
In the Supreme Court of the United States

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JOHN H. MERRILL, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE
OF ALABAMA, AND THE STATE OF ALABAMA,

APPLICANTS,

v.

PEOPLE FIRST OF ALABAMA, ET AL.,

RESPONDENTS.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Respondents' brief confirms that a stay is warranted, both under *Purcell* and on the merits.

1. First, Respondents give no persuasive reason why this Court should not “treat like cases alike,” *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment). Indeed, when Respondents assert (at 8) that this case is “[u]nlike every other case where this Court has stayed an injunction under *Purcell*,” they seem to forget this Court’s earlier stay in *this case*.

To be sure, Respondents then assert that this latest injunction of the curbside voting ban “is readily distinguishable from the July preliminary injunction” of the curbside voting ban. Resp.9. Respondents first note that, four months ago, “[t]he focus of the parties’ briefing ... was on the Witness and Photo ID Requirements, which are not at issue here,” *id.*, perhaps implying that the Court didn’t fully consider the curbside voting issue. But as Respondents note, a Supreme Court stay that overrides a Court of Appeals judgment to not grant a “stay is rare and exceptional.” Resp.4. Surely this Court in July did not override the Eleventh Circuit’s judgment regarding curbside voting without giving “the weightiest consideration[]” to the arguments that Respondents again bring before the Court. *Id.*

Next, Respondents assert that this time is different because the injunction follows a trial rather than a hearing. But there is no meaningful difference between the district court’s preliminary and permanent injunction opinions. And the *Purcell* principle does not take a break simply because a federal court permanently altered

Alabama’s election laws after trial rather than after a preliminary hearing. *See, e.g., Veasey v. Perry*, 135 S. Ct 9, 9-10 (2014) (denying application to vacate Fifth Circuit’s stay of permanent injunction of photo ID law even though—as Justice Ginsburg pointed out in dissent, *id.* at 10—the injunction “follow[ed] a full trial and rest[ed] on an extensive record”). The harm to the State’s interests occurs whether the injunction is permanent or preliminary. *See Ariz. v. Democratic Party v. Hobbs*, Nos. 20-16759 & 16766, 2020 WL 5903488 (9th Cir. Oct. 6, 2020) (staying *permanent* injunction).

Like back in June, Respondents raise a cursory judicial estoppel argument. *See* Resp.16. But Respondents were not put to a “heads too soon, tails too late” dilemma. *Id.* Rather, as the district court noted, Respondents “[we]re free to move for a separate preliminary injunction regarding” the November election before any trial on the merits of their claims. D. Ct. Doc. 58 at 12. Their failure to do so is their failure alone.

Respondents are also wrong to assert that the “status quo” in Alabama was that local officials were regularly offering curbside voting. *See* Resp.11. In fact, Secretary Merrill testified that he was aware of two instances—one in 2016 and one in 2018—in which local officials had offered curbside voting. Supp.App.5, 8. He testified that he called one of the local officials and asked “what authority granted to him in the Alabama code or the constitution” allowed him “to do that.” *Id.* at 8-9. When the official “could not cite a provision in the code or the constitution where he was able to do that,” the Secretary asked him to “cease and desist,” which he did. *Id.* at 9.¹

¹ It was here in the testimony that Secretary Merrill said—as Respondents repeat (at 7, 17)—that he “did not care” whether the incidents of curbside voting involved

2. The Secretary’s reading of Alabama election law is the right one. Alabama law authorizes in-person voting and mail-in voting. It does not authorize or allow curbside voting. No matter. According to Respondents and the district court, because “[n]o Alabama law” expressly “prohibit[s]” curbside voting, the Secretary is wrong and Alabama law authorizes a practice that has never been widely used in the State. Resp.6. This simplistic analysis highlights why federal courts “should refrain whenever possible from deciding novel or difficult state-law questions.” *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2188-89 (2019) (Kagan, J., dissenting).

As the amicus brief from District of Columbia and 16 States helpfully notes, many States that authorize the practice of curbside voting do so through laws that *expressly authorize* the practice. See DC Br.8 (citing laws in four States that expressly authorize curbside voting); see also, e.g., Tex. Elec. Code Ann. § 64.009(a) (same). Moreover, D.C. identifies only two States that “have offered curbside voting even though there is no statute or regulation expressly authorizing the practice.” DC Br.8.

And while D.C. contends that “most jurisdictions impose rigorous criteria to ensure that poll workers do not interfere with ballots” and that “[l]ocal jurisdictions can ensure that ballots remain private through proper guidance and procedures,” *id.* at 13, that point underscores a glaring problem with the district court’s order here: Alabama does not have “rigorous criteria” to protect against meddling that could occur during curbside voting, and Secretary Merrill cannot provide “proper guidance

disabled voters. Respondents omit the next part of his answer: that he “did not care *because it’s against the law*,” even though he was sympathetic to disabled voters’ plight because his own “father was an amputee.” Supp.App.9. (emphasis added).

and procedures” for a practice that violates Alabama law. In States where curbside voting is lawful, the appropriate election officials have created guidance and procedures to allow for it to take place. *E.g.*, Ariz. Sec’y of State, *2019 Elections Procedures Manual* 105-06 (Dec. 2019), available at <https://tinyurl.com/y39fbbeh> (listing procedures required, such as having two poll workers from different political parties assist voters). Additionally, States generally permit only a limited form of curbside voting, for example, for voters with disabilities. In contrast, the district court’s order prohibits its Secretary Merrill from stopping *any* curbside voting that does not expressly violate Alabama law. The district court’s order is not a modest accommodation—it is a new voting program and an overhaul of Alabama’s in-person voting procedures.

3. Thus, the district court improperly weighed the State’s interest under *Anderson-Burdick* and incorrectly determined that its injunction comported with the ADA. And Respondents’ assertion (at 3) that Secretary Merrill is “still permitted to offer guidance regarding curbside voting procedures” is unserious. The Secretary’s consistent guidance for years has been that there is no way to “establish curbside voting procedures that ... comply with state ... law,” Resp.3, and the injunction erroneously and injuriously precludes him from offering that guidance.²

² Worse still, the district court entered the injunction without finding anything more than “some” undefined “risk” to voters. App.146. Respondents show the absurdity of this standard by contending that curbside voting allows “high-risk Alabamians ... to safely vote from their vehicles.” Resp.29. That is strange, as Respondents’ expert “admit[ted] that curbside voting is not necessarily safer than absentee voting.” App.32. And Respondents spent months arguing that absentee voting was too dangerous. Thus, under the “some risk” standard, it’s hard to see how States can ever win.

The injunction’s harm runs deeper still, for county officials are now free to experiment with curbside voting without oversight by the Secretary of State (he can no longer tell them that what they are doing is unlawful under Alabama law). But “states that have curbside voting spent years establishing a method for curbside voting. They don’t do it in 40-something days.” App.212. Offering such voting comes with “massive logistical problems,” App.147, that, if implemented without much planning, could undermine important State interests. For instance, as the Director of Elections testified at trial, the State has an interest in ensuring that a disabled voter who seeks assistance “deposit[ing] the ballot in the precinct ballot counter,” Ala. Code § 17-8-1(b)(4), be able to *see* the poll worker deposit the ballot and in that way ensure that her vote is counted, App.210. That cannot happen if a poll worker must carry a marked ballot from a voter’s car to a tabulation machine inside the polling place. *Id.* Like the district court, Respondents (at 26) discount this interest by promising that poll workers can be trusted not to interfere. But such assurance does little to boost the public’s confidence in the integrity of the elections; as one of the State’s witnesses testified at trial, every case of voter fraud he prosecuted involved local officials “abusing their power to facilitate fraud.” App.43. Even one of the Respondents’ witnesses, Ms. Lux, testified that she had experienced one such breach when a poll worker assisting her commented unfavorably on her choice for President. App.66. Does the State really have no interest in ensuring that such poll workers aren’t left alone with marked uncast ballots?

CONCLUSION

This Court should stay the district court’s latest injunction.

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Respectfully submitted,

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