



AlaFile E-Notice

03-CV-2020-900702.00

Judge: J. R. GAINES

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

THE LEAGUE OF WOMEN VOTERS OF ALABAMA ET AL V. JOHN MERRILL ET AL
03-CV-2020-900702.00

The following matter was FILED on 6/17/2020 12:13:17 PM

C001 THE LEAGUE OF WOMEN VOTERS OF ALABAMA

MOTION FOR PRELIMINARY INJUNCTION

[Filer: DOWD AUGUSTA SALEM]

Notice Date: 6/17/2020 12:13:17 PM

GINA J. ISHMAN
CIRCUIT COURT CLERK
MONTGOMERY COUNTY, ALABAMA
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MONTGOMERY, AL, 36104

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
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STATE OF ALABAMA

Revised 3/5/08

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Unified Judicial System

03-MONTGOMERY

 District Court
 Circuit Court

CV2

THE LEAGUE OF WOMEN VOTERS OF ALABAMA
ET AL V. JOHN MERRILL ET AL

CIVIL MOTION COVER SHEET

Name of Filing Party: C001 - THE LEAGUE OF WOMEN VOTERS OF
ALABAMA

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

AUGUSTA S. DOWD
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BIRMINGHAM, AL 35203
Attorney Bar No.: DOW003

 Oral Arguments Requested
TYPE OF MOTION**Motions Requiring Fee**

- Default Judgment (\$50.00)
Joinder in Other Party's Dispositive Motion
(i.e. Summary Judgment, Judgment on the Pleadings,
or other Dispositive Motion not pursuant to Rule 12(b))
(\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative
Summary Judgment (\$50.00)
Renewed Dispositive Motion (Summary
Judgment, Judgment on the Pleadings, or other
Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other _____
pursuant to Rule _____ (\$50.00)

*Motion fees are enumerated in §12-19-71(a). Fees
pursuant to Local Act are not included. Please contact the
Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0 _____

Motions Not Requiring Fee

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other _____
pursuant to Rule _____ (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously
with this motion an Affidavit of Substantial Hardship or if you
are filing on behalf of an agency or department of the State,
county, or municipal government. (Pursuant to §6-5-1 Code
of Alabama (1975), governmental entities are exempt from
prepayment of filing fees)

Date:
6/17/2020 12:11:53 PM

Signature of Attorney or Party
/s/ AUGUSTA S. DOWD

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

THE LEAGUE OF WOMEN VOTERS OF)
ALABAMA, ARDIS ALBANY,)
LUCINDA LIVINGSTON, BRYAN A.)
LORGE, SUZANNE SCHWARTZ,)
MYRTLE SCOTT, PATRICIA BURKETT)
SMITH, ROSA MARIA TOUSSAINT, and)
SUZANNE BERGMAN WRIGHT,)

Plaintiffs,)

v.)

CASE NO.

03-CV-2020-900702.00

JOHN MERRILL, in his official capacity as)
Alabama Secretary of State; KAY IVEY, in)
her official capacity as Governor of)
Alabama; J C LOVE, III, in his official)
capacity as Judge of Probate and member of)
the Canvassing Board for Montgomery)
County; GINA ISHMAN, in her official)
capacity as Circuit Clerk, Absentee)
Election Manager, and member of the)
Canvassing Board for Montgomery County;)
DERRICK CUNNINGHAM, in his official)
capacity as a member of the Montgomery)
County Canvassing Board; DANIEL)
HARRIS, JR., ELTON N. DEAN, SR.,)
RONDA M. WALKER, ISAIAH)
SANKEY, and DOUG SINGLETON, in)
their official capacities as members of the)
Montgomery County Commission,)

Defendants.)

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs League of Women Voters of Alabama et al., through undersigned counsel, respectfully submit this motion for a preliminary injunction, pursuant to Rule 65(a), Ala.R.Civ.P.

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Introduction.

1. The July 14 primary runoff is only a few weeks away, and some of the emergency safeguards sought by this motion for preliminary injunction can still be implemented in time to protect voters in the runoff elections. But, careful planning needs to begin now, so that all of these emergency measures, and even more, can be implemented in time for the August 25 municipal elections and the November 3 general election.¹

2. Plaintiffs seek only temporary, emergency, common-sense measures that

¹ The April 29, 2020, email sent by the National Task Force on Election Crises to Governors, Legislative Leaders, Secretaries of State, and State Election Directors, urges state officials not to delay planning for the November general election: **“We ask that you implement the Task Force’s recommendations, accelerate planning for the general election, and request additional funding from the federal government if necessary to fund the new initiatives your state will need to undertake for the November election.”** Exhibit A at 1 (bold emphasis in original).

the CDC² and many other responsible authorities³ have urged states to implement during the COVID-19 pandemic, so that citizens can exercise their right to vote as safely as possible. To date, Defendants Merrill and Ivey have refused to order these changes, saying only that they lack legislative authority to do so. That simply is incorrect. The Alabama Legislature has enacted statutes that give the Governor and Secretary of State power to suspend election laws in emergencies precisely like the current pandemic.

3. Plaintiffs are hopeful that Secretary of State Merrill and Governor Ivey will agree voluntarily to exercise during the current pandemic their emergency powers by suspending statutory restrictions on absentee and in-person voting, authorizing county and municipal election officials to implement early voting and other changes dictated by their local circumstances. But if Defendants cannot give such assurances, this Court should preliminarily enjoin Defendants to protect the

² Centers for Disease Control and Prevention, *Recommendations for Election Polling Locations: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, March 27, 2020. Exhibit B.

³ E.g., Open Letter To Members of the United States Senate and House of Representatives, May 5, 2020, signed by more than 800 public health experts, including two professors at UAB and one at UA. Exhibit C.

Bipartisan Policy Center, *Assessing the Vote During a Pandemic*, May 2020. Exhibit D.

Nathaniel Persily, Charles Stewart, III, *Ten Recommendations to Ensure a Healthy and Trustworthy 2020 Election*, LAWFARE, March 19, 2020. Exhibit E.

health and safety of all Alabama voters, based on their rights guaranteed by the Constitution of Alabama to vote and to be protected from infection by the novel coronavirus.

4. Specifically, Defendants should be enjoined to authorize, at a minimum, the following emergency measures, which are based on recommendations of the Centers for Disease Control and Prevention (CDC) for preventing the spread of COVID-19 during elections, Exhibit B:

a. Extend no-excuse absentee voting beyond the July 14 runoff to the other elections in 2020, and amend the application for an absentee ballot to notify voters how to check the appropriate box, or, better yet, that no box need be checked at all.

b. Suspend the requirement that a copy of the voter's photo ID be included with the voter's application for an absentee ballot.

c. Suspend the requirement that the absentee ballot be notarized or signed by two witnesses.

d. Suspend the statutory time deadlines, so that a voter can apply for an absentee ballot up to the day of election and have that ballot counted if it is delivered or postmarked by election day, and in anticipation of the exceptionally large volume of absentee ballots in the November general election, allow

canvassing boards to begin counting absentee ballots at least a week before election day.

e. Provide adequate personal protective equipment for clerks and poll workers and disinfecting polling equipment.

f. Provide in-person voters with masks and disposable pens.

g. Implement social distancing procedures and authorize early voting at least fourteen days before election day.

h. Authorize drive-through voting.

i. Authorize local election officials to establish vote centers and relax restrictions on wrong-precinct voting.

j. Provide local election officials the financial resources to implement these emergency measures.

Standards for a Preliminary Injunction.

5. Plaintiffs' motion satisfies all the requirements for a preliminary injunction:

Before entering a preliminary injunction, the trial court must be satisfied: (1) that without the injunction the plaintiff will suffer immediate and irreparable injury; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff is likely to succeed on the merits of the case; and (4) that the hardship imposed upon the defendant by the injunction would not unreasonably outweigh the

benefit to the plaintiff.

Facebook, Inc. v. K.G.S., __ So. 3d __, 2019 WL 2710235 (Ala., June 28, 2019) (quoting *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 77-78 (Ala. 2009); *Blount Recycling, LLC v. City of Cullman*, 884 So. 2d 850, 853 (Ala. 2003); *Blaylock v. Cary*, 709 So. 2d 1128, 1130 (Ala. 1997)). Another requirement frequently cited is “that granting the injunction will not disserve the public interest.” *City of Gadsden v. Boman*, 143 So. 3d 695, 703 (Ala. 2013) (citation omitted).

Without the Preliminary Injunction Plaintiffs and All Alabama Voters Will Suffer Immediate and Irreparable Injury, and There Is No Remedy At Law.

6. If Alabama citizens choose not to vote because they reasonably believe doing so will threaten their health and lives and the health and lives of others, the injury will be irreparable once the 2020 elections have been held (and, indeed, once the lack of preparations have reached the point of no return). No remedy at law can make citizens whole if they were unable or unwilling to vote for fear of infection.

7. If Alabama citizens choose to vote in spite of the risk of infection, the injuries to their health and lives they may suffer and cause others to suffer will be irreparable, and there is no adequate remedy for these injuries at law.

8. One of the foremost experts on infectious diseases and public health is right here in Alabama. Dr. Michael Saag is seen regularly on local and national television explaining the dangers of the SARS CoV-2 virus and the precautions everyone should be taking, not only to protect themselves but to reduce the community spread of infection to the public. Dr. Saag's affidavit is attached to this motion as Exhibit F.

9. Dr. Saag is Associate Dean for Global Health, Infectious Diseases, and Director of the UAB Center for AIDS Research at the University of Alabama at Birmingham. He is very familiar with many of the infectious diseases that have been in our midst during the course of his 35+ year career, including Ebola, SARS, MERS, and AIDS. He has been involved in research and clinical studies and trials, treatment, diagnosis, and care of many patients with viral infections as well many other infectious diseases. Exhibit F at 2.

10. "This is a brand-new and novel infection which, based on the information we have to date, has never been transmitted into the human population until very recently. COVID-19, the disease caused by SARS CoV-2, has many disturbing characteristics that cause those of us in the medical and public health community great concern. First, we continue to learn more about this virus at a rapid pace. Second, it is respiratory and transmitted primarily via airborne routes.

Third, it is highly contagious from human to human. Fourth, it is associated with a considerable degree of morbidity and mortality. Fifth, we now know that a person is most contagious in the 24-hour period before that person becomes symptomatic.” Id. at 2.

11. “Equally concerning is the growing literature of the number of people who have the virus but are asymptomatic. That means they are infected with the virus but have no symptoms. Despite having no symptoms they still are able to spread the virus to others but do so without knowledge that they are carriers or transmitters of the disease. This means that they can infect countless people with whom they cross paths without ever realizing they are doing so. The presence of asymptomatic, yet highly-contagious, carriers of COVID-19 is a significant public health concern.” Id. at 2-3.

12. Dr. Saag cites the large and growing number of COVID-19 infections and death here in Alabama and throughout the country. “According [to] the Alabama Department of Public Health (<https://covid19.alabama.gov/#live-updates>), as of June 16, 2020, in the state of Alabama alone there have been 26,524 confirmed positive COVID-19 cases with an additional 388 probable cases and 779 confirmed COVID-19 deaths and 6 additional probable deaths resulting from the virus. There were 7,986 new cases

in the last 2 weeks alone. According to the CDC COVID Data Tracker as of June 16, 2020 there have been 2,104,346 total cases of the virus and 116,140 deaths resulting from the virus nationwide (<https://www.cdc.gov>). In contrast, the CDC estimates during the 2019-2020 flu season there were 24,000-62,000 deaths from the flu (<https://www.cdc.gov/flu/about/burden/preliminary-in-season-estimates.htm>).” Id. at 3.

13. The number of COVID-19 cases is still growing in Alabama.⁴ “During the month of May 2020, daily reported cases in Alabama increased at an average higher rate than in any prior month since we began keeping track of the COVID-19 infection rate. Specifically, as of May 1, 2020, the average daily incidence of new COVID-19 cases in Alabama was 180 cases / day; on June 16, 2020, the average number of new cases was 764 per day, the highest per day

⁴ *Alabama health official worries public growing weary of social distancing as coronavirus cases rise*, AL.com, June 12, 2020 (“Coronavirus cases in Alabama this week soared to unprecedented levels, setting new highs since the pandemic’s first positive tests in March, and leading state health officials to worry that Alabamians were growing weary of social distancing too soon.”). Exhibit G. ADPH press release, June 12, 2020, *ADPH reinforces safer at home recommendations as more than 800 COVID-19 cases reported in a single day* (“State Health Officer Dr. Scott Harris said, ‘COVID-19 spreads quickly, and your actions affect others. More than ever since the pandemic began, we need people to social distance, wear face coverings in public, and practice good respiratory hygiene.’”). Exhibit H.

average ever reported in Alabama.

(<http://91-divoc.com/pages/covid-visualization/>). We have no indication that transmission will decrease during the summer and fall months. Indeed, every indication is that the number of cases will continue to rise during the summer and into the fall. This opinion is based on the knowledge that the virus is present within the community, it is very contagious (more contagious than seasonal influenza), the at-risk population is made up of > 90% of the total population (i.e., those who have never been infected remain 'at-risk'), and the population is tired of staying at home and want to re-engage now back into the activities they were doing before the epidemic hit Alabama. For all of these reasons, the virus is very likely to continue its aggressive transmission rate for the foreseeable future until an effective vaccine is developed, mass produced, and made fully available to and utilized by > 50% of the general public. In other words, this virus is not going to magically disappear. The likelihood is that the rate of transmission will continue to increase as time goes on, into the fall and winter months of 2021.” Id. at 3-4.

Dr. Saag’s opinion is joined by other infectious disease experts.⁵

14. Some people in Alabama are especially susceptible to the virus, i.e.,

⁵ E.g., Stephen M. Kissler, Christine Tedijanto, Edward Goldstein, Yonatan H. Grad, Marc Lipsitch, *Projecting the transmission dynamics of SARS-CoV-2 through the postpandemic period*, SCIENCE MAGAZINE, Apr. 14, 2020. Exhibit I.

“[t]he elderly, people with underlying conditions that are prevalent in our state such as hypertension, diabetes, heart disease, obesity, and pulmonary issues, and those with compromised immune systems (e.g., those on potent immune suppressive agents to treat autoimmune disorders, malignancies, or those who have had organ or bone marrow transplants).” *Id.* at 4. But everyone is in danger of being infected, including Dr. Saag himself, who contracted COVID-19. “I am in my 60s and I am hypertensive, but otherwise I do not have underlying conditions that should make me particularly vulnerable to the effects of COVID-19.” *Id.* at 4-5.

15. The dangers of infection will be with us through the November 3 general election. “We Alabamians should be on high alert right now, because I believe we are under a great public health threat, the magnitude of which we have never before encountered. In my opinion, as relates to COVID-19, the people of Alabama are not even into the woods yet, much less out of the woods. I am extremely concerned about the health and welfare of the people of our state. I believe that this virus will not only continue to escalate in Alabama, but this epidemic will be raging at a worse level into the fall and likely beyond. If the current trends hold, the death rates of ~ 1000 deaths / day across the United States, minimally, will continue as is. In a worst-case scenario, both the death rates and

new case rates will continue to rise into autumn, with a potential 'spike' in cases as people return indoors for activities. This potential spike, if it occurs, would occur in late October or early November, right around the time of the election.

Complicating matters in the fall is the return of seasonal influenza, which will create a major diagnostic dilemma for physicians to determine if symptoms are due to influenza or COVID-19. This will cause confusion in both the healthcare settings and the general public.” *Id.* at 5.

16. “Because we have no widely available treatment or an effective vaccine to protect us against this virus, we must take significant precautions to reduce the risk of exposure leading to infections. These include: (a) frequent hand washing, (b) avoiding crowds, (c) wearing a mask, (d) social distancing of a minimum of 6 feet (determined by estimating the distance aerosolized droplets travel during speech), assuming no one in the crowd is yelling, singing, exercising, or engaging in other activities that cause virus particles to project into the air at a greater distance than 6 feet, (e) physical separation, and (f) common sense avoidance of high transmission or hot spot locations. Even when these precautions are followed, exposure and resulting infection could still occur. Additionally, and unfortunately, some people simply do not follow these recommendations, which increases the risk for all of us.” *Id.* at 6.

17. Crowds at the polls on election day in November will be dangerous. Dr. Saag agrees with the March 15, 2020, statement of Defendant Merrill that “[t]he health and well-being of the people of this state are of paramount importance,” and that we should strive “to effectively practice social distancing, as recommended by the President of the United States, the Centers for Disease Control & Prevention (CDC), the Alabama Department of Public Health, etc....” Id. at 6.⁶ These precautions “will be even more applicable in the fall, at the time of the November 3, 2020, general election. We must take precautions well in advance of an election date to protect the health and well-being of our citizenry as they exercise their constitutional right to vote.” Id. at 6. Dr. Saag specifically endorses the CDC’s recommendations. Id. at 7-8.

18. Voters across the country are fearful of becoming infected and contracting COVID-19 throughout the elections in 2020.⁷ Plaintiffs in this action

⁶ Quoting Brian Lyman, *Alabama Secretary of State John Merrill seeks postponement of March 31 runoffs*, MONTGOMERY ADVERTISER, Mar. 15, 2020.

⁷ Pew Research Center, *Two-Thirds of Americans Expect Presidential Election Will Be Disrupted by COVID-19*, April 28, 2020 (“With just over six months until Election Day, two-thirds of Americans (67%) – including 80% of Democrats and Democratic-leaning independents and half of Republicans and Republican leaners – say it is very or somewhat likely that the coronavirus outbreak will significantly disrupt people’s ability to vote in the presidential election.”). Exhibit J.

are among them.

a. Plaintiff Ardis Albany is seventy-three years old with a heart issue “that puts me at a very high risk of death if I become infected with COVID-19. ... I am frightened that many citizens are being encouraged to ignore these warnings, that they will refuse to respect my fear of close contact in November, and that they will refuse to obey lawful orders by poll officials to maintain social distancing. ... I am anxious to vote in the November 3, 2020 general election, but I expect there will be a very high turnout and I fear it will not be safe for me to vote at my regular polling place, where the space is too small to maintain social distancing either for the poll workers or for the voters. I would prefer to vote in person at a site and under conditions that substantially reduce the size of crowds and permit safe distancing. Early voting fourteen days before election day at an election center should substantially reduce the size of crowds. They could permit me to vote from my vehicle or otherwise assure my safe distance from other voters and poll workers and could provide me an opportunity to vote in person.” Exhibit K.

b. Plaintiff Lucinda Livingston is sixty-three years old and is “fearful of serious negative or deadly health consequences for me and other people who, during the current COVID-19 pandemic, must vote in-person on election day in this year’s elections. I am also concerned that being forced to vote in-person

among large crowds may cause me to unnecessarily expose my young grandson, who lives with me, to COVID-19 as well as other relatives who visit me. ... I would like for Montgomery County to have a period of early voting. I think it will allow me and many people I know to go to a designated site and vote when the polls are not so crowded, decreasing the chance of acquiring and spreading COVID-19. Absentee ballots may be an alternative to early voting at the polls that I can accept, but I simply do not trust my vote will be counted when voting by mail. I prefer voting in person and early voting makes sense for those of us with serious health issues who will benefit from lighter crowds at voting locations.”

Exhibit L.

c. Plaintiff Bryan Lorge is sixty-three years old and a poll worker. He has “serious concerns for my health and the safety of others who wish to vote in this year’s elections. ... I am afraid there will be some people who refuse to respect the advice of health care professionals and who carelessly engage in close, unprotected contact. I worry in particular about my health and the health of other persons who must work at the polls and be exposed throughout the day to such dangerous behavior. ... Two particular areas of concern to me are the use of the Electronic Poll Pads used to register voters and the privacy booths used by voters to mark their ballots. The Poll Pads required the styluses be passed back

and forth between the registration clerk and voter. During busy times sanitization of the styluses may be nonexistent. Especially for the General Election, voters will be spending a considerably longer time marking their ballots while using the privacy booths.” Exhibit M.

d. Plaintiff Suzanne Schwartz is seventy-three years old and, until this month, a poll worker. She is healthy, “but my age puts me in the vulnerable category that the CDC urges to avoid contact with other persons. ... I worry about the vulnerability of the many aging voters at my polling place. I firmly believe that early voting for at least fourteen days prior to election day is critical for reducing the size of crowds at the polls and facilitating social distancing.” Exhibit N.

e. Plaintiff Myrtle Scott is seventy years old and a retired nurse, who “understand[s] the health risks associated with exposure to infectious disease. ... I should not have to choose between my health and my right to vote. Alabama’s decision to not allow for early voting and the barriers inherent in the absentee voting process serve as a ‘Hobson's choice’ alternative to safely voting at the polls during the ongoing pandemic.” Exhibit O.

f. Plaintiff Patricia Burkett Smith is sixty-eight years old, who suffers from asthma and sequesters herself at home, because “due to the coronavirus

pandemic, I have serious concerns for my own health, and for the safety of others who wish to vote in this year's elections. Based on the advice of public health officials and infectious disease experts, I believe it is necessary to avoid crowds, wear masks, and maintain social distancing at the polls. That will be hard to do at my polling place due to the nature of the space. It would have to be much larger to accommodate everyone in a safe manner. I am afraid there will be some people who refuse to respect the advice of health care professionals and who recklessly engage in close, unprotected contact. Any new proposal would need to be in place prior to the July municipal elections in order to allow all to have safe access to the polls." Exhibit P.

g. Plaintiff Rosa Maria Toussaint is sixty years old and has a thyroid disorder that can compromise her immune system. She is "working with Hispanic citizens urging them to vote in this year's elections. None of us has ever voted absentee before, and I am concerned that the process will be too complicated especially for Spanish speakers. ... They would be more likely to vote and trust their vote is counted if they are able to vote in person. Therefore, I believe early voting and other procedures that will reduce the size of crowds at the polls are urgently needed." Exhibit Q.

h. Plaintiff Suzanne Bergman Wright is seventy-five years old and a

Professor Emerita of Medicine at UAB School of Medicine. “I fear for myself, poll workers, other voters, and my former patients if we must all go to the polls on election day. ... I have never voted by absentee ballot before, but I likely will attempt to do so in November. Most of my former patients in my general nephrology population will need to vote absentee as well. I am concerned that many will not have a printer or safe access to a notary or other persons to attest to their identity. Those with special needs [lack of computer or printer access or voting on their dialysis day] will have additional difficulty of exposure to Covid-19 in going through all the procedures correctly and having their votes counted.” Exhibit R.

19. Plaintiffs’ fear of becoming infected and developing COVID-19 is more than justified for residents of Alabama. Between Monday, June 8 and Sunday, June 14, Alabama saw the second highest rate of new coronavirus cases per capita in the nation.⁸ Last Sunday the Decatur Daily published an article about a front-line physician, Dr. James Boyle. Exhibit EE. Dr. Boyle describes in detail the horrors of the disease most people aren’t aware of and says he is “mystified that people in Decatur are not being more cautious, particularly since asymptomatic

⁸ Ramsey Archibald, *Alabama sees nation's second most new cases per capita in last 7 days*, AL.com, June 15, 2020.

and presymptomatic people can transmit the virus. ‘I’m 100% convinced they are not taking it seriously enough,’ he said, especially when he finds himself as one of the few people in a store wearing a mask. ‘In general, I would say we’re doing a terrible job. ... Each exhalation, you’re just blowing that virus out. And anybody that walks by that cloud and inhales is going to have the virus.’” *Id.*

Plaintiffs and the Class of All Alabama Voters Are Likely To Succeed On the Merits.

This Court’s Subject Matter Jurisdiction.

20. Under the Constitution of Alabama, “all political power is inherent in the people,” Ala. Const. Art. I, § 2, and it secures to Plaintiffs and every other “citizen of the United States who has attained the age of eighteen years” and resides in Alabama “the right to vote....” Ala. Const. Art. VIII, § 177.

21. The Constitution of Alabama further guarantees that the right to vote of Plaintiffs and the class they seek to represent “shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from *power*, bribery, *tumult*, or other improper conduct.” Ala. Const. Art. I, § 33 (emphases added).

22. Two definitions of tumult in *Webster’s Unabridged Third New International Dictionary of the English Language* (1976) are: “disorderly and

violent movement, agitation or milling about, of a crowd accompanied usually with great uproar and confusion of voices,” and “violent agitation of mind or feelings: highly disturbing mental or emotional excitement or stress.” Thus “tumult” is one way to describe the public health emergency caused by the COVID-19 pandemic.

23. Plaintiffs allege that Defendants Merrill and Ivey are unduly influencing their right to vote by refusing to exercise the *power* given them by the Legislature to protect them from the *tumult* caused by the risk of COVID-19 infection at the polls. As the chief election official for the State of Alabama, Defendant Merrill has stated that he will exercise his statutory emergency powers to relax restrictions on absentee voting and authorize local election officials to reduce the size of crowds at the polls only when he “in his *discretion*, deems appropriate and, when prudent, in consultation with other election officials and with the Governor’s Office.” Helms declaration, Exhibit S at 17-18 (emphasis added). Defendant Merrill contends his emergency powers give him authority to make crucial public health decisions about what is necessary to protect voters from infection. For example, “Even if in-car voting were feasible from an implementation standpoint, and even if the Secretary had the authority to order it be implemented, the Secretary would not, in his *discretion*, order it because it

would not seem a prudent way to reduce the COVID-19 risk.” *Id.* at 24 (emphasis added).

24. This Court has jurisdiction to adjudicate Plaintiffs’ claims in this action and to enforce their rights guaranteed by the Constitution of Alabama. *Brooks v. Hobbie*, 631 So. 2d 883, 888 (Ala. 1993) (“Alabama’s circuit courts possess general subject-matter jurisdiction to decide all justiciable issues of federal and state constitutional and statutory law. These courts of general jurisdiction have the inherent power and responsibility to enforce constitutional rights under both the federal and the state Constitution. Art. VI, Ala. Const. 1901 (Amend. 328).”);⁹ accord, *Rice v. English*, 835 So. 2d 157, 162 (Ala. 2002) (where plaintiffs’ claims are based on the Alabama Constitution, state courts must apply “the settled principle that the people have forbidden the Legislature from conducting itself in a manner inconsistent with their constitution and when it does, it is incumbent upon the judiciary to nullify a legislative enactment contrary to the constitution”).

25. In the instant action this Court also has jurisdiction to determine whether the refusal of state executive officials to use power given them by the Legislature to protect Plaintiffs’ right to vote is contrary to the Alabama

⁹ Amendment 328 is now codified as Article VI of the Official Recompilation of the Constitution.

Constitution. E.g., *Cole v. Riley*, 989 So. 2d 1001 (Ala. 2007) (rejecting contention that by “permitting individuals of limited English proficiency to take the written portion of the Alabama driver’s license test in their native language,” the Governor and other state executive officials violated Amendment 509 of the Alabama Constitution). “Neither the Legislature nor the Executive have or enjoy any prerogative to ignore or violate the Constitutions. Indeed, obedience to the Constitutions’ provisions must be regarded as the desire, the purpose and intent of every department and officer in the government.” *In re Opinions of the Justices*, 209 Ala. 593, 598 (1923).

Plaintiffs’ State Constitutional Claims in This Action.

26. Section 177 of the Alabama Constitution guarantees the fundamental right to vote of all Alabama citizens. By itself, Section 177 requires the Defendant state officials to take every possible measure to protect citizens from infection during the current pandemic so that they may cast their ballots and have them counted. However, Plaintiffs’ Section 177 rights are buttressed in this case by Section 33, which expressly requires Defendants Merrill and Ivey to exercise the emergency “power” the Legislature has granted them to protect Alabama voters from “undue influence” caused by the “tumult,” by the “milling about ... of

crowds” and the “mental stress” of the COVID-19 pandemic.

27. Plaintiffs’ fundamental right to vote is entitled to even greater protection under the Alabama Constitution than under the U.S. Constitution. There is no explicit right to vote in the Constitution of the United States. Article I, § 4 of the U.S. Constitution provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof....”¹⁰ Consequently, when a state or federal court addresses claims that an election regulation violates the U.S. Constitution, it must “weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’” *Crawford v. Marion*

¹⁰ E.g., *Oregon v. Mitchell*, 400 U.S. 112, 119-20 (1970) (Opinion of Black, J.); accord, *Blevins v. Chapman*, 47 So. 3d 227, 231 (Ala. 2010) (“The Constitution provides that States may prescribe ‘[t]he Times, Places and Manner of holding Elections for Senators and Representatives,’ Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.”) (citations omitted).

The Reconstruction Republicans who drafted the Fourteenth Amendment wanted the right to vote to be among the “privileges or immunities of citizens of the United States” in Section 1. But, because *northern* states were opposed to black suffrage (all the former Confederate states were forced by Congress to include black male suffrage in their Reconstruction constitutions) the drafters conceded the issue and placed the compromise “Penalty Clause” in Section 2, which required reduction of the number of seats in the House for any state that denied the right to vote “to any of the male inhabitants of such State....” *Minor v. Happersett*, 88 U.S. 162 (1874); James Blacksher and Lani Guinier, *Free At Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right To Vote*, *Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39 (March 2014).

County Election Bd., 553 U.S. 181, 190 (2008) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)); accord, *Blevins v. Chapman*, 47 So. 3d 227, 232 (Ala. 2010)). Under the *Anderson-Burdick* “balancing approach,” a court addressing a federal constitutional claim must give deference to the state’s rights and subject a state election law to strict scrutiny only if it imposes a “severe restriction” on the plaintiffs’ right to vote. *Crawford*, 553 U.S. at 190.

28. But Plaintiffs in this action are not relying on provisions in the U.S. Constitution, which are limited to providing federal Equal Protection or First Amendment protections when they are exercising a right to vote granted by a state constitution. Plaintiffs here are invoking their right to vote directly under Alabama’s Constitution. They are invoking the “state’s rights” in their own behalf, because the Alabama Constitution assures that “all political power is inherent in the people....” Ala. Const. Art. I, § 2. There is now an explicit “right to vote” in the Constitution of Alabama, Ala. Const. Art. VIII, § 177, ratified as part of Amendment 579 in 1996.

29. So for Alabama citizens voting is a fundamental right, and barriers that restrict their ability to cast a free and effective ballot are subject to strict scrutiny. “A fundamental right has been defined as one which has its origins in the

constitution.” *Weldon v. Ballow*, 200 So. 3d 654, 662, 674 (Ala. 2015); accord, e.g., *State v. B.T.D.*, __ So. 3d __, 2019 WL 2262700 (Ala. Crim. App., May 24, 2019) at *13 (quoting *State v. C.M.*, 746 So. 2d 410, 414 n.6 (Ala. Crim. App. 1999) (citing *Scott v. Dunn*, 419 So. 2d 1340 (Ala. 1982))). And statutes that impinge on fundamental rights, under either the U.S. Constitution or the Alabama Constitution, are subject to strict scrutiny. *Blevins*, 47 So. 3d at 231; accord, *Shelton v. Green*, 261 So. 3d 295, 298 (Ala. 2017); *Gideon v. Alabama State Ethics Commission*, 379 So. 2d 570, 576 (Ala. 1980).

30. Plaintiffs in this action are not asking the Court to determine whether, on their face, restrictions in the current Alabama statutes governing absentee and in-person voting violate Plaintiffs’ right to vote. Rather, they contend that the restrictions identified in their complaint violate Sections 33 and 177 of the Alabama Constitution *as applied* by Defendants Merrill and Ivey to Alabama voters during the emergency conditions of the current pandemic.

31. Section 33 of the Alabama Constitution provides specific protections to citizens’ right to vote during a pandemic. The command of Section 33, that voters “shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult, or other improper conduct,” has been in every Alabama constitution since it became a

state. The two antebellum Alabama Constitutions called “suffrage” a “privilege.”¹¹ The 1865 Presidential Reconstruction Constitution, the 1868 Congressional Reconstruction Constitution, and the 1875 Redeemer Constitution all used the term “right of suffrage.”¹² However, the 1901 Constitution, which was adopted primarily to disfranchise almost all black citizens and many poor white citizens,¹³ restored the antebellum term “privilege of suffrage.”¹⁴ Alabama is still governed by the 1901 Constitution, and the original language of Section 33 is unchanged, even though the 1996 amendment established the “right” to vote. The terms “power” and “tumult” have remained unchanged throughout Alabama’s constitutional history.

Tumult.

32. Another definition of “tumult,” according to the Merriam-Webster Dictionary, is “disorderly agitation or milling about of a crowd usually with uproar and confusion of voices.”¹⁵ The word tumult appears more than fifty times in the

¹¹ 1819 Ala. Const. and 1861 Ala. Const. Art. VI, § 5.

¹² 1865 Ala. Const. Art. I, § 35; 1868 Ala. Const. Art. I, § 36; 1875 Ala. Const. Art. I, § 34.

¹³ *Hunter v. Underwood*, 471 U.S. 222 (1985).

¹⁴ 1901 Ala. Const. Art. I, § 33.

¹⁵ <https://www.merriam-webster.com/dictionary/tumult>.

King James Bible, depending on which version one uses.¹⁶ And it appears throughout Alabama statutes giving the Governor emergency police powers to call out the military forces.¹⁷ By statute, Governor Ivey has the power to call out the state’s military to active duty “in case of war, invasion, insurrection, riot, *tumult*, breach of peace, natural disaster, or imminent danger thereof...” Ala. Code § 31-2-52 (emphasis added).¹⁸

33. The pandemic has caused us to be in a period of tumult; i.e, these are tumultuous times, characterized by dramatic changes in our ways of life (e.g., education, religion, work including the absence of work – unemployment,

¹⁶ <https://bibleapps.com/t/tumult.htm>. Passages that arguably describe the stances of some state election officials in today’s pandemic include: “When Pilate saw that he could prevail nothing, but that rather a *tumult* was made, he took water, and washed his hands before the multitude, saying, I am innocent of the blood of this just person: see ye to it.” Matthew 27:2 (emphasis added). Or “For God is not the author of *tumult* but of peace, as in all churches of the saints. Let your women keep silence in the churches: for it is not permitted to them to speak; but they are commanded to be under obedience as also said the law. And if they will learn any thing, let them ask their husbands at home: for it is a shame for women to speak in the church.” 1 Corinthians 14:33 (emphasis added).

¹⁷ E.g., Ala. Code §§ 13A-11-3, 31-2-52, 36-21-20.

¹⁸ See also, Ala. Code §§ 31-2-111, 31-2-115, 31-2-116, 31-2-117. Mayors also are authorized to order the closing of businesses selling of arms and ammunition “[w]hensoever any mob, riot, or *tumult* has occurred or there is reasonable cause to apprehend an occurrence thereof in any city, town, or village....” Ala. Code § 11-43-82 (emphasis added).

leisure);¹⁹ there is upheaval; there are protests against compelled protective measures; and there are passionate outpourings of opposing views running from claims of hoax to the most serious health risk of our times.

34. There is disorder in our lives and in our healthcare. People are physically and/or emotionally ill. They are afraid of crowds and afraid of going to the polls, including afraid of being confronted by people who are not afraid and who, therefore, do not, or are less likely to, use precautions or honor the use of

¹⁹ E.g., *Stocks close down after tumultuous session*, The Hill, April 13, 2020, <https://thehill.com/policy/finance/492567-stocks-close-down-after-tumultuous-session>;

Analysis: Louisiana lawmakers face budget tumult amid virus, U.S. News, Mar. 27, 2020, <https://www.usnews.com/news/best-states/louisiana/articles/2020-03-27/analysis-louisiana-lawmakers-face-budget-tumult-amid-virus>;

Farmers' hopes for respite from Trump-era struggles fade amid pandemic, The Washington Post, May 11, 2020, <https://www.washingtonpost.com/business/2020/05/11/farmers-hopes-respite-trump-era-struggles-fade-amid-pandemic/>;

China's Coronavirus Opportunity, The Wall Street Journal, March 16, 2020, <https://www.wsj.com/articles/chinas-coronavirus-opportunity-11584398121> (“As bodies are thrown into mass graves in Iran, as Italian doctors practice triage in overcrowded wards, as borders close across Europe and American cities shut down, it is hard to look past the *tumult* and distress of each passing day”);

US faith leaders lead congregations through tumultuous time, Associated Press, May 31, 2020, https://www.manchestertimes.com/news/national/us-faith-leaders-lead-congregations-through-tumultuous-time/article_0b74b1ea-bf60-5f11-9273-e70657d3616a.html.

precautions by others.²⁰ These are the fears of the named Plaintiffs in this action. See Exhibits K, L, M, N, O, P, Q, and R.

Power.

35. Defendant Merrill has acknowledged that he and Defendant Ivey have sufficient statutory emergency powers to provide the relief Plaintiffs seek in this action. In a March 11, 2020, press release, Defendant Merrill stated: “In Alabama, our Legislature has already provided a mechanism to confront situations of detriment to the state. Our Governor has broad and expanse[sic] emergency powers. Understanding Governor Ivey’s concern and care for the people of Alabama, I am confident that, if deemed necessary, the Governor would consult with our office to ensure the March 31 Runoff Election runs smoothly and without issue.” Exhibit T.

36. Two days later, Defendant Ivey proclaimed a public health emergency based on her authority under the Alabama Emergency Management Act of 1955

²⁰ E.g. *Trump Warns of 'a Lot of Death' While Also Revisiting Easter Sunday Services*, The New York Times, April 4, 2020, (“The tumult around Wisconsin's upcoming primary election continued on Saturday....”), <https://www.nytimes.com/2020/04/04/world/coronavirus-live-news-updates.html>; *Chicago Tribune' Reporters Face Tumultuous Times During Pandemic*, NPR, April 21, 2020, <https://www.npr.org/2020/04/21/840522609/chicago-tribune-reporters-face-tumultuous-times-during-pandemic>.

(“AEMA”), Ala. Code § 31-9-8. Exhibit U. The same day, Defendant Merrill issued another press release that said, “[v]oters who are concerned about contracting or spreading an illness or have an infirmity may vote by absentee.” But there were no instructions about what excuse box to check on the absentee application, and it emphasized that “[v]oters must submit an accompanying copy of their valid photo identification.” Exhibit SS.

37. On March 15, Defendant Merrill requested an emergency opinion from the Attorney General. “In the nature of keeping Alabamians safe from the potential spread of the virus, Merrill has asked if, under the emergency powers granted to the Governor under Section 31-9-1 et seq. Ala. Code, the Governor has the authority to postpone the election. ... The health and well-being of the people of this state are of paramount importance. In order to effectively practice social distancing, as recommended by the President of the United States, the Centers for Disease Control & Prevention (CDC), the Alabama Department of Public Health, etc., the March 31 Runoff Election must be postponed.” Exhibit V.²¹

²¹ The press release said Defendant Merrill had been asking the Legislature to be “explicit” about the Governor’s emergency powers. “Currently, neither the Code of Alabama nor the Constitution of the State of Alabama allow for the suspension, delay, or postponement of an election once the date has been set. This is why, in 2019, our office asked the Legislature to give the Governor the explicit power to be able to take prescribed action through means that would be codified. Our attempt was unsuccessful but in the 2020 Legislative Session, we have asked

38. Defendant Merrill’s letter to the Attorney General pointed to several sections of the AEMA to suggest that the Governor has “substantial powers” to protect the public from the current “epidemic.” Exhibit V. It cited as precedent the Governor’s cancellation of primary elections on September 11, 2001, and expressed Defendant Merrill’s opinion that, “in order to avoid jeopardizing the general election schedule, the primary should not be postponed beyond July 14, 2020.” *Id.*

39. On March 17, 2020, Attorney General Marshall issued an opinion, Exhibit W, that, pursuant to the powers granted her by the AEMA, Governor Ivey “has the authority to postpone a primary runoff election to protect the public health and safety during the proclaimed emergency.” The Attorney General’s opinion affirmed Governor Ivey’s authority to declare a public health emergency, which includes “[a]n occurrence or imminent threat of an illness or health condition that . . . [i]s believed to be caused by . . . [t]he appearance of a novel or previously controlled or eradicated infectious agent or biological toxin’ or ‘[p]oses

Senator Donnie Chesteen and Representative David Standridge to introduce this legislation once again for consideration by the membership of their respective bodies.” *Id.* The 2020 Regular Session of the Legislature adjourned without acting on these bills.

a high probability of . . . [w]idespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.’ Ala. Code §§ 31-9-3(4)(a)(2), -3(4)(b)(3) (2016).

Additionally, the definition of a ‘state of emergency’ refers to an ‘epidemic’” (citing Ala. Code. § 31-9-3(5)). The opinion affirmed that Governor Ivey has acquired “substantial power,” Ala. Code §§ 31-9-6 through 31-9-8, that the AEMA “shall be construed liberally in order to effectuate its purpose,” Ala. Code § 31-9-23, and that “[a]ll existing laws, rules, and regulations or parts thereof inconsistent with [the Governor’s emergency orders] shall be suspended during the period of time and to the extent that such inconsistency exists.” *Id.* (citing Ala. Code § 31-9-13).

40. The Attorney General’s opinion concluded that Defendant Ivey “has the authority to postpone a primary runoff election to protect the public health and safety during the proclaimed emergency. Should the Governor exercise her authority to postpone the primary runoff election, any existing law setting a contrary date for the primary runoff election would be suspended by the AEMA.” Exhibit W.

41. Accordingly, on March 18, 2020, Defendant Ivey rescheduled the March 31 primary runoff election to July 14, 2020. But, following Defendant

Merrill’s advice, her order included this qualification: “Nothing in this section shall be construed to alter, amend, or modify any other provision of state law regarding the conduct of this primary runoff election.” Exhibit X.

42. As Secretary of State and chief elections officer for Alabama, Defendant Merrill has rulemaking authority to ensure that voters’ ballots are “cast and counted [in a private and independent manner],” Ala. Code § 17-2-4(a)(1)a, and that each voting system is “accessible for individuals with disabilities....” Ala. Code § 17-2-4(c)(1). Defendant Merrill also is authorized to adopt “an emergency rule to allow those qualified voters [who respond to the emergency] to vote by absentee ballot.” Ala. Code § 17-11-3(e).

43. On March 18, Defendant Merrill exercised his own statutory emergency authority under Ala. Code § 17-11-3(e), and pursuant to the administrative rulemaking procedures of Ala. Code §§ 41-22-5(b) and 41-22-6(c)(2) a. and b., issued an emergency rule that provided: “any qualified voter who determines it is impossible or unreasonable to vote at their voting place for the Primary Runoff Election of 2020 due to the declared states of emergency, shall be eligible to check the box on the absentee ballot application which reads as follows:

‘I have a physical illness or infirmity which prevents my attendance at the polls. [ID REQUIRED]’”.

Exhibit Y. Defendant Merrill’s order directed “[a]ll Absentee Election Managers and any other election officials of this state . . . to follow this Emergency Administrative Rule and accept all absentee ballot applications filed hereunder immediately.” Id.

44. Defendant Ivey’s March 18 emergency proclamation gave this instruction: “[t]he Secretary of State and appropriate election officials shall take all reasonable efforts to publicize voter registration and absentee-voting opportunities.” Exhibit X. But Defendant Merrill’s March 18 emergency rule is confusing. His March 18 press release, Exhibit Z, announced postponement of the March 31 primary runoff, but it did not refer to his emergency rule authorizing absentee voting for any “voter who determines it is impossible or unreasonable to vote at their voting place.” Exhibit Y.

45. Five days later, on March 23, 2020, Defendant Merrill issued a press release about absentee voting. Exhibit Z. It said voters who believed in-person voting during the coronavirus pandemic “is impossible or unreasonable” should “check the box on the absentee ballot application that is most applicable to that individual.” Id. There are two potentially relevant boxes on the application:

I have a physical illness or infirmity which prevents my attendance at the polls. [ID Required]

I have a physical illness or infirmity which prevents my attendance at the polls. 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.

*[ID Not Required]

Exhibit Z. The voter who checks the first physical illness box must include a copy of her photo ID with the completed application; the voter who checks the second physical illness box is not required to submit a photo ID. Defendant Merrill's March 23 press release "encourage[d] voters to check the box which reads as follows (in the case none of the boxes are appropriate): 'I have a physical illness or infirmity which prevents my attendance at the polls. [ID REQUIRED].'"

Exhibit Z. There was no further explanation of why checking the second box would not also be appropriate during the pandemic. Nor did the press release alert voters to the fact that Defendant Merrill's absentee ballot emergency rule would not apply to the municipal elections in August or the general election November 3, 2020.

46. Barbara Caddell, President of LWVAL, wrote Defendant Merrill on April 13, 2020, asking him to waive the requirement of including a copy of the voter's photo ID with an absentee ballot application, and the requirement that the

ballot envelope be notarized or signed by two witnesses. Exhibit AA. Ms. Caddell added: “There also is the issue of postage and/or carrier fees. Could the application and the ballot include prepaid postage? Finally, are there any of the procedures that have been successfully developed for overseas civilian and military voters (UOCAVA) that could be implemented for voters within the state? For instance, could the absentee ballot guidance be extended to all elections through the end of the year, and a voter be allowed to make one application rather than having to reapply for each election more than 42 days apart?” Id.

47. On April 15, 2020, Hugh R. Evans, III, General Counsel for the Office of the Secretary of State, emailed Ms. Caddell a response. Exhibit BB.

Notwithstanding the recognized emergency powers of Defendants Merrill and Ivey, Mr. Evans’ response emphasized the constraints of statutory election laws:

Section 17-11-3(e) allows us to adopt an emergency rule when the state is operating under a state of emergency to make it easier for a citizen to vote by absentee ballot. We still however, have to operate within the parameters of the statutes.

When the Governor first entered her State of Emergency Order last month, we recognized, that because of the concerns over the COVID-19 virus, we needed to do what we could to help those voters who were in a high risk category or were otherwise concerned of contracting the virus, vote absentee.

The absentee laws (which we cannot change by rule) require, among other things, a photo ID and 2 witnesses. We understand the problems

this may create for some voters, however, they cannot be changed without legislative action.

Id.

48. Ms. Caddell replied by email, saying:

We do not understand why the Secretary's rule making authority does not allow the Secretary to modify some of the requirements for absentee voting, given that the statutory provision to which you refer specifically gives the Secretary the authority in a declared emergency to establish an emergency rule so that qualified voters can exercise their franchise when substantial compliance with the letter of the law is rendered impossible or unreasonable. That is exactly the situation we are facing.

We have some further questions:

Would you be willing to ask for an Attorney General's opinion on (1) limiting the number of absentee ballot verifying signatures to one, and (2) modifying or removing the requirement of a copy of a photo ID, at least for persons who are at-risk and who do not have access to copying services?

Would you consider using self-addressed postage paid envelopes for absentee ballot returns?

What legislation would your office support or draft to address these and other concerns raised by my letter? The League of Women Voters stands ready to work with your office to promote and encourage passage of appropriate legislation.

Exhibit CC. Ms. Caddell received no further reply from Defendant Merrill's office.

49. There was still further confusion about Defendant Merrill's absentee

ballot emergency rule, which prompted him to write a letter on May 14, 2020, to all absentee election managers. Exhibit DD. The letter acknowledged that voters who checked the first box on the absentee application, “I have a physical illness or infirmity which prevents my attendance at the polls. [ID REQUIRED],” will confront different language when they receive the ballot:

However, the absentee ballot affidavit envelope does not contain the same exact language in its list of reasons for voting an absentee ballot. On the affidavit envelope (see enclosed), the language reads *"I am physically incapacitated and will not be able to vote in person on election day."*

Id. (emphasis in original). The ballot envelope language corresponds to the second physical illness box on the application (which has no photo ID requirement). Defendant Merrill’s letter gave these instructions:

You may receive questions from voters as to which reason to select on the affidavit envelope if the voter applied for an absentee ballot due to physical illness or infirmity, especially since voters concerned about COVID-19 are permitted by emergency rule to select the first “physical illness or infirmity” reason in applying for an absentee ballot.

Please advise these voters that they should mark on the affidavit envelope the reason that reads *"I am physically incapacitated and will not be able to vote in person on election day"* if they are voting absentee in accordance with the emergency administrative rule.

Id. (emphasis in original). Defendant Merrill has not issued a press release regarding this confusion, or otherwise sent these instructions directly to voters.

Many voters rightly will be concerned that the application and ballot envelope say they will be subject to criminal prosecution if they check the wrong box.

50. The Defendant state officials have also failed or refused to respond to pleas from local election officials seeking relief from statutory restraints on their authority to facilitate safe in-person voting during the pandemic. In April the Alabama Probate Judges Association asked Defendants Merrill and Ivey to exercise their emergency powers to authorize (1) suspending the requirement in Ala. Code. § 17-13-3 that the same poll workers be used in the runoff as worked the primary elections and (2) establishing voting centers:

The Election Code [17-6-4(C)] requires a local enabling act for the Voting Center Concept to be used. If the counties are allowed to use the Voting Center Concept they could combine several of the smaller precincts in with those with much larger footprints. Such action would also require fewer Poll workers and thus would allow for implementation of the CDC guidelines. As a remedy, under current circumstances, we would like to discuss the feasibility of Governor Ivey amending her Emergency Proclamation or issuing a new one that would allow the County Commissions to utilize the Voting Center Concept and reduce the number of polling places and workers for this Run-off to allow for implementation of the CDC guidelines.

Exhibit FF.

51. On May 4, 2020, Probate Judge Don Davis of Mobile County wrote Defendant Merrill describing the many problems he will have conducting the July 14 runoff elections and requesting relief from having to comply with all Alabama

statutes regulating voting in person.

It is Mobile County's intention and plan to utilize the CDC's recommended guidelines for election polls in terms of personal protective equipment and social distancing of election officials and voters. We have represented this to our election officials and the general public. We are in the process of procuring the necessary supplies to accomplish such. ... Members of Governor Ivey's staff were notified on April 16, 2020, by electronic mail of this concern and on March 17, 2020, members of your staff confirmed by electronic mail that they were aware of the concern that had been shared with Governor Ivey's office by a representative of the Court.

...

We are approximately 9 weeks out from the Alabama Primary Runoff Election. I am at a loss to determine how I will be able to discharge my legal responsibilities relating to the Runoff Election that is compliant with state and federal election law and also compliant with the CDC's recommended social distancing guidelines relating to the COVID-19 pandemic.

I respectfully request that you provide instruction as to how I should approach this upcoming election and fulfill my legal duties and responsibilities as Mobile County's chief election officer.

Exhibit GG.

52. On information and belief, based on the recommendation of Defendant Merrill, in her May 8, 2020, proclamation Defendant Ivey authorized only the first request of the probate judges:

Notwithstanding the provisions of Ala. Code § 17-13-3, or any other law to the contrary, and only for the July 14, 2020 Primary Runoff Election, a judge of probate may determine if fewer precinct election officials or poll workers than the total number of election officials or poll workers who worked the primary election are necessary to conduct the election. If fewer workers are necessary, the judge of

probate may conduct the election with the total number of workers he or she deems necessary to conduct the election.

Exhibit HH.

53. The National Task Force on Election Crises has advised states that early voting is one of “the steps necessary for a safe general election...” Exhibit A at 1. Probate Judge Arthur Crawford of Hale County, the President of the Alabama Probate Judges Association, says “I believe it would help alleviate crowds and allow for appropriate social distancing at the polls to have early voting set up in a few places across the county.” Exhibit II at 4. Early voting would facilitate curbside voting and “would increase access to the polls for the 60% of employed people in Hale County who work outside the county, especially if some portion of the early voting was done outside the traditional 7 a.m. to 7 p.m. voting hours.” Id. at 5.

54. Defendant Merrill recognizes that the vast majority of Alabama citizens will choose to vote in person, which makes early voting the most effective way to prevent the crush of large crowds and long lines everyone expects at the polls on November 3. “Alabamians,” he said on June 12, 2020, “have a long history of attending the polls on Election Day. Currently, on average, 96% of those Alabamians who choose to vote, vote in-person on Election Day.” Exhibit JJ.

Twenty years ago Alabama did allow early voting at a few polling places set aside for that purpose. But that early voting law was repealed in 2001. Exhibit JJ. In 2018, prior to the mid-term elections, Defendant Merrill acknowledged this history, but said the costs were not worth it. “I’m not going to be an advocate for early voting if its only benefit is for the convenience of a few,” he said. *Id.* During the current pandemic early voting would benefit many voters, including those who choose to vote on election day, by reducing the size of crowds at the polls. The reduction in risk of infections would be more than worth the costs, which could be minimized by using only a few polling locations in each county.²²

55. But, in spite of Defendants’ emergency powers under the AEMA, powers broad enough to postpone an entire election, Defendant Merrill told the press that authorizing local election officials to conduct early voting “would take an act of the Legislature.” Exhibit KK. He did not explain why the Governor has sufficient emergency power to postpone the primary runoff for three and one-half months, but lacks the power to permit two weeks of early voting in those counties that need to reduce the size of crowds at the polls on election day.

²² A bill was prefiled January 14 in the 2020 Regular Session, before the coronavirus threat was widely known, that would have required each county to provide at least one early voting center to be open for a period of 14 days during the week immediately preceding election day. HB 30. But the bill was never reported out of committee.

56. After the City Councils of Birmingham, Montgomery, and Mobile adopted resolutions urging legislators to allow no-excuse absentee voting, Defendant Merrill told the press “it is unlikely the resolution would’ve led to any action anyway, as it is up to the Legislature to make changes to absentee ballot requirements and lawmakers had already adjourned their latest session. However, Merrill said if the issue comes up in the next session he would work with legislators on a solution.” Exhibit LL. Adding to the confusion, according to the press, Defendant Merrill “said voters now only have to attach a copy of their identification when sending a ballot back, instead of during the application process.” Id.

The Judicial Standards Governing Challenges To Restrictions On the Right To Vote In the Alabama Constitution.

57. Plaintiffs invoke their rights under Sections 177 and 33 of the Alabama Constitution to require Defendants Merrill and Ivey to exercise the emergency powers the Legislature has afforded them by suspending during the pandemic statutory restrictions on their ability safely to cast and have counted an absentee ballot or to vote safely in person.

58. Section 33 is mandatory in its terms: “The privilege [sic: right] of suffrage *shall* be protected by laws regulating elections, and prohibiting, under

adequate penalties, all undue influences from *power*, bribery, *tumult*, or other improper conduct.” (Emphases added.) “The word [‘shall’] in ordinary usage means ‘must’ and is inconsistent with a concept of discretion.” *Opinion of Justices*, 260 So. 3d 17, 22-23 (Ala. 2018) (quoting Black's Law Dictionary 1375 (6th ed. 1990)). “The same rule applies to constitutional provisions: The word ‘shall’ is considered presumptively mandatory unless something in the character of the provision being construed requires that it be considered differently.” *Id.* at 23 (citations omitted).

59. Plaintiffs have brought this action to require the defendant Governor and Secretary of State to exercise their emergency powers by suspending restrictions on absentee voting statewide and by authorizing the probate judges and other local election officials in each county to tailor in-person voting processes to their particular circumstances. Any reasons Defendants Merrill and Ivey may present to justify their refusal to authorize local election officials to suspend the statutory restrictions on absentee and in-person voting identified in the Complaint must be subjected to strict scrutiny. Defendants must come forward with reasons that are narrowly tailored to protect state interests that are more compelling than Alabama citizens’ right to vote without endangering their health and safety during the current pandemic. See cases cited *supra* at page 24.

60. However, even though barriers to the exercise of Plaintiffs' fundamental right to vote are subject to strict scrutiny, because the Alabama Supreme Court has yet to address squarely the standard of judicial review applicable to Sections 177 and 33 of the Alabama Constitution, this Court should also hold, in the alternative, that the failure or refusal of Defendants Merrill and Ivey to exercise their emergency powers has no rational basis either. It is unreasonable for the State Defendants not to simplify the absentee ballot process and in-person voting procedures as much as practicable during the COVID-19 pandemic.

61. This was the approach recently taken by the state trial court in Tennessee. *Demster v. Hargett*, No. 20-0435-I(III) (Davidson County Chancery Court, June 4, 2020), slip op. at 24. Exhibit PP. The *Demster* court applied the federal *Anderson-Burdick* standard to the plaintiffs' claims based on the right to vote in the Tennessee Constitution, citing the Tennessee Supreme Court's application of *Anderson-Burdick* to federal voting rights claims based on the First and Fourteenth Amendment. *Id.* at 24-25.

62. But it appears the Alabama Supreme Court has never discussed the *Anderson-Burdick* standard at all. Instead, in a case where a judicial candidate was claiming violation of the federal Equal Protection Clause, the Alabama

Supreme Court applied a rational basis analysis, citing federal case law holding that “not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.” *Blevins*, supra, 47 So. 3d at 231 (citing *Bullock v. Carter*, 405 U.S. 134, 142–43 (1972)). *Blevins* can be distinguished on the ground that it addressed claims of “aspirants for office, rather than voters,” 47 So. 3d at 231, while the instant action seeks protection of voters’ most fundamental right, their right to cast a ballot free from the undue influence of power and tumult. Nevertheless, this Court should hold that the refusal of Defendants Merrill and Ivey to implement the temporary, emergency changes sought by Plaintiffs fails the rational basis standard, as well as strict scrutiny.

63. The evidence in this case shows that the emergency measures Plaintiffs seek are exactly what health authorities, like the CDC and Dr. Saag, and election officials here in Alabama and around the country are urging states to implement. According to Probate Judge Arthur Crawford, who is President of the Alabama Probate Judges Association, these are temporary changes that can give all local election officials the flexibility they need to keep voters safe from infection in each county’s particular circumstances. Exhibit II. The cities of Birmingham, Mobile, and Montgomery have adopted resolutions asking the Legislature to authorize no-excuse absentee voting for the November 2020 general election.

Exhibit LL. According to the National Conference of State Legislatures, “States are updating their election emergency powers provisions to give governors and election officials more latitude to move polling places or postpone elections. Other states are expanding absentee and mail voting and working to preserve in-person voting options.” Exhibit MM.

64. Even when there is no pandemic emergency there are 29 states and Washington, D.C., that do not require an excuse from those who wish to vote absentee, and another five states conduct elections entirely by mail. Exhibit NN.

65. Even when there is no pandemic emergency, only six other states require submission of a photo or any other ID to obtain and cast an absentee ballot: Alaska (but not photo ID), Arkansas, Kansas, Pennsylvania, South Dakota (only if application is not notarized), and Wisconsin (but only with first absentee ballot request).²³

66. Even when there is no pandemic emergency, only five other states require either notarization or witness signatures on absentee ballots: Alaska (the signature of one witness or an authorized official), Minnesota (notary or one witness), North Carolina (notary or two witnesses), Oklahoma (must be notarized),

²³ VoteRiders, <https://www.voteriders.org/voter-id-for-absentee-ballots/>.

and South Carolina (signature must be witnessed).²⁴

67. Even when there is no pandemic emergency, there are 39 states and the District of Columbia that already offer in-person early voting. Exhibit OO.

68. Based on the evidence, Defendants Merrill and Ivey cannot demonstrate that their refusal to exercise their acknowledged emergency powers to remove barriers to Plaintiffs' state constitutional right to vote by absentee ballot and in person during the coronavirus pandemic is narrowly tailored to serve any compelling state interest, *Blevins*, 47 So. 3d at 231 (citations omitted), and thus cannot survive strict scrutiny.

69. Alternatively, based on the evidence, Defendants Merrill and Ivey cannot demonstrate that their refusal to exercise their acknowledged emergency powers to remove barriers to Plaintiffs' state constitutional right to vote by absentee ballot and in person during the coronavirus pandemic bears some rational relationship to a legitimate state end, *Blevins*, 47 So. 3d at 231 (citations omitted), and thus cannot survive judicial review under a rational basis standard. Whatever legitimate purposes these voting restrictions may have in ordinary circumstances cannot reasonably justify maintaining them during the current coronavirus pandemic.

²⁴ VoteRiders, <https://www.voteriders.org/voter-id-for-absentee-ballots/>.

The Relief Requested Is In the Public Interest, and Any Alleged Hardship Imposed Upon the Defendants By the Injunction Will Not Unreasonably Outweigh the Life-saving Benefits To the Class of Plaintiff Voters.

70. The vital public interest that will be served by the preliminary injunction cannot be overstated. The evidence demonstrates that the emergency measures Plaintiffs request would not only protect themselves and all other voters and poll workers, they would substantially reduce the size of crowds at the polls and thus reduce the risk of community spread that makes the SARS CoV-2 virus such a dangerous threat to public health. This danger has already been made manifest in the past month by the infections spread by long lines and large crowds of voters during primary elections in other states. Many of these ensuing infections are catalogued in the *Demster* opinion, slip op. at 22 ¶ 9. Exhibit PP. Even more recent were the huge crowds and long lines at the polls in Georgia on June 5, 2020, which are being blamed on lack of advance planning for both emergency absentee and in-person voting procedures. Exhibit QQ.

71. Defendants Merrill and Ivey, sued in their official capacities as Secretary of State and Governor, can suffer no injury by executing the emergency powers given them by the Alabama Constitution and by the Alabama Legislature. The injury that likely will be inflicted on millions of Alabama citizens should

Defendants fail to provide emergency relief at the polls is enormous.

The Issues In This Action Are of Great Public Concern, and No Security Need Be Given To Obtain a Preliminary Injunction.

72. Rule 65(c), Ala.R.Civ.P., provides: “No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained...”

73. “Alabama law ... clearly provides that “[i]t is mandatory that security be given under Rule 65(c), unless the trial court makes a specific finding based upon competent evidence that one or more of the exceptions ... do exist.” *City of Gadsden v. Boman*, 143 So. 3d 695, 706-07 (Ala. 2013) (quoting *Spinks v. Automation Personnel Services, Inc.*, 49 So. 3d 186, 190 (Ala. 2010) (citations and internal quotation marks omitted).

74. One of the exceptions to the requirement of giving a security bond is that “the issue is one of overriding public concern.” *City of Gadsden*, 143 So. 3d at 706 (quoting *Spinks v. Automation Personnel Services, Inc.*, 49 So. 3d 186, 190 (Ala. 2010); *Anders v. Fowler*, 423 So. 2d 838, 840 (Ala. 1982); *Lightsey v.*

Kensington Mortg. & Fin. Corp., 294 Ala. 281, 285, 315 So. 2d 431, 434 (1975).).

75. There can be no greater overriding public concern than the issues presented in this action, i.e., the protection of the lives and health of all Alabama citizens as they exercise their fundamental right to vote during the coronavirus pandemic. Accordingly, this Court should make this specific finding and waive the requirement of security for granting the requested preliminary injunction.

Summary.

76. All of the emergency measures Plaintiffs seek are supported by the latest recommendations posted recently on the CDC web site. Exhibit RR.²⁵ They are based on the CDC’s guiding principle that “The *more people* an individual interacts with at a gathering and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19 and COVID-19 spreading.” *Id.* at 1 (emphasis in original).

a. “Event planners,” that is, Alabama’s election officials planning for the elections in 2020, should encourage “attendees,” that is, voters, to stay home when appropriate. *Id.* at 2. That means encouraging voters to cast absentee

²⁵ Centers for Disease Control and Prevention, *Considerations for Events and Gatherings*, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>.

ballots and making it possible for them to do so without having to leave home.

Voters should not have to check any boxes on the application and ballot envelope, and the requirements of supplying a photo ID and a notary certificate or signatures of two witnesses should be waived. Voters should be able to apply for an absentee ballot up to the day of election and have that ballot counted if it is delivered or postmarked by election day. Local election officials confronted with a large volume of absentee ballots should have the authority to begin counting them before election day.

b. To protect those citizens voting in person, discourage them from handshaking and other physical contact, require staff to use masks, and provide masks or encourage voters to bring their own masks and avoid raising their voices. *Id.* at 2-3.

c. Discourage crowded waiting areas, eliminate lines or queues if possible, maintain social distancing, and “stagger shifts.” *Id.* at 4-6. The most effective way of implementing these recommendations is by providing early voting. Indeed, early voting is perhaps the most important emergency measure Alabama officials should implement, given the history of Alabamians preferring to vote in person.

PRAYER FOR RELIEF.

WHEREFORE, the Plaintiffs respectfully pray that this Court will:

A. Promptly set this motion for a hearing, and following said hearing enter a preliminary injunction and waiving the requirement of a security bond, as follows:

B. Ordering Defendants Merrill and Ivey promptly to submit an emergency plan that remedies the constitutional violations alleged herein and that adequately notifies all Alabama voters of the emergency measures that provide them the ability to vote safely during the current pandemic.

C. Retain jurisdiction of this action to ensure compliance with the Court's orders and injunctions and to supplement or modify them as required to protect the health and safety of Alabama voters during the pandemic.

D. Award Plaintiffs their reasonable attorneys' fees and the costs and disbursements of maintaining this action.

E. Order such other or additional relief as the Court may deem just and equitable.

Respectfully submitted, this 17th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2020, I electronically filed the foregoing via the Alafile system, which will electronically send notice to the following counsel of record:

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- EXH KK: Tommy Stevenson, *AT LARGE_ State resists mail-in voting*, TUSCALOOSA NEWS, June 2, 2020
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- EXH MM: Brian Hinkle, *COVID-19: How’s it Changing Elections?*, National Conference of State Legislatures, LEGISBRIEF, June 2020
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- EXH QQ: Ben Brasch and Mark Niese, *Metro Atlanta voters face long lines; state investigates Fulton issues*, THE ATLANTA JOURNAL-CONSTITUTION, June 5, 2020
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