IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA

The NATIONAL FEDERATION OF THE BLIND OF ALABAMA, GAIL SMITH, JILL ROSSITER, and ERIC PEEBLES,

Plaintiffs,

VS.

JOHN H. MERRILL in his official capacity as Secretary of State of Alabama,

Defendant.

Case No.: _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. Plaintiffs the National Federation of the Blind of Alabama, Gail Smith, Jill

Rossiter, and Eric Peebles bring this action to vindicate the right of individuals who are blind¹ or

have print disabilities² to vote privately and independently by absentee ballot. Alabama's

absentee ballot program requires voters with vision and print disabilities to secure another

person's assistance to complete their absentee ballot. This requirement violates federal law.

2. Alabama is one of the top eight states in the country for its percentage of residents

with vision impairments (3.3%).³ This percentage exceeds the national average of 2.3%.

¹ For semantic convenience throughout this Complaint, the term "blind" is used in its broadest sense to include all persons with a vision impairment that substantially limits the major life activity of seeing.

² "Print disabilities" are all disabilities that interfere with a person's ability to read, mark, and handle printed paper documents. Those disabilities include vision disabilities, manual dexterity disabilities such as cerebral palsy, and other physical disabilities such as quadriplegia.

³ Rehabilitation Research and Training Center on Disability Statistics and Demographics, 2020 Annual Disability Statistics Compendium 22, https://disabilitycompendium.org/sites/default/files/user-uploads/Events/2021_release_year/Final%20Accessibility%20Compendium

3. Blind and print disabled Alabamians, like U.S. citizens across the country, are proud to exercise the duty, right, and privilege of voting for their elected representatives. Yet, when trying to vote in person, they face barriers in the form of transportation, untrained poll workers, and inaccessible voting technology.

4. While Alabama purports to make absentee voting available to voters who are blind or who have print disabilities, it falls well short of its promise and legal obligation to do so. The State excludes blind and print disabled Alabamians from its absentee voting system because its absentee ballots are transmitted, marked, and returned entirely on paper and are thus inaccessible to those who are blind or have print disabilities.

5. To vote privately and independently by absentee ballot, Plaintiffs and other voters with vision and print disabilities need an accessible electronic ballot that they can read and mark on their own computers or smart devices, using their own assistive technology. Accessible electronic ballots are available and widely used across the country.

6. In fact, Alabama already makes absentee ballots available electronically to citizens living overseas and citizens in the military. It also allows overseas and military voters to return their absentee ballots electronically. Thus, Alabama has the means to provide ballots electronically to, and accept marked ballots electronically from, voters with print and vision disabilities.

7. Alabama's exclusive reliance on paper ballots for non-overseas and military voters prevents blind and print disabled Alabama voters from participating in absentee voting with the privacy and independence afforded to voters without disabilitie

8. By requiring blind and print disabled voters to seek another person's assistance to complete a paper ballot, Alabama's absentee ballot system forces Plaintiffs to forfeit their right to vote privately and independently when voting absentee. Because individuals without disabilities may cast their votes by absentee ballot privately and independently, Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 *et seq.*, require Defendant to provide individuals with disabilities—including Plaintiffs—an equal opportunity to do the same.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.

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13. Ms. Smith would like to vote absentee in future elections. However, she is not comfortable voting absentee using Alabama's current paper ballot system because the system does not allow her to vote privately and independently. She does not wish to reveal her vote selections to a third party, and she is concerned that a third party may incorrectly mark her ballot or may make a mistake that causes her ballot not to be counted.

14. Because Alabama refuses to provide accessible electronic absentee ballots to voters with disabilities who cannot use paper absentee ballots, Ms. Smith will be unable to vote absentee privately and independently in upcoming elections.

15. Ms. Smith wished to vote absentee during the 2020 primary and general elections but she could not do so privately and independently because Alabama did not provide an accessible electronic ballot for blind voters. She ultimately did not vote absentee for that reason.

16. Ms. Smith was unable to vote in person in the 2020 general election. She called her polling location, but nobody was able to confirm the availability of accessible voting machines. Voting in person is already difficult for her because her polling place is 18 miles from where she lives. Ultimately, she was not able to arrange for transportation to her polling place.

17. Because she could not reach her polling location in person and had no independent and private way to vote absentee, Ms. Smith was functionally deprived of her right to vote in the 2020 elections.

18. Plaintiff Jill Rossiter is a blind individual who is registered to vote in Alabama. Ms. Rossiter is a member of the National Federation of the Blind of Alabama. She resides in Lauderdale County, Alabama. She is eligible to vote absentee because her disability prevents her from making a trip to her polling place. She wishes to vote absentee in future elections.

19. Ms. Rossiter is legally blind. She uses the JAWS screen reader software on her computer to interact with electronic information.

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and equally in all aspects of their lives, including by ensuring its blind members can vote on equal footing with every other Alabama resident.

31. NFB-AL has many blind members, including Gail Smith and Jill Rossiter, who are registered to vote in Alabama, are eligible to vote absentee, and wish to vote in upcoming elections by casting absentee ballots privately and independently. NFB-AL brings this lawsuit on behalf of its eligible of its members.

32. Defendant John Merrill is the Alabama Secretary of State and is sued in his official capacity. As Secretary of State, Defendant Merrill is the chief elections official in the State of Alabama. Ala. Const., art. V, § 112. He is charged with administering and supervising elections.

FACTUAL BACKGROUND

Use of Accessible Electronic Documents by the Blind and Print Disabled Individuals

33. Blind people and people with print disabilities access documents from personal computers or smart devices by using keyboards in conjunction with screen reader software and/or voice-to-text software. Screen reader software reads aloud, or displays on a refreshable Braille display, the visual information on the electronic page.

34. Blind people and people with print disabilities can independently access and interact with printed materials only when they are rendered in electronic formats (e.g., Word or html) that can be used with screen reader software. When electronic documents are compatible with screen reader software, blind and print disabled people can fully and independently access and interact with the documents.

35. Several screen reader software programs are available, including Job Access With Speech (JAWS), NVDA, and VoiceOver.

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36. The World Wide Web Consortium (W3C) develops international standards for the web. The Web Content Accessibility Guidelines (WCAG) 2.0, Success Criteria A and AA, issued by the W3C Web Accessibility Initiative, provide an international consensus standard for making electronic materials accessible to blind and print disabled people using screen reader software. These guidelines do not depend on the type of screen reader software being used. The WCAG guidelines have been adopted as the legal standard for federal government technology under Section 508 of the Rehabilitation Act, 36 C.F.R. § 1194.1, App. A, § 205.4, and certain state laws, regulations, and policies, including the State of Alabama Information Technology Standard, Standard 530S2-00: Universal Accessibility (2011).⁴ *See also, e.g.*, TX Admin. Code §§ 213.10, 213.11, 213.15, 213.16; Pennsylvania Information Technology Policy ITP-ACC001;⁵ Kansas ITEC Policy 1210, Revision 3, Information and Communication Technology Accessibility.⁶

The Absentee Ballot Process in Alabama

37. Absentee voting in Alabama is available to certain voters, including those who have "any physical illness or infirmity which prevents [their] attendance at the polls." Ala. Code § 17-11-3(a)(2).

38. Likewise, absentee voting is available to any person who is "PHYSICALLY INCAPACITATED AND WILL NOT BE ABLE TO VOTE IN PERSON BECAUSE THEY CANNOT ACCESS THEIR ASSIGNED POLLING PLACE DUE TO ONE OF THE FOLLOWING DISABILITIES (neurological, musculoskeletal, respiratory (including speech

⁴ Available at http://oit.alabama.gov/wpcontent/uploads/2017/09/Standard_530S2_Universal_Accessibility.pdf.

⁵ http://www.oa.pa.gov/Policies/Documents/itp_acc001.pdf.

⁶ https://ebit.ks.gov/itec/resources/policies/policy-1210.

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organs), cardiovascular, or other life-altering disorder that affects his or her ability to perform manual tasks, stand for any length of time, walk unassisted, see, hear or speak) <u>AND</u>: A) HE OR SHE IS AN ELDERLY VOTER AGED 65 OR OLDER; OR B) HE OR SHE IS A VOTER WITH A DISABILITY."⁷

39. Absentee voting is also available to other categories of voters, including voters living outside their county of residence, such as members of the armed forces or college students.⁸

40. An order from Governor Kay Ivey tempor

Mechanisms are Available to Provide Accessible Absentee Ballots.

48. Accessible alternatives to paper absentee ballots exist and are used in other states.

49. Implementing accessible electronic alternatives to paper absentee ballots would afford Plaintiffs an equal opportunity to vote privately and independently via absentee ballot.

50. Technology is readily available that would provide Plaintiffs, and other voters with vision and print disabilities, the opportunity to cast their votes through accessible electronic absentee ballots. Accessible electronic absentee ballots enable individuals with vision and print

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system, the Prime III system, the Five Cedars Alternate Format Ballot, and/or the Dominion Voting system to make their absentee voting programs accessible.

56. These RAVBM systems have been approved for use in Oregon, Washington, New Hampshire, California, Ohio, Colorado, Hawaii, Michigan, New York, Pennsylvania, Delaware, West Virginia, Virginia, and the District of Columbia, among other jurisdictions.

57. The use of RAVBM systems in other states demonstrates that electronic absentee voting systems can be made accessible and available to voters with vision and print disabilities in Alabama.

Alabama Offers Electronic Ballots to Overseas and Military Voters but Has Refused to Provide Them to Blind and Print Disabled Voters

58. A separate absentee voting system applies to Alabama voters who live overseas or who are active members of the military.

59. Military and overseas voters may receive their absentee ballots electronically through this system.

60. Overseas voters, including military voters who are outside the U.S., may also return their ballots electronically.

61. The ADA and Section 504 require these electronic ballots to be accessible for overseas voters with vision and print disabilities. Therefore, they can be made accessible and available to voters with vision and print disabilities.

62. Alabama has refused to make its existing electronic ballots available to voters with vision and print disabilities who are eligible to vote absentee.

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63. Disability rights advocates, including NFB-AL, have repeatedly engaged with Defendant about the need for a RAVBM system for vision and print disabled voters but Defendant has failed to implement one.

64. In September 2019, for example, NFB-AL urged Defendant to make Alabama's absentee ballot program accessible to blind and

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programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.*

69. In providing aids, benefits, or services, public entities may not "[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others," nor may public entities provide qualified individuals with disabilities "an aid, benefit, or service that is not as effective in affording equal opportunity" to obtain the same result or benefit as provided to others. 28 C.F.R. § 35.130(b)(1)(ii)-(iii).

70. Public entities must make reasonable modifications to their policies, practices, and procedures when necessary to avoid discriminating against individuals with disabilities. *Id.* § 35.130(b)(7)(i).

71. Furthermore, public entities "shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others," and "shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." *Id.* § 35.160.

72. To be effective, "auxiliary aids and services must be provided in . . . such a way as to protect the privacy and independence of the individual with a disability." *Id.* § 35.160(b)(2).

73. Auxiliary aids and services include "screen reader software; magnification software; optical readers; ... accessible electronic and information technology; or other effective

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methods of making visually delivered materials available to individuals who are blind or have low vision." *Id.* § 35.104.

74. Because they are blind, Ms. Smith, Ms. Rossiter and other NFB-AL members are individuals with disabilities protected by the ADA. *See* 42 U.S.C. § 12102; 28 C.F.R. § 35.108(a)(1), (b)(1)(i), (b)(2), (c)(1)(i); 28 C.F.R. § 35.108(d)(2)(iii)(B) ("Blindness substantially limits seeing").

75. Because he has cerebral palsy, Dr. Peebles is an individual with a disability protected by the ADA. *See Id*; 28 C.F.R. § 35.108(d)(2)(iii)(G) ("Cerebral palsy substantially limits brain function").

76. Ms. Smith, Ms. Rossiter, Dr. Peebles, and NFB-AL members are registered to vote in Alabama, are eligible to vote absentee, and would like to vote absentee in Alabama elections.

77. Ms. Smith, Ms. Rossiter, other NFB-AL members, and Dr. Peebles are qualified to receive voting services from Defendant and are entitled to the protections afforded under the ADA. *See* 42 U.S.C. § 12131(2).

78. Defendant John Merrill in his capacity as Secretary of State is an agency or instrumentality of the state of Alabama subject to the ADA.

79. Absentee voting is a service, program, or activity provided by Defendant.

80. Defendant's absentee voting process discriminates against Plaintiffs and other blind and print disabled voters because these individuals cannot read or mark their ballots secretly, privately and independently, but voters without vision and print disabilities can.

81. Defendant has failed to provide Plaintiffs and other blind and print disabled voters with an opportunity to vote by absentee ballot that is equal to the opportunity provided to voters that do not have disabilities.

82. Defendant has failed to make reasonable modifications to Alabama's absentee voting process by offering accessible electronic voting to Plaintiffs and other voters who are blind or print disabled.

83. Defendant has failed to provide Plaintiffs and blind and print disabled voters auxiliary aids and services necessary to afford them equally effective communication with equivalent privacy and independence by proviem equally eexclu8]TJ8.

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94. Section 504 defines "program or activity" to include "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government" or "the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government[.]" *Id.* § 794(b)(1).

95. Such federally funded entities may not, in providing aids, benefits, or services, "[d]eny a qualified handicapped person the opportunity accorded others to participate in the program or activity receiving Federal financial assistance." 28 C.F.R. § 42.503(b)(1)(i).

96. Such federally funded entities must also "insure that communications with their ... beneficiaries are effectively conveyed to those having impaired vision and hearing," *id.* § 42.503(e), and, if the entity has 15 or more employees, must "provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons in a program or activity receiving Federal financial assistance," *id.* § 42.503(f).

97. Defendant John Merrill in his capacity as Secretary of State is an agency or instrumentality of the state of Alabama and receives federal financial assistance, and therefore is subject to the requirements of Section 504.

98. Absentee voting is a service, program, or activity provided by Defendant.

99. Ms. Smith, Ms. Rossiter, Dr. Peebles, and NFB-AL members are people with disabilities under Section 504.

100. Ms. Smith, Ms. Rossiter, Dr. Peebles, and NFB-AL members are registered to vote in Alabama and are eligible to vote absentee and are thus qualified individuals with disabilities entitled to the protections of Section 504.

101. Defendant has failed and continues to fail to provide voters with vision and print disabilities an opportunity to vote that is equal to the opportunity provided to other voters.

102. In refusing to implement an accessible electronic absentee ballot system, Defendant is withholding an auxiliary aid or service that would

- B. A declaration that Defendants have and continue to violate the ADA and Section
 504 by failing to offer accessible electronic ballots to voters with vision and print
 disabilities who are eligible to vote absentee;
- C. An award of Plaintiffs' reasonable attorneys' fees, litigation expenses, and costs; and
- D. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ William Van Der Pol

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* Motions for Admission or Motions to Participate Pro Hac Vice will be filed after case opening.