No. 20-12184-GG

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PEOPLE FIRST OF ALABAMA, et al.,
Plaintiffs-Appellees,

v.

JOHN H. MERRILL,
in his official capacity as the Secretary of the State of Alabama, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 2:20-cv-00619-AKK

EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
barrett.bowdre@AlabamaAG.gov
* Counsel of Record

STEVE MARSHALL
Attorney General
A. Barrett Bowdre*
Deputy Solicitor General
James W. Davis
Winfield J. Sinclair
Misty S. Fairbanks Messick
Jeremy S. Weber
Brenton M. Smith
Assistant Attorneys General

Counsel for Secretary of State John H. Merrill and the State of Alabama

June 17, 2020

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(3) and 26.1-2(b), the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Abudu, Nancy G. – Counsel for Plaintiffs;
2. Alabama Disabilities Advocacy Program – Counsel for Plaintiffs;
3. Alabama State Conference of the NAACP – Appellee;
4. Anderson-Smith, Jacqueline – Defendant, Circuit Clerk of Jefferson County, Alabama;
5. Barnett, Alleen – Defendant, Absentee Election Manager of Mobile County, Alabama;
6. Brom, Steven M – Counsel for Amicus Honest Elections Project;
7. Burks, Karen Dunn – Defendant, Deputy Circuit Clerk of the Bessemer Division of Jefferson County, Alabama;
8. Bowdre, Alexander Barrett – Counsel for Appellants;
9. Caroll, Donald McKinley – Counsel for Defendants Jacqueline Anderson-Smith and Karen Dunn Burks;
10. Clopton, Robert – Appellee;
11. Davis, Elliott M. – Counsel for United States of America;
12. Davis, James W. – Counsel for Appellants;
13. Dellheim, Richard A. - Counsel for United States of America;

14. Dreiband, Eric S. – U.S. Assistant Attorney General, Civil Rights Division, Counsel for United States of America;
15. Dungan, Aubrey Patrick – Counsel for Defendant Alleen Barnett;
16. Dyar, Robert F. – Counsel for Defendant Alleen Barnett;
17. Engelhardt, Todd D. – Counsel for Defendant Alleen Barnett;
18. Essig, Brandon Keith – Counsel for Defendant Mary B. Roberson;
19. Freeman, Daniel J. - Counsel for United States of America;
20. Greater Birmingham Ministries – Appellee;
21. Green, Tyler R. – Counsel for Amicus Honest Elections Project
22. Herren, T. Christian - Counsel for United States of America;
23. Honest Elections Project – Amicus;
24. Kallon, Hon. Abdul K. – Judge for the Northern District of Alabama;
25. Lance, Steven – Counsel for Plaintiffs;
26. Lawson, Theodore A. - Counsel for Defendants Jacqueline Anderson-Smith and Karen Dunn Burks;
27. Marshall, Hon. Steve –Alabama Attorney General;
28. Merle, Natasha C. – Counsel for Plaintiffs;
29. Merrill, Hon. John H. – Alabama Secretary of State, Appellant;
30. Messick, Misty S. Fairbanks – Counsel for Appellants;
31. NAACP Legal Defense & Educational Fund – Counsel for Plaintiffs;

32. Norris, Cameron Thomas – Counsel for Amicus Honest Elections Project;
33. People First of Alabama – Appellee;
34. Reed, Mahogane D. – Counsel for Plaintiffs;
35. Roberson, Mary B. – Defendant; Circuit Clerk of Lee County, Alabama;
36. Ross, Deuel – Counsel for Plaintiffs;
37. Ross, Jay M. – Counsel for Defendant Alleen Barnett;
38. Ryan, Jenny – Counsel for Plaintiffs;
39. Sewell, Robert Jackson – Counsel for Defendant Mary B. Roberson;
40. Short, Caren E. – Counsel for Plaintiffs;
41. Sinclair, Winfield J. – Counsel for Appellants;
42. Smith, Brenton Merrill – Counsel for Appellants;
43. Southern Poverty Law Center – Counsel for Plaintiffs;
44. State of Alabama – Appellant;
45. Town, Jay E. – United States Attorney for the Northern District of Alabama, Counsel for United States of America;
46. United States of America;
47. Van Der Pol, William – Counsel for Plaintiffs;
48. Zampierin, Sara – Counsel for Plaintiffs;
49. Zaragoza, Liliana – Counsel for Plaintiffs

Respectfully submitted this 17th day of June, 2020.

/s/ A. Barrett Bowdre
A. Barrett Bowdre
Deputy Solicitor General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. It entered a preliminary injunction on June 15, 2020. Doc. 59. "A district court's grant of a preliminary injunction is an appealable interlocutory order over which [this Court] ha[s] jurisdiction." *Jones v. Governor of Fla.*, 950 F.3d 795, 805 (11th Cir. 2020) (citing 28 U.S.C. §1292(a)(1)).

INTRODUCTION

Less than a month before Alabama's primary runoff election day and while absentee voting is already taking place, the district court rewrote the anti-fraud provisions of the State's absentee-voting law to exempt from compliance certain voters who "determine[]" for themselves that the State's law is "unreasonable … in light of the COVID-19 pandemic." Doc. 59 at 2. The court also enjoined the Secretary of State from requiring uniform election procedures throughout the State by giving counties the option to establish curbside voting procedures. *Id.*

Why? Because, according to the district court, the State's absentee-ballot requirements—requiring a copy of the voter's ID and the signature of either two witnesses or one notary public—*could* dissuade some hypothetical eligible voter from voting, given that the State has not "completely eliminate[d] the risk of exposure" to COVID-19. *See* Doc. 58 at 48; *see id.* at 36 ("[S]atisfying the witness requirement *could* impose a more significant burden on some voters who live alone and who are at heightened risk of severe COVID-19 complication" (emphasis added)); *id.* at 48 ("[T]he photo ID requirement *could* present some elderly and disabled voters who wish 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." (emphasis added)). Because four voters—the individual plaintiffs in this case—"feel it is … unreasonable to comply with" Alabama law

"because of COVID-19," they don't have to. *Id.* at 47. Worse still, instead of tailoring relief to the 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 affect the integrity of an in-progress election. Doc. 59 at 1-2.

This is not how the law works. As the Fifth Circuit recently held, the emergence of COVID-19 "has not suddenly obligated [Alabama] to do what the Constitution has never been interpreted to command." *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2982937, at *14 (5th Cir. June 4, 2020). Even during COVID-19, the State does not have the responsibility to eliminate *all* burdens on voting, and its legitimate interests in preventing voter fraud are not suddenly diminished. For these reasons, *every* Circuit Court to consider a challenge to a State's election law in light of COVID-19 has found that the State was likely to win on appeal and thus entitled to a stay of all or part of the lower court's injunction pending appeal. *See Tex. Democratic Party*, 2020 WL 2982937, at *17 (5th Cir.); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, Doc. 30 (7th Cir. Apr. 3, 2020); *Miller v. Thurston*, No. 20-2095, 2020 WL 3240600, at *1 (8th Cir. June 15, 2020). This Court should do the same—enter an immediate administrative stay and then a stay pending appeal.

STATEMENT OF THE CASE

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. *See* Docs. 16-1 to 16-21. Some of these restrictions were recently loosened. *See* 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. Doc. 34-1 at 7-8.

Second, the Secretary of State, John Merrill, encouraged Probate Judges, who oversee federal, state, and county elections in their counties, to consider introducing alternate polling places and recruiting additional poll workers. *Id.* at 5. He also offered suggestions and funds to help precincts maintain safe and sanitary voting practices. *Id.* 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 apply for an absentee ballot. *See* Ala. Admin. Code. r. 820-2-3-.06.01ER; Doc. 34-1 at 9-10. Any voter who does not wish to vote in person because of COVID-19 may now vote absentee.

State law imposes two requirements on absentee voting that "go[] to the integrity and sanctity of the ballot and election." Ala. Code §17-11-10(b). One, absentee ballots must contain a voter affidavit that is either notarized or signed by two witnesses. *See id.* And two, voters must submit a copy of their photo ID with their absentee ballot application. *Id.* §17-9-30(b). As the State explained in its successful 1996 preclearance application, these procedures are necessary to prevent absentee voter fraud. *See* Docs. 34-9 to 34-15.

The State has also tried to make these necessary requirements as easy as possible to comply with during the pandemic. For instance, Governor Ivey granted permission for notaries public to notarize signatures remotely so that voters need not leave their homes to have an affidavit notarized. *See* Doc. 16-17. Secretary Merrill has advised the Boards of Registrars that photo IDs must still be issued for free, even if a courthouse is otherwise closed. Doc. 34-1 at 11. 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). And because the runoff election was postponed, voters have had months of additional time to satisfy these requirements.

One accommodation the State has not offered, however, 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." 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. 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 Circuit Clerks for Mobile, Jefferson, and Lee Counties who, by virtue of their office, typically serve as their counties' absentee election managers. Doc. 1. They moved for a preliminary injunction eleven days later, and the district court granted it in part on June 15. Docs. 15, 59. 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 the election but felt burdened by either the photo ID requirement (Porter and Thompson), the witness requirement (Clopton and Thompson), or the inability to vote curbside at a voting precinct—what Plaintiffs and the district court refer to as Secretary Merrill's "ban on curbside voting." Doc. 58 at 14-17. The court did not determine whether the organizational Plaintiffs have standing, saving that question for a later day. *Id.* at 18 n.8. The court also did not explain how Plaintiffs have standing to sue the Jefferson or Lee County AEMs when none of the individual Plaintiffs eligible to vote on July 14 or any of the identified members of the organizational Plaintiffs reside there,[1] *see* Doc. 1 at ¶¶24, 27; Doc. 16-45, or how Plaintiffs have standing to challenge the "ban" on curbside voting when the court found that "[e]ach of the individual plaintiffs … intends to vote absentee in 2020," Doc. 58 at 58.[2]

[1] Clopton, Porter, and Thompson live in Mobile County. Doc. 1 at ¶¶12, 26-27. Peebles lives in Lee County. *Id.* at ¶25. And though People First submitted evidence that it has a member named "Kelly" who feels that she cannot safely obtain a copy of her photo ID, "Kelly" does not live in Mobile, Lee, or Jefferson Counties. Doc. 16-45 at 24-25.

[2] To be sure, Porter alleges that "[h]e would feel the safest if he could vote absentee in the 2020 elections," but worries that "he may not be able to afford the ink or paper needed to maintain his printer though the 2020 elections"—which he says he needs to make a copy of his ID—and thus "would be willing to use curbside voting" if needed. Doc. 1 at ¶26. Notably, Porter does not allege that he *is* out of printer paper or ink. Peebles is not eligible to vote until November. *Id.* at ¶25. And Clopton alleges only that he would "consider" voting curbside. *Id.* at ¶24.

Second, the court found that the witness requirement, the photo ID requirement, and the Secretary's so-called "ban" on curbside voting likely violate Plaintiffs' and hypothetical other voters' constitutional right to vote. *Id.* 34-51. Though purporting to apply the Supreme Court's balancing tests from *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)—together, *Anderson-Burdick*—the district court time and again found that the State's legitimate interests in combatting voter fraud and conducting orderly elections were outweighed by the minimal, mostly hypothetical burdens either experienced by Plaintiffs 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." Doc. 58 at 48 (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* Doc. 58 at 41 (accepting Plaintiffs' 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 id.* at 48 (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 the Plaintiffs 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." Doc. 58 at 51. Yet later in the opinion, the court recounted a number of justifications offered by the State in a declaration submitted by the Director of Elections for the Secretary of State's Office. *See id.* at 68 n.47 (citing Doc. 34-1 at 21-24). 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." *Id.*

Third, the court found a substantial likelihood that Plaintiffs would prevail on the merits of their claims challenging the voter ID law and Secretary Merrill's "ban"

under Title II of the Americans with Disabilities Act (ADA).[3] 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, Plaintiffs' 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 get a copy elsewhere, the State law "presents a nearly insurmountable hurdle," doc. 58 at 63, and finding that 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." *Id.*)

Finally, the court found that Plaintiffs were likely to succeed on their ADA claim challenging the "ban" on curbside voting. *Id.* at 68-69. 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

[3] The court found that Plaintiffs were unlikely to state a prima facie claim for relief on their ADA challenge to the witness requirement. Doc. 58 at 60.

defendants' witness identified methods for making the offering feasible." *Id.* at 68 (citing 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" that explains why such voting is "completely unfeasible." Doc. 34-1 at 21-22.

But having thus found that Plaintiffs 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 AEMs for Jefferson, Mobile, and Lee Counties 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." Doc. 59 at 1-2. Additionally, Secretary Merrill is also "enjoined from prohibiting counties from establishing curbside voting procedures that otherwise comply with state election law." *Id.* at 2.

The State entered its notice of appeal the next day. Doc. 60. The State has not sought a stay from the district court because of "the time-sensitive nature of the proceedings." *Gonzalez ex rel. Gonzalez v. Reno*, No. 00-11424-D, 2000 WL

381901, at *4 (11th Cir. Apr. 19, 2000). Each day the injunction remains in effect, it forces election officials to divert limited resources to implementing the order while creating confusion among voters. Moreover, the order from the district court shows that "seeking such relief there would not be practicable." *Populist Party v. Herschler*, 746 F.2d 656, 657 n.1 (10th Cir. 1984); *see also* Fed. R. App. P. 8(a)(2)(A)(i).

STANDARD OF REVIEW

In determining whether to stay a lower court's decision pending appeal, this Court will consider: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). A district court's decision to grant a preliminary injunction is reviewed for an abuse of discretion, while its underlying legal conclusions are reviewed *de novo* and its findings of fact for clear error. *Id.* at 1317.

SUMMARY OF THE ARGUMENT

At the root of the district court's erroneous finding that Plaintiffs' are likely to succeed on their constitutional claims was its repeated emphasis that "even one disenfranchised voter … is too many." Doc. 58 at 48 (alteration in original) (quoting

Lee, 915 F.3d at 1321); Doc. 58 at 4 (same). That may be generally true, but the work is in what "disenfranchised" means. And what it cannot mean is precisely what the district court said it did: that minimal safeguards to ensure election integrity, undoubtedly lawful in normal times, are unlawful now because they "could"—maybe—present some voters with a burden that "could"—maybe—"dissuade them from voting." Doc. 58 at 48. Under this reasoning, *any* restriction on voting must be cast aside as unlawful "disenfranchisement," because "[a]ny such restriction is going to exclude, either de jure or de facto, some people from voting." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). But that has never been the law; "[e]lection laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433; *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (noting that in *Burdick*, the Court "upheld Hawaii's prohibition on write-in voting despite the fact that it prevented a significant number of voters from participating" (cleaned up)). The lower court's resolution of Plaintiffs' ADA claims was similarly fast and loose with binding precedent, fundamentally altering Alabama's election law when Plaintiffs have not shown that they are qualified individuals under the statute.

This Court should grant a stay of the district court's preliminary injunction. Each of the four factors for granting a stay is met. First, the State[4] is likely to win on the merits because the lower court's decision was wrong through and through.

[4] For brevity, this brief refers to Appellants as "the State."

Second, the Supreme Court has "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election" because of the harm such interference causes. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). Third, restoring the status quo by granting the stay will not substantially injure Plaintiffs or anyone else because they will still be able to exercise their right to vote. Fourth, the public interest clearly favors a stay because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

ARGUMENT

I. The State Is Likely to Prevail.

A. Plaintiffs Lack Standing to Bring Most of Their Claims.

Standing problems are likely to doom at least some of Plaintiffs' claims as to some Defendants. "To establish Article III standing," a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation marks omitted). And "standing is not dispensed in gross." *Id.* Thus, "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to

which he has not been subject." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

Plaintiffs have identified two individuals—Clopton and Thompson—who are eligible to vote in the July 14, 2020 election and who are affected by the witness requirement purportedly enforced by the AEM in the voters' county. But both of these Plaintiffs lives in Mobile County. *See* Doc. 1 at ¶¶24-27; Doc. 58 at 16. Neither plaintiff has suffered an injury that can be traced to the Jefferson or Lee County Defendants or redressed by an injury against those Defendants.

Likewise, only two Plaintiffs—Porter and Thompson—claim the photo ID requirement burdens their right to vote. *See id.* at ¶¶26-27. They both live in Mobile. Neither has suffered any harm from the Jefferson or Lee County Defendants, so the district court had no authority to enjoin those Defendants from enforcing the photo ID requirement.

Finally, none of the individual Plaintiffs has standing to challenge the "ban" on curbside voting outside their home counties, and it is unlikely they have standing to sue at home either because "[e]ach of the individual plaintiffs … intends to vote absentee in 2020." Doc. 58 at 58.[5] Thus, they have not been injured by any curbside voting policy because they can't vote twice.

[5] Thompson states that she would vote curbside if given the option, but given that she also states that she desires to vote absentee and to avoid any person-to-person contact, it is unclear which voting method she intends to pursue. Doc. 16-45 ¶¶16, 23.

The organizational Plaintiffs' diversion-of-resources allegations likewise fail to establish standing. "[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1205 (11th Cir. 2020) (citation omitted). But any additional resources the organizations are spending are the result of the *pandemic*, not any "defendant's illegal acts." *Id.*

Moreover, Plaintiffs' complaint makes clear that the organizations are not "diverting" any resources at all. People First makes no allegation about diverting resources. Doc. 1 ¶¶21-23.[6] And the most GBM and the Alabama NAACP allege is that "the Witness Requirement and the Prohibition on Curbside Voting" will force them to continue to do what they were already doing. *Id.* ¶¶31, 35. The organizations allege that they would normally spend their resources on voter registration and turnout efforts, and they continue to spend resources on voter registration and turnout efforts. There is no diversion of "resources away *from*" these activities because the resources are being used *for* those activities. *Jacobson*, 957 F.3d at 1206.

[6] While People First attached a declaration to its preliminary injunction motion alleging that the organization must divert resources from its voter education training programs to "train its members on navigating the election system during the pandemic," Doc. 16-45, at 26 ¶14, the complaint contains no such allegation. In any event, People First's allegation is simply that it is spending voter education resources on educating voters. There is no diversion.

B. Plaintiffs Are Almost Sure to Lose Their Constitutional Challenges.

Plaintiffs are likely to lose on the merits of their constitutional claims, too. Under the "flexible standard" of *Anderson-Burdick*, "a regulation that imposes a 'severe' burden must be 'narrowly drawn to advance a state interest of compelling importance,' but 'reasonable, nondiscriminatory restrictions' that impose a minimal burden may be warranted by the State's important regulatory interests." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Burdick*, 504 U.S. at 434, 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 and thus the lesser standard of scrutiny applied. Doc. 58 at 38, 46 (citing *Crawford*, 553 U.S. 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")).

But the train went off the rails when the court purported to apply this less searching standard. As described above, the court discounted the State's interests, highlighted the (minimal) burdens faced by Plaintiffs, and judged the State's laws against "other," less restrictive measures the court thought the State *could have taken* to prevent voter fraud. Doc. 58 at 47. This was all wrong; "*Anderson-Burdick*'s intermediate scrutiny doesn't require narrow tailoring." *Thompson*, 959 F.3d at 811. Instead, 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).

That is the case here. On one side of the scale is the little bit of work that an absentee voter may need to do to have a copy of her ID made and to have either two witnesses or one notary witness her signing the affidavit. As for voters who wish to vote in person, there is nothing about the State's lack of curbside voting that burdens them from doing so—and if they don't want to vote in person without curbside voting, then they have the option to vote absentee. These burdens are light, and neither one "qualif[ies] as a substantial burden on the right to vote, or even represent[s] a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

Weighing down the other side of the scale are the State's significant interests. There are at least three of them. First, combatting voter fraud, which both the photo ID and witness requirements do. *See* Ala. Code §17-11-10(b) ("The provision for witnessing of the voter's affidavit signature … goes to the integrity and sanctity of the ballot and election."); *Crawford*, 553 U.S. at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only votes of eligible voters."); *cf. Tex. Democratic Party*, 2020 WL 2982937, at *18 (Ho, J., concurring) (noting that "courts have repeatedly found that mail-in ballots are particularly susceptible to fraud").

Second, conducting orderly, lawful, and uniform elections throughout the State, which the two absentee-ballot provisions and the "ban" on curbside voting do. *See Crawford*, 553 U.S. at 196 ("[T]he interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process."). The Secretary of State explained that curbside voting would be "completely unfeasible" in the near future. Doc. 34-1 at 21-22. And having different sets of standards for absentee voters from one county to the next creates unequal voting practices throughout the State. *Cf.* Ala. Code §17-1-3(a) ("The Secretary of State … shall provide uniform guidance for election activities.").

Third, avoiding changes to election procedures during an election to avoid diminishing public confidence in the election. *See Purcell*, 549 U.S. at 4-5 (noting that changing election law on the eve of an election can "result in voter confusion and consequent incentive to remain away from the polls"); *Crawford*, 553 U.S. at 197 ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages participation in the democratic process."). Voters will go to the polls in less than a month and are already voting absentee. The district court's order thus changes the rules governing an *in-process* election in three of the State's sixty-seven counties.

"These interests are not only legitimate, they are compelling." *Thompson*, 959 F.3d at 811. They demand relief from this Court.

C. Plaintiffs Are Likely to Lose Their ADA Claims.

Finally, Plaintiffs are unlikely to succeed on their ADA claims challenging the Secretary's "ban" on curbside voting and the State's photo ID requirement. As to the first, allowing curbside voting for the first time would fundamentally alter Alabama elections and is not a reasonable modification to existing election procedures. 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," *Tennessee v. Lane*, 541 U.S. 509, 511 (2004).[7] The district court's finding otherwise was error.

As for the photo ID requirement, Plaintiffs' single sentence in their brief below devoted to this claim was not enough for them to establish a prima facie showing, much less to show that they were substantially likely to prevail. *See* Doc. 20-1 at 27 ("Further, as Plaintiffs are protected by the ADA, Defendants must interpret the Photo ID Requirement in a manner that protects their right to vote." (citation omitted)). And in any event, Plaintiffs have failed to make a prima facie case for relief because they do not meet the essential eligibility requirements for

[7] *See also* Ala. Code §17-9-13 (allowing disabled voters to go to the front of the line when voting).

having their absentee ballots counted, nor have they been excluded from voting "by reason" of their disabilities. *See Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1083 (11th Cir. 2007) (noting that a plaintiff must establish that (1) she is a qualified individual with a disability, (2) she was excluded from participating in a public entity's services, and (3) the exclusion was "by reason" of her disability to make a prima facie case); 42 U.S.C. §12131(2) (defining "qualified individual with a disability" as "an individual with a disability who … meets the essential eligibility requirements" for the public action).

First, Plaintiffs are not qualified individuals because the photo ID requirement is an essential eligibility requirement of having an absentee ballot counted. *See Lane*, 541 U.S. at 531-32 ("Title II … does not require States to compromise their essential eligibility criteria for public programs."). Alabama law makes that clear: "[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)-(c).

Second, Plaintiffs have not been excluded from voting absentee "by reason" of their disabilities. The Plaintiffs did not address this in their brief, doc. 20-1 at 27, but the district court reasoned for them that they are excluded because voting absentee is not "readily accessible" to them. Doc. 58 at 63. 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. And

the district court's analysis that the photo ID requirement could "dissuade" a person from voting, doc. 58 at 63, is a slippage back into the *Anderson-Burdick* framework; it is not relevant to determine whether a disabled individual has been *excluded* under the ADA.

II. The Remaining Factors Favor a Stay.

Unless a statute is unconstitutional, enjoining "the State from conducting this year's elections pursuant to a statute enacted by the Legislature … would seriously and irreparably harm the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). That harm is especially acute, and injunctions especially unwise, during an on-going election. *Republican Nat'l Comm.*, 149 S. Ct. at 1207. In contrast, Plaintiffs 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. Doing so does not constitute a great burden.

CONCLUSION

The Court should enter an immediate administrative stay, and then it should stay the district court's preliminary injunction pending appeal.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

/s/ A. Barrett Bowdre
A. Barrett Bowdre
Deputy Solicitor General
James W. Davis
Winfield J. Sinclair
Misty S. Fairbanks Messick
Jeremy S. Weber
Brenton M. Smith
Assistant Attorneys General

OFFICE OF ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Barrett.Bowdre@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov
Winfield.Sinclair@AlabamaAG.gov
Misty.Messick@AlabamaAG.gov
Jeremy.Weber@AlabamaAG.gov
Brenton.Smith@AlabamaAG.gov

Counsel for Appellants Secretary of State John Merrill and the State of Alabama

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. I certify that this motion complies with the type-volume limitations set forth in Fed. R. App. P. 27(d)(2)(A). This motion contains 5,185 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

2. In addition, this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s/ A. Barrett Bowdre
A. Barrett Bowdre
Counsel for Appellants Secretary of State John Merrill and the State of Alabama

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2020, I filed the foregoing petition using the Court's CM/ECF system, which will serve all counsel of record.

/s/ A. Barrett Bowdre __
A. Barrett Bowdre
Counsel for Appellants Secretary of State John Merrill and the State of Alabama