



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. CV-2020-\_\_\_\_\_

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.

**COMPLAINT**

1. This action is brought to ensure that all Alabama voters have adequate means to obtain and cast ballots and to have their votes counted without endangering their health and safety during the current coronavirus/COVID-19 pandemic. National and state emergencies have been declared urging and sometimes requiring citizens to remain in their homes, to maintain social distancing, and to avoid crowds. Even with relaxed or repealed orders in place, governmental officials have continued to urge citizens to remain in their homes, to maintain social distancing, and to avoid crowds.

2. The Constitution of Alabama guarantees that “[e]very citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her residence.” Ala. Const. Art. VIII, § 177. The Alabama Constitution further requires that the right to vote “shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult<sup>1</sup> or other improper conduct.” Ala. Const. Art. I, § 33.

---

<sup>1</sup> Medical professionals are “not optimistic about how soon the tumult caused by the coronavirus will be behind us.” Eric Fleischauer, *Decatur doctor: Keep your distance, but viral threat won't end soon*, The Decatur Daily, April 10, 2020.

## **PARTIES**

3. Plaintiff The League of Women Voters of Alabama (“LWVAL”) is a nonpartisan political organization that seeks to improve our systems of government and impact public policies through citizen education and advocacy. LWVAL neither supports nor opposes political parties or candidates for office at any level of government. At the same time, the League is wholeheartedly political and works to influence policy through advocacy. It is the original grassroots citizen network, following the consensus of its members in Alabama and nationwide as a member of The League of Women Voters of the United States. LWVAL knows that voting is a sacred right. LWVAL has fought to protect the rights of eligible voters and expand access for those who’ve been left out of our democratic process. Their volunteers spearhead efforts to enact common-sense voting reforms, and they are among the first to fight back when voters’ rights are threatened. LWVAL has members who are registered voters throughout the State of Alabama.

4. Plaintiff Ardis Albany is a white, seventy-three-year-old citizen of the United States residing in Jefferson County, where she is registered to vote at Avondale Elementary School in Birmingham. Ms. Albany has an artificial aortic valve and has sequestered herself at home since mid-March, 2020, where she lives

alone. Her polling place is too crowded to permit social distancing of either poll workers or voters, who sometimes form a line that goes out the door. Because she fears exposing herself to COVID-19 infection, Ms. Albany has already applied for an absentee ballot for the November 3, 2020, general election. Her application checked the box for being out of county on election day, and she is prepared to leave Jefferson County on election day if necessary to vote an absentee ballot. Ms. Albany does not know how else she can qualify for an absentee ballot. She would consider voting in person if arrangements were made for her to vote without leaving her car and being in unnecessarily close contact with poll workers and other voters. Ms. Albany would like the opportunity to vote in person before election day, which should make it easier to avoid crowds and to maintain social distancing.

5. Plaintiff Lucinda Livingston is an African American, sixty-three-year-old citizen of the United States who resides in Montgomery County, Alabama, where she is registered to vote at Beulah Baptist Church on Rosa Parks Avenue in the City of Montgomery, which currently is closed. Ms. Livingston suffers from heart and lung ailments and has sequestered herself at home since March 17, 2020, where she lives with her grandson, who is under the age of five. She fears acquiring COVID-19, given her physiological pre-morbidity, and she fears

spreading the virus to her grandson at home. She has never voted an absentee ballot, but she wishes to do so in the elections held in 2020. She does not have a scanner in her home, cannot make a copy of her photo ID, and has no way safely to get her absentee ballot notarized or signed by two witnesses.

6. Plaintiff Bryan A. Lorge is a white, sixty-three-year-old citizen of the United States residing in Limestone County, where he is registered to vote at Copeland Presbyterian Church, which currently is closed. Mr. Lorge is a member of LWVAL. He suffers from asthma and limits his leaving home to volunteer work and occasional trips to the store for necessary supplies. He lives with his wife and daughter. Mr. Lorge has worked as a registration clerk at his polling place, which is too crowded to maintain social distancing for poll workers and voters. For the March 3, 2020, primary election Mr. Lorge was the inspector at the Belmont Baptist Church polling place. This is a larger facility, which might make social distancing possible, although it would be difficult to do so with the expected large turnout for the November 3 general election. Mr. Lorge has been willing to work wherever the Limestone County Election Manager has needed him. If his assignment is away from his home precinct, he will vote by absentee ballot. Mr. Lorge believes that early voting at least fourteen days prior to election day is very important for reducing the size of crowds at the polls and facilitating

social distancing.

7. Plaintiff Suzanne Schwartz is a white, seventy-three-year-old citizen of the United States who resides in Mobile County, Alabama, where she is registered to vote. Ms. Schwartz is a member of LWVAL and is a registration clerk at Precinct 56, St. John's Episcopal Church, in midtown Mobile, where most of the voters are elderly African Americans. Approximately twenty-eight poll workers are in her precinct, which is too small to maintain social distancing, either for the poll workers or for voters, who line up twenty-deep at peak hours on election day. The Precinct 56 polling place is located on a very busy intersection, and curbside voting would not be practicable there. She has been informed by the Probate Judge's office that some sanitizing and personal protective equipment will be made available for the poll workers, but she does know what protections will be made available for voters.

8. Plaintiff Myrtle Scott is an African American, seventy-two-year-old citizen of the United States who resides in Montgomery County, Alabama, where she is registered to vote at Rufus A. Lewis Library on Mobile Highway in the City of Montgomery, which currently is closed. Ms. Scott has very few physical ailments but, because the COVID-19 virus can have a deadly impact on a person her age, she has sequestered herself at home since March 2020, where she lives

alone. She has never voted an absentee ballot, but she wishes to do so in the general election held in November, 2020. Ms. Scott has no way safely to get her absentee ballot notarized or signed by two witnesses.

9. Plaintiff Patricia Burkett Smith is a white, sixty-eight-year-old citizen of the United States who resides in Madison County, Alabama, where she is registered to vote at Trinity United Methodist Church on Airport Road in Huntsville, which currently is closed. Ms. Smith suffers from asthma and has sequestered herself at home, where she lives alone, since March 17, 2020. She has never voted an absentee ballot, but she wishes to do so in the municipal, state, and federal elections held in 2020. She has no way safely to get her absentee ballot notarized or signed by two witnesses.

10. Plaintiff Rosa Maria Toussaint is a black sixty-year-old citizen of the United States of Hispanic heritage who resides in Madison County, Alabama, where she is registered to vote in the City of Huntsville. Ms. Toussaint suffers from a thyroid disorder that can compromise her immune system, and she lives alone. She has never voted an absentee ballot, but she wishes to do so in the municipal, state, and federal elections held in 2020. She has no way of obtaining a notary certificate or the signatures of two witnesses without leaving the safety of her home. Ms. Toussaint would consider voting in person if she could do so

without having to leave her vehicle.

11. Plaintiff Suzanne Bergman Wright is a white seventy-five-year-old citizen of the United States who resides in Jefferson County, Alabama, where she is registered to vote at Avondale Library in Birmingham. It is very difficult to maintain social distancing for poll workers and voters in her polling place. Dr. Bergman is a physician who is Professor Emeritus on the faculty of the University of Alabama Birmingham School of Medicine, where she has done research, taught, and has been a clinician providing acute care in the field of Nephrology. She has supervised a dialysis unit with up to 140 patients. Many of her patients, young and old, coming from all over Alabama, need to vote by mail because of their vulnerable medical conditions, particularly kidney and cardiac diseases. Dr. Bergman herself suffers from asthma, hyperinflated lungs, and hypertension. She lives alone and wishes to vote an absentee ballot in the November 2020 general election. She does not want to put her health at risk by leaving home to obtain a notary certification or the signatures of two witnesses.

12. Defendant John Merrill is sued in his official capacity as the Alabama Secretary of State. “The Secretary of State is the chief elections official in the state and shall provide uniform guidance for election activities. The Secretary of State is granted rule making authority for the implementation of Chapter 2 under

the Alabama Administrative Procedure Act.” Ala. Code § 17-1-3. Defendant Merrill is responsible for ensuring that each voting system in Alabama “[p]ermit[s] the voter to verify, in a private and independent manner, the votes selected by the voter on the ballot before the ballot is cast and counted,” Ala. Code § 17-2-4(a)(1)a., and is “accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters.” Ala. Code § 17-2-4(c)(1). When a state of emergency has been declared by the State or the federal government, Defendant Merrill 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).

13. Defendant Kay Ivey is sued in her official capacity as Governor of Alabama. The supreme executive power of the State of Alabama is vested in the Governor. Ala. Const. Art. V, § 113. Pursuant to the relevant provisions of the Alabama Emergency Management Act of 1955, as amended, Ala. Code § 31-9-1, et seq., on May 8, 2020, Governor Ivey renewed the emergency order she issued originally on March 13, 2020, declaring a public health emergency during the current coronavirus pandemic. The Alabama Emergency Management Act of

1955 (AEMA), as amended, Ala. Code § 31-9-1, et seq., gives Governor Ivey the power to suspend election laws and regulations during the current pandemic. Ala. Code §§ 31-9-3(5), 31-9-13, 31-9-23. The Attorney General of Alabama has expressed his opinion that Governor Ivey alone decides “what action to take regarding the conduct of elections during a state of emergency.”<sup>2</sup>

14. Defendant J C Love, III, is sued in his official capacity as Judge of Probate for Montgomery County, and in that capacity he is the chief elections officer for Montgomery County and is a member of the Canvassing Board. Ala. Code §§ 17-1-3, 17-1-2(6), 17-12-15. Defendant Love is sued for relief purposes only. He cannot adequately protect the health and safety of Montgomery County voters during the current pandemic unless Defendants Merrill and Ivey exercise their emergency statutory and constitutional authority in the manner sought by the prayer for relief in this complaint.

15. Defendant Gina Ishman is sued in her official capacity as the Absentee Election Manager for Montgomery County. Defendant Ishman is responsible for administering the delivery, receipt, and counting of absentee ballots in Montgomery County, Ala. Code § 17-11-1 et seq., and she has authority to

---

2

<https://www.al.com/news/2020/05/sneeze-guards-and-sanitizer-alabama-election-officials-prepare-for-july-14-runoff.html> (last accessed May 27, 2020).

“determine whether an applicant for an absentee ballot is obligated to produce [photo] identification....” Ala. Code § 17-11-9. Defendant Ishman also is the Circuit Clerk, and in that capacity she is a member of the Canvassing Board for Montgomery County. Ala. Code §§ 17-1-2(6), 17-12-15. Defendant Ishman is sued for relief purposes only. She cannot adequately protect the health and safety of Montgomery County voters during the current pandemic unless Defendants Merrill and Ivey exercise their emergency statutory and constitutional authority in the manner sought by the prayer for relief in this complaint.

16. Defendant Derrick Cunningham is sued in his official capacity as Sheriff of Montgomery County, and in that capacity he is a member of the Canvassing Board for Montgomery County. Ala. Code §§ 17-1-2(6), 17-12-15. Defendant Cunningham is sued for relief purposes only. He cannot adequately protect the health and safety of Montgomery County voters during the current pandemic unless Defendants Merrill and Ivey exercise their emergency statutory and constitutional authority in the manner sought by the prayer for relief in this complaint.

17. Defendants Daniel Harris, Jr., Elton N. Dean, Sr., Ronda M. Walker, Isaiah Sankey, and Doug Singleton are sued in their official capacities as members of the Montgomery County Commission. The Defendant County Commissioners

are responsible for establishing and funding polling places, including distribution of federal emergency funds. The Defendant County Commissioners are sued for relief purposes only. They cannot adequately protect the health and safety of Montgomery County voters during the current pandemic unless Defendants Merrill and Ivey exercise their emergency statutory and constitutional authority in the manner sought by the prayer for relief in this complaint.

### **CLASS ACTION**

18. Plaintiffs bring this action on behalf of themselves and the putative class of all citizens of the United States who are eligible to vote in Alabama. The plaintiff class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims of the named plaintiffs are typical of the claims of the class, and the named plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs request that this Court will certify a plaintiff class of Alabama voters pursuant to Rules 23(b)(1) and 23(b)(2), Ala. R. Civ. P.

19. Plaintiffs request that this Court certify Defendant J C Love, III, as representative of a defendant class consisting of all Judges of Probate in Alabama. The defendant class of Probate Judges is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the

defenses of Defendant Love are typical of the defenses of the class, and Defendant Love will fairly and adequately protect the interests of the class. Plaintiffs request that this Court will certify a defendant class of probate judges pursuant to Rules 23(b)(1) and 23(b)(2), Ala. R. Civ. P.

20. Plaintiffs request that this Court certify Defendant Gina Ishman as representative of a defendant class consisting of all Absentee Election Managers in Alabama. The defendant class of Absentee Election Managers is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the defenses of Defendant Gina Ishman are typical of the defenses of the class, and Defendant Gina Ishman will fairly and adequately protect the interests of the class. Plaintiffs request that this Court will certify a defendant class of Absentee Election Managers pursuant to Rules 23(b)(1) and 23(b)(2), Ala. R. Civ. P.

21. Plaintiffs request that this Court certify Defendants J C Love, III, Gina Ishman, and Derrick Cunningham as representatives of a defendant class consisting of all county canvassing boards in Alabama. The defendant class of canvassing boards is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the defenses of Defendants Love, Ishman, and Cunningham are typical of the defenses of the class, and

Defendants Love, Ishman, and Cunningham will fairly and adequately protect the interests of the class. Plaintiffs request that this Court will certify a defendant class of canvassing boards pursuant to Rules 23(b)(1) and 23(b)(2), Ala. R. Civ. P.

22. Plaintiffs request that this Court certify Defendants Daniel Harris, Jr., Elton N. Dean, Sr., Ronda M. Walker, Isaiah Sankey, and Doug Singleton as representatives of a defendant class consisting of all County Commissioners in Alabama. The defendant class of County Commissioners is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the defenses of Defendants Daniel Harris, Jr., Elton N. Dean, Sr., Ronda M. Walker, Isaiah Sankey, and Doug Singleton are typical of the defenses of the class, and Defendants Daniel Harris, Jr., Elton N. Dean, Sr., Ronda M. Walker, Isaiah Sankey, and Doug Singleton will fairly and adequately protect the interests of the class. Plaintiffs request that this Court will certify a defendant class of County Commissioners pursuant to Rules 23(b)(1) and 23(b)(2), Ala. R. Civ. P.

### **STATEMENT OF FACTS**

23. The State of Alabama, the United States, and the world are in the midst of a novel coronavirus, COVID-19 pandemic. The Alabama State Health Officer has declared that “the appearance of COVID-19 in the State poses the potential of

widespread exposure to an infectious agent that poses significant risk of substantial harm to a large number of people; and . . . the State Board of Health has designated COVID-19 to be a disease of epidemic potential, a threat to the health and welfare of the public....” Order of the State Health Officer suspending certain public gatherings due to risk of infection by COVID-19, (applicable statewide), amended May 21, 2020.<sup>3</sup>

24. The State Health Officer’s web site says:

Coronavirus disease, (COVID-19), is a major stressor as Alabama experiences a true state of emergency and one whose end is not yet in sight. No one was fully prepared for the current outbreak which has infected more than 1 million people in our country alone. Everyone’s routines have been changed and many are facing significant financial and other pressures like never before. This time of social distancing finds people may be more vulnerable to emotional and physical illness.<sup>4</sup>

A recent report by Harvard scientists concludes that “prolonged or intermittent social distancing may be necessary into 2022.” *Projecting the transmission dynamics of SARS-CoV-2 through the postpandemic period*, Science 14 Apr

---

3

<https://www.alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-052120.pdf> (last accessed May 27, 2020).

<sup>4</sup> <https://www.alabamapublichealth.gov/news/sho-message.html> (Last visited May 18, 2020).

2020.<sup>5</sup>

25. Local election officials are attempting to implement the recommendations of the Centers for Disease Control and Prevention (CDC) for preventing the spread of COVID-19 during elections.<sup>6</sup> The CDC recommendations include the following “actions for elections officials in advance of election day:

Encourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.

Encourage mail-in methods of voting if allowed in the jurisdiction.

Encourage early voting [i.e., before election day], where voter crowds may be smaller throughout the day. This minimizes the number of individuals a voter may come in contact with.

Encourage drive-up voting for eligible voters if allowed in the jurisdiction.

Encourage voters planning to vote in-person on election day to arrive at off-peak times. For example, if voter crowds are lighter mid-morning, advertise that in advance to the community.

Encourage relocating polling places from nursing homes, long-term care facilities, and senior living residences, to minimize COVID-19

---

<sup>5</sup> <https://science.sciencemag.org/content/early/2020/04/24/science.abb5793> (last accessed May 27, 2020).

<sup>6</sup>

<https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last accessed May 27, 2020).

exposure among older individuals and those with chronic medical conditions.

Consider additional social distancing and other measures to protect these individuals during voting.”

26. Local election officials have reported to Defendant Merrill their inability to comply with these CDC recommendations and to keep all polling places open. Most poll workers are more than sixty-five years old, and they are reluctant or unwilling to expose themselves to potential infection at their assigned polling places. See letter dated May 4, 2020, from Mobile County Probate Judge Don Davis to Defendant Merrill, a copy of which is attached as Exhibit A to this complaint, seeking instructions on how to comply with both state and federal election laws and with the CDC social distancing guidelines.

27. According to the Pew Research Center, most Americans expect the coronavirus pandemic to disrupt the presidential election in November.<sup>7</sup>

28. The only emergency order Defendant Merrill has issued pursuant to his authority under Ala. Code § 17-11-3(e) authorizes Alabama voters to obtain absentee ballots without medical excuse. Rule 820-2-3-.06-.01ER, Absentee Voting During State of Emergency. It waives none of the other requirements for

---

7

<https://www.people-press.org/2020/04/28/two-thirds-of-americans-expect-presidential-election-will-be-disrupted-by-covid-19/> (last accessed May 27, 2020).

obtaining and submitting an absentee ballot, including “proper identification,” and it expires July 17, 2020, three days after the July 14, 2020, primary runoff. Nor has Defendant Merrill modified the application for absentee ballot form to instruct voters which box to check, without danger of committing a criminal offense, for purposes of the emergency.

29. According to the Secretary of State’s web site, “In response to the COVID-19 pandemic, Congress has allocated \$6,473,612.00 to the State of Alabama for it to prepare for and respond to election activities related to the July 14 Primary Runoff Election and the November 3 General Election. The Secretary of State’s Office matched this funding by 20% (\$1,294,722.00). The total funding available to Alabama is \$7,768,334.00. On April 28, 2020 the Secretary of State’s Office was notified of an additional \$25,062 in funding being offered requiring \$5,012 match dollars. Alabama has accepted this additional allotment to increase the allocated amount to \$6,498,674 and the match amount to \$1,299,734 for a total of \$7,798,408.” Application for Election Expense Funding Related to COVID 19.<sup>8</sup> “This funding will be used to reimburse county commissions, by and through the Secretary of State’s Office, for various election expenses including, but are not

---

<sup>8</sup> <https://www.sos.alabama.gov/application-election-expense-covid19/> (last accessed May 27, 2020).

limited to, personal protective equipment (PPE), masks, gloves, disinfectant spray, cleaning supplies, hand sanitizer, alcohol wipes, and professional cleaning services to prepare and return polling places back to a safe and sanitary condition.” Id.

30. On April 13, 2020, Barbara Caddell, as President of LWVAL, sent a letter to Defendant Merrill calling attention to the likelihood that the coronavirus pandemic will impact all elections in 2020 and urging him to exercise his emergency powers (1) to ensure all those who are eligible to register or who need to obtain a valid ID are able to do so without endangering their health; (2) to address the many issues needed to protect the health and safety of election workers and voters who wish to vote in person; and (3) to eliminate or modify the requirement of including a photo ID with the application for an absentee ballot and the requirement of obtaining a notary certificate or the signature of two witnesses on the absentee ballot returned by the voter. Ms. Caddell’s letter also suggested including prepaid postage with the application and absentee ballot and allowing one application to receive absentee ballots for all elections in 2020.

31. By email on April 15, 2020, Hugh R. Evans, III, General Counsel for the Office of the Secretary of State, replied to Ms. Caddell, saying:

Ms. Caddell, thank you for your 4/13/20 email and attached letter. It

was obviously well thought out and has a great deal of merit.

Our staff has spent a lot of time discussing the same issues due to the current uncertainties that we are faced with.

As you know, our elections are governed by statute. We are required to operate within those statutes, and while we do have rulemaking authority, we cannot adopt a rule that conflicts with the statutes.

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.

We have discussed with the various registrars around the state, procedures that we recommend them use, in light of the fact county courthouses are closed. We have told them that as long as they have access, someone should be in the office.

We have suggested that they use an appointment system to allow the voter photo ID's to be made.

We understand the uncertainty of the times, and are considering all available options in order to make our elections run as smoothly as possible.

32. By email on April 22, 2020, Ms. Caddell thanked Mr. Evans for his prompt and courteous reply, but said, “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.” Ms. Caddell went on to ask if Mr. Evans would ask for an Attorney General opinion about Defendant Merrill’s authority to make her requested changes, and she inquired what legislation the Secretary of State was supporting or drafting. To date Ms. Caddell has received no reply, and the Legislature adjourned its regular session on May 18, 2020, without passing any emergency measures to protect Alabama’s voters.

**COUNT I**  
**No-Excuse Absentee Voting**

33. The facts set out in the Statement of Facts, *supra*, are realleged herein. On March 18, 2020, Defendant Merrill exercised his emergency authority and responsibility under Ala. Code § 17-11-3(e) by authorizing any qualified voter in Alabama to apply for an absentee ballot without swearing or affirming that he or

she satisfies any of the requirements specified by § 17-11-3(a). But said March 18 emergency no-excuse order extends only to the primary runoff elections to be held July 14, 2020. Pursuant to Ala. Code § 41-22-5(b), it expires after 120 days and before the August 25, 2020, municipal elections and the November 3, 2020, general election. Pursuant to § 41-22-5(b)(2), Defendant Merrill “shall not adopt the same or a substantially similar emergency rule within one calendar year from its first adoption unless the agency clearly establishes it could not reasonably be foreseen during the initial 120-day period that such emergency would continue or would likely reoccur during the next nine months. The adoption of the same or a substantially similar rule by normal rulemaking procedures is not precluded.” Defendant Merrill has not undertaken to extend his March 18 order by normal rulemaking procedures. By failing to exercise his emergency statutory and constitutional authority to order no-excuse absentee voting for all upcoming elections in the year 2020 Defendant Merrill has violated the right to vote of plaintiffs and of all qualified Alabama voters guaranteed by Ala. Const. Art. VIII, § 177, and their right to exercise the franchise free of undue influence from tumult guaranteed by Ala. Const. Art. I, § 33.

34. Alternatively, Defendant Governor Ivey has violated plaintiffs’ state constitutional rights and the rights of all Alabama voters by failing to exercise her

emergency statutory and constitutional authority to order no-excuse absentee voting for all upcoming elections in the year 2020.

35. Alternatively, if Alabama's statutory emergency and administrative procedure laws prohibit Defendant Merrill and Defendant Ivey from extending their emergency orders to all elections in 2020, those statutes violate the Alabama Constitution as applied to plaintiffs and the class of all Alabama voters they seek to represent in the current pandemic.

## **COUNT II**

### **Waiver of Photo Identification Requirement for Absentee Ballot**

36. The facts set out in the Statement of Facts, *supra*, are realleged herein. Defendant Merrill's March 18, 2020, emergency order continues to require applications for absentee ballots to present "proper identification," which includes photo identification. Ala. Code §§ 17-9-30, 17-10-1, 17-11-9. Requiring voters without facilities in their homes to obtain copies of photo identifications will endanger their health and their lives during the coronavirus pandemic by exposing them to potential infection outside their homes. Overseas voters and elderly and handicapped voters are already exempt from providing photo identifications with their applications, Ala. Code § 17-9-30(d), and the pandemic emergency should exempt all other voters as well. By failing to exercise his emergency statutory and

constitutional authority to waive the photo identification requirement for absentee ballots Defendant Merrill has violated the right to vote of plaintiffs and of all qualified Alabama voters guaranteed by Ala. Const. Art. VIII, § 177, and their right to exercise the franchise free of undue influence from tumult guaranteed by Ala. Const. Art. I, § 33.

37. Alternatively, Defendant Governor Ivey has violated plaintiffs' state constitutional rights and the rights of all Alabama voters by failing to exercise her emergency statutory and constitutional authority to waive the photo identification requirement for absentee ballots.

38. Alternatively, if Alabama's statutory laws prohibit Defendant Merrill and Defendant Ivey from waiving the photo ID requirement, those statutes violate the Alabama Constitution as applied to plaintiffs and the class of all Alabama voters they seek to represent in the current pandemic.

### **COUNT III**

#### **Waiver of Notary or Witness Requirement for Absentee Ballot**

39. The facts set out in the Statement of Facts, *supra*, are realleged herein. Defendant Merrill's March 18, 2020, emergency order fails to waive the requirement that the voter "have a notary public (or other officer authorized to acknowledge oaths) or two witnesses witness his or her signature to the affidavit"

included with the absentee ballot. Ala. Code §§ 17-11-9, 17-11-10(b). Requiring voters to obtain the signatures of a notary public or two witnesses during the coronavirus pandemic may endanger their health and their lives by exposing them to potential infection outside their homes. Voters who don't have their own vehicles and must rely on public transportation will be even more at risk of infection. By failing to exercise his emergency statutory and constitutional authority to waive the notary or two witnesses requirement for absentee ballots Defendant Merrill has violated the right to vote of plaintiffs and of all qualified Alabama voters guaranteed by Ala. Const. Art. VIII, § 177, and their right to exercise the franchise free of undue influence from tumult guaranteed by Ala. Const. Art. I, § 33.

40. Alternatively, Defendant Governor Ivey has violated plaintiffs' state constitutional rights and the rights of all Alabama voters by failing to exercise her emergency statutory and constitutional authority to waive the notary or two witnesses requirement for absentee ballots.

41. Alternatively, if Alabama's statutory laws prohibit Defendant Merrill and Defendant Ivey from waiving the notary or two witnesses requirement for absentee ballots, those statutes violate the Alabama Constitution as applied to plaintiffs and the class of all Alabama voters they seek to represent in the current

pandemic.

**COUNT IV**  
**Modify Deadlines for Absentee Ballots**

42. The facts set out in the Statement of Facts, *supra*, are realleged herein. Defendant Merrill's March 18, 2020, emergency order fails to extend the deadline of not less than five days before the election for applying for an absentee ballot, Ala. Code § 17-11-3(a), fails to extend the deadline of noon on election day for delivery of an absentee ballot to the absentee election manager, Ala. Code § 17-11-10(b), and fails to move back from the closing of polls the time for beginning to count absentee ballots, *id.* The exigencies and contingencies caused by the pandemic should allow voters to apply for and obtain an absentee ballot up to and including the day of election and to sign and mail the absentee ballot on the day of election. Due to the pandemic an exceptionally large number of absentee ballots can be expected, and absentee election officials should be allowed to begin counting far enough in advance of election day to prevent delays in certifying the results of the election. By failing to exercise his emergency statutory and constitutional authority to modify absentee ballot deadlines, Defendant Merrill has violated the right to vote of plaintiffs and of all qualified Alabama voters guaranteed by Ala. Const. Art. VIII, § 177, and their right to exercise the franchise

free of undue influence from tumult guaranteed by Ala. Const. Art. I, § 33.

43. Alternatively, Defendant Governor Ivey has violated plaintiffs' state constitutional rights and the rights of all Alabama voters by failing to exercise her emergency statutory and constitutional authority to modify absentee ballot deadlines for absentee ballots.

44. Alternatively, if Alabama's statutory laws prohibit Defendant Merrill and Defendant Ivey from modifying absentee ballot deadlines, those statutes violate the Alabama Constitution as applied to plaintiffs and the class of all Alabama voters they seek to represent in the current pandemic.

### **COUNT V**

#### **Adopt Safety Measures For In-Person Voting, Including Early Voting**

45. The facts set out in the Statement of Facts, *supra*, are realleged herein. Defendant Merrill's March 18, 2020, emergency order fails to adopt procedures for the safety of poll workers and voters who cast their ballots in person during the pandemic. Common sense measures that can guard against COVID-19 infection include at least:

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

Providing voters with gloves, masks, and disposable pens.

Implementing social distancing procedures and authorizing early

voting at least fourteen days before election day.

Providing drive through voting.

Establishing vote centers and relaxing restrictions on wrong precinct voting.

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

By failing to exercise his emergency statutory and constitutional authority to order the implementation of these and other procedures that protect the health and safety of poll workers and citizens voting in person, and/or by failing to authorize county election officials to tailor to their local conditions the times, places and manner of in-person voting, Defendant Merrill has violated the right to vote of plaintiffs and of all qualified Alabama voters guaranteed by Ala. Const. Art. VIII, § 177, and their right to exercise the franchise free of undue influence from tumult guaranteed by Ala. Const. Art. I, § 33.

46. Alternatively, Defendant Governor Ivey has violated plaintiffs' state constitutional rights and the rights of all Alabama voters by failing to exercise her emergency statutory and constitutional authority to order and/or authorize the implementation of these and other procedures that protect the health and safety of poll workers and citizens voting in person.

47. Alternatively, if Alabama's statutory laws prohibit Defendant Merrill

and Defendant Ivey from ordering and/or authorizing the implementation of these and other procedures that protect the health and safety of poll workers and citizens voting in person, those statutes violate the Alabama Constitution as applied to plaintiffs and the class of all Alabama voters they seek to represent in the current pandemic.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs respectfully pray that this Court will:

A. Declare that the failure of defendants to modify absentee balloting procedures and guidelines and to institute procedures to protect poll workers and those citizens voting in person that are adequate to protect the health and safety of plaintiffs and all other Alabama citizens during the coronavirus pandemic violates the right to vote of plaintiffs and of all qualified Alabama voters guaranteed by Ala. Const. Art. VIII, § 177, and their right to exercise the franchise free of undue influence from tumult guaranteed by Ala. Const. Art. I, § 33.

B. Enjoin Defendants, their agents and successors in office, and all persons acting in concert with, or as an agent of, any Defendants in this action, from failing to modify absentee balloting procedures and guidelines and to institute procedures to protect poll workers and those citizens voting in person that are adequate to protect the health and safety of plaintiffs and all other Alabama

citizens during the coronavirus pandemic.

C. Enter a preliminary injunction 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.

D. 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 28<sup>th</sup> day of May, 2020.

/s/Joseph Mitchell McGuire

Joseph Mitchell McGuire (MCG044)  
31 Clayton Street  
Montgomery, Alabama 36104  
(334) 517-1000 Office  
(334) 517-1327 Fax  
[jmcguire@mandabusinesslaw.com](mailto:jmcguire@mandabusinesslaw.com)

/s/Robert D. Segall

Robert D. Segall (ASB-7354-E68R)  
Copeland Franco Screws & Gill, P.A.  
Post Office Box 347  
Montgomery, Alabama 36101-0347  
(334) 834-1180 Office  
(334) 834-3171 Fax  
[segall@copelandfranco.com](mailto:segall@copelandfranco.com)

/s/Edward Still

Edward Still (ASB-4786-i47w)  
429 Greensprings Hwy, STE 161-304  
Birmingham Alabama 35209  
Office & Fax: (205) 320-2882  
[still@votelaw.com](mailto:still@votelaw.com)

Attorneys for Plaintiffs Ardis Albany,  
Lucinda Livingston, Bryan A. Lorge,  
Suzanne Schwartz, Myrtle Scott,  
Patricia Burkett Smith, Rosa Maria  
Toussaint, and Suzanne Bergman  
Wright

/s/Augusta S. Dowd

Augusta S. Dowd (ASB-5274-D58A)  
White Arnold & Dowd P.C.  
2025 Third Avenue North, Suite 500  
Birmingham, AL 35203  
Telephone: (205) 323-1888  
Facsimile: (205) 323-8907  
[adowd@whitearnolddowd.com](mailto:adowd@whitearnolddowd.com)

/s/James U. Blacksher

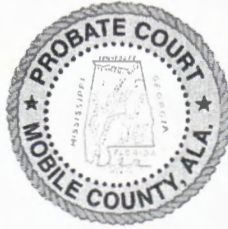
James U. Blacksher (ASB-2381-S82J)  
P.O. Box 636  
Birmingham, Alabama 35201  
(205) 591-7238 Office  
(866) 845-4395 Fax  
[jblacksher@ns.sympatico.ca](mailto:jblacksher@ns.sympatico.ca)

Attorneys for Plaintiff League of  
Women Voters of Alabama

**Don Davis**  
*Judge of Probate*

**C. Mark Erwin**  
*Chief Clerk/Administrator*

**W. Rushing Payne, Jr.**  
*Chief of Staff/Chief Deputy Clerk*



Judicial Division - (251) 574-6001  
Recording Division - (251) 574-6040  
Records Division - (251) 574-6070  
Elections Division - (251) 574-6080  
Accounts Division - (251) 574-6101  
Facsimile - (251) 574-6003

## PROBATE COURT OF MOBILE COUNTY, ALABAMA

May 4, 2020

### VIA ELECTRONIC MAIL AND UNITED STATES CERTIFIED MAIL

The Honorable John H. Merrill  
Secretary of State  
State of Alabama  
Alabama State Capitol, Suite S-102  
600 Dexter Avenue  
Montgomery, AL 36130

Re: Upcoming Alabama Primary Runoff Election in Mobile County, Alabama Scheduled  
For July 14, 2020

Dear Secretary Merrill:

You will recall that in Alabama, our judges of probate serve as the chief election officers of their respective counties. However, notwithstanding the moniker, Alabama's judges of probate do not have total control or oversight of elections. For example, county commissions determine the election precincts, election poll locations, number of election officials utilized and number of voting machines utilized.<sup>1</sup> Alabama's county commissions also provide the funding for elections, some of which is reimbursed by the State following the conclusion of an election.

Mobile County has 88 election precincts (geographic areas), which were determined by the Mobile County Commission. Each election precinct has a poll (also determined by the Mobile County Commission), at which registered voters residing within the precinct are to vote. The number of registered voters residing within a precinct varies precinct-by-precinct. The size of the locations utilized as polls are not uniform either. Many privately-owned facilities are utilized as election polls. The number of election officials assigned to a poll also varies poll-by-poll, primarily based on the number of registered voters residing within a precinct. Overall, Mobile County utilizes approximately 1,700 election officials in a county-wide election at this time.

The Alabama Election Code provides that primary runoff elections are to be held at the same places as the first primary and the same election officers utilized.<sup>2</sup> Alabama law also specifies that

---

<sup>1</sup>*Ala. Code* §§ 17-6-2 and 3 and 17-8-1 (1975).

<sup>2</sup>*Ala. Code* § 17-13-3 (1975).

The Honorable John Merrill  
 May 4, 2020  
 Page 2

an election poll shall not be changed within three (3) months before an election is to be held.<sup>3</sup>

At least 75 percent of the election officials that served in Mobile County's 2020 Alabama Primary Election held on March 3, 2020, were 65 years or older in age. According to information provided by the United States Centers for Disease Control & Prevention ("CDC"), these persons are considered to have a higher risk of contracting COVID-19. These persons have been urged by the CDC and Governor Kay Ivey to stay at home and avoid contact with other persons.

Many of these election officials have contacted my office and expressed concern about serving as an election official in the upcoming Alabama Primary Runoff Election scheduled for July 14, 2020. We have also received notice from some of the owners of the privately- owned facilities Mobile County customarily uses for election polls that their facilities will not be available for use in the upcoming Alabama Primary Runoff Election because of the COVID-19 pandemic. Additionally, this office has fielded numerous calls from citizens who are concerned about going to an election poll on July 14, 2020, as a result of the COVID-19 pandemic.

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.

In mid March 2020, I verbally expressed concern to the Mobile County Commission about our ability to properly conduct the July 14, 2020 Alabama Primary Election in accordance with all applicable election laws (federal and state) and the CDC recommended guidelines. I formally expressed these concerns in writing to the Mobile County Commission on April 16, 2020. 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.

Mobile County conducted an assessment of the facilities it used in the March 3, 2020 Alabama Primary Election. This assessment reflects that 46 of Mobile County's 88 poll locations *cannot* accommodate the same number of *election officials* who worked at the *same facilities*<sup>4</sup> used in the Primary Election. Accordingly, these election polls could not accommodate any voters. Additionally, two (2) facilities utilized in the Primary Election are not available for the Primary Runoff Election. Of the remaining 40 poll locations, ten (10) poll sites have less than 400 square

---

<sup>3</sup>*Ala. Code* § 17-6-4(d) (1975).

<sup>4</sup>At ten (10) of these locations there are adjacent larger rooms that we may be able to utilize for the Runoff Election that would accommodate the same number of election officials who worked at these polls in the Primary Election.

The Honorable John Merrill  
 May 4, 2020  
 Page 3

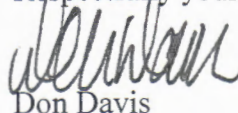
feet of space in excess of what is needed to accommodate the same number of election officials who worked at the same facility in the Primary Election. Additionally, several of the last category of poll locations have permanent fixtures and equipment that impede the ability to use the entire square footage of the facility. The assessment further reflected that in many of the election polls that can accommodate the same number of election officials who worked at these polls on March 3, 2020, these polls could only accommodate a handful of voters within the election poll at the same time if compliance with the CDC's social distancing guidelines is maintained.<sup>5</sup>

Contemporaneously herewith, I have formally notified Governor Kay Ivey, Alabama Attorney General Steve Marshall, the United States Department of Justice, and the United States Attorney for the Southern District of Alabama of the aforesaid problems, with copies to other elected officials, chairpersons of the two (2) state political parties, and the candidates who are on Mobile County's Primary Runoff ballots.

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.

Respectfully yours,



Don Davis

Judge of Probate and Chief Election Officer

cc: The Honorable Kay Ivey  
 The Honorable Steve Marshall  
 Members of the Mobile County Commission  
 Members of the Mobile County Legislative Delegation  
 The Honorable Sam Cochran

---

<sup>5</sup>For example: Precinct Number 66 (Creekwood Church of Christ) has 7,606 voters assigned to it. The room utilized at this poll for elections has 5,227 square feet of space, of which 4320 would be needed to accommodate assigned election officials per the CDC COVID-19 pandemic social distancing guidelines. If the guidelines are utilized and all of the same election officials are utilized, only six (6) voters could be inside the poll at one time to participate in the Runoff Election.

The Honorable John Merrill  
May 4, 2020  
Page 4

The Honorable Jo Jo Schwarzauser  
The Honorable Eric S. Dreiband  
The Honorable Richard W. Moore  
Mr. Jeff Sessions  
Mr. Tommy Tuberville  
Mr. Bill Hightower  
Mr. James Averhart  
Ms. Kiani Al Gardner  
Mr. Fred Bell  
Ms. Tonya Smith Chesnut  
Mr. Ty Burden  
Ms. Sherry Dillihay-McDade  
Mrs. Terry Lathan  
Mr. Christopher J. England