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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

DAVID RISSLING, et al., *Plaintiffs,* vs. MAGARIA BOBO, *in her official capacity as Absentee Election Manager of Tuscaloosa County, Alabama*, et al., *Defendants.*	)	Case No. 7:23-cv-01326-RDP

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Anthony J. May*
Eve L. Hill*
Lauren J. Kelleher*
Catalina Odio*
Brown, Goldstein & Levy LLP
120 E. Baltimore St., Ste. 2500
Baltimore, MD 21202
(410) 962-1030 (phone)
(410) 385-0869 (fax)
amay@browngold.com
ehill@browngold.com
lkelleher@browngold.com
codio@browngold.com

Larry G. Canada, JD, LLM
(AL Bar # 3153N73L)
Alabama Disabilities Advocacy Program
2008 12th St., Tuscaloosa, AL 35401
(205) 539-2031 (phone)
lcanada@adap.ua.edu

Bradley Heard*
Sabrina Khan*
Ahmed Soussi*
Ellen Degnan
(AL Bar # 3244I12V)
Southern Poverty Law Center
150 E. Ponce de Leon Avenue, Suite 340
Decatur, GA 30030
(470) 521-6700 (phone)
bradley.heard@splcenter.org
sabrina.khan@splcenter.org
ahmed.soussi@splcenter.org
ellen.degnant@splcenter.org

Counsel for Plaintiffs

*Admitted *Pro Hac Vice*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

In Defendants' ongoing efforts to deny Plaintiffs equal access to their remote absentee voting programs, Defendants' Cross-Motion for Summary Judgment, ECF No. 67, tries to transform Plaintiffs' case into something it is not. Defendants' attempts to recast Plaintiffs' claims under a broader voting framework, and to defend forcing Plaintiffs to physically travel to polling places when other absentee voters without print disabilities are not so required, ignores the breadth of election law supporting Plaintiffs' right to equal access and should be rejected.

STATEMENT OF UNDISPUTED FACTS AND PROCEDURAL HISTORY

I. Response to Defendants' Statement

1–7. Undisputed.

8. Undisputed that Ms. Clayton has advanced glaucoma, which has eliminated her peripheral vision and left her remaining vision blurry. ECF No. 56-5, Ex. 5, Clayton Dep. at 12:10, 18:16–17, 19:6–8.

9. Undisputed that individuals with print disabilities *who are sighted*, like Dr. Peebles, use speech-to-text software to engage with electronic information and documents. *See* ECF No. 56-2, Ex. 2, Peebles Dep. at 43:20–45:10.[1]

10. Undisputed that OCR technology can make images of ballots readable to some software. ECF No. 56-38, Ex. 35, Selker Rep. at 10. Undisputed that a voter with a disability can scan a paper ballot in order for it to be OCRed. ECF No. 56-35, Ex. 32, Selker Dep. at 51:14–52:1. A scanned ballot, even if OCRed, would not be navigable or fillable using a screen reader, and therefore not accessible. ECF No. 56-24, Ex. 24, Zimnik Dep. at 91:9–24, 96:16–97:6.

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[1] Defendants' response to ¶ 9 fails to cite record evidence indicating some sighted individuals without print disabilities *do not* use speech-to-text software, as required per Judge Proctor's Appendix II, Summary Judgment Requirements at 3.

11–13. Undisputed.

14. Undisputed that NFB-AL does not keep records of whether members are blind or low vision, but the NFB-AL President and corporate designee estimated that 95 percent or more of its members were blind or low vision. ECF No. 56-7, Ex. 7, Manuel Dep. at 31:8–9.

15–19. Undisputed.

20. Undisputed that Defendants are required, per the Secretary of State's Alabama Absentee Election Manager Official Guide, to deliver absentee ballots in sealed affidavit envelopes to elections officials for tabulation beginning at 7 a.m. on Election Day. *See* ECF No. 56-14, Ex. 14, Alabama Absentee Election Manager Guide at D. Smith 000132.

21. Undisputed that voters with vision impairment and musculoskeletal disorders are eligible to vote absentee. *See* ECF No. 56-16, Ex. 16, D. Potts 000690.

22. Undisputed that absentee ballot applications are only available in paper or inaccessible PDFs. *See* ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 62:2–19, 65:10–21; ECF No. 56-12, Ex. 12, Potts Dep. at 45:15–24; ECF No. 56-11, Ex. 11, Bobo Dep. at 67:3–68:7, 73:10–20; ECF No. 56-23, Ex. 23, Zimnik Rep. at 5–6; ECF No. 56-25, Ex. 25, Zimnik Suppl. Rep. at 3–5, 7.

23. Undisputed that the generic absentee ballot application is inaccessible to screen reader users because, even though it contains fillable fields, those fields are not labeled or tagged, meaning there is no way for a screen reader user to know which fillable field corresponds to which selection. *See* ECF No. 56-23, Ex. 23, Zimnik Rep. at 6.

24. Undisputed that UOCAVA voters can also complete the generic absentee ballot application. ECF No. 56-14, Ex. 14, Absentee Election Manager Guide at D. Smith 000124, 127.

25. Undisputed that AEMs check absentee voters' registration to verify that their address matches the address on PowerProfile. *See, e.g.*, ECF No. 56-11, Ex. 11, Bobo Dep. at 113:24–114:15, 121:20–122:4.

26. Undisputed that the general absentee ballot application specifically refers to voters with vision impairment and musculoskeletal disorders as eligible to vote absentee. *See* ECF No. 56-16, Ex. 16, D. Potts 000690.

27–30. Undisputed.

31. Undisputed that Defendants have never encountered instances of self-certification of disability resulting in fraud. ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 77:19–79:215, 120:7–121:9; ECF No. 56-11, Ex. 11, Bobo Dep. at 84:19–85:17, 121:17–123:18; ECF No. 56-12, Ex. 12, Potts Dep. at 61:23–62:24.

32. Undisputed that UOCAVA requires election officials to accept the Federal Post Card Application, 52 U.S.C. § 20302(a)(4), to accept the federal write-in ballot, *id.* § 20302(a)(2), to exempt such voters from photo identification requirements, *id.* § 21083(b)(3)(C)(i), and to transmit electronic ballots to such voters, *id.* § 20302(f).

33. Undisputed.

34. Undisputed that a voter must have *two* witnesses sign the affidavit envelope or have their signature on the envelope notarized, Ala. Code § 17-11-10(b)(2), and that a voter may return the ballot by mail, hand delivery, or commercial carrier, Ala. Code § 17-11-3(a).

35. Undisputed that absentee ballots can be rejected for "[n]o signature, no witnesses, no reason checked, incomplete affidavit, or no affidavit at all"—not, for example, an improper trifold. ECF No. 56-11, Ex. 11, Bobo Dep. at 154:6–12.

36. Undisputed.

37. Undisputed that only UOCAVA voters physically located outside the U.S. can submit their ballots electronically and that UOCAVA voters within the U.S. can receive a blank ballot electronically but cannot return it electronically and must mail a paper copy instead. ECF No. 56-14, Ex. 14, Absentee Election Manager Guide at D. Smith 000127.

38. Undisputed that for the past four years, the Alabama Secretary of State's Office has contracted with Democracy Live. *See* ECF No. 56-19, Ex. 19, Elrod Dep. at 146:9–24.

39. Undisputed that the AEMs have not individually contracted with Democracy Live for Omniballot but are all responsible for using OmniBallot to receive completed overseas UOCAVA ballots electronically. ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 116:9–119:12; ECF No. 56-11, Ex. 11, Bobo Dep. at 128:22–133:19; ECF No. 56-12, Ex. 12, Potts Dep. at 115:15–118:11; ECF No. 56-21, Ex. 21, Pinnick Dep. at 22:16–29:5.

40. [redacted]

41. Undisputed that the Secretary of State's Office transmits information for voters who have chosen to receive their ballots electronically to Democracy Live through a daily report from PowerProfile (based on determinations made by AEMs), [redacted] ECF No. 56-19, Ex. 19, Elrod Dep. at 50:11–52:19; ECF No. 56-11, Ex. 11, Bobo Dep. at 123:14–23; ECF No. 56-12, Ex. 12, Potts Dep. at 111:11–112:25.

42. Undisputed.

43. Undisputed that only UOCAVA voters physically located outside the U.S. can submit their ballots electronically and that UOCAVA voters within the U.S. can receive a blank ballot electronically but cannot return it electronically and must mail a paper copy instead. ECF No. 56-14, Ex. 14, Absentee Election Manager Guide at D. Smith 000127.

44. Undisputed that there are no known instances of a voter in Alabama or any other jurisdiction successfully fraudulently misrepresenting their identity using OmniBallot. ECF No. 56-21, Ex. 21, Pinnick Dep. at 47:2–16, 89:16–90:21; ECF No. 56-29, Ex. 29, Appel Dep, at 48:2–49:1.

45–46. Undisputed.

47. Undisputed that at least 12 states use statewide electronic return. ECF No. 56-1, Ex. 1, Blake Rep. at 11–12.

48. Undisputed that Plaintiffs and other individuals with print disabilities who rely on assistive devices to read and/or fill out forms cannot do so on paper without assistance and thus cannot complete the application, voting, or return steps of the paper-based absentee voting process. *See* ECF No. 56-1, Ex. 1, Blake Rep. at 6–8, 11; ECF No. 56-4, Ex. 4, Rissling Dep. at 93:8–17, 94:16–95:7; ECF No. 56-5, Ex. 5, Clayton Dep. at 22:18–23:21, 41:1–6; ECF No. 56-3, Ex. 3, Presley Dep. at 27:5–15, 33:1–35:8; ECF No. 56-2, Ex. 2, Peebles Dep. at 86:7–21, 112:11–113:21; ECF No. 56-7, Ex. 7, Manuel Dep. at 112:3–15; ECF No. 56-6, Ex. 6, Pls.' Ans. to Defs.' Interrog. Nos. 4, 6–7.

49. Undisputed that voters with print disabilities cannot read and/or complete paper absentee ballots without third-party assistance. *See, e.g.*, ECF No. 56-1, Ex. 1, Blake Rep. at 6–8, 11.

50. Undisputed that the only way a blind voter can vote in Defendants' counties without third-party assistance is in-person with the ExpressVote machine. *See* ECF No. 67 at 35 (admitting the only way Plaintiffs can vote privately and independently is by traveling in-person to Defendants' offices to vote using an ExpressVote machine); ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 55:1–24, 141:10–142:13; ECF No. 56-11, Ex. 11, Bobo Dep. at 88:24–91:13, 141:20–142:16; ECF No. 56-12, Ex. 12, Potts Dep. at 79:6–15, 134:2–138:6.51. Undisputed that Dr. Peebles could "touch" his choices on the ExpressVote screen, but someone else was then required to "select" those choices, take his ballot out of the slot after it was printed, and manipulate it into the optical scanner for him. ECF No. 56-2, Ex. 2, Peebles Dep. at 87:3–89:8. Whether such assistance comports with relevant Title II regulations is legal not factual argument.

52. Undisputed that the only way in which a blind voter can vote in any of Defendants' counties without third-party assistance is in-person with the ExpressVote machine, which they can use 55 days before the election. *See* ECF No. 67 at 35 (admitting the only way Plaintiffs can vote privately and independently is by traveling in-person to Defendants' offices to vote using an ExpressVote machine); ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 55:1–24, 141:10–142:13; ECF No. 56-11, Ex. 11, Bobo Dep. at 88:24–91:13, 141:20–142:16; ECF No. 56-12, Ex. 12, Potts Dep. at 79:6–15, 134:2–138:6.

53. Undisputed that in one instance Dr. Peebles was able to fill out, on his computer, the absentee ballot application available online through the Secretary of State's website but required assistance mailing it after printing it. ECF No. 56-2, Ex. 2, Peebles Dep. at 103:5–104:4. Undisputed that Dr. Peebles cannot vote absentee privately and independently with the current paper-based system. ECF No. 56-2, Ex. 2, Peebles Dep. at 86:8–21, 104:5–12, 113:6–8, 113:20–

21. Undisputed that Ms. Clayton can in some instances review print on paper if the print is big enough. ECF No. 56-5, Ex. 5, Clayton Dep. at 37:5–20, 49:23–50:6.

54. Undisputed that the only way in which a blind voter can vote in any of Defendants' counties without third-party assistance is in-person with the ExpressVote machine. *See* ECF No. 67 at 35 (admitting the only way Plaintiffs can vote privately and independently is by traveling in-person to Defendants' offices to vote using an ExpressVote machine); ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 55:1–24, 141:10–142:13; ECF No. 56-11, Ex. 11, Bobo Dep. at 88:24–91:13, 141:20–142:16; ECF No. 56-12, Ex. 12, Potts Dep. at 79:6–15, 134:2–138:6.

55. Undisputed that because Dr. Peebles has a print disability that prevents him from handling a pen or pencil and writing on paper, he must enlist his sighted aide to fill out his ballot for him. *See e.g.*, ECF No. 56-2, Ex. 2, Peebles Dep. at 86:8–21.

56. Undisputed that Ms. Presley has voted in person "absentee" before an election one time—before the ExpressVote machine was available—and required assistance to do so. *See* ECF No. 56-3, Ex. 3, Presley Dep. at 27:7–16.

57. Undisputed that in at least one election, Ms. Clayton did not vote because she did not have transportation to the polls, was unable to read the paper absentee ballot sent to her, and had no family members available to assist her in reading and completing the paper absentee ballot. ECF No. 56-5, Ex. 5, Clayton Dep. at 37:5–20. Undisputed that in at least one another election Ms. Clayton was unable to vote in-person using the ExpressVote machine because her polling place did not have one and that she had to attempt to vote with her magnifier but was not sure she "did it right" because she still could not see her ballot. *Id*. at 38:19–41:23.

58. Undisputed that NFB-AL members have encountered issues voting in person. ECF No. 56-7, Ex. 7 Manuel Dep. at 51:5–56:21, 90:23–92:20.

59. Undisputed that NFB-AL has encouraged members voting in person to use Alabama's ExpressVote machines and that its members with blindness and low vision are unable to vote absentee without assistance reading and filling their paper absentee ballots. *See* ECF No. 56-7, Ex. 7, Manuel Dep. at 61:8–16, 68:6–11, 74:14–75:10.

60. Undisputed.

61. Undisputed that NFB-AL has advocated with the state legislature, filed a complaint with the U.S. Department of Justice, and filed a prior lawsuit against the Secretary of State, seeking a system that would allow its members to vote absentee remotely, privately, and independently. *See* ECF No. 56-7, Ex. 7, Manuel Dep. at 56:22–57:2, 58:16–59:9, 79:5–12, 90:23–92:20, 95:16–106:17, 111:1–13. Undisputed that Defendants have not provided this relief since the instant lawsuit was filed. *See* ECF No. 34, Defs.' Ans. ¶ 55; ECF No. 18, Defs.' Mot. Dismiss 12–13. Undisputed that OmniBallot is accessible to voters who rely on screen reader assistive technology to read and complete forms on their computers. ECF No. 56-23, Ex. 23, Zimnik Rep. at 8; ECF No. 56-21, Ex. 21, Pinnick Dep. at 34:3–20, 49:9–25; ECF No. 56-20, Ex. 20, at Democracy Live 0004764, 4779.

62. Undisputed that Plaintiffs brought a prior Title II lawsuit in 2023 against Alabama's then-Secretary of State, Wes Allen. *See Nat'l Fed'n of Blind of Ala. v. Allen*, 661 F. Supp. 3d 1114 (N.D. Ala. 2023).

63. Undisputed that the court dismissed that case, finding that the "AEMs, not the Secretary, are in charge of administering absentee ballots—paper or electronic" and "[AEMs] would have to implement Plaintiffs' requested relief." *Id*. at 1123.

II. Response to Defendants' Additional Undisputed Facts

63. Undisputed that each Plaintiff identified means of travel within their communities, each with varying costs and degrees of reliability and convenience. ECF No. 56-2, Ex. 2, Peebles

Dep. at 13:5–6; ECF No. 56-3, Ex. 3, Presley Dep. at 37:10–15; ECF No. 56-4, Ex. 4, Rissling Dep. at 78:2–6; ECF No. 56-5, Ex. 5, Clayton Dep. at 21:16–22:6.

64. Undisputed (though immaterial to the ultimate issues).

65. Undisputed that Dr. Peebles raised concerns about the privacy and accessibility of the ExpressVote machine, a non-remote voting option. ECF No. 56-2, Ex. 2, Peebles Dep. at 87:16–88:10, 89:13–21.

66. Undisputed that Plaintiffs Clayton, Peebles, and Presley were each forced to select individuals from their personal lives to help them vote. ECF No. 56-5, Ex. 5, Clayton Dep. at 31:5–15; ECF No. 56-2, Ex. 2, Peebles Dep. at 86:7–21; ECF No. 56-3, Ex. 3, Presley Dep. at 23:21–24:21.

67. Undisputed that Mr. Rissling has voted in person in every election since 2014 and had no problems with the ExpressVote machine on the sole occasion he used it. ECF No. 56-4, Ex. 4, Rissling Dep. at 64:7–14.

68. Undisputed that Mr. Rissling believes the ExpressVote machine allows him to vote independently and privately. Disputed that he has never experienced a problem using such a machine. *See* ECF No. 56-4, Ex. 4, Rissling Dep. at 72:10–15.

69. Undisputed that Mr. Rissling's preference is to vote in person when he is able to do so, but that he would like to vote remotely, privately, and independently when he is not able to vote in person. ECF No. 56-4, Ex. 4, Rissling Dep. at 81:15–82:17, 105:1–7.

70. Undisputed.[2]

71–72. Undisputed.

[2] With respect to Additional Undisputed Facts, ¶ 70, Plaintiffs do not dispute this fact, but the portion of Mr. Rissling's deposition cited by Defendants does not support it.

73. Undisputed that Ms. Presley joined this lawsuit to ensure that if she is unable to reach the polls, she will have a private and independent voting option, which Alabama does not currently provide. ECF No. 56-3, Ex. 3, Pressley Dep. at 45:17–46:16.

74. Undisputed that Ms. Clayton has advanced glaucoma, which has eliminated her peripheral vision and left her remaining vision blurry. ECF No. 56-5, Ex. 5, Clayton Dep. at 12:10, 18:16–17, 19:6–8.

75. Undisputed.

76. Undisputed, except that Ms. Clayton testified her sister is able to visit only "sometimes." ECF No. 56-5, Ex. 5, Clayton Dep. at 23:4–15.

77. Undisputed.

78. Undisputed that Ms. Clayton was unable to vote because by the time she had exhausted other options, such as seeking third party assistance from family members to fill out the paper absentee ballots, she "didn't get a chance to call public transportation." ECF No. 56-5, Ex. 5, Clayton Dep. at 37:7–17, 38:8–12.

79. Undisputed.

80. Undisputed that Dr. Peebles recanted his claim that he was unable to vote in 2022; he was unable to vote remotely. ECF No. 74, Ex. 40, Pls.' First Am. Resp. to Defs.' First Interrog. No. 5 at 6.

81–85. Undisputed.

86. Undisputed that the survey results showed electronic voting was respondents' second choice (of five choices). ECF No. 56-42, Ex. 39, Voting Accessibility Preferences Survey Results at NFB-AL 000697–98.

87–88. Undisputed.

89. Undisputed as to NFB-AL's belief that electronic voting is secure because Alabama would not use it otherwise. Undisputed that Ms. Manuel testified in her personal capacity, and not on behalf of NFB-AL, that she thought electronic is more secure than paper voting because fewer humans are involved. ECF No. 56-7, Ex. 7, Manuel Dep. at 86:11–19.

90–93. Undisputed.

94. Undisputed that, while AEMs determine the resources and personnel needed to perform the duties of their office, the amount of funding available is set at the County level. ECF No. 56-12, Ex. 12, Potts Dep. at 156:11–15.

95. Undisputed that it would cost $60,000 [redacted]

96. Undisputed that Defendants have not actually considered the cost of expanding their Remote Accessible Vote-By-Mail ("RAVBM") system. ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 159:19–25; ECF No. 56-12, Ex. 12, Potts Dep. at 156:1–158:19; ECF No. 56-11, Ex. 11, Bobo Dep. at 168:22–171:3.

96. [sic] Undisputed that cases Defendants cite—all of which involve ***paper-based*** absentee voting irrelevant to Plaintiffs claims—may have rested on "[a]dditional information discovered after an individual applies for or votes an absentee ballot."

97. Undisputed that fraud has been documented in Alabama's ***paper-based*** absentee voting system.

98. Undisputed that courts may use voter and witness signatures—*which Alabama does not require every absentee voter to provide*—to assess whether fraudulent activity has occurred. ECF No. 56-13, Ex. 13 Anderson-Smith Dep. at 93:24–25; *see* Ala. Code § 17-11-46.

99. Undisputed that a candidate for Clay County Commission pleaded guilty for falsifying a ***paper*** absentee ballot and application.

100. Undisputed that a mayor was convicted for falsely notarizing ***paper*** absentee ballots.

101. Undisputed that an individual was indicted for fraudulently completing a ***paper*** absentee ballot *application*.

102. Undisputed that a 2016 mayoral election result had to be vacated after fraudulent ***paper-based*** mail-in absentee ballots were excluded.

103. Undisputed that a 2018 City Council race required the exclusion of fraudulent ***paper-based*** mail-in absentee ballots.

104. Undisputed.

105. Undisputed that the federal government has declared internet to be high risk. Undisputed that Democracy Live's web-based platform OmniBallot does not send or receive ballots by email; rather, it sends voters a link to a secure, protected online portal through which voters can access, complete, and return their ballots. Undisputed that Democracy Live routinely tests the security of its OmniBallot platform, which has had no known instances of fraud or other election compromising security issues. *See* ECF No. 56-21, Pinnick Dep. at 17:2–21:1, 23:12–27:24, 57:6–58:16, 158:3–159:3, 161:20–162:21.

106–107. Undisputed.

ARGUMENT

I. All Plaintiffs Have Standing to Pursue the Injunctive Remedies They Seek.

Defendants do not dispute that Plaintiffs are unable to vote remotely, privately, and independently. *Compare* ECF No. 58 at p. 8–9, ¶¶ 1–7; *with* ECF No. 67 at p. 6, ¶¶ 1–7 *and id.* at 35 (admitting the only way Plaintiffs can vote privately and independently is by traveling in-person to Defendants' offices to vote using an ExpressVote machine); *see also e.g.*, ECF No. 56-

13, Ex. 13, Anderson-Smith Dep. at 55:1–24, 141:10–142:13; ECF No. 56-11, Ex. 11, Bobo Dep. at 141:20–142:16; ECF No. 56-12, Ex. 12, Potts Dep. at 79:6–15.

Yet without responding to the breadth of authorities Plaintiffs cite in their Motion, Defendants argue that absentee voting is not a program or service and Plaintiffs, therefore, have not suffered an injury. ECF No. 67 at 19–24. Contrary to Defendants' mischaracterization, Plaintiffs' claims do not assert third party interests. ECF No. 67 at 20–21. Plaintiffs are "assert[ing] [their] own legal rights and interests." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).[3]

A. The Individual Plaintiffs Have Standing.

Individual Plaintiffs have suffered, and continue to suffer, the inability to vote absentee remotely. *See Schalamar Creek Mobile Homeowner's Ass'n, Inc. v. Adler*, 855 F. App'x 546, 552 (11th Cir. 2021). That injury would be redressed by providing them equal access to Defendants' RAVBM system. *See Polelle v. Fla. Sec'y of State*, 131 F.4th 1201, 1208 (11th Cir. 2025) (standing to sue requires "an injury in fact that is concrete, particularized, and actual or imminent"; causation; and redressability).

Defendants misunderstand the nature of the harm here and incorrectly claim that Individual Plaintiffs lack a real and immediate threat of future injury. ECF No. 67 at 23–24. Individual Plaintiffs' injury is that they are denied "full and equal" access, on the basis of their disability, to the remote absentee voting program, and cannot vote remotely, privately, and independently as voters without print disabilities are able to do. *See Schalamar,* 855 F. App'x at 552; *Streeter v. Dep't of Pub. Safety*, 689 F. Supp. 3d 1312, 1323 (S.D. Ga. 2023) (establishing

[3] Defendants do not contest Dr. Peebles's standing, thereby conceding his right to obtain relief from this Court. *See* ECF No. 67 at 21; *Case v. Eslinger*, 555 F.3d 1317, 1329 (11th Cir. 2009).

actual and imminent injury-in-fact where defendant's policy discriminated against plaintiff under Title II).

Individual Plaintiffs all testified that they want the option to vote remotely in an accessible way, but that they are unable to vote privately and independently through the current absentee system. *See* ECF No. 56-5, Clayton Dep, at 73:2–14, 77:18–80:7; ECF No. 56-4, Rissling Dep. at 100:21–103: 23, 108:4–16; ECF No. 56-3, Presley Dep. at 42:13–43:3, 45:17–46:11. Defendants' deposition citations reflect only the fact that, in the absence of an accessible option, unsurprisingly, Individual Plaintiffs must vote in person or not at all. Because absentee voters without disabilities have a choice to vote absentee remotely, privately, and independently, *see, e.g.*, Ala. Code § 17-6-34, Plaintiffs are denied equal access under the law, *see Schalamar*, 855 F. App'x at 552; *see also Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1337 (11th Cir. 2013). Defendants' unwillingness to extend the RAVBM system to Individual Plaintiffs means that "the cause of the injury continues to exist," and is not "contingent upon events that are speculative or beyond [Individual Plaintiffs'] control." *Houston,* 733 F.3d at 1337. Such a discriminatory barrier is "injury in precisely the form the [ADA] was intended to guard against." *Schalamar,* 855 F. App'x at 552 (quoting *Houston*, 733 F.3d at 1332).

Defendants do not, and cannot, dispute causation: Defendants' failure to provide an accessible remote voting option is the cause of Plaintiffs' injury. There is also no dispute that an extension of the current RAVBM system would remedy Plaintiffs' injury. Defendants' argument on the scope of those remedies and that Plaintiffs seek relief "beyond [their] claimed injuries," ECF No. 67 at 20, is both premature and incorrect, *see Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003) (explaining injunctive remedy is determined *after* establishing liability); *Cobb v. Georgia Dep't of Cmty. Supervision*, No. 1:19-CV-03285-WMR, 2022 WL

22865202, at *9 (N.D. Ga. Oct. 13, 2022) (finding it "appropriate to wait until there are specific legal violations before fashioning any injunctive relief" in light of *Keener*). In any event, courts have regularly ordered the implementation of RAVBM systems in response to claims brought by similarly situated individual and organizational plaintiffs. ECF No. 58 at 29 (citing cases).

B. NFB-AL Has Associational Standing.

Defendants concede that NFB-AL's interest in having equal access to Defendants' remote absentee voting program is germane to its purpose of promoting the integration of blind people into all areas of civic life on terms of equality with non-disabled people. *Compare* ECF No. 58 at pp. 10–11, ¶¶ 13–18 *with* ECF No. 67 at p. 6, ¶¶ 13–18; *accord Case*, 555 F.3d at 1329. Yet Defendants argue that NFB-AL members do not have standing in their own right and that this case requires the participation of individual members. ECF No. 67 at 21–22. Neither argument defeats NFB-AL's standing for at least two reasons.

First, at least some NFB-AL members have standing to sue in their own right. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014). Ms. Clayton and Mr. Rissling are NFB-AL members with standing to obtain the relief they seek. ECF No. 58 at p. 10, ¶ 14; ECF No. 56-6, Ex. 6, Pls.' Resp. to Defs.' Interrog. No. 18; ECF No. 67 ¶ 14. At least 95 NFB-AL members intend to vote absentee remotely. *See* ECF No. 56-42, Ex. 42, Voting Accessibility Preferences Survey Results at NFB-AL 000696. Like Individual Plaintiffs, these members have suffered, and will continue to suffer, the concrete injury from Defendants' categorical exclusion from their remote absentee voting programs. *See Schalamar* 855 F. App'x at 552.

Second, the participation of nearly 100 individual NFB-AL members is not necessary to advance the Title II claim or fashion the relief sought. *See* ECF No. 56-42, Ex. 42, Voting Accessibility Preferences Survey Results. NFB-AL seeks an injunction, and it "can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the

association actually injured." *Warth*, 422 U.S. at 515; *see also United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996); *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003) (same); *Payan v. Los Angeles Cmty. Coll. Dist.*, No. 19-56111, 2021 WL 3743307, at *2 (9th Cir. Aug. 24, 2021). The variations in the degree of disability among NFB-AL members is irrelevant, *see* ECF No. 67 at 22, and Defendants' failure to engage with Plaintiffs' cited authorities, *id.* at 21–23, demonstrates that their standing arguments lack credence.

Defendants' reliance on *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach*, 884 F. Supp. 487, 488 (S.D. Fla. 1994), ECF No. 67 at 23, is misplaced. *Concerned Parents* predates Supreme Court and Eleventh Circuit cases Plaintiffs cite, which reiterate that individual participation is not necessary when an association seeks injunctive relief, as long as relief will "inure to the benefit" of members. *See, e.g.*, *United Food & Com. Workers Union Loc. 751*, 517 U.S. at 546; *Norton*, 324 F.3d at 1244; *see also Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999) (ADA context). Defendants also ignore subsequent cases that distinguish *Concerned Parents* and have upheld associational standing under the ADA. *E.g.*, *Alumni Cruises, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290, 1301 (S.D. Fla. 2013) (collecting cases).[4]

II. The ADA Preempts Any Conflicting State Law Requirements.

This Court has already rejected Defendants' arguments that compliance with state law "shields [Defendants] from ADA liability," *Rissling v. Bobo*, No. 7:23-CV-01326-LSC, 2024

[4] In a footnote, Defendants claim to "preserve the right" to argue that associational standing violates Article III. ECF No. 67 at 23 n.4. This challenge ignores that the Supreme Court has repeatedly recognized associational standing as consistent with Article III. *E.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 199 (2023); *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *United Food & Com. Workers Union Loc. 751*, 517 U.S. at 553; *accord Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008).

WL 3106897, at *3 (N.D. Ala. June 24, 2024), explaining that the Eleventh Circuit has already "applied the ADA to voting; so will this Court," *id*. at *4. That is the law of the case, and Defendants offer no justification for why the Court should not do so again. *See United States v. Siegelman*, 786 F.3d 1322, 1327 (11th Cir. 2015) ("As most commonly defined, the law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the *same issues* in subsequent stages in the *same case*.'") (quoting *Pepper v. United States,* 562 U.S. 476, 506 (2011)); *accord Baker v. Paulison*, No. 4:04-CV-2961, 2006 WL 8436602, at *3 (N.D. Ala. Jan. 30, 2006) (citation omitted) (clarifying that there are "two branches" to the law of the case doctrine, and that the second is implicated "when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issues by a higher court").

"[D]efendants' argument—that the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination—cannot be correct." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016). Federal district courts have consistently ruled that federal disability rights laws, including the ADA, preempt conflicting state laws, including in the area of voting. *See, e.g.*, *Johnson v. Callanen,* No. SA-22-CV-00409-XR, 2023 WL 4374998, at *10 (W.D. Tex. July 6, 2023); *Hindel* v. *Husted*, 875 F.3d 344, 349 (6th Cir. 2017); *Lamone*, 813 F.3d at 508; *see also Astralis Condo. Ass'n v. HUD*, 620 F.3d 62, 69–70 (1st Cir. 2010) (Fair Housing Amendments Act preempted any application of Puerto Rican law that would permit discrimination based on disability); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (ADA required modifications to Hawaii's animal quarantine law to the extent it interfered with use of guide dogs); *Quinones v. City of Evanston*, 58 F.3d 275, 279–80 (7th Cir. 1995) (Age Discrimination in

Employment Act's prohibition on aged-based discrimination prevailed over state law denying pensions to public employees hired after a certain age).

Even when the presumption against preemption applies, it can be defeated by a clear statement that Congress intends to preempt state law. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congress provided such a statement in the ADA, demonstrating its intent to cover voting and elections: "discrimination against individuals with disabilities persists in such critical areas as . . . *voting*, and access to public services." 42 U.S.C. § 12101(a)(3) (emphasis added). The ADA "prohibits all discrimination" on the basis of disability "by a public entity, regardless of the context." *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (citation omitted).

In *American Association of People with Disabilities v. Harris*, 647 F. 3d 1093 (11th Cir. 2011), the Eleventh Circuit explained that "as a public program, disabled citizens must be able to participate in the County's voting program." *Id*. at 1107. Consistent with *Harris*, another court in this district similarly applied the ADA to election administration in *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, 1214 (N.D. Ala. 2020). Other district courts in the Eleventh Circuit have agreed that "there is no question that elections are a public program." *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1157 (N.D. Fla. 2022), aff'd in part, vacated in part, rev'd in part sub nom., *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905 (11th Cir. 2023). Defendants cite to no authority to the contrary.

III. Defendants Concede Plaintiffs Are Excluded from Using Their Already Deployed and Accessible RAVBM System.

The undisputed record establishes that: 1) Defendants' current paper-based, remote absentee voting program is completely inaccessible to Plaintiffs; and 2) Defendants have an accessible alternative that could be extended to Plaintiffs. Defendants attempt to deflect liability

by arguing that Alabama has an accessible *in-person* option, the ExpressVote machine. ECF 67 at 35. Defendants' attempt to reframe this case as merely seeking access to the "voting program generally," ECF No. 67 at 33, cannot be squared with the relief Plaintiffs' have sought from the beginning.

A. Plaintiffs Have Sought Remote, Private, and Independent Voting from the Outset of this Litigation.

The Court has already found that the "proper analytic scope" of Plaintiffs' Title II claims is Defendants' "[e]xclusion [of Plaintiffs'] from private and independent absentee voting.," *Rissling*, 2024 WL 3106897, at *6. Defendants ignore this framing, in an attempt to improperly expand the Court's focus. *See* ECF No. 67 at 35 (framing as "*voting* as a general matter"). Again, Defendants offer no controlling authority for why the Court should not adhere to its earlier rulings. *See Siegelman*, 786 F.3d at 1327; *Baker*, 2006 WL 8436602, at *3.

First, Defendants' contention that Plaintiffs have raised the issue of Defendants' remote absentee voting programs for the first time at summary judgment, ECF No. 67 at 32–33, is simply wrong. *See* Am. Compl., ECF No. 4 ¶¶ 53–60, 66 (referring to *Remote* Accessible Vote-By-Mail or RAVBM systems ten times); *id.* at p. 20–21, ¶ A (requesting in Plaintiffs' Prayer for Relief a permanent injunction "requiring Defendants to remedy the inaccessibility of their absentee ballot systems by implementing a *remote* accessible vote-by-mail system, including electronic delivery and return") (emphasis added); Pls' Opp'n to Mot. to Dismiss, ECF No. 26 at 1, 12–18, 20–25 (arguing that providing an accessible means for voting in person does not defeat Plaintiffs' Title II challenge to the inaccessible means for voting remotely); ECF No. 56-6, Ex. 6, Pls.' Ans. to Defs.' Interrog. Nos. 6–7 (responding that Defendants do not offer any accessible remote means to vote absentee); ECF No. 56-7, Ex. 7, Manuel Dep. at 45:18–46:7 (noting

standing objection made in formal objection to ExpressVote on 30(b)(6) topic list as irrelevant to the issue of accessibility of Defendants' remote absentee voting programs).

Second, this Court, like others, has correctly found that the Title II program at issue is inaccessible absentee voting. *See* ECF No. 58 at 23–25 (citing cases).[5] Failing to respond to these authorities, Defendants rely instead on *Harris*, ECF No. 67 at 35, which is inapposite. There the Eleventh Circuit considered a Title II challenge to a Florida county's failure to provide accessible voting machines for in-person voting and merely referred to the "County's voting program" as "a public program" that "disabled citizens must be able to participate in." *Id*. (citing 42 U.S.C. § 12101(a)(3)). It neither considered nor evaluated any absentee program. *But see Rissling*, 2024 WL 3106897, at *6.

Third, Defendants' argument that ExpressVote machines are an accessible option, ECF No. 67 at 35–38, ignores: (1) their own expert's clarification that this is not actually "absentee voting" but, rather, "early voting," ECF No. 56-30, Ex. 29, Appel Dep. at 127:11–128:2; and (2) that those machines deprive Plaintiffs of the same right to vote *remotely* afforded to absentee voters without print disabilities.

B. There Is No Genuine Dispute of Material Fact that Plaintiffs Are Excluded from Defendants' Remote Absentee Voting Programs.

Defendants either offer no facts rebutting Plaintiffs' evidence regarding each of the elements of Plaintiffs' Title II claims or ignore (and thus concede) them entirely. *See* ECF No. 67 at 30–39; *accord Case*, 555 F.3d at 1329.

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[5] Defendants take umbrage with *Lamone*, ECF No. 67 at 31–32, based on an irrelevant factual distinction under Maryland law, yet ignore that *Lamone* rejected the exact argument that Defendants make here. 813 F.3d at 504 (rejecting that the "in its entirety" language of 28 C.F.R. § 35.150(a) required the court to look broadly at all voting, where that regulation was "targeted principally at *physical* accessibility" (emphasis added)).

First, it is undisputed that Plaintiffs are qualified individuals with disabilities. Indeed, at least one Plaintiff has successfully, albeit inaccessibly, applied to vote absentee and was approved to do so. ECF No. 56-4, Ex. 4, Rissling Dep. at 60:23–61:9. Defendants' argument that absentee voting is "available only for those who cannot [physically] attend the polling place on Election Day," ECF No. 67 at 34, (and thus not Plaintiffs) is belied by the record. The absentee ballot application permits voters with a disability, including vision impairment and musculoskeletal disorders, to vote absentee by checking a box attesting:

> I am physically incapacitated and will not be able to vote in person on election day.
> I am ***unable to access my assigned polling place*** due to a neurological, musculoskeletal, respiratory (including speech organs), cardiovascular, or other life-altering disorder that affects my ability to perform manual tasks, stand for any length of time, walk unassisted, ***see***, hear or speak ***and***:
>
> a) I am an elderly voter aged 65 or older; ***or***
> b) I am a ***voter with a disability***.

ECF No. 56-16, Ex. 15 at D. Potts 000690 (emphasis added); *accord* Ala. Code § 17-11-3(a)(2). Checking the box next to this attestation is all that is required to apply to vote absentee by reason of disability. ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 72:17–23; ECF No. 56-11, Ex. 11, Bobo Dep. at 82:19–83:4; ECF No. 56-12, Ex. 12, Potts Dep. at 61:17–62:6.

Defendants' argument that "Plaintiffs are able to attend the polls," ECF No. 67 at 39, ignores Plaintiffs' testimony that, because of their disabilities, transportation is not always available to them. *See, e.g.,* ECF No. 56-3, Ex. 3, Presley Dep. at 37:7–15; ECF No. 56-4, Ex. 4, Rissling Dep. at 77:9–78:6, 88:5–89:3; ECF No. 56-5, Ex. 5, Clayton Dep. at 34:3–16; ECF No. 56-2, Ex. 2, Peebles Dep. at 11:12–21, 13:5–7. And Ms. Manuel testified that many NFB-AL

members often have difficulties getting to and from the polls. *See* ECF No. 56-7, Ex. 7, Manuel Dep. at 17:2–7, 61:8–12, 67:18–68:5, 75:2–10, 76:5–12.[6]

Second, there is no dispute that Plaintiffs are excluded from voting absentee remotely, privately, and independently—a benefit afforded to voters without disabilities. *See* ECF No. 58 at 25–28; *accord* 28 C.F.R. § 35.130. The paper absentee ballots Defendants provide to voters with print disabilities cannot be accessed because of their disabilities and are not "as effective as communications" with voters without print disabilities. 28 C.F.R. § 35.160(a)(1).

Contrary to Defendants' argument, ECF No. 67 at 31–32, the Eleventh Circuit treats voting as communication subject to the ADA's equally effective communication requirement. *Harris*, 647 F.3d at 1108 (affirming lower court's finding that plaintiffs had presented "no evidence that communication with visually and manually impaired voters is not as effective as communication with non-disabled voters"). Other Courts agree. *See e.g., Am. Ass'n of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1291–92 (M.D. Fla. 2002); *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1236 (N.D. Cal. 2013).[7] Defendants cite no relevant authority to the contrary. *See* ECF No. 67 at 31–32.

Instead, they cite *Burdick v. Takushi*, which analyzed whether voting for a preferred write-in candidate was a constitutional "expressive function" under the First Amendment, not

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[6] The question Defendants claim Plaintiffs "ducked" regarding voters with print disabilities' *eligibility* to vote absentee using the RAVBM system was about what *verification* process Defendants should employ if that relief is granted to print-disabled voters. ECF No. 56-7, Ex. 7, Manuel Dep. at 80:10–13. This question was objected to as beyond the scope of the 30(b)(6) topics and Ms. Manuel answered in her personal capacity, stating that she did not personally believe verification from a doctor would be necessary in light of the steps in place to prosecute voters for perjury who inaccurately represented their eligibility to vote absentee. *Id*. at 80:14–83:19.

[7] DOJ Guidance similarly treats voting as a communication under Title II. *See* Dep't of Justice, *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, Apr. 18, 2024, https://www.ada.gov/resources/protecting-voter-rights/.

whether the ballots themselves were a communication under the ADA. 504 U.S. 428, 438 (1992). They also cite *Lamone*, which did not reach the question, instead granting the requested RAVBM system relief solely on the "ADA itself and the general anti-discrimination regulation [28 C.F.R. § 35.130]." 813 F.3d at 505, n.7. Similar to *Lamone*, Defendants' paper-based remote absentee voting program violates Title II's general prohibition against excluding or discriminating against Plaintiffs by reason of their disability, even if it weren't subject to the effective communication obligation (it is).

Third, the availability of third-party assistance does not, as Defendants argue, *see* ECF No. 67 at 37, change this analysis, *see Rissling,* 2024 WL 3106897, at *7; *accord* 28 C.F.R. § 35.160(c)(2) ("A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except" where needed to communicate an "imminent threat to the safety or welfare of an individual" or where the "individual with a disability specifically requests that the accompanying adult interpret or facilitate communication"). Defendants do not even attempt to respond to the authorities Plaintiffs cite for the proposition that "the enjoyment of a public benefit is not contingent upon the cooperation of third persons." ECF No. 58 at 27. Instead, they cite to inapposite regulations relating to interpreters that have no bearing on the right to vote privately and independently.

Finally, Defendants make no argument that the challenged discrimination was not by reason of Plaintiffs' disabilities—nor could they—thus conceding that element. *Case*, 555 F.3d at 1329.

C. There Is No Dispute that Plaintiffs Have Proposed a Reasonable Modification—An Effective Auxiliary Aid in the Form of an Already Deployed RAVBM System.

Defendants must provide auxiliary aids necessary to ensure equally effective communication in their remote absentee voting programs, 28 C.F.R. § 35.160(a)–(b), unless they

can prove their undue burden or fundamental alteration affirmative defenses, *id*. at § 35.164. Because voting is subject to the effective communication requirements, Defendants must provide the auxiliary aid—extension of the current RAVBM system—that Plaintiffs have established would make Defendants' remote absentee voting program accessible. ECF No. 58 at 28–29.

But even if Defendants were correct that voting is not communication for Title II purposes, Plaintiffs have still cleared the minimal threshold of pointing to a reasonable modification. 28 C.F.R. § 35.130(b)(7). Contrary to Defendants' argument, no exhaustion of remedies mandate exists under Title II that required Plaintiffs to "request reasonable modifications from the AEMs," before bringing suit. ECF No. 67 at 32.[8] Rather, "Plaintiffs need only show [in making their Title II claim] that their proposed accommodation 'seems reasonable on its face, i.e., ordinarily or in the run of cases, or is plausible or feasible to implement.'" *Johnson*, 2023 WL 4374998, at *7 (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (internal quotations omitted)).

Plaintiffs' burden is "not a heavy one" and "it is enough for [plaintiffs] to suggest the existence of a plausible accommodation[.]" *Id*. (quoting *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (internal quotations omitted) (cleaned up). The proposed modification here—extending the RAVBM system Defendants already use to voters with print disabilities—meets this low threshold where the evidence is undisputed that 1) Defendants have successfully operated an RAVBM system, Democracy Live's OmniBallot, with electronic return for overseas voters for four years (two federal election cycles); 2) this platform is accessible to voters who rely on screen reader assistive technology to read text and/or fill forms; and 3) it would thus be

[8] Even if it did, such a request in this case would have been futile, as Defendants maintain that they are prohibited from extending the RAVBM system to Plaintiffs.

accessible to the Individual Plaintiffs and NFB-AL members, who could then privately and independently review, complete, and return their remote absentee ballots. *See* ECF 58 at 28–29.

In the "run of cases," extending an existing modification to "a limited group" is "facially reasonable." *See People First*, 467 F. Supp. 3d at 1192–93, 1221 (finding proposed modification of "extend[ing] an existing exemption" to the photo-ID verification requirement to voters who were older than 65 *or* disabled was reasonable). This includes cases extending a pre-existing RAVBM systems. *See Johnson*, 2023 WL 4374998, at *8; *Lamone*, 813 F.3d at 508. Defendants offer no evidence to rebut the facial reasonableness of the proposed modification and thus the burden shifts to Defendants to prove their affirmative defenses, which they cannot do.

IV. Defendants Offer No Facts Proving Their Affirmative Defenses.

Defendants continue to ignore this Court's instruction to develop ***facts*** proving their affirmative defenses of undue burden and fundamental alteration. *Rissling*, 2024 WL 3106897, at *5. Instead, they repeat the same conclusory allegations this Court rejected in denying their Motion to Dismiss, entitling Plaintiffs to summary judgment as a matter of law on both.

A. Defendants Have Not Established Extending the Current RAVBM System to Voters with Print Disabilities Would Create an Undue Burden.

Defendants argue that the Court must compare the cost and administrative burden of extending RAVBM system access to voters with print disabilities to the benefit voters with print disabilities would receive from that access. ECF No. 67 at 40 (citing *Schaw v. Habitat for Human. of Citrus Cnty., Inc.*, 938 F.3d 1259, 1266 (11th Cir. 2019)). Yet Title II's regulation requires comparing the cost against the public entity's available resources. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 606 n.16 (1999); *accord Tauscher v. Phoenix Bd. of Realtors, Inc.*, 931 F.3d 959, 965–66 (9th Cir. 2019) (remanding for district court to consider undue burden in the context of defendant's "overall financial resources"); *accord* ECF No. 58 at 31–32.

But even if Defendants' framework were correct, they devalue the importance of allowing absentee voters with print disabilities the ability to exercise their right to vote privately, independently, and remotely compared to the minor cost associated with expanding a preexisting RAVBM system to that small number of absentee voters, There are no facts showing that the burden would be so undue that it would outweigh Plaintiffs' right to be free from discrimination.

1. Defendants Still Have Not Provided Any Evidence of Prohibitive Cost.

Defendants point to no facts regarding the cost of extending their existing RAVBM system or showing that that cost would be prohibitively burdensome. *See Nat'l Ass'n of the Deaf v. Florida*, 980 F.3d 763, 773 (11th Cir. 2020) (noting some "cost or effort" is not in and of itself an undue burden). Rather, they ignore all of their own witnesses' testimony that they never looked into the cost of expanding the RAVBM system. *See* Pltfs.' Mot. ECF No. 58 at 32.

The sole example Defendants cite is Ms. Potts's "forecasting" what financial factors she might have to consider in extending RAVBM system access to voters with print disabilities; not any actual analysis of the cost that she had performed and could offer as evidence of an undue burden. ECF No. 67 at 41 (citing ECF No. 56-12, Ex. 12, Potts Dep. at 158:6–19; 159:3–5). Yet Ms. Potts admitted that she has not "had any conversations with anyone about specific cost increases or budget increases, no." ECF No. 56-12, Ex. 12, Potts Dep. at 156:1–11. The other Defendants similarly testified they had not investigated the issue. *See* ECF No. 56-11, Ex. 11, Bobo Dep. at 169:11–19; ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 159:19–160:5.

Defendants argue that they have "negligible budgets over which they have no control." ECF No. 67 at 41. This does not excuse Defendants from gathering evidence to support their burden. 28 C.F.R. § 35.164 ("This subpart does not require a public entity to take any action *that it can demonstrate* would result in a fundamental alteration . . . or in undue financial and administrative burdens") (emphasis added). Moreover, Ms. Anderson-Smith specifically

referenced her "control" over funds her office has used under the Help America Vote Act ("HAVA") to cover its absentee voting budgetary needs. ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 46:23–47:19; *see* ECF No. 56-19, Ex. 19, Elrod Dep. at 165:25–166:23.

Defendants omit the context of their claim that a $60,000 increased cost would be an undue burden. ECF No. 67 at 41. Democracy Live's testimony [redacted] Neither Defendants nor their county representatives provided any information regarding what the absentee voting budgets actually are or how $895 would result in an undue financial hardship. *Compare* ECF No. 58 at 32–33 *and* ECF No. 67 at 41 *with Olmstead*, 527 U.S. at 606, n.16 (providing factors consistent with undue hardship). Thus, Defendants have failed to carry their burden to demonstrate that $895 would create an undue burden on their total budget.

2. Defendants Still Have Not Provided Any Evidence of Prohibitive Administrative Burden.

Defendants also retread old ground regarding two hypothetical administrative burdens: more staff and more time to process additional electronically returned ballots. ECF No. 67 at 40–42. That a reasonable modification will take more time or effort than what is currently required is not, alone, sufficient to constitute an undue burden. *Nat'l Ass'n of the Deaf*, 980 F.3d at 773. Defendants have not specified what additional resources they would need or how much additional time would be incurred, and the evidence indicates Defendants have either managed these challenges in the past or have not considered readily available solutions.

Defendants offer no response to their own testimony that they have successfully handled a significant influx of absentee ballots in past elections by hiring additional staff. *See* ECF No. 58 at 33–34. Ms. Bobo explained that the Tuscaloosa County probate judge provided three or

four staff members from his office to assist with the huge influx of absentee voters during the 2020 election. ECF No. 56-11, Ex. 11, Bobo Dep. at 55:17–56:15. Ms. Anderson-Smith managed the "tsunami" of absentee voters during the 2020 election by hiring additional staff to help process ballots and recruiting "nonstudents and volunteers" to assist in handling lawsuit-related ballot issues. *See* ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 31:12–34:18, 151:17–154:25. Ms. Anderson-Smith's office has also used HAVA grant funds to cover the cost of hiring additional staff when needed. *Id.* at 46:23–47:19; *see* ECF No. 56-19, Ex. 19, Elrod Dep. at 165:25–166:23. Ms. Potts has not looked into whether she could get more staff to assist with the administrative undue burden she claims. ECF No. 56-12, Ex. 12, Potts Dep. at 117:22–118:17.

Nor do Defendants address the other alternative systems available for processing electronic ballots that would not require the additional transcribing or hand counting they claim would create an undue burden. ECF No. 58 at 40 [redacted] Defendants admitted they have not looked into this option or any other ways to streamline the printing process for electronically returned ballots. *E.g.,* ECF No. 56-13, Ex. 13, Anderson-Smith Dep. at 118:17–24; ECF No. 56-12, Ex. 12, Potts Dep. at 132:18–133:15.

B. Defendants Have Not Established that Extending the Current RAVBM System to Voters with Print Disabilities Would Fundamentally Alter Absentee Voting.

Despite this court's clear admonishment not to, Defendants continue to rely on "mere citation to Alabama statutes governing elections procedure," rather than facts, to argue fundamental alteration. *Rissling*, 2024 WL 3106897, at *5. The record shows that these so-called "essential" requirements are subject to established exceptions under UOCAVA that have not resulted in compromised election integrity or security breaches. Any security concerns are

defeated by Defendants' and the State's acceptance of those risks in deploying the system to the much larger group of military and overseas voters.

1. Defendants Still Have Not Provided Any Evidence Showing Paper Ballots and the Witness Requirement are Essential.

Defendants cannot "merely state that the discriminatory" use of paper by absentee voters with print disabilities "is essential to the fundamental nature of the activity at issue—[they] must provide evidence that the procedural requirement is necessary to the substantive purpose undergirding the requirement." *People First*, 467 F. Supp. 3d at 1216 (citing *Schaw*, 938 F.3d at 1266–67); *accord Hindel*, 875 F.3d at 348 (same). Yet Defendants make the same arguments citing the same statutes on which they unsuccessfully relied at the motion to dismiss stage. *See* ECF No. 67 at 40–45. These recycled arguments offer no justification or additional facts to change this Court's prior ruling. *Siegelman*, 786 F.3d at 1327; *Baker*, 2006 WL 8436602, at *3. Again, the Court should not "fall into the logical fallacy" other courts (and this Court) have rejected, i.e., assuming, without factual evidence, that a procedural requirement is necessary to fulfill an underlying substantive purpose. *Hindel*, 875 F.3d at 348 (quoting *Lamone*, 813 F.3d at 509).

a. Defendants Still Offer No Evidence Establishing that Paper Ballots Are Essential to Absentee Voting.

In arguing paper is "essential" to voting, Defendants simply reference the "laws and regulations underlying Alabama's voting system" listed in their Motion to Dismiss, as "show[ing] that the paper ballot is essential for ensuring election integrity and security." ECF No. 67 at 43 (citing ECF No. 18 at 12–15). Conceding that the Court rejected these arguments, they ask for reconsideration without offering any facts from the record to explain why paper is "essential for ensuring election integrity and security." *Id*. This Court should find that Defendants, having failed once, fail again. *Siegelman*, 786 F.3d at 1327; *Baker*, 2006 WL

8436602, at *3. The fact that Defendants allow military and overseas voters to receive, mark, and return their ballots electronically belies the contention that there is something magical about paper.

b. Defendants Still Offer No Evidence Establishing that the Witness Attestation Is Essential to Absentee Voting.

Defendants provide no facts indicating that the paper ballot witness signatures are essential to serving the substantive purpose of ensuring election integrity and security. *See generally* ECF No. 67 at 43–44. They further ignore the evidence cited in Plaintiffs' Motion that the alternatives in place under the current RAVBM system adequately serve this purpose. ECF No. 58 at 39–40.

Contrary to Defendants' argument, ECF No. 67 at 44, *People First* is not decisive on the essentialness of the witness requirement to election security. That court did not consider the fact that overseas voters are already exempted from this requirement, Ala. Code § 17-11-49, and instead found, solely based on a 1999 Alabama Supreme Court opinion, that it was essential to absentee voting. 467 F. Supp. 3d at 1219 (citing *Eubanks v. Hale*, 752 So. 2d 1113, 1157–58 (Ala. 1999)). Since *Eubanks*, the Alabama legislature has amended state election laws in accordance with federal law (UOCAVA) and authorized the Secretary of State to create an exemption to the witnessed signature requirement for overseas voters, who can now return ballots electronically, replacing it with a voter attestation under oath. *See* Ala. Code § 17-11-49 (2011); *see also* ECF No. 56-19, Ex. 19, Elrod Dep. 63:10–17, 151:1–11. The ADA requires the same alternative be offered to print disabled voters. *See* ECF No. 58 at 37–38 (collecting cases finding program requirements not essential where they had established exemptions). The fact that the attestation overseas voters complete in lieu of a witness signature has not resulted in fraud underscores that the witnessed signature requirement is not essential. *See* ECF No. 56-19,

Ex. 19, Elrod Dep. 153:3–154:5; *cf. People First*, 467 F. Supp. 3d at 1222 (finding photo ID requirement was non-essential where it was already subject to exemptions).

The additional, unrebutted evidence of Democracy Live's robust verification process and privacy protections show that protecting election integrity can be satisfied through the existing RAVBM system. ECF No. 56-21, Ex. 21 Pinnick Dep. 47:17–50:15 [redacted] 50:16–54:4 [redacted] 47:2–16, 89:16–90:21 [redacted]

Rather than engage with any of this evidence, Defendants cite a slew of voter fraud cases involving ***paper ballots*** that are wholly irrelevant to the issues presented in this case. First, it is unclear whether all of the cases cited by Defendants have resulted in an actual finding of voter fraud. *See* ECF No. 62-7, *State v. Toomey*, No. CC-2024-2952 at 2 (Mobile Cnty. Cir. Ct. Oct. 18, 2024) (citing indictment only). Second, regardless of the outcome, all of the cases dealt with ***paper*** (not electronic) absentee ballot issues. *See* ECF No. 67 at 46–47.[9] If anything, these cases

[9] *See Eubanks v. Hale*, 752 So. 2d 1113, 1147–62 (Ala. 1999) (identity fraud and forgery, failure to comply with signature requirements, non-resident voting, and filling out the wrong affidavit for ***paper absentee*** ballots); *Evans v. State*, 794 So. 2d 415, 422, 440 (Ala. Crim. App. 2000) (forgery and illegal absentee voting by ***paper absentee ballots***); *Wilder v. State*, 401 So. 2d 151, 152–53, 165 (Ala. Crim. App. 1981) (casting ***paper absentee ballots*** for others without consent); *United States v. Smith*, 231 F.3d 800, 804–805, 821 (11th Cir. 2000) (casting ***paper absentee ballots*** for others without consent); ECF No. 62-6, Ex. 6, *State v. Heflin*, No. CC-2024-00130 at 6-8 (Clay Cnty. Cir. Ct. May 19, 2025) (pleading guilty to absentee voter fraud of casting a ***paper mail-in ballot*** in another person's name); ECF No. 62-8, Ex. 8, *Cooper v. Dean*, No. 68-CV-2016-900602.00 at 5, 9–10 (Jefferson Cnty. Cir. Ct. Sep. 25, 2017) (inconsistent signatures, false mailing address and improper absentee voter residence, and false reason for voting absentee on ***paper absentee ballots***); ECF No. 62-9, Ex. 9, *Porter v. Alexander*, No. 68-CV-2018-900776.00 at 4, 6–12 (Jefferson County Cir. Ct. Sep. 3, 2021) (failure to comply with signature requirements, identity fraud and forgery, false mailing addresses and improper residency for ***paper absentee ballots***); ECF No. 62-10, Ex. 10, *State v. Melton*, No. 38-CC-2017-1469 & -1470 at 2–7 (Houston Cnty. Cir. Ct. Jan. 16, 2019) (falsely notarizing a ballot affidavit accompanying a ***paper absentee ballot***).

speak to why electronic voting should be favored over paper-based voting, and Defendants fail to provide evidence that these paper-based "requirements" are essential to absentee voting.

2. Defendants Fail to Establish Security Concerns that Are Not Already Accepted by the State.

Defendants continue to insist, ignoring the case law to the contrary, ECF No. 58 at 40–43, that their security concerns allow them to discriminate against Plaintiffs and violate Title II. Defendants' failure to point to any specific evidence of the same is highlighted by their gloss of their expert's testimony in their Motion. *See* ECF No. 67 at 48 (citing generally to Dr. Appel's entire report without identifying any specific information therein). The unrebutted facts regarding security remain: 1) there are no known instances of election compromising security issues resulting from the use of electronic ballot return in any jurisdiction using any RAVBM system; 2) Defendants have already accepted any risks by utilizing the RAVBM system for a much larger group of people than is at issue in this case; and 3) in using the current RAVBM system, Defendants have not actually encountered any security issues. ECF No. 58 at 40–43.

Defendants' expert, Dr. Appel, testified that there is no actual evidence of election compromising security issues from use of electronic ballot return. ECF No. 56-29, Ex. 29, Appel Dep, at 48:2–49:1. Instead, he offered only his general belief that "internet voting" (returning ballots via e-mail, rather than secure portal) is never secure, in light of two potential threats: 1) the installation of "fraudulent software" on an individual voter's computer that might change their vote; and 2) malware that might corrupt election officials' server computers where electronically returned ballots are stored. *Id.* at 46:10–49:1. He knew of no real-world examples of either and admitted the second risk could be mitigated. *Id*. His only evidence of how these particular risks might apply to Democracy Live OmniBallot were based on a non-election setting testing of the Democracy Live OmniBallot system completed by two other individuals in 2021.

ECF No. 56-30, Ex. 29, Appel Dep. 87:10–18. But unlike the non-election setting hacking exercise in which these other individuals engaged, [redacted]. ECF No. 56-21, Ex. 21, Pinnick Dep. 83:16–85:24. Dr. Appel did not consider this information, including the independent security review of Democracy Live in 2022 *after* the article he exclusively relied on was published. ECF No. 56-30, Ex. 29, Appel Dep. at 105:13–24, 106:24–110:7. Defendants do not rebut these points.

Defendants do not address Plaintiffs' argument, or their own expert's agreement, that, consistent with federal law, these hypothetical risks have been accepted by Alabama and that measures have been put in place to mitigate those risks. *See* ECF No. 58 at 41–43. UOCAVA, as amended by the MOVE Act, expressly requires such security and privacy protections. 52 U.S.C. § 20302(f)(3)(A)–(B); *see also Johnson*, 2023 WL 4374998, at *9. In accordance with federal law, Alabama includes in its RFP for services certain security and privacy requirements that must be met by their RAVBM vendor. ECF No. 56-36, Ex. 33, at Democracy Live 004740–51. Alabama certified Democracy Live's OmniBallot for use in two election cycles, *id*. at Democracy Live 004728, concluding that its security and privacy measures are both acceptable to the State and mitigate against any concerns. And as the Secretary of State's Office representative testified, no RAVBM system vendor is ever entitled to automatic contract renewal: "[t]hey still have to submit a bid and they still have to come out on top as the most responsible respondent to that process." ECF No. 56-19, Ex. 19 Elrod Dep. at 146:9–148:19. That neither Defendants nor the State have applied for a "hardship exemption" under 52 U.S.C. § 20302(g) reveals that they are not actually concerned about undue hardship—only discriminating against voters on the basis of disability.

Finally, there is no evidence Defendants have encountered any election compromising security issues while using OmniBallot in all elections since 2020. *See* ECF No. 58 at 42. That Democracy Live's Chief Technology Officer [redacted] [10] Accordingly, the Court should grant Plaintiffs summary judgment on Defendants' fundamental alteration defense.

V. Defendants' Constitutional Argument is Improper and Misconstrues *Tennessee v. Lane*.

Defendants conclude with a sweeping and incorrect argument that if the ADA requires accessible absentee voting, it exceeds Congress's authority under Section 5 of the Fourteenth Amendment because it would not be congruent and proportional to the unconstitutional conduct Congress sought to address. *See* ECF No. 67 at 51–52. Defendants' argument relies on an incorrect reading of *Tennessee v. Lane*, 541 U.S. 509 (2004).

Lane found that Title II of the ADA was an appropriate exercise of legislative authority under § 5 of the Fourteenth Amendment in the context of access to the courts. *Id.* at 530–34. The *Lane* Court found that "[t]he unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination." *Id.* at 531. Thus, "[f]aced with considerable evidence

[10] The single email Defendants cite as evidence of issues with OmniBallot is of no import and flatly inadmissible. ECF No. 67 at 16, ¶ 108 (citing ECF No. 62-11). First, the email is hearsay within hearsay that does not fall under any exception. *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1280 (11th Cir. 2009). Second, it is irrelevant because it offers no admissible testimony from the purported individual who experienced the so-called issue, and it proves nothing about Democracy Live's security, vulnerability to voter fraud, or that election compromising security issues have actually occurred.

of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Id.* (quoting *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 737 (2003)).

As Defendants admit, and as the *Lane* Court specifically noted, the ADA responded to unconstitutional discrimination against people with disabilities in the context of voting. *Id*. at 524–25. Indeed, the ADA itself expressly noted that "discrimination against individuals with disabilities persists in such critical areas as . . . voting[.]" 42 U.S.C. § 12101(a)(3). That many courts have provided the exact relief Plaintiffs seek in this matter pursuant to their authority under Title II of the ADA, *see* ECF No. 58 at 29 (collecting cases), demonstrates that Defendants' last-ditch effort to avoid liability fails.

CONCLUSION

For the foregoing reasons, and for those set forth in Plaintiffs Motion for Summary Judgment, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment on their Title II claims and further grant their Motion for Summary Judgment on Defendants' Affirmative Defenses.

Respectfully submitted,

/s/ Anthony J. May

Anthony J. May*
Eve L. Hill*
Lauren J. Kelleher*
Catalina Odio*
Brown, Goldstein & Levy LLP
120 E. Baltimore St., Ste. 2500
Baltimore, MD 21202
(410) 962-1030 (phone)
(410) 385-0869 (fax)
ehill@browngold.com
amay@browngold.com
lkelleher@browngold.com
codio@browngold.com

Larry G. Canada, JD, LLM
(AL Bar # 3153N73L)
Alabama Disabilities Advocacy Program
2008 12th St., Tuscaloosa, AL 35401
(205) 539-2031 (phone)
lcanada@adap.ua.edu

Bradley Heard*
Sabrina Khan*
Ahmed Soussi*
Ellen Degnan
(AL Bar # 3244I12V)
Southern Poverty Law Center
150 E. Ponce de Leon Avenue, Suite 340
Decatur, GA 30030
(470) 521-6700 (phone)
bradley.heard@splcenter.org
sabrina.khan@splcenter.org
ahmed.soussi@splcenter.org
ellen.degnan@splcenter.org

Counsel for Plaintiffs
*Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Anthony J. May
Counsel for Plaintiffs