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

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

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June 19, 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 19th day of June, 2020.

/s/ A. Barrett Bowdre
A. Barrett Bowdre
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REPLY IN SUPPORT OF EMERGENCY STAY MOTION

Alabama has an election in less than a month. Absentee ballot voting has already begun. Yet earlier this week, a district court entered a preliminary injunction that rewrites the laws governing this ongoing election. The State of Alabama and Secretary of State John Merrill have sought emergency relief from this Court to stay that injunction. Earlier today, Plaintiffs responded to this motion, and the State now makes a few brief points in reply.

ARGUMENT

I. The State Is Likely To Prevail.

A. The State Defendants Have Standing to Seek Relief From the District Court's Preliminary Injunction.

When Plaintiffs brought their challenge to the State's voting procedures, they named as defendants the State of Alabama, Secretary of State Merrill, Governor Kay Ivey, and Absentee Election Managers or Circuit Clerks for Mobile, Jefferson, and Lee Counties who, by virtue of their office, typically serve as their counties' AEMs. Doc. 1. The district court ruled that Plaintiffs lacked standing to sue Secretary Merrill because he could not provide a remedy for Plaintiffs' alleged harm stemming from the State's photo ID and witness requirements as he did not directly enforce the law. Doc. 58 at 23 n.12, 23-26. And the court noted that the State itself was not a proper defendant for the Plaintiffs' constitutional claims because of its sovereign immunity. *Id.* at 30.

Plaintiffs interpret these holdings and the State's arguments to mean that the State Defendants lack standing to seek relief from this Court and that they are estopped from seeking it. Resp.4-7. But even though the State Defendants cannot redress Plaintiffs' claims—and so are not proper defendants—both the State itself and Secretary Merrill are injured by the court's rewrite of Alabama's election law. And while "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it … [i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 334 (1980); *Agripost, Inc. v. Miami–Dade County, ex rel. Manager*, 195 F.3d 1225, 1230 (11th Cir. 1999) ("Ordinarily, the prevailing party does not have standing to appeal because it is assumed that the judgment has caused that party no injury." (citing *Roper*, 445 U.S. at 333)). It follows from this rule that when a party *is* injured by the court's judgment, that party *can* seek relief on appeal. And that is the case here—particularly given the "special solicitude in [the Supreme Court's] standing analysis" to which States are entitled when protecting their sovereign and quasi-sovereign interests. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

It is obvious that the State Defendants have been harmed by the district court's injunction. As explained more fully in their motion, the court's ruling changes the rules of an *ongoing state election* and will require AEMs in three counties to follow one set of rules created by the court while those in the remaining 64 counties will follow controlling state law. It is hard to see how the State and its voters aren't harmed by this court-ordered confusion. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (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"); *see also, e.g.*, 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."); Ala. Code §17-1-3(a) ("The Secretary of State … shall provide uniform guidance for election activities."). Indeed, if the State Defendants could intervene to defend these interests—and surely they could—there is no reason why they cannot seek relief now that they are already here. *See* Fed. R. Civ. P. 24(a). Indeed, this is exactly the sort of case where intervention would be needed, as the Jefferson County Defendants declared themselves "nonparticipant[s] in the present preliminary injunction" dispute. Doc. 45 at 2.

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

Only four people in all of Alabama have come forward alleging harm from the confluence of the State's generally applicable election laws and the current

pandemic. Doc. 1 at ¶¶24-27. Only three of them are eligible to vote in the July 14 election, and all three of them live in Mobile County. None of them, therefore, have standing to challenge how Jefferson or Lee County election officials are managing elections in those counties. And none have standing to seek relief from the Secretary of State regarding how he will respond to curbside voting (if any) in 66 of the State's 67 counties. Plaintiffs' response serves only to underscore that the district court has stepped beyond its Article III bounds.

Plaintiffs contend that because they challenge "statewide policy" against curbside voting, they are entitled to statewide relief. Resp.9. But a plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc*., 137 S. Ct. 1645, 1650 (2017) (quotation marks omitted). In other words, "'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), not the injuries of other persons not before the Court (and who might not even want the relief a plaintiff is seeking purportedly on their behalf). *See also Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 163 (2010) (plaintiffs "d[id] not represent a class, so they could not seek to enjoin [an agency] order on the ground that it might cause harm to other parties"). And equitable principles reinforce this Article III limit, for equity commands that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v.*

Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). That three voters in Mobile want to vote curbside did not grant the district court authority to restructure elections for all voters in the State.

Plaintiffs respond that their members "desire to use curbside voting," Resp.9, and are burdened by the State's photo ID and witness requirements. But who these members are and where they live is a mystery. Before a federal court accepts an organization's invitation to rewrite state election law, the least the court can do is require the organization to identify at least *one* member who would be affected by that law. Hence the well-recognized "requirement that an organization name at least one member who can establish an actual or imminent injury" before the organization has standing to invoke a federal court's jurisdiction. *Ga. Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1204 (11th Cir. 2018).

Plaintiffs ask the Court to just "presume[]" that they have members across the State, and they point to *Arcia v. Florida Secretary of State*, 772 F.3d 1335 (11th Cir. 2014), to support their "presumptive standing" argument. Resp.11. But this Court has already explained that *Arcia* "did not relax the requirement that an organization name at least one member who can establish an actual or imminent injury." *Ga. Republican Party*, 888 F.3d at 1204. And when Plaintiffs' requested relief is a rewrite of the laws governing an *ongoing election*, it is presumptuous indeed for organizations to ask the court to credulously accept that they have standing.

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

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And the Constitution did not install federal courts as the government actors that manage state elections. Thus, "when a state election law 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." *Id.* (quotation marks omitted). The election laws at issue in this case easily satisfy the *Anderson-Burdick* balancing test.

As to curbside voting, Plaintiffs—who already have unprecedented access to absentee voting—assert that they face significant burdens that far outweigh the State's interests. In response to the evidence from the Secretary of State's office that implementing curbside voting would be "completely unfeasible" in the near future, Doc. 34-1 at 21-22, Plaintiffs breezily respond that it is just "a minor logistical concern to place extra tabulation booths and poll workers curbside." Resp.13. Based on what? Plaintiffs offer no numbers regarding how many poll workers are required or how many will likely show up on election day during this pandemic. State and local election officials are the experts in administering state and local elections. And even more importantly, they—not Plaintiffs, and not federal courts—are the ones

entrusted by the People of Alabama to manage elections. Plaintiffs failed to pass the *Anderson-Burdick* test, and the district court's injunctions should be stayed.

In response to concerns raised under *Purcell* about election administration and confusion, Plaintiffs again don their Election Manager hats to declare that a month is more than enough time to implement curbside voting. Resp.13-14. But more is required than just Plaintiffs' word before substituting their judgment for that of the Secretary of State.

As to the witness requirement, Plaintiffs play the role of unimaginative epidemiologists, proclaiming that there is no safe way for Plaintiffs or their members—who already see at least one person each day, *see* Doc. 1 at ¶¶24-27—to find a second person to watch them sign a piece paper. But nothing requires a Plaintiff to lock arms with his witnesses, or for a signatory and witnesses to unmask themselves before the signing. A particularly cautious Plaintiff could meet his witnesses outside or in a large room and then each sign the piece of paper. And they have had *months* to make this happen. If this lack of imagination is enough to enjoin a state election law that protects the integrity of the ballot, no election regulation is likely to withstand the scrutiny of federal courts.

Plaintiffs say that notarization via videoconferencing is no good because "videoconferencing is not free and a notary is entitled to a $5.00 fee." Resp.14 (quotation mark omitted). What's more, notarization still "*may* ultimately require"

some possible "person-to-person interaction and risks." *Id.* (emphasis added). But *every* election regulation carries some cost and some risk. Even in the halcyon days of 2019—to say nothing of 1789—voting required expending some resources, whether that be time away from work or other obligations, money for transit or a stamp. And we all take some risk when we leave home. Nothing in the Constitution requires a State to alleviate every fear, risk, cost, or inconvenience for every voter.

Plaintiffs argue that the witness requirement does not help prevent fraud because it could do more. *See* Resp.16. But the requirement enacted by Legislature clearly helps the State deter and detect voter fraud. For example, if some similar irregularity is seen across multiple ballots, the State can follow up with witnesses. Or if the handwriting of numerous voters and witnesses look suspiciously similar, the State can follow up with the witnesses. In contrast, under the district court's injunction, the absentee ballot applicant needs only submit a signed affidavit stating that she thinks it "unreasonable" to comply with Alabama law. Doc. 58 at 76. Under this watered-down system, a fraudster could simply commit fraud twice by signing a false name on the application and the affidavit.

Plaintiffs next argue that the district court "found that there is no meaningful voter fraud in Alabama that the Witness Requirement has or can prevent," Resp.16, but that is irrelevant. "*Anderson* does not require any evidentiary showing or burden

of proof to be satisfied by the state government." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009).

Finally, Plaintiffs complain that the State is only now advancing its "interest in conducting orderly, lawful, and uniform elections throughout the State." Resp.18. The Secretary of State has always been concerned about orderly, lawful, and uniform elections. He is pressing this argument now because the district court's injunction created a patchwork of election laws, burdening the State Defendants and spurring voter confusion. That is why the issue is now before this Court, and it is yet another reason why the district court's preliminary injunction of an ongoing election should be stayed.

D. Plaintiffs Are Likely to Lose Their ADA Claims.

Plaintiffs' ADA claims largely rehash their *Anderson-Burdick* claims and are similarly likely to fail. Most fundamentally, the ADA claims fail because Plaintiffs are simply wrong that there is no safe way for them to vote. If they can find one more friend—or delivery person, or caregiver, or neighbor—to stand a safe distance away from them as they sign a piece of paper, they can satisfy the witness requirement. And the State has gone to great lengths to make in-person voting safe. *See* Mot. 3-5. Plaintiffs have not established that in-person voting is so risky as to be a concrete obstacle to voting.

As to curbside voting, in Plaintiffs' view, only "minor logistical concerns"

stand in the way of rolling out curbside voting—though almost no one in Alabama has provided curbside voting before, much less during a pandemic. Resp.19. Plaintiffs, of course, offer no evidence to support this speculation.

And Plaintiffs contend that "no statutory language indicates that the Photo ID Requirement is essential." Resp.25. But Alabama law is clear that providing a photo ID is an essential eligibility requirement to having an absentee ballot counted. *See* Ala. Code §17-9-30. The fact that there are exceptions to Section 17-9-30 does not negate the photo ID requirement's essential nature; those exceptions exist to comply with federal law. *See* Ala. Code §17-9-30(d). Title II does not require States to choose between either violating federal law or "compromis[ing] their essential eligibility criteria for public programs." *See Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004).[1]

II. The Remaining Factors Favor a Stay.

For the reasons stated in the State's motion, the remaining factors favor a stay. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (noting that enjoining "the State from conducting this year's elections pursuant to a statute enacted by the Legislature … would seriously and irreparably harm the State). Moreover, Plaintiffs' feeble response to the obvious *Purcell* problems created by the district court's injunction

[1] Plaintiffs do not make any specific argument in support of their ADA claim against the witness requirement.

confirm that a stay is warranted. The Plaintiffs urge this Court to overlook *Purcell* simply because it involved a district court that denied a motion for preliminary injunction and a Circuit Court that reversed. Resp.18. But, of course, the *Purcell* principle applies to *all* "lower federal courts," not just Circuit Courts. *Republican Nat'l Comm. v. Democratic Nat'l Comm*., 140 S. Ct. 1205, 1207 (2020). Such courts, district or appellate, "should ordinarily not alter the election rules on the eve of an election," *Id.*; *see also id.* ("The District Court's order granting a preliminary injunction is stayed."). To avoid "voter confusion and consequent incentive to remain away from the polls," this Court should stay the district court's preliminary injunction. *Purcell*, 549 U.S. at 4-5.

CONCLUSION

The Court should stay the district court's preliminary injunction pending appeal.

Respectfully submitted,

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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)(C). This motion contains 2,584 words, including all headings, footnotes, and quotations, and excluding the parts of the reply 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
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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 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