No. 19A1063

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.,

Respondent.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY

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

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, the undersigned states that none of the Respondents has a parent corporation, and no publicly held corporation holds 10 percent of more of any Applicants'

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Ct. at 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief). People of all ages contract and die from COVID-19, but infection poses special dangers for "high-risk" people whose age, medical conditions, or disabilities make them more susceptible to death or severe illness from COVID-19. App. 18.

Social distancing is the only proven means of protecting against this deadly disease. App. 3. Thus, the Centers for Disease Control and Prevention ("CDC") recommends that states "[e]ncourage voters to use voting methods that minimize direct contact with other people," including absentee voting and curbside or "drive-up voting." Doc. 16-2 at 2; App. 80. And Governor Kay Ivey has issued a Safer-at-Home Order instructing Alabamians, especially high-risk persons to stay home and remain six feet apart from people outside of their household. App. 3-4, 37-38. This order was recently extended through July 31—past the July 14, 2020 primary runoff election.[4]

Respondents are individuals and organizations with members who are high-risk people, but who wish to vote in Alabama's July 14 election. On May 1, 2020, Respondents filed suit to challenge Alabama election provisions that, because of state social distancing orders and the pandemic, pose severe obstacles to voting: (1) the requirement that voters have their absentee ballot envelope either notarized or

ID requirement"); and (3) the Secretary's *de facto* ban on curbside voting ("curbside voting ban") (collectively, the "challenged provisions").

Respondents filed this suit against three State Defendants—Governor Ivey, Secretary Merrill, and the State of Alabama—and against the absentee election managers ("AEMs") in three counties: Jefferson, Mobile, and Lee. These three counties have the first-, third-, and sixth-highest number of total infections in the State, respectively.[5] As of July 1, the Alabama Department of Public Health ("ADPH") has identified them as "very high risk" (Lee) or "high risk" (Jefferson and Mobile) areas.[6] In the District Court, State Defendants vigorously argued that they were not proper defendants, asserting that they "do not enforce any of the challenged provisions" and that they are "protected by sovereign immunity." Doc. 36 at 19, 20.

On June 15, 2020, the District Court issued a 77-page memorandum opinion, in which it carefully reviewed the evidence, made detailed factual findings, and concluded that Respondents were likely to succeed on the merits of their as-applied constitutional claims in light of the unique burdens imposed by the challenged provisions during the pandemic, and that Respondents were also likely to succeed in part on their claims under the Americans with Disabilities Act ("ADA"). The District Court, however, agreed with State Defendants that Respondents' claims against

[5] Leada Gore, *Alabama adds 906 coronavirus cases, COVID hospitalizations reach new high of 776*, AL.com, July 1, 2020, https://www.al.com/news/2020/07/alabama-adds-906-coronavirus-cases-covid-hospitalizations-reach-new-high-of-776.html.

[6] Alabama Department of Public Health, *Alabama's COVID-19 Risk Indicator Dashboard*, https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/b585b67ef4074bb2b4443975bf14f77d (last updated June 20, 2020).

Governor Ivey were barred by sovereign immunity, concluded that Secretary Merrill was likely not a proper defendant except with respect to the curbside voting claim, and did not enter any injunction against the State of Alabama.

With respect to the witness and photo ID requirements the District Court entered a preliminary injunction that applies only to the AEMs, prohibiting them from enforcing those requirements for high-risk voters who sign a statement under penalty of perjury that they cannot reasonably comply with the requirements. The injunction simply creates a means for high-risk voters in these counties to vote without violating the Safer-at-Home order in a single primary. The District Court also enjoined the Secretary from enforcing his curbside voting ban, meaning simply that the Secretary may not prohibit "counties from establishing curbside voting procedures that otherwise comply with state election law." App. 30. The injunction allows (but does not require) counties to provide curbside voting. The District Court's preliminary relief is limited to the July 14 election, which includes local and congressional elections in the affected counties.

Defendants appealed and sought an emergency stay of the preliminary injunction. On June 25, the Eleventh Circuit denied this stay motion. All three judges doubted State Defendants' standing to challenge the injunction as to the photo ID and witness requirements. App. 11-12 n.7, 26-27. Two judges wrote a concurrence explaining why State Defendants had failed to meet their burden on the merits. App. 25.

State Defendants now seek an emergency stay from this Court. But, once again, they fail to meet their burden in requesting such extraordinary relief.

First, State Defendants cannot show a sufficient likelihood either that four Justices would grant certiorari or that a majority of the Court would reverse the decision below. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). This case involves a narrow injunction directed to a single election, most of which the State Defendants lack standing to appeal. Because they successfully argued below that they

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State Defendants are not harmed by the portions of the District Court's narrow injunction that they lack standing to challenge, and the Secretary does not suffer irreparable harm from being prohibited from enforcing a ban on curbside voting that has no basis in state law. App. 52. While State Defendants point to the concerns this Court identified in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), about voter confusion and election integrity when electoral rules are changed close to an election, here, those concerns weigh against a stay. For about two weeks, the AEMs have told high-risk people to vote without witnesses or photo IDs. In seeking a stay, State Defendants invite this Court to inject doubt and confusion into Alabama's electoral process and to disenfranchise those high-risk people who are now voting under the injunction.

Accordingly, this Court should deny State Defendants' request.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The COVID-19 pandemic has deeply affected Alabama. With vaccines months (or more) away, public health officials have been left to urge the public to practice "social distancing," i.e., avoidance of close contact with others. For that reason, Governor Ivey and the CDC recommend that high-risk individuals stay at home, ad t()2 r(om)-1

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contact during in-person voting. Doc. 16-2 at 2.

To combat viral spread, Governor Ivey and the ADPH have taken a series of steps since early March, including issuing increasingly aggressive guidelines and restrictions. These orders have had the incremental effect of closing most "non-essential" businesses—including photo ID issuing offices and copying centers—and urging residents to shelter in place. Individuals—especially high-risk persons—are asked to stay home. App. 38. In Lee County, the ADPH is instructing vulnerable people like Respondents to be "especially careful" and "exercise extreme caution and stay at home if at all possible."[7] In Jefferson and Mobile, high-risk people are told to "[l]imit visits with friends, or family outside your household," "[l]imit in-person meetings," and "[a]void groups of any size."[8]

On March 18, Governor Ivey rescheduled the March 31 primary runoff to July 14, 2020. App. 39. That same day, Secretary Merrill promulgated an emergency rule entitled "Absentee Voting During State of Emergency," which authorizes "any qualified voter who determines it is impossible or unreasonable to vote at their voting place for the Primary Runoff Election of 2020" because of COVID-19 to vote absentee. App. 39. But, notwithstanding this recognition that the emergency created by the pandemic and the need for social distancing justifies this expansion of absentee ballot, Secretary Merrill did not use his power under Alabama law, Ala. Code § 17-

[7] Alabama Public Health, *Alabama's Very High Risk Phase: What does it mean and what can you do?*, https://www.alabamapublichealth.gov/covid19/assets/alguidelines-red.pdf.

[8] Alabama Public Health, *Alabama's High Risk Phase: What does it mean and what can you do?*, https://www.alabamapublichealth.gov/covid19/assets/alguidelines-orange.pdf.

11-3(e), to suspend or interpret other provisions that will still require many Alabama voters to violate the Safer-at-Home order to vote, including the photo ID requirement.

When asked about the photo ID requirement by a voter on social media, Secretary Merrill responded: "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." App. 7. Respondents directly requested that Secretary Merrill address the obstacles posed by the challenged provisions but were unsuccessful. Docs. 16-34, 16-35.

Only 12 states have witness or notarization requirements for absentee voters. Only three states require voters to mail-in copies of photo IDs. And only two states, including Alabama, require both photo ID and witnesses to verify absentee ballots.[9]

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from establishing curbside voting procedures that otherwise comply with state election law." App. 29-30. Although the District Court had recognized that the ADA abrogates the State's sovereign immunity, App. 61, no part of its injunction applies against the State. App. 29-30.

State Defendants appealed to the Eleventh Circuit and requested an emergency stay of the District Court's preliminary injunction. On June 25, 2020, the Eleventh Circuit denied the stay motion. App. 1. In a joint concurrence, Judges Rosenbaum and Jill Pryor concluded that the State Defendants failed to meet their burden of showing a strong likelihood that District Court abused its discretion in issu ƀgmj0.137 4 (e)]TJr5bj53 -2.4056 (j10.575 0)-2 (t).575 2 (9S3on)1 (gI42 (ef) -353 -2.4056s

COVID-19 by foregoing nationwide and statewide social distancing and self-isolation

Defendants bear the burden of proving that a stay is warranted. *Id.* at 433-34.

To obtain a stay here, State Defendants must show a sufficient likelihood that: (1) four Justices would grant certiorari; (2) a majority of the Court would reverse the judgment below; and (3) irreparable harm would result from the denial of a stay. *Hollingsworth*, 558 U.S. at 190. "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Here, State Defendants cannot meet their burden. Serious vehicle problems, and the narrowness of the injunction at issue, mean this case is not appropriate for this Court's certiorari review. Even if it were to exercise such review, the Court would consider the District Court's injunction through the deferential abuse of discretion standard. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004). State Defendants identify no legal error, clearly erroneous factfinding, or other abuse of discretion in the District Court's careful weighing of the relevant interests under *Anderson-Burdick* or ADA analysis. Finally, there is no irreparable injury to the State Defendants from the limited injunction that primarily affects the AEMs, but there would be serious harms in terms of voter confusion and disenfranchisement if the Court were to grant a stay now after the AEMs have already been complying with the injunction for two weeks.

A. State Defendants Lack Standing to Appeal the Portions of the District Court's Injunction that Apply Only to the AEMs.

First, this case is not the right vehicle to address most of the State's arguments. State Defendants do not have standing to challenge the portions of the injunction that apply only to the AEMs. This means the only issue properly before the Court is the

District Court's injunction stopping the Secretary from disallowing curbside voting consistent that is otherwise consistent with state law.

It is a basic rule of appellate procedure that a party cannot ordinarily appeal an injunction that applies only to third parties. And, while the State Defendants now contend that a State has standing to act as a defendant-intervenor to defend the constitutionality of its laws, that is not what the State of Alabama did here. On the contrary, as State Defendants acknowledge, they argued in the "district court that they were improper defendants," Stay Mot. at 5, and they asserted sovereign immunity as a defense. Doc. 36 at 20-21. Having made these arguments and declined to waive its sovereign immunity in the District Court (as it would have to if it were a defendant-intervenor), the State cannot reverse course on appeal and claim standing to challenge an injunction that applies only to the AEMs in the three Alabama AEt- reo5 0

because it concluded that the AEMs were the proper parties. App. 53-54 & n.12.

As for the State of Alabama, far from seeking to act as a defendant-intervenor and choosing to litigate the validity of the challenged provisions, it also vigorously advanced an immunity defense. The State asserted: "The State of Alabama preserves the defense that its sovereign immunity has not been abrogated with respect to any claim." Doc. 36 at 20 n.13. Although the District Court found that the State was a proper party with respect to the ADA claim, App. 61, it ruled in favor of the State on the merits in the challenge to the witness requirement, App. 90-91, and it did not apply any portion of its injunction against the Statoe2 (i)-1 (t (c001 Tc 0.001 Tw -37.065 -2.4t-

The State is similarly estopped. State Defendants insist to this Court that "the State is like a defendant-intervenor" insofar as the State has an interest in defending the constitutionality of any state law. Stay Mot. at 5. But that argument is foreclosed by the State's litigation conduct in the District Court. When a State acts like a defendant-intervenor, it "voluntarily invoke[s]" the jurisdiction of a federal court, and it waives its sovereign immunity. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). That is not what the State did here. It did not choose to waive its sovereign immunity and participate in the litigation of Respondents' constitutional claims. Instead, as discussed, the State vigorously asserted a sovereign immunity defense even with respect to the VRA and ADA claims. Doc. 36 at 20.

In sum, a State may ordinarily have standing to act as a defendant-intervenor in support of the constitutionality of its laws. But the State must actually act as a defendant-intervenor, and it must waive sovereign immunity to invoke that principle. *See Lapides*, 535 U.S. at 620. What a State cannot do, however, is argue that it is not a proper party and invoke sovereign immunity in the district court, but then maintain that it *is* a proper party when it wants to appeal an injunction entered solely against local officials. *See Maine*, 532 U.S. at 750 (explaining that judicial estoppel acts to prohibit "parties from deliberately changing positions according to the exigencies of the moment[]" or "playing fast and loose with the courts"Tc 0.161 Tw-3 (e)3.9 (w)-3 (i)1y-

United States" extends to them and 2) invoke federal jurisdiction to appeal, thereby accepting that the "Judicial power of the United States" extends to them. *Lapides*,

injunction should apply to one county or three—is worthy of certiorari review.

In any event, as the joint concurrence explained, Respondents People First, GBM, and the NAACP have standing both on behalf of their individual members who live in these counties and because they "have had to divert resources" to new activities in response to the Challenged Provisions. App. 14; *see also Havens Realty Corp v. Coleman*, 455 U.S. 363, 378-79 (1982). Unsurprisingly, GBM and its members are in Jefferson County. As the joint concurrence observed, People First and the NAACP indisputably have members "all over Alabama," App. 13-14.[10] The joint concurrence also explained that Respondents had submitted evidence that their members include senior citizens, individuals who "lack access to a computer, the internet, or videoconferencing technology," and "fall into the high-risk COVID-19 category." App. 13. Because these members wished to vote absentee in the three enjoined counties, the organizational Respondents had standing sufficient to obtain the relief granted by the District Court. App. 14-15.

In addition, as the joint concurrence recognized, "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." *Id.* at 14. Since these new activities are outside their usual work, absent the challenged p

the argument is incorrect. *See* App. 13. State Defendants misperceive the relationship between Respondents' harm and the relief granted. Respondents do not, as State Defendants suggest, "seek to enjoin [the curbside voting ban] on the ground that it might cause harm to other parties." Stay Mot. at 21 (citation omitted). Instead, Respondents challenge the curbside voting ban based on their own particular harms. As the joint concurrence explained, the curbside voting ban is a *statewide* ban. App. 15. No voter can benefit from curbside voting and no election official can implement it unless the Secretary is stopped enforcing his ban, which has no basis in state law. Thus, the Respondents "have standing to seek a state-wide injunction because they challenge the Secretary's *statewide* policy disallowing curbside voting." App. 15.

Accordingly, the District Court and the joint concurrence were correct to find that Respondents have standing to assert each of their claims and requested relief.

2. State Defendants Are Unlikely to Succeed on the Merits as to Respondents' Constitutional Claims.

The constitutional rule that governs this case is clear and undisputed: it is the balancing test set forth by this Court in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). Under this *Anderson-Burdick* framework,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" 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,

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curbside voting below. Nevertheless, in rejecting a similar uniformity argument as to the absentee voting restrictions, the Eleventh Circuit concluded that State Defendants "have not demonstrated that permitting some high-risk Alabamians to vote absentee without satisfying the photo ID and witness requirements somehow detracts from that interest." App. 21. The same is true as to the curbside voting ban.

Second, State Defendants argue that implementing curbside voting before the July 14 election poses logistical concerns that the Secretary is hesitant to "roll[] out for the first time during a pandemic under short notice and with minimal planning." Stay Mot. 28. But, again, all the injunction does is allow counties that want to permit curbside voting consistent with state law to do so. And, as the District Court found, a witness for State Defendants "identified methods for making the offering feasible[]" for the July 14 election in the counties that wish to provide it. App. 99. "[T]hose counties that choose to implement curbside voting face minimal burdens because it generally requires the use of polling supplies and staff that already exist." App. 17. And the District Court issued the preliminary injunction a month before the July 14 elections, giving the Secretary sufficient time to decide whether to encourage local officials to employ curbside voting and to formulate procedures to do so in a uniform manner. App. 17 n.11 (observing that "Plaintiffs filed this action over a month-and-a-half ago, and curbside voting will not be used for three weeks.").

of voting absentee for the July 14 election. Stay Mot. at 29 (internal quotation marks omitted). But the District Court rejected this argument because, despite the no-excuse absentee voting option, some high-risk voters, including People First and NAACP members, must vote in person to receive necessary assistance because of their disabilities or low literacy, App. 80-82; *see also* Doc. 16-45 at 36-37, or certain disabilities, *id.* at 25-26 ¶ 13. For these voters, the CDC recommends the use of curbside voting to "minimize the risk of COVID-19 eo-r. thspii4u Distcu17 (ru)2 (s)sict C(g)rejca3 T

Burdick, the District Court "did not abuse its discretion by concluding that the 'significant' burdens imposed on high-risk Alabamian voters by the witness and photo ID requirements" outweighed the interests proffered by State Defendants as-applied in the context of the ongoing global COVID-19 pandemic. App. 17-18.

On Respondents' side of the scale, both requirements impose substantial burdens on Respondents' right to vote. For the witness requirement, the District Court found that satisfying it imposes a "significant burden on some voters who live alone and who are at heightened risk of severe COVID-19 complications." App. 67. State Defendants fail to acknowledge these very real burdens on Respondents or Respondents' members who live alone or with one person. Doc. 20-1, at 24. Because Respondents do not encounter two people simultaneously, Doc. 20-1, at 18-19, the witness requirement would force them to violate social distancing rules to interact with one or more people outside their household. But COVID-19 is spread easily and stays in the air for up to 14 minutes. App. 243. "Strikingly," State Defendants would seek to enforce the witness requirement for everyone, requiring an "asymptomatic COVID-19 voter [to] unknowingly place potential witnesses at risk" and a symptomatic voter to "find a willing witness." *Thomas v. Andino,* No. 3:20-cv-01552-JMC, 2020 WL 2617329 (D. S.C. May 25, 2020).

State Defendants seek to minimize these burdens by offering questionable

witnesses outside or in a large room and then each sign the piece of paper—with everyone remaining masked and staying six feet or more from one another." Stay Mot.

strict Stay-at-Home order in March and April, which required the closure of most stores, offices, and libraries. Docs. 16-19, 16-39, 16-40, 16-41 at 10. It also ignores the personal circumstances of Respondents. For example, Respondents Clopton was hospitalized and convalescing at home for much of April and May. Doc. 16-45 at 3-

they say they are. *See Crawford*, 472 at 954 (Posner, J.) (noting that requiring a voter to mail in a photocopy of his or her photo ID with his absentee ballot leaves "no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo").

Further, as the District Court explained, State Defendants' voter-fraud justification for enforcing the photo ID requirement as to high-risk voters makes little sense given (1) that Alabama law already provides an exception for those voters aged 65 and older or with disabilities

application that exempts them from the photo ID requirement. *See* App. 20. The injunction imposes an even stricter requirement for voters seeking the exemption since high-risk voters must also swear under penalty of perjury that they meet the exemption. Therefore, to the extent that the preliminary injunction order includes any subjective test, it is rooted i

affected counties are also those counties with the highest infection numbers in Alabama, there is reason to offer voters in those areas more leeway. In fact, Alabama itself instructs people, like Respondents, in these "very high risk" and "high risk" counties to take extra and different precautions than people elsewhere. *Supra* 3.

Moreover, State Defendants have not provided any explanation or evidence as to why voters would be confused by the clear guidance being provided by AEMs—consistent with the District Court's injunction—simply because it applies to certain counties and not others. Indeed, Alabama's 67 counties have different processes and resources for administering elections. For example, as State Defendants' witness declared, 35 of Alabama's 67 counties use e-poll books to verify voters' registration information at in-person polling locations, the remaining 32 counties use poll lists. Doc. 34-1 ¶ 46. State Defendants do not complain that this lack of uniformity to check in confuses voters across counties. And counties regularly follow different election procedures, schedules, and cycles. For example, only a subset of counties will participate in the First Congressional primaries—Mobile—or in an upcoming special election for a newly vacated state house district—Bibb, Chilton, and Shelby counties. State Defendants do not contend that this lack of uniformity results in confusion.

Here, far from supporting a stay, the concerns this Court has previously identified about confusion and diminished confidence in the electoral process would be implicated by *granting* a stay. As discussed, the AEMs—i.e., the parties charged with implementing the injunction—have not appealed and are already notifying voters about the injunction and instructing them about the process for waiving the

witness and photo ID requirement. A stay at this stage, however, would cause confusion and undermine confidence in elections, because it would require AEMs to reverse course and inform voters that the previous burdens were being reinstated. This would likely lead to the disenfranchisement of those voters who have already sought to cast absentee ballots pursuant to the injunction for the July 14 election.

Indeed, this Court previously *vacated* a stay that—like the stay that State Defendants seek here—would have resulted in similar voter confusion and disfranchisement. *See Frank v. Walker*, 574 U.S. 929 (2014). In *Frank*, the district court had granted an injunction blocking an absentee photo voter ID requirement. *Id.*; *see also id.* (Alito, J., dissenting) (noting that "absentee ballots1 (a)2 1 (ila)1 (r (e)5 (e (v

the plaintiff's disability. *See United States v. Georgia*, 546 U.S. 151, 153-54 (2006).

Once a plaintiff establishes a prima facie case, they must offer "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.130(b)(7). Respondents met this burden by proposing modifications that do not cause "undue hardship." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-03 (2002).

State Defendants do not dispute the finding that Respondents—including Respondents with ambulatory disabilities who would benefit from curbside voting regardless of the pandemic—established a *prima facie* ADA claim with respect to the curbside voting ban. *See* App. 99. Rather, the sole argument of State Defendants is that curbside voting "would fundamentally alter Alabama elections." Stay Mot. 30.

This is not true. There is no law prohibiting curbside voting procedures. In any event, State Defendants are not required to do anything except permit local officials to implement curbside voting in a manner consistent with state law. App. 23. As the District Court concluded, "there is no evidence that curbside voting—mandated or otherwise—would fundamentally alter Alabama law." App. 99. And, as described above, Defendants' own witness undercuts this argument: other than minor logistical concerns related to implementation, curbside voting would not fundamentally alter Alabama law. App. 99 & n.47.

So too with the photo ID requirement. State Defendants challenge the first and third elements of Respondents' *prima facie* case. They are wrong. Respondents are qualified persons—all eligible to vote—with disabilities, including medical conditions that place them at a high-risk of serious bodily injury or death from COVID-19 should

they leave home. App. 21-23. The Eleventh Circuit's joint concurrence correctly determined that the District Court did not abuse its discretion in finding that Respondents are "qualified individuals with a disability" under the statute and that they "have shown that they will be excluded from participation *by reason of* their disability." App. 22. "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." App. 23 (emphasis in original).

State Defendants argue that Respondents are not qualified because the photo ID requirement is an essential eligibility requirement. Stay Mot. at 19-20. But State Defendants cannot overcome the ADA claim by simply asserting that the Photo ID Requirement is "essential." Rather, the Court examines a requirement's purpose (*i.e.*, identification) and whether that purpose can be satisfied with a reasonable modification. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 685-86 (2001).

No statutory language indicates that the photo ID requirement is essential, App. 97, and there are already multiple exemptions to the requirement. *See* Ala. Code §§ 17-9-30(d), 17-9-30(f). A requirement cannot be unalterable if it already permits a sizable group of similarly situated voters to also demonstrate their identity without providing photo ID. App. 22; *see also Martin*, 532 U.S. at 685 (concluding that the PGA's walking rule was not an "indispensable feature of tournament golf" because PGA allowed golf carts to be used by non-disabled golfers in other tournaments). Tellingly, State Defendants argued below that proof of identification is not even a qualification. Doc. 36 at 26-27. The District Court was correct in holding that the

requirement is not "essential" and does not "fundamentally alter" state law. App. 97.

State Defendants also argue that Respondents are not excluded from voting "by reason" of their disabilities. Stay Mot. at 2

This after-the-fact disenfranchisement of high-risk voters who are seeking to safely exercise the franchise is the epitome of irreparable and favors a stay. As the joint concurrence observed "One wrongfully disenfranchised voter is one too many." App. 24. Because the election is ongoing and voters are already being allowed to vote under the injunction, "Plaintiffs face immediate and irreparable harm if the burdens imposed by the challenged requirements are not enjoined." App. 24.

Moreover, Alabama cannot implement the necessary measures to address the problems addressed by the injunction. caused by the stay in the next 13 days. Alabama's DMVs, libraries, and stores—where people can obtain or photocopy their photo IDs—have been closed. *See supra* 28. Even for those voters who have photo ID, there are over 230,000 Alabama households without a computer to copy IDs. Docs. 20-1 at 15, 16-37 at 53. The Secretary has offered no help to these voters. App. 7 n.3.

As to the curbside voting injunction, the Secretary may still bar "unlawful procedures"— the injunction does not injure him at all." App. 27. Respondents presented evidence that voters, like members of People First and the NAACP, who need in-person assistperscs

requirements would be to the AEMs, who are not seeking a stay.

CONCLUSION

For the reasons above, the Emergency Application for Stay should be denied.

Dated: July 2, 2020

Respectfully submitted,

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