

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

Harding, *et al.*,

Plaintiffs,

v.

John Bel Edwards, the Governor of the State
of Louisiana, in his Official Capacity, *et al.*,

Defendants,

Civil Action: 20-cv-495-SDD-RLB

**DEFENDANTS THE STATE OF LOUISIANA AND THE SECRETARY OF STATE'S
JOINT RESPONSE IN OPPOSITION MOTION FOR A PRELIMINARY INJUNCTION**

Defendant Jeff Landry, in his official capacity as Attorney General of Louisiana and on behalf of the State of Louisiana, and Kyle Ardoin, in his official capacity as Louisiana Secretary of State, file this Joint Response in Opposition to Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION

Of course, there will always be other voters for whom, through no fault of the state, getting to the polls is “difficult” or even “impossible.” But as the Court explains, that is a matter of personal hardship, not state action. For courts to intervene, a voter must show that the state “has in fact precluded [voters] from voting”—that the voter has been “prohibited from voting by the State.”

Tex. Democratic Party v. Abbott, 961 F.3d 389, 415 (5th Cir. 2020) (Ho, J. concurring) (internal citations omitted) (quoting and citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 810, 810 n.8, 808, 808 n.7 (1969)); *see also id.* at 404. Plaintiffs' preliminary injunction fails due to the simple, undisputable fact that the current pandemic¹ is not caused by the State of Louisiana. Likewise, Plaintiffs' attempt at Preliminary Injunction by ambush with their newly invented—and mostly novel—claim under the Americans with Disabilities Act (“ADA”) similarly fails.

¹ For simplicity Defendants will refer to COVID-19, SARS-CoV-2, or coronavirus as “the Virus.”

The one thing anyone can say about this case with certainty is that “it’s like déjà vu all over again.”² Once again, nearly identical Plaintiffs come to this Court seeking nearly identical relief with nearly identical claims. And, just like déjà vu, the outcome should also be nearly identical. Just two months ago, this Court dismissed the *Power Coalition* plaintiffs’ claims because they lacked standing. *Clark v. Edwards*, No. 20-308-SDD-RLB, 2020 U.S. Dist. LEXIS 108714 (M.D. La. June 22, 2020) (hereinafter, *Power Coalition 1*).³ Now, the Power Coalition Plaintiffs return, substituting two individual Plaintiffs from *Power Coalition 1*—Jane Chandler and Edith Gee Jones—with one new individual Plaintiff—Omega Taylor. *Compare Power Coalition 1*, No. 20-cv-283 (M.D. La. May 5, 2020) (complaint filed) with *Harding v. Edwards*, No. 20-cv-495 (M.D. La. Aug. 3, 2020) (Complaint filed) (hereinafter, *Power Coalition 2*). Irrespective of the procedural gamesmanship being played by the *Power Coalition 2* Plaintiffs, the outcome ought to be the same: Plaintiffs here lack standing.⁴

It is extraordinarily telling that the United States Supreme Court has stayed or overturned nearly every Federal Court that sought to change a state’s election laws in light of the Virus. *See, e.g., Republican Nat’l Comm. v. Democratic Nat’l Comm.*, No. 19A1016 (Apr. 6, 2020) (granting stay of district court order requiring Wisconsin to count late postmarked absentee ballots for primary election, pending final disposition on appeal); *Merrill v. People First Of Ala.*, No. 19A1063 (July 2, 2020) (granting stay of district court order enjoining Alabama’s duly enacted photo identification and witness requirements for absentee voting during the pandemic); *Little v.*

² This quote is commonly attributed to baseball legend Yogi Berra.

³ *Power Coalition 1* was the first filed case and was consolidated with *Clark v. Edwards*. However, due to the recusal of the Honorable Judge Jackson from *Power Coalition 1*, the *Clark* case was adopted as the lead case. In the interest of simplicity, the *Clark v. Edwards* consolidated litigation will be referred to as *Power Coalition 1* due to the overwhelming similarities between this litigation and the original *Power Coalition* litigation.

⁴ It also must be noted that Hurricane Laura, a Category 4 hurricane, made landfall during the timeframe allowed for briefing, which resulted significant loss of life and property, further complicating the election calendar in Louisiana. The Secretary of State’s Office is currently working with Parish officials to determine what assistance from the State or Secretary is necessary for those hard-hit parishes.

Reclaim Idaho, No. 20A18 (July 30, 2020) (granting stay of district court orders relaxing Idaho’s rules for ballot initiatives); *Clarno v. People Not Politicians*, No. 20A21 (Aug. 11, 2020) (granting stay of district court order relaxing Oregon’s election procedures because of the coronavirus pandemic); *Thompson v. DeWine*, No. 19A1054 (June 25, 2020) (denying application to vacate Sixth Circuit stay of district court order suspending Ohio’s enforcement of in-person signature requirements and extending filing deadlines for initiative campaigns); *Tex. Democratic Party v. Abbott*, No. 19A1055 (June 26, 2020) (denying application to vacate Fifth Circuit stay of district court order forcing Texas to implement no-excuse absentee voting). The Supreme Court has also denied relief in a number of cases where litigants have sought to challenge various actions of states to deal with non-election related actions related to the Virus. *See, e.g., South Bay United Pentecostal Church v. Newsom*, No. 19A1044 (May 29, 2020); *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070 (July 24, 2020). Finally, this Court previously dismissed nearly identical claims less than three-months ago. *See Power Coalition I*, 2020 U.S. Dist. LEXIS 108714.

Setting aside the practical and procedural inequities—if not procedural infirmities—brought about by this putative *preliminary* injunction motion, Plaintiffs still have no hope of meeting the demanding standard required of claims for mandatory injunctive relief. First, this Court lacks subject matter jurisdiction under Article III of the Constitution.⁵ Second, Plaintiffs do not have a clear entitlement to relief on the merits of their claims because Louisiana’s interest in the integrity of its election process, including the prevention of voter fraud, is an interest sufficient under rational basis review pursuant to the Fourteenth and First Amendment and Plaintiffs have no entitlement to relief under the ADA. Third, because Plaintiffs’ harms are speculative at best, they will not suffer an irreparable injury absent an injunction. Fourth, the harm to Louisiana and

⁵ In the interest of clarity and space, Defendants’ jurisdictional defenses are found in the State of Louisiana’s Motion to Dismiss the Amended Complaint.

the public interest advise against the grant of a mandatory preliminary injunction. Finally, Plaintiffs' claims come too late in the election season under the Supreme Court's *Purcell* doctrine.

Therefore, for the reasons that follow, a preliminary injunction, which operates effectively as a permanent injunction, should not issue for the November and December 2020 elections.⁶

I. PLAINTIFFS HAVE NOT SHOWN A PRELIMINARY INJUNCTION IS JUSTIFIED HERE.

Plaintiffs must show the following to obtain a preliminary injunction: (1) a substantial likelihood of success on the merits, (2) a substantial threat that Plaintiffs will suffer irreparable injury in the absence of an injunction, (3) that Plaintiffs' threatened injury outweighs the threatened harm to the defendant, and (4) that granting the preliminary injunction is not against the public interest. *PCI Transp. Inc. v. Fort Worth & W.R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). The Fifth Circuit has "cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' on all four requirements." *Id.* (quoting *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003)). While Plaintiffs have the burden of meeting "all four requirements" for a preliminary injunction, none of the four favor Plaintiffs here. *Id.* (emphasis added).

In addition to the significant hurdle Plaintiffs must overcome to show they are "clear[ly] entitle[d] to the relief they seek, *Justin Indus., Inc. v. Choctaw Secur., L.P.*, 920 F.2d 262, 268 (5th Cir. 1990) (per curiam), Plaintiffs' preliminary injunction is suspect because it is not actually a preliminary injunction at all. "The purpose of [a preliminary injunction] is *not* to conclusively

⁶ The fact that there exists no Emergency Election Plan due to the reticence of the Governor is a red herring. In reality, the inability to have the government take a particular action is neither evidence of anything nor reason to overturn the law as it stands. It is a feature rather than a flaw of the republican form of governance guaranteed by the U.S. Constitution that sometimes a person's preferred law does not get adopted. *Cf. Fusilier v. Landry*, 963 F.3d 447, 464-466 (5th Cir. 2020) (noting that "legislation succeeds or fails standing alone. It is no evidence of discriminatory intent").

determine the rights of the parties” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (emphasis added); *see also Miami Beach Fed. Sav. & Loan Assoc. v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958) (the Fifth Circuit has “repeatedly held that an order for a temporary injunction does not and cannot decide the merits of the case.”). However, that is exactly what Plaintiffs are seeking here. Both the Amended Complaint and the Preliminary Injunction Motions seek relief *only* for the 2020 elections. It seems nearly impossible that this case will proceed to even summary judgment—let alone a full trial on the merits—in time for the November or December elections due to the time available and the significant discovery and other evidentiary requirements that are attendant with the Court’s normal procedures. *See Order Granting Mot. to Stay, Johnson v. Ardoin*, No. 18-cv-625 (M.D. La. October 17, 2019) (ECF No. 133) (staying Voting Rights Act case that sought to create an additional majority-minority district in Louisiana in October of 2019 for the 2020 elections because given the “posture of this case and the Court’s crowded docket, the likelihood of resolution before the Fall 2020 elections is remote.”). Therefore, it is unquestionable that should the Court grant Plaintiffs’ proposed “preliminary” injunctive relief, the actual effect of that relief would be to conclusively determine the rights of the parties with respect to *all* of Plaintiffs’ claims.

Plaintiffs have an additional hurdle in that claims for mandatory injunctive relief are subject to a heightened standard. Under normal circumstances, when seeking a preliminary injunction, a plaintiff must prove not just that they are likely to succeed on the merits but that they have a *substantial* likelihood of success. However, as “extraordinary” as granting a preliminary injunction is in the normal course, “[m]andatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite*, is particularly disfavored, and should not be issued unless the facts and the law clearly favor the moving party.” *Martinez v. Mathews*, 544 F.2d 1233, 1243

(5th Cir. 1976); *see also Miami Beach Fed. Sav. & Loan Assoc. v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958) (“A mandatory injunction, especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are *clearly in favor* of the moving party.”) (emphasis added); *Justin Indus., Inc.*, 920 F.2d at 268 (a party “seeking a mandatory injunction . . . bears the burden of showing *clear entitlement* to the relief under the facts and the law.” (emphasis added)); *Humana Ins. Co. v. Tenet Health Sys.*, 2016 U.S. Dist. LEXIS 161274, *35 (N.D. Tex. November 21, 2016).

Therefore, because this is not a “rare instance[] in which the facts and law are *clearly* in favor” of Plaintiffs, the Motion for Preliminary Injunction should be denied. *See Miami Beach Fed. Sav. & Loan Assoc.*, 256 F.2d at 415 (emphasis added).

A. Plaintiffs do Not Have a Substantial Likelihood of Success on the Merits.

1. Plaintiffs are Unlikely to Succeed on the Merits of Their First and Fourteenth Amendment Claims.

Louisiana is vested with the constitutional authority to enact elections regulations. *See* U.S. Const. art. I, § 4; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick v. Takushi*, 504 U.S. 428, 433, 441 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Although the right to vote is a fundamental right, “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.” *Burdick*, 504 U.S. at 433. The Supreme Court has therefore recognized that a state’s election code will “inevitably affect[] – at least to some degree—the individual’s right to vote and his right to associate with others for political ends.” *Anderson*, 460 U.S. at 788. This “burden” on the right to vote, such as it is, is not a *per se* violation of the constitution. *Id.*

To address the fact that an election regulation will always burden First and Fourteenth Amendment rights, at least to some degree, the Supreme Court has articulated a balancing test to

determine the applicable level of scrutiny. *See Burdick*, 504 U.S. at 434. “[W]hen a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* at 434 (emphasis added) (quoting *Anderson*, 460 U.S. at 788)). By contrast, when a challenged law “severely” burdens voting rights, heightened scrutiny applies, and the law in question must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* at 434 (internal citation omitted). “However, the class of laws facing this higher scrutiny is limited. Subjecting too many laws to strict scrutiny would unnecessarily ‘tie the hands of States seeking to assure that elections are operated equitably and efficiently.’” *Sarvis v. Alcorn*, 826 F.3d 708, 717 (4th Cir. 2016) (quoting *Burdick*, 504 U.S. at 433).

If rational basis (or even intermediate scrutiny) is applicable to Plaintiffs’ claims, then the State need only assert regulatory interests that are “sufficiently weighty to justify the limitation.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). The Supreme Court does not require “empirical verification of the weightiness of the State’s asserted justifications.” *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

Under rational basis review (i.e. minimal scrutiny under *Anderson/Burdick*), “a court must uphold the law if there is any conceivable basis for it.” *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 406 (5th Cir. 2020) (quoting *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam)). “The Constitution does not require the [state] to draw a perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line.” *Id.* at 407 n.43 (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012)).

Louisiana has many bases that meet rational basis review including to preserve the integrity of the election process, to combat voter fraud, to ensure public confidence in the outcome of elections, to timely conclude elections processes, and to prevent confusion among the electorate with respect to the outcome of any last minute changes. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008). The Supreme Court has repeatedly and unequivocally stated that “[a] State indisputably has a compelling interest in preserving the integrity of its election process.” *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *see also, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *Republican Nat’l Comm.*, 140 S. Ct. at 1207 (noting the “grave[] effect [on] the integrity of the election process.”); *Crawford*, 553 U.S. at 197 (2008) (plurality op.) (“[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”).

Relatedly, the Supreme Court has not been shy with repeatedly emphasizing that the State has a legitimate interest in preventing voter fraud. *See Purcell*, 549 U.S. at 4 (calling the State’s interest in preventing voter fraud “compelling.”); *Crawford*, 553 U.S. at 194-97. The risk of voter fraud is especially pernicious here, where Plaintiffs seek unlimited and unrestricted absentee voting. Absentee voter fraud is a “much greater” concern than in-person voting. *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016). Also, “[m]ail-in voting involves a complex procedure that cannot be done at the last minute.” *Id.* at 256. This increases the risks of counting errors that may dilute the votes of everyone. *Cf. Purcell*, 549 U.S. at 4 (“Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. ‘[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.’” (quoting *Reynolds v. Sims*, 377 U.S. 533, 555

(1964))).⁷ Add to that the fact that it may be impossible for the local parish Boards and Registrars to change their procedures sufficiently in time for any election in 2020 to handle the influx of unlimited vote by mail, and the harm to the State—and its voters—becomes clear. *See, e.g.*, Ex. Q ¶ 32-36.

a. Plaintiffs’ First and Fourteenth Amendment Claims Fail due to Lack of State Action.

The State of Louisiana’s and the Secretary of State’s arguments related to standing, *see* Joint Mot. to Dismiss at 4-18,⁸ proceed *a fortiori* to the conclusion that Plaintiffs cannot succeed on the merits of their claims under the *Anderson/Burdick* framework because it is the Virus and not the challenged provisions of Louisiana law that is the cause of Plaintiffs’ alleged harms. A law that was perfectly constitutional before the Virus is not somehow made unconstitutional by the Virus. *See, e.g., President, Directors & Co. of Commercial Bank v. Buckingham Ex’rs*, 46 U.S. 317 (1847) (“If the power of the legislature be constitutionally exercised at the time, the act cannot afterwards, by any kind of fiction of relation, be divested of its constitutional character, and become unconstitutional and void.”). Therefore, rather than belabor the point, it is enough to say that all of Plaintiffs’ arguments fail on the merits for nearly identical reasons as they lack standing: The harm complained of is not due to any action by the State. *See, e.g., Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) (“The plaintiffs are welcomed and permitted to vote, and there is no indication that they are in fact absolutely prohibited from voting *by the State*.”

⁷ *See generally cf., In the Matter of Investigation of Election Irregularities Affecting Counties within the 9th Congressional District* (ordering a new election due to voter fraud) (attached as Ex. M); *Final Report of the Miami-Dade Grand Jury Spring Term 2012*, (11th Jud. Cir. Miami-Dade 2012) (noting the risk for fraud and other problems with mail in voting generally) (attached as Ex. N).

⁸ An ECF number was unavailable at the time of drafting due to the proximate time frame of the filing of the Motion to Dismiss and the Opposition to the Motion for Preliminary Injunction.

(emphasis in original) (internal quotation marks omitted)).⁹ This is especially true of their First Amendment and Equal Protection claims. *See Tex. Democratic Party*, 961 F.3d at 415 (Ho, J. concurring) (internal citations omitted) (quoting and citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 810, 810 n.8, 808, 808 n.7 (1969)); *see also id.* at 405.

b. The Excuse Requirement and Current Early Voting Timetable Survives Rational Basis Review Under *McDonald* and *Texas Democratic Party*.

Plaintiffs' arguments that every voter be permitted to vote by absentee ballot and that early voting be extended "amid the COVID-19 pandemic", *see* ECF No. 31-1 at 10, fail in light of the Supreme Court's holding in *McDonald* and the recent holding by a Fifth Circuit motions panel in *Texas Democratic Party*.¹⁰ "The Constitution is not 'offended simply because some groups find voting more convenient than' do the plaintiffs because of a state's mail-in ballot rules." *Tex. Democratic Party*, 961 F.3d at 405 (quoting *McDonald*, 394 U.S. at 810). "That is true even where voting in person 'may be extremely difficult, if not practically impossible,' because of circumstances beyond the state's control, such as the presence of the Virus." *Id.* at 405 (quoting *McDonald*, 394 U.S. at 810) (emphasis added). "[U]nder governing Supreme Court precedent, expanding access to mail-in voting to redress personal hardship—as opposed to state action—is a policy matter for the Legislature, not the courts." *Id.* at 415 (citing, among others, *O'Brien v. Skinner*, 414 U.S. 524, 525-27, 529-31 (1974)). The simple fact is that there is no Constitutional right to either vote absentee, *McDonald*, 394 U.S. at 807-808, or for "any opportunities for early

⁹ In fact, the individual Plaintiffs in this case have proven the 5th Circuit correct – they all voted in person in both the July and August primaries, and none contracted the Virus from voting. P.I. Ex. 5 ¶ 13; P.I. Ex. 4 ¶¶ 16, 18; P.I. Ex. 6 ¶ 16; *but see* Ex. G ¶ 6 (stating that Ms. Taylor voted in a different precinct than stated in her affidavit).

¹⁰ It also cannot be emphasized enough that all three individual Plaintiffs voted in person during the last two elections that were held during the Virus. *See* P.I. Ex. 5 ¶ 13; P.I. Ex. 4 ¶ 16, 18; P.I. Ex. 6 ¶ 16; *but see* Ex. G ¶ 6 (stating that Ms. Taylor voted in a different precinct than stated in her affidavit). One of the Plaintiffs was even a poll worker, sitting in a polling location that she claims to be injurious to her health for over many hours. Ex. G ¶¶ 8-11; Ex. D ¶¶ 3-5, 7-8.

voting,” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (emphasis in original).

In fact, the right to vote is “not at stake” even in light of the Virus because “there is no indication that [voters] ‘are in fact absolutely prohibited from voting *by the State.*’” *Tex. Democratic Party*, 961 F.3d at 404 (emphasis added in *Tex. Democratic Party*) (quoting *McDonald*, 394 U.S. at 807, 808 n.7)). To show that the right to vote is “at stake,” Plaintiffs must prove that their right to vote has been “in fact absolutely prohibited.” *Id.* at 404. Because Plaintiffs cannot possibly make that showing here, nor have they even attempted to do so, rational basis follows. Every Louisiana voter, including Plaintiffs, are permitted to vote in person either on election day or for a seven-day early voting period (assuming they meet the registration and other legal requirements). More than 500,000 Louisianans voted in the July 2020 primary election.¹¹ Therefore, enforcing Louisiana’s excuse absentee voting regime and not extending early voting does not prove any prohibition on the right to vote.¹²

Furthermore, Plaintiffs’ own actions contradict their claims. Each individual Plaintiff voted in person either early or on election day for both the July and August 2020 elections. *See* P.I. Ex. 5 ¶ 13; P.I. Ex. 4 ¶ 16, 18; P.I. Ex. 6 ¶ 16; *but see* Ex. G ¶ 6. Despite the fact that all of the individual Plaintiffs here had no problems voting twice in the last 60 days, every Louisianan who is either diagnosed with the Virus or who has a co-morbidity that, in a medical professional’s opinion, places that person at increased risk from the Virus has a qualifying disability and is able to vote

¹¹ Louisiana has not held a July primary previously, and the July primary was the delayed traditional March primary, so direct comparisons of turnout from previous primaries are not reliable.

¹² Plaintiffs’ claim for increased early voting is bizarre as there is no reasonable way for any court to determine that 13 days of early voting is somehow constitutional and does not present an undue burden on the right to vote but that 7 days somehow is unconstitutional. As this Court said before, Plaintiffs “want[] to vote early, and the law permits [them] to do so. The Court sees no injury to [their] right to vote.” *Power Coalition I*, 2020 U.S. Dist. LEXIS 108714, *22.

absentee under current Louisiana law. *See* La. R.S. § 18:1303(I); A.G. Op. No. 20-0104 (attached herein as Ex. A).

Rational basis is compelled here due, in part, to two cases in particular: *McDonald* and *Tex. Democratic Party*. In *McDonald v. Bd. Of Election Comm'rs*, the Supreme Court held that a statute that denied certain inmates from receiving absentee ballots did not restrict the right to vote. 394 U.S. 802, 804 (1969). The Court ruled that because the inmate was not “in fact *absolutely prohibited* from voting by the State,” *id.* at 809 (emphasis added); *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403 (5th Cir. 2020) (also adding emphasis), the statute was subject to rational basis review. *Tex. Democratic Party*, 961 F.3d at 403-04.

Following in *McDonald's* footsteps, a Fifth Circuit motions panel recently stayed a preliminary injunction issued in the Western District of Texas that allowed every voter to vote absentee if they had a “fear” of contracting the Virus. *See id.* at 412. Like Louisiana, “Texas has similarly decided to give only some of its citizens the option to vote by mail.” *See id.* at 403.

Unsurprisingly, other circuits have similarly held that there is no right for everyone to have an absentee ballot. For example, in *Griffin v. Roupas*, the Seventh Circuit upheld a district court’s motion to dismiss a claim on behalf of “working mothers who contend that because it is a hardship for them to vote in person on election day, the U.S. Constitution requires Illinois to allow them to vote by absentee ballot.” 385 F.3d 1128, 1129 (7th Cir. 2004) (Posner, J. for a unanimous panel). In affirming the district court’s opinion, the Seventh Circuit noted that:

In essence the plaintiffs are claiming a blanket right of registered voters to vote by absentee ballot. For it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting (and would it then have to buy everyone a laptop, or a Palm Pilot or Blackberry, and Internet access?). That leaves as the only alternative that will satisfy the plaintiffs a general hardship exemption from the requirement of in-person voting; and as a practical matter that means absentee voting at will. For “hardship” is a subjective category dependent on personal circumstances that cannot be codified but must be left to the judgment

of each voter. It is hardly to be supposed that election officials would require proof of hardship or question claims of hardship; the necessary inquiry would be unmanageable.

Id. at 1130. The court goes on to note that “voter fraud is a serious problem in U.S. elections” and the many other problems created by absentee voting. *See id.* at 1130-31.

Rational basis is also justified under the *Anderson/Burdick* framework. As has been noted, ballot access is determined under the Supreme Court’s analysis in *McDonald*. *Tex. Democratic Party*, 961 F.3d at 405-06. The panel correctly noted that *Burdick* cited approvingly to *McDonald*, *id.* at 406 (“*McDonald* lives.”), and, in any event, the application of the determination of scrutiny under the *Anderson/Burdick* framework would be subject to the *McDonald* Court’s finding that restrictions on absentee voting—or similar putative restrictions like not expanding early voting—are subject to rational basis review. *McDonald v. Bd. Of Election Comm’rs*, 394 U.S. 802, 807-09 (1969). There is also the simple fact that there is no constitutional right to vote absentee. *Id.* at 807-808. And, when fundamental rights are not involved, minimal scrutiny is appropriate. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-91 (2008). Therefore, no matter whether a court analyzes *McDonald* alone or in conjunction with *Anderson/Burdick*, the same result is reached: Louisiana’s limitations on absentee ballots are subject to, and survive, rational basis review.

Under rational basis review, “[t]he law need only ‘bear some rational relationship to a legitimate state end.’” *Tex. Democratic Party*, 961 F.3d at 406. The State has offered, and will offer, at least four legitimate ends that are rationally related to not allowing every voter to vote absentee: (1) taking prophylactic steps to prevent voter fraud; (2) maintaining the integrity of its elections systems; (3) avoiding voter confusion; and (4) preserving public confidence in election results. *See generally* Ex. Q. Each of these individually are sufficient to meet rational basis review.

Crawford, 533 U.S. at 196-97. Therefore, Plaintiffs’ request for unlimited absentee ballot voting is unlikely to succeed on the merits.

2. Plaintiffs Are Unlikely to Succeed on the Merits of their ADA Claims.

In a transparent attempt at a “Hail Mary” to save their deficient constitutional claims, Plaintiffs have amended their suit to allege new claims under the ADA. Amend. Compl. at ¶¶ 17, 136-144; Mot. for Prelim. Inj. at 21-23. Plaintiffs allege that “in the context of the ongoing COVID-19 pandemic, the Challenged Provisions unduly exclude people with comorbidities from equal participation in the upcoming elections in violation of Title II of the [ADA].” Mot. for Prelim. Inj. at 21. Plaintiffs’ new claims under the ADA are without merit and are destined to fail, just as their constitutional claims.

First, Plaintiffs fail to make out a *prima facie* case of discrimination under the ADA because either they do not have ADA-recognized disabilities, they do not meet the essential eligibility requirements to vote absentee, and they are not excluded by reason of their “disabilities,” or at all. Plaintiffs’ failure to make out a *prima facie* ADA case also stems from their failure to establish proper standing. *See* Joint Mot. to Dismiss at 4-18. Second, even if Plaintiffs do somehow manage to make out a *prima facie* case of discrimination under the ADA, which they do not, their requested relief works a “fundamental alteration” to Louisiana’s absentee voting system. *See, e.g., People First of Ala. v. Merrill*, 2020 U.S. Dist. LEXIS 104444, *67-68 (N.D. Ala. June 15, 2020), stay granted, 2020 U.S. LEXIS 3541 (July 2, 2020). Similarly, Plaintiffs’ proposed remedy does not constitute a reasonable modification of the Louisiana election law.

Because Plaintiffs fail to make out a *prima facie* ADA violation, and their requested relief would be unreasonable, they are not likely to succeed on their new ADA claims.

a. Plaintiffs Have Not Established a *Prima Facie* Case of Discrimination Under the ADA.

Plaintiffs cannot establish that Louisiana’s election laws work a *prima facie* ADA violation because Plaintiffs do not have ADA-recognized disabilities, do not meet the essential eligibility requirements, and are not excluded or discriminated against because of their alleged “disabilities,” or at all. Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. “A plaintiff must first establish a *prima facie* case of discrimination before relief under the ADA can be considered.” *Melton v. Dall. Area Rapid Transit*, 391 F.3d 669, 672 (5th Cir. 2004). Thus, to establish a *prima facie* case of discrimination under Title II of the ADA, a plaintiff must demonstrate:

(1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability.

Id. at 671-72. *See also Lightbourn v. County of El Paso*, 118 F.3d 421, 428 (5th Cir. 1997) (quoting 42 U.S.C. § 12132). If a plaintiff can establish a *prima facie* case of discrimination, “a presumption of discrimination arises,” and the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 590 (5th Cir. 2016).

i. *Plaintiffs Cannot Establish “Disability” Under the ADA in the Context of Voting.*

As a preliminary matter, a plaintiff must establish that he or she is disabled in order to maintain a cause of action under the ADA.¹³ *Mason v. United Air Lines, Inc.*, 274 F.3d 314, 316

¹³ In the present case, Plaintiffs do not assert their ADA claims on behalf of Plaintiffs Harding or Power Coalition, *see* Amend. Compl. at ¶ 139, and so no ADA analysis is necessary for them. Similarly, the Louisiana Branch of the

(5th Cir. 2001). *See also Smith v. Tangipahoa Parish Sch. Bd.*, 2006 U.S. Dist. LEXIS 85377, *21-27 (E.D. La 2006). The term “disability” is defined under the ADA as: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment” 42 U.S.C. § 12102(1). The determination of disability boils down to a three-part test, examining whether: (1) the plaintiff has an “impairment;” (2) whether the impairment affects a “major life activity;” and (3) whether its effects are “substantial.” *Waldrip v. General Elec. Co.*, 325 F.3d 652, 654 (5th Cir. 2003). *See also Moore v. Centralized Mgmt. Servs., LLC*, 2020 U.S. Dist. LEXIS 74157, *5-10 (E.D. La. 2020); *Hebert v. Ascension Parish Sch. Bd.*, 396 F. Supp. 3d 686, 693 (M.D. La. 2019).

Plaintiff Pogue incorrectly asserts that her asthma is conclusively a disability under the ADA. Compl. ¶¶ 23, 139. Asthma can, in some cases, qualify as a disability under the ADA. *See, e.g., Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998). Suffering from asthma, however, does not constitute a *per se* substantial limitation on the major life activity of breathing, and courts engage in an individualized inquiry, including, until recently, the effect of medication on the condition, in order to determine whether a condition substantially limits a major life activity. *See Kropp ex rel. S.K. v. Me. Sch. Admin. Union # 44*, 2007 U.S. Dist. LEXIS 11648, 2007 WL 551516, at * 17 (D. Me. Feb. 16, 2007) (any limitation must be substantial even when medications and treatments are in place) (citing *Sutton v. United Air Lines*, 527 U.S. 471, 481-83 (1999) (superseded by ADA Amendments Act of 2008, Pub.L. No. 110-325, 122 Stat. 3553 (2008)); *White v. Honda of Am. Mfg.*, 241 F.Supp.2d 852, 856 (S.D. Ohio 2003) (collecting cases).

NAACP alleges no separate claim under the ADA outside of its member Ms. Taylor. However, as is shown *infra*, Ms. Taylor is not covered under the ADA (and can likely vote absentee in any event) and therefore Louisiana NAACP’s claims under the ADA also fail.

Asthma has typically been found to rise to the level of a substantial limitation on the major life activity of breathing only where the plaintiff has a long history of asthmatic attacks and endures numerous and severe restrictions on daily activities as a result of the condition. *See, e.g., Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1245 (10th Cir. 2004) (explaining the length of time and the severity of the asthmatic symptoms); *Geuss v. Pfizer, Inc.*, 971 F.Supp. 164, 169 (E.D. Pa. 1996) (same).

Where a plaintiff suffers asthma attacks only in response to particular stimuli and is able to engage in almost all normal life activities, courts have been less likely to conclude that the plaintiff is substantially limited in the major life activity of breathing. *See, e.g., Boker v. Sec'y, Dep't of Treasury*, 2009 U.S. Dist. LEXIS 90109 (S.D. Oh. 2009) (Plaintiff not disabled under the ADA where her asthma is only triggered by specific irritants); *Ventura v. City of Independence*, 108 F.3d 1378, 1997 WL 94688, at *2 (6th Cir. 1997) (same); *Minnix v. City of Chillicothe*, 205 F.3d 1341, 2000 WL 191828 (6th Cir. 2000) (same); *DeCastro v. Lahood, Sec'y, U.S. Dept. of Transp.*, 2009 U.S. Dist. LEXIS 33389, 2009 WL 1067030 (E.D.N.Y. April 21, 2009) (finding the limitations of asthma attacks, windedness and wheezing only impacted plaintiff's major life activity "during an exacerbation of symptoms" and thus no disability within the Rehabilitation Act found); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999) (Plaintiff's "substantial physical activity without encountering debilitating allergens cuts against his claim of disability. Simply put, there is not enough evidence of off-the-job breathing problems to find a substantial limitation of that life activity."); *Droutman v. N.Y. Blood Ctr., Inc.*, 2005 U.S. Dist. LEXIS 42951, 2005 WL 1796120, at *6 (E.D. N.Y. July 27, 2005) (Plaintiff's "ten or so asthma attacks were apparently limited to her working environment, self-medicated with an inhaler, and mitigated by breathing exercises and movement to an area of fresh air[.] [Plaintiff] was also generally capable of

performing her job assignments [and] thus did not have a 'disability' as defined by the ADA. . . .”); *Gaddy v. Four B Corp.*, 953 F.Supp. 331, 337 (D. Kan. 1997) (finding that a person was not substantially limited in her ability to breathe where she was able to control her asthma with an inhaler or a breathing machine).

Plaintiff Pogue alleges her asthma and respiratory issues are “environmentally induced, triggered by allergens and other pollutants, like smoke or dust. [She has] difficulty breathing and require[s] an inhaler when [she] experience[s] an asthma attack.” P.I. Ex. ¶ 6; Amend. Compl. at 23. Her “symptoms are . . . not perpetual, so [she] do[es] not require [her] inhaler on a frequent or standard basis.” P.I. Ex. 5 ¶ 6. In her declaration, Plaintiff Pogue describes going grocery shopping, visiting doctors for consultations, and voting in person during the July 11, 2020 and August 15, 2020 elections all during the Virus. P.I. Ex. 5 ¶¶ 4, 7, 13. Plaintiff Pogue herself defines her asthma as a “minor diagnosis” and “not ‘moderate or severe.’” *Id.* ¶ 10. Plaintiff Pogue admits that her respiratory issues are so minor that she believed applying for an absentee ballot by attesting that she has a “serious underlying medical condition” would subject her to “criminal penalties.” *Id.* ¶ 10-11. If Plaintiff Pogue does not believe her intermittent respiratory issues are “serious,” “severe,” or even “moderate,” how can they somehow rise to the level of “substantial” for ADA purposes?¹⁴ *Cf. Boker v. Sec’y, Dep’t of Treasury*, 2009 U.S. Dist. LEXIS 90109. Her respiratory issues were not serious enough to inhibit her in any way from voting previously and she submits no evidence to adduce exactly what her respiratory issues are. Accordingly, Plaintiff Pogue’s alleged

¹⁴ See Centers for Disease Control and Prevention, *People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (accessed on 9/1/20) (listing only “moderate-to-severe” asthma as a factor that “*might*” increase risk for severe illness from the Virus).

respiratory issues do not rise to the level of a disability for purposes of her ADA claims in this case.¹⁵

Plaintiff Taylor asserts that her diabetes, high blood pressure, and “other medical conditions” classify as disabilities under the ADA. Amend. Compl. ¶¶ 24, 139; Mot. Prelim. Inj. at 21-23. In her declaration, Plaintiff Taylor clarifies that the “other medical conditions” described in her complaint and motion for preliminary injunction refer to a thyroid disorder. P.I. Ex. 6 at 4. At the *prima facie* stage of an ADA analysis a “plaintiff must point to evidence that [s]he has a disability for purposes of the ADA.” *Steele v. Oasis Turf & Tree, Inc.*, 2012 U.S. Dist. LEXIS 103722, *16-17 (S.D. Ohio 2012). Simply having a medical diagnosis is not sufficient to establish a “disability” for purposes of the ADA. *Laws v. HealthSouth N.Ky. Rehab. Hosp.*, 828 F.Supp.2d 889 (E.D. Ky. 2011) (granting summary judgment to employer because plaintiff did not show she was disabled under the ADA, never requested an accommodation, and worked full schedules). To demonstrate an impairment or disability under the ADA, plaintiffs “must offer some admissible evidence that [they are] ‘disabled’ as that term is defined in the ADA. Plaintiff’s own conclusory statements are insufficient.” *Smith v. Waffle House, Inc.*, 2012 U.S. Dist. LEXIS 85577, *5-6 (M.D. Tenn. 2012). Both this Court and the Fifth Circuit have held that diabetes does not always amount to “substantial limitations under the ADA” unless a plaintiff alleges sufficient facts to establish otherwise. *See Odds v. Louisiana*, 2012 U.S. Dist. LEXIS 134194, *7-8 (M.D. La. 2012); *Griffin v. UPS*, 661 F.3d 216, 220, 222-25 (5th Cir. 2011).

Plaintiff Taylor has not offered any evidence that she is “disabled” within the meaning of the ADA. Plaintiff Taylor fails to adequately describe her medical conditions whatsoever or

¹⁵ That said, she may be entitled to an absentee ballot under Louisiana law if, in a medical professional’s opinion, her asthma presents a unique risk in conjunction with the Virus such that it rises to the level of a disability. *See Ex. A.* Louisiana’s statutory provisions providing mechanisms for those with disabilities to vote does not define disability as the ADA does, but requires a medical professional to certify the disability.

explain why they qualify as disabilities under the ADA. *See generally* Amend. Compl. ¶¶ 24, 139; P.I. Ex. 6 at 4. Furthermore, Plaintiff Taylor does not adduce any evidence aside from her mere assertion that she actually has diagnoses for or suffers from these conditions. Amend. Compl. ¶¶ 24, 139; P.I. Ex. 6 at 4. Plaintiff Taylor has failed to “offer some admissible evidence that [s]he is ‘disabled’ as that term is defined in the ADA. [Her] own conclusory statements are insufficient.” *Smith*, 2012 U.S. Dist. LEXIS 85577 at *6. *See, e.g., id.* at *5-6 (holding that “plaintiff has not sufficiently created a genuine issue of material fact, through admissible evidence, that he is disabled”). *See also Odds*, 2012 U.S. Dist. LEXIS 134194 at *7-8; *Griffin*, 661 F.3d at 220, 222-25.

What evidence does exist shows that she is not at all impaired by her alleged condition. *See* P.I. Ex. 6; Ex. D, Ex. G. Ms. Taylor voted in person during both the July and August elections. *Id.* In addition, as evidenced by the affidavits of her registrar and from Parish payroll records, Ms. Taylor served as Commissioner in Charge for both summer elections at a polling place within her Parish.¹⁶ *See* Ex. D, Ex. G. Someone who has the ability to serve over twelve hours in a polling place for two summer elections in 2020, and who has regularly served as an election commissioner for the last five years has no valid claim of a disability under the ADA – absent some emerging health condition. Ms. Taylor has not made such allegations. Accordingly, no Plaintiff in the present case is disabled within the meaning of the ADA with respect to voting and so Plaintiffs’ ADA claims fail to reach even a *prima facie* level.

ii. *Plaintiffs Are Not Qualified Individuals Because the Challenged Election Laws Are Essential Eligibility Criteria.*

¹⁶ Ms. Taylor did *not* vote at the polling place she described in her affidavit. Rather, Ms. Taylor was the Commissioner in Charge at that location. Ms. Taylor in fact voted at her home precinct. Ex. G ¶ 6-7. The affidavits from the Commissioner in Charge at Ms. Taylor’s actual precinct substantially contradict her description of the polling place. Ex. J ¶ 2. And if Ms. Taylor were describing the polling place she was in charge of, that would mean that she failed to ensure that the polling place under her control was adhering to the Secretary of State’s requirements. Other individuals present at the polling place where Ms. Taylor worked contradict her apparent description of that polling place. Ex. L.

A plaintiff is a qualified individual if she “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity . . . with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.” *United States v. Georgia*, 546 U.S. 151, 153-54 (2006) (quoting 42 U.S.C. § 12131(2)). While “rules, policies, [and] practices” may be subject to reasonable modification, “essential eligibility requirements” are not. *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 159 (2d Cir. 2013) (citing 42 U.S.C. § 12131(2)). When an individual cannot meet an essential eligibility requirement, “the only possible accommodation is to waive the essential requirement itself . . . [but] [w]aiving an essential eligibility standard would constitute a fundamental alteration in the nature of the . . . program [at issue].” *Pottgen v. Mo. State High School Activities Ass’n*, 40 F.3d 926, 930 (8th Cir.1994); *see also Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 850 (7th Cir. 1999). Therefore, a plaintiff who does not meet an essential eligibility requirement is not qualified to state a claim under the ADA. *See People First of Ala. v. Merrill*, 2020 U.S. Dist. LEXIS 104444 at *60-61, 67-68 (N.D. Ala. June 15, 2020). The question then becomes: Is the requirement essential for eligibility in the program? “[W]hether an eligibility requirement is essential is determined by consulting the importance of the requirement to the program in question.” *Mary Jo C.*, 707 F.3d at 159; *Pottgen*, 40 F.3d at 930 (“[T]o determine whether [the plaintiff] is a ‘qualified individual’ under [Title II of] the ADA, we must first determine whether the [challenged provision] is an essential eligibility requirement by reviewing the importance of the requirement to the . . . program [at issue].”). *People First of Ala.*, 2020 U.S. Dist. LEXIS 104444 at *60-61, 67-68.

Louisiana’s Excuse Requirement for voting by absentee ballot, which Plaintiffs challenge as violative of the ADA, is unquestionably an essential eligibility requirement. Specifically, the Excuse Requirement goes to the integrity and sanctity of the ballot and election. *See, e.g., Adkins v. Huckabay*, 755 So.2d 206 (La. 2000) (discussing the interests in integrity and sanctity of the ballot and election furthered by substantial compliance with Section 1303). No state official has the power under Louisiana’s code to grant “waivers” of the Excuse Requirement.¹⁷ *Cf. Mary Jo C.*, 707 F.3d at 160 (finding the challenged provision non-essential where the state regularly granted waivers and extensions of the provision). Accordingly, the Excuse Requirement is a condition precedent to eligibility under state law, and essential eligibility requirements are not subject to reasonable modifications. *See People First of Ala.*, 2020 U.S. Dist. LEXIS 104444 at *67-68. Waiving the Excuse Requirement would result in a fundamental alteration in the nature of absentee voting in Louisiana. *See Pottgen*, 40 F.3d at 930. Accordingly, Plaintiffs cannot state an ADA claim against the Excuse Requirement.

iii. *Plaintiffs Are Not Being Excluded, Denied, or Discriminated Against by Reason of their Alleged “Disabilities” or at All.*

As discussed *supra*, Plaintiffs have not adequately demonstrated that they possess “disabilities” within the meaning of the ADA with respect to voting. Accordingly, Plaintiffs’ ADA claims fail and that should be the end of both the *prima facie* ADA analysis and the ADA analysis altogether. However, assuming *arguendo* that this Court determines that Plaintiffs do possess disabilities under the ADA, which they do not, Plaintiffs’ ADA claims also fail at the *prima facie* level because they are not excluded, denied, or discriminated against by reason of their alleged

¹⁷ Although, it bears repeating that these Plaintiffs may qualify for an absentee ballot under current Louisiana law if they follow applicable procedures. *See*, La. R.S. § 18:1303(I); Ex. A.

“disabilities,” or at all. *See Melton v. Dall. Area Rapid Transit*, 391 F.3d 669, 671-72 (5th Cir. 2004).

Exclusions under Title II need not be absolute: Mere difficulty in accessing a benefit is not, by itself, a violation of the ADA. *People First of Ala.*, 2020 U.S. Dist. LEXIS 104444, at *61 (citing *Bircoll v. Miami-Dade Cty*, 480 F.3d 1072, 1088 (11th Cir. 2007)). Instead, a plaintiff must show that the failure to accommodate created an injury. *Id.* Further, a public entity need not “employ any and all means to make judicial services accessible to persons with disabilities.” *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004). Rather, the entity must make “reasonable modifications that would not fundamentally alter the nature of the service provided . . . [or] impose an undue financial or administrative burden.” *Id.* (citations omitted).

Here, Plaintiffs are not discriminated against, excluded, or denied from voting or voting by absentee ballot by reason of their alleged “disabilities.” All Plaintiffs have admitted that they are able and willing to leave their homes and have done so, for one reason or another, during the pendency of the Virus. *See generally* P.I. Ex. 5; P.I. Ex. 6. In fact, all individual Plaintiffs voted in person during the July and August 2020 elections. P.I. Ex. 5 ¶ 13; P.I. Ex. 4 ¶ 16, 18; P.I. Ex. 6 ¶ 16. Ms. Taylor was even a poll worker during the July and August elections. Exs. D, G, L. There is absolutely no evidence that voting in person was not readily accessible to Plaintiffs, or that it resulted in harm to any of them.

Furthermore, voting by absentee ballot is readily accessible to Plaintiffs if they in fact have disabilities certified by a medical professional. Louisiana law clearly and expressly makes voting by absentee ballot accessible to persons with disabilities, stating in relevant part that:

(1) Any qualified voter who submits any of the following to the registrar of voters may vote absentee by mail upon meeting the requirements of this Chapter: . . .

(c) *Current proof of disability from a physician, optometrist, physician assistant as defined in R.S. 37:1360.22, or nurse practitioner as defined in R.S. 37:913.*

La. R.S. § 18:1303(I) (emphasis added). A simple search of the Secretary of State’s website yields the Disabled Application for Absentee By Mail Ballot Form, which is clearly available on the Vote By Mail page.¹⁸ Through § 18:1303(I) and the Disabled Application for Absentee By Mail Ballot Form, Plaintiffs are eligible to vote absentee by mail if they are “disabled” in the opinion of a physician or other medical professional, as defined.¹⁹ Moreover, on September 1, 2020, the Attorney General, at the request of a registrar of voters, issued guidance interpreting the term “disability” in La. R.S. § 18:1303(I) to include the Virus or any “underlying health condition known to be a co-morbidity for COVID-19 . . . if a medical professional certifies that, in the medical professional’s opinion, the existence of the co-morbidity presents an unreasonable risk for that elector to vote in person.” Therefore, voting and voting by absentee ballot remain completely accessible to Plaintiffs. *See Am Ass’n of People with Disabilities v. Harris*, 647 F.3d 1093 (11th Cir. 2011) (“Although the Plaintiffs professed fears that this system was ineffective, the district court found that the ‘Plaintiffs presented no evidence that communication with visually and manually impaired voters is not as effective as communication with non-disabled voters.’ . . . Accordingly, the Plaintiffs ‘have been afforded an equal opportunity to participate in and enjoy the benefits of voting.’”). Regardless of whether or not the ADA applies here, the provisions of Section 1303(I) provide an accommodation for qualifying voters. Any minor difficulty Plaintiffs may experience with voting in person or by absentee ballot is not because of state action and is not

¹⁸ Available at <https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/DisabledApplicationForAbsenteeByMailBallot.pdf>

¹⁹ As previously noted, there is no indication at the definition of disability under 18:1303(I) is co-extensive with the ADA’s definitions. In fact, the ability to vote by mail with a disability and a certification by a physician pre-dated the adoption of the ADA by the federal government. See La. R.S. 18:1304(A) (1991). This provision has been amended over the years and in 2006 was moved into La. R. S. 18:1303.

because of their alleged “disabilities” or state discrimination against those disabilities, but rather is a result of the Virus. *See supra*.

b. Plaintiffs’ Requested Relief Under the ADA Is Unreasonable.

Assuming *arguendo* that Plaintiffs do manage to make a *prima facie* showing of discrimination under the ADA, which they cannot, their ADA claims must fail because their requested relief is unreasonable and incompatible with Louisiana’s absentee voting program. Specifically, as discussed *supra*, Plaintiffs’ requested relief would work a “fundamental alteration” to Louisiana’s absentee voting system. *See also, e.g., People First of Ala. v. Merrill*, 2020 U.S. Dist. LEXIS 104444, *67-68 (N.D. Ala. June 15, 2020). Second, granting Plaintiffs’ requested relief would interfere with the impending elections. *See infra*. The Supreme Court has repeatedly dissuaded such interference. *Id.* In fact, in *People First of Ala.*, where the Northern District of Alabama enjoined Alabama’s absentee photo ID requirement as violative of the ADA, the Supreme Court later issued a stay of the district court’s order. 2020 U.S. LEXIS 3541.

3. The Facts do not Clearly Support Plaintiffs’ Request for Extraordinary Relief.

As previously stated *supra*, Plaintiffs must show that both the facts and the law “*clearly support*” their claims for relief to be awarded a preliminary injunction. *See, e.g., Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)(emphasis added). Plaintiffs have failed to make the requisite showing here. First and foremost, in-person voting is safe with reasonable precautions. *See, e.g., Tim Hains, Dr. Fauci: Voting In Person Will Be As Safe As Going to the Grocery Store, If You Follow Guidelines*, Real Clear Politics, Aug. 15, 2020²⁰; Ex. O; Ex. P. The Secretary of State established these precautionary measures for the July and August primary elections, and they

²⁰https://www.realclearpolitics.com/video/2020/08/14/dr_fauci_there_is_no_reason_people_cant_vote_in_person_if_they_follow_safety_guidelines.html

were followed by precinct staff. Exs. D, F, H, I, J, K, L. The Secretary of State recently notified the parishes of similar procedures for the November and December elections. Ex. O. Finally, as was shown in Wisconsin—and multiple other states—there is no link between elections and the Virus. Ex. P ¶¶ 21, 27, 29, 30, 33, 35, 37, 39, 41, 43, 44.

Second, the individual Plaintiffs themselves each voted in person—either early or on election day—for the July and August elections. P.I. Ex. 5 ¶ 13; P.I. Ex. 4 ¶ 16, 18; P.I. Ex. 6 ¶ 16; *but see* Ex. G ¶ 6. This fact should be conclusive of their lack of harm for standing, *see* Joint Mot. to Dismiss at 4-18, but, at the very least, is certainly evidence that they can vote in person in November and December. Plaintiff Taylor can certainly claim no harms from voting in person as she *worked as a poll worker on election day in both the July and August elections. See, e.g.,* Ex. D. All that aside, any person who either has the Virus or has a comorbidity is entitled to an absentee ballot under Louisiana law so long as a medical professional certifies to that fact. Ex. A. In fact, both Ms. Taylor Pogue state that they are currently under the care of physicians who would be able to certify to their ability to receive an absentee ballot. *See, e.g.,* P.I. Ex. 5 ¶ 7; P.I. Ex. ¶ 4.

B. Because Plaintiffs’ Harms are Speculative at Best, They Will not Suffer an Irreparable Injury Absent an Injunction.

An “applicant must demonstrate that in the absence of a preliminary injunction, the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (internal quotations omitted). This means that “[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court’s] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* This element then mimics the requirements of standing because, “[a]t the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing.” *Barber v. Bryant*, 860 F.3d 345,

352 n.3 (5th Cir. 2017). When a future injury is alleged as the basis for irreparable harm, it is Plaintiffs' burden to show that "future injury is 'certainly impending.'" *Aransas Project v. Shaw*, 775 F.3d 641, 664 (5th Cir. 2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

By contrast, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020) (finding irreparable injury in the context of a stay of a district court order changing absentee ballot rules due to the Virus); *Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020). The evidence is also clear that there will be no irreparable harm absent an injunction. First, elections have resulted in no spike in cases of the Virus. *See, e.g.*, Ex. P ¶¶ 21, 27, 29, 30, 33, 35, 37, 39, 41, 43, 44. Similarly, Plaintiffs here are permitted to vote early should they so choose, and they have demonstrated an ability to vote in person in 2020 without harm. P.I. Ex. 5 ¶ 13; P.I. Ex. 4 ¶ 16, 18; P.I. Ex. 6 ¶ 16. Third, even Dr. Fauci has stated that voting is safe with the proper precautions in place, which have been implemented by the Secretary. *See supra*.

C. The Harm to Louisiana and the Public Interest Weigh Against the Grant of a Mandatory Preliminary Injunction.

The Fifth Circuit's analysis with respect to whether an injunction is in the public interest "begins with the staunch admonition that a federal court should jealously guard and sparingly use its awesome powers to ignore or brush aside long-standing state constitutional provisions, statutes, and practices." *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988). When analyzing the public interest, the courts should also consider the proximity of forthcoming elections. *See id.*

As has been thoroughly argued *supra*, the public interest favors conducting the elections under restrictions *less* or as restrictive as Louisiana's normal election procedures. Specifically, as it relates to the November and December elections, the election machinery is already in motion

and expanding absentee voting to all Louisianans is likely to wreak havoc on the State's election machinery because Louisiana's system is not set up or equipped to process that volume of ballots. The threatened injury to all Louisiana voters and its election systems outweighs the lack of concrete and particularized harm put forth by Plaintiffs.

II. THE PURCELL DOCTRINE PRECLUDES PLAINTIFFS FROM RECEIVING ANY OF THE RELIEF THEY SEEK.

The Supreme Court and the Fifth Circuit “ha[ve] repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411-12 (5th Cir. 2020). “Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). “As an election draws closer, that risk will increase.” *Id.* at 5. Recently, the Supreme Court stated that “changing the election rules so close to the election date . . . contravened [Supreme Court] precedent[.]” *Republican Nat’l Comm.*, 140 S. Ct. at 1207 (staying a district court order changing election deadlines in response to the Virus). As the Sixth Circuit recently stated, “rewriting a state’s election procedures or moving deadlines rarely ends with one court order. Moving one piece on the game board invariably leads to additional moves.” *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (citing *Republican Nat’l Comm.*, 140 S. Ct. at 1207; *Purcell*, 549 U.S. at 4-5)); *see also Tex. Democratic Party*, 961 F.3d at 411-12.

Therefore, even assuming Plaintiffs’ allegations are correct and there is a violation of the Constitution or the ADA or both, the Court still ought to decline to interfere in Louisiana’s upcoming elections. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964). “In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election

and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.” *Reynolds*, 377 U.S. at 585; *Chisom v. Roemer*, 853 F.2d 1186, 1189-90 (5th Cir. 1988). The existence of the Virus does not change this analysis.

The conduct of an election is a carefully choreographed series of steps including but not limited to qualifying candidates, preparing and printing ballots and instructions, registering voters and printing pollbooks, conducting early voting and absentee voting under existing requirements, conducting election day, following all of the mandated post-election procedures to verify and ascertain results (including the statutory deadlines for recounts and contests), and preparing for and executing any run-off elections.

As Louisiana’s Commissioner of Elections notes, implementing “no excuse” absentee voting and the requested increase in early voting days in Louisiana for 2020 is not logistically feasible. Ex. Q ¶¶ 31-54. First, instruction forms are already printed and circulating. Second, ballots themselves will be mailed to military voters and those who are eligible and have already requested absentee ballots on September 19.

With respect to the additional early voting days requested, as noted by the Commissioner, there is not enough time between the close of voter registration and the opening of a thirteen-day early voting period to permit sufficient time for early voting. Ex. Q ¶ 16-23. In addition, the logistics of adding early voting days at this point in the cycle includes recruiting and securing the availability of sufficient early voting sites and election commissioners. With the crush of all of the other requirements to carry out the November and December elections, an additional requirement to implement and execute additional early voting days would at this time, in the opinion of the Commissioner, be unmanageable by most registrars and potentially catastrophic to the administration of the November and December elections. *See, e.g., id.*

Finally, Louisiana is on the eve of the November election. Election administrators are currently making preparations to print and distribute vote by mail applications and ballots. Absentee ballots will be distributed by September 18th, 2020. *See* 52 U.S.C. § 20302. The registration deadline for the November election in person or by mail is currently October 5, 2020, and the registration deadline for electors using Louisiana's online registration portal GeauxVote is October 13, 2020, which is less than two months away. Ex. C. Early voting begins on October 20. *Id.* Changing the method of absentee balloting at this stage will invite chaos into the system and harm more people through voter confusion than any remedy ordered by the Court would help.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be denied.

Should an injunction issue, Defendants herein request that Plaintiffs post a bond.

Dated: Sept. 2, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 2nd day of September 2020, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record.

/s/ Jason Torchinsky

Jason Torchinsky

*Counsel for Defendant Attorney General
Jeff Landry on behalf of the State of Louisiana*