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

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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, Black Voters Matter Capacity Building Institute, Eric Peebles, Howard Porter, Jr., Annie Carolyn Thompson, Teresa Bettis, and Sheryl Threadgill-Matthews. They were plaintiffs in the district court and appellees in the court of appeals.

Other defendants in the district court and appellants in the court of appeals were JoJo Schwarzauer, in her official capacities as Circuit Clerk and Absentee Election Manager of Mobile County, Alabama; and Don Davis, in his official capacity as Probate Judge of Mobile County, Alabama.

Other defendants in the district court were Jacqueline Anderson-Smith, in her official capacities as Circuit Clerk and Absentee Election Manager of Jefferson County, Alabama; Karen Dunn Burks, in her official capacities as Deputy Circuit Clerk and Absentee Election Manager of the Bessemer Division of Jefferson County, Alabama; Mary B. Roberson, in her official capacity as Circuit Clerk of Lee County, Alabama; James Majors, in his official capacity as Absentee Election Manager of Lee County, Alabama; Gina Jobe Ishman, in her official capacities as Circuit Clerk and Absentee Election Manager of Montgomery County, Alabama; Debra Kizer, in her official capacities as Circuit Clerk and Absentee Election Manager of Madison

County, Alabama; Ruby Jones Thomas, in her official capacity as Circuit Clerk of Lowndes County, Alabama; Johnnie Mae King, in her official capacity as Absentee Election Manager of Lowndes County, Alabama; Carolyn Davis-Posey, in her official capacities as Circuit Clerk and Absentee Election Manager of Wilcox County, Alabama; Sherri Friday, in her official capacity as Probate Judge of Jefferson County, Alabama; James Naftel, II, in his official capacity as Probate Judge of Jefferson County, Alabama; Bill English, in his official capacity as Probate Judge of Lee County, Alabama; Lashandra Myrick, in her official capacity as Probate Judge of Lowndes County, Alabama; Frank Barger, in his official capacity as Probate Judge of Madison County, Alabama; J.C. Love, III, in his official capacity as Probate Judge of Montgomery County, Alabama; and Britney Jones-Alexander, in her official capacity as Probate Judge of Wilcox County, Alabama. These defendants have not appealed the district court's preliminary injunction. The Jefferson County and Montgomery County Defendants agreed to the entry of consent orders. D. Ct. Docs. 181, 182. All other County Defendants settled, with the district court retaining jurisdiction to enforce the settlement agreements. D. Ct. Docs. 76, 216, 235, 240, 242.

Other plaintiffs in the district court were Robert Clopton and Gregory Bentley. They both withdrew as plaintiffs. D. Ct. Doc. 150.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

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

This is another in the recent wave of stay applications by States whose election laws have been upended by district courts relying on the COVID-19 pandemic to impose new election requirements. *See Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020) (staying district court's injunction that amended South Carolina's witness requirement for absentee voting); *Clarno v. People Not Politicians*, No. 20A21, 2020 WL 4589742 (U.S. Aug. 11, 2020) (staying district court's injunction that altered Oregon's initiative process for passing constitutional amendments); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (staying district court's injunction that relaxed Idaho's rule for ballot initiatives); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (staying district court's injunction that required Wisconsin to count absentee ballots postmarked after election day). By now, the Court knows this dance all too well.

What makes this case remarkable, though, is that the déjà vu really is all over again. Just a few months ago, on July 2, the Court stayed a preliminary injunction entered by the district court just 29 days before Alabama's primary election runoff. *See Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049 (U.S. Jul. 2, 2020). That injunction had three components. First, it enjoined officials in three counties from enforcing the State's witness requirement for absentee voting. Second, it enjoined those same officials from enforcing the State's photo ID requirement for absentee voting. And third, it enjoined Secretary of State John Merrill from prohibiting counties from offering curbside voting, even though the Secretary had determined

that such voting would violate Alabama law and would cause a host of logistical and safety problems in addition. The Court stayed all three parts of the injunction.

Then history repeated itself. On September 30, three weeks after absentee voting had begun and just 34 days before the general election day, the district court entered a permanent injunction that mirrored its preliminary injunction in all material respects. App. 6. As before, the court enjoined the witness and photo ID requirements for absentee voting. And as before, the court enjoined Secretary Merrill from issuing guidance to local officials that offering curbside voting would violate Alabama law. *Id.* Nowhere in its 197-page opinion did the district court even try to explain how its decision could be squared with this Court's stay of its prior injunction. App. 8-204.

Nor did the Eleventh Circuit in its three-sentence order staying the injunction in part. App. 1-2. Although the Court of Appeals stayed the district court's injunction as to the witness and photo ID requirements, it denied a stay as to the Secretary's curbside voting ban. *Id.* In so doing, the court refused "to treat like cases alike," *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment), for there is nothing that would make the curbside voting injunction inappropriate when it was entered 29 days before the primary election runoff but fitting now that it's been entered 34 days before the general election.

This Court should therefore stay the injunction—again. The injunction flouts both principles this Court has repeated in recent months—first, that a State's decision "either to keep or to make changes to election rules to address COVID-19 ordinarily 'should not be subject to second-guessing by an unelected federal judiciary,'"

Andino, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring) (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of application)), and second, "that lower federal courts should ordinarily not alter the election rules on the eve of an election," *RNC*, 140 S. Ct. at 1207. And the district court's injunction promises to cause confusion and much harm; as State election officials repeatedly testified at trial, implementing curbside voting comes with a host of logistical, safety, and ballot secrecy concerns (in addition to being unlawful under Alabama law). *See* App. 112-13, 143-44. Yet by simultaneously arrogating to itself the sole responsibility for interpreting Alabama's election laws while enjoining the Secretary of State from performing his duties to "provide uniform guidance for election activities," Ala. Code § 17-1-3(a), the district court has ensured that local officials will be both on their own and free to improvise if they attempt to offer curbside voting for the first time in the middle of a pandemic. Given that none of this disruption was legally required to begin with, this Court should stay the district court's injunction as soon as possible.

OPINIONS AND ORDERS BELOW

The district court's findings of fact and conclusions of law are reproduced at App. 8-204. The final judgment and permanent injunction are produced at App. 3-7. The district court's order denying Applicants' motion for stay is at App. 205-06. And the Eleventh Circuit's order granting a stay in part and denying a stay in part is reproduced at App. 1-2.

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. App. 6.

STATEMENT

A. Voting in Alabama During COVID-19

Alabama has taken extraordinary measures to adapt election procedures to account for the COVID-19 pandemic. First, the Governor moved the primary runoff election that was scheduled for March 31, 2020, to July 14, 2020. App. 33.

Second, Secretary Merrill encouraged probate judges, who oversee federal, state, and county elections in their counties, to introduce alternate polling places and recruit additional poll workers. *Id.* He also offered suggestions and provided millions of dollars to help local elections officials maintain safe and sanitary voting practices. *Id.*

Third, Secretary Merrill used authority granted to him in emergency situations to promulgate emergency rules expanding absentee balloting for any voter concerned about COVID-19 for elections through January 2021. App. 33-35. Any voter who does not want to vote in person because of fears of contracting COVID-19 may now vote absentee. Because an absentee ballot may be cast in person prior to election day, this expansion also effectively implements universal early voting in Alabama. App. 32 n.36.

Alabama imposes two requirements on absentee voting that "go[] to the

integrity and sanctity of the ballot and election." Ala. Code § 17-11-10(b). Absentee ballots must be accompanied by a voter affidavit that is either notarized or signed by two witnesses. *See id.* And voters must submit a copy of their photo ID with their absentee ballot application. *Id.* § 17-9-30(b). These procedures are necessary to deter and investigate absentee voter fraud. *See Greater Birmingham Ministries v. Sec'y of State of Ala.*, 966 F.3d 1202 (11th Cir. 2020) (holding that Alabama's photo ID requirement was a legitimate, nondiscriminatory voting requirement that advanced interests in preventing voter fraud and protecting public confidence in election integrity).

The State has also tried to make these necessary requirements as easy as possible to comply with during the pandemic. For instance, the Governor allowed notaries public to notarize signatures remotely so that voters could have their affidavits notarized from home. *See* App. 24. Secretary Merrill has ensured that photo IDs will still be issued for free, including by *personally* copying and mailing those copies to voters who contact him and by having his office's mobile ID unit hold at least 40 events during the pandemic. App. 90-91. A pre-existing exemption from the photo ID requirement, carved out to comply with federal voting laws, still applies for voters who are "unable to access [their] assigned polling place" and are either disabled or over 65. Ala. Code § 17-9-30(d); Ala. Admin. Code. r. 820-2-9-.12(3). And because absentee voting begins 55 days before election day, voters have nearly two months to satisfy these requirements.

One accommodation the State has not offered, however, is curbside voting.

Although not expressly prohibited by statute, Alabama law does not provide for it, and Secretary Merrill has concluded that offering curbside voting would not comport with state law. App. 143-44. In addition, the Secretary determined that curbside voting would conflict with other state election laws that protect ballot secrecy and require the voter to personally sign the poll list and place the ballot in the tabulation machine. App. 143-44. And at trial, the Secretary of State's Director of Elections identified a host of practical issues that would need to be resolved before a county could implement curbside voting, even if the practice were lawful. 9/15 Tr. at 157-59, 185-86.[1] For instance:

> [To have curbside voting], [y]ou'd have to have additional workers. You'd have to have additional electronic poll books if you have electronic poll books at all. Those electronic poll books would have to be mobile or able to be moved. Some vendors don't have poll books that attach from a stand. You'd need additional vote machines in every single voting place, which there's not enough machines in existence that we could get our hands on to perform curbside voting in which the ballot is secret, and the voter, if they are receiving assistance, can assure that their ballot is being inserted in the tabulator and that their vote's counting. So a multitude of things that scare me to death on that.

9/15 Tr. at 157-58. Thus, "states that have curbside voting spent years establishing a method for curbside voting. They don't do it in 40-something days." *Id.* at 185.

[1] Like the district court, "[d]ue to the time-sensitive nature of this case, [Applicants] cite[] to the Court Reporter's uncertified rough transcript of the trial." App. 9 n.3. Excerpts of the transcripts Applicants cite in this application are included in an appendix to the application. Additional transcripts are available in the appendix Applicants filed with their Eleventh Circuit motion for stay pending appeal.

B. The District Court's Injunctions

On June 15, while absentee voting for the State's July 14 primary election runoff was already taking place, the district court issued a preliminary injunction that prohibited election officials in three counties from enforcing the witness and photo ID requirements for absentee voting. App. 97-98. It also permitted counties to implement curbside voting without the Secretary's oversight. App. 98. According to the district court, these changes to Alabama's election laws were required by the First and Fourteenth Amendments of the Constitution and Title II of the Americans with Disabilities Act (ADA), as applied during the COVID-19 pandemic. *Id.*

Applicants immediately sought a stay from the Eleventh Circuit, which denied it, *see People First of Ala. v. Sec'y of State of Ala.*, 815 F. App'x 505, 505 (11th Cir. 2020), and then from this Court. On July 2, the Court stayed the district court's injunction in full. *See Merrill*, 2020 WL 3604049, at *1. The July 14 primary runoff then took place with all state-law requirements in place, with all eligible Respondents satisfying those requirements or voting in person, with record turnout, with no evidence of any increase in COVID-19 cases because of the election, and with infection rates and hospitalizations in Alabama declining since the election. *See* App. 26, 34, 54, 57.

Even so, Respondents—a group of five elderly or disabled individuals (Howard Porter, Jr., Eric Peebles, Annie Carolyn Thompson, Teresa Bettis, and Sheryl Threadgill-Matthews) and four organizations (People First of Alabama, Greater Birmingham Ministries, the Alabama State Conference of the NAACP, and Black Voters Matter), App. 48-76—sought permanent injunctive relief for the November 3 general election, App. 99. The district court conducted a two-week bench trial from September 8

through September 18. App. 99. Absentee voting began the second day of trial. App. 35. By the fourth day of trial, more than 30,000 Alabamians had applied for absentee ballots, and several hundred of them had already cast their ballots in person. *Id.*

On September 30, the district court issued an opinion and order enjoining Applicants from enforcing the challenged provisions during the November 3 election. Specifically, the district court enjoined: (1) the State of Alabama and election officials in Mobile County[2] from enforcing the witness requirement "for any qualified voters who provide a written statement that they have an underlying medical condition that puts them at a heightened risk from COVID-19;" (2) the State and the absentee election manager for Mobile County from enforcing the photo ID requirement "for absentee voters over 65, or those under 65 who cannot safely obtain a copy of their photo ID during the COVID-19 pandemic due to an underlying medical condition that makes them particularly to COVID-19 complications, and who provide other required identifiers … such as their driver's license number"; and (3) Secretary Merrill "from prohibiting counties from establishing curbside voting procedures that otherwise comply with state and federal election law." App. 6.

As pertinent to this application—which concerns only the district court's injunction of Secretary Merrill's so-called "ban on curbside voting," App. 8—the district court made two key findings. First, it applied the *Anderson-Burdick* balancing test for constitutional challenges to laws burdening voting rights and determined that

[2] Though Respondents had named a smattering of county election officials across the State as defendants, by the end of trial the Mobile County defendants were the only ones left. *See* D. Ct. Docs. 76, 181, 182, 216, 235, 240, 242.

"the plaintiffs have shown that the curbside voting ban imposes a significant burden on vulnerable voters during the COVID-19 pandemic," while "[t]he State, in contrast, has not provided 'relevant and legitimate state interests sufficiently weighty to justify the limitation.'" App. 147-48 (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008)). In coming to this conclusion, the court reasoned that "plaintiffs seek only a negative injunction barring Secretary Merrill from preventing curbside voting, not a positive one requiring its implementation," so "[t]he defendants' pragmatic objections are thus irrelevant to the court's balancing analysis." App. 147.

Second, the court found that the curbside voting ban also violated the ADA during the COVID-19 pandemic. App. 168. The court framed its query as "whether the curbside voting ban excludes [plaintiffs] from voting in-person on Election Day, instead of whether it excludes them from voting in general." App. 160. The court then determined that (1) certain individual plaintiffs were disabled under the ADA "because their impairments substantially limit the major life activities of interacting with others or working" during the pandemic, App. 157; (2) voting in person is not "readily accessible" to disabled plaintiffs because of the risk of contracting COVID-19, App. 160-61; and (3) lifting the Secretary's ban on curbside voting constituted a reasonable accommodation, App. 164-68. For this last finding, the court relied on its own reading of Alabama's election laws to disagree with the Secretary of State's reading that curbside voting would be unlawful, instead concluding that "counties may implement the practice without a grant of additional authority from the legislature" because curbside voting is simply "a form of in-person voting at a polling site." App.

166. And the court disregarded the ballot secrecy and security concerns inherent in having poll workers transport completed ballots from voters outside a polling place to tabulation machines inside the polling place—and outside the voter's sight—by noting that "poll workers take an oath to maintain the integrity of elections" and thus "should be trusted to take that oath seriously." App. 167.

C. The Eleventh Circuit's Partial Relief

Applicants appealed the district court's injunction the same day it was issued—September 30—and that day also sought a stay pending appeal in the district court. After two days with no ruling on the stay motion, Applicants sought a stay from the Eleventh Circuit on October 2. On October 6, the district court denied Applicants' request for a stay. App. 205.

On October 14, the Eleventh Circuit issued a three-sentence order granting the stay in part and denying it in part. App. 1-2. Specifically, it granted a stay "as to the witness and photo ID requirements," but denied it "as to the curbside voting ban." App. 2 (footnotes omitted).

REASONS FOR GRANTING THE APPLICATION

This Court will stay 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. These factors all favor granting the application for a stay.

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.

This Court already determined that it would likely review, and likely reverse, an order enjoining Secretary Merrill from providing guidance regarding the legality of curbside voting in Alabama. It did so just three months ago when it stayed the district court's preliminary injunction that it entered 29 days before the July 14 primary election runoff. *Merrill*, 2020 WL 3604049, at *1. Because the district court has now entered a permanent injunction affording Respondents the exact same relief—this time 34 days before the general election on November 3—the Court should again grant a stay.

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—Including in This Case.

Since this case was last here, the Court has continued to "emphasize[] that federal courts ordinarily should not alter state election rules in the period close to an election." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). As the Court has by now made clear, the *Purcell* principle applies full force during the COVID-19 pandemic. Or as the Seventh Circuit recently observed: While "[a] last-minute event may require a last-minute reaction," it is no longer "possible to describe COVID-19 as a last-minute event." *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-2836 & 20-2844, 2020 WL 5951359, at *2 (7th Cir. Oct. 8, 2020) (granting stay of district court's injunction that extended

Wisconsin's registration and receipt deadlines for the November 3 election). The same month the Court issued a stay in this case, it also stayed a district court's injunction that relied on COVID-19 to relax Idaho's rule for ballot initiatives. *See Little*, 140 S. Ct. at 2616. Then in August, the Court granted a stay of an injunction that saw the pandemic as reason to alter Oregon's initiative process for passing state constitutional amendments. *See Clarno*, 2020 WL 4589742, at *1. And just a couple of weeks ago, the Court stayed a district court's injunction that used COVID-19 as an excuse to alter South Carolina's witness requirement for absentee voting. *See Andino*, 2020 WL 5887393, at *1.

This teaching is just as pertinent at this stage of the case as it was when the Court stayed the district court's preliminary injunction. Then, like now, absentee voting was already underway. And then, like now, in-person voting was just around the corner and well within the normal *Purcell* window. *E.g.*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying order entered 32 days before election day); *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (staying order entered 61 days before election day); *Purcell*, 549 U.S. at 4-5 (staying order entered 33 days before election day).

Somewhat stunningly, the district court never grappled with the fact that its earlier order was stayed—other than as a note of procedural history. App. 98. Instead, the court discussed eight other election law stay cases and purported to distinguish state-friendly decisions from this case. *See* App. 116-24. But there is no distinguishing *this case* from *this case*.

In an attempt to escape this conclusion, the district court held that Applicants were "judicially estopped" from relying on *Purcell* because they had argued in May that Respondents' preliminary injunction request for the November election was at that time too speculative (no one knew in May what the state of the pandemic would be in November). App. 123. As a result of that position, the court said, Applicants were barred from later objecting to the confusion that would flow from an injunction entered 34 days before the November election (and three weeks after absentee voting had begun). *Id.*

But nothing about Applicants' earlier position—which came before Respondents amended their complaint, and well before trial—is inconsistent with *Purcell*. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) ("[A] party's later position must be 'clearly inconsistent' with its earlier position."). There is no "irreconcilable conflict" (*Chevron Corp. v. Donziger*, 833 F.3d 74, 128 (2d Cir. 2016)) between the arguments that (1) allegations about how a novel virus will affect an election that is half a year away are too speculative, *and* (2) equitable considerations warrant the denial of an injunction once that election has begun. In other words, the same claim can be unripe on one day and untimely on another. Applicants were not required to pretend that Plaintiffs' claims were well-founded this spring to preserve the right to argue that voter confusion may follow when laws are changed after voting has begun.

That result follows from numerous cases, including *Zedner v. United States*, which held that a criminal defendant's position "that a continuance was needed to gather evidence … was not 'clearly inconsistent' with petitioner's later position that

the continuance was not permissible under the" Speedy Trial Act. 547 U.S. 489, 505-06 (2006). Moreover, "[i]nconsistent positions result only when the government raises contradictory arguments in response to the *same* set of facts." *Ezekiel v. Michel*, 66 F.3d 894, 905 (7th Cir. 1995). Nor were Applicants "unfair[ly] advantage[d]" by advancing the two arguments. *New Hampshire*, 532 U.S. at 751. As the district court recognized in June, it was then "premature for the court to consider a preliminary injunction for the election[] in … November," but "plaintiffs [we]re free to move for a separate preliminary injunction regarding" that election at a later date. D. Ct. Doc. 58 at 12. That Respondents never did is no one's fault but their own.

The district court also reasoned that its injunction would be "unlikely to cause voters confusion" because it was "taking away requirements placed on Alabama voters, as opposed to imposing them." App. 120. The curbside voting portion simply "relieve[d] voters of the necessity of … going inside a polling place on Election Day." *Id.* But this is hardly a distinction. Most cases where *Purcell* applies involve lower courts "taking away requirements" from voters; rare is the district court that has *imposed* requirements on them. *E.g.*, *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring) (district court removed "South Carolina's witness requirement for absentee ballots"); *RNC*, 140 S. Ct. at 1208 (district court removed requirement that absentee ballots "be mailed and postmarked by election day"); *Purcell*, 549 U.S. at 4 (Ninth Circuit removed requirement that voters present identification).

As for *Purcell*'s application here, it is hard to see how enjoining the Secretary of State from providing uniform guidance about curbside voting—his job under

Alabama law—won't lead to confusion or undermine "[c]onfidence in the integrity of [Alabama's] election process." *Purcell*, 549 U.S. at 4. For instance, how will local election officials who wish to experiment with curbside voting ensure that it is done in a manner that preserves ballot secrecy? How will they acquire the extra equipment necessary to implement curbside voting? How will they deal with traffic? How many additional poll workers will be required? How will voters who now assume curbside voting will be available statewide react if their local polling place ultimately does not offer it and their time to vote absentee has passed? And how will curbside voting be provided in a safe, legal, and efficient manner, without uniform guidance from the Secretary of State, in the middle of a pandemic, with just weeks to go before election day, when "states that have curbside voting spent years establishing a method for curbside voting" and "don't do it in 40-something days"? 9/15 Tr. 185. The district court offered no answer.

Nor is it appropriate to say, as the district court did, that the State's "pragmatic objections" are "irrelevant" because "the only counties that will implement curbside voting are those that determine they can do so practically and consistent with Alabama law." App. 147. That minimizes the harm that the court's gag order of Secretary Merrill has on the process, because it is his job to "provide uniform guidance for election activities." Ala. Code § 17-1-3(a). Without such guidance and oversight—which Secretary Merrill cannot provide without either risking contempt of court or abandoning his own reading of Alabama's election laws—local officials will be left to their own devices to figure out how to implement curbside voting for the first time in the

State's history. That does not inspire confidence that it will be done safely, legally, or efficiently. And while Plaintiffs may respond that local officials are not *required* to offer curbside voting, how will officials not be confused about their obligations when the district court apparently concluded that the ADA requires curbside voting?

Moreover, the Secretary's expertise in administering Alabama's election law is itself a reason the district court should have refrained from using the COVID-19 pandemic to interfere with the political process. "Deciding how best to cope with difficulties caused by disease is principally a task for the elected branches of government." *Bostelmann*, 2020 WL 5951359, at *2. That is why this Court "has consistently stayed orders by which federal judges have used COVID-19 as a reason to displace the decisions of the policymaking branches of government." *Id. (*citing, among others, *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (staying preliminary injunction that overrode a prison warden's decision about how to cope with the pandemic), and *S. Bay United Pentecostal Church*, 140 S. Ct. 1613 (denying request for injunctive relief of governor's order limiting public gatherings during the pandemic)). Indeed, as Chief Justice Roberts recently put it in *South Bay United Pentecostal Church*, "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" 140 S. Ct. at 1613 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). So long as their actions do not exceed the "'especially broad'" limits that bound officials acting "'in areas fraught with medical and scientific uncertainties,'" *id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)), such officials "should not be subject to second-guessing by an 'unelected

federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.* (*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

All the more potent are these concerns when a district court's injunction turns on matters of *state* law that the enjoined *state* official is required by *state* law to interpret and administer. *See* Ala. Code § 17-1-3(a) ("The Secretary of State is the chief elections official in the state and shall provide uniform guidance for election activities."). Notably, the district court did not hold that the Constitution or the ADA *required* Alabama to offer curbside voting. Rather, it held that the Constitution and the ADA required Secretary Merrill to quit advising local officials that curbside voting would violate Alabama law—and it determined that such relief was reasonable because, in the court's opinion, curbside voting did *not* violate Alabama law. *See* App. 165-66 ("[S]imply because no provision of Alabama law explicitly states that a voter may cast a ballot in person from a car with the help of poll workers does not mean that the practice is prohibited by law."). But federal courts are not the "ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and thus "should refrain whenever possible from deciding novel or difficult state-law questions," *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2188-89 (2019) (Kagan, J., dissenting). Instead, the district court arrogated to itself the authority to interpret Alabama's election law and prohibited the Secretary of State from providing uniform guidance based on *his* understanding of the state laws he is tasked with administering. For all these reasons, the Court should grant the stay application.

B. Secretary Merrill's Curbside Voting "Ban" Does Not Violate the Constitution or the ADA, Even During the COVID-19 Pandemic.

The Constitution grants States—not courts—the primary authority to set the "manner" of elections. U.S. Const. art. I, § 4, cl. 1. States exercise this power in myriad lawful ways; the Constitution does not mandate a particular way of securing the franchise. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-08 (1969). Nor has the COVID-19 pandemic changed this fundamental truth. "[T]he spread of the Virus has not given 'unelected federal judges' a roving commission to rewrite state election codes." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020) (cleaned up) (quoting *S. Bay United Pentecostal Church*, 2020 WL 2813056, at *1 (Roberts, C.J. concurring)).

And "[y]et the Circuits diverge in fundamental respects when presented with challenges" to state election laws as applied during the pandemic. *Little*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in grant of stay). The Stanford-MIT Healthy Elections Project counts "over 300 cases in more than 44 states" involving election law challenges "arising out of the COVID-19 pandemic." *See COVID-Related Election Litigation Tracker*, Stanford-MIT Healthy Elections Proj., healthyelections-case-tracker.stanford.edu/search (last visited Oct. 14, 2020) (searchable database). The specific issues in these suits differ, *see Andino* Stay App. 12-13 (collecting cases), but their overarching theory is similar: COVID-19 has made election laws that are lawful in normal times unduly burdensome during the pandemic. The fundamental flaw in this theory thus also remains constant: "It's the pandemic, not the State, that might

affect [voters'] determination to cast a ballot." *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020).

Here, the district court enjoined Secretary Merrill from advising county officials that curbside voting would violate state law. App. 6. It did so for two reasons: (1) "As applied during the COVID-19 pandemic to voters who are particularly susceptible to COVID-19 complications, the curbside voting ban violates the First and Fourteenth Amendments," and (2) "As applied during the COVID-19 pandemic to voters with disabilities, the curbside voting ban violates the ADA." App. 5. Both of those rulings were in error.

1. Respondents' constitutional challenge to Secretary Merrill's curbside voting "ban" is reviewed under this Court's *Anderson-Burdick* balancing test. Respondents thus carry the burden of satisfying a two-step inquiry. Step one requires Respondents to demonstrate the severity of the burden—if any—the challenged provisions impose on the right to vote. A "severe" burden is subject to strict scrutiny, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), while "[l]esser burdens … trigger less exacting review," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The arrived-at level of scrutiny is then applied at step two, which requires Respondents to prove that the burdens outweigh the State's interests. *Timmons*, 520 U.S. at 358. "[A] State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Burdick*, 504 U.S. at 434).

The district court stumbled at both steps. Initially the court concluded—correctly—that strict scrutiny did not apply to the curbside voting ban. App. 146. But

then the court constructed a novel "some risk" standard that it used to condemn the Secretary's judgment regarding the propriety of curbside voting. *Id.* "[E]ven masked, face-to-face interactions," the court reasoned, "impose *some level of risk* that might dissuade justifiably cautious persons from voting." *Id.* (emphasis added).

Problems abound with this analysis. First, if a voter declines the State's offer to vote absentee and then decides not to vote in-person either, Alabama's "voting laws [will] not [be] to blame" for that choice. *Tully*, 2020 WL 5905325, at *1. Second, even attributing pandemic risks to the State, the district court never quantified that risk, and thus it never "quantif[ied] the magnitude of the burden on this narrow class of voters." *Crawford*, 553 U.S. at 200; *cf. id.* 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"). This is fatal to the court's analysis, particularly since Respondents' own epidemiologist "admit[ted] that curbside voting is not necessarily safer than absentee voting." App. 32. Thus, "on the basis of the record that has been made in this litigation," the Court is unlikely to "conclude that [Secretary Merrill's guidance] impose[d] excessively burdensome requirements on any class of voters." *Crawford*, 553 U.S. at 202 (quotation marks omitted).

The court faltered at step two of the *Anderson-Burdick* analysis as well, where Respondents were tasked with demonstrating 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 v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Such is the case here. Some level of risk is inherent in life and in voting, pandemic or no. Driving to the polling place in rush hour presents "some level of risk that might dissuade justifiably cautious persons from voting." The relevant question is thus not whether "some level of risk" exists, but whether the risk has become unduly, unconstitutionally, burdensome. Answering that question is no easy judicial task—which is why this Court consistently affords "especially broad" latitude to political actors faced with making these difficult decisions amidst "medical and scientific uncertainties." *S. Bay United Pentecostal Church*, 2020 WL 2813056, at *1 (Roberts, C.J. concurring) (quotation marks and citation omitted).

Secretary Merrill's determination that curbside voting was unlawful under state law and would cause "massive logistical problems" (App. 147) was thus due deference because it promoted the State's interests in running its elections in an orderly and secure manner. *See Crawford*, 553 U.S. at 196. State election officials testified at trial that offering curbside voting is complicated and that there's a reason that "states that have curbside voting spent years establishing a method" for offering it in a uniform and safe manner. 9/15 Tr. at 157-58, 185; *see also* App. 147 (noting that problems with curbside voting include "cost, personnel, geographical constraints, weather, integrity of the ballot, secrecy of the ballot, traffic and time limitations").

For instance, the Secretary of State's Director of Elections testified that one

way a county could (wrongfully) implement curbside voting would be to allow poll workers to carry the marked ballot from the car to a tabulation machine inside the precinct. 9/15 Tr. at 158. This would be problematic, he explained, because "chain of custody is just as important as the ballot being secret," and if a poll worker examined the ballot and didn't like the way it looked, "then all of a sudden that ballot's tucked into the trash can nice and neat"—and the voter out in the car is none the wiser. *Id.* The district court discounted this interest in preventing fraud as "simply specu-lat[ion]," and determined that poll workers should instead "be trusted" to maintain the integrity of elections. App. 167. But the State need not agree with the district court's policy judgments for its own determinations about how to prevent fraud and promote public confidence in the integrity of the electoral process to qualify as "im-portant regulatory interest[s]" sufficient to justify the negligible burden imposed by the Secretary's curbside voting ban. *See Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

Perhaps recognizing this fact, the district court promptly whisked away such "pragmatic objections" as "irrelevant to the court's balancing analysis" because "the only counties that will implement curbside voting are those that determine they can do so practically and consistently with Alabama law." App. 147. Yet that determina-tion itself wrongly lays a heavy thumb on the *Anderson-Burdick* scales by discounting entirely the harm to the State and Secretary Merrill that the injunction would im-pose. Simply put, Secretary Merrill's job by law is to "provide uniform guidance for election activities." Ala. Code § 17-1-3(a). Because of the injunction, Secretary Merrill

can no longer do the job the people of Alabama tasked him with doing. And as result, local election officials are on their own to determine whether and how to implement curbside voting for the first time in the State's history without the help or oversight of the State's chief election official. Properly weighed, there can be no doubt that the State's interests in promoting uniform elections, following state law (as determined by state officials or state courts), preventing voter fraud, running efficient elections, and keeping voters safe far outweigh the negligible burden imposed by Secretary Merrill's curbside voting ban.

2. The district court likewise erred in its ADA analysis. App. 154-67. Respondents contended that the curbside voting ban violates the ADA as applied in the COVID-19 pandemic because "in-person voting is not accessible to voters with conditions that place them at high risk from COVID-19." App. 154. But Respondents neither stated a prima facie case for relief nor offered a modification that was reasonable.

To state a prime facie case under the ADA, Respondents had to show that they (1) are "qualified individual[s] with a disability," (2) who were "excluded from participation in or … denied the benefits of the services, programs, or activities of a public entity," and (3) the exclusion, denial of benefits or discrimination was "by reason of such disability." 42 U.S.C. § 12132.

Respondents failed to establish the second and third elements. They are not excluded from voting because they are "able to participate in [the] voting program." *Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107-08 (11th Cir. 2011). Mere difficulty in accessing a benefit is insufficient to state a prima facie case.

See Bircoll v. Miami-Dade County, 480 F.3d 1072, 1088 (11th Cir. 2007). And while the district court's analysis improperly treated absentee and in-person voting as two separate programs, that bifurcation is inconsistent with the ADA's general requirement that public programs be viewed "in [their] entirety." 28 C.F.R. § 35.150(a). So long as Respondents have accessible means *to vote*—which they do because, even assuming in-person voting is too risky, they can vote absentee—they have not been excluded.

Respondents also failed to show a causal connection between their alleged disabilities and their supposed exclusion. *See Bircoll*, 480 F.3d at 1081 n.11. Respondents contended that they will not go out in public to vote because if they do, they might catch COVID-19, and if they do, they might experience severe complications because of underlying conditions. But the underlying conditions are not the legal cause of their "exclusion"—Respondents' actions to avoid COVID-19 are. *See Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020) ("[W]e cannot hold private citizens' decisions to stay home for their own safety against the State."). Moreover, Respondents presented no evidence at trial as to their own individualized risks of either contracting COVID-19 or experiencing severe complications if they do.

Even if Respondents stated a prima facie case, though, the remedy the district court implemented—enjoining the Secretary of State from offering guidance as to curbside voting—was not a reasonable modification. "Title II does not require States to employ any and all means to make [public] services accessible to persons with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004). A reasonable modification

is a "limited one"; public entities need not "employ any and all means to make [public] services accessible," and "in no event" must they "undertake measures that would impose an undue financial or administrative burden" or fundamentally alter the nature of the service offered." *Id.* at 531-32.

The district court's remedy fails on multiple grounds. First, Alabama already offers accommodations to voters with disabilities, both by allowing them to move to the front of the line at the polling place, Ala. Code § 17-9-13(c), and by allowing *any* Alabama voter who determines that it would be impossible or unreasonable to vote in person due to COVID-19 to vote absentee, Ala. Admin Code. r. 820-2-3-.06-.04ER (July 17, 2020). Second, because curbside voting is no safer than absentee voting, App. 32, would come with a host of logistical issues, and would undermine the State's interests in having uniform elections, the district court's injunction did not provide a reasonable modification. And third, permitting curbside voting would fundamentally alter Alabama elections and thus need not be offered—even if it were otherwise a reasonable modification. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (noting that a public entity need not offer a reasonable modification if doing so would "fundamentally alter the nature of the service, program, or activity"). Offering curbside voting violates state law and would "be inequitable" given "the allocation of available resources" and the State's responsibility for "a large and diverse population" of other voters participating in election day voting. *Id.* Allowing counties to offer curbside voting without the Secretary's input would thus fundamentally alter elections in Alabama.

II. Applicants Will Suffer Irreparable Harm Absent A Stay.

Absent a stay, Applicants will be irreparably harmed. "[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). "[F]or all intents and purposes," the order "constituted [an] injunction[] barring the State from conducting this year's election[]" in the manner chosen by the Legislature. *Id.* at 2324. That is why this Court allows even for interlocutory appeals of preliminary injunctions: Unless the legislative directive "is unconstitutional, [such injunctions] would seriously and irreparably harm the State." *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").

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

If Alabama ever decides to offer curbside voting, it should be done thoughtfully after careful consideration and with time to consider how to do it fairly and uniformly around the State. It shouldn't happen as a result of a federal court order, in the middle of an election, that prevents the State's chief election official from performing his duty to offer uniform guidance about Alabama election law. The Court recognized as much four months ago when it stayed the district court's preliminary injunction. The Court should also stay the district court's latest injunction.

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