

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

PEOPLE FIRST OF ALABAMA <i>et al.</i> ,	)	
	)	
	)	
v.	)	CASE NO. 2:20-cv-00619-AKK
	)	
JOHN MERRILL, in his official	)	
capacity as Secretary of State of	)	
Alabama <i>et al.</i> ,	)	

**DEFENDANT MARY B. ROBERSON’S RESPONSE TO PLAINTIFF’S
MOTION FOR PRELIMINARY INJUNCTION**

Defendant Mary B. Roberson, in her official capacity as Circuit Clerk of Lee County, Alabama, (“Mrs. Roberson”) responds to Plaintiffs’ Motion for Preliminary Injunction and its supporting brief. *See* [Docs. 15, 20-1]. Unless specified otherwise, Mrs. Roberson joins, adopts, and incorporates the response and evidence filed by the Attorney General’s Office, [Docs. 34, 34-1–34-15, 36], to the extent those arguments relate to Mrs. Roberson. While Mrs. Roberson largely adopts the Attorney General’s arguments, certain issues need additional argument.

Relevant Background

Plaintiffs seek to enjoin Mrs. Roberson’s performance, as Absentee Election Manager (“AEM”) in Lee County, of certain challenged provisions under Alabama election law. However, effective Friday, May 22, 2020, Mrs. Roberson no longer

serves as the AEM in Lee County because she has exercised her right not to serve in that role. In Lee County, Mrs. Roberson has traditionally served as AEM simply by virtue of her election as circuit clerk. Roberson Decl. at ¶ 3. So service as circuit clerk conferred on Mrs. Roberson “two hats”—circuit clerk and AEM—unless she exercised her right NOT to serve as AEM. *See* Ala. Code 17-11-2. This is consistent with Alabama law, which allows circuit clerks the first option of serving as AEM (unless they decline that role), a separate and distinct job and function from the circuit clerk. *See id.* The distinction between the two roles is critical and dispositive here because, as circuit clerk, Mrs. Robinson cannot do anything in relation to the relief sought in Plaintiffs’ Complaint, for any actions in relation to absentee ballots under Alabama law are the exclusive province of the AEM. Mrs. Roberson no longer wears the AEM “hat.” Furthermore, even if Mrs. Roberson were the AEM, Plaintiffs would not be entitled to an injunction against Mrs. Roberson because of the AEM’s specific role within the absentee balloting process.¹

¹ Mrs. Roberson files this response reserving all defenses, substantive and procedural, she may have to the underlying suit, including issues of proper parties, standing, immunity, capacity, and joinder. Additionally, in light of Mrs. Roberson’s election not to serve as AEM, she anticipates moving for dismissal.

I. Mrs. Roberson’s election not to serve as AEM moots Plaintiffs’ claims—or those directed at Mrs. Roberson—and bolsters her claim of sovereign immunity.

No longer the Lee County AEM, Mrs. Roberson cannot enforce the challenged provisions, and the claims against Mrs. Roberson are moot and subject to sovereign immunity.² A case must be justiciable at all stages of litigation. *See Arizonans for Official English v. Arizona* (“AOE”), 520 U.S. 43, 67 (1997) (citation omitted). Mootness occurs when subsequent events clearly show that the alleged harm is not reasonably likely to occur. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). A change in a party’s circumstances can moot a case. *See AOE*, 520 U.S. at 72.

Mrs. Roberson’s electing not to serve as AEM moots Plaintiffs’ claims against her. Plaintiffs seek injunctive relief relating to the July 14, 2020, primary run-off election and overall relief for the 2020 election year. *E.g.*, [Doc. 1 at 52–54; Doc. 15 at 1]. By not serving as AEM for the remainder of 2020, Mrs. Roberson has no authority to provide the relief Plaintiffs request.³ It is absolutely

² Only certain portions of Plaintiffs’ motion seek injunctions against Mrs. Roberson. First, Plaintiffs seek injunction of the Witness Requirement and the compulsion of curbside voting. [Doc. 20-1 at 1]. However, as argued elsewhere, AEMs do not enforce these provisions. Second, Mrs. Roberson is not subject of the requested injunction of the Photo ID Requirement because the only Plaintiff with Lee County ties, Peebles, is not seeking that injunction. *See id.*

³ By arguing that her electing not to serve as AEM renders Mrs. Roberson powerless to provide Plaintiffs’ requested relief, Mrs. Roberson is not conceding that she otherwise could enforce the challenged provisions absent her opting out.

clear that Mrs. Roberson cannot reasonably be expected to perform the allegedly wrong behavior, and Plaintiffs' claims are moot. *See Laidlaw*, 528 U.S. at 190.

In addition to the Attorney General's arguments, Mrs. Roberson is entitled to sovereign immunity with the State Defendants. A state officer who does not have responsibility for enforcing a challenged provision cannot be stripped of sovereign immunity. *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999) (citation omitted). Mrs. Roberson is a circuit clerk, a state constitutional officer. Ala. Const. § 160(b). A circuit clerk serves as AEM only at her choosing. *See* Ala. Code. § 17-11-2. Thus, as only circuit clerk, Mrs. Roberson has no connection to enforcing the challenged provisions, and she is entitled to sovereign immunity. *See Summit Med.*, 180 F.3d at 1341.

II. Plaintiffs lack standing because of AEMs' limited role.

In addition to arguments of the Attorney General, Mrs. Roberson argues she and other AEMs (if Mrs. Roberson were still an AEM) have limited roles relating to the challenged provisions, and Plaintiffs cannot prove traceability or redressability to confer standing. First, as the Attorney General shows and state law mandates, AEMs deliver absentee ballots to poll workers and election officials who are ultimately responsible for inspecting signatures and determining if the absentee ballots are to be counted. *See* Ala. Code § 17-11-11(b). AEMs receive guidance from the Alabama Secretary of State's Office to enter all absentee ballots

received into the records system as “accepted” for purposes of record keeping, regardless of signature or witness requirements. Roberson Decl. at ¶ 7. Entering a ballot into the voter registration system as “accepted” is no indication of whether it conforms to the law and will actually be counted, but rather shows that it was received by the AEM and will be turned over to the election officials. *Id.*

Therefore, AEMs do not enforce the signature requirement.

Second, an AEM’s determination of whether an applicant for an absentee ballot is required to submit proper photo ID is based solely on the reason indicated (checked) by the applicant on the application. *See* Ala. Code § 17-9-30(b), (d); § 17-11-9; [Doc. 16-46 at 19] (Absentee Ballot Application); Roberson Dec. at ¶ 6. If the applicant did not designate a reason to vote absentee that is photo-ID exempt and has not provided proper photo ID, the AEM must contact the voter and inform him or her of the requirement to submit proper photo ID. Ala. Code § 17-10-2(c). On the eighth day prior to the election, if proper photo ID is not provided with the absentee application, the AEM will issue a provisional absentee ballot. *Id.* at §§ 17-9-30(c), 17-10-2(c).

However, the board of registrars determines whether the provisional ballot should be certified and counted. *See id.* at §§ 17-10-2(f); 17-10-2(g). The canvassing board, on which the circuit clerk serves for general elections, counts the provisional ballots, but in a primary election, which Plaintiffs seek to enjoin,

executives for the political parties are the canvassing board. *Id.* at §§ 17-1-2(6), 17-10-2(f). In summary, AEMs may make an initial determination as to whether required photo ID has been provided, any photo-ID-deficient ballots that exist after a certain timeframe are marked provisional, and the board of registrars—a non-party—decides whether the provisional ballots should be counted. Even if Mrs. Roberson were an AEM and even if a Lee County voter was seeking injunction of the photo ID requirement, she does not have the authority to certify ballots for counting. Accordingly, Plaintiff’s claims are not traceable to any action or inaction by Mrs. Roberson and an injunction as to her would not redress the issue.

Conclusion

For the adopted reasons in the Attorney General’s response and for the reasons specifically argued here, Mrs. Roberson asks the Court to deny Plaintiffs’ Motion for Preliminary Injunction.

/s/ Robert J. Sewell
Attorney for Defendant

OF COUNSEL:

Brandon K. Essig
bessig@lightfootlaw.com
Robert J. “Jay” Sewell
jsewell@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC
The Clark Building
400 20th Street North
Birmingham, Alabama 35203
(205) 581-0700
(205) 581-0799 (Facsimile)

CERTIFICATE OF SERVICE

I certify that on May 26, 2020, I filed the foregoing document by electronically filing with the CM/ECF court system, which will automatically serve counsel registered for electronic delivery. I also certify that I served a copy of this document by U.S. mail to the following:

Jacqueline Anderson-Smith
Circuit Clerk of Jefferson County, Alabama
716 Richard Arrington, Jr. Blvd. North, Room 500
Birmingham, Alabama 35203

Karen Dunn Burks
Deputy Circuit Clerk and Absentee Election Manager of the Bessemer Division of
Jefferson County, Alabama
1851 2nd Avenue North
Bessemer, Alabama 35020

/s/ Robert J. Sewell

OF COUNSEL