DOCKET NO. 20-13695

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SECRETARY OF STATE FOR THE STATE OF ALABAMA in his official capacity, STATE OF ALABAMA, JOJO SCHWARZAUER, and DON DAVIS

Appellants,

-against-

PEOPLE FIRST OF ALABAMA, ERIC PEEBLES, HOWARD PORTER, JR., ANNIE CAROLYN THOMPSON, GREATER BIRMINGHAM MINISTRIES, ALABAMA STATE CONFERENCE OF THE NAACP, BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, TERESA BETTIS, and SHERYL THREADGILL-MATTHEWS ,

Appellees.

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' TIME SENSITIVE MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

DATED October 6, 2020.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1(a)(3) and 26.1-2(c), the undersigned counsel certifies that the CIP filed by appellants is correct and complete.

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INTRODUCTION

COVID-19 has infected 160,000 and led to the deaths of 2,500 Alabamians. Every decision about whether to leave home requires Alabamians to take calculated health risks. These risks are especially acute for those people who, like Plaintiffs and their members, are at higher risk of a severe infection or death from the virus due to their ages, races, and/or medical conditions ("high-risk voters"). To date, 96% of Alabamians who have died from COVID-19 were high-risk people. Plaintiff Howard Porter, a high-risk voter who the Challenged Provisions endanger, testified to what is at stake—his life. "[S]o many of my [ancestors] even died to vote. And while I don't mind dying to vote, I think we're past that – we're past that time." Op. 3.[1]

After a two-week trial and in a 197-page opinion, the District Court ruled that Plaintiffs had succeeded in their challenges to the: (1) requirement that an absentee ballot include an affidavit that is signed by the voter either in the presence of a notary or two adult witnesses ("Witness Requirement"); (2) requirement that copies of photo ID accompany absentee ballot applications ("Photo ID Requirement"); and (3) *de facto* prohibition on curbside voting ("Curbside Voting Ban") (collectively, the "Challenged Provisions").

For November 3 only, the District Court issued a statewide injunction against

[1] "Op." represents citations to the Opinion's (Doc. 250) internal pages.

the Witness and Photo ID Requirements for high-risk Alabamians and enjoined the Secretary of State from enforcing the Curbside Voting Ban in those counties that wish to offer this accommodation.

Appellants now appeal and seek a stay of the District Court's injunction. However, Appellants fail to address the applicable standard of review: Following a bench trial, this Court reviews the decision to issue an injunction and its scope for abuse of discretion. *Prison Leg. News v. Sec., Fla. Dep't of Corrections*, 890 F.3d 954, 964 (11th Cir. 2018). This deferential standard is important, as the District Court heard from over 20 witnesses and made findings and credibility determinations after weighing the evidence. While Appellants disagree with those findings, they fail to demonstrate that the Court abused its discretion.

ARGUMENT

I. *PURCELL* DOES NOT FORECLOSE RELIEF

As the District Court correctly found, *Purcell* "does not preclude the court from providing a remedy to the plaintiffs in this case." Op. 117.

As to curbside voting, *Purcell* is entirely inapposite. "[L]ifting the ban on curbside voting permits counties willing to implement the practice" to do so, but the order "does not mandate that counties must provide curbside voting in Alabama." Op. 5. Appellants introduced no evidence at trial or now that allowing counties to resume curbside voting would cause voter confusion. Op. 158–61. And, unlike every

case where a court has stayed an injunction under *Purcell*, the narrow curbside voting injunction is consistent with Alabama law, whereby county officials have broad discretion to "determine how to lawfully handle 'voting logistics' in their counties." Op. 160. The only abrupt (and potentially confusing) reversals of policy have stemmed from Secretary Merrill's intervening in 2016 and 2018 to stop curbside voting in some counties. Op. 86–88. "Because the order applies only to curbside voting procedures 'that otherwise comply with [the] law,' . . . unlawful procedures can still be barred." *People First of Ala. v. Sec'y of State*, 815 F. App'x 505, 517 (11th Cir. 2020) (Grant, J., concurring).

As to the Witness and Photo ID Requirements, the instant order is readily distinguishable from the stay of the preliminary injunction. First, the District Court issued robust findings after trial regarding the Challenged Provisions' harms and the lack thereof to Appellants. Second, Appellants were not judicially estopped from raising *Purcell* in July. Third, the Court found that the injunction would not result in voter confusion in part because it provides statewide relief, while Appellants stressed that the July preliminary injunction covered just three counties. *Compare* Doc. 251 *with* Doc. 59.

Likewise, yesterday's partial grant of a stay in *Andino v. Middleton* is inapposite here. That case is wholly irrelevant to the curbside voting injunction. And the injunction there did not occur after a trial, involve a defendant judicially estopped

from relying on *Purcell*, nor a discrimination finding, nor a draconian two-witness or paid notary requirement. No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020).

A. THE DISTRICT COURT ENTERED THIS INJUNCTION AFTER A TRIAL.

In *Purcell*, in staying the issuance of a preliminary injunction by the appellate court (entered notwithstanding the trial court's denial of an injunction), the Court underscored that it was expressing no opinion "on the ultimate resolution" of the case, which involved "hotly contested" facts, but an "inadequate time to resolve the factual disputes" before the election. 549 U.S. 1, 5–6 (2006). By contrast, the District Court had the opportunity to resolve the parties' factual disputes after a two-week trial.

Appellants make no serious argument that its findings are clearly erroneous. And Appellants cannot cite a single case where the Court relied on *Purcell* to stay an injunction after a trial. Indeed, the Court has repeatedly left in place election-related injunctions entered after a trial. *See, e.g.*, *North Carolina v. N. Carolina State Conf. of NAACP*, 137 S. Ct. 27 (2016); *Frank v. Walker*, 574 U.S. 929 (2014).

B. APPELLANTS ARE JUDICIALLY ESTOPPED FROM RAISING *PURCELL*.

The District Court correctly determined that Appellants are judicially estopped from relying on *Purcell* to contend that this injunction is too close in time to the November election. Appellants argued in May that Plaintiffs' requested

preliminary injunction for November was too speculative, and they prevailed on that argument. Op. 116. That Appellants made this argument before Plaintiffs filed an amended complaint makes no difference. The instant order implicates the identical Challenged Provisions and identical claims against the same Defendant-Appellants as in May.[2]

Nonetheless, Appellants argue that judicial estoppel is unwarranted, asserting that it was not "'clearly inconsistent'" for them to argue in May that Plaintiffs' claims concerning the November election were too speculative and now argue that it is too late for Plaintiffs to obtain any relief on those claims. Mot. at 10-11.

This is incorrect. In "determining the applicability of judicial estoppel[,]" a court weighs various "considerations [which] may inform the doctrine's application in specific factual contexts." *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). Where a party has "convinced the Court to accept [a] previous position," any argument inconsistent with that prior position, including any "necessary predicate" underlying the prior position, "may be subject to judicial estoppel." *Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 554–55 (5th Cir. 2014). This is true even if a

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[2] Plaintiffs sued the Mobile County Absentee Election Manager ("AEM") in her official capacity in their original complaint. Doc. 1. Plaintiffs did misidentify the AEM's name, but for a party sued in her official capacity, "any misnomer not affecting the parties' substantial rights must be disregarded." Fed. R. Civ. P. 25(d). The AEM joined State Defendants in arguing that Plaintiffs had sought relief too soon. *See* Doc. 36 at 7. But, even if estoppel did not apply to her, that is irrelevant to the injunctions against the State.

prior position is only an alternative argument. *See id.*

When Appellants argued in May that Plaintiffs' claims for the November election were too speculative, a "necessary predicate" of their argument—and as accepted by the District Court—was that Plaintiffs would subsequently have an opportunity to litigate those claims. Litigation necessarily takes time to proceed until completed. To allow Appellants to now argue that it is too late for Plaintiffs to obtain relief would place Plaintiffs in an impossible position where they would have no opportunity to vindicate their fundamental right to vote, because any request for relief would both be too early and too late. Appellants' cynical strategy is underscored by the fact that they repeatedly pushed to delay the September trial date. Docs. 74, 95, 118. Plaintiffs pushed for an earlier August trial date. Doc. 77.

As the District Court held, "[t]o hold that an aggrieved voter cannot challenge the purported abridgement of her franchise right after a set date before an election [would] invite some officials to engage in shenanigans knowing that courts will not hear a challenge to their illegal conduct." Op. 110. Appellants cannot play "fast and loose" with the Courts in this manner. *New Hampshire*, 532 U.S. at 750. By contrast, there was no similar concern in the cases cited by Appellants. Mot. at 10; *see, e.g.*, *Zedner v. United States*, 547 U.S. 489, 505–06 (2006) (prior position properly understood to be about district court's mistake and management of its calendar, not the propriety of a continuance under the Speedy Trial Act).

Even if Appellants were correct that their positions are not technically inconsistent, Appellants' "tails too early, heads too late" approach is inequitable, and it counts heavily against granting them relief under *Purcell.* Timing has been a central and contested issue throughout this case. *Purcell* is an equitable doctrine, and, as a matter of equity, Appellants should not be permitted to "chang[e] positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 750.

C. THE INJUNCTION WILL NOT CAUSE VOTER CONFUSION.

Purcell does not create "a bright-line cutoff date" after which a court may not issue relief regarding impending elections. Op. 109–10. Rather, *Purcell* set out a balancing test whereby courts "weigh" several "considerations specific to election cases" which may cause a "consequent incentive [for voters] to remain away from the polls[.]" 549 U.S. at 4–5. In *Purcell*, concerns about confusion came from the conflicting orders issued by the trial and appellate courts despite "the imminence of the election." *Id.* at 5–6.

Purcell counsels against a stay here. The District Court's weighing of the potential for confusion is "owed deference[.]" *Id*. at 5. And the Court found that the injunction here is straightforward and "will not cause voter confusion or create an incentive for voters to remain away from the polls." Op. 111, 113. Indeed, the Court properly concluded that an injunction will minimize existing confusion. Op. 113. A stay now would put the enjoined requirements back, which carries a far greater risk

of confusion than allowing people to vote under the injunction's clarified rules.

With respect to curbside voting, the injunction restores the status quo in which some counties offered curbside voting. Op. 113–14. Permitting those counties and others to continue to do so does not implicate *Purcell*. Nor is there any chance of voter confusion: either a county will offer curbside voting or not. Counties such as Jefferson and Montgomery, which have agreed to offer curbside voting, Op. 106, are also fully capable of publicizing it. Op. 113.

As to the Witness and Photo ID Requirements, "evidence from trial shows that Alabama's absentee voting laws are causing voters confusion as they stand." Op. 113–14. For example, some voters are exempt from the Photo ID Requirement and the Mobile AEM testified that "there are times when people should have included a photo ID in their application and did not, or included a photo ID when they were exempt from the requirement." Op. 84. Similarly, the Secretary does not interpret the photo ID law's exemption to apply to voters with COVID-19. 9/15 Tr. at 173. But, as the District Court correctly noted, a voter "who has a symptomatic case of COVID-19, *i.e.*, a respiratory disorder, would almost certainly qualify for this exception to the photo ID requirement." Op. 131 n.57. The injunction clarifies the options available to voters.

Indeed, "the order is taking away requirements placed on Alabama voters," therefore it is not likely to cause confusion or to "cause any voters to forgo voting

altogether." Op. 113. "[E]ven if a voter were to be confused, this confusion would, at most, result in the voter taking additional unnecessary steps to apply for or complete their absentee ballot." *Id*. Appellants claim this is wrong because *Purcell* also involved an appellate court order that sought to remove a voter ID requirement. Mot. at 9. But, as discussed *supra*, the primary concern in *Purcell* arose from the confusion caused by conflicting court orders, and the appellate court's failure to defer to the District Court's evaluation of the evidence. And the Supreme Court has vacated or denied stays in cases where, as here, District Courts *did* remove voting requirements even where the injunction came close to an election. *See, e.g.*, *McCrory*, 137 S. Ct. at 27 (denying a stay with seven Justices voting to keep it entirely or partially in place); *Frank*, 574 U.S. at 929 (vacating an appellate court's stay of a District Court's injunction against a photo ID law in an upcoming election). And not all relief was stayed in *Republican National Committee v. Democr*atic National Committee. 140 S. Ct. 1205, 1208 (2020). This Court has also "declined in two recent cases to stay injunctions issued immediately before and even after Election Day." Op. 100 (citing *Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019); *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262 (11th Cir. 2019)).

That absentee voting has already begun is one factor to consider, but it is not dispositive. The trial record confirms that the timing of the injunction will not

increase the likelihood of voter confusion. The Mobile AEM was able to easily implement and notify voters about the previous preliminary injunction. Op. 114–15.

Nor will the timing of the injunction burden or confuse election officials. Under the preliminary injunction, election officials were able to quickly train poll workers. Op. 115. Poll workers and county canvassing boards do not review absentee ballots for witness signatures until Election Day, so Appellants will have ample time to notify and educate them about the injunction. Op. 114-15.

II. APPELLANTS HAVE NOT MET THEIR BURDEN FOR A STAY

The party requesting a stay bears the burden of showing that the circumstances justify the exercise of the Court's discretion. *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Appellants must demonstrate: (1) a "strong" likelihood of success; (2) irreparable injury; (3) that a stay will not substantially injure Plaintiffs; and (4) that the public interest favors a stay. *Lee*, 915 F.3d at 1317.

Appellants cannot satisfy these factors. This is especially true here where the injunction is reviewed for abuse of discretion, *Prison Leg. News*, 890 F.3d at 964, and its factual findings for clear error, *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986).

A. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

1. The Curbside Voting Ban Violates the Constitution and ADA.

Appellants barely address the curbside voting injunction and are not burdened by that injunction.

The *Anderson-Burdick* framework requires a court to "weigh the character and magnitude of the asserted injury to the" plaintiffs' right to vote "against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks and citation omitted).

Appellants assert that, because the District Court concluded that none of the Challenged Provisions impose a categorically severe burden on voters, it should have automatically found that the State's proffered interest outweighs the significant burden on voters. Mot. at 12. This argument tracks Justice Scalia's concurrence in *Crawford*, which tried to change "the flexible *Anderson-Burdick* balancing standard into a 'two-track approach' in which only laws imposing a severe burden are invalid [and] all others would be upheld." Op. 121 n.53. But, "Justice Scalia spoke for only three Justices. The six other Justices, in both the plurality and the dissent, did not question the *Anderson-Burdick* framework." *Id*. As this Court recently held, under *Anderson-Burdick*, "even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden." *Lee*, 915 F.3d at 1318–19 (citation omitted).

The District Court found that the burdens here are "significant," Op. 4, especially as to high risk voters, and that during the pandemic those burdens

outweigh the State's proffered interest in combatting voter fraud. Op. 121, 133, 139.

a. The Ban Significantly Burdens the Right to Vote.

The District Court concluded that "the curbside voting ban imposes a significant burden" on voters. Op. 140. Voting in person indoors poses a significant danger to voters, as even those voters known to have COVID-19 cannot be temperature checked or required to wear a mask. Op. 138. The risk is far less when a voter need only interact with a poll worker, who is outdoors, without leaving their car. *Cf.* Op. 8, 136. The CDC therefore recommends that states offer curbside voting during the COVID-19 pandemic, Op. 136, and many states have done so, Op. 88.

Nor is mail-in voting an adequate alternative for many disabled and high-risk voters. Some disabled voters have "strong reasons to vote in person" so that they may "receive assistance from poll workers." Op. 137–38. The Curbside Voting Ban forces these voters to enter polling places and stand in line to vote, where they are subjected to a heightened risk of exposure to COVID-19. Op. 138–39.

Based on this robust record, the District Court correctly concluded that the Curbside Voting Ban imposed a "significant burden" on the right to vote. Op. 137–39. The Court recognized "the risk of COVID-19 transmission indoors" and unrebutted testimony that "vulnerable voters should not risk going inside a polling place to vote in November." Op. 157. And the Court found "[c]urbside voting would minimize the risk of exposure to COVID-19" for vulnerable voters. Op. 138.

Weighed against this significant burden, Appellants entirely failed at trial to identify any state interest in maintaining the Curbside Voting Ban. Appellants agree that "no provision of Alabama law expressly prohibits curbside or drive-thru voting." Op. 86. Although Appellants argued that the purported "chain of custody" is broken when a poll worker handles a ballot, that term that is found nowhere in Alabama election law. Op. 88. "Alabama law expressly allows voters to receive assistance from poll officials while casting a ballot[,]" *id.*, including allowing poll workers to place a ballot in the voting machine. Ala. Code § 17-8-1.

Given that curbside voting does not violate state law, Appellants argue instead that "serious questions exist" about whether it "complies with other election laws that protect ballot secrecy and require the voter to personally sign the poll list and place the ballot in the tabulation machine." Mot. at 5.

However, "several Alabama counties have provided [curbside voting] for disabled citizens who need assistance voting." Op. 136. The only reason those counties stopped providing it is because of Secretary Merrill's intervention. Op. 136. Appellants presented no evidence that offering curbside voting "compromised either the orderliness of those elections or ballot secrecy." Op. 139–40; *see also* Op. 160. Plaintiffs, in contrast, offered evidence that curbside voting would *preserve* ballot secrecy for voters who need to receive assistance in the privacy of their vehicle. Op. 140.

And Appellants' argument that curbside voting may cause "practical problems," Mot. at 15–16, is irrelevant. At least two counties, have agreed to offer curbside voting and will manage any logistics. Op. 89. Any county that finds that curbside voting would pose "practical problems" can simply decline to offer it.

b. Curbside Voting Is a Reasonable Accommodation.

As to Plaintiffs' Americans with Disabilities Act ("ADA") claim, Appellants focus on the Court's determination that curbside voting is a reasonable accommodation. *See* Mot. at 18. However, the burden of showing that a modification is reasonable is "not a heavy one" and it "is enough for the plaintiff to suggest the existence of a plausible accommodation[.]" *Nat'l Fed'n of the Blind v. Lamone,* 813 F.3d 494, 507–08 (4th Cir. 2016).

Allowing counties to provide a modified form of in-person voting on election day if they choose to do so is not a fundamental alteration, nor is it prohibited by law. *See People First*, 815 F. App'x at 512 (Rosenbaum & Pryor, J., concurring); Op. 158–59. Indeed, curbside voting was previously provided in Alabama without undue hardship. Op. 86–87, 136, 139–40; *see PGA Tour, Inc. v. Martin*, 532 U.S. 661, 685 (2001) (an accommodation's prior use demonstrated its reasonableness); *Lamone,* 813 F.3d at 507–08 (same).

2. **The District Court Did Not Clearly Err in Finding that the Witness Requirement Violates the Constitution and Voting Rights Act.**

Alabama is one of only two states that has a two-witness or notary signature requirement to vote absentee. Op. 74. The District Court correctly held that, in the pandemic, this requirement violates the Constitution and Section 2 of the VRA.

With respect to the *Anderson-Burdick* claim, contrary to Appellants' argument that the Court did not quantify the increased risks of satisfying the Witness Requirement, Mot. at 12, the Court held that "the witness requirement might not be severe, but it doubtlessly exists" and that the burden was "at least significant[,]" Op. 125, because "[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote." Op. 123 (quoting *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020)). This finding is not clearly erroneous.

Plaintiffs and their members are high-risk people who mostly live alone and do not regularly interact with two other adults. Op. 121–22. Appellants claim that getting a ballot witnessed presents no more risk to Plaintiffs than any other errand. Mot. at 13–14. But, while "risks may be necessary to obtain food and other necessities, . . . the burden one might be forced to accept to feed oneself differs in kind from the burden that the First and Fourteenth Amendment tolerate on the right to vote." Op. 125 (quotation and citation omitted). Appellants also mischaracterize the testimony of Plaintiffs' experts. Mot. at 13. Drs. Reingold and Elopre unequivocally stated that high-risk persons should not seek two witnesses from persons outside the home. 9/8/20 Tr. at 50–51; 9/9/20 Tr. at 60-61.

The Court then weighed the significant burden on Plaintiffs against the State's proffered interest in deterring voter fraud. Appellants assert that the Court should have accepted the State's interest as "legislative fact," but the case they cite, *Frank v. Walker*, concerned voter confidence, not voter fraud. 768 F.3d 744, 750 (7th Cir. 2014). The mere validity of a governmental interest as an "abstraction" is insufficient under *Anderson-Burdick* when it does not actually advance the stated interest. *N.E. Ohio Coal. v. Husted*, 837 F.3d 612, 632 (6th Cir. 2016). The District Court recognized the legitimacy of the State's interest in combatting fraud, and carefully laid out why the Witness (and Photo ID) Requirements did not meaningfully advance the State's anti-fraud interest, Op. 126–28, and that other laws effectively safeguard elections, Op. 128–30. The Court acknowledged defense witness testimony about fraud prosecutions decades ago but found those witnesses had not used the Witness Requirement to prevent voter fraud. Rather, officials were able to identify potential fraud by reviewing voter signatures and determining whether absentee ballots contain consecutive street addresses. Op. 76–77, 127–28. The Court made no error, much less clear error, in weighing the evidence under *Anderson-Burdick*.

As to Plaintiffs' Voting Rights Act claim, the District Court found that, under the "totality of circumstances," the Witness Requirement "results in the denial or abridgement of the right . . . to vote on account of race or color." 52 U.S.C. §

10303(a). Appellants cannot meet their burden of making a strong showing that the Court's "ultimate finding" of a Section 2 violation is clearly erroneous. *Gingles*, 478 U.S. at 78.

Black Alabamians are more likely to be infected with COVID-19 (thus, in mandatory quarantine) and suffer worse health outcomes if infected because of discrimination. Op. 14–15, 18, 179–80. Black people, particularly the elderly, are more likely to live alone. Op. 173–74. The two-witness option is therefore more likely to force high-risk Black voters to violate social distancing rules and risk infection to vote. *Id*. The notary option is equally inaccessible to Black voters who have less access to the financial and technological means needed for notary fees or online notarization. Op. 177–78.

Appellants dismiss these disparate burdens as "statistical discrepancies." Mot. at 19. But the Court found that "some state officials" were "motivated by racial bias" in enacting this requirement. Op. 183. This finding is "strong" evidence of discriminatory results: "any doubt about discriminatory results should be resolved in favor of concluding that [discriminators] knew how to achieve their nefarious ends." *Johnson v. DeSoto Cty. Bd. of Comm'rs*, 72 F.3d 1556, 1565 (11th Cir. 1996).

The Court also found, based largely on agreed facts, that Black people are more likely to get COVID-19, suffer worse outcomes, and less able to satisfy the Witness Requirement because of decades of widespread discrimination. Op. 182–

86. This is the proper analysis. *See United States v. Marengo Cty.*, 731 F.2d 1546, 1568–69 & n.36 (11th Cir. 1984).

3. The Photo ID Requirement Violates the Constitution and ADA.

As to the Plaintiffs' ADA claim concerning the Photo ID requirement, Appellants wrongly contend that the Photo ID Requirement is an essential eligibility requirement. Mot. at 16. An essential eligibility requirement is one "without which the 'nature' of the program would be 'fundamentally alter[ed].'" *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 158 (2d Cir. 2013) (quoting 28 C.F.R. § 130(b)(7)). Alabama is one of only three states that requires photo IDs with absentee ballot applications, S.D. Codified Laws § 12-19-2; Wis. Stat. § 6.87(1), and the State already excludes similar groups of voters from compliance—voters either over 65 or with a disability *and* who are unable to access their polling place due to certain limited reasons. Op. 131 n.57. The injunction merely allows all high-risk voters to enjoy this exemption if they provide identifying information. Op. 162–63.

Still, Appellants argue that this modest change to the Photo ID Requirement fundamentally alters elections. Mot. at 18. But the District Court made unchallenged findings that the injunction is a reasonable modification. Op. 165–66. The burden of showing the reasonableness of an accommodation is "not a heavy one." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003). By contrast, even though fundamental alteration is an affirmative defense upon which Appellants bear the

burden of proof, Appellants identify no "facts and evidence to support" their argument. *Hindel v. Husted*, 875 F.3d 344, 347–48 (6th Cir. 2017).

Appellants also contend that Plaintiffs did not meet the "exclusion" prong under the ADA because "mere difficulty" in accessing a service is insufficient. Mot. at 17. But they only partially recite the relevant standard—a service must be "readily accessible," and the mere fact that a disabled person "manages in some fashion" to access it is insufficient for accessibility. *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001). A plaintiff "need not … prove that they have been disenfranchised" to meet this burden. *Disabled in Action v. Bd. of Elec. in City of N.Y.*, 752 F.3d 189, 198 (2d Cir. 2014). The Court made ample factual findings demonstrating the lack of ready accessibility for high-risk voters to submit a photo ID—include photocopying and transportation barriers. Op. 96–97, 174–75.

Appellants also criticize the District Court's treatment of absentee voting and in-person voting as two separate programs under the ADA. Mot. at 17. But where, as here, a state makes absentee voting available to all voters, the "relevant public service or program at issue" is not the "voting program in its entirety" but rather the "absentee voting program." *See Lamone*, 813 F.3d at 503; *Hernandez v. N.Y. State Bd. of Elections*, No. 20-4003, 2020 WL 4731422, at *8 (S.D.N.Y. Aug. 14, 2020) (collecting cases). Regardless, the Court *did* analyze the accessibility of in-person voting and held that "voting in person on Election Day is not readily accessible to

the plaintiffs or their members with disabilities during the COVID-19 pandemic." Op. 154.

As to Plaintiffs' *constitutional claim*, Appellants do not challenge the burdens on high-risk voters in complying with the Photo ID Requirement during the pandemic, which undergirded the finding that the burden is "significant" under *Anderson-Burdick*. Op. 133. Nor did the District Court disregard the State's voter fraud justification. Indeed, despite finding that the "that the photo ID requirement's value is marginal at best," Op. 135, the Court left it in place for those voters who can safely satisfy it. It simply found that the burden for some high-risk voters required a modest extension of an exception the State already has in place.

B. THE REMAINING *NKEN* FACTORS FAVOR PLAINTIFFS

The District Court did not abuse its discretion in finding the balance of equities favors entering an injunction. Op. 196–97. The Challenged Provisions present high-risk voters with the untenable choice between disenfranchisement or an increased risk of contracting COVID-19. 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). And "[t]he 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).

On the other hand, Appellants will not be irreparably harmed if a stay is

denied. State Appellants contend that "the inability to enforce [their] duly enacted plans" constitutes irreparable harm. Mot. at 20. As to the Curbside Voting Ban, Appellants are not injured as Alabama law does not prohibit curbside voting and they are not required to affirmatively act. Op. 86; *see also Kemp*, 918 F.3d at 1268 (concurring opinion) (movant's "failure to show that he is likely to suffer irreparable harm requires that [the] motion for a stay be denied"). As to the Witness and Photo ID Requirements, Appellants suffer "no harm from the state's nonenforcement of invalid legislation." *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012).

Nor does the fact that local election officials may incur some costs to implement the injunction tilt the balance of equities in Appellants' favor. Mot. at 20. The Court correctly concluded that the costs of the Court-ordered accommodations "do not clearly exceed its benefits." Op. 143 (quoting *Henrietta*, 331 F.3d at 280).

Finally, the public interest strongly favors denying a stay. The "protection of the [Appellees'] 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). 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.

DATED September 22, 2020.

Respectfully submitted,

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October 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), I hereby certify that this brief complies with the type-volume limitation. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(f), this brief contains 5.152 words based on the word-count feature of Microsoft Word.

This brief also complies with the typeface and tyle-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Century Schoolbook font with 14-point type using Microsoft Word 2016.

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