

**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,)

Defendant.)

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

DEFENDANT’S REPLY IN SUPPORT OF MOTION TO STAY INJUNCTION PENDING APPEAL

In support of Defendant’s motion to stay (DE 78), Defendant submits this brief reply.

*

On the merits, the enjoined provisions of SB 1 do not unduly burden the right of Section 208 voters to choose a person to provide necessary voting assistance.

The Court has recognized that Section 208 is ambiguous “as to the scope of the ‘choice’ that Congress intended to provide for voters.” DE 82 at 6. It follows that Section 208 lacks the “clear statement” necessary to “preempt state law” that reasonably regulates absentee voting—an area of “traditional state responsibility.” *Bond v. United States*, 572 U.S. 844, 859 (2014). Plaintiffs maintain that the Submission and Compensation Provisions are *facially* preempted by Section 208 “regardless of the number of voters impacted or the nature of the burden.” DE 82 at 5. This position runs headlong into the *Salerno* standard for facial challenges, which requires *all* of a challenged law’s applications to be invalid, and Section 208’s preemption standard, which the Court read to turn on whether a State’s voting law imposes an *undue* burden on voter choice.

The Compensation Provision, on its face, does not categorically criminalize “assistance at some stages of the voting process during which assistance [is] needed.” DE 76 at 11 (quoting S.

Rep. No. 97-417, at 63 (1982)). Instead, it excludes paid absentee-application handlers from performing tasks that, if needed as assistance, can be performed by virtually *anyone* else whom a Section 208 voter chooses. Indeed, anyone in the State who isn't receiving payments or gifts for providing absentee assistance is a potential assistor. Thus, "the extent of any burden on voters" imposed by the Compensation Provision depends on "[f]actual evidence" showing that some Section 208 voters depend on the prohibited absentee-application transactions. *Contra* DE 82 at 6. Because the evidence establishes that Section 208 voters overwhelmingly trust and choose "someone other than a paid operative" to help them vote absentee, DE 78 at 10, and that paid ballot harvesters are more likely to be untrustworthy, DE 73-2 ¶16, the limitation imposed by the Compensation Provision is reasonable and consistent with Section 208. Evidence of the weight of SB 1's burden on voters' choice is only "irrelevant" (DE 82 at 8) under a flawed fixed-universe interpretation of Section 208 that leaves States no "wiggle room" to enact reasonable regulations. Doc. 69 at 56.

The Submission Provision must be read in harmony with SB 1's other provisions that authorize any blind, disabled, or illiterate voter "who requires assistance to vote" to "be given assistance" by someone other than a paid ballot harvester. Ala. Code § 17-11-4(e). Because "a limiting construction has and can be placed on" the Submission Provision to allow disabled voters to receive required assistance in submitting their applications, the court "should read it that way" to avoid preemption. *Henry v. Attorney General, Ala.*, 45 F.4th 1272, 1292 (11th Cir. 2022).

* *

On the equities, "the relative harms" and "the interests of the public at large" overwhelmingly favor staying the preliminary injunction. *Trump v. IRAP*, 582 U.S. 571, 580 (2017).

It is well settled that state legislatures are entitled to enact “legislation that aims to *prevent future fraud*.” *League of Women Voters of Fla. v. Fla. Sec’y of State*, 81 F.4th 1328, 1333-34 (11th Cir. 2023) (en banc) (emphasis added). Plaintiffs nonetheless argue that “Defendant suffers *no injury*” from the injunction because prosecutors will be “free to pursue” other election crimes after the election. DE 82 at 11. “Even if the State can prosecute fraudulent” ballot harvesters “after the fact” under different statutes, “it would be irreparably harmed by allowing them” to operate in the first place. *Brakebill v. Jaeger*, 905 F.3d 553, 560 (8th Cir. 2018). Prophylactic regulation, rather than after-the-fact punishment, maintains “confidence in the integrity of our electoral processes ... essential to the functioning of our participatory democracy.” *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam). Here, “the record ... contain[s] undisputed evidence that” fraudsters—indeed, ballot harvesters—*have* targeted absentee voting in recent Alabama elections. *Id.* at 1334.¹ Allowing SB1’s protections to extend to Section 208 voters is crucial to deter vote-stealing schemes targeting the most vulnerable voters. The injunction removes that deterrent, and unless it is stayed, “all will” *not* have to “play by the same, legislatively enacted rules” in the upcoming election. *New*

¹ Plaintiffs ignore the Absentee Election Managers’ testimony and dispute the inferences to be drawn from election statistics to assert there is no evidence of absentee voter fraud and manipulation in Alabama. DE 82 at 15. They explain the anomalous absentee voting figures in Marengo, Wilcox, and Perry Counties by the fact that over half of the employed residents of those counties “have jobs outside the county where they live,” which could cause them to vote absentee. *Id.* at 15 n.11. This explanation makes little sense. Plaintiffs’ own exhibits show far fewer residents of those counties are employed relative to other counties (where absentee voting rates are normal). Regardless, 72.1% of the employed residents of Pickens County also work *outside* Pickens County—a higher proportion than Wilcox, Marengo, or Perry. Alabama Department of Labor, Labor Market Information, “County Profiles – Pickens County,” <https://www2.labor.alabama.gov/workforcedev/CountyProfiles/Pickens%20County.pdf>. Still, Pickens County sees stable absentee voting rates with results that do not break at an astonishing 95:1 rate for one political party like in Perry County. DE 73-4 ¶¶1, 13. Whether ballot harvesting operations or something more benign produces the skewed absentee figures constitutes a factual dispute.

Georgia Project v. Raffensperger, 976 F.3d 1278, 1284 (11th Cir. 2020). This injury is serious, irreparable, and not mitigated by post-election prosecutions for fraud.

Plaintiffs’ alleged injury is comparatively difficult to pin down. The evidence simply doesn’t establish that financing absentee-application handlers is “critical for [Section 208] voters to access their fundamental right to vote.” DE 82 at 12. The parties do not dispute that “*unassisted* [Section 208] voters may not be able to vote at all,” *id.* (emphasis added); but they do dispute whether Section 208 voters depend on and choose persons who are paid to act on their absentee ballot applications. Even if there is “*real* fear of future prosecution” by “family, friends, caregivers, volunteers, or nursing home staff” for *freely* helping Section 208 voters with their absentee ballot applications, DE 82 at 3, this “subjective fear” is not “objectively reasonable.” *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998). Subjective “belief” unsupported by credible threats fails to establish an Article III injury, *id.*, much less irreparable harm.

As to the public interest, Plaintiffs characterize the injunction as only affecting “a subset of (a subset of) voters,” but their own evidence reveals that it likely implicates a huge swath of the electorate. DE 82 at 14. (“30% of all adults (or about 1.5 million people) in Alabama have some form of disability.”) If “many of these individuals w[ill] effectively be precluded from participating in what for them is the only way to vote” without paid absentee-application handlers, *id.* at 15, one would expect evidence from *voters* to that effect. Instead, the Court has declarations from voters whose preferred assistors are likely eligible under SB 1 to assist, and the Court is forced to either credit Plaintiffs’ assertions or intuit that someone somewhere in Alabama who needs to vote absentee will be able to do so only if SB 1 is enjoined.

Most concerning, persons unable “to read or write” are Section 208 voters, and Plaintiffs document the high number of low literacy voters in Alabama—roughly a quarter of the electorate

by their count. DE 82 at 15. These voters, of course, do not necessarily qualify to vote absentee and are ill-suited for a means of voting that requires *additional* paperwork. They are necessarily susceptible to paid absentee ballot harvesters whose “assistance” consists of distributing, completing, and collecting absentee forms the voter may have trouble reading. And with the Submission Provision enjoined, third parties can then physically submit the absentee applications filled out on behalf of the illiterate voter. None of this is mandated by Section 208 or in the public interest.

* * *

Plaintiffs’ response relies on declarations and statistics in an attempt to show voter demand and need for persons paid or given gifts to handle absentee ballot applications. *Supra* Reply at 3 n.1. According to one declaration, LWVAL “visited at City Center Village” before the injunction “and denied assistance to every voter who requested absentee ballot application assistance.” DE 82-1 ¶ 5. It is unclear whether a single Section 208 voter who resides at City Center Village requested this visit. The “many voters” who then “requested assistance at [this] event” could likely, with minimal burden, receive *physical* absentee application assistance² from someone they trust—facility staff, family members, friends, or volunteers who serve the elderly. Doc. 73-2 ¶¶17, 19. LWVAL’s assertion that “likely many” Section 208 voters “will be unable to vote at all” if the court enters a stay goes to the weight of the burden, DE 82-1 ¶11, and requires “a credibility determination or inferential leap” that shouldn’t be made “without the benefit of an evidentiary hearing.” *CBS Broad., Inc. v. EchoStar Commc’ns Corp.*, 265 F.3d 1193, 1207 (11th Cir. 2001).

This Court should grant Defendant’s motion.

² If the injunction is stayed, Plaintiffs are free to assist voters, their caretakers, and family members through instructions or guidance. Doc. 69 at 26 (“SB 1 regulates on conduct, not speech.”). In fact, Plaintiff ADAP assists Section 208 voters in exactly that manner. Doc. 34-7 ¶¶7-8 (describing education and training for residential facilities and election officials); Doc. 74-5 ¶¶6-7 (discussing different trainings that family members attended).

Respectfully submitted,

Steve Marshall

Attorney General

Edmund G. LaCour Jr. (ASB-9182-U81L)

Solicitor General

James W. Davis (ASB-4063-I58J)

Deputy Attorney General

Soren Geiger (ASB-0336-T31L)

Dylan Mauldin (ASB-3281-Z11M)

Assistant Solicitors General

Brenton M. Smith (ASB-1656-X27Q)

s/ Charles A. McKay

Charles A. McKay (ASB-7256-K18K)

Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL

STATE OF ALABAMA

501 Washington Avenue

P.O. Box 300152

Montgomery, Alabama 36130-0152

Telephone: (334) 242-7300

Fax: (334) 353-8400

Edmund.LaCour@AlabamaAG.gov

Soren.Geiger@AlabamaAG.gov

Dylan.Mauldin@AlabamaAG.gov

Jim.Davis@AlabamaAG.gov

Brenton.Smith@AlabamaAG.gov

Charles.McKay@AlabamaAG.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on October 3, 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/ Charles A. McKay
Counsel for Defendant

RETRIEVED FROM DEMOCRACYDOCKET.COM