IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12184

D.C. Docket No. 2:20-cv-00619-AKK

PEOPLE FIRST OF ALABAMA,
ROBERT CLOPTON,
ERIC PEEBLES,
HOWARD PORTER, JR., and
ANNIE CAROLYN THOMPSON,

Plaintiffs-Appellees,

versus

SECRETARY OF STATE FOR THE STATE OF ALABAMA and
THE STATE OF ALABAMA,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

Before ROSENBAUM, JILL PRYOR, and GRANT, Circuit Judges.

ORDER:

Defendants-Appellants Secretary of State for the State of Alabama and the State of Alabama's Emergency Motion for Stay Pending Appeal is hereby DENIED.

ROSENBAUM and JILL PRYOR, Circuit Judges, concurring:

"To die, to [vote]; To [vote]: perchance to dream: ay, there's the rub[.]" William Shakespeare, Hamlet, Act 3, Scene 1, 3:66 (substituting "vote" for "sleep").

Appellants Alabama Secretary of State John Merrill (the "Secretary" or Merrill) and the State of Alabama[1] move for a stay of a preliminary injunction enjoining the defendants from enforcing certain Alabama voting restrictions against a specific demographic of Alabamian voters who are at risk of becoming seriously ill or dying by contracting COVID-19. For the reasons that follow, we concur in our decision to deny the motion for a stay.

I.

On March 13, 2020, the Governor of Alabama declared a state public-health emergency because of the outbreak of the novel coronavirus known as COVID-19. *See Robinson v. Att'y Gen.*, 957 F.3d 1171, 1174 (11th Cir. 2020). For good reason. As of this writing, Alabama has over 30,000 confirmed cases and more than 800 deaths, from COVID-19: a virus for which there is no known cure, surefire treatment, or vaccine. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct.

[1] The defendants in the district court are Alabama Governor Kay Ivey; Secretary of State John Merrill; Alleen Barnett, the absentee ballot manager for Mobile County; Jacqueline Anderson-Smith, the Circuit Clerk of Jefferson County; Karen Dunn Burks, the Deputy Circuit Clerk of the Bessemer Division of Jefferson County; Mary B. Roberson, the Circuit Clerk of Lee County (together with Barnett and Burks, the "AEMs"); and the State of Alabama. Only Merrill and Alabama appealed.

1613, 1613 (2020) (Roberts, C.J., concurring). And while people of any age can contract a serious or deadly case of COVID-19, some groups have a substantially higher risk of developing complications and dying from COVID-19.

The parties do not dispute the basic facts about COVID-19. The virus spreads quickly and easily. It can be spread through droplet transmission—*e.g.*, when a person speaks or sneezes—and it can be spread through contact with a contaminated surface. Making matters worse, people who are infected do not always show symptoms, and those who develop symptoms may be contagious prior to the appearance of any symptoms.

The parties likewise do not dispute the best way to avoid spreading the virus and aggravating the national and global pandemic. The Centers for Disease Control (the "CDC") and Alabama itself recommend self-isolation, which is self-explanatory, and social distancing, which means "maintaining at least six feet of distance between individuals." So Alabama Governor Ivey has emphasized the importance of staying home as much as possible and maintaining at least a six-foot distance with others when outside the home to minimize the risk of exposure to the virus. Similarly, Alabama's current COVID-19-related "Safer at Home" order

prohibits "non-work related gatherings of any size . . . that cannot maintain a consistent six-foot distance between persons from different households."[2]

There is also no dispute that people over the age of 65 or those with underlying health conditions are particularly at risk of contracting a serious or fatal case of COVID-19 (we refer to these individuals as "high-risk people" or "high-risk voters"). And the parties do not dispute that the four individual Plaintiffs, Robert Clopton, Eric Peebles, Howard Porter, and Annie Carolyn Thompson, are at higher risk of contracting a severe case of the virus because of their ages, races, or underlying medical conditions. For that reason, each individual Plaintiff has thus far gone to great lengths to self-isolate and limit his or her exposure to the virus. It is also undisputed that the three organizational Plaintiffs, People First of Alabama, Greater Birmingham Ministries ("GBM"), and the Alabama State Conference of the National Association for the Advancement of Colored People, have members who are at a higher risk of contracting COVID-19.

The individual Plaintiffs and the organizational Plaintiffs brought this lawsuit challenging procedures that apply to Alabama's upcoming primary runoff election. Alabama held its primary election on March 3, 2020. Under Alabama law, a primary election may be won only by a majority vote. If the leading candidate secures less

[2] Though this order expires on July 3, 2020, the total number of COVID-19 cases in Alabama is continuing to increase, and there is no reason to believe that the pandemic will end on July 3, 2020.

than a majority, then the top two candidates meet in a primary runoff election, which is held four weeks after the primary election. *See* Ala. Code § 17-13-18. Because there were several primary elections for which the leading candidate failed to secure a majority of the vote, primary runoff elections became necessary in several races, including the Republican primary for United States Senate (a statewide office), the Republican primary for the Court of Criminal Appeals (a statewide office), and both the Democratic and Republican primaries for Congressional District 1.

The primary runoff election was originally scheduled to be held on March 31, 2020. But during the month of March, COVID-19 was spreading rapidly through the United States. In early March, when Secretary Merrill was asked what would happen to the runoff election if COVID-19 continued to spread, he refused to discuss the issue, saying that "we don't need for people to be concerned about something that may not ever happen" and dismissed concerns about COVID-19 as "not even important." On March 13, Secretary Merrill sent a letter to local voting officials noting that there had been no cases of COVID-19 in Alabama but suggesting that they consider offering alternate polling places. As it turns out, Alabama had its first reported case of COVID-19 that day. Later that day, Governor Ivey declared a statewide public-health emergency. And a few days later, Governor Ivey issued a proclamation rescheduling the primary runoff election for July 14, 2020.

Because of the increased risk of voting at polling stations, Alabama made other emergency alterations to elections and voting protocols. The Secretary promulgated an emergency regulation that allows "any qualified voter who determines it is impossible or unreasonable to vote at their polling place for the Primary Runoff Election of 2020"—i.e., the July 14, 2020, election—to apply for an absentee ballot. That regulation also directs "[a]ll Absentee Election Managers ["AEMs"] and any other election officials of this state" to "accept all absentee ballot applications filed" pursuant to the new rule. In short, in recognition of the inherent risks that COVID-19 creates for in-person voting, the new regulations allow any Alabamian voter to vote absentee.

But those Alabamian voters must still comply with Alabama's existing rules for casting absentee ballots. And therein lies the rub.

As people with a higher risk of contracting a serious or fatal case of COVID-19 or organizations with members who are at a higher risk, Plaintiffs complain that certain parts of Alabama's absentee voter restrictions require them to forego social distancing and self-isolation—practices that they have unfailingly maintained for months—merely to exercise their right to vote. As relevant, voters who wish to vote absentee must submit a copy of their photo identification with their absentee ballot

application. Ala. Code § 17-9-30(b) (the "photo ID requirement").[3] And even if the putative voter has done that, her absentee vote will not be counted unless it is returned with an affidavit that is signed by a notary public or two adult witnesses who witnessed the voter sign her affidavit. Ala. Code § 17-11-10 (the "witness requirement"). Apparently recognizing that these requirements could require Alabamians to violate social-distancing and self-isolation recommendations, Governor Ivey issued a rule permitting notaries to witness the signing of absentee affidavits through videoconferencing.

Alabama recognizes that voting at polling stations increases the risk of contracting COVID-19. This risk is not theoretical. Plaintiffs presented evidence that more than 50 people from Wisconsin who recently worked or voted at polling stations there in the midst of the pandemic tested positive for COVID-19 in the two weeks following Wisconsin's April 7 election. As Plaintiffs showed, this phenomenon was not limited to those in Wisconsin. In Chicago, a poll worker died of COVID-19 in the weeks following his service, and Broward County, Florida,

[3] As relevant here, voters eligible to vote absentee under the Voting Accessibility for the Elderly and Handicapped Act do not have to submit a copy of their photo ID to receive an absentee ballot. *See* Ala. Code § 17-9-30(d). For those not eligible for that exception, one Alabamian voter observed that they will need access to a photocopier or a computer, scanner, and printer. When asked to confirm that, Secretary of State Merrill responded by tweet, "When I come to your house and show you how to use your printer I can also show you how to tie your shoes and to tie your tie. I could also go with you to Walmart or Kinko's and make sure that you know how to get a copy of your ID made while you're buying cigarettes or alcohol."

likewise reported two of its poll workers tested positive for COVID-19 just a few days after working the voting polls.

Because of the risks created by voting at polling stations, the individual Plaintiffs would prefer to vote absentee but cannot comply with the photo ID or witness requirements without foregoing their self-isolation practices and increasing their risk of contracting the virus. Barring the ability to vote absentee, the four individual Plaintiffs would prefer to utilize curbside voting if their county were willing to offer it.

Though Alabama does not officially prohibit curbside voting, Secretary Merrill has "on at least two occasions," shut down attempts by counties to establish curbside voting operations because they were not, in his view, complying with the law. The plaintiffs allege that Secretary Merrill's position on the matter acts as a de facto ban on curbside voting (the "curbside voting ban;" together with the photo ID and witness requirements, "the challenged election restrictions").

Plaintiffs argue that under the present COVID-19-created circumstances, the challenged election restrictions violate (1) the individual Plaintiffs' and the organizational Plaintiffs' members' right to vote under the First and Fourteenth Amendments, (2) Title II of the Americans with Disabilities Act ("ADA"), and (3) for the witness requirement only, § 201 of the Voting Rights Act ("VRA").

Appellants disagree. They argue that the challenged laws are necessary to preserve the legitimacy of upcoming elections by preventing voter fraud and safeguarding voter confidence.[4]

On June 15, 2020, in a 77-page order replete with factual findings, the district court granted in part the plaintiffs' motion for a preliminary injunction.[5] Though Plaintiffs requested a broad injunction that would have covered all voters participating in all elections held in 2020, the district court entered a narrow injunction pertaining to only the July 14, 2020, primary runoff, and applying to only high-risk voters. Specifically, the court enjoined (1) the AEMs from enforcing the witness requirement against any qualified voter who determines it is impossible or unreasonable to safely satisfy that requirement, and who provides a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the CDC has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19; (2) the AEMs from enforcing the photo ID requirement for any qualified voter age 65 or older or with a disability who determines it is impossible or unreasonable to safely satisfy that requirement, and who provides a written statement signed by the voter under penalty

[4] Appellants fail to explain why voter confidence is not negatively affected by their enforcement of voting restrictions that force Alabamians to choose between voting and potentially contracting a severe or deadly case of COVID-19.

[5] The district court concluded that Plaintiffs were not likely to succeed on the merits of their VRA claim and granted state sovereign immunity in favor of Governor Ivey.

of perjury that he or she is 65 or older or has a disability; and (3) the Secretary from prohibiting counties from establishing curbside voting procedures that otherwise comply with state election law.

Unhappy with that decision, Appellants appealed. Appellants also filed an emergency motion to stay the preliminary injunction pending appeal. In this concurrence, we consider only the emergency motion to stay the preliminary injunction pending appeal.[6]

II.

In reviewing a motion to stay a preliminary injunction pending appeal, we consider the following factors: "(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 [the] issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the

[6] Federal Rule of Appellate Procedure 8 provides that a party seeking to stay an order of a district court pending appeal "must ordinarily move first in the district court" for relief. Fed. R. App. 8(a)(1). But Appellants never sought relief in the district court, despite the fact that the court had disposed of all motions in the case with great speed. Appellants instead argue that they were not required to seek relief in the district court given the "time-sensitive nature of the proceedings." But they cite no case from our Court in the election context excusing a party from complying with Rule 8's requirement. Indeed, Appellants ignore that states have routinely complied with Rule 8's requirement, even under similarly time-pressured circumstances. *See, e.g.*, *Ga. Muslim Voting Project v. Kemp*, No. 18-cv-4789, Doc. 33 (N.D. Ga. Oct. 25, 2018) (reflecting that the state of Georgia filed a motion to stay in the district court before bringing an emergency motion in our Court to stay the effect of the district court injunction requiring the state to provide notice to voters before rejecting ballots submitted by mail based on a perceived signature mismatch, even though the district court's injunction was entered just days before the election). Although we address the merits of Appellants' argument, nothing in this concurrence should be read to suggest that a state in a future case facing a similar timeframe may bypass first seeking a stay in the district court.

public interest lies." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The first two factors "are the most critical." *Nken*, 556 U.S. at 434; *Lee*, 915 F.3d at 1317. "It is not enough that the chance of success on the merits be better than negligible . . . . By the same token, simply showing some possibility of irreparable injury . . . fails to satisfy the second factor." *Nken*, 556 U.S. at 434–35 (citations and internal quotation marks omitted).

Like the district court, we do not definitively rule on the merits of the case. Instead, the narrow question for us is whether Appellants have made a strong showing that the district court abused its discretion. *Robinson*, 957 F.3d at 1177.

III.

Appellants attack the district court's order with a volley of arguments: (1) Plaintiffs lack standing to bring most of their claims; (2) Plaintiffs are almost sure to lose their constitutional challenges; and (3) Plaintiffs are likely to lose their ADA claims. In addition, Appellants argue that the remaining *Nken* factors weigh in favor of a stay. We think those arguments fall short.[7]

[7] Plaintiffs-Appellees challenge Appellants' standing to appeal the district court's injunction as it pertains to the photo ID and witness requirements because the district court prohibited the AEMs, not Merrill or Alabama, from enforcing those requirements. With respect to those requirements, Plaintiffs moved to enjoin both Appellants and the AEMs, but the district court enjoined only the AEMs from enforcing the photo ID and witness requirements and only the Secretary from prohibiting curbside voting, based in part on *Jacobson v. Florida Secretary of State*, 957 F.3d 1193, 1207 (11th Cir. 2020) (explaining Secretary of State was the wrong defendant for procedures enforced by local election officials). Having won on these arguments in the district

A.

Appellants have not shown that they are likely to succeed—let alone that they are strongly likely to succeed—based on Plaintiffs' purported lack of standing.

To assert Article III standing, "[t]he 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." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). If 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." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).

Appellants argue that Plaintiffs fail the first element because the individual Plaintiffs do not have standing to enjoin the photo ID or witness requirements in any county other than Mobile County because that is where three of them live.[8] In

court, Plaintiffs assert that the Secretary may appeal only the curbside-voting aspect of the injunction, and the State of Alabama may not appeal any of it. *See also Keating v. City of Miami*, 598 F.3d 753, 761 (11th Cir. 2010) (explaining that a party may not appeal from a judgment in his favor). Appellants respond they have standing to appeal, despite their victory on these issues in the district court, because the injunction in its entirety nonetheless injures them. Though Appellants' standing on appeal is questionable, for the limited purpose of resolving this emergency motion to stay, I assume without deciding that Appellants have standing to appeal the entirety of the district court's injunction.

[8] The fourth plaintiff, Peebles, lives in Auburn, Alabama, which is located in Lee County. In Lee County, the only primary runoff election in July involves Republican candidates. *See* https://www.sos.alabama.gov/alabama-votes/2020-primary-runoff-election-sample-ballots (showing only a Republican runoff election in Lee County). Peebles's affidavit indicates that he intends to vote in the November election, not the primary runoff election. Because Peebles apparently does not intend to vote in the primary runoff election, we agree that he is not facing an imminent injury with respect to that election.

addition, GBM, which, not surprisingly, is located in Birmingham (in Jefferson County, Alabama), is also a plaintiff here. And its executive director, Scott Douglas III, has submitted a declaration swearing that it has 5,000 members, including a third of whom are senior citizens. Douglas pointed as an example of its membership to a 65-year-old woman who lives with only her husband. He noted that the couple has been self-isolating, forgoing even their regular church attendance to stay safe from COVID-19. He also stated that many of GBM's members lack access to a computer, the internet, or videoconferencing technology. Similarly, Bernard Simelton of Plaintiff Alabama State Conference of the NAACP attested that many of that organization's members who reside all over Alabama fall into the high-risk COVID-19 category. For example, one of the presidents of its local chapters is in their 80s, lives alone, and has heart disease and breast cancer. And Plaintiff People First of Alabama's executive director Susan Ellis swore that, with 25 chapters across Alabama, it has members who also fall into the COVID-19 high-risk category. Ellis highlighted one such member with severe asthma who lives in Pea Ridge, Alabama (in Shelby County). That member, who lives alone, has been self-isolating to prevent contraction of the virus.

The district court concluded that all the individual Plaintiffs had standing to challenge the absentee voting restrictions and the prohibition of curbside voting. That conclusion was clearly correct. *See Common Cause/Georgia v. Billups*, 554

F.3d 1340, 1351-52 (11th Cir. 2009). The district court did not directly consider the standing of the organizations because it found that the individual Plaintiffs had standing, regardless. But as a brief recitation of the record reflects, Plaintiffs presented evidence showing that the organizational Plaintiffs had individual members who could likewise establish standing to challenge these provisions. "An organizational plaintiff has standing to enforce the rights of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Arcia v. Fla. Sec'y of Stat*e, 772 F.3d 1335, 1342 (11th Cir. 2014) (internal quotation marks omitted). Moreover, the organizational Plaintiffs themselves have suffered an injury in fact because they have had to divert resources to new activities associated with the Governor's emergency "Safer-at-Home" order and the Secretary's new absentee voter regulations.[9]

The injunction enjoins only three county AEMs (from Mobile, Jefferson, and Lee Counties—all of which are counties where Plaintiffs reside and vote), rather

[9] Our court recently addressed the diversion-of-resources theory of standing in *Jacobson*, holding that several organizations challenging a Florida statute regarding ballot ordering failed to prove at trial that they suffered an injury-in-fact under a diversion-of-resources theory. 957 F.3d. at 1206. We concluded that the organizations' proof was insufficient because they failed to offer *any* evidence about "what activities [they] would divert resources away *from* in order to sped additional resources on combatting" the effect of Florida's ballot-order statute. *Id.* Unlike the organizations in *Jacobson*, the organizational Plaintiffs here introduced evidence about how they are forced to divert resources and thus established that they experienced an injury in fact.

than all Alabama AEMs, because those were the only AEMs named as defendants, and Merrill and the State won on their claim that Plaintiffs lacked standing to sue them on these issues.

Appellants have likewise failed to show a strong likelihood that Plaintiffs lack standing to enjoin the Secretary from prohibiting curbside voting. Appellants argue that the individual Plaintiffs intend to vote absentee, so they are not harmed by the alleged prohibition on curbside voting. But that ignores the district court's finding that the individual plaintiffs would vote curbside if they are unable to vote absentee. The individual Plaintiffs' *preference* to vote absentee does not make the district court's finding clearly erroneous. That's especially true here because Appellants' no-injury argument relies on the continued viability of an alternate voting method that they continue to challenge in this appeal.

Finally, Plaintiffs have standing to seek a state-wide injunction because they challenge the Secretary's *statewide* policy disallowing curbside voting.

B.

Appellants have also failed to show a strong likelihood of success on their substantive defense against Plaintiffs' constitutional and ADA claims.

1. The Constitutional Claims

Appellants argue that Plaintiffs are almost sure to lose their constitutional challenges because Alabama's significant interests outweigh the minimal burden imposed on Alabamians who wish to vote absentee. We respectfully disagree.

A "flexible standard" applies to constitutional challenges to specific provisions of a state's election laws. *Common Cause*, 554 F.3d at 1352. Rules that impose "severe" burdens must be "narrowly drawn to advance a state interest of compelling importance[.]" *Id.* (internal quotation marks omitted). "[R]easonable, nondiscriminatory restrictions that impose a minimal burden may be warranted by the State's important regulatory interests." *Id.* (internal quotation marks omitted). But whatever the burden, no matter how slight, "'it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.'" *Id.* (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008)). "[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The district court declined to apply strict scrutiny to any of the three challenged election restrictions because it found that the burden imposed was not severe. Appellants do not quibble with that decision, and neither do we for the purposes of resolving this emergency motion. Instead, Appellants contend only that the district court abused its discretion in how it weighed the burdens imposed by the

challenged election restrictions against the state's interests. I find no abuse of discretion in the district court's determination.

It is easy to see why the scale weighs in Plaintiffs' favor for curbside voting.[10] The injunction does not *require* anything. Instead, it just prohibits the Secretary from prohibiting counties from *choosing* to implement curbside voting procedures "*that otherwise comply with state election law.*" (emphasis added). And though it's irrelevant to the analysis, those counties that choose to implement curbside voting face minimal burdens because it generally requires the use of polling supplies and staff that already exist. Those considerations are light when compared to forcing high-risk Alabamians to vote in-person inside a polling place in contravention of the CDC's and Alabama's recommendation to minimize in-person interactions.[11]

The district court also did not abuse its discretion by concluding that the "significant" burdens imposed on high-risk Alabamian voters by the witness and

[10] Our colleague takes issue with the injunction as it relates to curbside voting because she says that Plaintiffs got what they wanted with the injunction against the challenged absentee-ballot restrictions. But to allow the state the maximum amount of time to prepare for the election, it appears the district court enjoined the curbside ban in case, on appeal, we or the Supreme Court vacated the absentee-ballot provisions. If that were to occur, it might happen very close in time to the July 14 election. And if that happened, in the absence of the district court's original injunction against the curbside ban, imposing the curbside ban at that time might well run afoul of *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

[11] Nor am I persuaded by Appellants' argument that we are too close to the July 14, 2020, election for this injunction. Plaintiffs filed this action over a month-and-a-half ago, and curbside voting will not be used for three weeks. Besides, the injunction does not *force* counties to implement curbside voting. Under the injunction, counties are free to decide that they cannot implement curbside voting in the allotted time.

photo ID requirements outweigh the considerations set forth by Appellants. The science is clear and undisputed. COVID-19 spreads easily between people in close-proximity, and it can spread between people who are never physically in the same room because it stays in the air for up to 14 minutes. The photo ID and the witness requirements force at least some Alabamians, including the individual plaintiffs here, to increase their risk of contracting COVID-19 by foregoing nationwide and statewide social distancing and self-isolation rules and recommendations to apply for and successfully vote absentee. It's bad enough that COVID-19 cases can be severe or deadly for people for all ages. But that burden weighs even more heavily on those people who face a higher risk of contracting a deadly or severe case of COVID-19 like the individual plaintiffs here. The district court's narrowly tailored injunction recognizes that additional burden.

Appellants argue that the photo ID and witness requirements impose only a "little bit of work" on Alabamian voters. That misperceives the burden. The burden here is not the finding of two people or a notary to witness a signature or the finding of a location to copy one's photo ID. Instead, the burden is tied to the fact that Plaintiffs and those similarly situated must risk death or severe illness to fulfill Alabama's absentee voter requirements and, therefore, to exercise their right to vote. Despite Appellants' insinuations, that risk isn't comparable to the normal risk faced "when we leave home." Sure, anyone may risk getting hit by a bus on the way to a

polling station. But that doesn't mean we set up polling stations in the middle of the street. Appellants' failure to acknowledge the significant difference between leaving one's home to vote in non-pandemic times and forcing high-risk COVID-19 individuals to breach social-distancing and self-isolation protocols so they can vote reflects a serious lack of understanding of or disregard for the science and facts involved here.

Appellants' stated interest for maintaining the photo ID and witness requirements do not outweigh the significant, if not severe, burdens faced by high-risk Alabamian voters. "Combatting voter fraud" is certainly a legitimate interest. But according to Plaintiffs' evidence from the Heritage Foundation, Alabama has prosecuted a total of only sixteen people for absentee-ballot voter fraud since the year 2000.[12] ECF No. 16-46 (citing The Heritage Foundation, https://www.heritage.org/voterfraud-print/search?combine=&state=AL&ye ar=& case_type=All&fraud_type=24489&page=0 (last accessed June 21, 2020)). That suggests that Alabama has not found itself in recent years to have a significant absentee-ballot fraud problem.

And it is difficult to understand how getting two witnesses to sign a ballot provides more protection against absentee voter fraud than requiring the voter to

[12] That includes two in 2000, one in 2002, one in 2005, one in 2009, two in 2010, two in 2012, three in 2015, one in 2016, and one in 2019.

sign an affidavit under penalty of perjury, as the injunction requires. As the district court explained, to satisfy the witness requirement "[t]he witness certifies only that they watched the individual sign the individual envelope" and the witness "does not even attest that the voter is who she says she is." That is, the two witnesses do not certify that the voter is not voting fraudulently. So when balanced against the potential life-or-death burden placed on high-risk Alabamian voters, the absentee-ballot requirements, which appear to provide little protection against a nearly non-existent problem, simply do not carry the day.

The story is much the same for the photo ID requirement. Indeed, Alabama already provides an exception to that requirement for voters over age 65 or with disabilities who cannot access the polls due to a physical infirmity. *See* Ala. Code § 17-9-30(d). So Alabama itself has determined that its interest in enforcing the photo ID requirement is outweighed when people physically cannot access the polls. We see no reason why that same balancing does not apply to Alabamian voters who are at a high-risk of contracting a severe or deadly case of COVID-19 if they do not conform to the CDC's and Alabama's social distancing and self-isolation recommendations. In addition, Alabama's other absentee voting requirements—*e.g.*, the requirement that a voter provide her driver's license number or the last four digits of his Social Security number with her absentee ballot application—will help prevent voter fraud.

Appellants' other interests fall short, individually and in the aggregate, of outweighing the burdens imposed by the challenged election restrictions. While Appellants have an interest in generally conducting orderly, lawful, and uniform elections, they have not demonstrated that permitting some high-risk Alabamians to vote absentee without satisfying the photo ID and witness requirements somehow detracts from that intertest.

And to the extent any *Purcell*[13] problems exist, the district court's injunction requires the defendants to accept absentee ballot applications and absentee ballots under relatively minor expanded circumstances. At most, that requires defendants to provide additional training to ballot workers—a feat hardly impossible in the allotted time. *Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists.

2. The ADA Claim

Appellants argue that Plaintiffs have failed to establish their ADA claim. We again disagree.

To state a claim under Title II, a plaintiff must demonstrate the following: "(1) that [s]he is a 'qualified individual with a disability;' (2) that [s]he was 'excluded

[13] *Purcell v. Gonzalez*, 549 U.S. 1, 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").

from participation in or . . . denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity;' (3) 'by reason of such disability.'" *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting 42 U.S.C. § 12132; ellipses in original). A plaintiff is a qualified individual if she "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity . . . with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services." *United States v. Georgia*, 546 U.S. 151, 153–54 (2006) (internal quotation marks omitted).

Appellants assert that Plaintiffs have failed to show that they are "qualified individuals" because the photo ID requirement is an essential eligibility requirement of having an absentee ballot counted. Not so. Statutory language does not indicate that the photo ID requirement is an essential eligibility requirement. And Alabama's enactment of multiple exceptions to that requirement, including one that covers a voter demographic that bears substantial similarities to the individual Plaintiffs, *see* Ala. Code § 17-9-30(d); *see also id.* § 17-9-30(f), buoys that conclusion.

The district court also did not abuse its discretion by concluding that Plaintiffs have shown that they will be excluded from participation *by reason of* their disability. A public entity violates Title II not just when "a disabled person is

completely prevented from enjoying a service, program, or activity," but also when such an offering is not "readily accessible." *Shotz*, 256 F.3d at 1080. Forcing a high-risk voter to choose between risking her health and life or abandoning her *right* to vote easily satisfies the "not readily accessible" requirement.

Once the plaintiff has established a prima facie ADA claim, she must also propose a reasonable and proportionate modification to the challenged requirement or provision. *Nat'l Ass'n of the Deaf v. Fla.*, 945 F.3d 1339, 1351 (11th Cir. 2020). Appellants contend that Plaintiffs have failed to do so with respect to the curbside voting challenge because curbside voting "would fundamentally alter Alabama elections." But the challenged injunction does not require Appellants or anyone else to implement curbside voting. It just enjoins the Secretary from prohibiting counties from enacting such procedures if they otherwise comply with state election law. So we do not see how Plaintiffs' proposed remedy, and the district court's subsequent adoption of that remedy, "fundamentally alters" anything. It merely allows counties to implement voting procedures that comply with Alabama law.

3. The Remaining *Nken* Factors

Nken tells us to consider not only (1) whether the appellant has made a strong showing that it is likely to succeed on the merits—which we have done above—but also (2) whether the appellant will be irreparably injured absent a stay, (3) whether

the issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. *Lee*, 915 F.3d at 1317.

As an initial matter, it is far from clear that Appellants will be irreparably harmed absent a stay. Our resolution of Appellants' emergency application for a stay does not definitively resolve the appeal. Appellants have the option of seeking expedited resolution of their appeal. If they did so successfully, any injury to Appellants would be felt on July 14, by which time a panel of this Court would have fully resolved the appeal on its merits.

Putting that aside, the other factors weigh in Plaintiffs' favor. "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 795, 828 (11th Cir. 2020). One wrongfully disenfranchised voter is one too many. *See Lee*, 915 F.3d at 1321. As Appellants concede, the election is ongoing, and voters are already voting absentee. So unlike Appellants, Plaintiffs face immediate and irreparable harm if the burdens imposed by the challenged requirements are not enjoined. And 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).

IV.

We agree with the decision to deny the emergency motion to stay the district court's preliminary injunction pending appeal. On this record, Appellants have not made a "strong showing that [they are] likely to succeed on the merits." *See Lee*, 915 F.3d at 1317. Plus, a stay will "substantially injure the other parties interested in the proceeding," and the public interest does not favor a stay. *See id.*

GRANT, Circuit Judge, concurring in the denial of the stay:

The United States Constitution gives States the power to set the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. And that power "is matched by state control over the election process for state offices." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005).

I have serious concerns about the order under review, which is dramatic both in its disregard for Alabama's constitutional authority and in its confidence in the court's own policymaking judgments. The State has responded to the very real COVID-19 threat by moving its election date, dramatically expanding absentee ballot access through an emergency regulation, and taking other steps to maintain safe polling places. The Supreme Court has emphasized time and time again that federal courts should not jump in to change the rules on the eve of an election. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020). "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation omitted). And a dangerous virus does not give the federal courts unbridled authority to second-guess and interfere with a State's election rules.

Even so, because it is uncertain that the proper parties have appealed the order's remarkable revisions to the State's absentee ballot rules for its upcoming primary election, I concur in the denial of an emergency stay relating to those revisions. I say no more because, contrary to the alternative concurrence's suggestion, I cannot "assume without deciding that Appellants have standing to

appeal the entirety of the district court's injunction." Concurring Op. at 11 n.7. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

As for the district court's decision to prohibit the Secretary of State from stopping pop-up "curbside voting" in any precinct in Alabama, I question why this statewide ban on a ban is necessary even under the district court's broad view of its own authority. The court has implemented all of the new absentee ballot voting rules that the plaintiffs requested, and found that each of the individual plaintiffs "intends to vote absentee in 2020." Meanwhile, the only individuals who advocate for curbside voting say they would "consider" or "be willing to use" curbside voting—but only if the court did not remove the State's ordinary anti-fraud provisions for anyone who "determines" for themselves that complying with the State's absentee ballot laws is "unreasonable . . . in light of the COVID-19 pandemic." Because the plaintiffs have what they want on absentee voting, I have a hard time seeing why they also need relief on their secondary request. And the organizational plaintiffs' evidence-free contention that some of their members "must vote in-person" does not make sense given the State's new rules providing for universal absentee ballots.

Still, we have no evidence that any jurisdiction is likely to accept the court's invitation to innovation, much less find a way to do so lawfully. Because the order applies only to curbside voting procedures "that otherwise comply with state election law," I reluctantly concur in the denial of an emergency stay with the understanding that unlawful procedures can still be barred.

* * *

No one in this litigation disagrees that the COVID-19 pandemic poses a grave threat. Alabama took serious steps to ensure that its citizens could safely vote—more than some States, less than others. But the district court's order uses the State's legislative and administrative grace against it, concluding that because the State has made some changes, it is constitutionally obligated to make others. Nonetheless, for the reasons explained above, I concur in denying the requested stay.