidentiary showing" is required to establish that the harms combatted by SB1 are "real." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 299 (2000) (plurality op.). *Contra* Doc. 1, ¶ 53 (alleging "no evidence

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[12] This test only applies "to those cases in which 'the governmental interest is unrelated to the suppression of free expression.'" *Johnson*, 491 U.S. at 407 (quoting *O'Brien*, 391 U.S. at 377). As explained in Section IV.C.2 *supra*, SB1 is a content neutral regulation of conduct, not expression. Alabama's interests in regulating ballot harvesting conduct are entirely "unconnected to expression." *Id.* Further, the State must have the "constitutional power" to enact the law. *O'Brien*, 391 U.S. at 377. Alabama has the legitimate authority to regulate federal and state elections by identifying who may vote absentee, creating the process for doing so, and imposing sanctions for violations. *See Boyd v. Thayer*, 143 U.S. 135, 161 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.").

of any widespread voter fraud attributable to absentee voting or so-called ballot harvesting"). Indeed, "the Supreme Court has already held that deterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud." *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1334 (11th Cir. 2021) ("*GBM*") (citing *Crawford*, 553 U.S. at 192-97). And States 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.*, 141 S. Ct. 2321, 2348 (2021) ("[A] State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders."). Nonetheless, there is extensive evidence of voter fraud—including that involving absentee ballots, absentee ballot applications, and ballot harvesting activities—both in Alabama and other States. *See supra* Section II.B. These interests are "unquestionably relevant," *Crawford*, 553 U.S. at 191, to Alabama's efforts "to preserve the basic conception of a political community," *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973), by promoting "fair," "honest," and orderly elections. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

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SB1 "add[s] to the effectiveness" of achieving these interests by fortifying the absentee ballot application process. *Rumsfeld*, 547 U.S. at 67. Mass distribution of blank or prefilled absentee ballot applications, like mass submission of completed applications, "could cause mass confusion" and "increase[] the risk of fraud." *Lichtenstein*, 83 F.4th at 600; *see also VoteAmerica v. Raffensperger*, —F. Supp. 3d.—, No. 1:21-cv-01390-JPB, 2023 WL 6296928, at *3-4, 12 (N.D. Ga. Sept. 27, 2023) (cataloguing and weighing voter complaints regarding confusion and alarm caused by receiving prefilled or multiple absentee ballot applications). It stands to reason, then, that just like "[l]imiting … who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence," a State might also limit who handles

applications for those ballots. *Brnovich*, 141 S. Ct. at 2347 (citing *Report on the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections* 46 (Sept. 2005)); *see also Feldman*, 840 F.3d at 1084. Alabama is just one of many states to regulate the preparation and handling of absentee ballot applications in the interests of election integrity and voter protection. In Tennessee, it is a felony for anyone other than an election official to "give[] an application for an absentee ballot to any person." TENN. CODE ANN. § 2-6-202(c)(3). Other States prohibit the distribution of prefilled absentee ballot applications to voters. O.C.G.A. § 21-2-381(a)(1)(C)(ii); S.D. CODIFIED LAWS § 12-19-1.3; IOWA CODE §53.2(2)(d); TEX. ELECTION CODE ANN. § 276.016(a)(4). For over two decades in Texas, it has been unlawful for any person to offer to buy or sell a "signed application for an early voting mail ballot," TEX. ELECTION CODE ANN. § 276.010(a).

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Because the integrity of the electoral process "would be more exposed to harm without the" ballot harvesting "prohibition than with it, the ban is safe from invalidation under the First Amendment." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297 (1984). Plaintiffs fail to state a free speech claim under the First Amendment as a matter of law.

D. SB1 Does Not Violate Plaintiffs' Right To Associate (Count II).

The Supreme Court has interpreted the First Amendment to protect the "right of expressive association" because the rights enumerated by the First Amendment—speech, religion, petition, and assembly—would mean little if citizens could not exercise those rights together. *See FAIR*, 547 U.S. at 68; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). So, naturally, it protects the ability to associate for the "purpose" of engaging "in activities independently protected by the First Amendment." *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). "The Supreme Court has described the freedom of association as the exercise of one's right to choose one's associates." *O'Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045, 1054 (11th Cir. 2022) (cleaned up).

"[S]ignificant" interference with the ability to exercise First Amendment rights with the associates of one's choosing violates the right. *See N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)); *Lyng v. Int'l Union*, 485 U.S. 360, 366, 367 n.5 (1988). Take a few examples. It may violate the right to require a group to accept a member when associating with that member forces the group to advance views contrary to its own, *see Boy Scouts v. Dale*, 530 U.S. 640, 654 (2000), to punish someone based on membership, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982), to require a group to disclose its associates, *see Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101-02 (1982), or to prevent a group from seeking out new associates, *see NAACP v. Button*, 371 U.S. 415, 419, 431 (1963). In those circumstances, the government limits association in a way that creates "First Amendment concerns about affecting the group's ability to express its message." *See FAIR*, 547 U.S. at 69.

Plaintiffs fail to state an expressive association claim because SB1 does not significantly burden group expression or group association. *Dale*, 530 U.S. at 648. To the contrary, SB1 allows Plaintiffs to create and convey speech while associating with anyone willing to join.

Plaintiffs nonetheless allege that SB1 violates their expressive associational rights in a few ways. In their view, "absentee ballot application assistance is a crucial means of associating with their primary constituencies" and "a means" to promote "the importance of voting." Doc. 1, ¶ 76; *see id.* ¶ 138. They believe that the bans on distributing prefilled absentee ballot applications and submitting a third-party's application "prohibit entire forms of association." *Id.* ¶ 77; *see also id.* ¶ 139. And, they continue, the prohibitions on paying or providing gifts to those engaged in other types of assistance limit their ability to associate with the community and voters because Plaintiffs

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pay their employees, reimburse volunteers, and provide materials to voters. *Id.* ¶¶ 78, 139. Similarly, they allege that if SB1 limits their ability to associate with voters, it necessarily limits their ability to associate with each other to assist voters. *Id.* ¶¶ 79, 139.

Plaintiffs have failed to state a claim because SB1 does not impose a "significant" burden on their associational rights. *See N.Y. State Club*, 487 U.S. at 13; *Lyng*, 485 U.S. at 366, 367 n.5 (1988). Indeed, SB1 is not a limitation at all. The freedom of association allows them to join with others of their choosing to participate in "activities protected by the First Amendment." *Roberts*, 468 U.S. at 618; *see McCabe*, 12 F. 3d at 1563. SB1 does not tell Plaintiffs whom they may associate with to exercise their rights. It instead instructs Plaintiffs that, while they are associating with others of their choice, they may not engage in certain forms of non-expressive conduct. Thus, SB1 does not interfere with their associational rights. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (freedom of association does not protect right to associate for activities not protected by First Amendment); *see also Claiborn Hardware*, 458 U.S. at 933.

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Even if SB1 works some incidental burden on Plaintiffs' associational rights, it is far short of the level that raises "concerns" about Plaintiffs' "ability to express" their message. *FAIR*, 547 U.S. at 69. SB1 does not create a "likelihood of substantial restraint" on Plaintiffs' association by forcing them to disclose their membership lists to those who have shown them "hostility." *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). SB1 does not flat-out bar Plaintiffs from "solicit[ing]" new "political association[s]." *See Button*, 371 U.S. at 419, 431. Nor does it punish anyone for joining their groups or attending their events. *See Claiborn Hardware*, 458 U.S. at 888-89. SB1 "does not require" Plaintiffs to "alter or abandon" any of their "activities that are protected by the First Amendment." *Rotary Club*, 481 U.S. at 548. It "does not require them to abandon their basic goals," voter education efforts, or voter registration drives. *Id.* SB1

doesn't even interfere with Plaintiffs' ability to engage in the vast majority of their absentee application assistance, such as providing detailed instructions, reviewing applications for correctness, photocopying IDs, or sharing a pen. Doc. 1, ¶¶ 14; 19; 25; *see supra* IV.C.3.

In this light, Plaintiffs' allegations do not permit an inference that their circumstances under SB1 are comparable to those of a group barred from advertising their events, forced to publish membership lists, or whose associates are fined for being members. As the Sixth Circuit concluded in *Lichtenstein*, Plaintiffs' "amorphous theory interprets the right of association more broadly than the Supreme Court's cases permit." 83 F.4th at 602. Because SB1 does not significantly affect Plaintiffs' expressive association, they fail to state a claim as a matter of law.

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E. SB1 Is Not Unconstitutionally Vague (Count III).

Plaintiffs allege the so-called "Payment and Gift Provisions"—ALA. CODE § 17-11-4(d)(1)-(2))—are "unconstitutionally vague laws because they regulate a sweeping amount of noncommercial speech and constitutionally protected expressive conduct." Doc. 1, ¶ 146. Because SB1 does "not define 'payment,' 'gift,' or 'third party,'" Plaintiffs allege (d)(1) and (d)(2) impede "all" of their "absentee ballot application activities in Alabama[.]" Doc. 1, ¶ 147. They relatedly assert that they lack "reasonable notice of what constitutes prohibited conduct." *Id.* ¶ 148. Even with their shotgun complaint taking aim at every clause in SB1, *supra* Section IV.A, Plaintiffs fail to identify any "confusing and misleading terms," *contra* Doc. 1, ¶ 149.

Plaintiffs muddle their causes of action by invoking the First Amendment as an independent source of protection against "the enactment of unconstitutionally vague restrictions." Doc. 1, ¶ 144. However, "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304

(2008).[13] The Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Gonzales v. Carhart*, 550 U.S. 124, 148–49 (2007) (quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). Yet, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989). SB1 therefore is sufficiently clear if it provides citizens "of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). The Court "has made clear that scienter requirements alleviate vagueness concerns." *Gonzales*, 461 U.S. at 149.

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Carter, Inc.*, 486 U.S. 281, 291 (1988). Any arguments about arbitrary enforcement "are somewhat speculative" at this point. *Gonzales*, 550 U.S. at 150 "This is a preenforcement challenge, where 'no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct].'" *Id.* at 150 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 503 (1982)). Accordingly, with no evidence available, Plaintiffs' vagueness challenge can be rejected as a matter of law based on statutory text alone.

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As previously explained (*supra* Section IV.C), SB1 prohibits *conduct*, not speech. Specifically, subsections (d)(1) and (d)(2) (hereinafter the "Compensation Prohibition") prohibit third-party transactions in which someone pays an agent (the third party) for specified harvesting

[13] Although the Fifth Amendment's Due Process Clause only applies to the federal government, the Fourteenth Amendment likewise contains a Due Process Clause and does apply to the States.

conduct. Plaintiffs find vagueness in the Compensation Prohibition by reading its terms in isolation devoid of any context and presenting hypothetical edge cases. But citizens do "not read words or strings of them in isolation[]" as Plaintiffs have, but instead "in context." *Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1267 (11th Cir. 2006). And "what renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306. The plain text puts citizens of ordinary intelligence on notice of the incriminating facts under the Compensation Prohibition: (1) taking specified actions toward a voter's absentee ballot application in return for compensation or (2) paying someone else to do the same.

The Compensation Prohibition consists of two subsections, which state the following:

> (d)(1) . . . it shall be unlawful for a *third party to knowingly receive a payment or gift for* distributing, ordering, requesting, collecting, completing, prefilling obtaining, or delivering *a voter's* absentee ballot application. . . .
> (d)(2) . . . it shall be unlawful for *a person* to knowingly *pay or provide a gift to a third party to* distribute, order, request, collect, prefill, complete, obtain, or deliver *a voter's* absentee ballot application. . . .

ALA. CODE § 17-11-4(d)(1)-(2).

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By implausibly splitting the Compensation Prohibition into separate "Payment" and "Gift" provisions, Doc. 1, ¶¶ 65–66, Plaintiffs obscure the obvious meaning of the phrases "third party" and "payment or gift" when read in context. The structure of the Compensation Prohibition confirms its twin provisions address two sides of the same coin: the third-party harvesting of voters' applications in return for compensation. Just as (d)(1) disallows "a *third party*" from "knowingly *receiv[ing]* a payment or gift for" specified conduct with a voter's application, (d)(2) disallows anyone from "knowingly *pay[ing] or provid[ing]* a gift to [that] third party to" engage in that same specified conduct. The consistent use of the word "third party" establishes the "third party" as the payee-harvester. A statutory definition for the term "third party" is unnecessary

because in both provisions the third-party harvester is plainly someone who is being paid to harvest an absentee ballot application.

The phrase "payment or gift" is equally self-explanatory. It refers to something of value (whether a $100 bill or $100 gas card) provided or received in exchange for enumerated harvesting services. The verb "pay" ordinarily means to "engage for money" or "to give in return for goods or service." *Pay*, Merriam-Webster, Merriam-Webster.com (May 16, 2024), https://www.merriam-webster.com/dictionary/pay, (definitions 1b & 2a). Here, "service[s]," not goods, are being paid for, and the services are identical in both provisions: "distributing, ordering, requesting, collecting, completing, prefilling, obtaining, or delivering a voter's absentee ballot application." (d)(1); *accord* (d)(2). Sandwiched between the noun "payment" and the enumerated harvesting services is the term "gift,"[14] which also refers to a thing of monetary value—not just cash—that is given *to* compensate *for* the specified services. *See Yates v. United States*, 574 U.S. 528, 543 (2015) ("[A] word is known by the company it keeps."). In other words, "payment or gift" covers any form of compensation.

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Read together (and coherently), the "payment or gift" provisions criminalize compensated harvesting transactions. Specifically, they prevent any "person" from knowingly providing compensation to a third party—and likewise prevent that third party from knowingly receiving such compensation—for certain conduct: "distributing, ordering, requesting, collecting, completing, prefilling, obtaining, or delivering a voter's absentee ballot application." ALA. CODE § 17-11-4(d)(1). The text and structure of these provisions shows that the "payment or gift" provisions (though broad) are not vague.

[14] ALA. CODE §36-25-1(34) provides the following definition for "thing of value": "a. Any gift, benefit, favor, service, gratuity, . . . or honoraria or other item of monetary value."

The explicit *mens rea* requirements in the Compensation Prohibition alleviate any possible vagueness concerns. That the payor or payee must "knowingly" enter into the harvesting transaction "narrow[s] the scope of the Act's prohibition and limit[s] prosecutorial discretion." *Gonzales*, 550 U.S. at 149. Consider Plaintiffs' "jail and prison-staff" hypothetical. Doc. 1, ¶ 147. Plaintiffs suggest that a prison guard or administrator who hands an inmate an application and subsequently collects his salary for working at the prison has received a payment for distribution of an application. *Id*. But that prison staffer has not partaken in a quid pro quo involving harvesting; rather, he has received a general salary for professional services unrelated to absentee voting.[15] And he certainly hasn't entered a ballot harvesting transaction "knowingly." *See Ex parte Phillips*, 287 So.3d 1179, 1196 (Ala. 2018) (quoting ALA. CODE § 13A-2-2(2)) ("A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists."). Even during election season, no one would say the Alabama prison staffer is paid to provide absentee ballot assistance for eligible voters who are incarcerated. By contrast, Plaintiffs' staff are admittedly paid to go into prisons to specifically provide "absentee application assistance" to "incarcerated voters," and to the extent "this work" involves doling out applications to inmates, it is prohibited. Doc. 1, ¶ 26. Put simply,

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[15] In statutes, "the word person includes corporations and other entities, but not the sovereign." SCALIA & GARNER, READING LAW 273. So, when the entity paying third parties to distribute absentee applications is a State or Federal government, (d)(2) would not apply. And, of course, election officials are not third parties; they (along with the voter) are necessarily party to the voting process. Moreover, under Alabama law, corporate criminal liability exists only when the criminal statute explicitly provides for it. *State v. St. Paul Fire & Marine Ins. Co.*, 835 So. 2d 230, 233 (Ala. Crim. App. 2000). Because SB1 has not "specifically provided for corporate liability," Plaintiff organizations themselves cannot be prosecuted. *Id*.

a third-party harvester under (d)(1) must be "aware that his conduct is of that" quid-pro-quo "nature" to be criminally liable. *Ex parte Phillips*, 287 So.3d at 1196. The scienter elements distinguish the innocent jailer from the culpable harvester.

As alluded to above, Plaintiffs invite confusion by presenting harvesting conduct as "voter assistance," but they ignore SB1's express recognition that any applicant who desires assistance in "filling out" their application may receive it, subject to the applicable signature and witnessing requirements. § 17-11-4-(b)(1) ("Any applicant may receive assistance in filling out the application as he or she desires, but each application shall be manually signed by the applicant . . . ."). Second, "any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by an individual of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." § 17-11-4(e). By allowing "require[d] assistance" from *"a* person of the voter's choice," rather than *any person* or *the person* of the voter's choice, subsection (e) and § 208 allow a disabled voter to obtain assistance from a broad array of people, save those categories the federal government or State have reasonably determined might exert undue influence. According to a natural reading of the statute, "ordinary people can understand what conduct is prohibited." *Kolender,* 461 U.S. at 357.

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Plaintiffs betray the clarity of the law by resorting to hypotheticals. But "litigants cannot argue that a law is vague based on how it might apply to a hypothetical scenario." *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1334 (M.D. Ala. 2019). Rather, "courts 'consider whether a statute is vague as applied to the particular facts at issue.'" *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)). Nonetheless, Plaintiffs assert that "providing gas money or stamps to submit an absentee ballot application[]" may run afoul of the "payment or gift" prohibition. Doc. 1, ¶ 147. Notably, this hypothetical doesn't identify any of the parties involved—the payor/donor,

the payee/donee, or actor who is submitting an application.[16] If the gas money or stamps are provided to staff members for them "to submit" voters' applications, then the conduct is prohibited under SB1's separate submission provision, regardless of compensation. *See* ALA. CODE § 17-11-4(c)(2). Though Plaintiffs present hypotheticals, "the mere fact that close cases can be envisioned" does not "render[] a statute vague." *Williams*, 553 U.S. at 305.

Finally, the Prefilled-Application and Submission Provisions are sufficiently clear without statutory definitions for the verbs "prefill," "distribute," and "submit." Doc. 1, ¶¶ 85–86.[17] As Plaintiffs acknowledge elsewhere in their shotgun complaint (*see, e.g.*, Doc. 1, ¶ 35), SB1 explicitly defines the three ways an absentee ballot application "may be submitted to the absentee election manager": delivery in person, by U.S. mail, or by commercial carrier. (c)(1)(a.)-(c.). Thus, a person *submits* an application when they either hand deliver or mail (through U.S. mail or commercial carrier) an application to an absentee election manager. Rather than covering an "amorphous amount of conduct," *contra* Doc. 1, ¶ 86, the submission restriction clearly bars a person from "dropping [other people's] applications off in the mailbox," ¶ 86, at UPS (or FedEx), or at an absentee ballot office, unless the voter is disabled and "requires" such "assistance," *see* ALA. CODE § 17-11-(e). The statute's use of the verb "distribute" is similarly straightforward. "Distribute" ordinarily means "to divide among several or many," "to spread out so as to cover something,"

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[16] State and Federal law already prevent Plaintiffs from paying people to vote. ALA. CODE § 17-17-34 ("It shall be unlawful for any person to pay or offer to pay, or for any person to accept such payment, either to vote or withhold his or her vote."); *see also* 18 U.S.C. § 597 (prohibiting persons from offering or soliciting "an expenditure" to vote). SB1 provides important additional protections against adjacent conduct that may lead to or enable concealment of vote buying and similar abuses.

[17] Defendants construe the incorporation of "all relevant allegations" in Count III as alleging the Submission and Prefilling Restrictions are vague. Count III does not specifically allege that all challenged provisions are unconstitutionally vague, though Plaintiffs' preliminary injunction motion does. *Compare* Doc. 1, ¶¶ 143–150 (alleging that only "the Payment and Gift Provisions" are vague), *with* Doc. 34-1, pp. 30–34 (arguing the "Challenged Provisions" are vague).

or "to give out or deliver, especially to members of a group." *Distribute*, Merriam-Webster, Merriam-Webster.com (Apr. 6, 2024), https://www.merriam-webster.com/dictionary/distribute (definitions 1, 2a, & 2b). Of course, "prefilled" means "filled in advance." *Prefilled*, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/prefilled (last accessed Apr. 8, 2024). Again, these words do not cover an "amorphous amount of activity," *contra* Doc. 1, ¶ 85; if a person (even a relative) fills out another voter's name and address on an application in advance of delivering that application to the voter, he has distributed a prefilled absentee ballot application. Plaintiffs may dislike this policy, but they cannot fairly say that it is unclear. Because Plaintiffs fail to plausibly allege that SB1 is unconstitutionally vague, Count III is due to be dismissed.

F. SB1 Is Not Unconstitutionally Overbroad (Count IV).

Plaintiffs' overbreadth claim relies heavily on their vagueness arguments. Doc. 1, ¶ 155 ("The threat of penalties for violations of SB 1's ambiguous and overbroad provisions will impermissibly chill or present the substantial risk of chilling Plaintiffs' protected speech and expressive conduct."); *id.* ¶ 157 ("SB 1's language is full of uncertainties and risk a degree of capricious enforcement that will make Plaintiffs' compliance potentially impossible"). Merging these "related yet distinct" doctrines,[18] Plaintiffs' Count IV could be interpreted as an "overbreadth from indeterminacy" claim. *Am. Booksellers v. Webb*, 919 F.2d 1493, 1505-06 (11th Cir. 1990).

But incorporating "indeterminacy" into the overbreadth inquiry does Plaintiffs no favors. *Supra* Section IV.E. "The first step in overbreadth analysis is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). The second is to determine whether the statute, so construed, "criminalizes a substantial amount of protected expressive activity." *Id.* at 297.

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[18] While a law that clearly prohibits a substantial amount of protected speech is overbroad but not vague, a statute that fails to define prohibited non-expressive conduct with sufficient clarity is vague but not overbroad. *Webb*, 919 F.2d at 1505.

To meet this burden, Plaintiffs must show " that SB1 "punishe[s] a 'substantial' amount of protected expression, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). And this they must do "from the text of the law and from actual fact." *Id.* at 122. Because "invalidation for overbreadth is strong medicine that is not to be casually employed," courts "vigorously enforce[] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292–93 (cleaned up) (citations omitted). Plaintiffs cannot clear that high bar.

SB1 prohibits specific nonexpressive conduct involving absentee ballot applications. With "the boundaries of the forbidden" harvesting conduct "clearly marked" by SB1, *Webb*, 919 F.2d at 1506 (cleaned up), Plaintiffs bear the burden to identify "real" and "substantial" overbreadth within them, *Broadrick*, 413 U.S. at 615.

Plaintiffs offer the bare assertion that SB1 is "unconstitutionally overbroad because it regulates a sweeping amount of noncommercial political speech and constitutionally protected expressive conduct." Doc. 1, ¶ 153. Setting aside the conclusory refrain about SB1 "criminaliz[ing] a sweeping amount of speech," *see e.g.*, Doc. 1, ¶ 80, Plaintiffs do not identify a *single* provision of SB1 that specifically addresses speech. "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Hicks*, 539 U.S. at 124 (2003). Recognizing SB1 does not regulate speech, Plaintiffs argue the prohibited conduct is "intertwined" with speech. Doc. 1 ¶¶ 74, 125, 138. Yet, if they cease trafficking applications entirely—still hosting meetings and demonstrations, distributing pamphlets and informational materials, or providing actual instructive assistance—the "total quantum of their oral or written" advocacy for absentee

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voting will remain unaffected. *Supra* Section IV.C. Plaintiffs' First Amendment overbreadth claim doesn't even pass go.

Plaintiffs' reliance on *Board of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 576 (1987), proves the point. There, the Supreme Court applied the overbreadth doctrine to an airport regulation that stated, "the Central Terminal Area at Los Angeles International Airport *is not open for First Amendment activities* by any individual and/or entity." *Id*. at 570–71 (emphasis added). Whereas that regulation purported to convert the airport into "a virtual 'First Amendment Free Zone,'" SB1 ensures Alabama is a Ballot Harvesting Free Zone—prohibiting conduct directed at official government forms that "might create problems" for the fair administration of absentee voting. *Id.* at 574. The airport authorities in *Jews for Jesus* offered a "vague limiting construction" deputizing them to draw "[t]he line between airport-related speech and nonairport-related speech." *Id*. at 576. In contrast to "airport-related" or election-related speech, giving out, gathering, or completing (other people's) absentee ballot applications is not protected expression, *Lichtenstein*, 83 F.4th at 579, and performing the steps necessary to vote absentee is not protected by the First Amendment. *See Hand v. Scott*, 888 F.3d 1206, 1211 (11th Cir. 2018) ("It is well established in [the Eleventh Circuit] that the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment."); *Thompson v. Alabama*, 293 F.Supp.3d 1313, 1327 (M.D. Ala. 2017) (concluding "the First Amendment does not guarantee the right to vote"). Because SB1, on its face, does not even "reach[] the universe of expressive activity" protected by the First Amendment, *Jews for Jesus*, 482 U.S. at 574, it cannot be facially invalid.

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Even assuming SB 1 reaches expressive conduct, any overbreadth would be insubstantial "judged in relation to the statute's plainly legitimate sweep." *Hicks*, 539 U.S. at 118. Plaintiffs can

argue otherwise only by dismissing "so-called 'ballot harvesting'" as a nonconcern., Doc. 1, ¶ 53, and by asserting Alabama elections are "already sufficiently" secure, *id.* ¶ 132. But these unfounded, conclusory assertions do not negate the legitimate sweep of SB1. It is uncontroversial that absentee ballots are an avenue for electoral abuse and indisputable that the absentee *application* is necessary for those abuses to occur. *See supra* Section II.B. SB 1, as a whole, "reduce[s] the risks of fraud and abuse in absentee voting by prohibiting '*third-party*' organizations, candidates, and political party activists" from requesting, obtaining, and submitting absentee ballot applications *on behalf of* voters who decide their political fate. *Building Confidence* at 46 (emphasis added). By reserving the steps of absentee voting to voters, SB 1's "plainly legitimate sweep" is broad and vital "to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992).

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As with the purported examples of vagueness, the alleged "overbreadth" of the "Submission and Prefilling Restrictions" comprises conduct that is either reasonably prohibited or clearly permissible. Beginning with the permissible, simply writing down another voter's name on an application is prohibited only if done prior to distributing the application to a voter who has neither input his own information nor obtained the application for himself. It is *pre*filling that is prohibited; not any filling at all. Indeed, "[a]ny applicant may receive assistance in filling out the application as he or she desires," subject to SB1's reasonable constraints as to how and from whom that assistance derives. These guardrails aim to ensure (at a minimum) "that every [absentee] vote is cast freely, without intimidation or undue influence." *Brnovich*, 141 S. Ct. at 2340. None of this chills expressive conduct; it's a bulwark against dubious ballot harvesting.

Taking aim at the Compensation Prohibition, Plaintiffs rely on token gifts to establish overbreadth. *E.g.*, Doc. 1, ¶ 153 (asserting the Compensation Prohibition "lacks any reasonable

bounds" because a stamp or sticker might be given "in exchange for" a service). It is doubtful whether anyone has ever knowingly provided or accepted a common "stamp or sticker" as compensation for a service. Indeed, Plaintiffs allege that they "give away stickers to voters" and volunteers alike, with no indication that the organizations offer or the volunteers receive stickers as compensation for particular services rendered. *Id.* ¶¶ 20, 72. The scenarios envisioned by Plaintiffs "demonstrate nothing so forcefully as the tendency of [the] overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." *Williams*, 553 U.S. at 301. Plaintiffs try to "conceive of some impermissible applications of" the Compensation Prohibition, *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984), identifying expressive gifts that could be compensatory. Doc. 1, ¶ 72. But "the existence of that exception"—say, the "Get Out The Vote" t-shirt knowingly provided and received as compensation for harvesting services—"would not establish that the statute is *substantially* overbroad." *Williams*, 553 U.S. at 303. Judged in relation to the statute's plainly legitimate sweep in curtailing voter fraud—which Plaintiffs refuse to even acknowledge—SB1's overbreadth would be insubstantial.

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Plaintiffs fail to plausibly allege that SB1 criminalizes a substantial amount of speech in relation to the statute's plainly legitimate sweep. Count IV is due to be dismissed.

G. By Exempting from Liability the Exact Assistance That § 208 of the VRA Permits, SB1 Cannot Violate or Be Preempted by It (Count V).

Alabama law explicitly permits "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write [to] be given assistance by an individual of the voter's choice" with limited exceptions. ALA. CODE § 17-11-4(e). The Legislature directly copied the VRA's provision regarding "Voting assistance for blind, disabled or illiterate persons[,]" 52 U.S.C. § 10508 (title) ("§ 208"). But under Plaintiffs' reading, because the Legislature did not use certain magic words or directly cite the federal law that it copies word for word, the exception

apparently means nothing, and the law violates the VRA. *See* Doc. 1, ¶¶ 162–66. Such a reading fails to give any effect to the Legislature's express adoption of federal law.[19]

Statutory text "obviously transplanted from another legal source … brings the old soil with it." *Hall v. Hall*, 584 U.S. 59, 73 (2018). Subsection (e) "is obviously transplanted" from § 208 because it copies the language *verbatim*. Put another way, copying § 208 "word for word" in ALA. CODE § 17-11-4(e) "would have been a bizarre way of suggesting that the two [statutes] should bear drastically different meanings." *United States v. Davis*, 588 U.S. 445, 460 (2019). There is no reason for this Court to give § 17-11-4(e)'s exception for assisting disabled voters a different meaning from that given to identical language in § 208. *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) ("We can think of no reason to read 'force' in the revised statute to require anything more than the degree of 'force' required in the 1984 statute.").

Under the old-soil canon, § 208's definition of "vote" and "voting" apply to § 17-11-4(e). *See* Doc. 1, ¶ 160 (citing 52 U.S.C. § 10310(c)(1) (defining "vote" and "voting" under the VRA to "include all action necessary to make a vote effective")).[20] Plaintiffs' reading renders § 17-11-4(e) meaningless[21] because it doesn't use their preferred magic words, *see* Doc. 1, ¶ 162–63, and "flouts the interpretive canon against surplusage—the idea that every word and every provision is to be given effect and that none should needlessly be given an interpretation that causes it … to

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[19] It is only this reading that puts wind in the sails of most of Plaintiffs' armada of manufactured examples regarding disabled voters. A blind voter who requires assistance will not "face criminal liability for … asking someone to submit their application on their behalf" nor will someone who cannot walk be prosecuted for requesting required assistance from "a friend to place their application in the mailbox." *Contra* Doc. 1, ¶ 113.

[20] Even without the old-soil canon, the State does not interpret "voting" to only cover "the mechanical act of filling out the ballot sheet[,]" Doc. 1, ¶ 160 (quoting *OCA-Greater Houston v. Texas*, 867 F.3d 604, 607 (5th Cir. 2017)).

[21] This theory—and the complaint entirely—also ignores § 4(b)(1), which allows *any applicant* to "receive assistance in filling out the application as he or she desires."

have no consequence." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (cleaned up) (quoting ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012)). Instead, § 17-11-4(e) authorizes absentee voting assistance for disabled individuals consistent with § 208.[22] SB1—by expressly incorporating § 208's protection for disabled voters—avoids "criminaliz[ing] conduct expressly protected and authorized under the VRA." Doc. 1, ¶ 166. For that same reason, neither can § 17-11-4(e) "create[] an impermissible barrier to accomplishing the full purposes and goals of Congress[,]" *id.*, which could invoke federal preemption. Plaintiffs' VRA claim thus fails to state a claim on the merits.

To the extent Plaintiffs contend that § 208 broadly preempts § 17-11-4(d)'s prohibitions on ballot harvesting transactions, they are mistaken. Section 208 does not expressly preempt subsection (d), and it does not meet the "high threshold" for conflict preemption. *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011). In considering conflict preemption, courts look to Congressional intent, and assume "the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Marrache v. Bacardi U.S.A., Inc.*, 17 F.4th 1084, 1095 (11th Cir. 2021). Here, "Section 208 allows certain voters who need help voting to select '*a* person of the voter's choice'—not '*any* person,' not '*the* person.'" *Priorities USA v. Nessel*, 628 F. Supp. 3d 716, 732 (E.D. Mich. 2022) (emphasis added by court). Both § 208's use of the indefinite article "a" and its limitation on a disabled voter relying on her employer or union show that Congress did not intend to give the voter boundless options. "When used as an indefinite article, 'a' means some undetermined or unspecified particular." *McFadden v. United States*, 576

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[22] To be clear, § 17-11-4(e) exempts from criminal liability voting assistance that is both required by reason of a voter's disability and provided by someone of that voter's choice. It does not provide immunity for individuals to target disabled persons with impermissible harvesting conduct. For instance, mailing prefilled ballots to nursing homes or assisted living facilities would not be lawful simply because a high proportion of the recipients are disabled.

U.S. 186, 191 (2015) (quotations omitted). And by excluding unions and employers, Congress recognized that certain people might unduly influence a disabled voter's choice. Thus, "a State law that limits a voter's choice does not automatically flout Section 208," *Priorities USA*, 628 F. Supp. 3d at 733, particularly when it operates to limit the influence of paid operatives. Thus, § "208's natural effect allows some wiggle room: a voter may select 'a person' to assist them, but not *the* person of their choice." *Id.* Otherwise, States would be powerless to limit even known fraudsters from trying to manipulate voters.

H. ADAP's HAVA Claim Fails Because SB1 Permits ADAP to Assist Voters, But Regardless They Lack a Cause of Action to Bring This Claim (Count VI).

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Plaintiffs' "claim" under Count VI suffers from three fatal flaws. First, the claim depends on the mistaken assumption, *see supra* Section IV.G, that the challenged provisions prohibit "absentee assistance" that HAVA allegedly implicitly authorized ADAP to conduct. Because § 17-11-4(e) expressly allows disabled individuals to "receive assistance," ADAP is not at risk of criminal prosecution[23] by helping disabled voters apply to vote absentee nor do the challenged provisions "create[] an impermissible barrier to accomplishing the full purposes and goals of Congress" under HAVA. *See* Doc. 1, ¶ 170.

Second, Plaintiffs lack an avenue to bring this claim. Despite bringing a claim for "Violation of the Supremacy Clause and the Help America Vote Act of 2002[,]" Doc. 1, p. 67, Plaintiffs don't allege a private right to enforce either. Nor could they. "The Supremacy Clause is not the source of any federal rights, . . . and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (cited by Doc. 1, ¶ 172). Neither does the Supremacy Clause create rights enforceable under § 1983, *Golden State Transit Corp. v. City of*

[23] ADAP itself is not at risk of criminal prosecution anyway. Alabama law does not provide for corporate criminal liability unless the Legislature "has specifically provided for corporate liability." *State v. St. Paul Fire & Marine Ins. Co.*, 835 So. 2d 230, 233 (Ala. Crim. App. 2000).

Los Angeles, 493 U.S. 103, 107 (1989). And "HAVA creates no private cause of action." *Bellitto v. Snipes*, 935 F.3d 1192, 1202 (11th Cir. 1992). Thus, Plaintiffs cannot rely on the Supremacy Clause, § 1983, or HAVA to allow them to bring this claim. Plaintiffs instead appeal to one line from *Armstrong*: "if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." 575 U.S. at 326 (citing *Ex parte Young*, 209 U.S. 123, 155–56 (1908)).[24]

But "[t]here is no such thing as a suit for a traditional injunction in the abstract." *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1127 (11th Cir. 2005). Instead, any request for injunctive relief "must be based upon a cause of action." *Id.* But, as just discussed, Plaintiffs have no cause of action under which to enforce either the Supremacy Clause or HAVA. Indeed, even *Armstrong* recognized that the Supremacy Clause's force only comes into play "once a case or controversy properly comes before a court[.]" *Armstrong*, 575 U.S. at 326. Moreover, the line from *Armstrong* upon which Plaintiffs rely cites *Ex parte Young*, which provides an exception to the States' sovereign immunity that allows prospective injunctive relief against State officials for on-going violations of federal law—but not a standalone cause of action. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103 (1984). And whether a plaintiff possesses a cause of action is not a question of subject-matter jurisdiction (and subject to challenge under Rule 12(b)(1)), but rather whether a plaintiff can state a claim (subject to challenge under Rule 12(b)(6)). *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). In sum, Plaintiffs fail to state a claim in Count VI because they lack a cause of action under which to assert it.

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[24] *Armstrong*, 575 U.S. at 327 (This is a "judge-made remedy" that does not "rest[] upon an implied right of action contained in the Supremacy Clause.").

Lastly, even if Plaintiffs had some standalone cause of action under which to assert their Count VI claim, federal courts' equitable powers must yield to express and implied statutory limitations. *Armstrong*, 575 U.S. at 327 (citations omitted). Indeed, the Supreme Court in *Armstrong* did not allow respondents to proceed against Idaho. *Id.* at 327–28. Plaintiffs here merely allege that "Congress has not evinced any 'intent to foreclose' equitable relief under the PAVA provisions of HAVA[,]" Doc. 1, ¶ 172, but Plaintiffs don't engage with the reasons such intent could exist. In fact, the same two reasons that *Armstrong* discusses as to the Medicaid Act apply to HAVA: exclusive alternative remedies and judicially unadministrable text. Thus, "Plaintiffs cannot cloak their [HAVA] arguments in the guise of the Supremacy Clause to assert a private enforcement action that is precluded by the statute." *Corey v. Rockdale County*, __F. Supp. 3d__, No. 1:22-cv-3918-MLB, 2023 WL 6242669, at *5 (N.D. Ga. Aug. 28, 2023).

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Armstrong first held that Congress intended to foreclose equitable relief because "the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of [HHS][.]" 575 U.S. at 328 (citing 42 U.S.C. § 1396c). Similarly, "Congress established only two HAVA enforcement mechanisms: (1) a civil action brought by the Attorney General, and (2) a state-based administrative complaint procedure." *Bellitto*, 935 F.3d at 1202 (citing 52 U.S.C. §§ 21111, 21112). The "express provision" of HAVA's enforcement to the U.S. Attorney General and State-based administrative processes "suggests that Congress intended to preclude" private equitable enforcement. *See Alexander v. Sandoval*, 532 U.S. 275, 290 (2001).

Next, because "[t]he provision for the [HHS] Secretary's enforcement by withholding funds might not, *by* itself, preclude the availability of equitable relief[,]" the *Armstrong* Court found that it did "when combined with the judicially administrable nature of §30(A)'s text." 575

U.S. at 328 (citing *Va. Office for Prot. and Advocacy v. Stewart*, 563 U.S. 247, 256 n.3 (2011)). Asking a federal court to determine whether a State has violated § 21061(a) has similar judicial administration issues. The provision merely states that that "the Secretary of Health and Human Services shall pay [ADAP] to ensure full participation in the electoral process for individuals with disabilities[.]" The only duty § 21061(a) imposes is on the Secretary of HHS; it imposes no duty on the States.

The language that supposedly insulates ADAP from liability—"ensur[ing] full participation" is "precatory." *Cf. Blessing v. Freestone*, 520 U.S. 329, 341 (1997) ("[T]he provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."). Does ADAP assert that if disabled individuals do not have a 100% registration and turnout rate in elections that they have violated § 21061(a) by not *ensuring full participation*? Of course not. This aspirational language doesn't impose any duty on ADAP, so the challenged provisions cannot "make[] it impossible for ADAP to exercise its duties under 52 U.S.C. § 21061[,]" *contra* Doc. 1, ¶ 170. This judicially unadministrable language further suggests that Congress intended to foreclose judicial equitable enforcement of § 21061(a).

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Relatedly, it's quite the stretch to argue that HAVA "immunizes [ADAP] from state regulation" whatsoever. *Armstrong*, 575 U.S. at 326 (citing *Ex parte Young*, 209 U.S. at 155-56). Nor would § 21061(a) prohibit a State court from convicting ADAP's employee for violating the challenged provisions. *Id.* (citing *Pennsylvania v. Nelson*, 350 U.S. 497, 499, 509 (1956)). ADAP's argument has no limiting principle. ADAP could argue that any State statute or regulation with the most marginal impact on its efforts to "ensure full participation" is preempted. Or it could argue that HAVA preempts Ala. Code § 17-17-34, which makes it unlawful to pay someone to vote,

because paying disabled individuals to vote would work to "ensure full participation." Section 21061(a)'s text does not mandate—let alone plausibly support—these absurd results.

Because HAVA "implicitly precludes private enforcement" of §[21061(a)] through its provision of other enforcement mechanisms and its use of judicially unadministrable text, Plaintiffs "cannot . . . circumvent Congress's exclusion of private enforcement" by invoking this Court's equitable powers. *Armstrong*, 575 U.S. at 328 (citation omitted). By not having a standalone cause of action to raise in this pre-enforcement suit, it's not as if Plaintiffs are left "with no resort." 575 U.S. at 331. Plaintiffs' employees could raise this preemption argument as a defense in any potential criminal prosecution. *See Armstrong*, 575 U.S. at 326 (referring to immunity from ongoing "state regulatory actions"). But as discussed *supra* Section IV.G, Ala. Code § 17-11-4(e) exempts from liability the assistance ADAP intends to perform. Thus, Plaintiffs' "claim" for "Violation of the Supremacy Clause and [HAVA]" fails to state a claim.

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V. CONCLUSION

The Complaint should be dismissed.

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CERTIFICATE OF SERVICE

I certify that on May 20, 2024, 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/ Edmund G. LaCour Jr.
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