No. _____

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.,

RESPONDENTS.

EMERGENCY APPLICATION FOR STAY

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

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

A. Barrett Bowdre
Deputy Solicitor General

James W. Davis
Winfield J. Sinclair
Jeremy S. Weber
Misty S. Fairbanks Messick
Brenton M. Smith
Assistant Attorneys General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Edmund.LaCour@AlabamaAG.gov

PARTIES TO THE PROCEEDING

The parties to the proceedings below are as follows:

Applicants John H. Merrill, in his official capacity as Secretary of State for the State of Alabama, and the State of Alabama were defendants in the district court and appellants in the court of appeals.

Respondents are People First of Alabama, Greater Birmingham Ministries, the Alabama State Conference of the NAACP, Robert Clopton, Eric Peebles, Howard Porter, Jr., and Annie Carolyn Thompson. They were plaintiffs in the district court and appellees in the court of appeals.

Other defendants in the district court were Kay Ivey, in her official capacity as Governor of the State of Alabama; Alleen Barnett, in her official capacity as Absentee Election Manager of Mobile County, Alabama; Jacqueline Anderson-Smith, in her official capacity as Circuit Clerk of Jefferson County, Alabama; Karen Dunn Burks, in her official capacity as Deputy Circuit Clerk of the Bessemer Division of Jefferson County, Alabama; Mary B. Roberson, in her official capacity as Circuit Clerk of Lee County, Alabama; and, James Majors, in his official capacity as Absentee Election Manager of Lee County.[1] Governor Ivey was dismissed with prejudice on the basis of

[1] Circuit Clerks have a first right of refusal for the job of Absentee Election Manager (AEM) in their county. Ala. Code § 17-11-2. Respondents sued the AEM in Mobile County and Circuit Clerks who were serving as AEMs in Jefferson County and Lee County. The Lee County Circuit Clerk (Roberson) resigned as AEM and argued that the new AEM should be substituted. D. Ct. Doc. 54. The district court agreed that the new AEM should be substituted, D. Ct. Doc. 58 at 30-31, but Respondents took the position that they are suing Roberson in her capacity as Circuit Clerk such that she *and* the new AEM, Majors, should both be defendants, D. Ct. Doc. 66. Because this is a live dispute, both are listed in the text.

sovereign immunity. She and the local election official defendants have not appealed the district court's preliminary injunction.

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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:

Alabama is in the middle of a primary election runoff. Because of the threat of COVID-19, the State is allowing *any* registered voter to vote absentee, and such voting has already begun. Voters who choose to vote in person will head to the polls on July 14.

Despite the ongoing election, and despite this Court's "repeated[] emphasi[s] that lower federal courts should ordinarily not alter the election rules on the eve an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citations omitted), the district court entered a preliminary injunction on June 15 that rewrites Alabama's election law by prohibiting election officials in three counties from enforcing modest anti-fraud requirements for absentee voting. App. 29-30. (Election officials in the remaining 64 counties are still required to enforce State law, creating a patchwork of uneven treatment.) The injunction also enjoins Secretary of State John Merrill from prohibiting counties from offering curbside voting, even though the Secretary has concluded that trying out a brand-new voting procedure during a pandemic would create more logistical and safety problems than it would fix and is likely unlawful in any event. App. 30.

Why did the district court do this? Because, according to its findings, the State's absentee-ballot requirements—requiring a copy of the voter's ID with an application and the signature of either two witnesses or one notary public with the ballot—*could* dissuade some hypothetical eligible voter from voting, given that the State has not "completely eliminate[d] the risk of exposure" to COVID-19. App. 79. Thus,

because three voters from Mobile—the individual plaintiffs in this case—"feel it is … unreasonable to comply with" Alabama law "because of COVID-19," they don't have to comply. App. 78. And instead of tailoring relief to those three plaintiffs who "feel" that the law is "unreasonable," the district court crafted a sweeping injunction that will directly affect all voters in three Alabama counties, potentially alter other election practices statewide, and threaten the integrity of an ongoing election. App. 29-30.

The State and Secretary Merrill (together, "Applicants") sought emergency relief from the Eleventh Circuit, which entered an order on June 25 refusing to stay the injunction. App. 1. Two judges on the panel wrote a concurring opinion that chastised the State and Secretary Merrill for their purported "disregard for the science and facts." App. 19. According to the joint concurrence, though the State gave plaintiffs months to find a safe way to copy their IDs and arrange to have someone watch them sign a piece of paper, they must "risk death" to cast a vote. App. 18. Of course, neither the plaintiffs nor the courts below quantified the risk to plaintiffs or explained why it was unavoidable. Nor could they, because no voter need "risk death" when she can, for example, simply meet two masked neighbors outside for a few moments while they watch each other, from several yards away, sign an absentee ballot. Yet here we are, where such lack of imagination is enough to grant a federal court the power to rewrite State election law in the middle of an election.

This Court should stay the injunction. First, this Court's precedent prohibits federal courts from changing the rules of an ongoing or rapidly approaching election.

See, e.g., *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 136 S. Ct. 9 (2014); *Purcell v. Gonzales*, 549 U.S. 1 (2006) (per curiam).

Second, the district court's order enjoining enforcement in three counties of the State's anti-fraud provisions for absentee voting *while absentee voting is already taking place* seriously threatens the integrity of the election, undermines voter confidence in that election, and creates an unworkable mishmash of law that cannot be uniformly administered. *See Purcell*, 549 U.S. at 4-5. Applicants respectfully ask this Court to enter an *immediate* administrative stay to prevent further voter confusion and interruption of an ongoing election, and then to enter a stay pending resolution of Applicants' appeal.

Finally, there is a reasonable probability that four Justices will consider the issues in this case sufficiently meritorious to grant certiorari and a fair prospect that a majority of the Court will vote to reverse the judgment below. States across the country are facing claims that their generally applicable election laws must be shelved during the current pandemic. Alabama, despite granting all voters the right to vote by absentee ballot and giving voters months to cast their ballot, became the latest State to have its laws enjoined on the eve of an election. Many other courts, in contrast, have shown States the deference typically accorded them under this Court's precedent. And challenges like the one at issue here will continue to proliferate as the November presidential election approaches. This Court's attention is thus needed now to provide clear guidance to the States and courts.

OPINIONS AND ORDERS BELOW

The district court's memorandum opinion and order granting a preliminary injunction are reproduced at App. 32-108 and App. 29-31, respectively. The Eleventh Circuit's order denying Applicants' emergency motion for stay is reproduced at App. 1-28.

JURISDICTION

This Court has jurisdiction over this Application under 28 U.S.C. §§ 1254(1), 1651(a), and 2101(f). Applicants were named defendants before the district court, and Secretary Merrill was enjoined by the court from advising election officials not to offer curbside voting. Though the State was not specifically enjoined by the district court, the order, "for all intents and purposes, constituted injunctions barring the State from conducting this year's elections" in the manner chosen by the Legislature. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). "Unless that statute is unconstitutional, this would seriously and irreparably harm the State, and only an interlocutory appeal can protect that State interest." *Id.* (footnote omitted); *see also Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("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." (alteration omitted) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox. Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))); *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) (noting that the "harm of being prevented from enforcing one of its laws" is "present every time the validity of a state law is challenged"). It is thus clear that the State of Alabama has been harmed by the district court's injunction, and equally clear that

relief from this Court would redress that harm. The State thus has standing to seek such relief from this Court.

Respondents argued below that Applicants do not have standing to appeal the district court's order enjoining absentee election managers in three counties from enforcing the anti-fraud provisions of State law for absentee voting. According to Respondents, the State and Secretary Merrill secured a great "judgment in [their] favor" because they "avoided an injunction against them." Resp. Circ. Ct. Br. 5. But "a State"—whether directly enjoined or not—"clearly has a legitimate interest in the continued enforceability of its own statutes." *Maine v. Taylor*, 477 U.S. 131, 137 (1986); *see Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."); *cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980) (noting that an "appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III").

The State and Secretary Merrill did inform the district court that they were improper defendants because they could not redress Respondents' alleged harms. That's true: under Alabama law, local officials implement the State laws that Respondents are challenging. *See Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1207-12 (11th Cir. 2020). But that does not mean the *State* isn't harmed when its laws are enjoined. In this way, the State is like a defendant-intervenor (except that Respondents have already brought the State to the table as a party). An intervenor need not

be able to redress a plaintiff's injury to defend against the plaintiff's claim; she just needs to show that the relief would harm her and that she has Article III standing independent of the named defendant. *See, e.g.*, *Taylor*, 477 U.S. at 136-37; *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). That's analogous to what happened here: Though the State was not enjoined by the district court's order, it suffered harm all the same, and that harm can be redressed by vacating the preliminary injunction and denying Respondents' requested relief.

STATEMENT

A. Alabama Takes Extraordinary Measures to Make Voting Safe During the COVID-19 Pandemic.

Alabama has taken extraordinary measures in response to COVID-19. It has operated in a state of emergency since March 13, 2020, and the State Health Officer has entered a series of health orders that encouraged, and then required, citizens to avoid non-essential actions. D. Ct. Docs. 16-1 to 16-21. Some of these restrictions were recently loosened. D. Ct. Doc. 34-15.

The State has also altered its election procedures because of the danger COVID-19 presents. First, the Governor moved the primary runoff election that was scheduled for March 31, 2020, to July 14, 2020. App. 39.

Second, Secretary Merrill has encouraged probate judges, who oversee federal, state, and county elections in their counties, to consider introducing alternate polling places and recruiting additional poll workers. D. Ct. Doc. 34-1 at 5. He also offered suggestions and funds to help probate judges maintain safe and sanitary practices for in-person voting. D. Ct. Doc. 34-1 at 15.

And third, Secretary Merrill promulgated an emergency regulation allowing voters who determined that it would be "impossible or unreasonable to vote at their voting place" to use the absentee ballot process. Ala. Admin. Code r. 820-2-3-.06.01ER (Mar. 18, 2020). Normally, voters would have to fit into one of eight scenarios to be eligible to vote absentee. Ala. Code § 17-11-3(a)(1)-(8). As the district court found, "for the runoff election in July … the emergency regulation allows *any* voter who does not wish to vote in person because of COVID-19 to vote absentee." App. 39 (emphasis added).

State law imposes two requirements on absentee voting that are relevant here. One, voters must submit a copy of their photo ID with their absentee ballot application. Ala. Code § 17-9-30(b); *see also id.* § 17-9-30(c). And two, absentee ballots must contain a voter affidavit that is either notarized or signed by two witnesses. *See id.* § 17-11-10(b) & (c). As the State explained in 1996 when successfully seeking preclearance for strengthening the witness requirement, the protection was enacted in direct response to "systematic absentee ballot fraud and abuse" that had likely altered the results in several statewide races in 1994. D. Ct. Doc. 34-10 at 2. These provisions remain vital for preventing absentee voter fraud.

At the same time, the State has tried to make these important requirements as easy as possible to satisfy safely during the pandemic. For instance, the Governor granted permission for notaries public to notarize signatures remotely so that voters need not leave their homes to have an affidavit notarized. App. 40. Secretary Merrill has advised the Boards of Registrars that photo IDs must still be issued for free, even

if a courthouse is otherwise closed. D. Ct. Doc. 34-1 at 11. And a pre-existing exemption from the photo ID requirement still applies for voters who are "unable to access [their] assigned polling place" and are either disabled or 65 or older. Ala. Code § 17-9-30(d); Ala. Admin. Code. r. 820-2-9--.12(3) (2013). Because the runoff election was postponed from March to July, voters have had more than *three months* of additional time to satisfy these easy-to-satisfy requirements.

One accommodation the State has not offered is curbside voting. Although not expressly prohibited by statute, Secretary Merrill has notified election officials in the past that the curbside voting they were offering did "not legally comply with Alabama laws concerning election integrity measures[,] including the voter personally signing the poll list, ballot secrecy, and ballot placement in tabulation machines." D. Ct. Doc. 34-1 at 21. And Secretary Merrill has concluded that "implementation of 'curbside' voting would be completely unfeasible for the July 14, 2020 primary runoff election or any 2020 election" because of the additional e-poll books, tabulation machines, and trained poll workers that would be required to offer it—to say nothing of the logistical, privacy, and social distancing problems that would arise from administering curbside voting for the first time during a pandemic. D. Ct. Doc. 34-1 at 21-25.

B. The District Court Issues a Preliminary Injunction That Replaces the State's Election Procedures with a Subjective Test Dependent on Whether an Individual Voter Thinks Alabama Law is "Reasonable."

Not content with the above accommodations, on May 1, 2020, four elderly or disabled individuals (Robert Clopton, Eric Peebles, Howard Porter, Jr., and Annie Carolyn Thompson) and three organizations (People First of Alabama, Greater Birmingham Ministries, and the Alabama State Conference of the NAACP) sued the

State of Alabama, Secretary Merrill, Governor Ivey, and local election officials for Mobile, Jefferson, and Lee Counties. D. Ct. Doc. 1. Notably, only three of the individual plaintiffs are eligible to vote in the July 14 runoff—Clopton, Porter, and Thompson—and all three of them live in Mobile. Dt. Ct. Doc. 1 at 9-12. Respondents moved for a preliminary injunction eleven days later, and the district court granted it in part on June 15. App. 29. As relevant here, the district court made three main findings.

First, the court determined that the four individual plaintiffs have standing to sue because they intend to vote in an upcoming election but feel burdened by either the photo ID requirement, the witness requirement, or the inability to vote curbside at a voting precinct—what Respondents and the district court refer to as Secretary Merrill's "ban on curbside voting." App. 45-48. The court did not determine whether the organizational plaintiffs have standing, saving that question for a later day. App. 49. The court did not explain how Respondents have standing to sue the Jefferson or Lee County officials when none of the individual plaintiffs eligible to vote on July 14 and none of the identified members of the organizational plaintiffs reside in those counties. Nor did the court explain how any of the plaintiffs have standing to require a statewide restructuring of election procedure for curbside voting when the court itself found that "[e]ach of the individual plaintiffs … intends to vote absentee in 2020," App. 89, and the only three plaintiffs who said they would consider using curbside voting, if offered, all live in Mobile.

Second, the court found that the witness requirement, the photo ID requirement, and the Secretary's so-called "ban" on curbside voting likely violate

Respondents' and hypothetical other voters' constitutional right to vote. App. 65-82. Though purporting to apply this Court's balancing tests from *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the district court time and again found that the State's legitimate interests in combating voter fraud and conducting orderly elections were outweighed by the minimal, mostly hypothetical burdens either experienced by Respondents or thought up by the court. Thus, for instance, the court reasoned that "the photo ID requirement *could* present some elderly and disabled voters who wished to vote absentee with the burden of choosing between exercising their right to vote and protecting themselves from the virus, which *could* dissuade them from voting." App. 79 (emphasis added). And thus, for instance, the court discounted the State's interest in and tailoring of its witness requirement as a means to prevent voter fraud by pointing out that the photo ID requirement accomplishes the same purpose—and then, having enjoined certain applications of the witness requirement, the court enjoined application of the photo ID law in certain circumstances as well because of its tailoring. *Compare* App. 72 (accepting Respondents' argument "that the witness requirement is not necessary" to prevent voter fraud because, among other things, "a voter must submit a copy of his or her photo ID with an absentee ballot application"), *with* App. 79 (finding the photo ID law unnecessary because "there are other measures to prevent voter fraud").

As for Secretary Merrill's "ban" on curbside voting, the court found that Respondents were likely to prevail because "the defendants have not proffered any legitimate justification for the burden imposed by Secretary's Merrill's prohibition on

curbside voting." App. 82. Yet later in the opinion, the court recounted a number of justifications offered by Secretary Merrill in a declaration submitted by the Director of Elections for the Secretary's Office. App. 99 n.47. Citing from a section of the declaration helpfully entitled "Why Curbside Voting Cannot Work," the court reported: "[The Director] explained that curbside voting would require the use of e-poll books or alternatively the transport of polling lists from inside the polling place to the curb, additional tabulation machines to preserve ballot secrecy, and additional poll workers to staff the curbside voting stations," and he "expressed concerns that these procedures would compromise the privacy of the curbside voters, inconvenience candidates wishing to campaign 30 feet from the polling site, and create parking and traffic flow problems around the site." App. 99 n.47.

Third, the court found a substantial likelihood that Respondents would prevail on the merits of their claims challenging the photo ID law and Secretary Merrill's "ban" under Title II of the Americans with Disabilities Act (ADA).[2] As noted above, a voter who is "unable to access his or her assigned polling place" and is either disabled or 65 or older already need not submit a copy of his or her photo ID to vote absentee. *See* Ala. Code § 17-9-30(d); Ala. Admin. Code. r. 820-2-9-.12(3). So, Respondents' claim is that the State's photo ID requirement is unlawful as applied to voters who have a disability but *are* physically able to access their assigned polling place. The district court agreed, reasoning that, because a person without a copier at home may need to

[2] The court found that Respondents were unlikely to state a prima facie claim for relief on their ADA challenge to the witness requirement. App. 91.

find some other way to obtain a copy, State law "presents a nearly insurmountable hurdle," App. 94, and thus the ADA likely requires the State to accommodate such voters by exempting them from the photo ID requirement. To the State's suggestion that such a voter could ask a friend to make a copy, the court responded: "Requiring a voter to ask another person to clear this hurdle on their behalf, even if this request proves successful, could easily dissuade them from voting." App. 94.

Finally, the court found that Respondents were likely to succeed on their ADA claim challenging the "ban" on curbside voting. App. 99-100. Relying on the Director of Election's declaration, the court found that "there is no evidence that curbside voting … would fundamentally alter Alabama law" because, "[i]n fact, the defendants' witness identified methods for making the offering feasible." App. 99. (citing D. Ct. Doc. 34-1 at 22-24). To say the least, that is an odd way of construing a subsection of a declaration on "Why Curbside Voting Cannot Work," which explains why such voting is "completely unfeasible." D. Ct. Doc. 34-1 at 21-22.

But having thus found that Respondents were likely to succeed on three of their constitutional claims and two of their ADA claims, the court determined that an injunction was necessary. Accordingly, the court ordered that, for the upcoming runoff election on July 14, the Jefferson, Mobile, and Lee County defendants are enjoined from enforcing (1) the witness requirement for any absentee voter "who determines it is impossible or unreasonable to safely satisfy that requirement" and who declares in writing that she is at a substantially higher risk of developing a severe case of COVID-19, and (2) the photo ID requirement for any voter who declares in

writing that she is 65 or older or has a disability and "who determines it is impossible or unreasonable to safely satisfy that requirement." App. 29-30. Additionally, Secretary Merrill is "enjoined from prohibiting counties from establishing curbside voting procedures that otherwise comply with state election law." App. 30.

Applicants appealed to the Eleventh Circuit the next day, and the day after that, June 17, they moved for a stay pending appeal.

C. The Eleventh Circuit Refuses to Stay the Injunction Pending Appeal.

On June 25, the Eleventh Circuit denied Applicants' emergency motion for a stay. App. 1. Judges Rosenbaum and Jill Pryor authored a joint concurrence, which suggested that Alabama, by enforcing its anti-fraud provisions for absentee voting, is putting its citizens to an abominable choice: "To die, to [vote]; To [vote]: perchance to dream: ay, there's the rub[.]" App. 2 (alterations in original; emphasis deleted) (referencing William Shakespeare, *Hamlet*, act 3, scene 1). In the opinion's view, requiring a copy of a photo ID and a couple signatures on an absentee ballot is akin to "set[ting] up polling stations in the middle of the street." App. 19. The joint concurrence declared that any suggestion that a plaintiff could safely fulfill these requirements over the course of more than three months "reflects a serious lack of understanding of or disregard for the science and facts involved here." App. 19.

The joint concurrence also found that Respondents had standing to seek relief for the July 14 election in counties where *none* of the individual plaintiffs live because the organizational plaintiffs were located in those counties or attested that they had members who lived there—even though the organizations didn't provide names of, or declarations from, any of those members. App. 13-14. And the joint concurrence found

that the district court likely did not err in granting three Mobile voters statewide relief for curbside voting because the plaintiffs had "challenge[d] the Secretary's *statewide* policy." App. 15.

The joint concurrence recognized that the State had some "legitimate" interest in applying its photo ID and witness requirements to combat voter fraud, but then promptly discounted that interest because the State had prosecuted "only sixteen people for absentee-ballot voter fraud since the year 2000." App. 19. (The opinion never mentioned the State's evidence recounting the rampant absentee voter fraud that caused the Legislature to strengthen the witness requirement in the first place. *See* D. Ct. Doc. 34-10 at 2.) And the joint concurrence discounted the State's interest in enforcing its photo ID requirement because "Alabama already provides an exception to that requirement for voters over age 65 or with disabilities who cannot access the polls due to a physical infirmity." App. 20 (citing Ala. Code § 17-9-30(d)). The opinion, however, neglected to mention that these voters are entitled to special protections under federal law. *See* Ala. Code § 17-9-30(d) ("[A] voter who is entitled to vote by absentee ballot pursuant to … federal law, shall not be required to produce identification prior to voting."). The joint concurrence then relied on many of these same rationales to conclude that the district court likely properly resolved Respondents' ADA claims. App. 21-23.

The joint concurrence saw no *Purcell* problems with an injunction entered during an ongoing election. "At most," it said, the injunction simply "requires defendants to provide additional training to ballot workers—a feat hardly impossible in the

allotted time." App. 21. The opinion did not address whether nullifying the witness and photo ID requirements in only three of the State's 67 counties might present issues of voter confusion during the ongoing election.

Judge Grant wrote a separate opinion concurring in the denial of the stay. App. 26-28. She noted her "serious concerns" about the district court's order, which she characterized as "dramatic both in its disregard for Alabama's constitutional authority and in its confidence in the court's own policymaking judgment." App. 26. She emphasized that "a dangerous virus does not give the federal courts unbridled authority to second-guess and interfere with a State's election rules." App. 26. And she recognized that "organizational plaintiffs' evidence-free contention that some of their members 'must vote in-person' does not make sense given the State's new rules providing for universal absentee ballots." App. 27. Nevertheless, she was concerned that Applicants did not have standing to appeal because they were not directly enjoined by the district court. App. 26. As already discussed above, that concern was misplaced because Applicants satisfy Article III standing requirements to appeal the district court's injunction that undoubtedly harms the State of Alabama.

REASONS FOR GRANTING THE APPLICATION

This Court will grant a stay of a district court's order, including in a case still pending before the court of appeals, if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of the stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see* 28 U.S.C. § 2101(f). "In

close cases," the Court will also "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

I. There Is A Reasonable Probability That This Court Will Grant Certiorari And A Fair Prospect That It Will Grant Relief From The District Court's Injunction That Alters Alabama's Election Procedures While Voting Is Already Taking Place.

A. This Court Has Repeatedly Warned Lower Courts Not to Change Election Laws During or On the Eve of an Election, and It Has Repeatedly Stayed Such Injunctions.

Just three months ago, this Court followed its usual practice and stayed a district court's injunction that altered state election procedures on the eve of Wisconsin's spring election. *Republican Nat'l Comm.*, 140 S. Ct. at 1208. In that case, the district court entered its injunction five days before the election, *id.* at 1206, whereas the district court here entered its injunction 29 days before in-person voting is to take place. App. 29. That difference does not matter for two reasons. First, when the district court entered its injunction changing absentee election procedures in three counties in Alabama, voters were *already* voting absentee and had been since March. Second, this Court regularly grants stays under similar circumstances. *See, e.g.*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying lower court's order entered 32 days before election day); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (staying lower court's order entered 61 days before election day); *Purcell*, 549 U.S. at 4-5 (staying lower court's order entered 33 days before election day); *cf. Perry v. Perez*, 565 U.S. 1090 (2011) (staying lower court's order entered 22 days before candidate registration deadline).

The Court's reasons for doing so are clear. It has "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republic Nat'l Comm.*, 140 S. Ct. at 1207, because such orders "can themselves result in voter confusion and consequent incentive to remain away from the polls," *Purcell*, 549 U.S. at 4-5. Confusion is sure to follow the district court's order here unless it is stayed. That order changes Alabama's absentee-voter law in three counties—Mobile, Jefferson, and Lee Counties—while leaving the law in place in the State's remaining 64 counties. How is that not going to confuse voters? And it is no answer to say that absentee election managers in the other counties can choose for themselves to disobey State law and adopt Respondents' preferred policy outcomes as their own; those AEMs are still bound to follow the law enacted by the Legislature. The district court's patchwork creation requires uneven enforcement of the law and is sure to sow voter confusion.

It is also sure to undermine "[c]onfidence in the integrity of [Alabama's] election process," which this Court has said "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages participation in the democratic process."). Indeed, those concerns are especially acute in this case, where the district court's order enjoins enforcement of two of the State's anti-fraud provisions for absentee voting. These provisions were enacted by the Legislature precisely to combat claims of absentee-voter fraud; with their sudden enjoinment, voters could wonder if

fraud will increase and if their votes will really make a difference, perhaps leading them not to vote at all. This is the very concern that underpins *Purcell*.

For its part, the district court dismissed these concerns because the only burdens it thought would result from its order would be that State officials would have "to quickly communicate the changed rules to local election officials and voters." App. 106. The joint concurrence in the Eleventh Circuit echoed this nonchalance, concluding that the State need only "provide additional training to ballot workers—a feat hardly impossible in the allotted time."[3] App. 21. Under this Pollyannaish view, it's hard to imagine a court ever harboring concerns sufficient to warrant the restraint required by *Purcell*. But this Court's standard is far more sober in counting the costs of judicial interference on the eve of—or during—an election. Those costs are real and widespread in this case, and they warrant a stay by this Court.

B. The Question Presented is Exceptionally Important, Recurring, and Warrants Review.

Lower courts across the nation are facing a flood of requests for, and appeals of, preliminary injunctions challenging States' election laws in light of COVID-19. This Court has already resolved three such requests since the pandemic began. In two of those orders, both issued last week, the Court gave no guidance to lower courts because it properly denied applications to vacate stays that had been entered by courts of appeals. *Tex. Democratic Party v. Abbott*, No. 19A1055 (June 26, 2020);

[3] As discussed below, this conclusion also ignores the litany of costs the State provided that would be required if curbside voting is implemented. *See* D. Ct. Doc. 34-1 at 21-25.

Thompson v. Dewine, No. 19A1054 (June 25, 2020). In the third case—*Republican National Committee*—the Court granted a stay and reminded "lower federal courts" that they "should ordinarily not alter the election rules on the eve of an election," 140 S. Ct. at 1207—but apparently more guidance is needed. Indeed, some courts, such as the district court in this case, have not only altered rules on the eve of an election, but fundamentally changed voting requirements after voting has already begun. This Court, therefore, must clarify whether, during a pandemic, the States retain their authority to manage their elections.

Indeed, already five different courts of appeals have issued seven rulings on motions for stays of preliminary injunctions altering a State's upcoming election processes due to COVID-19. Two of those courts—the Sixth and Seventh Circuits—have each heard two challenges, with panels coming out different ways. *Compare Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020) (granting Ohio's motion for stay pending appeal), *application to vacate stay denied*, No. 19A1054 (June 25, 2020), *with Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020) (granting in part Michigan's motion for stay pending appeal but "uphold[ing] the core of the injunction"); *compare also Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, Doc. 30 (7th Cir. Apr. 3, 2020) (granting and denying in part Wisconsin's motion for stay pending appeal), *with Libertarian Party of Ill. v. Cadigan*, 2020 WL 3421662 (7th Cir. June 21, 2020) (denying motion for stay by members of Illinois' State Board of Elections). Two other courts—the Fifth and Eighth Circuits—have both granted stays pending appeal. *Tex. Democratic Party v. Abbott,* No. 20-50407, 961 F.3d 389 (5th Cir.

2020), *application to vacate stay denied*, No. 19A1055 (June 26, 2020); *Miller v. Thurston*, No. 20-2095, 2020 WL 3240600 (8th Cir. June 15, 2020). The final court—the Eleventh Circuit in this case—denied Alabama's application for a stay pending appeal. App. 1.

This confusion in the lower courts will not end without firm guidance from this Court. And as election dates draw nearer, culminating in the 2020 presidential election on November 3, these challenges to the constitutionality of election practices during the COVID-19 pandemic will only increase. The Court should act now to promote predictability and fairness in November.

C. Respondents Lack Standing to Bring Most of Their Claims.

Turning to the merits of this case, action by this Court is necessary because both the district court and the Eleventh Circuit ignored blatant Article III standing problems that doom most of Respondents' claims. Only four people in all of Alabama have come forward alleging harm from the confluence of the State's generally applicable election laws and the COVID-19 pandemic. D. Ct. Doc. 1 at 9-12. Only three of them are eligible to vote in the July 14 election, and all three live in Mobile County. None of them, therefore, has standing to challenge how Jefferson or Lee County election officials are managing elections in those counties. And none of them has standing to seek relief regarding how the Secretary of State will respond to the implementation of curbside voting (if any) in 66 of the State's 67 counties.

The joint concurrence below concluded that Respondents "have standing to seek a state-wide injunction because they challenge the Secretary's *statewide* policy of disallowing curbside voting." App. 15. But a plaintiff must establish standing

"separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation marks omitted). In other words, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), not the injuries of other persons not before the Court (and who might not even want the relief a plaintiff is seeking purportedly on their behalf). *See also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (plaintiffs "d[id] not represent a class, so they could not seek to enjoin [an agency] order on the ground that it might cause harm to other parties"). And equitable principles reinforce this Article III limit, for equity commands that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). That three voters in Mobile want to vote curbside did not grant the district court authority that potentially affects all Alabama voters.

Respondents also contended below that the organizational plaintiffs' members "desire to use curbside voting," Resp. Circ. Ct. Br. 9, and are burdened by the State's photo ID and witness requirements. But who these members are and where they live remains a mystery because Respondents never identified them or submitted a single declaration from a member allegedly harmed by the State's voting laws. Before a federal court can accept an organization's invitation to rewrite state election law, the organization must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S.

488, 498 (2009).[4]

D. The State's Interests Are Overwhelming Under *Anderson-Burdick*.

There is also a reasonable likelihood this Court would grant review and reverse the lower court's holding that the Constitution likely prohibits three absentee election managers in Alabama from enforcing the anti-fraud provisions of the State's election laws and that it forbids the Secretary of State from issuing guidance to local election officials about the concerns he has about trying out curbside voting for the first time during a pandemic.

1. Respondents' challenge to Alabama's election law is reviewed under this Court's *Anderson-Burdick* balancing test. Respondents thus carry the burden of satisfying a two-step inquiry. First, they must demonstrate that the laws or procedures they challenge impose a cognizable burden on their right to vote, and then they must establish the severity of that burden. *Timmons v. Twin Cities Area New Party*, 520

[4] The joint concurrence likewise accepted Respondents' assertion of organizational standing based on a diversion-of-resources theory of harm. App. 14. That was also error. Any additional resources the organizations are spending are the result of the *pandemic*, not "a result of the *defendant's* actions." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (emphasis added). In any event, the organizations are not "diverting" any resources at all. People First alleged only that the organization must divert resources from its voter education training programs to "train its members on navigating the election system during the pandemic," D. Ct. Doc. 16-45 at 26, which shows only that People First is spending voter education resources on voter education. And all Greater Birmingham Ministries and Alabama NAACP alleged is that instead of spending their resources on voter registration and turnout efforts, they may be forced to spend resources on … voter registration and turnout efforts. *See* D. Ct. Doc. 1 at 13-15. That is not a diversion of "resources away *from*" these activities because the resources are being used *for* those activities. *Jacobson*, 957 F.3d at 1206.

U.S. 351, 358 (1997). When the burden is "'severe,'" the law is subject to strict scrutiny and narrow tailoring, but when the "provision imposes only 'reasonable, nondiscriminatory restrictions,'" then a less searching standard of review applies. *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279,289 (1992), and *Anderson*, 460 U.S. at 788). Here, the district court correctly found that the burdens imposed on voters categorically did not warrant strict scrutiny. App. 69; *see Crawford*, 553 U.S. at 198 (noting that "making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting"); *id.* at 205 ((Scalia, J., concurring in the judgment) (explaining that courts should look at the burden's impact "categorically" upon all voters, without "consider[ing] the peculiar circumstances of individual voters").

That moves things to the second part of the inquiry: Respondents must demonstrate that the burdens outweigh the State's interests. *Timmons*, 520 U.S. at 358. That is a tough hurdle to clear, because "when a state election 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." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Indeed, a State's voting law must be upheld so long as there are "relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (cleaned up). The election laws at issue here easily satisfy this minimal threshold.

2. As for the witness requirement, Alabama law proclaims the State's interest: "The provision for witnessing of the voter's affidavit signature … goes to the integrity and sanctity of the ballot and election." Ala. Code. § 17-11-10(b) & (c). So has this Court: "There is no question about the legitimacy or importance of the State's interest in counting only votes of eligible voters." *Crawford*, 553 U.S. at 196; *cf. Tex. Democratic Party*, 961 F.3d at 413 (Ho, J., concurring) (collecting cases where "courts have repeatedly found that mail-in ballots are particularly susceptible to fraud"). And as the State demonstrated, the provision was in direct response to claims of absentee voter fraud reaching record heights in the 1994 election.[5] D. Ct. Doc. 34-8 through 34-13. If there have not been many prosecutions for absentee-ballot fraud in Alabama since then, *see* App. 19, that would indicate that Alabama's witness requirement is working, not that it should be scrapped.

Against this, Respondents contend, and the courts below found, that while the State's interest may be legitimate and the burden light during normal times, COVID-19 changes the calculus such that Respondents "and those similarly situated [now]

[5] *See also Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1257 (N.D. Ala. 2018) (referencing a 1996 newspaper article discussing the following types of voter fraud in Alabama: "Since 1994, affidavits and courtroom testimony have established the following abuses: (1) absentee ballots cast in the names of dead people and people who have long since moved out of the county; (2) absentee ballots mailed to unregistered voters; (3) voter brokers following mail trucks and removing absentee ballots from mailboxes; (4) intimidation of poor and elderly voters who are made to fear a cutoff of their governmental assistance from local politicians if they do not cooperate by handing over their absentee ballots; (5) pressuring and solicitation of nursing home patients; (6) vote buying at $5 and $10 a piece; (7) bulk mailing of hundreds of absentee ballots by just a few individuals in some counties…."), *appeal pending*, No. 18-10151 (11th Cir.).

must risk death or severe illness to fulfill Alabama's absentee voter requirements and, therefore, to exercise their right to vote." App. 18. Hence the accusation by the joint concurrence that the State has shown "a serious lack of understanding of or disregard for the science and facts involved here" for its purported "failure to acknowledge the significant difference between leaving one's home to vote in non-pandemic times and forcing high-risk COVID-19 individuals to breach social-distancing and self-isolation protocols so they can vote." App. 19.

But this dichotomy between voting and safety is false, even during COVID-19. The individual plaintiffs in this case regularly see at least one other person. D. Ct. Doc. 1 at 9-12. Can they really not find a safe way to have a second person watch them sign a piece of paper? Nothing requires voters to lock arms with their witnesses, or for a signatory and witnesses to unmask themselves before the signing. 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. In fact, there is nothing to prevent the witnesses from watching the voter sign from a different room entirely or through a window, such that the voter need never be in the same room as the witnesses. These are all easy and safe ways to make possible what the courts below deemed impossible. And Respondents have had *months* to make this happen, since the Governor moved the election runoff scheduled for March to July. If such lack of imagination is enough to enjoin a state election law

that protects the integrity of the ballot, no election regulation is likely to withstand the scrutiny of federal courts.[6]

3. "The story is much the same for the photo ID requirement." App. 20. Requiring a copy of a voter's photo ID deters fraud and makes the election more secure. That is true whether the person is voting in person or absentee. *See Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1256 (N.D. Ala. 2018) (granting summary judgment to the State in a challenge to the State's in-person and absentee-ballot photo ID requirements), *appeal pending*, No. 18-10151 (11th Cir.); *see also* D. Ct. Doc. 34-5 (declaration from State investigator explaining how requiring absentee voters to submit a copy of their photo ID deters fraud and may provide an investigative lead).

Again, Respondents rely on the same false dichotomy between remaining safe from COVID-19 or voting in order to challenge these interests. *See* App. 20. Yet here,

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[6] The joint concurrence also faulted the State's witness requirement for—in the court's eyes—not being substantially more effective at combating voter fraud than would be "requiring the voter to sign an affidavit under penalty of perjury, as the injunction requires." App. 19-20. First, this assertion is not based on any evidence, in the record or elsewhere. Second, the State did not have to present evidence concerning the effectiveness of its witness requirement to show the legitimacy of its interest in combating voter fraud. *Anderson-Burdick* treats the sufficiency of the State's justification as a "legislative fact," *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014), and "does not require any evidentiary showing or burden of proof to be satisfied by the state government," *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009). Third, commonsense tell us that someone who is intent on committing voter fraud may not be hindered by falsely signing an affidavit any more than he is hindered by falsely submitting his own vote as someone else's—but adding two witnesses or a notary public to the mix likely changes that calculus. Fourth, the requirement enacted by the Legislature also helps officials to *detect* voter fraud. For example, if a similar irregularity is seen across multiple ballots, the State can follow up with the witnesses. Or if the handwriting of numerous voters and witnesses look suspiciously similar, the State can follow up with the witnesses. Not so under the district court's new policy.

the injury is even *more* speculative. One of the individual plaintiffs, Porter, says that he has a copier at home but is "worried that [he] may not be able to afford the ink, paper, and toner needed to maintain [his] printer for the July 14 election." D. Ct. Doc. 16-45 at 14. That bears repeating. The theory is that an otherwise valid election law was rendered unconstitutional because one voter began to worry about a possible ink shortage.

To be sure, some voters, like plaintiff Thompson, allege more than a hypothetical lack of toner. She does not have a copier at home and may choose not to venture out in public to make a copy. *See* D. Ct. Doc. 16-56 at 19. That's understandable. But Thompson's daughter and granddaughter visit her regularly, *id.* at 18, and Respondents presented *no* evidence indicating why Thompson's family members could not make a copy of her photo ID for her. And again, Respondents have had *months* to ask a friend or family member (or caregiver or neighbor…) to help them make photocopies of their IDs. No precedent of this Court indicates that the mere possibility that *some* voters *may* need to ask someone else for help making a photocopy imposes an unconstitutional burden on the right to vote.

4. As for Secretary Merrill's so-called "ban" on curbside voting, Alabama's Director of Elections explained in a declaration the Secretary's hesitancy to allow curbside voting to be rolled out for the first time during a pandemic under short notice and with minimal planning. D. Ct. Doc. 34-1 at 24-24. Among those reasons are:

- Alabama law requires voters themselves to place their voted ballot into the tabulation machine, which would be hard to do if the voter is in the car and the tabulation machine is inside the polling place; and, because

of privacy concerns, a poll worker is ordinarily prohibited by law from handling an individual's voted ballot;

- Additional tabulation machines would be needed for in-car voters to insert their voted ballots in order to preserve the secrecy of the ballot, but each new tabulation machine costs over $5,000 (excluding maintenance contract costs)—and there are 1,980 polling places used in Alabama for a statewide election;

- Electronic-poll books would also be needed so that voters can sign the poll book without disrupting the voting in the building (by moving around a paper poll book), but only 35 counties in Alabama currently have e-poll books, which cost between $850 and $1200 each;

- Additional poll workers would be needed to staff the additional voting stations, but election officials are already worried that they may not have enough poll workers to run the July 14 primary runoff election as it is; and

- The poll workers handling curbside voting would still be interacting with voters in their cars, so it is not clear that such voting would even be safer than in-person voting if proper sanitation, mask-wearing, and social-distancing rules are implemented.

See D. Ct. Doc. 34-1 at 21-24.

Despite all this evidence to the contrary, the joint concurrence below somehow concluded that it was "easy to see why the scale weighs in [Respondents'] favor for curbside voting." App. 17. First, the opinion noted, the injunction does not "require" anything, and instead "just" enjoins Secretary Merrill "from prohibiting counties from choosing to implement curbside voting procedures." App. 17 (emphasis omitted). But Alabama law *requires* Secretary Merrill to "provide uniform guidance for election activities," Ala. Code § 17-1-3(a), and the State and its citizens benefit greatly from that guidance because they benefit greatly from uniform and orderly elections. *See Crawford*, 553 U.S. at 196. Prohibiting a State official "just" from performing his statutorily mandated duties is no small thing.

Second, the joint concurrence opined that "those 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. But the evidence presented in this case said just the opposite. *See* Doc. 34-1 at 21-24. To be sure, Respondents gave their assurance that it would be "a minor logistical concern to place extra tabulation booths and poll workers curbside," Resp. Circ. Ct. Br. 13, but they provided no evidence to support that assertion other than their own say-so. That should not be enough to tie the hands of the Secretary of State just weeks before the election.

Third, the joint concurrence below concluded that the State's hardships "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. Again, that's a false dichotomy. No voter is "forc[ed]" to go inside a polling place at all. That's why the State opened absentee voting to *anyone* who wants to vote that way. And election officials are taking great precautions to make in-person voting as safe as possible. The injunction does not help them do that.

E. Respondents' ADA Claims Did Not Warrant an Injunction.

This Court should also grant a stay of the district court's injunction based on Respondents' ADA claims challenging the Secretary's "ban" on curbside voting and the State's photo ID requirement. Most fundamentally, these claims fail because Respondents are simply wrong that there is no safe way for them to vote. They have had more than three months to find a way to obtain a copy of their photo ID. And the

State has gone to great lengths to make in-person voting safe. Respondents have not established that in-person voting is so risky as to be a concrete obstacle to voting.

In any event, Title II of the ADA "does not require States to compromise their essential eligibility criteria for public programs." *Tennessee v. Lane*, 541 U.S. at 509, 532 (2004). Instead, it "requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service provided." *Id.* Thus, Respondents lose their challenge to curbside voting because allowing curbside voting for the first time would fundamentally alter Alabama elections and is not a reasonable modification to existing election procedures. The obstacles to implementing curbside voting are great, as detailed above. And Title II requires public entities only to "make reasonable modifications" to remedy disability discrimination, 28 C.F.R. §355.130(b)(7)(i), not to use "any and all means," *Lane*, 541 U.S. at 531.

As for Respondents' challenge to the State's photo ID requirement, Alabama law makes it clear that the photo ID requirement is an essential eligibility requirement of having an absentee ballot counted: "[A]n absentee ballot *shall* not be issued unless the *required* identification is submitted with the absentee ballot application." Ala. Code § 17-9-30(b) (emphasis added); *see also* Ala. Code § 17-9-30(c) (if an application is received by the AEM "after the eighth day prior to the election" without a photo ID where one is required and the voter is otherwise eligible, the AEM shall issue a provisional ballot which will only count if the photo ID is thereafter timely produced). Thus, Respondents are not "qualified individuals" under Title II because

they cannot meet the essential eligibility requirements.[7] And even if that weren't the case, Respondents have not been excluded from voting absentee "by reason" of their disabilities. The district court reasoned that an injunction was necessary because voting absentee is not "readily accessible" to Respondents. App. 94. But Secretary Merrill's emergency regulation allowing *any* qualified voter who fears voting in person to vote absentee belies that claim. *See* Ala. Admin. Code r. 820-2-3-.06-.01ER. The district court's response that the photo ID requirement could "dissuade" a person from voting, App. 94, is slippage back into the *Anderson-Burdick* framework that is irrelevant to determining whether a disabled individual has been *excluded* under the ADA.

II. Applicants Will Suffer Irreparable Harm Absent A Stay.

"[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). That harm is especially acute, and injunctive relief especially unwise, during an ongoing election—such as the one currently taking place in Alabama. *Republican Nat'l Comm.*, 149 S. Ct. at 1207. And Alabama "indisputably has a compelling interest in preserving the integrity of its election process" and "may impose restrictions that promote the integrity of primary elections." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S.

[7] To be sure, Alabama law provides an exemption from the photo ID requirement for voters who are "unable to access [their] assigned polling place" and are either disabled or 65 or older. Ala. Code § 17-9-30(d); Ala. Admin. Code. r. 820-2-9-.12(3). But the fact that there are exceptions to Section 17-9-30 does not negate the photo ID requirement's essential nature, particularly because these exceptions exist to ensure compliance with federal law. Ala. Code § 17-9-30(d) (noting that the exception applies to voters covered by the Voting Accessibility for the Elderly and Handicapped Act); *see* 52 U.S.C. §§ 20101 through 20107 (current codification of the Voting Accessibility for the Elderly and Handicapped Act).

214, 231 (1989) (citations omitted). As explained above, the district court's injunction undermines confidence in the ongoing election by altering the anti-fraud provisions related to absentee voting while absentee voting is already occurring; it creates a patchwork of uneven enforcement by enjoining local election officials in three of Alabama's 67 counties from enforcing State law; it prohibits the Secretary of State from performing the duties the Legislature requires him to perform; and, it encourages non-parties to try out curbside voting for the first time during a pandemic even though State election officials have determined that it would be "completely unfeasible" and extraordinarily costly to do so.

In contrast to this irreparable harm, Respondents will not be harmed by a stay of the lower court's order because they will still be able to vote—by absentee ballot if they wish, in person if they choose. They, like every other Alabamian, will simply need to follow the generally applicable election laws that ensure that a legitimate, lawful election takes place.

CONCLUSION

This Court should stay the district court's injunction.

Dated: June 29, 2020

Respectfully submitted,

Steve Marshall
Attorney General

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

A. Barrett Bowdre
Deputy Solicitor General

James W. Davis
Winfield J. Sinclair
Jeremy S. Weber
Misty S. Fairbanks Messick
Brenton M. Smith
Assistant Attorneys General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Edmund.LaCour@AlabamaAG.gov