

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

PEOPLE FIRST OF ALABAMA, et
al.,

Plaintiffs,

v.

JOHN MERRILL, et al.,

Defendants.

Case No.: 2:20-cv-00619-AKK

**PLAINTIFFS' OPPOSITION TO
DEFENDANT ROBERSON'S MOTION TO DISMISS**

Plaintiffs and Defendant Mary B. Roberson are seeking to amicably resolve Defendant Roberson's pending motion to dismiss. *See* Doc. 63 at 1. Plaintiffs maintain that a resolution is still possible and thus respectfully ask the Court to grant their unopposed motion to extend the timeline for Defendant Roberson to file her reply brief. *Id.* Nonetheless, Plaintiffs are filing this opposition in an abundance of caution because the Court has yet to grant Plaintiffs' motion for an extension of time.

Plaintiffs have adequately pled claims under the Americans with Disabilities Act ("ADA"); the Voting Rights Act of 1965 ("VRA"); and the First and Fourteenth Amendments to the U.S. Constitution. Doc. 1 ¶¶ 10–12. Plaintiffs seek to enjoin all Defendants—including Defendant Roberson in her official capacity as Circuit Clerk of Lee County—from enforcing the Witness Requirement and Photo ID

Requirement for absentee voters, and the Prohibition on Curbside Voting (collectively, the “Challenged Provisions”). On June 15, 2020, this Court found that Plaintiffs are likely to succeed on the merits of their constitutional and ADA claims and granted their preliminary injunction, thereby confirming—at a minimum—the sufficiency of the pleadings at this stage. Doc. 58.

Defendant Roberson has filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). Defendant Roberson does not contest that the Absentee Election Manager (“AEM”) is a proper defendant. And because she has abdicated her duties as the AEM, the Court has already ruled that the new AEM for Lee County, James Majors, should be substituted into the litigation in his official capacity. Mem. Op., Doc. 58 at 31. Nonetheless, Defendant Roberson erroneously asserts that, after abdicating her AEM role, she “has no authority [as Circuit Clerk] to effect change to, enforce, or apply any of the challenged provisions.” Doc. 54 at 11. This is incorrect. The Complaint’s factual allegations and requests for relief also implicate Defendant Roberson’s continuing role as Lee County Circuit Clerk in enforcing and administering the Challenged Provisions and thus satisfies the Article III inquiry.

Further, consistent with the Court’s opinion on the preliminary injunction, Defendant Roberson is not entitled to sovereign immunity under *Ex Parte Young*. Doc. 58 at 27–28. Finally, Plaintiffs have also sufficiently and plausibly pled facts to support each of their claims.

Accordingly, Defendant Roberson's motion should be denied in full.

FACTUAL BACKGROUND

On May 1, 2020, Plaintiffs filed their Complaint seeking to enjoin Defendants' enforcement of the Challenged Provisions, including Defendant Roberson. Doc. 1. The Complaint alleges that Defendants' enforcement of the Challenged Provisions during the ongoing COVID-19 pandemic creates "nearly insurmountable barriers to exercising the fundamental right to vote," in violation of the First and Fourteenth Amendments to the U.S. Constitution, the ADA, and the VRA. Doc. 1 ¶¶ 10–11, 138. In the absence of an injunction against Defendants, an absentee ballot that does not comply with the Witness and Photo ID Requirements goes uncounted. Doc. 1 ¶ 7. However, complying with the Challenged Provisions burdens the right to vote of Black voters, elderly voters, and voters with disabilities, and puts them at a heightened risk of contracting COVID-19. *Id.* ¶ 18.

In May 2020, Defendant Roberson announced that she would no longer serve as the AEM for all remaining 2020 elections. Doc. 37-1 ¶ 3. On June 9, 2020, Defendant Roberson moved to dismiss all of Plaintiffs' claims against her for failure to state a claim and lack of subject matter jurisdiction. Doc. 54. The appointing board for Lee County, of which Defendant Roberson is a member, has since appointed James Majors as her successor in the AEM role. *Id.* at 3, 5. Defendant Roberson continues to serve as Circuit Clerk for Lee County. *Id.*

ARGUMENT

I. The Court Has Subject-Matter Jurisdiction over Claims Against Defendant Roberson.

Defendant Roberson was sued in her official capacity as both Circuit Clerk and AEM. Doc. 1 ¶ 40. Despite recently stepping down as AEM, Defendant Roberson still serves as Circuit Clerk and will continue to serve “on the appointing board and canvassing board as a required duty of the Circuit Clerk.” Doc. 37-1 ¶ 4. Yet, she wrongly asserts that “none of the claims in Plaintiffs’ complaint, even if successful, implicate Mrs. Roberson’s . . . duties as circuit clerk” Doc. 54 at 1–2. Given that Defendant Roberson, in her official capacity as Circuit Clerk of Lee County, enforces and administers aspects of the Challenged Provision, she remains a proper party and the Court has jurisdiction over the claims against her.

To survive a motion to dismiss, “‘general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.’” *United States v. Baxter Intern., Inc.*, 345 F.3d 866, 881 (11th Cir. 2003) (quoting *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994)). The causation and redressability requirements of Article III standing are easily satisfied where the facts alleged indicate a “fairly traceable” link to the defendants’ conduct and the potential for redress of the injury. *See Ga. Latino All. For Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1257 (11th Cir. 2012). In

evaluating Article III causation, something less than proximate cause is required, such that “even harms that flow indirectly from the action in question can be said to be ‘fairly traceable’ to that action for standing purposes.” *Focus on the Family v. Pinellas Suncoast Transit*, 344 F.3d 1263, 1273 (11th Cir. 2003) (citation omitted).

The Court has already concluded that Plaintiffs have alleged an injury-in-fact sufficient to satisfy Article III standing. Doc. 58 at 14–18. Defendant Roberson, however, argues that Plaintiffs have not met the traceability and redressability prongs of the inquiry because “Mrs. Roberson has no authority to effect change to, enforce, or apply any of the challenged provisions.” Doc. 54 at 11.

This is incorrect. Plaintiffs’ allegations that their injuries have been caused by Defendant Roberson are sufficient to satisfy the “relatively modest” requirements that apply at “this stage of the litigation.” *Bennett v. Spear*, 520 U.S. 154, 171 (1997).

First, the Complaint alleges that the Circuit Clerks play a role in “enforcing the Witness and Photo ID Requirements” through “canvassing absentee ballots.” Doc. 1 ¶ 40; *see also id.* at 54–56. Contrary to Defendant’s contentions, where a state official has some statutory role in enforcing a law, as is the case with Defendant Roberson, an injunction against them satisfies redressability and traceability. *See, e.g., Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1159 & n.9 (11th Cir. 2008); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 & n.3 (11th Cir. 2005). The Complaint seeks to enjoin all Defendants from enforcing the

Witness and Photo ID Requirements. Doc. 1 at 53(B)(1)–(2). To do so, the Complaint specifically asks the Court to order Defendants, including Defendant Roberson, to “count otherwise validly cast absentee ballots” that are unwitnessed or missing photo ID. Doc. 1 at 53(B)(4)–(5). As a member of the canvassing board, the Circuit Clerk has a direct statutory charge to “make a correct statement from the returns of the votes from the several voting places of the county,” and certify those results to be filed with the Probate Judge and Secretary of State. *See, e.g.*, Ala. Code §§ 17-12-9, 17-12-15, 17-14-33, 17-14-72, 17-10-2 (f).

As a result, if the requested relief is granted, the Court can order the Circuit Clerk, including Defendant Roberson, to canvass and certify those election returns that include unwitnessed ballots or ballots that lack photo ID. Doc. 1 ¶ 40 and 53(B). Indeed, State Defendants have conceded that canvassing and certifying officials are proper parties. *See* Doc. 36 at 12 n.10 (arguing AEMs cannot enforce Challenged Provisions but stating the “canvassing board, on which the circuit clerk serves for general elections, counts the provisional ballots”).

Second, the Complaint requests that the Court “order[] Defendants to issue guidance instructing” election officials (*i.e.*, poll workers) to accept unwitnessed ballots and ballots without photo ID. Doc. 1 at 53(B)(4)–(5). The Circuit Clerk is a member of the appointing and canvassing board. Ala. Code. § 17-1-2(1) and (6). As such, the Circuit Clerk is charged with the selection, *id.* § 17-8-1(a), and training of

poll workers on the proper acceptance or rejection of absentee ballots, and the means of conducting curbside voting. *See id.* § 17-8-9 (providing that the circuit clerk, probate judge, and sheriff must provide poll worker trainings and that the probate judge notifies poll workers of this training); *see also id.* §§ 17-11-10, 17-11-11 (describing the existing process whereby poll workers count absentee ballots). Plaintiffs’ requested relief directly implicates the Circuit Clerk’s role in selecting and training of poll workers.

Importantly, as this Court acknowledged with respect to the canvassing of ballots and certifying election results: “On election day, the AEM delivers the absentee ballots to absentee election officials, who ‘shall examine each affidavit envelope to determine if the signature of the voter has been appropriately witnessed.’” Doc. 58 at 20 (quoting Ala. Code §17-11-10(b)). The Circuit Clerks are responsible for selecting and training the poll workers who inspect absentee ballots for witness signatures. Ala. Code §§ 17-8-1, 17-8-9. In addition, as a member of the canvassing board, the Circuit Clerk is responsible for canvassing ballots and certifying election results. Ala. Code § 17-10-2(g)–(f). An injunction against the AEMs and the Circuit Clerks¹ will likely result in the relief requested: the counting

¹ As this Court recognized in its determination that plaintiffs have standing to sue the AEMs, the role of the board of registrars and canvassing board in ultimately counting provisional ballots “does not somehow negate the AEMs role in screening the ballots in the first instance.” Doc. 58 at 19 n.9. Conversely, the AEMs’ initial screening of ballots, does not negate “[t]he fact that the board of registrars, in conjunction with the canvassing board”—of which the Circuit Clerk is a

of absentee ballots without witness signatures or photo IDs. Doc. 1 at 53–54; *see also* Doc. 58 at 22–23, 26.

Moreover, Defendant Roberson need not on her own provide Plaintiffs with complete relief, instead, partial relief is sufficient for standing purposes. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310 (11th Cir. 2001); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (redressability does not require complete relief). An injunction against enforcing the Witness and Photo ID Requirements—which necessarily involves counting ballots that are unwitnessed or lack ID, certifying returns that include such ballots, training poll officials to accept such ballots, and training poll workers on the implementation of curbside voting—will substantially or, at least, partially redress Plaintiffs’ injuries.

II. Defendant Roberson Is Not Entitled to Sovereign Immunity.

Defendant Roberson cannot assert that sovereign immunity protects her from suit. Assuming *arguendo* that Circuit Clerks might at times enjoy sovereign immunity as state actors, *Ex Parte Young* provides an exception for suits against state officers seeking prospective equitable relief to end continuing violations of federal law. Doc. 58 at 27. So long as a state officer has “some connection with enforcement” of the challenged provision, the *Ex Parte Young* doctrine applies. *Id.*

member—plays a role in ultimately counting any provisional ballots and certifying election returns. *Id.* In other words, Plaintiffs’ injuries are traceable and redressable to both roles.

Just as AEMs are not entitled to immunity, Doc. 58 at 28–29, Circuit Clerks are also sufficiently connected to the Witness and Photo ID Requirements’ enforcement to satisfy *Ex Parte Young* for the reasons explained above in Section I.

Moreover, Congress validly abrogated sovereign immunity for purposes of the ADA and VRA claims asserted against Defendant Roberson. Doc. 58 at 30.

Thus, for the claims raised in Plaintiffs’ Complaint, sovereign immunity is inapplicable or abrogated as to Defendant Roberson.

III. Plaintiffs Have Adequately Alleged Constitutional, ADA and VRA Claims.

Defendant Roberson also posits the Court should grant Defendant’s motion to dismiss pursuant to Rule 12(b)(6). Yet, she makes no attempt to argue that Plaintiffs have not adequately pled plausible claims under the Constitution, the VRA or ADA. *See* Doc. 54 at 4–8. Instead, Defendant Roberson again argues that in her capacity as Circuit Clerk she does not play any role that would provide the relief Plaintiffs’ request. As stated above, that argument is meritless.

Defendant Roberson neither addresses the allegations required for each claim nor specifies how the Complaint is insufficient as to any claim. Yet it is clear from the Court’s opinion granting a preliminary injunction that Plaintiffs have adequately alleged claims under the ADA and Constitution seeking to enjoin Defendants from enforcing the Challenged Provisions. *See generally* Doc. 58 at 34–69.

Nonetheless, Plaintiffs briefly address the sufficiency of their VRA claims

against Defendant Roberson. To establish a Section 2 violation, Plaintiffs must allege that the Challenged Provisions have a racially discriminatory impact and that that impact is in part linked to social and historical discrimination. *See Veasey v. Abbott*, 830 F. 3d 216, 244 (5th Cir. 2016) (en banc); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999). Here, the Complaint alleges that the Challenged Provisions will have an adverse impact on Black voters, Doc. 1 ¶ 160–61, and that this disparate impact results from past and present racial discrimination, *id.* ¶¶ 162–65. Plaintiffs have also adequately pled that the Witness Requirement, at least insofar as it requires a “class” of notaries to vouch for the identity of voters, Doc. 58 at 72–74, is prohibited under Section 201 of the VRA. Doc. 1 ¶ 166–73.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants’ motion to dismiss.

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

/s/ Deuel Ross

Deuel Ross*
Natasha C. Merle*
Liliana Zaragoza*
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
P: (212) 965-2200
dross@naacpldf.org
nmerle@naacpldf.org
lzaragoza@naacpldf.org

Mahogane D. Reed*
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street N.W.Ste.600
Washington, DC 20005
P: (202) 682-1300
mreed@naacpldf.org

/s/ William Van Der Pol

William Van Der Pol (ASB-211214F)
Jenny Ryan (ASB-5455-Y84J)
ALABAMA DISABILITIES
ADVOCACY PROGRAM
Box 870395
Tuscaloosa, AL 35487
P: (205)348-4928
wvanderpoljr@adap.ua.edu
jrryan2@adap.ua.edu

/s/ Caren E. Short

Caren E. Short (ASB-0646-P48N)
Nancy G. Abudu*
SOUTHERN POVERTY LAW CENTER
PO Box 1287
Decatur, GA 30031
P: (404) 521-6700
F: (404) 221-5857
caren.short@splcenter.org
nancy.abudu@splcenter.org

/s/ Sara Zampierin

Sara Zampierin (ASB-1695-S34H)
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, AL 36104
P: (334) 956-8200
F: (334) 956-8481
sara.zampierin@splcenter.org

*Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2020 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to counsel of record.

/s/ Deuel Ross
Deuel Ross
Counsel for Plaintiffs