

No. 20-13695-B

**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 State 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

**REPLY IN SUPPORT OF TIME SENSITIVE MOTION FOR
ADMINISTRATIVE STAY AND STAY PENDING APPEAL**

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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:

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Respectfully submitted this 7th day of October, 2020.

s/ Edmund G. LaCour Jr.

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INTRODUCTION

Four months ago, the district court enjoined the election laws at issue in this case even though the primary runoff election was only 29 days away. The Supreme Court had to step in and grant a stay. *Merrill v. People First of Ala.*, 591 U.S. ___, 2020 WL 3604049 (2020).

Yet here we are again. The district court, 34 days before the general election, has enjoined these same provisions again. The district court may not have gotten the Supreme Court's message, but this Court and numerous others have. Indeed, since Defendants filed their motion last Friday, the Supreme Court, Ninth Circuit, and this Court have all again applied *Purcell* to stay injunctions that would have rewritten election laws after voting had begun. The same result is required here—again.

Plaintiffs' responses fall short. First, Plaintiffs invent the theory that *Purcell* applies only to preliminary injunctions, not permanent ones; but “the *Purcell* principle ... seeks to avoid ... judicially created confusion,” whether it follows a hearing or a trial. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (2020). Second, Plaintiffs contend that Defendants are estopped from arguing against mid-election changes to voting because some Defendants noted in May 2020 that a preliminary injunction as to the November election was speculative. But there is nothing inconsistent in these positions, nor inequitable in Defendants pressing them. Indeed, Plaintiffs could have renewed their request for a preliminary

injunction before general election voting began; they just never did. Third, Plaintiffs' argument that voter confusion won't arise because the injunction merely "takes away" requirements of State law ignores the obvious problem of pre-printed instructions on applications and ballots, which conflict with the injunction. Moreover, Plaintiffs' argument runs headlong into decisions like *Purcell*, *RNC*, and the first appeal in this case, where laws were "taken away" yet stays were granted.

On the merits, Plaintiffs do not contest what Defendants noted repeatedly in their motion—that Plaintiffs failed to show that Alabama law causes them any appreciable risk of harm, even if the risks of COVID-19 are (improperly) imputed to the State. The most Plaintiffs proved, and the most the district court found, was that interacting with another person to get a witness signature or photo ID copy presents "some" unquantified "risk." Doc. 250 at 123. And even Plaintiffs' experts agreed there are "reasonably safe" ways for "a high-risk voter" to briefly interact with another person. Doc. 250 at 177. This fundamental failure of proof dooms all of Plaintiffs' claims. Unless courts are to have nearly limitless power to set the times, places, and manners of elections, a stay should be granted.

ARGUMENT

I. *Purcell* Requires Staying the District Court's Injunction.

As this Court noted just days ago when it stayed a different district court's injunction enjoining a different State's voting laws "in the middle of" an election,

the Supreme Court has been “repeat[ing] its mantra” of late “that ‘lower federal courts should ordinarily not alter the election rules on the eve an of an election.’” *New Ga. Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588, at *3-4 (11th Cir. Oct. 2, 2020) (quoting *RNC*, 140 S.Ct. at 1207). “That mantra,” the Court observed, “has consistently pointed the Supreme Court in one direction—allowing the States to run their own elections.” *Id.* Indeed, shortly after the Court made that observation, the Supreme Court again stepped in, without dissent, to stay a district court’s pandemic-based injunction affecting a State’s election laws—this time South Carolina’s witness requirement for absentee voting. *See Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020).

But evidently the mantra needs repeating once more. Yesterday evening, the district court denied Defendants’ stay motion, finding that “the *Purcell* principle does not preclude the court from providing relief to the plaintiffs in this case.” Doc. 260 at 2. Plaintiffs likewise seek to distinguish the steady stream of *Purcell*-mandated stays—including of the district court’s prior injunction in this case—based on three purported distinctions. *See* Resp.3-4.

First, Plaintiffs suggest (at 4) that *Purcell* applies only to preliminary injunctions, as if voter confusion turns on whether a judicial rewrite of election laws follows a hearing or a trial. But the Ninth Circuit just yesterday relied on *Purcell* in granting a stay of a permanent injunction that had altered Arizona’s election laws.

See Ariz. Democratic Party v. Hobbs, Nos. 20-16759 & 16766, 2020 WL 5903488, at *2 (9th Cir. Oct. 6, 2020); *see also Veasey v. Perry*, 135 S.Ct. 9 (2014) (denying application to vacate Fifth Circuit’s stay of permanent injunction of photo ID law).

Second, Plaintiffs contend (at 4-6) that “Appellants are judicially estopped from relying on *Purcell*” because State Defendants argued in May that Plaintiffs’ preliminary injunction request for the November election was at that time too speculative. Even if the premise were true, it is undisputed that at least one of the Appellants—Mobile County Probate Judge Don Davis—was not a defendant in May. Plaintiffs have not explained how he could be estopped.

In any event, Plaintiffs’ estoppel theory fails in toto because Defendants’ arguments—that Plaintiffs’ claims were too speculative in May *and* that equitable considerations warrant denial of an injunction now that the election has begun—*can both be true*. These positions are not “‘clearly inconsistent,’” and Defendants were not “unfair[ly] advantage[d]” by advancing them. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). As a legal matter, the same claim can be unripe on one day and moot on another. And as a factual matter, Plaintiffs were not put to a “tails too early, heads too late” bind. Resp.7. As the district court recognized in June, it was then “premature for the court to consider a preliminary injunction for the election[] in ... November,” but “plaintiffs [we]re free to move for a separate preliminary injunction regarding” that election at a later date. Doc. 58 at 12. That Plaintiffs never

did is no one's fault but their own.

Plaintiffs thus resort to tilting at windmills, raising concerns about “officials ... engag[ing] in shenanigans knowing that courts will not hear a challenge to their illegal conduct.” Resp.6 (quoting Doc. 250 at 110). But there are no such “shenanigans” here. Rather, it is uncontested that Alabama has gone to great lengths to make voting safe while keeping voting secure—including by expanding absentee voting to *all* voters. Doc. 250 at 17, 25-28.

Third, Plaintiffs echo the district court's findings that “taking away requirements placed on Alabama voters” will cause no harm. Resp.8 (quoting Doc. 250 at 113-14). In fact, Plaintiffs assure, the injunction simply “clarifies the options available to voters.” *Id.*

That is not the reasoning of the Supreme Court's mantra. *See Raffensperger*, 2020 WL 5877588, at *3-4. For good reason: Alabamians—voters and local election officials alike—are sure to have many questions about the district court's order. For instance: For the new judge-made signature requirement, what written statement about underlying conditions and COVID-19 risk will suffice and what form must it take? What underlying medical conditions qualify for the exemption? For the photo ID requirement, how are election officials to know which voters “cannot safely obtain a copy of their photo ID” because of underlying medical conditions? Doc. 251 at 4. And for curbside voting, how many additional poll workers will be

required, how will officials acquire the extra equipment necessary, how will they deal with traffic, and how will they preserve ballot secrecy? That all these questions are left unanswered confirms that *Purcell* again applies in this case.

Moreover, Plaintiffs ignore that the absentee ballot applications and ballots are pre-printed with instructions that clarify Alabama's photo ID and witness requirements, and these cannot be changed in time to reflect the injunction. *See* 9/16 Tr. at 81-82; 9/17 Tr. at 125, 150. Faced with conflicting information regarding how to make their vote count, *of course* voters will be confused. That is why, after the district court's last injunction, one confused voter asked an AEM, "[W]hy are we changing the rules in the middle of the football game?" 9/16 Tr. at 82-83. There is no good answer. "[W]e are in the middle of [an election], with absentee ballots already printed and mailed," and the district court's latest mid-game rule change should be stayed. *Raffensperger*, 2020 WL 5877588, at *3.

II. Defendants Are Likely to Prevail.

A. The State's Interests Are Overwhelming Under *Anderson-Burdick*.

"Reasonable, nondiscriminatory restrictions" on voting rights are almost always justified by the "State's important regulatory interests," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (cleaned up), for there is no right to be free from "the usual burdens of voting," *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008). The district court held that the burdens imposed by the

challenged provisions were “significant” because complying with them “presents some risk of COVID-19 exposure.” Doc. 250 at 123; *see also id.* at 133, 139. “But [Alabama]’s absentee-voting laws are not to blame. It’s the pandemic, not the State, that might affect Plaintiffs’ determination to cast a ballot.” *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020). And even attributing pandemic risks to the State, the district court never quantified the risk, apparently concluding that *any* risk of *any* exposure would constitute a “significant burden” on the right to vote. This failure to “quantify the magnitude of the burden on this narrow class of voters” is fatal to Plaintiffs’ sweeping claims and the court’s statewide injunction. *Crawford*, 553 U.S. at 200.

Moreover, even accepting the district court’s conclusion that *any* increased risk of exposure to COVID-19 constitutes a significant burden, the record does not reveal any voter who must be exposed to any such risk to vote in next month’s election. *See* Mot.27-28. The district court held that voters should not have to expose themselves to the same risks to vote as they do to run errands or groom their pets. Critically, though, Plaintiffs can satisfy the complained-of requirements while they are *already engaging* in these activities. That is, Plaintiff Thompson, for example, can satisfy the witness requirement *while already at* the grocery store or dog groomer. *See* Doc. 250 at 124-25. Plaintiffs’ epidemiologist confirmed this would present no appreciable additional risk. 9/8 Tr. at 70-73. Thus, “[v]oters must simply

take reasonable steps and exert some effort[.]” *Raffensperger*, 2020 WL 5877588, at *2. Such a “burden” is not “significant.”

And, even assuming that some Plaintiff is exposed to some marginal risk (which they incongruously seek by demanding curbside voting), that burden is vanishingly small when weighed against the State’s overwhelming interest in secure elections. The State has a significant interest in “conducting an efficient election, maintaining order ... and preventing voter fraud.” *Id.* at *3. But the injunction as to curbside voting inhibits Secretary Merrill’s authority to “provide uniform guidance for election activities.” Ala. Code §17-1-3(a). And the photo ID and witness requirements were created to prevent and combat voter fraud. Mot.29-30. All these interests are heightened during the pandemic, when Alabama expects “a record number of absentee ballot requests” at the same time its “general election system [is] facing a wide variety of challenges in the face of the pandemic.” *Little v. Reclaim Idaho*, 140 S.Ct. 2616, 2617 (2020) (Roberts, C.J., concurring).

Finally, “a State legislature’s decision either to keep or to make changes to election rules to address COVID-19 ordinarily should not be subject to second-guessing by an unelected federal judiciary.” *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring) (cleaned up). Because the district court’s flawed “some risk” approach makes second-guessing inevitable, the court’s injunction should be stayed.

B. Defendants Are Likely to Prevail on Plaintiffs' ADA Claim.

Plaintiffs' ADA claim fails for similar reasons. Most fundamentally, the challenged provisions, even during the pandemic, do not exclude anyone from voting. "Some" unquantified "risk" to Plaintiffs is not tantamount to exclusion from the franchise.

Next, Plaintiffs' narrow framing of public services is inconsistent with the ADA. An ADA violation occurs only if an individual is excluded or otherwise denied a benefit. 42 U.S.C. §12132. And different services that are equally effective are permissible where necessary. 28 C.F.R. §35.130(b)(1)(iv). While Defendants maintain that both in-person and absentee voting are available to Plaintiffs, even if only the latter is available, not every avenue for providing the benefit of voting must be accessible. *See Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107-08 (11th Cir. 2011) (holding plaintiffs were not excluded where they were "able to participate in [the] voting program").

Moreover, Plaintiffs have not established a prima facie ADA claim as to either the photo ID requirement or curbside voting because they fail to show a causal connection between their disabilities and alleged exclusion. *See* Mot.17-18.

Lastly, States must be afforded significant "leeway" in asserting a fundamental-alteration defense. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 605 (1999). If the State shows that it has a "comprehensive, effectively working plan"

for addressing plaintiffs’ concerns, then “the reasonable-modifications standard would be met.” *Id.* at 606. Here, the State has expanded absentee voting and effectively allowed early in-person voting for the first time. Further, State law allows disabled voters to move to the front of the voting line.

Invalidating the State’s duly enacted laws is not only unreasonable but also fundamentally alters Alabama’s elections. Waiving the photo ID requirement removes the most significant security measure accompanying the absentee ballot application. And enjoining the curbside voting “ban” is not an accommodation at all, because enjoining the Secretary from prohibiting counties to allow it is not a modification that redresses Plaintiffs’ alleged exclusion.¹

C. Defendants Are Likely to Prevail on Plaintiffs’ VRA Claim.

Plaintiffs never engage with Defendants’ primary Section 2 arguments: Any voter can get two witnesses to sign an envelope while remaining six feet apart, and a statistical difference by race in the number of voters in a high-risk category is not enough to show that any impact on the right to vote is “on account of race or color.” *See Greater Birmingham Ministries v. Merrill*, 96 F.3d 1202, 1234 (11th Cir. 2020)

¹ The Jefferson and Montgomery County Defendants agreed to undertake only “reasonable efforts” to provide curbside voting at some polling places. Docs. 181 at 9 & 182 at 9. Simply *allowing* nonparty local officials to offer curbside voting does not establish standing because no Plaintiff’s injury will likely be redressed. *See Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019).

(holding that a statistical difference in photo ID possession rates did not establish a Section 2 violation). Thus, no one has been denied anything.

Plaintiffs argue that because the district court found that “some state officials” were “motivated by racial bias” in enacting a witness signature requirement, this Court should assume that disparate impact exists. Resp.17. But the district court never made that finding, noting only that Plaintiffs presented evidence to that effect. Doc. 250 at 183. That “evidence” was a 1996 quote from one Republican Senator in a Democrat-controlled Legislature, the type of evidence this Court held does not even create a question of fact on intent. *GBM*, 96 F.3d. at 1226-28. And that evidence doesn’t change the fact that in 2020, race does not impact a voter’s ability to safely get two signatures on an envelope.

III. The Remaining Factors Favor a Stay.

For the reasons given in Defendants’ motion (at 8-11, 20-21) and in the above discussion of *Purcell*, the remaining factors favor a stay. Alabama law should govern this election.

CONCLUSION

The Court should stay the district court’s 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 2,597 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

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

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CERTIFICATE OF SERVICE

I hereby certify that on October 7th, 2020, I filed this reply brief using the Court's CM/ECF system, which will serve all counsel of record.

/s/ Edmund G. LaCour Jr.

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

PEOPLE FIRST OF ALABAMA, et)	
al.,)	
)	
Plaintiffs,)	
)	Civil Action Number
v.)	2:20-cv-00619-AKK
)	
JOHN MERRILL, et al.,)	
)	
Defendants.)	

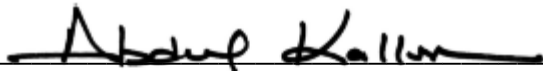
ORDER

This action is before the court on the defendants' motion for stay pending appeal, doc. 253, which the plaintiffs oppose, doc. 256. For the reasons below, the motion is due to be denied.

To determine whether to issue a stay, courts consider: ““(1) whether the stay applicant has made a strong showing that [they are] likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). At issue here is whether under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), these factors weigh in favor of a stay. The defendants contend that the court issued its order enjoining certain provisions of Alabama election law too close to the November 3, 2020 election, *see* doc. 253 at 4-14, and, consequently, they are likely to succeed on the

merits. But, as the court explained in its conclusions of law, the *Purcell* principle does not preclude the court from providing relief to the plaintiffs in this case. *See* doc. 250 at 109-117. And, the defendants have not shown that the court erred in reaching that conclusion, or made a strong showing that they are likely to succeed on the merits of their appeal. Moreover, the defendants will not be irreparably injured absent a stay because enjoining enforcement of laws that violate federal law and the plaintiffs' fundamental right to vote does not harm the State or the county defendants. In contrast, staying the court's order would substantially injure the plaintiffs because, among other things, enforcement of the witness and photo ID requirement for absentee voting and the curbside voting ban imposes significant burdens on their right to vote under the First and Fourteenth Amendments. Thus, the public interest favors denying the stay. Therefore, for these reasons, the defendants' motion, doc. 253, is **DENIED**.

DONE the 6th day of October, 2020.



ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE