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

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

ALABAMA STATE CONFERENCE OF THE NAACP, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 2:24-cv-420-RDP
STEVE MARSHALL, in his official capacity as Attorney General of Alabama, *et al.*,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The enactment of § 17-11-4 of the Alabama Code ("SB1") fortified the absentee voting process while permitting numerous opportunities for legitimate voter assistance. SB1 requires able-bodied voters to submit their own absentee ballot applications. (c)(2). It also prevents the distribution of prefilled absentee ballot applications, (b)(2), and the provision or receipt of payments to those who would traffic, prefill, or complete voters' absentee ballot applications. (d)(1)-(2). All Alabama voters who desire assistance in filling out their applications are still free to receive it, (b)(1), and disabled or illiterate Alabamans who require assistance to vote can still—with only a few exceptions—select "an individual of the voter's choice" to provide that necessary help. (e). SB1 strikes a balance between security and accessibility, deterring fraudulent conduct while insulating vulnerable voters and the electoral system from manipulation.

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On what basis do Plaintiff organizations seek extraordinary relief to bar enforcement of this commonsense law? They first claim it restricts their ability "to speak." Doc. 34-1 at 9. But a person doesn't speak by distributing or submitting another voter's ballot application. Without explanatory speech accompanying those actions, the conduct itself doesn't convey a particularized message. And without an expressive message, the First Amendment affords no special protection. Similarly, engaging in conduct as a group does not transform otherwise nonexpressive conduct into political association. Plaintiffs offer a historian to say otherwise, but his opinions don't change the law. The First Amendment claims do not warrant preliminary injunctive relief.

Nor do Plaintiffs' vagueness and preemption claims. Plaintiffs complain that they don't know what any of the words in SB1 mean, but it is doubtful that Alabama's voters share Plaintiffs' confusion. SB1's prohibitions are spelled out in plain language. Not even a dictionary is required for citizens of ordinary intelligence to have a reasonable opportunity to know what conduct is

prohibited. Plaintiff organizations then invoke the interests of Alabama's "voters who require absentee application assistance." Doc. 34-1 at 9. Yet, they can't point to a federal statute that conflicts with SB1's regulations, and they don't offer an actual voter who has received any assistance from Plaintiffs, much less one who says they won't be able to vote unless Plaintiffs can violate SB1.

Against Plaintiffs' bare assertions, Defendants present hard evidence. There's no denying that absentee voting in Alabama has been susceptible to varied forms of fraud, and this fraud has recently occurred in Alabama elections. In addition to physically stealing applications and ballots, fraudsters have exerted undue influence and bribed voters. Ballot brokers in Alabama have specifically targeted absentee applications in their corrupt schemes, and the victims have often been vulnerable. Finally, an expert versed in causal analysis and political science explains that the distribution of prefilled voter forms is a known and noxious practice that confuses voters. He methodically assesses Plaintiffs' causal claims about providing indispensable voting assistance to Alabama's electorate, highlighting how Plaintiffs failed to substantiate those claims. He also reveals that the opinion offered by Plaintiffs' expert—legal conclusion that it is—emerges without a passably reliable methodology. Plaintiffs' complaint should be dismissed in its entirety for failure to state a claim, *see* Doc. 42, but even if the Court disagrees, Plaintiffs' motion for a preliminary injunction on all of their claims should be denied.

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II. BACKGROUND

On April 4, 2024, four organizations brought this lawsuit challenging four provisions of Alabama election law, Doc. 1, and sought a preliminary injunction on May 2, 2024, Doc. 34. To support their preliminary injunction motion, Plaintiffs attached one declaration by a court reporter who transcribed legislative debates over SB1, Doc. 34-2, and five declarations from officers and employees at Plaintiff-organizations, Doc. 34-3 (Executive Director, Greater Birmingham Ministries), Doc. 34-4 (President, Alabama NAACP), Doc. 34-5 (President, League of Women Voters

of Alabama), Doc. 34-6 (Acting Executive Director, ADAP), Doc. 34-7 (Employee, ADAP). Defendants moved to dismiss on May 20, 2024. Doc. 42. Plaintiffs supplemented their preliminary injunction motion with a declaration by historian Dr. Joseph Bagley on May 24. Doc. 45-1.

The nature of Alabama's absentee voting process and the well-documented history of voter fraud in Alabama specifically and the United States generally are adequately presented in Defendants' motion to dismiss, Doc. 42, which they adopt and incorporate here in the interest of judicial economy. For the Court's convenience, Defendants outline SB1's "Challenged Provisions," as well as its disability assistance provision. Under the Prefilled-Application Provision, "[i]t shall be unlawful for any person to knowingly distribute an absentee ballot application to a voter that is prefilled with the voter's name or any other information required on the application form." ALA. CODE § 17-11-4(b)(2). Under the Submission Provision, "it shall be unlawful for an individual to submit a completed absentee ballot application to the absentee election manager other than his or her own application," except in cases where a voter requires emergency medical treatment "within five days before an election." *Id.* § 17-11-4(c)(2). The Compensation Prohibition consists of two different offenses. It is a Class C felony "for a third party to knowingly receive a payment or gift for distributing, ordering, requesting, collecting, completing, prefilling, obtaining, or delivering a voter's absentee ballot application." *Id.* § 17-11-4(d)(1). It is a Class B felony "for a person to knowingly pay or provide a gift to a third party to distribute, order, request, collect, prefill, complete, obtain, or deliver a voter's absentee ballot application." *Id.* § 17-11-4(d)(2).

SB1 expressly incorporated the Voting Rights Act's protection of disability voting assistance. Thus, "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by an individual of the voter's choice, other than

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the voter's employer or agent of that employer or officer or agent of the voter's union." *Id.* § 17-11-4(e).

Additionally, Defendants submit declarations from former Assistant Attorney General Gregory M. Biggs (Doc. 46-1) and Dr. Justin Grimmer (Doc. 46-2). Mr. Biggs prosecuted Alabama voter fraud cases between October 1995 and April 2001 in Wilcox County, Greene County, Hale County, and Winston County (several of which resulted in the appellate cases cited by Defendants in their motion to dismiss, *see* Doc. 42 at 6). Biggs Decl. ¶ 3. In particular, Mr. Biggs's "prosecutions focused on absentee election fraud." *Id*. ¶ 4. His experiences demonstrate "absentee voting has been a source of fraud and voter manipulation in Alabama." *Id*. ¶ 5. He "saw cases where the victim-voters did not even know that they had requested absentee ballots or that they had voted in a particular election." *Id.* ¶ 4. He also spoke "with a large number of African-Americans who were outraged that someone had tried to steal—or had stolen—their votes." *Id*.

In his prosecution in Green County, the evidence revealed "an assembly line process to complete the stolen absentee applications, affidavits, and ballots." *Id.* ¶ 9. To obtain the ballots, "[s]ometimes the absentee fraudster requested the application materials and ballots without the voter's knowledge." *Id*. In other instances, fraudsters would steal mail or "convince, threaten, or bribe" voters to give up absentee materials or sign the absentee affidavits without seeing them. *Id*. ¶¶9-10. "Regardless of the absentee ballot scheme to defraud, the key of the absentee ballot fraudsters in the commission of the crime was getting control of the absentee voting materials and ballots." *Id.* ¶ 10.

Mr. Biggs recounts that "most of these victim-voters were not well educated," *id*. ¶ 11, and some of the victims "were vulnerable," either struggling to read or write or otherwise not understanding the absentee balloting process. *Id.* ¶ 21. Mr. Biggs also assisted in the prosecution of a

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sheriff who provided alcohol for ballot brokers "to use to bribe voters for their blank absentee voting materials and ballots." *Id*. ¶ 24. Mr. Biggs's declaration establishes not only that absentee fraud has occurred in Alabama, but also that the vote-stealing schemes often focus on obtaining control over the absentee ballots and applications.

Dr. Justin Grimmer is a professor at Stanford University and Senior Fellow at the Hoover Institution and Co-Director of the Democracy and Polarization Lab. Grimmer Decl. ¶ 4. He holds a Ph.D. in Political Science from Harvard University and AB in Mathematics and Political Science from Wabash College. *Id*. As part of his professional research, he develops and applies statistical methods to study U.S. elections and political communication. *Id*. ¶ 5.

In his report, Dr. Grimmer discusses prominent efforts by third-party groups to distribute pre-filled ballot applications, along with the consequential mistakes these groups make in the process. *Id*. ¶¶ 12-17. He documents situations in which the distribution of unsolicited, prefilled applications created "extra work for election officials" and "confusion among voters." *Id*. ¶ 18.

He proceeds to analyze Plaintiffs' "causal claims about how [they] currently increase voter turnout among Alabama residents and about how complying with SB1's regulation will alter Plaintiffs' effectiveness at increasing voter turnout." *Id*. ¶ 21. He explains that Plaintiffs' description of "their voter mobilization efforts" fails to "establish their influence or quantify their effect on any voters." *Id*. ¶ 24. Plaintiffs have shown that they engage in voting assistance efforts without showing they produce "an actual effect" on voter turnout that would be blunted by complying with SB1. *Id*.

Dr. Grimmer then examines "three randomized control trials from the political science literature on absentee ballot applications." *Id*. ¶ 26. By analyzing these studies, he finds that, in general, "providing voters with information about how to vote absentee——which is allowed under SB

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1—has an effect on turnout comparable to the effect of providing voters with a physical unsolicited absentee ballot application." *Id*.

Using "common areas of methodology" shared by political scientists and historians, Dr. Grimmer examines Dr. Joseph Bagley's report "to determine if the evidence and data sources he cites support his opinions." *Id*. ¶ 38. Dr. Grimmer finds that Dr. Bagley's historiography generally fails to discuss the absentee "assistance" regulated by SB1, ¶¶ 39-43, includes assertions "that cannot possibly follow from the evidence he cites," *id*. ¶ 44, and appears to impute knowledge to the State without "a rigorous and replicable methodology," *id*. ¶ 46.

III. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). Rather, granting a preliminary injunction is "the exception rather than the rule." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). Indeed, "[t]he preliminary injunction is an extraordinary and drastic remedy not to be granted until the movant clearly carries the burden of persuasion as to the four prerequisites. The burden of persuasion in all of the four requirements is at all times upon the plaintiff." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1286 (11th Cir. 1990) (quotations omitted).

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Those four prerequisites to obtain a preliminary injunction are: "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a showing that plaintiff will suffer irreparable injury if an injunction does not issue, (3) proof that the threatened injury to plaintiff outweighs any harm that might result to the defendants, and (4) a showing that the public interest will not be disserved by grant of a preliminary injunction." *Id.* at 1284. "[W]here the government is the party opposing the preliminary injunction its interest and harm merge with the public interest." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020).

IV. ARGUMENT

A. Plaintiffs Are Not Substantially Likely to Prevail on the Merits.

As explained in Defendants' motion to dismiss, Plaintiffs fail to state a claim for which relief can be granted. Doc. 42 at 17–50. Those arguments demonstrate Plaintiffs "have no chance of success on the merits, much less a substantial one." *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). Properly construing the "Challenged Provisions" and applying the correct legal standard disposes of each of Plaintiffs' six claims. Thus, it is unnecessary to weigh the evidence to conclude Plaintiffs fail to satisfy the first prerequisite of injunctive relief. Nonetheless, if the Court decides that Plaintiffs have stated a claim, Plaintiffs still fail to meet their much higher burden to show a substantial likelihood of success on the merits. *See State of Fla. v. Dep't of Health & Human Servs.*, 19 F.4th 1271, 1286 ("It is not enough that the chance of success on the merits be better than negligible."). "At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). The appropriate evidence submitted by the parties reflects that SB1 is a legitimate and necessary law to protect voters and election security.[1]

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1. The Challenged Provisions Are Not Unconstitutionally Vague.

"[V]agueness is a question of law for the judge . . . to determine." *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1330 (11th Cir. 2005). By its terms, SB1 generally bars distributing *prefilled* absentee ballot applications, submitting *another* voter's absentee ballot application, or receiving

[1] For the sake of brevity and judicial efficiency, Defendants incorporate and summarize rather than fully rehash the arguments presented in their motion to dismiss. This response focuses on the evidence presented to the Court in relation to Plaintiffs' motion for a preliminary injunction on each of their six claims.

or providing *compensation* for prefilling, completing, or trafficking (*e.g.*, distributing, collecting, delivering) a voter's absentee ballot application. ALA. CODE §17-11-4(b)(2) (Prefilled-Application Provision); *id.* §17-11-4(c)(2) (Submission Provision); *id*. §17-11-4(d)(1)-(2) (Compensation Prohibition). SB1 provides "citizens of ordinary intelligence a reasonable opportunity to know" that this harvesting conduct "is prohibited." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Plaintiffs' demand for "perfect clarity and precise guidance" in all of SB1's applications misunderstands the Due Process standard for vagueness. *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989). Moreover, SB1's "scienter requirements" remove any plausible claim that SB1 is unconstitutionally vague. *Gonzales v. Carhart,* 550 U.S. 124, 148–49 (2007). Plaintiffs' vagueness claim (Count III) thus is not substantially likely to succeed.

2. Plaintiffs Have Not Demonstrated A Substantial Likelihood Of Success On Their Free Speech, Free Association, and Overbreadth Claims.

The harvesting conduct prohibited by SB1 is neither pure speech nor inherently expressive conduct. *See, e.g.*, *Lichtenstein v. Hargett*, 83 F.4th 575, 599 (6th Cir. 2023) (affirming pleadings-stage dismissal of First Amendment claims). Because the conduct conveys a message only if accompanied by explanatory speech, SB1's restrictions do not burden any expression protected by the First Amendment, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale,* 901 F.3d 1235, 1237 (11th Cir. 2018), much less "criminalize a substantial amount" of it "judged in relation to" SB1's "plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 297 (2008). Unlike the supposed burdens on Plaintiffs' expression, SB1's legitimate sweep is rooted in "actual fact." *Virginia v. Hicks,* 539 U.S. 113, 122 (2003). The third-party distribution of prefilled voter forms is a well-documented phenomenon—known to at least one Plaintiff organization—that precipitates

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massive voter confusion. Grimmer Decl. ¶¶ 11-17.[2] Similarly, ballot brokers in Alabama *have* corruptly appropriated, bought, and submitted absentee ballot applications to steal votes. Biggs Decl. ¶¶ 9, 21, 23, 24, 25; *Greater Birmingham Ministries v. Sec'y of State for State of Ala.,* 992 F.3d 1299, 1305 (11th Cir. 2021). The Prefilled-Application Provision, Submission Provision, and Compensation Prohibition address these evils, advancing the State's substantial interests in reducing voter confusion, deterring fraud, preventing undue influence, and instilling voter confidence. Whether under rational basis review, the "relatively lenient" *O'Brien* standard, or an even more rigorous form of scrutiny, SB1 passes muster. Accordingly, Plaintiffs' free speech (Count I), expressive association (Count II), and overbreadth (Count IV) claims are meritless.

The declaration by Dr. Joseph Bagley fails to support Plaintiffs' First Amendment claims. Dr. Bagley's primary contribution is an inappropriate legal conclusion that "providing voters with assistance has historically been, and continues to be, political free speech and expression, protected by the very Constitution [voting rights] advocates have been trying to enforce." Doc. 45-1 at 12. It is inappropriate for experts to opine on questions of law. *See, e.g.*, *Freund v. Butterworth*, 165 F.3d 839, 863 n.34 (11th Cir. 1999) (en banc). Whether any particular conduct is protected by the First Amendment is a question of law and thus "not a matter subject to expert testimony." *Myers v. Bowman,* 713 F.3d 1319, 1328 (11th Cir. 2013). His support for this statement largely consists

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[2] In Virginia, the League of Women warns about the practice on their website:

> The state of Virginia was flooded with absentee ballot applications from a 3rd party that are pre-filled out. Unfortunately, in many areas, the enclosed envelopes have the wrong voter registrar's office return address. Before you use these, please double-check the return address is for your City Registrar.
>
> Or better yet, you can go on the official Virginia Board of Elections portal to request a ballot. [hyperlink].

League of Women Voters of South Hampton Roads, https://my.lwv.org/virginia/south-hampton-roads/absentee-ballot-applications-3rd-party-are-pre-filled-out-please-double-check-return-address-your (last accessed May 8, 2024).

of a survey of election laws—white primaries, literacy tests, gerrymandering, at-large voting schemes, and more—that do not even faintly resemble SB1. Doc. 45-1 at 4–11. And the "myriad forms of voter assistance" that Bagley labels "political expression," Doc. 45-1 at 2, do not appear to involve the third-party prefilling, submission, or handling of absentee ballot applications. Grimmer Decl. ¶ 40–43. When Dr. Bagley makes an assertion about the connection between contemporary absentee ballot assistance and political expression, the sources cited do not support it. *Id.* ¶ 44. And his claim that the Alabama Legislature has knowingly targeted political expression through SB1 is supported by nothing at all. *Id.* ¶ 46. He "provides no methodology, explanation, or even logical deduction to explain how the groups that might be affected by a law enables an inference about whether 'the state' views a particular kind of action as 'political expression and speech' or not." *Id.* Dr. Bagley's attempt at mind reading is entitled to no weight, and the Court should certainly not credit his unreliable legal opinion that SB1 burdens political expression.[3]

In contrast to Dr. Bagley's declaration, Dr. Justin Grimmer's expert report shows voter participation does not significantly depend on the distribution of absentee ballot applications (whether prefilled or blank). Grimmer Decl. ¶¶ 30-31 (finding "no statistically significant difference between the effect on overall turnout of providing voters with information about absentee voting or the effect of providing voters with unsolicited physical absentee ballot applications"). So even if Plaintiffs were correct that "participation in . . . absentee voting" counted as First Amendment "speech on a public issue," Doc. 34-1 at 27, the total quantum of voting does not generally depend on the conduct prohibited by SB1. Indeed, research suggests that communications directing voters to online State resources—in other words, *actual* speech—can be just as effective in generating voter turnout as distributing physical ballot applications. *Id.* ¶ 34. No matter how one slices

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[3] *See* FED. R. EVID. 702.

their claims, Plaintiffs have not shown a substantial likelihood that SB1 impermissibly burdens their First Amendment rights.

3. Plaintiffs Have Not Demonstrated a Substantial Likelihood Of Success On Their Claims That Federal Law Preempts The Challenged Provisions.

Plaintiffs have also not shown a substantial likelihood that their preemption challenges under § 208 (Count V) or HAVA (ADAP's Count VI) will succeed. In Count V, Plaintiffs invoke conflict preemption by arguing that SB1 "stands as an obstacle to the objective of" § 208 of the Voting Rights Act. *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008); *see* 34-1 at 37 (arguing SB1 "obstruct[s] Congress's purposes and goals in ensuring equal [voting] access for disabled, blind, and low literacy voters."). For Plaintiffs to prevail on this claim, they must meet a "high threshold" of actual conflict rather than mere "tension with federal objectives." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011). Here, where SB1 expressly adopts federal law's protection for disability voting assistance, Plaintiffs have failed to even show tension between SB1 and § 208.[4]

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"It is certainly possible" for Plaintiffs "to comply with both" SB1 and § 208, and Plaintiffs "do not suggest otherwise." *Kansas v. Garcia*, 589 U.S. 191, 210–11 (2020). Because § 208 does not impose a mandate to perform conduct proscribed by the Challenged Provisions, Plaintiffs argue that SB1 conflicts with the "universe of lawful assistors" created by implication in § 208. Doc. 34-1 at 37. But § 208 does not fix a universe of lawful assistors that implicitly includes paid ballot harvesters. Under both § 208 and subsection (e), a disabled voter may receive voting assistance he "requires" from "a person" or "an individual" whom he chooses, not from "any" person who is

[4] Section 17-11-4(e) copies § 208 word for word, except it uses the synonym "individual" in place of "person." *Compare* 52 U.S.C. §10508 (". . . may be given assistance by a person of the voter's choice . . ."), *with* ALA. CODE §17-11-4(e) (" . . . may be given assistance by an individual of the voter's choice . . .").

willing to get involved. *Priorities USA v. Nessel,* 628 F. Supp. 3d 716, 732 (E.D. Mich. 2022); *see Ray v. Texas,* No. 2-06-CV-385, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008) (interpreting § 208 to allow a disabled voter to "choose a person who will assist" them without granting "the right to make that choice without limitation"). The Voting Rights Act expressly demonstrates that disabled and illiterate voters *should* be insulated from would-be assistors with potential ulterior motives or disproportionate influence, such as "the voter's employer or agent of that employer or officer or agent of the voter's union." § 208. And this makes sense: vulnerable voters are prime targets for absentee vote-stealing schemes. *See* Biggs Decl. ¶ 22. Consonant with federal law, the Compensation Prohibition identifies paid third-party ballot harvesters and vote-buyers as falling within the class of individuals who—like union officers and corporate employers—may have ulterior motives or exert undue influence over a vulnerable voter.

The lone Plaintiff in Count VI, ADAP, lacks a cause of action to challenge SB1 based on the Supremacy Clause and HAVA. Doc. 34-1 at 41. The Supremacy Clause does not create a cause of action or rights enforceable under §1983, and neither does HAVA. Doc. 42 at 46–47. Assuming there is a cause of action, ADAP, unlike the other Plaintiffs, argues it is "*impossible* for [it] to fulfill its duties or congressional mandate under PAVA to ensure [] 'the full participation of persons with disabilities in the voting process.'" Doc. 34-1 at 41 (quoting 52 U.S.C. § 21061(a)); *see also* Doc. 1 at ¶ 68 ("SB 1 thus makes it impossible for ADAP to exercise its duties under 52 U.S.C. § 21061 without risk of criminal prosecution."). But ADAP's preemption theory proves too much, for surely they would agree that they cannot ignore Alabama's ban on *paying* voters to vote, *see* ALA. CODE § 17-17-34, even if cash for votes would promote a fuller "participation of persons with disabilities in the voting process." As the example shows, HAVA does not provide a

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judicially administrable standard to assess ADAP's assertion. Doc. 42 at 48–49. Plus, there is little evidence to support it either.

The submitted declarations indicate PAVA funds are used for many activities that are plainly permissible under SB1. *See* Doc. 34-6 ¶ 8 (listing grant activities); Doc. 34-7 ¶¶ 4–6 (describing the assistance she provides in reading and filling out applications and how non-ADAP residential/in-patient staff handle the mail). Moreover, the general goals of ensuring "full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote and accessing polling places," are wholly consistent with SB1's restrictions on the paid third-party completion and handling of absentee ballot applications. 52 U.S.C. § 21061(a). But even if ADAP's federal grant—rather than federal law—conditioned funding on the performance of conduct prohibited by SB1, the solution would be ADAP's discontinuation of that particular program rather than preemption of state criminal law. *Guardians Ass'n v. Civ. Serv. Comm'n of N.Y.*, 463 U.S. 582, 596 (1983).

Plaintiffs' self-serving affidavits improperly speculate or rely on unverifiable hearsay to argue that voters will be unable to vote without indispensable "assistance" from Plaintiffs' employees and volunteers. *See, e.g.*, Doc. 34-4 at 7 ¶ 21 (asserting fears about voters "forego[ing] voting altogether" and relaying hearsay from unidentified voters supposedly expressing concern). Hearsay-within-hearsay about the plight of unidentified, non-party voters is plainly not appropriate to show that SB1 deprives disabled persons of their right to vote.[5] Though Plaintiffs invoke "the right of disabled, blind, and low literacy voters to assistance guaranteed by § 208 of the Voting

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[5] *Cf. Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1303 (11th Cir. 2022) ("Although a hearsay statement can be considered at summary judgment if it can be reduced to admissible evidence at trial, the 'possibility that unknown witnesses will emerge to provide testimony ... is insufficient to establish that the hearsay statement could be reduced to admissible evidence at trial.'" (quoting *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1294 (11th Cir. 2012))).

Rights Act," Doc. 34-1 at 9, the Court is not presented with a single declarant who fits that description. It is telling that Plaintiffs—five organizations engaged in voter outreach—have not marshaled even *one* declaration from a voter attesting to the need for them to receive aid from paid operatives.

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In sum, Defendants' submitted evidence both reaffirms their strong interest in enforcing § 17-11-4 and undercuts Plaintiffs' unsupported assertions about its supposed burdens. Though Defendants have no obligation to submit evidence justifying § 17-11-4's regulation of absentee balloting, they have done so. In their motion to dismiss, Defendants document recent cases of voter fraud as well as its nexus to absentee ballots, applications, and ballot harvesting. *See, e.g.*, Doc. 42 at 9. The declaration of Mr. Biggs establishes fraudsters' desire to gain control of absentee ballot applications to carry out their schemes, documents varied forms of voter manipulation, and confirms that voters are the victims in these corrupt enterprises. Finally, the attached expert declaration of Dr. Grimmer reveals that Plaintiffs' say-so and intuition are inadequate to establish that § 17-11-4 will harm voter participation. With or without the submitted evidence, Plaintiffs cannot show that they are substantially likely to prevail on the merits of their claims at this preliminary stage.

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B. Plaintiffs Have Not Proved They Will Suffer Irreparable Injury Without A Preliminary Injunction.

The second element Plaintiffs must prove is that "irreparable injury will be suffered unless the injunction issues." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Mazurek v. Armstrong*, 520 U.S. 968, 972

(1997). In other words, the purported irreparable injury "must be neither remote nor speculative, but actual and imminent." *Siegel*, 234 F.3d at 1176 (11th Cir. 2000) (en banc).

The irreparable harms asserted in Plaintiffs' motion fall into two basic categories: (1) direct penalization of Plaintiffs' and their members' First Amendment rights; and (2) burdens on "the right to vote for Plaintiffs' members and constituents and many other Alabamians." Doc. 34-1 at 41. Plaintiffs fail to show that either of these harms will occur without a preliminary injunction.

First, Plaintiffs cite the infringement upon their First Amendment freedoms as constituting irreparable harm, asserting that such freedoms are being either lost or directly penalized. Doc. 34-1 at 41. In general, "an ongoing violation of the First Amendment constitutes an irreparable injury." *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017). Still, that violation must be a "direct penalization, as opposed to incidental inhibition, of First Amendment rights." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983); *see KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (noting violation of First Amendment "does not automatically require a finding of irreparable injury"); *see also Siegel*, 234 F.3d at 1178. Here, Plaintiffs have not made a showing that SB1 directly penalizes their First Amendment rights.

Plaintiffs' discontinuation of expressive activities that are plainly permissible under the Challenged Provisions is, at most, an incidental inhibition. In other words, Plaintiffs have failed to identify a direct penalization of political speech that "could not be remedied absent an injunction." *KH Outdoor*, 458 at 1272. Plaintiffs' declarations underscore their ongoing ability to "convey their

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message to encourage participation in the democratic process." Doc. 34-1 at 17; *see id.* at 23 (describing their conduct as "a message about the importance of voting").[6]

Consider a few examples. GBM's Executive Director asserts that the organization has ceased distributing "election guides on applying for and voting by absentee ballot" because of SB1. Doc. 34-3 ¶¶ 29-30. The Alabama NAACP suggests it will refrain "from sending a link to the [absentee] application to [its] members or voters who join [its] mailing list" for fear of criminal prosecution. Doc. 34-4 ¶ 19. The League of Women Voters of Alabama once offered college students "the requisite information to apply for an absentee ballot application," Doc. 34-5 ¶ 20, but no more: they have allegedly stopped "to determine what communication is lawful," *id*. ¶ 29. There is simply not a colorable argument that SB1's provisions restrict communications of this sort. These "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003). Plaintiffs' needless discontinuation of actual speech not plausibly prohibited by SB1 highlights that Plaintiffs do not require a preliminary injunction to avoid irreparable harm.

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Next, regarding Plaintiffs' preemption claims under § 208 and HAVA, Plaintiffs' speculation that unspecified voters will be unable to vote without Plaintiffs' absentee ballot application assistance does not establish "irreparable harm."[7] Plaintiffs' various "causal claims about how [they] currently increase voter turnout among Alabama residents and about how complying with SB 1's regulation will alter Plaintiffs' effectiveness at increasing voter turnout" can be supported

[6] The organizations themselves are not at risk of criminal prosecution because Alabama law imposes corporate criminal liability only if the criminal statute has "specifically provided for corporate liability," and § 17-11-4 does not. *State v. St. Paul Fire & Marine Ins. Co.*, 835 So. 2d 230, 233 (Ala. Crim. App. 2000).

[7] As asserted above, this Court should not consider the hearsay-within-hearsay conveyed in Plaintiffs' submitted declarations. *See supra* Section IV.A. Nonetheless, Plaintiffs would fail to establish irreparable injury even if it were considered for the reasons explained in this section.

by evidence, Grimmer Decl. ¶ 20, but Plaintiffs have not offered any. Instead, their supporting declarations show their intentions and initiatives but fail to provide analysis or data "that could establish their influence or quantify their effect on any voters." *Id.* ¶ 23. Without a single voter corroborating that Plaintiff organizations provide "necessary" assistance, Docs. 34-4 ¶ 21, 34-5 ¶ 22, Plaintiffs have failed to show SB1 inflicts irreparable harm by denying disabled persons the right to vote.

Plaintiffs have failed to show that any of *their* members will lose the opportunity to vote without an injunction. *See Ne. Fla. Chapter*, 896 F.2d at 1284 (requiring "a showing that *plaintiff* will suffer irreparable injury if an injunction does not issue" (emphasis added)). Nothing less than a denial of the right to vote constitutes irreparable injury; mere burdens will not do. *See Siegel*, 234 F.3d at 1177 (rejecting voter Plaintiffs claims of harm because none were "prevented from registering to vote, prevented from voting or prevented from voting for the candidate of his choice" and rejecting any other infringement on right to vote); *see also Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1271 (11th Cir. 2020) ("[M]issing the opportunity to vote [amounts to] an irreparable [injury]."). Voter can receive assistance (within certain limits) such that no member's right to vote is likely to be burdened as a result of the ban on ballot harvesting. *Compare* ALA. CODE §17-11-4(b)(1) ("Any applicant may receive assistance in filling out the application as he or she desires") *with* Doc. 34-1 at 7-9. Regardless, Plaintiffs have failed to identify even a single member whose right to vote purportedly depends on an injunction.

Plaintiffs' unnecessary discontinuation of expressive activities does not amount to a direct penalization of their First Amendment rights. Moreover, Plaintiffs' failure to show that relief from SB1 is necessary to enable at least one of its members to vote, "standing alone, make[s] preliminary injunctive relief improper" as to Counts V and VI. *Siegel*, 234 F.3d at 1176. Accordingly,

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Plaintiffs' motion for preliminary injunctive relief should be denied for failure to establish a substantial likelihood of irreparable harm.

C. Plaintiffs' Requested Relief Will Cause Substantial Harm To The State And Will Not Further The Public Interest.

"[W]here the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest." *Swain*, 958 F.3d at 1091 (11th Cir. 2020). First, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (holding that State "would be harmed if it could not apply its own laws"). By contrast, Plaintiffs' gloss on the test—that "[t]he State has no interest in defending provisions that violate federal law," Doc. 34-1 at 43—would neuter the third and fourth preliminary injunction elements by making their outcome wholly contingent on the merits analysis of the first element. Of course, even Plaintiffs' framing misses a key distinction: a preliminary injunction is not a final adjudication of whether provisions "violate federal law," only an interim determination that there is a substantial likelihood that they *may*.

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Defendants and the State at large face great harm if § 17-11-4 is enjoined because it provides important tools for preventing and ferreting out voter fraud and voter confusion. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam). This includes not just maintaining voter confidence and combatting voter confusion, but also proactively deterring voter fraud. "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government," leaving voters "who fear their legitimate votes will be outweighed" feeling disenfranchised." *Id.* The State

thus has an obvious and "compelling interest in preventing voter fraud." *Id.* It is likewise indisputable that the State has no obligation to wait until after fraud arises to seek to stymie its ill effects. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1334 (11th Cir. 2021) ("[D]eterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud.")[8]; *see also* Doc. 42 at 26–27 (MTD Section IV.C.3.) (collecting cases demonstrating strength of State's interests underpinning § 17-11-4).

Plaintiffs' refusal to acknowledge the role of absentee ballot applications in voter fraud and the public's substantial interests in election integrity generally and combatting voter fraud specifically betrays the weakness of their position. *See, e.g.*, Doc. 34-1 at 29 ("There is simply no nexus—let alone a compelling and narrowly tailored one—between any purported governmental interest and the conduct that SB 1 regulates."). As laid out extensively by this point, voter fraud often arises out of the absentee balloting process. *See, e.g.*, Doc. 42 at 7–10. Though it should go without saying, the absentee ballot application is the gateway to an absentee ballot. Biggs Decl. ¶ 5. Existing statutes criminalize some forms of fraudulent conduct directed at ballots, but they do not specifically prevent mishandling of the absentee application or provide enhanced penalties for voter manipulation and bribery schemes. Tighter controls on absentee ballot applications make it more difficult for fraudsters to get control over absentee materials and the ballot itself, while stiffer penalties reflect the seriousness of election crimes and deter fraud. Enjoining the important tools provided by § 17-11-4 to promote election integrity would thus cause significant harm to the State and the public at large.

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[8] *GBM* also acknowledged that "increasing confidence in election" is another valid justification to support election laws.

By contrast, Plaintiffs face little harm. As explained above, *supra* Section IV.B, they face no risk of irreparable harm from enforcement of § 17-11-4 because it does not prohibit speech or expressive conduct or deprive disabled persons of their right to vote. Plaintiffs have failed to provide any proper evidence to back up their claims as to how § 17-11-4 will affect voters. *See supra* Section IV.A.

Finally, the purpose of a preliminary injunction—preservation of the status quo—supports the State. Whenever a plaintiff seeks to enjoin duly enacted legislation, "the status quo is that which the People have wrought, not that which unaccountable federal judges impose upon them." *Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997) (Luttig, J., staying injunction in published, single-judge order). The relief Plaintiffs seek would require the State to cease enforcement of a statute currently in force; even if the first election cycle the statute applies to is the November 2024 general election, *see* Doc. 34-1 at 43, Alabama law provides no start date on when voters may begin submitting absentee ballot applications. Indeed, the law contemplates that the absentee election manager may have received applications even before the ballots are ready (which must occur no later than 60 days before the election). *See* ALA. CODE § 17-11-5(a) ("requiring absentee ballots to be mailed "no later than the next business day after an application has been received unless the absentee ballots have not been delivered," in which case ballots for such requests shall be mailed the next business day after ballots are received). Contrary to Plaintiffs' assertions, the status quo is that absentee harvesting activities are banned *now*.

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D. Plaintiffs Are Not Entitled To A Universal Injunction.

Plaintiffs apparently request a universal injunction preventing the State from enforcing SB1 against anyone in the State. But this is not a class action, and Plaintiffs offer no justification for the Court to depart from its narrow authority to adjudicate an Article III "case or controversy."

"The fundamental principle of equity guiding the court" when it issues an injunction "is that injunctive relief should be limited in scope to the extent necessary to protect the interests *of the parties*." *Ga. Advoc. Off. v. Jackson*, 4 F.4th 1200, 1209 (11th Cir. 2021) (cleaned up, emphasis added); *see also Georgia v. President of the United States*, 46 F. 4th 1283, 1303 (11th Cir. 2022) ("[R]emedies should be limited" to redressing the plaintiff's "injury in fact" and "no more burdensome" than needed to afford it "complete relief.") (cleaned up). "When a district court fails to follow this principle and drafts an unnecessarily broad injunction, the district court abuses its discretion." *Jackson*, 4. F. 4th at 1209. Thus, if the Court were to find that these Plaintiffs have proven their entitlement to a preliminary injunction, any such injunction should be no broader than necessary to provide only these Plaintiffs relief.

V. CONCLUSION

Plaintiffs' motion for a preliminary injunction should be denied.

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CERTIFICATE OF SERVICE

I certify that on June 7, 2024, I electronically filed the foregoing notice with the Clerk of the Court using the CM/ECF system, which will send notice to all counsel of record.

s/ Edmund G. LaCour Jr.
Counsel for Defendants

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