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

APPELLEES' BRIEF IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

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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 CIP filed by appellees is correct and complete.

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

OTHER AUTHORITY

Our country faces an unprecedented health crisis. COVID-19 has infected over 2 million Americans.[1] Alabama alone has more than 27,000 confirmed cases and 800 confirmed deaths.[2] That number is rapidly rising. This week, Alabama has seen record numbers of daily COVID-19 infections. No vaccine exists for COVID-19. Social distancing is the only proven means of protecting against this deadly disease. For this reason, the Centers for Disease Control and Prevention ("CDC") recommend that states "[e]ncourage voters to use voting methods that minimize direct contact with other people," including absentee voting and curbside or "drive-up voting." ECF 16-2 at 2. Governor Ivey has issued a Safer-at-Home Order instructing Alabamians, especially vulnerable persons like Plaintiffs, to stay home and stay six feet apart from people outside of their household. App. 244.

Plaintiffs are individuals and organizations who—because of age, disabilities, and race—are especially at risk of contracting COVID-19 and wish to participate in Alabama's July 14, 2020 election. Plaintiffs challenged multiple provisions that, because of the pandemic and social distancing orders, are severe obstacles to voting in the pandemic: (1) the requirement that an absentee ballot include an affidavit that

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[1] Ctrs. for Disease Control, *Cases in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last updated June 18, 2020).

[2] ADPH, *Alabama Public Health Daily Case Characteristics: 6/18/20*, http://www.alabamapublichealth.gov/covid19/assets/cov-al-cases-061820.pdf

is either notarized or signed by the voter in the presence of two adult witnesses, Ala. Code §§ 17-11-7–17-11-10 ("Witness Requirement"); (2) the requirement that copies of photo ID accompany absentee ballot applications or ballots, *id*. §§ 17-9-30(b), 17-11-9, 17-11-10(c) ("Photo ID Requirement"); and (3) the prohibition on curbside voting ("Curbside Voting Prohibition") (collectively, the "Challenged Provisions").

The District Court preliminarily enjoined the Absentee Election Managers ("AEMs") in Jefferson, Lee, and Mobile Counties from enforcing the Witness and Photo ID Requirements. It enjoined the Secretary of State from enforcing the Curbside Voting Prohibition. Despite this limited relief, the Secretary and the State of Alabama ("State Defendants") now appeal and seek to stay the District Court's entire injunction. Yet, State Defendants lack standing to challenge much of the injunction. And this Court has already found that where, as here, social distancing rules serve to severely burden constitutional rights, a stay of a preliminary injunction is inappropriate. *See Robinson v. Att'y Gen*., 957 F.3d 1171, 1180 (11th Cir. 2020).

Applying *Anderson-Burdick*, courts across the country have recognized that various election laws cannot be constitutionally applied during the pandemic and entered preliminary injunctions against them. *See, e.g., Thomas v. Andino*, 2020 WL 2617329 (D.S.C. May 25, 2020); *League of Women Voters of Va. v. Va. State Bd. of Elec.*, 2020 WL 2158249 (W.D. Va. May 5, 2020); *Garbett v. Herbert*, 2020 WL

2064101 (D. Utah Apr. 29, 2020); *Libertarian Party of Ill. v. Pritzker*, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020). Contrary to State Defendants' misleading suggestion, two appellate courts have declined to stay core parts of those injunctions. *See Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553 (6th Cir. May 5, 2020); *Dem. Nat'l Comm. v. Bostelmann,* No. 20-1538, ECF 30 (7th Cir. Apr. 3, 2020).

The District Court correctly found that Plaintiffs are likely to succeed on the merits of their constitutional and Americans with Disabilities Act ("ADA") claims here. Nothing presented in State Defendants' motion to stay upsets that correct determination.

ARGUMENT

I. State Defendants Lack Standing to Appeal Part of the Injunction

The preliminary injunction entered by the District Court in this case has three components. Two of the components apply only to the AEMs, prohibiting them from enforcing the Witness and Photo ID Requirements against certain voters. App. 316-17. Those components do not apply to State Defendants. Only the third component of the injunction applies to any State Defendant, enjoining the Secretary from stopping counties from establishing curbside voting sites that otherwise comply with state law. App. 317.

The AEMs have not appealed the injunction, nor sought a stay and State Defendants do not have standing to challenge the portions of the injunction that

apply only to the AEMs. Therefore, the only issue properly before the Court is the motion for a stay of the injunction against the Secretary as to the Curbside Voting Prohibition.

"[W]hether on interlocutory appeal or appeal from a final judgment, . . . an appellate court 'reviews judgments, not statements in opinions.'" *Keating v. City of Miami*, 598 F.3d 753, 761 (11th Cir. 2010) (citation omitted). A party may not appeal from a judgment in his favor. *Id*. Having avoided an injunction against them as to the Photo ID and Witness Requirements, State Defendants cannot now challenge the portions of the injunction that only bind the AEMs. *See VP Properties & Developments, LLLP v. Seneca Specialty Ins. Co*., 645 F. App'x 912, 914–15 (11th Cir. 2016).

Plaintiffs sought a preliminary injunction against both State Defendants and the AEMS. App. 100-01. State Defendants vigorously argued in the District Court that they were immune from suit under § 1983, and, relying on *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020), that the Secretary had no role in enforcing the Witness and Photo ID Requirements. App. 150-51 & n.12. The District Court accepted the Secretary's argument that he was not a proper party with respect to the Witness Requirement. App. 260-62. Because the AEMs were proper parties, the Court declined to decide whether the Secretary was a proper party as to the Photo ID Requirement. App. 259-60 & n.12. And, although the Court found that the State

was a proper party for the ADA claim, App. 267, the Court ruled in favor of the State on the merits in the challenge to the Witness Requirement, App. 296-97. Accordingly, the Court only enjoined the AEMs from enforcing these requirements. App. 316-17.

Having won on these arguments below, the Secretary is judicially estopped from changing his position now and arguing that he does in fact have some stake in the enforcement of these requirements. *See Maine v. New Hampshire*, 532 U.S. 742, 749 (2001) (explaining that "judicial estoppel[] 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase'") (citation omitted).

The State is similarly estopped. It asserted sovereign immunity, App. 152, and Plaintiffs did not (and could not) sue the State under § 1983 as to any constitutional claim, App. 71. And, while the ADA abrogates sovereign immunity, the State prevailed insofar as the Court declined to enter an injunction against it.[3] App. 297. Because the injunction does not enjoin the State, and the State did not waive sovereign immunity so it could litigate Plaintiffs' constitutional claims, the State is in no position to appeal the injunction.

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[3] Plaintiffs do not waive the argument that the District Court could enter an injunction against the State based on the ADA or Voting Rights Act claims in the future. But the District Court did not abuse its discretion in granting a narrow preliminary injunction.

Because the injunction did not order State Defendants "to do or refrain from doing anything" with respect to the Witness and Photo ID requirements, they have "no 'direct stake' in the outcome of their appeal." *Hollingsworth v. Perry*, 570 U.S. 693, 705–06 (2013) (citation omitted) (concluding that a similarly situated defendant lacked standing to appeal). As such, they have no standing to appeal from the injunction issued against the third party AEMs.

II. State Defendants Have Not Met their Burden to Obtain a Stay.

As the parties seeking a stay of a preliminary injunction pending appeal, State Defendants have the burden to demonstrate that a stay is warranted. *See Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). In determining whether State Defendants have met their burden, this Court considers: (1) whether State Defendants have made a strong showing they are likely to succeed on the merits, (2) whether they will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties, and (4) where the public interest lies. *Id.* The first two factors are the most critical. *Id*. State Defendants must show more than the mere possibility of success on the merits or of irreparable injury. *Id*. And, because the District Court has already granted a preliminary injunction in Plaintiffs' favor, this Court considers these factors through the lens of the abuse of discretion standard. *Id.* Here, State Defendants fail to carry their burden, and a stay is not

warranted. *See Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1264 (11th Cir. 2019) (mem.).

A. State Defendants Are Not Likely to Succeed on Appeal.

As discussed, State Defendants do not have standing to challenge two of the three parts of the District Court's injunction. In any event, none of the arguments presented by State Defendants show that the District Court abused its discretion in entering a preliminary injunction.

1. State Defendants Are Unlikely to Show that Plaintiffs Lack Standing. III.

a. *Curbside Voting*

To assert Article III standing, Plaintiffs must have (1) suffered an injury in fact, (2) that is fairly traceable to the defendant, and (3) that is likely to be redressed by a favorable decision. *See Common Cause v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009). So long as at least one plaintiff has standing with respect to each claim for relief requested, the Court "need not consider whether the other individual and [organizational] plaintiffs have standing to maintain the suit." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).

Plaintiffs have clearly alleged an injury-in-fact from the curbside voting ban. As the District Court correctly found, "[a]ll four individual plaintiffs allege that, if they cannot vote absentee, they would prefer to utilize a curbside voting method, rather than enter a polling place." App. 247; *see* App. 37-40, 110. Defendants

misleadingly state that "'[e]ach of the individual plaintiffs … intends to vote absentee in 2020[.]" Mot. Stay at 6. But the District Court concluded that Plaintiffs would vote curbside if they are unable to vote absentee—notwithstanding their intentions—because of the burdens imposed by the Witness and Photo ID Requirements (which State Defendants continue to challenge). App. 247. And State Defendants' argument about individual Plaintiffs cannot challenge the Curbside Voting Prohibition outside of their home counties, *see* Motion at 14, misses the point. The challenge here is to Secretary Merrill's statewide policy that no county may offer curbside voting, not to a county-specific practice.

Moreover, the Complaint alleges and Plaintiffs' evidence shows that the Organizational Plaintiffs' members desire to use curbside voting as a safe in-person option. App. 36-43, 110; ECF. No. 16-45. The District Court recognized that Plaintiffs' members alleged that they would "prefer to vote curbside, rather than inside the polling place, if they cannot vote absentee" because of the burdens of the Witness and Photo ID Requirements. App. 248.

Likewise, the NAACP and People First provided evidence that their members must have safe options for voting in person, like curbside voting, particularly for members with limited literacy, ECF 16-45, at 36-37, or certain disabilities. *Id.* at 25-26 ¶ 13. State Defendants simply ignore these allegations and the declarations, which

establish the organizations' standing on behalf of their members. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014).

The District Court also correctly found that the burden of Curbside Voting Prohibition is directly traceable to and redressable by Secretary Merrill. App. 254, 263-64; 305-06.

b. *Witness and Photo ID Requirements*

The District Court correctly found that Plaintiffs have standing to bring claims against the Witness and Photo ID Requirements. App. 251. Voters always have standing to challenge state laws that require them to take some act—such as obtain a witness or photo ID—to vote. *See Billups*, 554 F.3d at 1351-52.

State Defendants argue that Plaintiffs have no standing to assert claims against the Witness and Photo ID requirements with respect to Jefferson and Lee counties. Ironically, as explained above, the injunction with respect to these requirements runs only to the AEMs who have not appealed or sought a stay, and so it is State Defendants who lack standing to raise arguments.

In any event, Plaintiffs People First, GBM, and the NAACP have both associational standing on behalf of their members who live in Jefferson, Lee, and Mobile Counties, and organizational standing on their own behalf.

Plaintiff GBM's members live in Jefferson County. App. 40-41. People First and the NAACP have members across Alabama, including members in Jefferson

and Lee Counties. App. 36, 42. Large, statewide organizations like the NAACP and People First are presumed to have affected members by broad policies like the ones enjoined here. *See Arcia*, 772 F.3d at 1342. Organizational Plaintiffs each allege that they have members who intend to vote in the July elections, but face burdens associated with the Challenged Provisions. App. 36-37, 109-10.

Organizational Plaintiffs also allege and offer evidence that, because of the Safer-at-Home Order and the Secretary's expansion of absentee voting options, they are diverting resources from traditional get-out-the-vote programs to *new* activities, like addressing Defendants' refusal to mitigate burdens of the Challenged Provisions and educating voters about the Challenged Provisions. App. 41-43; ECF 16-45 at 26. For example, due to the Challenged Provisions and Defendants' inadequate response to COVID-19, GBM is "now required to divert a portion of its limited financial and organizational resources away from voter registration and turnout efforts to undertake [ ] new activities." App. 41 ¶ 31. Since these new activities are outside their usual work, absent the Challenged Provisions, Plaintiffs would stop diverting resources to these tasks. *Id*. ¶¶ 31, 36.

2. State Defendants Are Unlikely to Succeed on the Merits of Their Arguments with Respect to Plaintiffs' Constitutional Claims.

IV.

Under the *Anderson-Burdick* test, the Court must consider "the character and magnitude" of the asserted constitutional injury to Plaintiffs against the "proffered justifications for the burdens imposed by the rule, taking into consideration the

extent to which those justifications require the burden to plaintiffs' rights." *Lee*, 915 F.3d at 1317 (citations omitted). Here, the District Court correctly concluded that, for at least some voters, like Plaintiffs, "who are at heightened risk of severe COVID-19 complications due to age, disability, pre-existing conditions, and race" the risks of complying with the Challenged Provisions place a "significant burden" on the right to vote. App. 273, 282-83, 287.

Weighed against these significant burdens, the District Court carefully considered the interests identified by Defendants supporting each of the three requirements, "considering 'the extent to which those interests make it necessary to burden the Plaintiffs' rights.'" App. 277-78. After its careful examination, the District Court concluded the proffered interests did not warrant the burden on Plaintiffs' rights. State Defendants now use strong rhetoric to challenge those conclusions, but they identify no abuse of discretion or legal error.

a. The Curbside Voting Prohibition

As to curbside voting, the District Court correctly found that "voters with disabilities, including some members of People First, must vote in person, rather than by absentee ballot, to receive assistance at the polls, and curbside voting would minimize the risk of exposure to COVID-19 for those voters." App. 286. The District Court did not require curbside voting in counties that choose not to use it but simply

enjoined Secretary Merrill from "prohibiting counties from establishing curbside voting procedures that otherwise comply with state election law." App. 317.

Nonetheless, State Defendants insist that for any voter who wishes to "vote in person, there is nothing about the State's lack of curbside voting that burdens them." This is untrue. The Court found that, despite the absentee voting option, some vulnerable People First and NAACP members must vote in-person to receive necessary assistance because of their disabilities or illiteracy. App. 25-26. For these voters, the CDC recommends the use of curbside voting to "minimize the risk of COVID-19 exposure," but the Secretary's ban prevents that option. App. 286.

Plaintiffs' significant burdens far outweigh State Defendants' slight concern that curbside voting is "unfeasible." ECF 34-1 at 21-22. Such administrative burdens do not justify burdening the fundamental right to vote. *See Lee*, 915 F. 3d at 1323. Defendants' witness, Clay Helms testified that curbside voting would require: 1) the use of e-poll books; 2) a tabulation booth at the curbside voting site; and 3) poll workers to staff it. ECF 34-1 ¶ 46. For over half of Alabama counties that already employ e-poll books, it is a minor logistical concern to place extra tabulation booths and poll workers curbside. Thus, the District Court rightly concluded that Mr. Helms simply "identified methods for making the offering feasible." App. 305 & n.47.

Moreover, to the degree State Defendants contend this injunction is too close to election day, Stay Mot. at 18, local election officials who choose to implement

curbside voting on Election Day have a month to make plans to do so. The injunction therefore raises no concerns under *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Indeed, this Court has declined to stay injunctions within days of an election. *See Lee*, 915 F.3d 1312; *Kemp*, 918 F.3d at 1262; *see also infra* (explaining that *Purcell* is inapposite).

b. The Witness and Photo ID Requirements

Again, State Defendants lack standing to challenge the injunction with respect to these requirements. But, even if they had standing, they would be unlikely to succeed on the merits.

First, both requirements impose substantial burdens on Plaintiffs' right to vote. For the Witness Requirement, the District Court found that "satisfying the witness requirement could impose a . . . significant burden on some voters who live alone and who are at heightened risk of severe COVID-19 complications." App. 273. State Defendants fail to acknowledge these very real burdens on Plaintiffs or Plaintiffs' members who live alone or with one person. App. 115. Because Plaintiffs do not encounter two people simultaneously, App. 109-10, the Witness Requirement forces them to violate social distancing rules to interact with one or more people outside their household. And the Court found that COVID-19 is spread easily and stays in the air for up to 14 minutes. App. 243. "Strikingly," State Defendants seek to enforce the Witness Requirement for everyone, requiring an "asymptomatic

COVID-19 voter [to] unknowingly place potential witnesses at risk" and a symptomatic voter to "find a willing witness." *Thomas*, 2020 WL 2617329, at *24. This is untenable.

As the District Court recognized, remote notarization via videoconferencing is not an adequate alternative because "videoconferencing is not free" and a notary is entitled to a $5.00 fee. App. 275 n.20. The Constitution forbids hinging the right to vote "on an individual's financial resources" or the payment of "any fee." *Id*. (citations omitted). Remote notarization still requires a notary and voter to sign the same physical ballot, which may ultimately require person-to-person interaction and risks. App. 230.

The Photo ID Requirement demands voters submit a copy of their photo ID. For those who lack printers at home, like Plaintiff Thompson, Secretary Merrill has told them to violate the Safer-at-Home order and risk contracting COVID-19 to make copies or forego their right to vote. App. 282. Contrary to State Defendants' claims to the contrary, Stay Mot. P. 17, the District Court ruled that these burdens are substantial: requiring a vulnerable voter or a person willing to help them obtain a copy of their ID to "risk of potential exposure to COVID-19 is . . . a burden." App. 282-83.

State Defendants' interests are insubstantial when compared to Plaintiffs' burdens. Against the threat to Plaintiffs' health, State Defendants offer three

interests: the desire to combat voter fraud, orderly elections, and the concern that the election is a month away. State Defendants appear to argue that merely identifying significant interests satisfies their obligation under *Anderson-Burdick*, but that is not true: "even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must *justify the burden*." *Lee*, 915 F.3d at 1318 (emphasis added).

First, concerning State Defendants' interest in "combatting voter fraud," Defendants are correct that this is a legitimate state interest. Nonetheless, "the articulation of a legitimate interest is not a magic incantation a state can utter to avoid a finding" of a violation. *Veasey v. Abbott*, 830 F. 3d 216, 262 (5th Cir. 2016) (en banc). Rather, the Court "must take into consideration not only the 'legitimacy and strength' of the state's asserted interest, but also 'the extent to which those interests make it necessary to burden' voting rights." *Lee*, 915 F.3d at 1322 (citations omitted).

Here, as the District Court recognized, the Witness Requirement does little to meaningfully advance the State's interest: "[t]he witness certifies only that they watched the individual sign the individual envelope" and "does not even attest that the voter is who she says she is." App. 277. The Court found that there is no meaningful voter fraud in Alabama that the Witness Requirement has or can prevent. *Id*. at 277. And other laws sufficiently protect election integrity, including Alabama

laws requiring an absentee voter to provide identifying information and sign identifying documents under penalty of perjury. App. 278–79. State Defendants complain that the District Court relied on the Photo ID Requirement here but enjoined it in part. As the District Court explained, however, the injunction was specifically tailored to leave the Photo ID Requirement "in place for most absentee voters." App. 278 & n.23.

That is, the District Court only enjoined as to the most vulnerable voters: those who are over 65 or those with conditions that would make an infection more dangerous. App. 284–85. Further, as the District Court explained, State Defendants' voter-fraud justification for enforcing the Photo ID Requirement as to vulnerable voters makes little sense given (1) that Alabama already provides an exception for voters over age 65 or with disabilities who cannot access the polls due to a physical infirmity and (2) there are other measures to prevent voter fraud. App. 284–85.

In seeking a stay, State Defendants simply point to the general interest in deterring voter fraud. But the District Court specifically recognized the legitimacy of that interest, App. 283, and explained why it was not "necessary to burden voting rights." *Lee*, 915 F.3d at 1322; *see* App. 284–85 Far from attempting to explain how the District Court's analysis was an abuse of discretion, State Defendants essentially ignore it.

Second, State Defendants point to their interest in conducting orderly, lawful, and uniform elections throughout the State. Stay Mot. 18. State Defendants did not advance this argument before the District Court so they cannot rely on it to claim the District Court abused its discretion now. In fact, they argued the opposite: that "State Defendants . . .have no role in enforcing these provisions." App. 150–51. Nonetheless, State Defendants have not demonstrated that permitting medically vulnerable voters, like Plaintiffs, to sign affidavits to vote without photo ID, which state law already allows at times, or without witnesses would inordinately disrupt the smooth facilitation of the election. *See Lee*, 915 F.3d at 1322.

Third, State Defendants claim that the District Court's injunction implicates the Supreme Court's concern in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), about election-procedure changes too close to an election, which can diminish public confidence in the election. But in *Purcell*, the district court had denied a motion for a preliminary injunction and the Circuit Court reversed. The Supreme Court reversed in large part because it the Circuit Court had not accorded proper deference to the district court. *See id*. at 5.

And, to reiterate, the AEMs—i.e., the parties charged with implementing the injunction—have not appealed and are preparing to implement the injunction. A stay of a ruling that these Defendants did not appeal is only likely to cause confusion.

3. State Defendants Are Unlikely to Succeed on the Merits of Their Arguments with Respect to Plaintiffs' ADA Claim.

V.

State Defendants argue that Plaintiffs failed to establish a *prima facie* case under the ADA. But Plaintiffs do, and the District Court agreed. To prevail under the ADA, Plaintiffs need prove only that (1) they are qualified persons with a disability; (2) they were excluded from participation in or denied the benefits of a public entity's services; and (3) the exclusion or denial of the benefit was by reason of the plaintiff's disability. *Nat'l Fed. of the Blind v. Lamone*, 813 F. 3d 494, 502-03 (4th Cir. 2016). Once Plaintiffs establish a prima facie case, they must offer "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.130(b)(7). Plaintiffs met this burden as well, because they proposed modifications that will not cause "undue hardship." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-03 (2002).

Regarding curbside voting, State Defendants do not contest that Plaintiffs make out a *prima facie* case. But Defendants argue that allowing curbside voting would fundamentally alter Alabama elections and is an unreasonable modification. Stay Mot. 19. With good reason, the District Court rejected this argument. There is no law prohibiting or governing curbside voting procedures. And, as described above, Defendants' own witness undercuts this argument: other than minor logistical concerns related to implementation, curbside voting would not affect a fundamental alteration to Alabama law. The Court was correct to enjoin this de facto and *per se* ban under the ADA, which at times requires curbside voting. ECF 16-48.

Regarding the Photo ID requirement, State Defendants challenge the first and third elements of Plaintiffs' *prima facie* case. They are wrong. Plaintiffs are qualified persons—all eligible to vote—with disabilities, which include medical vulnerabilities that place them at a high risk of serious bodily injury or death should they leave their homes. *See* App. 298.

State Defendants argue that Plaintiffs are not qualified because the Photo ID requirement is an essential eligibility requirement of having an absentee ballot counted. Stay Mot. 19-20. Defendants cannot overcome the ADA claim by simply asserting that the Photo ID Requirement is "essential." *Compare* App. 36 *with Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001) (finding that a state constitution's voting qualification was not "essential"). Rather, the Court must examine these requirements' purpose (*i.e.*, identification) and whether it can be satisfied with a reasonable modification. *See Schaw v. Habitat for Humanity*, 938 F.3d 1259, 1266-67 (11th Cir. 2019).

As the District Court concluded, no statutory language indicates that the Photo ID Requirement is essential. App. 299. And it cannot: the law provides multiple exemptions to the Photo ID requirement for different subsets of voters and in different contexts. *See* Ala. Code §§ 17-9-30(d), 17-9-30(f). The requirement cannot be essential and unalterable if it already permits a sizable group of similarly situated elderly or disabled voters to also demonstrate their identity without providing photo

ID. Tellingly, State Defendants argued below that proof of identification is not even a voting qualification. App. 164-65. The District Court was correct in holding that the requirement is not "essential" and does not "fundamentally alter" state law.

State Defendants also argue that Plaintiffs have not been excluded from voting absentee "by reason" of their disabilities. Stay Mot. 20. But, because Plaintiffs' underlying medical conditions require them to remain at home and to self-isolate or face death or serious illness from COVID-19, this injury is also "by reason of" their disabilities. *See McAlindin v. San Diego Cty.*, 192 F.3d 1226, 1235 (9th Cir. 1999) (finding an ADA violation where a person's disability led to self-isolation); *Mooneyhan v. Husted*, 2012 WL 5834232, at *5 (S.D. Ohio Nov. 16, 2012) (state laws violated ADA as-applied to hospitalized voter because of her disability); *Ray v. Franklin Cty. Bd. of Elect.*, 2008 WL 4966759 (S.D. Ohio Nov.17, 2008) (similar).

State Defendants' claims also do not address the crux of Plaintiffs' argument: in the context of a pandemic, widespread absentee voting is meaningless when additional barriers prevent voters who are most susceptible to COVID-19 from casting an absentee ballot. Plaintiffs are excluded from voting by reason of their disabilities: they cannot vote inside poll sites or meet the Photo ID Requirement because their disabilities mean exposure to COVID-19 is especially dangerous.

i. The Remaining Factors Favor Plaintiffs

The District Court did not abuse its discretion in finding that, because "the singular circumstances presented by the COVID-19 pandemic are far from ordinary," Plaintiffs have shown that the balance of equities favors an injunction. App. 311-13. Further, any alleged harm to Defendants from the injunction concerning the Witness and Photo ID requirements would be to the AEMs, who are not seeking a stay.

"[I]t is a basic truth that even one disenfranchised voter —let alone several thousand—is too many." *Lee*, 915 F.3d at 1321 (citation omitted). "The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm." *Jones v. Governor of Fla.*, 950 F.3d 950 F. 3d 795, 828 (11th Cir. 2020). There "can be no injury more irreparable" than "serious, lasting illness or death." *Thakker v. Doll*, 2020 WL 1671563, at *4 (M.D. Pa. Mar. 31, 2020).

Organizational Plaintiffs also are "irreparably harmed when the right to vote is wrongfully denied or abridged—whether belonging to [their] membership or the electorate at large" and the diversion of resources. *See N.C. State Conf. of NAACP v. Cooper*, No. 18-cv-1034, 2019 WL 7372980, at *24 (M.D.N.C. Dec. 31, 2019); *Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1295 (N.D. Ga. 2018). All Plaintiffs' harms will continue until July 14. ECF 16-4 ¶¶ 13, 15; ECF 16-49 ¶ 17.

Further, the "protection of the Plaintiffs' franchise-related rights is without question in the public interest." *Charles H. Wesley Educ. Found v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005). State Defendants suffer "no harm from the state's nonenforcement of invalid legislation." *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012). And the injunction promotes the "paramount government interest" in the "protection of the public's health and safety." *Gun S., Inc. v. Brady*, 877 F.2d 858, 867 (11th Cir. 1989).

CONCLUSION

For the foregoing reasons the Motion to Stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th of June 2020, a copy of the above and foregoing Appelles' Brief in Opposition to Appellants' Emergency Motion for Administrative Stay and Stay Pending Appeal was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

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