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N.D. OF ALABAMA

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

GREATER BIRMINGHAM MINISTRIES and ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiffs, v. STATE OF ALABAMA; ROBERT J. BENTLEY, in his official capacity as Governor of Alabama; LUTHER J. STRANGE, in his official capacity as the Alabama Attorney General; JOHN MERRILL, in his official capacity as the Alabama Secretary of State; and SPENCER COLLIER, in his official capacity as the Secretary of the Alabama Law Enforcement Agency, Defendants.	Civil Action No. 2:15-cv-02193-LSC

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

With the 2016 statewide elections fast approaching—the first of which is the presidential primary election scheduled for March 1, 2016—Plaintiffs seek a preliminary injunction imposing rules, or requiring Defendants to enact regulations, that provide specific and objective guidance regarding the provision of the photo identification law ("Photo ID Law") under which voters without a required photo ID must be "positively identified" by election officials in order to cast a regular ballot ("Positively Identify Provision"). Absent such guidance, which does not presently exist, the Positively Identify Provision constitutes a *per se* violation of the Voting Rights Act of 1965. An injunction is necessary to protect the voting rights of the approximately 280,000 registered voters—as initially estimated by the Secretary of State—who lack any one of the seven forms of photo ID required to vote in-person or absentee in Alabama.

Under Alabama law, a registered voter who cannot present one of the few permissible photo IDs cannot cast a regular ballot in-person unless two election officials are willing to sign affidavits, under penalty of perjury, "positively identifying" the person as a voter on the poll list who is eligible to vote. Ala. Code § 17-9-30(e). This Positively Identify Provision violates Section 201 of the Voting Rights Act, which prohibits states from denying a citizen the right to vote in an

election for failure to "prove his qualifications by the voucher of registered voters or members of any other class." 52 U.S.C. § 10501(d).

Because the Positively Identify Provision contains no uniform, objective criteria governing its interpretation or implementation, election officials have unfettered discretion to determine whether or not to "vouch" for a registered voter's identity. This is precisely the type of device that Alabama and other states used for decades to discriminate against voters of color by subjecting their right to vote to "the passing whim or impulse" of individual election officials. *Louisiana v. United States*, 380 U.S. 145, 153 (1965). The threat of racial discrimination inherent in allowing such blanket discretion is the very harm that Congress sought to prevent when, in enacting Section 201, it imposed an absolute ban on voucher requirements and similar tests or devices.

To prevent Alabama's illegal voucher requirement from causing irreparable injury during the 2016 statewide and local elections—including, but not limited to the March 1 primary, the April 12 runoff, August 23 municipal elections and subsequent runoffs, Ala. Code § 11-46-21, and the November 8 general election—Plaintiffs seek a preliminary injunction requiring Defendants to set forth specific criteria directing election officials on whether and how to positively identify and provide regular ballots to registered voters who lack the required photo ID.

Specifically, in order to clarify the Positively Identify Provision, the Court should require election officials to positively identify a voter if that voter can meet any one of the following criteria: (a) accurately answer questions about identifying information in the poll book, such as the voter's name and address, (b) sign an affidavit confirming his or her identity, or (c) produce a form of non-photo identification that was previously acceptable under Alabama's non-photo ID law.[1] The Court should permit only one good faith exception to this rule: Where an election official signs an affidavit stating, with particularity, a basis to doubt the voter's claimed identity, that election official would not be required to "positively identify" the voter.

The proposed relief is modest and does not address Plaintiffs' claims regarding Defendants' violations of the Constitution and Section 2 of the Voting Rights Act, the remedies to which will ultimately require the wholesale invalidation of Alabama's photo identification law. Rather, this injunction would merely bring the Positively Identify Provision into compliance with the Voting Rights Act, as well as the practices of other states, by providing some interim relief

[1] Acceptable identification documents under the prior law, Ala. Code § 17-11A-1 (2003), included: a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; a valid Alabama hunting or fishing license; a valid Alabama permit to carry a pistol or revolver; a valid federal pilot's license; a certified birth certificate; a valid Social Security card; certified naturalization documentation; certified court records showing adoption or name change; a valid Medicaid card, Medicare card, or an Electronic Benefits Transfer Card; and a valid voter registration certificate.

to hundreds of thousands of voters and specific and objective guidance to election officials who currently enjoy needlessly broad discretion.

II. STATEMENT OF FACTS

A. Congress Enacted Section 201 of the Voting Rights Act to Categorically Prohibit All Voucher Requirements.

Section 201 of the Voting Rights Act ("VRA") provides that "[n]o citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election." 52 U.S.C. § 10501(a). The phrase "test or device" is defined, in relevant part, as "any requirement that a person as a prerequisite for voting or registration for voting . . . prove his qualifications by the voucher of registered voters or members of any other class." *Id*. § 10501(b)(4).

Congress enacted the VRA—and its unconditional prohibition on voucher requirements and other qualification tests—against the backdrop of rampant abuse of such tests or devices by election officials to suppress Black voting. *See, e.g.*, *Louisiana*, 380 U.S. at 148-150 (striking down an "interpretation" test, which lacked "any objective standard," as unconstitutional); *United States v. Alabama*, 192 F. Supp. 677, 679-80 (M.D. Ala. 1961) *aff'd*, 304 F.2d 583 (5th Cir. 1962) *aff'd per curiam*, 371 U.S. 37 (1962) (addressing the double standards that election officials applied to Black and white applicants); *Davis v. Schnell*, 81 F. Supp. 872, 874, 877-78 (S.D. Ala.) *aff'd per curiam*, 336 U.S. 933 (1949) (enjoining an

understanding test that gave election officials the "arbitrary power to accept or reject any prospective elector").

At the same time, these now-prohibited tests and devices were also used by states and election officials to protect the voting rights of white people while discriminating against people of color. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966) (explaining that literacy tests often contained exemptions "to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter.").

For example, prior to the passage of the VRA, election officials in Wilcox County, Alabama employed a voucher requirement whereby applicants for registration had to present a "supporting witness" to affirm "that he is acquainted with the applicant." *United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965).[2] Although county employees would either suggest the names of possible supporting witnesses or themselves serve as supporting witnesses for white applicants, "no one suggested the names of possible supporting witnesses to the [Black] applicants and none of their forms were signed by employees of the county." *Id*. at 292.

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Similarly, like Alabama's present law, a prior Louisiana voter ID law required registrants to establish their identities to the satisfaction of parish election officials, and if the registrant's identity was challenged, parish officials could require the registrant to produce "two registered voters to identify" the applicant under oath. *United States v. Manning*, 205 F. Supp. 172, 172-73 (W.D. La. 1962). Parish officials regularly identified white registrants but often challenged Black registrants and required them to produce "two registered voters to identify them before they could be registered." *United States v. Ward*, 349 F.2d 795, 799 (5th Cir.) *modified on reh'g*, 352 F.2d 329 (5th Cir. 1965); *see also Manning*, 205 F. Supp. at 173.

Congress was aware of this well-documented abuse of voucher requirements, and the impossibility of their fair administration. H.R. Rep. No. 89-439, at 15 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2446. Accordingly, Sections 4 and 5 of the VRA categorically outlawed all such tests and devices in states that, like Alabama, (1) had maintained such a test or device, and (2) had a voter registration or turnout rate below 50 percent as of November 1964. *Katzenbach*, 383 U.S. at 317. Five years later, when reauthorizing Sections 4 and 5, Congress reiterated that the VRA provides for "the automatic suspension" of tests and devices and does not require litigation over whether "such tests would have the purpose of [sic] effect of denying or abridging the right to vote on account

of race or color." H.R. Rep. No. 91-397, at 5-6 (1969), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3281-82 (internal quotations omitted).

After the reauthorization bill passed out of committee, the Nixon Administration proposed Section 201, the intent and effect of which was to extend the prohibition on tests and devices beyond just those states covered by Sections 4 and 5, to the entire nation. 115 Cong. Rec. 38,515 (1969). Section 201 was enacted in 1970, Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970), and made permanent in 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). *See Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (unanimously affirming Section 201's constitutionality and Congress's authority to "prohibit the use of literacy tests or other devices").

Accordingly, the VRA prohibits ***all*** voucher requirements as a prerequisite to voting, regardless of proof of their abuse.

B. The Positively Identify Provision Constitutes a Voucher Requirement.

In 2003, Alabama enacted legislation requiring voters to present one of more than a dozen forms of photo or non-photo ID at the polls. Ala. Code § 17-11A-1 (2003). That legislation had a provision allowing individuals without one of the required IDs to vote if two election officials "positively identified" the individual as a voter on the poll list. *Id.*

On June 15, 2011, Defendant Governor Robert Bentley signed the Photo ID Law into law, drastically cutting back the types of IDs a voter can present to vote. 2011 Alabama Laws Act 2011-673 (H.B. 19); Ala. Code § 17-9-30. Under the Photo ID Law, a voter can no longer verify his or her identity with a voter registration certificate, utility bill, *non-photo* government ID, or paycheck. *Id*. A voter can only vote by presenting one of seven specific forms of valid *photo* ID ("the required photo ID"). Ala. Code § 17-9-30(a).

The Photo ID Law also amended the Positively Identify Provision to require that any person without one of the required photo IDs be "positively identified by two election officials as a voter on the poll list who is eligible to vote *and the election officials sign a sworn affidavit so stating*." Ala. Code § 17-9-30(e) (emphasis added). The Photo ID Law thus added a requirement that election officials must sign an affidavit under penalty of perjury if they seek to vouch for a prospective voter.

Although Alabama was subject to Sections 4 and 5 of the VRA, which required the preclearance of new voting procedures, 52 U.S.C. §§ 10303, 10304, Alabama never sought or received preclearance to enforce the Photo ID Law. Instead, Alabama chose not to enforce the Photo ID Law for two years, until after the U.S. Supreme Court removed the preclearance hurdle in *Shelby County, Alabama v. Holder*, --- U.S. ----, 133 S. Ct. 2612, on June 25, 2013. Indeed, the

day after *Shelby County* was announced, the Alabama Attorney General and Secretary of State declared that the Photo ID Law would be implemented and enforced. Ex. 1.[3] Starting with the statewide primary election in 2014, in-person voters without the required photo ID were not allowed to vote unless they were vouched for by two election officials willing to sign a sworn affidavit. Ala. Admin. Code 820-2-9-.02.

A significant number of registered voters in Alabama must now rely on the voucher requirement of the Positively Identify Provision in order to cast a regular ballot. According to statements made by the Secretary of State's office in 2014, a cross-check of Alabama registered voters against the database of driver's license and non-driver IDs (the two most common forms of required photo ID) issued by the Alabama Law Enforcement Agency ("ALEA") revealed that 560,000 registered voters, or about 20% of registered voters, lack an ALEA-issued photo ID. Ex. 2; *see also* Ex. 3 at 2. The Secretary of State further estimated that only about half of those voters possess a different form of required photo ID. Ex. 2. Thus, according to the Secretary of State's initial estimate, approximately 280,000 registered voters lack any form of required photo ID and must be vouched for in order to cast a regular ballot.

[3] Exhibits cited in this Memorandum are attached to the concurrently filed Declaration of Deuel Ross in Support of Plaintiffs' Motion for Preliminary Injunction.

C. Election Officials Have Unfettered Discretion Over How to "Positively Identify" a Voter.

The Positively Identify Provision offers election officials no guidance about how to "positively identify" a voter without the required photo ID and imposes no restrictions on election officials' discretion to vouch (or not vouch) for a particular voter. *See* Alabama Code § 17-9-30(e).

On March 3, 2014, Plaintiffs wrote to the Secretary of State, warning that the Positively Identify Provision was effectively a voucher requirement in conflict with Section 201's ban on "tests or devices." Ex. 4 at 3-6. Plaintiffs urged the Secretary of State to set forth objective criteria requiring election officials to vouch for those registered voters who lack photo ID but can (1) answer questions about personal identifying information in the poll book, (2) sign a self-verifying affidavit, or (3) produce a non-photo ID. *Id.* at 6-8.

On March 24, 2014, the Secretary of State acknowledged that the lack of rules and guidance was a problem, responding, "I believe there is merit to your request that this office promulgate an additional administrative rule that will provide uniform guidance throughout the state as to how positive identification is to be established by election officials." Ex. 5. He continued, "I will therefore ask my staff to begin work to promulgate such a rule." *Id.*

On April 16, 2014, the Secretary of State certified two emergency administrative rules, Ex. 6 (Ala. Admin. Code § 820-2-9-.14-.14ER), Ex. 7 (Ala.

Admin. Code §820-2-9-.15-.15ER), interpreting the Positively Identify Provision to establish "personal acquaintance" as the sole basis for "positively identifying" a prospective elector. 2014 Ala. Reg. Text 360145, 360201. The emergency rules were in effect for the June 3, 2014 primary and remained in effect for no longer than 120 days. Ala. Code § 41-22-5(b). Thus, the emergency rules expired no later than mid-August 2014.

On April 18, 2014, the Secretary of State proposed two administrative rules, Ex. 8 (Ala. Admin. Code § 820-2-9-.14), Ex. 9 (Ala. Admin. Code §820-2-9.15), which were identical to the emergency rules. 2014 Ala. Reg. Text 360200.

On May 29, 2014, Defendants received comments that reiterated Plaintiffs' concern that the proposed administrative rules were a *per se* violation of Section 201. Ex. 10 at 1-5. The comments explained that the proposed rules were nearly identical to Alabama's past voucher requirement, whereby an applicant for voter registration had to produce a witness to affirm that "that he [was] acquainted with the applicant," *Logue*, 344 F.2d at 291, and mirrored the unlawful exemption to the State's poll tax whereby "the acquaintances and friends of the poll tax collector" received privileges that were not equally available to Black voters. *United States v. Alabama*, 252 F. Supp. 95, 104 (M.D. Ala. 1966) (three-judge court). Ex. 10 at 4.

The Secretary of State issued a press release on June 6, 2014 stating that he had "no intention of interpreting this law" in a manner different from that provided

for in the proposed rules. Ex. 11. The proposed rules, however, were never finalized and adopted. Ex. 12.

Thus, despite the Secretary of State's admission that there is "merit" to Plaintiffs' request for administrative guidance, election officials in Alabama continue to exercise unfettered discretion over how and whether to "positively identify" the estimated 280,000 or more voters who lack the required photo ID.

III. ARGUMENT

A. The Legal Standard for Preliminary Relief

The Court should issue a preliminary injunction where: (1) the moving party has a substantial likelihood of success on the merits; (2) there will be irreparable injury in the absence of an injunction; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) issuing the injunction would be consistent with the public interest. *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). As discussed below, all four factors are present here.

Moreover, preliminary injunctive relief is warranted where, as here, such relief is required to bring state elections into compliance with federal law. *See, e.g.*, *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1339 (11th Cir. 2014) (reversing the denial of a preliminary injunction and halting state practices that directly conflicted with the National Voter Registration Act); *Chatman v. Spillers*, 44 F.3d

923, 924-25 (11th Cir. 1995) (reversing denial of preliminary injunction and ordering relief to comply with Sections 2 and 5 of the VRA); *United States v. Dallas Cty. Comm'n*, 791 F.2d 831, 833 (11th Cir. 1986) (reversing the denial of a preliminary injunction and ordering relief under Section 2 of the VRA).

B. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

1. The Positively Identify Provision Constitutes a Prohibited Voucher Requirement.

The VRA's prohibition on tests or devices "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citation omitted). The language of Section 201 prohibits, in unambiguous, categorical language, all laws requiring that a voter prove his or her qualifications by voucher. Like the identical Section 4(b) upon which it was based, Section 201 requires no factual showing of discrimination, *see supra* Part II.A, and invalidates all state laws or practices that conflict with its prohibition on tests or devices.[4] *See, e.g.*, *Puerto Rican Org. for Political Action v. Kusper*, 490 F. 2d 575, 578-80 (7th Cir. 1973) (holding that Sections 201 and 4(e) prevent conditioning "the right to an effective

[4] Alabama has repeatedly attempted to enact tests or devices prohibited under the VRA. U.S. Dep't of Justice, Civil Rights Division, Voting Section, Alabama Voting Determination Letters, http://www.justice.gov/crt/records/vot/obj_letters/state_letters.php?state=al (last visited Jan. 8, 2016) (listing all Section 5 objections imposed against Alabama, including eleven objections to state laws that imposed poll list signature requirements, literacy requirements, and limitations on assistance for illiterate voters in violation of Section 4 of the VRA).

vote" on English literacy and entitle Puerto Rican voters to assistance in Spanish); *Dent v. Duncan*, 360 F.2d 333, 337 (5th Cir. 1966) (holding that Section 4 forbids all literacy tests and bars Alabama officials from asking registrants the potentially deceptive question: "Can you read and write?"); *Morris v. Fortson*, 261 F. Supp. 538, 541 (N.D. Ga. 1966) (three-judge court) (holding a state law, which had the potential to limit assistance for illiterate voters, invalid under Section 4); *cf. Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006) (holding that a state law conditioning the franchise on the disclosure of immaterial identifying information violated a similar categorical prohibition within the VRA).

Here, because the Positively Identify Provision requires a person who lacks the required photo ID to "prove his qualifications by the voucher" of a class of election officials, it is unquestionably the type of "test or device" that Congress sought to prohibit when it enacted Section 201.[5] 52 U.S.C. § 10501(b)(4). *Cf. Ward*, 349 F.2d at 799 (enjoining an unlawful voucher requirement, in which applicants who could not prove their identity to the satisfaction of election officials were required "to have two registered voters to identify them"); *Manning*, 205 F. Supp. at 173 (blocking the same requirement whereby a parish official "permit[ted] persons known to him to apply for registration without further identification").

[5] The sworn affidavit that election officials must complete in order to "positively identify" a voter, Ala. Admin. Code 820-2-9-.11, is also strikingly similar to the sworn supporting witness affidavit under Alabama's prior voucher requirement regime. *See, e.g., United States v. Parker*, 236 F. Supp. 511, 521-22 (M.D. Ala. 1964) (the "Examination of Supporting Witness" affidavit).

2. The Positively Identify Provision Confers Unfettered Discretion on Election Officials.

The Positively Identify Provision sets no objective criteria or guidelines for when or how election officials can or must "positively identify" a voter. The Secretary of State previously admitted that "there is merit" to Plaintiffs' position that there must be "uniform guidance . . . as to how positive identification is to be established." Ex. 5. Nonetheless, the Secretary of State failed to adopt a rule that would bring the Provision into compliance with Section 201. Instead, the "standard" set forth in the emergency rules confirmed the fact that the Provision is a voucher requirement. *Compare Logue*, 344 F.2d at 291 ("The supporting witness must affirm that he is acquainted with the applicant . . . .") *with* Ex. 7 (Ala. Admin. Code §820-2-9-.15-.15ER ("[T]he positive identification must be based on the election official's personal acquaintance with the voter . . . .")). Moreover, statements made by the Secretary of State confirm Alabama's commitment to implementing a personal acquaintance-based voucher system. *See* Ex. 11.

The Secretary's failure to adopt final administrative rules ensures that, absent imposition of a proper standard through this motion, the Positively Identify Provision will remain undefined and thus "not capable of fair administration." H.R. Rep. No. 89-439, at 15, *reprinted at* 1965 U.S.C.C.A.N. at 2446. The unregulated Provision affords individual election officials "virtually unlimited discretion" to apply it differently from polling place to polling place, from election

official to election official, and even for an election official to apply the Provision differently from one voter to another. *Louisiana*, 380 U.S. at 150; *cf. Bush v. Gore*, 531 U.S. 98, 106 (2000) (holding a ballot recount process unconstitutional where the lack of objective, state-wide criteria meant that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another").

While Plaintiffs need not show that election officials have actually applied the Positively Identify Provision to discriminate against a particular class of voters, it is nonetheless clear that Plaintiffs' concerns about the potential for such racial discrimination are not theoretical: Election officials in Alabama have a long, unfortunate, and recent history of abusing vague voting laws to disfranchise eligible voters.[6] *See, e.g.*, *Chapman v. Gooden*, 974 So. 2d 972, 985-88 (Ala. 2007) (acknowledging that the Secretary of State and local election officials had

[6] In 2006, the Congressional record for the reauthorization of Sections 4 and 5 of the VRA included significant evidence of the continued racially discriminatory administration of voucher requirements and other discrimination by election officials in Alabama. *See, e.g.*, H.R. Rep. No. 109-478, at 45 (2006), *reprinted at* 2006 U.S.C.C.A.N. 618, 650 (describing discriminatory challenges to Asian-American voters in Alabama in 2004, which resulted in such voters having to have their ballots vouched for by a registered voter); *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry: Hearing Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary*, 109th Cong. 365-402 (July 13, 2006) (documenting various additional instances of discrimination by Alabama election officials and noting that, between 1982 and 2006, federal observers were sent ninety-one times to various polling places across Alabama to prevent racial discrimination); *see also* B. Weinberg & L. Utrecht, *Problems in America's Polling Places*, 11 Temp. Pol. & Civ. Rts. L. Rev. 401, 409 (2002) (quoting federal observer reports of the racist verbal abuse and disparate treatment of Black voters by election officials in Alabama).

misinterpreted state law such that eligible voters were improperly disfranchised); *Harris v. Siegelman*, 695 F. Supp. 517, 526-27 (M.D. Ala. 1988) (finding Alabama liable for the disfranchisement of Black voters through election officials' abuse of state laws that limited voters' time in the poll booth and imposed rigorous affidavit requirements for voters in need of assistance). Given this history, the ambiguities of the Positively Identify Provision will "unduly lend themselves to discriminatory application, either conscious or unconscious."[7] *Oregon*, 400 U.S. at 216 (Harlan, J., concurring in part and dissenting in part). This is precisely the outcome Congress sought to avoid by enacting the *per se* ban on tests and devices under Section 201. Accordingly, Plaintiffs are likely to prevail on the merits of their Section 201 claim.

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[7] Academic research confirms that election officials tend to use the discretion afforded to them under voter ID laws to (consciously or unconsciously) discriminate. *See, e.g.*, Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 Pol. Sci. & Pol. 127, 128 (2009) (finding that, during the 2008 Super Tuesday primary elections held in Alabama and twenty-three other states, "53% of whites were asked to show photo ID, compared with 58% of Hispanics and a staggering 73% of African Americans," results that held constant after controlling for state laws, voter income, age, and other factors); R. Michael Alvarez, *et al.*, *2008 Survey of the Performance of American Elections*, 42-46 (2009) (finding that, across the nation, "[t]he higher incidence of requests for identification [from Black and Latino voters] . . . arises because all poll workers (White or minority) treat minority voters differently. In addition, minority poll workers are much more likely to request identification."); *see also* Rachael V. Cobb, *et al.*, *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 Q. J. Pol. Sci. 1, 22 (2012) (finding that during the 2008 elections in Boston, "the probability that a black or Hispanic voter was asked for ID [was] approximately 10 percentage points higher than the probability that an otherwise similarly situated white voter was asked for ID"); Lonna Rae Atkeson, *et al.*, *A New Barrier to Participation: Heterogeneous Application of Voter Identification Policies*, 29 Electoral Stud. 66, 68, 70 (2010) (finding that, in New Mexico's First Congressional District in 2006, self-identified Latino voters were sixteen percentage points more likely to be asked for voter ID than non-Latinos).

C. Without a Preliminary Injunction, Plaintiffs Will Suffer Irreparable Harm.

The "right of qualified voters . . . to cast their votes effectively . . . rank[s] among our most precious freedoms." *William v. Rhodes*, 393 U.S. 23, 30 (1968). "Given the fundamental nature of the right to vote, . . . it is simply not possible to pay someone for having been denied a right of [such] importance." *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986). Consequently, courts have consistently held that abridging the right to vote constitutes an irreparable injury. *See, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Common Cause v. Billups*, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005); *United States v. Metro. Dade Cty.*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993).

"[A]ny restrictions on [the] right [to vote] strike at the heart of representative government." *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964). By enforcing the Positively Identify Provision as an expressly banned voucher requirement, Defendants are imposing an illegal impediment on the right to vote for an estimated quarter-of-a-million registered voters.

Because of that impediment, Plaintiffs were required in the 2014 elections to divert significant amounts of their scarce resources from their regular activities to protecting the rights of those affected voters through: (1) petitioning Defendants to obey federal law by adopting administrative rules for the Positively Identify Provision that are consistent with the VRA; (2) educating their Black and Latino

constituents about the process for voting under the Photo ID Law; and (3) assisting voters who lack the required photo ID with voting. Ex. 13 at ¶¶ 6-11 (Declaration of Scott Douglas); Ex. 14 at ¶¶ 5-7 (Declaration of Benard Simelton). As a consequence, Plaintiffs could not address other issues of importance to their constituents. Ex. 13 at ¶¶ 12-16; Ex. 14 at ¶¶ 8-10. The requested injunction would allow Plaintiffs to stop diverting personnel and time to the resolution of voters' photo ID-related problems. *See, e.g., Cox*, 408 F.3d at 1355 ("The associational and franchise-related rights asserted by the [organizational] Plaintiffs were threatened with significant, irreparable harm . . . .").

Similarly, for Alabama voters, since Congress has declared that voucher requirements like the Positively Identify Provision cannot be fairly administered, the application of the voucher requirement—and the attendant likelihood of vote denial—is *necessarily* the sort of irreparable injury that "'cannot be undone through monetary remedies,'" *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1249 (11th Cir. 2012) (quoting *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010)), and that Congress sought to eradicate in enacting Section 201. 52 U.S.C. § 10302(b) ("If . . . the court finds that a test or device has been used . . . , it shall suspend the use of tests and devices in such [a] State . . . ."). Plaintiffs, therefore, need not "make the usual showing of irreparable injury as a

prerequisite to relief; rather, such injury is presumed by law." *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984).

But even were that not the case, the injury suffered by Plaintiffs and their constituents is quite clear. In 2014, the first year the Photo ID Law went into effect, the ballots of more than 600 registered voters who attempted to vote went uncounted because those willing voters did not present the required photo ID. Ex. 15. In total, an estimated 280,000 registered voters cannot provide the required photo ID. Ex. 2. Absent a preliminary injunction, thousands of in-person voters must either be "positively identified" by election officials or be disfranchised in the upcoming highly-publicized, hotly-contested March 1, 2016 election, as well as all other future elections. *Cf. Reynolds*, 377 U.S. at 585 (once it has been established that a voting plan violates federal law, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan"). That is exactly the sort of "illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute," that is, "by its nature . . . an irreparable injury." *Harris*, 593 F. Supp. at 135.

D. The Balance of Equities and Public Interest Weigh in Favor of Relief.

The balance of the equities weighs strongly in favor of a preliminary injunction to vindicate the public interest in protecting the rights of hundreds of thousands of Alabamians to vote in all of the upcoming 2016 elections. The right

to vote is a "fundamental right [that] is preservative of all other rights," and the denial of that right "works a serious, irreparable injury." *Common Cause*, 406 F. Supp. 2d at 1376; *see also Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."). The preliminary injunction sought by Plaintiffs would protect "franchise-related rights" and is thus "without question in the public interest." *Cox*, 408 F. 3d at 1355.

Defendants will suffer no harm by the preliminary injunction sought by Plaintiffs. *Cf. United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest, and we discern no harm from the state's nonenforcement of invalid legislation."). On the contrary, as explained below, the relief sought here will serve the public interest of ensuring the efficient and fair administration of elections.

Absent specific and objective guidance on the proper interpretation of the Positively Identify Provision, that Provision will undeniably constitute an illegal voucher requirement in violation of the VRA. The relief Plaintiffs seek fills that gap, providing election officials with much-needed guidance and rules on how to implement the Positively Identify Provision. Plaintiffs' proposed injunction would make it *easier* to train those election officials, by using concrete, objective criteria—as opposed to vague and nebulous standards—on what constitutes

"positive identification." Such trained officials will, in turn, be better equipped to properly resolve questions and concerns on Election Day.

An injunction from this Court adopting Plaintiffs' interpretation of the Positively Identify Provision will also minimize voter confusion at the polls by clarifying exactly how a voter lacking the required photo ID may establish his or her identity in order to vote. *See, e.g.*, *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, No. 3:11-CV-00123-TCB, 2015 WL 4633575, at *12 (N.D. Ga. Aug. 3, 2015) (recognizing the "public interest in avoiding voter confusion"); *Metro. Dade Cty.*, 815 F. Supp. at 1478 (the "public interest is best served by seeing that all voters are fully informed" regarding the election system).

To the extent that Defendants argue that it would be too burdensome to engage in a full rulemaking proceeding before the March primary elections, the Court can simply order proper relief or Defendants can issue emergency rules to implement Plaintiffs' proposed clarifications. Ala. Code § 41-22-5(b) (permitting the issuance of emergency rules where there is a need "to comply with a federal statute or regulation"). This is a step that the Secretary of State previously took less than two months before an election to define the Positively Identify Provision, *see* Section II *supra*, and it requires only a minimal administrative effort.

In any event, any minor inconvenience experienced by the State in its effort to ensure that election officials have sufficient guidance to properly implement the

law, and that voters too understand the provision and are given the greatest access to the vote, would be insufficient to defeat this motion. Put simply, this is a case where "[g]iven the right at issue and the likely injury caused by not entering a preliminary injunction," the "potential injury to Plaintiffs outweighs the harm to the State and Defendants." *Common Cause*, 406 F. Supp. 2d at 1376. *See also Ga. State Conference of the NAACP*, 2015 WL 4633575, at *9 (recognizing that "an injunction would require additional efforts on the part of the [defendant]," but finding that a VRA violation posed a greater harm); *Metro. Dade Cty.*, 815 F. Supp. at 1478 ("[T]he harm to the voters who are protected by the [VRA] outweighs the harm that the County must bear in complying with the measures of relief that the Court will prescribe.").

E. The Relief Plaintiffs Seek Is Modest and Appropriately Tailored to the Harms at Issue.

Plaintiffs are moving the Court to preliminarily enjoin Defendants by ordering specific and objective guidance governing, or otherwise directing Defendants to properly define, the Positively Identify Provision. The relief Plaintiffs seek is modest and, even if the injunction is granted, additional issues regarding Defendants' violations of the Constitution and Section 2 would remain.

The requested injunction would require an interpretation of the Positively Identify Provision under which election officials would be able and required to "positively identify" an individual lacking one of the required photo IDs if that

individual can: (1) answer simple questions about identifying information in the poll book, such as the voter's name and address, (2) sign an affidavit confirming his or her identity, or (3) produce a form of identification previously permissible under Alabama's non-photo voter ID law. Plaintiffs seek one good faith exception to this rule: An election official that signs an affidavit stating, with particularity, a basis for doubting the prospective voter's claimed identity could opt not to "positively identify" a voter.

Plaintiffs' requested relief is in no way extraordinary and is tailored to address the harm arising from Alabama's *per se* violation of Section 201.[8] Courts have provided similar injunctive relief in VRA cases. For example, in *United States v. Ward*, the Court applied the prohibition on voucher requirements and ordered parish officials—who had required Black voters to prove their identity by the voucher of two registered voters—to "[a]ccept from Negro applicants for registration reasonable proof of their identity," including documents like library cards, utility bills, and rent receipts. 352 F.2d 329, 332-33 (5th Cir. 1965); *see also Veasey v. Abbott*, 796 F.3d 487, 519 (5th Cir. 2015) (holding that, where a photo ID law violated the VRA, one possible remedy "would be to reinstate voter

[8] Halting the enforcement of the Positively Identify Provision in its entirety would be improper since, if correctly interpreted and fairly administered, the Provision would serve to protect the rights of those voters without the required photo ID, and "[n]othing in [the VRA] shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 52 U.S.C. § 10311.

registration cards as . . . acceptable identification"); *South Carolina v. United States*, 898 F. Supp. 2d 30, 34 (D.D.C. 2012) (in response to litigation under the VRA, the state issued binding rules governing a provision of its photo ID law that permitted people to continue to vote with non-photo registration cards). Likewise, provisions that allow affidavits to be accepted in lieu of photo ID are commonly allowed in other states. *See, e.g.*, La. Stat. Ann. § 18:562(A)(2) (permitting voters without photo ID to vote after signing an affidavit stating the voter's date of birth and mother's maiden name); Mich. Comp. Laws Ann. § 168.523(2) (permitting voters without photo ID to vote after signing an affidavit).

Moreover, Plaintiffs' requested preliminary injunction is narrowly tailored because it does not seek to preliminarily enjoin the Photo ID Law, or even the Positively Identify Provision, as a whole. By including a method for election officials to raise good faith objections to a prospective voter's identity, the proposed relief would remain consistent with the Photo ID Law's purposes. *Cf. Veasey*, 796 F.3d at 519.

IV. CONCLUSION

Because the Positively Identify Provision is a prohibited test or device, the Court should grant Plaintiffs' Motion for Preliminary Injunction for the upcoming March 1, 2016 primary elections and all future statewide and local elections.

Respectfully submitted this 8th day of January 2016.

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CERTIFICATE OF SERVICE

I certify that on 8 January 2016 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following attorneys:

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