No. 19A1063

IN THE

Supreme Court of the United States

JOHN H. MERRILL, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF ALABAMA, AND THE STATE OF ALABAMA,

Applicants,

v.

PEOPLE FIRST OF ALABAMA, ET AL.,

Respondent.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY

To the Honorable Clarence Thomas,
Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, the undersigned states that none of the Respondents has a parent corporation, and no publicly held corporation holds 10 percent of more of any Applicants' stock.

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Respondents People First of Alabama ("People First"), Greater Birmingham Ministries ("GBM"), the Alabama State Conference of the NAACP ("NAACP"), Robert Clopton, Eric Peebles, Howard Porter, Jr., and Annie Carolyn Thompson (collectively, "Respondents") respectfully submit this opposition to the Emergency Application for Stay filed by Applicants John H. Merrill, in his official capacity as Secretary of State for the State of Alabama, and the State of Alabama (collectively, "State Defendants").

Our country faces an unprecedented health crisis due to the exponential spread of COVID-19, "a novel severe acute respiratory illness that has killed . . . more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief). COVID-19 has infected more than 2.6 million Americans.[1] Alabama alone has more than 38,000 confirmed COVID-19 cases and 900 confirmed deaths.[2] That number is rapidly rising, as Alabama experiences a significant surge in the number of reported COVID-19 infections.[3] COVID-19 spreads aggressively. App. 3. "Because people may be infected but asymptomatic, they may unwittingly infect others." *Newsom*, 140 S.

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[1] Ctrs. for Disease Control & Prevention, *Cases in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last updated July 1, 2020).

[2] Ala. Dep't of Pub. Health, *Alabama Public Health Daily Case Characteristics: 7/01/20*, http://www.alabamapublichealth.gov/covid19/assets/cov-al-cases-070120.pdf.

[3] Dennis Pillion, *1 in 9 Alabama seniors diagnosed with COVID has died, state says*, AL.com, June 30, 2020, https://www.al.com/news/2020/06/1-in-9-alabama-seniors-diagnosed-with-covid-has-died-state-says.html; Lauren Walsh, *Alabama sets new records for Covid-19 hospitalizations*, July 1, 2020, https://abc3340.com/news/local/alabama-sets-new-state-records-for-covid-19-hospitalizations.

Ct. at 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief). People of all ages contract and die from COVID-19, but infection poses special dangers for "high-risk" people whose age, medical conditions, or disabilities make them more susceptible to death or severe illness from COVID-19. App. 18.

Social distancing is the only proven means of protecting against this deadly disease. App. 3. Thus, the Centers for Disease Control and Prevention ("CDC") recommends that states "[e]ncourage voters to use voting methods that minimize direct contact with other people," including absentee voting and curbside or "drive-up voting." Doc. 16-2 at 2; App. 80. And Governor Kay Ivey has issued a Safer-at-Home Order instructing Alabamians, especially high-risk persons to stay home and remain six feet apart from people outside of their household. App. 3-4, 37-38. This order was recently extended through July 31—past the July 14, 2020 primary runoff election.[4]

Respondents are individuals and organizations with members who are high-risk people, but who wish to vote in Alabama's July 14 election. On May 1, 2020, Respondents filed suit to challenge Alabama election provisions that, because of state social distancing orders and the pandemic, pose severe obstacles to voting: (1) the requirement that voters have their absentee ballot envelope either notarized or signed by two adult witnesses, Ala. Code §§ 17-11-7 to 17-11-10 ("witness requirement"); (2) the requirement that a voter mail-in a copy of their photo ID with the absentee ballot application or absentee ballot, *id.* §§ 17-9-30(b), 17-11-9 ("photo

[4] The Office of Alabama Governor Kay Ivey, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19, Amended June 30, 2020 (June 30, 2020), https://governor.alabama.gov/assets/2020/06/2020-06-30-Safer-at-Home-Order.pdf.

ID requirement"); and (3) the Secretary's *de facto* ban on curbside voting ("curbside voting ban") (collectively, the "challenged provisions").

Respondents filed this suit against three State Defendants—Governor Ivey, Secretary Merrill, and the State of Alabama—and against the absentee election managers ("AEMs") in three counties: Jefferson, Mobile, and Lee. These three counties have the first-, third-, and sixth-highest number of total infections in the State, respectively.[5] As of July 1, the Alabama Department of Public Health ("ADPH") has identified them as "very high risk" (Lee) or "high risk" (Jefferson and Mobile) areas.[6] In the District Court, State Defendants vigorously argued that they were not proper defendants, asserting that they "do not enforce any of the challenged provisions" and that they are "protected by sovereign immunity." Doc. 36 at 19, 20.

On June 15, 2020, the District Court issued a 77-page memorandum opinion, in which it carefully reviewed the evidence, made detailed factual findings, and concluded that Respondents were likely to succeed on the merits of their as-applied constitutional claims in light of the unique burdens imposed by the challenged provisions during the pandemic, and that Respondents were also likely to succeed in part on their claims under the Americans with Disabilities Act ("ADA"). The District Court, however, agreed with State Defendants that Respondents' claims against

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[5] Leada Gore, *Alabama adds 906 coronavirus cases, COVID hospitalizations reach new high of 776*, AL.com, July 1, 2020, https://www.al.com/news/2020/07/alabama-adds-906-coronavirus-cases-covid-hospitalizations-reach-new-high-of-776.html.

[6] Alabama Department of Public Health, *Alabama's COVID-19 Risk Indicator Dashboard*, https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/b585b67ef4074bb2b4443975bf14f77d (last updated June 20, 2020).

Governor Ivey were barred by sovereign immunity, concluded that Secretary Merrill was likely not a proper defendant except with respect to the curbside voting claim, and did not enter any injunction against the State of Alabama.

With respect to the witness and photo ID requirements the District Court entered a preliminary injunction that applies only to the AEMs, prohibiting them from enforcing those requirements for high-risk voters who sign a statement under penalty of perjury that they cannot reasonably comply with the requirements. The injunction simply creates a means for high-risk voters in these counties to vote without violating the Safer-at-Home order in a single primary. The District Court also enjoined the Secretary from enforcing his curbside voting ban, meaning simply that the Secretary may not prohibit "counties from establishing curbside voting procedures that otherwise comply with state election law." App. 30. The injunction allows (but does not require) counties to provide curbside voting. The District Court's preliminary relief is limited to the July 14 election, which includes local and congressional elections in the affected counties.

The AEMs did not appeal, nor did they seek a stay. Rather, the AEMs began implementing and continue to implement the District Court's injunction. The AEMs are actively informing voters via letters and online notices that high-risk voters can apply for absentee ballots and submit absentee ballots without providing photo IDs and witnesses as established by the District Court's preliminary injunction. Resp. App. 1-3.

Nonetheless, having asserted sovereign immunity in the District Court, State

Defendants appealed and sought an emergency stay of the preliminary injunction. On June 25, the Eleventh Circuit denied this stay motion. All three judges doubted State Defendants' standing to challenge the injunction as to the photo ID and witness requirements. App. 11-12 n.7, 26-27. Two judges wrote a concurrence explaining why State Defendants had failed to meet their burden on the merits. App. 25.

State Defendants now seek an emergency stay from this Court. But, once again, they fail to meet their burden in requesting such extraordinary relief.

First, State Defendants cannot show a sufficient likelihood either that four Justices would grant certiorari or that a majority of the Court would reverse the decision below. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). This case involves a narrow injunction directed to a single election, most of which the State Defendants lack standing to appeal. Because they successfully argued below that they were not proper parties and were protected by sovereign immunity, State Defendants are judicially estopped from challenging the portions of the injunction directed only at the AEMs. The only portion of the injunction that State Defendants do have standing to appeal simply bars the Secretary from implementing a curbside voting ban that has no basis in state law. App. 52. The narrowness of the injunction and serious vehicle problems mean this case is not worthy of certiorari review.

Even if it were, it is unlikely that a majority of the Court would find an abuse of discretion in the District Court's thoughtful and well-crafted injunction.

Second, State Defendants cannot meet their burden of showing irreparable injury or that the balance of harms favors them. *See Hollingsworth*, 558 U.S. at 190.

State Defendants are not harmed by the portions of the District Court's narrow injunction that they lack standing to challenge, and the Secretary does not suffer irreparable harm from being prohibited from enforcing a ban on curbside voting that has no basis in state law. App. 52. While State Defendants point to the concerns this Court identified in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), about voter confusion and election integrity when electoral rules are changed close to an election, here, those concerns weigh against a stay. For about two weeks, the AEMs have told high-risk people to vote without witnesses or photo IDs. In seeking a stay, State Defendants invite this Court to inject doubt and confusion into Alabama's electoral process and to disenfranchise those high-risk people who are now voting under the injunction.

Accordingly, this Court should deny State Defendants' request.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The COVID-19 pandemic has deeply affected Alabama. With vaccines months (or more) away, public health officials have been left to urge the public to practice "social distancing," i.e., avoidance of close contact with others. For that reason, Governor Ivey and the CDC recommend that high-risk individuals stay at home, at least six feet away from others, and stay out of crowded places. App. 3-4, 37-38.

The CDC has issued specific guidelines concerning voting during the COVID-19 pandemic. Among other things, it recommends that states "[e]ncourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations," including promoting absentee voting and employing "drive-up voting" as a means of complying with social distancing rules and to limit personal

contact during in-person voting. Doc. 16-2 at 2.

To combat viral spread, Governor Ivey and the ADPH have taken a series of steps since early March, including issuing increasingly aggressive guidelines and restrictions. These orders have had the incremental effect of closing most "non-essential" businesses—including photo ID issuing offices and copying centers—and urging residents to shelter in place. Individuals—especially high-risk persons—are asked to stay home. App. 38. In Lee County, the ADPH is instructing vulnerable people like Respondents to be "especially careful" and "exercise extreme caution and stay at home if at all possible."[7] In Jefferson and Mobile, high-risk people are told to "[l]imit visits with friends, or family outside your household," "[l]imit in-person meetings," and "[a]void groups of any size."[8]

On March 18, Governor Ivey rescheduled the March 31 primary runoff to July 14, 2020. App. 39. That same day, Secretary Merrill promulgated an emergency rule entitled "Absentee Voting During State of Emergency," which authorizes "any qualified voter who determines it is impossible or unreasonable to vote at their voting place for the Primary Runoff Election of 2020" because of COVID-19 to vote absentee. App. 39. But, notwithstanding this recognition that the emergency created by the pandemic and the need for social distancing justifies this expansion of absentee ballot, Secretary Merrill did not use his power under Alabama law, Ala. Code § 17-

[7] Alabama Public Health, *Alabama's Very High Risk Phase: What does it mean and what can you do?*, https://www.alabamapublichealth.gov/covid19/assets/alguidelines-red.pdf.

[8] Alabama Public Health, *Alabama's High Risk Phase: What does it mean and what can you do?,* https://www.alabamapublichealth.gov/covid19/assets/alguidelines-orange.pdf.

11-3(e), to suspend or interpret other provisions that will still require many Alabama voters to violate the Safer-at-Home order to vote, including the photo ID requirement.

When asked about the photo ID requirement by a voter on social media, Secretary Merrill responded: "When I come to your house and show you how to use your printer I can also show you how to tie your shoes and to tie your tie. I could also go with you to Walmart or Kinko's and make sure that you know how to get a copy of your ID made while you're buying cigarettes or alcohol." App. 7. Respondents directly requested that Secretary Merrill address the obstacles posed by the challenged provisions but were unsuccessful. Docs. 16-34, 16-35.

Only 12 states have witness or notarization requirements for absentee voters. Only three states require voters to mail-in copies of photo IDs. And only two states, including Alabama, require both photo ID and witnesses to verify absentee ballots.[9]

On May 1, 2020, Respondents filed suit against State Defendants and the AEMs in the Northern District of Alabama to enjoin enforcement of the challenged provisions that would unlawfully inhibit Respondents' right to vote under the First and Fourteenth Amendments, the ADA, and the Voting Rights Act of 1965 ("VRA"). The witness requirement mandates that, in addition to the signature of the voter, all mail-in ballots must contain the signatures of two adult witnesses or a notary public; otherwise, the ballot goes uncounted. Ala. Code § 17-11-7. Respondents offered substantial evidence that, in this crisis, this requirement poses an unreasonable

[9] National Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#deadlines (last updated June 22, 2020).

obstacle to many thousands of high-risk voters, like Respondents, who live alone and thus must risk their health by violating social distancing rules to vote. App. 66-69.

Respondents also challenged the photo ID requirement whereby each person who applies for an absentee ballot must mail in a copy of their photo ID, Ala. Code. § 17-9-30(b), and some absentee voters must submit copy of their ID when casting their ballot, *id.* § 17-11-9. Respondents presented evidence that over 230,000 households in Alabama lack a computer (i.e., basic copying technology), meaning that many voters must violate the Safer-at-Home order to copy their IDs. *See* Doc. 20-1 at 23.

Finally, Respondents challenged the Secretary's effective ban on curbside voting, a process that would allow voters to cast their ballots in person, but outside of a poll site without leaving the car. Before the pandemic, the Secretary has repeatedly stopped election officials from offering this reasonable accommodation for voters with ambulatory disabilities, like Respondents Peebles and Porter. Amid the pandemic, many high-risk voters are unable to access polling places. Other voters must vote in person because they require assistance from poll workers. Respondents presented evidence that the curbside voting ban means that high-risk voters—including members of People First and the NAACP with low literacy or physical disabilities—who cannot vote absentee because they need help to vote in person need a safe option for in-person voting, will be disenfranchised during 2020 elections. App. 80-82; *see also* Doc. 16-45, at 36-37.

Respondents filed a preliminary injunction motion seeking to enjoin Defendants from enforcing the challenged provisions. On June 15, the District Court

partially granted Respondents' motion. It concluded that Respondents had shown they likely had standing to challenge the witness and photo ID requirements because their injuries in having to comply with those requirements were traceable to, and redressable by, the AEMs. App. 50, 52. However, the District Court agreed with Secretary Merrill that, under Eleventh Circuit precedent, he was likely not a proper defendant as to the witness and photo ID requirements. App. 49-56. The Court found that the Secretary is a proper defendant solely as to the curbside voting ban. *Id*. The Court dismissed Governor Ivey on sovereign immunity grounds. App. 60-61.

The District Court held that Respondents would likely prevail on their constitutional claims under the *Anderson-Burdick* framework, because the burdens imposed by each of the challenged provisions outweighed the defendants' interests in enforcing the challenged provisions. App. 63-82. The District Court also held that Respondents were likely to prevail on their ADA claim with respect to the photo ID requirement and the curbside voting ban because they had made a prima facie case under the ADA and that they had proposed reasonable modifications to those requirements. App. 97-100.

After concluding that the remaining factors in the preliminary injunction analysis supported an injunction, the District Court entered an injunction, that, with respect to the July 14 election only prohibits the AEMs from enforcing the witness and photo ID requirements against high-risk voters who provide a statement signed under penalty of perjury that satisfying the photo ID or witness requirement is "impossible or unreasonable;" and enjoins the Secretary "from prohibiting counties

from establishing curbside voting procedures that otherwise comply with state election law." App. 29-30. Although the District Court had recognized that the ADA abrogates the State's sovereign immunity, App. 61, no part of its injunction applies against the State. App. 29-30.

State Defendants appealed to the Eleventh Circuit and requested an emergency stay of the District Court's preliminary injunction. On June 25, 2020, the Eleventh Circuit denied the stay motion. App. 1. In a joint concurrence, Judges Rosenbaum and Jill Pryor concluded that the State Defendants failed to meet their burden of showing a strong likelihood that District Court abused its discretion in issuing the preliminary injunction. App. 25. The joint concurrence recognized that State Defendants' standing on appeal to challenge the first two parts of the injunction was "questionable," but assumed that the State Defendants had standing "for the limited purpose" of resolving the motion to stay. App. 12 n.7. The joint concurrence then explained that, on the merits, the State Defendants failed to show it was likely that the District Court abused its discretion in weighing the burdens imposed by the Challenged Provisions against the State Defendants' interests under *Anderson-Burdick*. Concerning the curbside voting ban, the joint concurrence found it "easy to see why the scale weights in Plaintiffs' favor": "The injunction does not *require* anything. Instead, it just prohibits the Secretary from prohibiting counties from *choosing* to implement curbside voting procedures '*that otherwise comply with state election law*.'" App. 17 (emphasis in original). And "[t]he photo ID and the witness requirements force at least some Alabamians . . . to increase their risk of contracting

COVID-19 by foregoing nationwide and statewide social distancing and self-isolation rules and recommendations not apply for and successfully vote absentee," a burden that outweighs the State's interest in enforcing the minimal protections that the challenged provisions offer toward maintaining election integrity and uniform elections. These burdens also outweigh the Secretary's interest in enforcing a curbside voting ban that has no basis in state law or uniformity since counties that choose to offer curbside voting still must comply with state law. App. 18-20. The joint concurrence also concluded that the District Court did not abuse its discretion in concluding that Respondents were likely to succeed on their ADA claims with respect to the photo ID requirement and the curbside voting ban. App. 22-23.

In a separate opinion, Judge Grant expressed concerns about the District Court's opinion but nonetheless concurred in the decision to deny the stay motion. Judge Grant acknowledged that "it is uncertain that the proper parties have appealed" the portions of the injunction directed solely to the AEMs. App. 26. With respect to curbside voting, Judge Grant emphasized that "the order applies only to curbside voting procedures 'that otherwise comply with state election law.'" App. 27.

REASONS FOR DENYING THE APPLICATION

I. The State Defendants Have Not Met Their Burden to Obtain a Stay.

"A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). Rather, as the parties seeking a stay pending appeal, State

Defendants bear the burden of proving that a stay is warranted. *Id.* at 433-34.

To obtain a stay here, State Defendants must show a sufficient likelihood that: (1) four Justices would grant certiorari; (2) a majority of the Court would reverse the judgment below; and (3) irreparable harm would result from the denial of a stay. *Hollingsworth*, 558 U.S. at 190. "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Here, State Defendants cannot meet their burden. Serious vehicle problems, and the narrowness of the injunction at issue, mean this case is not appropriate for this Court's certiorari review. Even if it were to exercise such review, the Court would consider the District Court's injunction through the deferential abuse of discretion standard. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004). State Defendants identify no legal error, clearly erroneous factfinding, or other abuse of discretion in the District Court's careful weighing of the relevant interests under *Anderson-Burdick* or ADA analysis. Finally, there is no irreparable injury to the State Defendants from the limited injunction that primarily affects the AEMs, but there would be serious harms in terms of voter confusion and disenfranchisement if the Court were to grant a stay now after the AEMs have already been complying with the injunction for two weeks.

A. State Defendants Lack Standing to Appeal the Portions of the District Court's Injunction that Apply Only to the AEMs.

First, this case is not the right vehicle to address most of the State's arguments. State Defendants do not have standing to challenge the portions of the injunction that apply only to the AEMs. This means the only issue properly before the Court is the

District Court's injunction stopping the Secretary from disallowing curbside voting consistent that is otherwise consistent with state law.

It is a basic rule of appellate procedure that a party cannot ordinarily appeal an injunction that applies only to third parties. And, while the State Defendants now contend that a State has standing to act as a defendant-intervenor to defend the constitutionality of its laws, that is not what the State of Alabama did here. On the contrary, as State Defendants acknowledge, they argued in the "district court that they were improper defendants," Stay Mot. at 5, and they asserted sovereign immunity as a defense. Doc. 36 at 20-21. Having made these arguments and declined to waive its sovereign immunity in the District Court (as it would have to if it were a defendant-intervenor), the State cannot reverse course on appeal and claim standing to challenge an injunction that applies only to the AEMs in the three Alabama counties hit the hardest by COVID-19.

In the District Court, Respondents sought a preliminary injunction against both State Defendants and the AEMS. Doc. 15. State Defendants vigorously argued that they were not proper parties and were immune from suit. Relying on *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020), the Secretary argued that he had no role to play in enforcing the witness and photo ID requirements. Doc. 36 at 19 & n.12. The District Court accepted this argument, ruling that Respondents' injury from the witness requirement was neither traceable to nor redressable by the Secretary, and therefore he was not a proper party. App. 54-56. As to the photo ID requirement, the Court declined to decide whether the Secretary was a proper party

because it concluded that the AEMs were the proper parties. App. 53-54 & n.12.

As for the State of Alabama, far from seeking to act as a defendant-intervenor and choosing to litigate the validity of the challenged provisions, it also vigorously advanced an immunity defense. The State asserted: "The State of Alabama preserves the defense that its sovereign immunity has not been abrogated with respect to any claim." Doc. 36 at 20 n.13. Although the District Court found that the State was a proper party with respect to the ADA claim, App. 61, it ruled in favor of the State on the merits in the challenge to the witness requirement, App. 90-91, and it did not apply any portion of its injunction against the State. App. 29-31. Accordingly, the Court enjoined only the AEMs from enforcing the witness and photo ID requirements.

Whether on a motion to stay or petition for certiorari, "[t]his Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). And it is a basic rule that a party may not appeal from a judgment in its favor. *Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002).

Having won on his redressability and traceability arguments below, the Secretary is estopped from changing his position now and arguing that he does in fact have a stake in the enforcement of the witness and photo ID requirements sufficient to appeal. *See Maine v. New Hampshire*, 532 U.S. 742, 749 (2001) (explaining that "judicial estoppel[] 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'") (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)).

The State is similarly estopped. State Defendants insist to this Court that "the State is like a defendant-intervenor" insofar as the State has an interest in defending the constitutionality of any state law. Stay Mot. at 5. But that argument is foreclosed by the State's litigation conduct in the District Court. When a State acts like a defendant-intervenor, it "voluntarily invoke[s]" the jurisdiction of a federal court, and it waives its sovereign immunity. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). That is not what the State did here. It did not choose to waive its sovereign immunity and participate in the litigation of Respondents' constitutional claims. Instead, as discussed, the State vigorously asserted a sovereign immunity defense even with respect to the VRA and ADA claims. Doc. 36 at 20.

In sum, a State may ordinarily have standing to act as a defendant-intervenor in support of the constitutionality of its laws. But the State must actually act as a defendant-intervenor, and it must waive sovereign immunity to invoke that principle. *See Lapides*, 535 U.S. at 620. What a State cannot do, however, is argue that it is not a proper party and invoke sovereign immunity in the district court, but then maintain that it *is* a proper party when it wants to appeal an injunction entered solely against local officials. *See Maine*, 532 U.S. at 750 (explaining that judicial estoppel acts to prohibit "parties from deliberately changing positions according to the exigencies of the moment[]" or "playing fast and loose with the courts") (internal citations and quotation marks omitted).

It is "anomalous or inconsistent" for the State Defendants to seek to both 1) claim sovereign immunity below, thereby denying that the "Judicial power of the

United States" extends to them and 2) invoke federal jurisdiction to appeal, thereby accepting that the "Judicial power of the United States" extends to them. *Lapides*, 535 U.S. at 619 (rejecting a similar argument). "[A] Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results." *Id.*

The cases cited by the State Defendants are not to the contrary. Stay Mot. at 5-6. These cases merely support the undisputed proposition that a state ordinarily has standing to sue as a plaintiff, intervene as a defendant, or otherwise waive sovereign immunity to defend the constitutionality of its laws. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019); *Taylor*, 477 U.S. at 137. None of the cases cited support an argument that a State may invoke sovereign immunity to argue to the district court that it is not a proper defendant, but then assert for the first time on appeal that it is a proper party.

At a minimum, it is "uncertain that the proper parties have appealed the order[.]" App. 26. (Grant, J., concurring). This fact weighs strongly against this Court's exercise of certiorari review and thereby undermines State Defendants' request for a stay. *See North Carolina v. N. Carolina State Conference of NAACP*, 137 S. Ct. 1399, 1400 (2017) (Statement of Roberts, C.J., respecting the denial of certiorari) (suggesting the "blizzard of filings over who is and who is not authorized to seek review in this Court" weighed against a grant of certiorari review).

B. The District Court Did Not Abuse Its Discretion.

Even aside from these vehicle problems, it is unlikely that four Justices would

vote to grant certiorari or that, if certiorari were granted, a majority of the Court would vote to reverse the judgment below. This Court reviews the grant of a preliminary injunction only for an abuse of discretion, and the State Defendants have not made any arguments that show that the District Court abused its discretion here. "If the underlying constitutional question is close," which it is not here, the Court "should uphold the injunction and remand for trial on the merits." *Ashcroft*, 542 U.S. at 664-65.

1. Respondents Have Standing.

Article III standing is satisfied when a plaintiff has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). So long as at least one plaintiff has standing to assert each claim, the Court "need not consider whether the other individual and [organizational] plaintiffs have standing to maintain the suit." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).

State Defendants do not challenge Respondents' standing generally. Instead, they raise three arguments—each of which the District Court and the joint concurrence in the Eleventh Circuit rejected as a basis to deny or stay the injunction.

First, State Defendants claim that, because the three individual Respondents who are eligible to vote in the July 14 election live in Mobile County, they do not have standing to challenge voting restrictions in Jefferson or Lee Counties. State Defendants fail to explain how this argument—which goes only to whether the

injunction should apply to one county or three—is worthy of certiorari review.

In any event, as the joint concurrence explained, Respondents People First, GBM, and the NAACP have standing both on behalf of their individual members who live in these counties and because they "have had to divert resources" to new activities in response to the Challenged Provisions. App. 14; *see also Havens Realty Corp v. Coleman*, 455 U.S. 363, 378-79 (1982). Unsurprisingly, GBM and its members are in Jefferson County. As the joint concurrence observed, People First and the NAACP indisputably have members "all over Alabama," App. 13-14.[10] The joint concurrence also explained that Respondents had submitted evidence that their members include senior citizens, individuals who "lack access to a computer, the internet, or videoconferencing technology," and "fall into the high-risk COVID-19 category." App. 13. Because these members wished to vote absentee in the three enjoined counties, the organizational Respondents had standing sufficient to obtain the relief granted by the District Court. App. 14-15.

In addition, as the joint concurrence recognized, "the organizational Plaintiffs themselves have suffered an injury in fact because they have had to divert resources to new activities associated with the Governor's emergency 'Safer-at-Home' order and the Secretary's new absentee voter regulations." *Id.* at 14. Since these new activities are outside their usual work, absent the challenged provisions, Plaintiffs would stop diverting resources to these tasks. Doc. 1 ¶¶ 31, 36.

[10] *See* http://www.naacp.org/wp-content/uploads/2016/06/AL.pdf (listing NAACP chapters across Alabama, including Jefferson and Lee Counties); https://www.peoplefirstal.net/chapters (listing People First chapters in five regions throughout Alabama, including the affected counties).

State Defendants claim that the actions organizational plaintiffs have had to divert resources to undertake are insufficient to establish *Havens Realty* standing because they are broadly consistent with the *type* of actions those organizations might undertake under normal considerations. Stay Mot. 22 n.4. This argument fails. If an organization must devote resources away from existing projects to identify and respond to a defendant's actions—as all three organizational Respondents have here—"there can be no question that the organization has suffered injury in fact." *Havens Realty*, 455 U.S. at 379. There is no requirement that the new activities to which an organization diverts resources must be, as State Defendants would have it, categorically different from its previous mode of operation. *See, e.g.*, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (holding that the NAACP, which was already "actively involved in voting activities[,]" had satisfied standing because it "would divert resources from its regular activities to educate and assist voters in complying with the statute that requires photo identification."). And, contrary to State Defendants' assertion, Stay Mot. at 22 n.4, these injuries are traceable to, and redressable by, the AEMs because organizational Respondents will not incur them if the witness and photo ID requirements are not enforced. *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (rejecting a claim that Article III standing demands sole or proximate causation).

Second, seeking to preserve the curbside voting ban, State Defendants also assert that Respondents lack standing to challenge the ban's operation except in the counties where they live. Once again, this not an argument for certiorari review and

the argument is incorrect. *See* App. 13. State Defendants misperceive the relationship between Respondents' harm and the relief granted. Respondents do not, as State Defendants suggest, "seek to enjoin [the curbside voting ban] on the ground that it might cause harm to other parties." Stay Mot. at 21 (citation omitted). Instead, Respondents challenge the curbside voting ban based on their own particular harms. As the joint concurrence explained, the curbside voting ban is a *statewide* ban. App. 15. No voter can benefit from curbside voting and no election official can implement it unless the Secretary is stopped enforcing his ban, which has no basis in state law. Thus, the Respondents "have standing to seek a state-wide injunction because they challenge the Secretary's *statewide* policy disallowing curbside voting." App. 15.

Accordingly, the District Court and the joint concurrence were correct to find that Respondents have standing to assert each of their claims and requested relief.

2. State Defendants Are Unlikely to Succeed on the Merits as to Respondents' Constitutional Claims.

The constitutional rule that governs this case is clear and undisputed: it is the balancing test set forth by this Court in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). Under this *Anderson-Burdick* framework,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

The District Court applied *Anderson-Burdick*, weighed the burdens identified by Respondents against the interests identified by Defendants concerning the Challenged Provisions and concluded that the proffered interests did not warrant the burden on Respondents' rights. The Eleventh Circuit, "find[ing] no abuse of discretion in the district court's determination," agreed. App. 17.

State Defendants agree that *Anderson-Burdick* applies. Stay Mot. at 22. They argue only that the District Court misapplied the standard. This argument also does not warrant certiorari. Nor have State Defendants identified any abuse of discretion in the Court's careful evaluation of the relevant interests on both sides.

a. *Anderson-Burdick*: Curbside Voting Ban

Under *Anderson-Burdick*, any burden on the right to vote must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J.).

The Eleventh Circuit joint concurrence easily concluded that "the scale weighs in Plaintiffs' favor for curbside voting." App. 17. The CDC recommends curbside voting as a safe method of voting in person amid the pandemic. App. 80. The State Defendants have no interest in enforcing a curbside voting ban, as they concede curbside voting is "not expressly prohibited by statute." Stay Mot. at 8; *see also* App. 48. Over half of all states offer some form of curbside voting. Doc. 46 at 63. Several have offered it in the pandemic. Docs. 44, 45, 46, 47. But the Secretary has repeatedly

stopped local officials from using this common mode of accommodating elderly voters and people with disabilities. App. 8.

Importantly, "the injunction does not require anything." App. 17 (emphasis omitted). The injunction does not demand that the Secretary implement curbside voting in all counties, nor does it require any county to offer it. It merely enjoins the Secretary from "prohibiting counties from establishing curbside voting procedures that otherwise comply with state election law." App. 30. And "those counties that choose to implement curbside voting face minimal burdens because it usually requires the use of polling supplies and staff that already exist." App. 17. "Those considerations are light when compared to forcing high-risk Alabamians to vote in-person inside a polling place in contravention of the CDC's and Alabama's recommendation to minimize in-person interactions." App. 17.

Still, State Defendants challenge the injunction related to curbside voting on three unavailing grounds.

First, State Defendants argue that "Alabama law requires Secretary Merrill to provide uniform guidance for election activities" and that the injunction prohibits him from carrying out this duty. Stay Mot. at 28 (quoting Ala. Code § 17-1-3(1)). Not so. The injunction does not prohibit the Secretary from issuing uniform guidance regarding acceptable curbside voting procedures; it merely prohibits him from forbidding curbside voting altogether. App. 17, 81. As the Secretary concedes, no provision of Alabama law prohibits curbside voting. App. 48, 57; Stay Mot. at 8.

State Defendants did not clearly raise this uniformity concern with respect to

curbside voting below. Nevertheless, in rejecting a similar uniformity argument as to the absentee voting restrictions, the Eleventh Circuit concluded that State Defendants "have not demonstrated that permitting some high-risk Alabamians to vote absentee without satisfying the photo ID and witness requirements somehow detracts from that interest." App. 21. The same is true as to the curbside voting ban.

Second, State Defendants argue that implementing curbside voting before the July 14 election poses logistical concerns that the Secretary is hesitant to "roll[] out for the first time during a pandemic under short notice and with minimal planning." Stay Mot. 28. But, again, all the injunction does is allow counties that want to permit curbside voting consistent with state law to do so. And, as the District Court found, a witness for State Defendants "identified methods for making the offering feasible[]" for the July 14 election in the counties that wish to provide it. App. 99. "[T]hose counties that choose to implement curbside voting face minimal burdens because it generally requires the use of polling supplies and staff that already exist." App. 17. And the District Court issued the preliminary injunction a month before the July 14 elections, giving the Secretary sufficient time to decide whether to encourage local officials to employ curbside voting and to formulate procedures to do so in a uniform manner. App. 17 n.11 (observing that "Plaintiffs filed this action over a month-and-a-half ago, and curbside voting will not be used for three weeks.").

Third, State Defendants argue that the choice between voting in-person inside a polling place or using curbside voting presents a false dichotomy because "[n]o voter is forc[ed] to go inside a polling place at all"—i.e., all Alabamians now have the option

of voting absentee for the July 14 election. Stay Mot. at 29 (internal quotation marks omitted). But the District Court rejected this argument because, despite the no-excuse absentee voting option, some high-risk voters, including People First and NAACP members, must vote in person to receive necessary assistance because of their disabilities or low literacy, App. 80-82; *see also* Doc. 16-45 at 36-37, or certain disabilities, *id.* at 25-26 ¶ 13. For these voters, the CDC recommends the use of curbside voting to "minimize the risk of COVID-19 exposure," but the curbside voting ban prevents that option. App. 80.

Finally, as the joint concurrence noted, the District Court decided to issue the injunction against curbside voting "to allow the state the maximum amount of time to prepare for the election." App. 17 n.10. Specifically, the joint concurrence observed that, if State Defendants were to succeed in seeking a stay of the injunction against the photo ID and witness requirements, that "might happen very close in time to the July 14 election." App. 17 n.10. And if that happened, in the absence of the District Court's original injunction against the curbside ban, imposing the curbside ban [even closer to the election] might well [have] run afoul of *Purcell v. Gonzalez*[.]"App. 17 n.10 (citing 549 U.S. 1, 5 (2006)).

b. *Anderson-Burdick*: Photo ID and Witness Requirements

Again, State Defendants lack standing to challenge the injunction with respect to these requirements. But, even if they had standing, they would be unlikely to succeed on the merits. As the joint concurrence recognized, in applying *Anderson-*

Burdick, the District Court "did not abuse its discretion by concluding that the 'significant' burdens imposed on high-risk Alabamian voters by the witness and photo ID requirements" outweighed the interests proffered by State Defendants as-applied in the context of the ongoing global COVID-19 pandemic. App. 17-18.

On Respondents' side of the scale, both requirements impose substantial burdens on Respondents' right to vote. For the witness requirement, the District Court found that satisfying it imposes a "significant burden on some voters who live alone and who are at heightened risk of severe COVID-19 complications." App. 67. State Defendants fail to acknowledge these very real burdens on Respondents or Respondents' members who live alone or with one person. Doc. 20-1, at 24. Because Respondents do not encounter two people simultaneously, Doc. 20-1, at 18-19, the witness requirement would force them to violate social distancing rules to interact with one or more people outside their household. But COVID-19 is spread easily and stays in the air for up to 14 minutes. App. 243. "Strikingly," State Defendants would seek to enforce the witness requirement for everyone, requiring an "asymptomatic COVID-19 voter [to] unknowingly place potential witnesses at risk" and a symptomatic voter to "find a willing witness." *Thomas v. Andino,* No. 3:20-cv-01552-JMC, 2020 WL 2617329 (D. S.C. May 25, 2020).

State Defendants seek to minimize these burdens by offering questionable speculation about how voters could seek to satisfy the challenged requirements. Such speculation does not, however, prove an abuse of discretion by the District Court.

State Defendants maintain that "[a] particularly cautious voter could meet her

witnesses outside or in a large room and then each sign the piece of paper—with everyone remaining masked and staying six feet or more from one another." Stay Mot. at 25. But this novel suggestion, which would require substantial planning and cooperation from third parties, is nowhere found in CDC guidance for protecting voters during a pandemic. Introducing any person outside of the voter's household unit into the equation necessarily introduces a "risk of contracting COVID-19." App. 18. Indeed, COVID-19 "can spread between people *who are never physically in the same room* because it stays in the air for up to 14 minutes." App. 18 (emphasis added); *see also* App. 37. And the virus can "spread through contact with a contaminated surface[]" and by asymptomatic carriers, making the risk imperceptible to both witness and voter. App. 37; App. 3.

Moreover, State Defendants' hypothetical that "[a] particularly cautious voter could meet her witnesses outside or in a large room" not only minimizes the significant risk of harm to high-risk voters, but also neglects the high-risk voter with limited mobility. Stay Mot. at 25. Respondent Peebles and members of People First, for example, are high-risk voters with severe physical disabilities for whom there is no evidence that they could engage in the State Defendants' proposed choreography.

State Defendants further claim that Respondents "have had months" to ask someone to serve as a witness or photocopy IDs because the runoff was rescheduled from March to July. Stay Mot. at 27 (emphasis omitted). But this misguided emphasis on timing fails to recognize that the COVID-19 pandemic has been ongoing for the entirety of that period (with no end in sight) and that all Alabamians were under a

strict Stay-at-Home order in March and April, which required the closure of most stores, offices, and libraries. Docs. 16-19, 16-39, 16-40, 16-41 at 10. It also ignores the personal circumstances of Respondents. For example, Respondents Clopton was hospitalized and convalescing at home for much of April and May. Doc. 16-45 at 3-4 ¶¶ 7-9 In that time, numerous close friends—i.e., the people he is most likely to have asked to witness his ballots—have died or been infected by COVID-19. Doc. 16-45 at 3-4 ¶¶ 7-9. Had he done as State Defendants suggest and violated social distancing orders, he too would have risked exposure to the virus. Doc. 16-45 at 3-4 ¶ 7.

Whether required to seek witnesses or photocopy IDs in April or July, the risk to voters remains the same—the possibility of infection and therefore complications from and death by COVID-19.[11] Alabama's devastating data showing COVID-19 cases are still on the rise confirms that the risk remains. Supra nn.1-3. And the burden remains in "requiring a vulnerable voter to find a person willing to help at the risk of potential exposure to COVID-19[.]" App. 76-77.

In sum, as the joint concurrence recognized, Respondents "must risk death or severe illness to fulfill Alabama's absentee voter requirements[.]" App. 18. That is a significant burden. Against the threat to Plaintiffs' health, State Defendants offer: the desire to combat voter fraud, to conduct orderly elections, and the concern that the preliminary injunction was entered a month before the election. None of those interests are sufficient, in the context of the pandemic, to justify the application of

[11] The District Court found that the notarization option is also onerous and may run afoul of the Fourteenth and Twenty-Fourth Amendments. App. 69 n.20.

the witness or photo ID requirements to high-risk voters in the middle of a pandemic.

First, although voter fraud is exceedingly rare[12], the District Court recognized that Alabama "has a legitimate and strong interest in preventing [voter] fraud." App. 70. But, as the District Court further explained, simply identifying that interest is not enough: a court must also "consider[] 'the extent to which those interests make it necessary to burden the Plaintiffs' rights.'" App. 70-71 (quoting *Anderson*, 460 U.S. at 789) (additional citation and alterations omitted).

Here, as the Eleventh Circuit joint concurrence and District Court recognized, the witness requirement does little to meaningfully advance the State's interest: "[t]he witness certifies only that they watched the individual sign the individual envelope" and "does not even attest that the voter is who she says she is." App. 71. The District Court found that there is no meaningful voter fraud in Alabama that the witness requirement has prevented or can prevent. *Id*. And, as the District Court further explained, other laws sufficiently protect election integrity in Alabama. App. 72-74. Such laws include requiring prospective absentee voters to complete an application containing either the applicant's driver's license number or the last four digits of their social security number or the absentee voter submitting a sworn affidavit attesting to the accuracy of the information provided on the completed absentee ballot, which is done under penalty of felony conviction. App. 72-73 (citing

[12] As the Eleventh Circuit joint concurrence explained, in the last twenty years, Alabama has "prosecuted a total of only sixteen people for absentee-ballot voter fraud," and no more than three individuals have been prosecuted in any given election year. App. 19. This exceptionally small number of instances of voter fraud among the hundreds of millions of ballots cast in that period, "suggests that Alabama has not found itself in recent years to have a significant absentee-ballot fraud problem." *Id*.

to Ala. Code §§ 17-11-4; 17-9-30(b); 17-11-7; 17-17-24(a)).

State Defendants now contend that the witness requirement, which is only used by a small minority of states, *supra* 8, could deter voter fraud because it *could* allow officials to follow up with witnesses if the State spots irregularities on an absentee ballot. Stay Mot. at 26 n.6. But State Defendants do not assert this has ever actually happened. And their suggestion that Respondents could ask a grocer or other "total stranger" to sign the witness affidavit on absentee ballot envelope, reveals that this justification is makeweight. *See* App. 71; *see also* Doc. 34-1 at 20. If a "grocery or food delivery person" who does not know or has never before met the voter can serve as witness, then the witness has no reliable or useful information about the voter or the ballot on which to follow up. *See* App. 73.

And, in keeping with State Defendants' stated interest in ballot secrecy, *see* Stay Mot. at 8, 28; Doc. 34-1 at 21, the witness does not watch the voter fill out the ballot. Therefore, the person signing the outside of the ballot envelope "may or may not be the same person who completed the ballot" contained *within* the envelope, and the unknown witness would be none the wiser. App. 71. For the "fraudster who would dare to sign the name of another qualified voter at the risk of being charged with a felony, writing out an illegible scrawl on an envelope to satisfy the witness requirement would seem to present little to no additional obstacle—at least on the record before the court." App. 73-74 (citation and internal alterations omitted).

As to the Photo ID Requirement, it does nothing to address absentee voter fraud. Nothing about mailing in a photocopy of an ID confirms that the sender is who

they say they are. *See Crawford,* 472 at 954 (Posner, J.) (noting that requiring a voter to mail in a photocopy of his or her photo ID with his absentee ballot leaves "no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo").

Further, as the District Court explained, State Defendants' voter-fraud justification for enforcing the photo ID requirement as to high-risk voters makes little sense given (1) that Alabama law already provides an exception for those voters aged 65 and older or with disabilities and who cannot access the polls due to a physical infirmity and (2) there are other measures to prevent voter fraud. App. 78-79. Those voters who qualify for the existing photo ID exception bear "substantial similarities" to high-risk individual Respondents and organizational Respondents' members. App. 22 (citing Ala. Code § 17-9-30(d)). An interest in combatting voter fraud is not served by denying to *some* elderly or disabled voters (Respondents) access to a carveout which already exists for other elderly or disabled voters who cannot physically access the polls. The injunction very narrowly circumscribes the photo ID requirement only for high-risk voters and requires the voter to provide a written statement attesting, under penalty of perjury, that he or she is 65 or older or has a disability. App. 9-10.

And, while State Defendants complain that the District Court's remedy is too subjective, Alabama's existing exception already allows certain elderly voters and voters with disabilities to make the subjective determination that they are "unable to access" their polling location and thereby check a box on the absentee ballot

application that exempts them from the photo ID requirement. *See* App. 20. The injunction imposes an even stricter requirement for voters seeking the exemption since high-risk voters must also swear under penalty of perjury that they meet the exemption. Therefore, to the extent that the preliminary injunction order includes any subjective test, it is rooted in the state law's existing photo ID exception.

Second, State Defendants point to their interest in conducting orderly, lawful, and uniform elections throughout the State. Stay Mot. 18. State Defendants did not advance this argument before the District Court so they cannot rely on it to claim the District Court abused its discretion now. In fact, they argued the opposite: that "State Defendants . . . have no role in enforcing these provisions." Doc. 36 at 12–13. Nonetheless, State Defendants have not demonstrated that permitting medically vulnerable voters, like Respondents, to sign affidavits to vote without photo ID, which state law already allows at times, or without witnesses would inordinately disrupt the smooth facilitation of the election.

Third, State Defendants claim that the District Court's injunction implicates this Court's concern in *Purcell*, 549 U.S. 1, about election-procedure changes too close to an election, which can create confusion and diminish public confidence in the election. But in *Purcell*, the district court had denied a motion for a preliminary injunction and the Court of Appeals reversed. *Id.* at 3. This Court reversed the decision of the Court of Appeals in large part because it "was . . . necessary . . . for the Court of Appeals to give deference to the discretion of the District Court," which it had failed to do. *Id.* at 5. Here, by contrast, the State is asking this Court to do

precisely what it criticized the Court of Appeals for doing in *Purcell*, i.e., failing to give deference to the discretion of the district court.

And while State Defendants also cite *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020), in that case the Court repeatedly emphasized that the district court erred by granting a preliminary injunction that went beyond the relief plaintiffs sought in their preliminary injunction motions. *See id*. at 1206-07. That is not the case here. The District Court granted *narrower* relief than Respondents' sought. And, in *Republican National Committee,* another part of the district court's preliminary injunction was undisturbed, and indeed unchallenged, even though it had been entered days before the election. *See id*. (noting the extension of the absentee ballot receipt deadline).

State Defendants also assert there is a risk of confusion because the injunction applies only to certain counties. *See* Stay Mot. at 17. But the State Defendants never raised this argument to the District Court, so it too is waived. And, this newfound concern with uniformity is, to say the least, ironic: the State Defendants insisted below they were not proper defendants and asserted sovereign immunity, which resulted in the District Court limiting its injunction to county AEMs. *See* App. 50-52.

Nevertheless, State Defendants seem to now argue that the District Court abused its discretion by granting relief to Respondents because voters in other localities will not benefit from the injunction. There is no support for Defendants' contention that a court cannot rectify the constitutional violations for some voters, if others, who did not bring suit, may not benefit from such relief. Given that the

affected counties are also those counties with the highest infection numbers in Alabama, there is reason to offer voters in those areas more leeway. In fact, Alabama itself instructs people, like Respondents, in these "very high risk" and "high risk" counties to take extra and different precautions than people elsewhere. *Supra* 3.

Moreover, State Defendants have not provided any explanation or evidence as to why voters would be confused by the clear guidance being provided by AEMs—consistent with the District Court's injunction—simply because it applies to certain counties and not others. Indeed, Alabama's 67 counties have different processes and resources for administering elections. For example, as State Defendants' witness declared, 35 of Alabama's 67 counties use e-poll books to verify voters' registration information at in-person polling locations, the remaining 32 counties use poll lists. Doc. 34-1 ¶ 46. State Defendants do not complain that this lack of uniformity to check in confuses voters across counties. And counties regularly follow different election procedures, schedules, and cycles. For example, only a subset of counties will participate in the First Congressional primaries—Mobile—or in an upcoming special election for a newly vacated state house district—Bibb, Chilton, and Shelby counties. State Defendants do not contend that this lack of uniformity results in confusion.

Here, far from supporting a stay, the concerns this Court has previously identified about confusion and diminished confidence in the electoral process would be implicated by *granting* a stay. As discussed, the AEMs—i.e., the parties charged with implementing the injunction—have not appealed and are already notifying voters about the injunction and instructing them about the process for waiving the

witness and photo ID requirement. A stay at this stage, however, would cause confusion and undermine confidence in elections, because it would require AEMs to reverse course and inform voters that the previous burdens were being reinstated. This would likely lead to the disenfranchisement of those voters who have already sought to cast absentee ballots pursuant to the injunction for the July 14 election.

Indeed, this Court previously *vacated* a stay that—like the stay that State Defendants seek here—would have resulted in similar voter confusion and disfranchisement. *See Frank v. Walker*, 574 U.S. 929 (2014). In *Frank*, the district court had granted an injunction blocking an absentee photo voter ID requirement. *Id.*; *see also id.* (Alito, J., dissenting) (noting that "absentee ballots have been sent out"). After voters had already been mailed instructions informing them that they could vote without the photo ID requirement, the Seventh Circuit issued a stay of the injunction—resulting in confusion and raising the specter of disfranchisement. *Id.* The plaintiffs appealed to this Court, which vacated the Seventh Circuit stay and permitted voters to continue to vote without photo ID. *Id.*

3. State Defendants Are Unlikely to Succeed on the Merits as to Respondents' ADA Claims.

State Defendants argue that Respondents failed to establish a prima facie case under the ADA. But Respondents do, and the District Court agreed. To prevail under the ADA, a plaintiff need prove only that (1) they are qualified persons with a disability; (2) they were excluded from participation in or denied the benefits of a public entity's services; and (3) the exclusion or denial of the benefit was by reason of

the plaintiff's disability. *See United States v. Georgia*, 546 U.S. 151, 153-54 (2006).

Once a plaintiff establishes a prima facie case, they must offer "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.130(b)(7). Respondents met this burden by proposing modifications that do not cause "undue hardship." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-03 (2002).

State Defendants do not dispute the finding that Respondents—including Respondents with ambulatory disabilities who would benefit from curbside voting regardless of the pandemic—established a *prima facie* ADA claim with respect to the curbside voting ban. *See* App. 99. Rather, the sole argument of State Defendants is that curbside voting "would fundamentally alter Alabama elections." Stay Mot. 30.

This is not true. There is no law prohibiting curbside voting procedures. In any event, State Defendants are not required to do anything except permit local officials to implement curbside voting in a manner consistent with state law. App. 23. As the District Court concluded, "there is no evidence that curbside voting—mandated or otherwise—would fundamentally alter Alabama law." App. 99. And, as described above, Defendants' own witness undercuts this argument: other than minor logistical concerns related to implementation, curbside voting would not fundamentally alter Alabama law. App. 99 & n.47.

So too with the photo ID requirement. State Defendants challenge the first and third elements of Respondents' *prima facie* case. They are wrong. Respondents are qualified persons—all eligible to vote—with disabilities, including medical conditions that place them at a high-risk of serious bodily injury or death from COVID-19 should

they leave home. App. 21-23. The Eleventh Circuit's joint concurrence correctly determined that the District Court did not abuse its discretion in finding that Respondents are "qualified individuals with a disability" under the statute and that they "have shown that they will be excluded from participation *by reason of* their disability." App. 22. "Forcing a high-risk voter to choose between risking her health and life or abandoning her *right* to vote easily satisfies the 'not readily accessible' requirement." App. 23 (emphasis in original).

State Defendants argue that Respondents are not qualified because the photo ID requirement is an essential eligibility requirement. Stay Mot. at 19-20. But State Defendants cannot overcome the ADA claim by simply asserting that the Photo ID Requirement is "essential." Rather, the Court examines a requirement's purpose (*i.e.*, identification) and whether that purpose can be satisfied with a reasonable modification. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 685-86 (2001).

No statutory language indicates that the photo ID requirement is essential, App. 97, and there are already multiple exemptions to the requirement. *See* Ala. Code §§ 17-9-30(d), 17-9-30(f). A requirement cannot be unalterable if it already permits a sizable group of similarly situated voters to also demonstrate their identity without providing photo ID. App. 22; *see also Martin*, 532 U.S. at 685 (concluding that the PGA's walking rule was not an "indispensable feature of tournament golf" because PGA allowed golf carts to be used by non-disabled golfers in other tournaments). Tellingly, State Defendants argued below that proof of identification is not even a qualification. Doc. 36 at 26-27. The District Court was correct in holding that the

requirement is not "essential" and does not "fundamentally alter" state law. App. 97.

State Defendants also argue that Respondents are not excluded from voting "by reason" of their disabilities. Stay Mot. at 20. But, because Respondents' medical conditions require them to remain at home and to self-isolate or face death or serious illness from COVID-19, this injury is also "by reason of" their disabilities. *See* App. 22; *see also McAlindin v. San Diego Cty.*, 192 F.3d 1226, 1235 (9th Cir. 1999) (finding an ADA violation where a person's disability led to self-isolation); *Mooneyhan v. Husted*, No. 3:12-cv-379, 2012 WL 5834232, at *5 (S.D. Ohio Nov. 16, 2012) (similar).

State Defendants' claims also do not address the crux of Respondents' argument: in the context of a pandemic, Respondents are excluded from voting by reason of their disabilities: they cannot vote inside poll sites or meet the photo ID requirements because their disabilities mean exposure to COVID-19 is dangerous.

4. A Stay Would Irreparably Harm Voters and the Equities Favor Respondents.

Because State Defendants lack standing to appeal the injunction in part and the curbside voting ban demands nothing of them, it is doubtful that they will be harmed absent a stay. On the other hand, because the AEMs are even now instructing and allowing people to vote under the injunction, granting the stay would sow voter confusion and likely lead to the disenfranchisement of those voters who have already opted to cast a ballot without satisfying the witness and photo ID requirements.

The denial of the right to vote is an irreparable harm. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Moreover, the injunction also promotes the "paramount

government interest" in the "[p]rotection of the health and safety of the public." *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981). Nonetheless, State Defendants now seek to throw Alabama's elections into disarray by changing the voting rules in a way that will disenfranchise the hundreds of thousands of high-risk voters who, acting pursuant to state guidance, are staying home to protect themselves and others from severe illness. The irreparable harm to high-risk voters in the affected counties is particularly acute. The three affected counties include areas with the highest number of infected people in Alabama, where the ADPH is telling high-risk voters to be especially cautious. *See supra* 3.

For weeks, the AEMs have been complying with the injunction by publicly instructing these high-risk voters of the waiver of the photo ID and witness requirements for the July election. Thus, it is certain that voters have already received and submitted absentee ballots without the satisfying these requirements. A stay would spread doubt in the public about the validity of these ballots and likely deny those voters the opportunity to cast a meaningful ballot unless they: 1) learn about a potential stay, and 2) manage to procure a means of voting in-person or obtaining a new absentee ballot between now and the election in 13 days—a Herculean task under normal circumstances—let alone for high-risk voters in the worst pandemic of the last century. *See* App. 4. Alabama law does not permit a voter to "cure" unwitnessed ballots, which are simply thrown out. Ala. Code § 17-11-7. Amazingly, State Defendants do not address this quandary and accept that these high-risk voters should be disqualified.

This after-the-fact disenfranchisement of high-risk voters who are seeking to safely exercise the franchise is the epitome of irreparable and favors a stay. As the joint concurrence observed "One wrongfully disenfranchised voter is one too many." App. 24. Because the election is ongoing and voters are already being allowed to vote under the injunction, "Plaintiffs face immediate and irreparable harm if the burdens imposed by the challenged requirements are not enjoined." App. 24.

Moreover, Alabama cannot implement the necessary measures to address the problems addressed by the injunction. caused by the stay in the next 13 days. Alabama's DMVs, libraries, and stores—where people can obtain or photocopy their photo IDs—have been closed. *See supra* 28. Even for those voters who have photo ID, there are over 230,000 Alabama households without a computer to copy IDs. Docs. 20-1 at 15, 16-37 at 53. The Secretary has offered no help to these voters. App. 7 n.3.

As to the curbside voting injunction, the Secretary may still bar "unlawful procedures"— the injunction does not injure him at all." App. 27. Respondents presented evidence that voters, like members of People First and the NAACP, who need in-person assistance would suffer irreparable harm, if the Secretary continued to block curbside voting. And, if the stay were to be granted as to the witness and photo ID requirements, Respondents would prefer to use curbside voting. App. 8.

The District Court did not abuse its discretion in finding that, because "the singular circumstances presented by the COVID-19 pandemic are far from ordinary," the balance of equities favors an injunction. App. 105-07. Further, any alleged harm to State Defendants from the injunction concerning the witness and photo ID

requirements would be to the AEMs, who are not seeking a stay.

CONCLUSION

For the reasons above, the Emergency Application for Stay should be denied.

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