
**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 20-13695

PEOPLE FIRST OF ALABAMA, ET AL.,

Plaintiffs-Appellees,

vs.

SECRETARY OF STATE, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama, Southern Division

Case No. 2:20-cv-00619-AKK

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF LEAGUE OF
WOMEN VOTERS OF ALABAMA AND AMERICAN ASSOCIATION OF
UNIVERSITY WOMEN IN SUPPORT OF PLAINTIFFS-APPELLEES**

Dated: October 6, 2020

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admission pending)

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 27 and Eleventh Circuit Rules 26.1-1, and 27-1(a)(9), undersigned counsel for proposed *amici curiae* American Association of University Women (the “AAUW”) and League of Women Voters of Alabama (the “League”) (together, the “*Amici*”) certifies that to his knowledge the following persons or entities not yet disclosed by the parties to this action may have an interest in the outcome of this appeal:

1. AAUW, proposed *amici curiae*. AAUW is a nonprofit organization with no corporate parent. AAUW is not publicly held;
2. Bell, Christopher H., Counsel for *Amici*;
3. Borek, John A., Counsel for *Amici*;
4. Czechowski, Ashley A., Counsel for *Amici*;
5. Fried, Frank, Harris, Shriver & Jacobson LLP, Counsel for *Amici*;
6. Keats, Michael C., Counsel for *Amici*;
7. League, proposed *amici curiae*. The League is a nonprofit organization whose parent organization is the League of Women Voters of the U.S. Neither the League nor the League of Women Voters of the U.S. is publicly held;
8. Sandler, Shira, Counsel for *Amici*; and
9. Uppalapati, Avani, Counsel for *Amici*.

Respectfully submitted,

/s/ John A. Borek

John A. Borek

*Counsel for Amici Curiae League of
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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE
LEAGUE OF WOMEN VOTERS OF ALABAMA AND THE AMERICAN
ASSOCIATION OF UNIVERSITY WOMEN IN SUPPORT OF
PLAINTIFFS-APPELLEES**

Proposed *amici curiae* League of Women Voters of Alabama (the “League”) and American Association of University Women (the “AAUW”) respectfully move, pursuant to Fed. R. App. P. 29(a)(3) and 11th Cir. R. 29-1, for leave to file the attached brief *amici curiae* on behalf of themselves in support of Plaintiffs-Appellees and in opposition to Defendants-Appellants’ motion for stay pending appeal. In support of this Motion, proposed *amici curiae* state as follows:

1. Courts routinely permit non-parties to file *amicus curiae* briefs in support of the parties in appeals before this Court and other courts. *Amicus* briefs are helpful to assist the Court in understanding the impact and significance of the issues involved, determining applicable law, and introducing to the Court material issues that may have been omitted or not fully discussed in the parties’ briefs.

2. While it is less common to submit a brief *amicus curiae* in support of or in opposition to a party’s motion before this Court, leave is warranted under the circumstances. The Court’s disposition of Defendants-Appellants’ motion for stay will likely result in a final resolution of this matter given the rapidly approaching general election to be held November 3, 2020. *Amicus curiae* hope to provide the Court with as much information as possible for its consideration of this important

motion, which will determine whether qualified Alabama voters will be able to vote safely this November.

3. The League is a nonpartisan political organization that encourages informed and active participation in government, increased understanding of major policy issues, and seeks to influence public policy through education and advocacy. The League was founded in 1920 and arose from the Alabama Equal Suffrage Association.

4. Today, the League is a local chapter of the greater national League of Women Voters of the United States, which celebrated 100 years of empowering voters and defending democracy on February 14, 2020. Currently, the League is comprised of members from eight local leagues and one Member-at-Large Unit within Alabama. The League also has additional interested persons who regularly receive mailings and educational voting material from the organization. The League's membership is made up primarily of registered Alabama voters who will be directly impacted by both the instant appeal and the Court's disposition of Defendants-Appellants' Emergency Motion for Stay.

5. To advance its mission, the League seeks to enact common-sense voting reforms and are among the first to fight back when voters' rights are threatened. Since 2016, the League has fought for voting rights for Alabama citizens in state and federal court in the following actions: *League of Women*

Voters of the United States, et al. v. Newby, et al., No. 16-cv-00236 (D.D.C. 2016),
Greater Birmingham Ministries et al. v. Merrill, No. 15-cv-02193 (N.D. Ala.
2015) (as *amicus curiae*), and *League of Women Voters of Alabama, et al. v.*
Merrill, et al., No. 03-cv-2020-900702.00 (Cir. Ct. Montgomery Cty., Ala., 2020).

6. The League's volunteers help hundreds of thousands of citizens in Alabama navigate the confusing system of absentee voting, register to vote and/or check their registration status, update voter information, and track absentee ballots. During the COVID-19 pandemic, the League has provided the citizens of Alabama with vital voting information via online platforms and printed material.

7. AAUW was founded in 1881 by like-minded women who had challenged society's conventions by earning college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW of Alabama has over 1,600 members and supporters.

8. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with its member-adopted Public Policy Program, AAUW supports vigorous enforcement of and full access to civil and constitutional rights, including expanding voting rights.

9. The proposed *amici curiae* seek leave of Court to file the brief annexed to this Motion as Exhibit 1 to assist the Court in determining whether the District Court properly enjoined the Secretary of State's *de facto* ban on curbside voting, the State's absentee witness requirement, and the State's photo ID requirement (collectively, the "Challenged Requirements"). In its brief, the proposed *amici curiae* explain why, based on their knowledge of voting procedures and experience educating and mobilizing voters, the Challenged Requirements detrimentally impact Alabama citizens' constitutional right to vote. Proposed *amici curiae* explain that the Challenged Requirements violate the First and Fourteenth Amendments by unduly burdening the rights of thousands of Alabama voters as applied during the COVID-19 pandemic. Because the State has proffered no credible evidence of voter fraud or voter confusion that would necessitate such practices and procedures, the Challenged Requirements impose an unconstitutional burden under the Supreme Court's *Anderson-Burdick* framework by requiring voters to choose between exercising their fundamental right to vote and protecting their health and safety. Lastly, the proposed *amici curiae* explain why the *Purcell* principle counsels in favor of suspending the Challenged Requirements, as the District Court's September 30, 2020 order is likely to reduce voter confusion and increase voter participation in the November 3, 2020 general election.

10. All parties to this appeal have consented to *amici curiae* filing this brief.

11. Given the League's and AAUW's substantial interest in this case and their belief that the annexed brief will assist the Court in determining the disposition of Appellants' motion, proposed *amici curiae* respectfully request that this Court grant this Motion and accept their brief for consideration in this case.

12. Given that there is no applicable word limit for *amicus* submitting a brief in connection with a party's motion pursuant to Fed. R. App. P. 29(a)(5), proposed *amici curiae* respectfully request that the Court permit *amici* to file the brief annexed to this Motion as Exhibit 1 in accordance with a word limit of 5,200 words pursuant to Fed. R. App. P. 27(d)(2)(A). For the reasons that the Court should grant leave to file, the length of proposed *amici curiae*'s brief is proportionate to the interests at stake.

Dated: October 6, 2020

Respectfully submitted,

/s/ John A. Borek

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limitations set forth in Fed. R. App. P. 27(d)(2)(A). This motion contains 1,079 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

2. Additionally, this motion 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 2016 in 14-point Times New Roman font.

Dated: October 6, 2020

/s/ John A. Borek
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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury pursuant to 28 U.S.C. § 1746 that on October 6, 2020, he filed the foregoing Motion by using the Court's CM/ECF system, and that such filing effected service of the Appearance of Counsel on all counsel who are CM/ECF participants in this case.

The undersigned further certifies that on October 6, 2020, he caused true and correct copies of the foregoing Motion to be served on the below-listed attorneys by deposit in U.S. mail, with first class postage prepaid:

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Exhibit 1

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 20-13695-B

PEOPLE FIRST OF ALABAMA, ET AL.,

Plaintiffs-Appellees,

vs.

SECRETARY OF STATE, ET AL.,

Defendants-Appellants,

On Appeal from the United States District Court
for the Northern District of Alabama, Southern Division
Case No. 2:20-cv-00619-AKK

**BRIEF OF *AMICI CURIAE* LEAGUE OF WOMEN VOTERS OF
ALABAMA AND AMERICAN ASSOCIATION OF UNIVERSITY
WOMEN IN SUPPORT OF PLAINTIFFS-APPELLEES IN OPPOSITION
TO DEFENDANTS-APPELLANTS MOTION FOR STAY**

Dated: October 6, 2020

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rules of Appellate Procedure 26.1 and Eleventh Circuit Rules 26-1 and 29-2, undersigned counsel for proposed *amici curiae* the American Association of University Women (the “AAUW”) and League of Women Voters of Alabama (the “League”) (together, the “*Amici*”) certifies that to his knowledge the following persons or entities not yet disclosed by the parties to this action may have an interest in the outcome of this appeal:

1. AAUW, proposed *amici curiae*. AAUW is a nonprofit organization with no corporate parent. AAUW is not publicly held;
2. Bell, Christopher H., Counsel for *Amici*;
3. Borek, John A., Counsel for *Amici*;
4. Czechowski, Ashley A., Counsel for *Amici*;
5. Fried, Frank, Harris, Shriver & Jacobson LLP, Counsel for *Amici*;
6. Keats, Michael C., Counsel for *Amici*;
7. League, proposed *amici curiae*. The League is a nonprofit organization whose parent organization is the League of Women Voters of the U.S. Neither the League nor the League of Women Voters of the U.S. is publicly held;
8. Sandler, Shira, Counsel for *Amici*; and
9. Uppalapati, Avani, Counsel for *Amici*.

DISCLOSURE OF CORPORATE STATUS

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for the League and AAUW certifies as follows:

The League is a nonprofit organization whose parent organization is the League of Women Voters of the U.S. Neither the League nor the League of Women Voters of the U.S. is publicly held.

The AAUW is a nonprofit organization with no corporate parent. The AAUW is not publicly held.

STATEMENT OF INTEREST OF THE AMICI CURIAE

Amicus League of Women Voters of Alabama (the “League”) is a nonpartisan political organization that encourages informed and active participation in government, increased understanding of major policy issues, and seeks to influence public policy through education and advocacy. The League was founded in 1920 and arose from the Alabama Equal Suffrage Association. Today, the League is a local affiliate of the League of Women Voters of the United States, which celebrated 100 years of empowering voters and defending democracy on February 14, 2020. Protecting the right to vote and ensuring that this right is accessible to all eligible voters is rooted in the League’s history and fundamental to the organization’s existence.

The League’s volunteers help hundreds of thousands of citizens in Alabama navigate the system of absentee voting, register to vote and/or check their registration status, update voter information, and track absentee ballots. The League also educates individuals via its on-line and social media platforms. The League has created videos and power-point presentations to provide individuals with online instructions on all aspects of voting. The League also advertises Alabama-specific voting resources on www.vote411.org, a “one-stop-shop” for election-related information, which provides both general and state-specific

nonpartisan resources to the voting public, including a nationwide polling place locator, a ballot look-up tool, candidate positions on issues, and more.

On May 28, 2020, the League and eight Alabama voters brought a lawsuit against Secretary John Merrill, Governor Kay Ivey, and Montgomery County election officials demanding that the defendants modify or suspend the State's most onerous election regulations (including those challenged here) under State law and the Alabama Constitution. *See The League of Women Voters of Alabama et al. v. John Merrill et al.*, (Case No. 03-CV-2020-900802.00). Reflecting Alabama's longstanding hostility to its citizens' voting rights, on August 5, 2020, the state court summarily dismissed the lawsuit in its entirety, in only 336 words, finding that the court either somehow lacked jurisdiction due to the presence of a political question, or that plaintiffs lacked standing to assert voting rights claims, and/or that the claims against *all* defendants were barred by sovereign immunity. *See id.* Doc. 174. The intervention of the federal courts is plainly necessary to safeguard voting rights.

Amicus American Association of University Women ("AAUW") was founded in 1881 by like-minded women who had challenged society's conventions by earning college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college

and university partners nationwide. AAUW's local chapter, the American Association of University Women of Alabama, has over 1,600 members and supporters. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with its member-adopted Public Policy Program, AAUW supports vigorous enforcement of and full access to civil and constitutional rights, including expanding voting rights.

**STATEMENT UNDER FEDERAL RULE
OF APPELLATE PROCEDURE 29(a)(4)(E)**

Amici state: (1) no party or parties' counsel authored this brief in whole or in part; (2) no party or parties' counsel has contributed any money that was intended to fund preparing or submitting this brief; and (3) no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

Should this Court stay the District Court's final order and injunction entered on a full evidentiary record following trial that enjoins burdensome voting requirements that violate the First and Fourteenth Amendment right to vote in view of the COVID-19 pandemic?

SUMMARY OF ARGUMENT¹

Amici join Plaintiffs-Appellees in opposing the entry of a stay of the District Court’s order (Doc. 251, the “Order”) entered following a bench trial enjoining the Secretary of State’s *de facto* ban on curbside voting (the “curbside voting ban”), Alabama’s absentee witness requirement² (the “two-witness requirement”) and Alabama’s photo ID requirement³ (the “photo ID requirement”) (collectively, the “Challenged Requirements”) for the November 3, 2020 general election. This Court should be under no illusion that the request for an emergency stay pending appeal is in actuality a request for *final* relief that, if granted, would permanently deprive Alabama citizens of their right to vote in the November general election without risking their health and lives. The State had its day in court and lost—an unsurprising outcome given the tremendous health risks presented by the COVID-19 pandemic. This Court should deny the Motion for Stay Pending Appeal (“Def’s MFS”) filed by the State of Alabama and Secretary of State John Merrill (“State

¹ This brief does not address the District Court’s ruling with respect to Plaintiffs’ Counts II, III, and V, which allege, respectively, that certain of the Challenged Requirements violate Title II of the Americans with Disabilities Act, Section 2 of the Voting Rights Act, and the Fourteenth Amendment’s Equal Protection Clause. *Amici* join the arguments made by the AARP, the AARP Foundation, and the American Diabetes Association, filing separately as *amici* before this Court, with respect to Count II. *Amici* join the arguments made by Plaintiffs with respect to Counts II, III and V.

² Ala. Code § 17-11-9

³ Ala. Code §§ 17-9-30, 17-11-4.

Defendants”) Circuit Clerk JoJo Schwarzauer, and Probate Judge Don Davis (the “Mobile County Defendants”) (collectively “Defendants”).

The Challenged Requirements unconstitutionally burden Plaintiffs’ and countless other Alabama voters’ fundamental right to vote as applied during the COVID-19 pandemic. Many Alabama voters do not live with two adults who may serve as witnesses, and thus will not be able to comply with the two-witness requirement without violating State and Federal health guidelines. Many more do not have access to the technology that would allow them to make copies of their photo ID at home, requiring further unnecessary exposure to the general public. Individually and collectively, the Challenged Requirements lay a heavy, inequitable burden on Alabama voters and force them to make an impossible choice: violate State and federal health and social distancing guidelines, or forfeit their fundamental right to vote.

The Challenged Requirements do little, if anything, to advance the State’s interest in combatting voter fraud. As the District Court found, Defendants’ claims are unsupported by the record, and belied by the countless other states that offer curbside voting, and do not require witnessing ballots and providing proof of ID to vote absentee. While the State has a legitimate interest in preventing fraud and preserving ballot integrity, the marginal value of the Challenged Requirements

must temporarily give way in light of the extraordinary burden they impose on voters during the pandemic.

Finally, *Purcell* is no barrier to the relief granted here. Suspending the witness requirement and allowing curbside voting—which facilitate and do not restrict voting rights—are fundamentally unlikely to confuse voters who can and do expect accommodations during the COVID-19 pandemic to protect their health and safety. Alabama’s citizens have long been on notice of this litigation and the relief Plaintiffs sought, and are keenly aware of its impact on voting. The likelihood of voter confusion is far greater if the Order is stayed and voters are left with a patchwork of public pronouncements less than 30 days before an election, requiring them to jump through dangerous and unnecessary hoops to exercise their voting rights.

“A stay is not a matter of right It is instead an exercise of judicial discretion[.]” *Nken v. Holder*, 556 U.S. 418, 433-34, (2009). On behalf of their members and voters statewide, *amici curiae* urge this Court to deny Defendants’ Motion for Stay and uphold the District Court’s Order, to ensure that every eligible voter in the state may cast their ballot without fear for their health and safety.

ARGUMENT

I. COURTS HAVE SUSPENDED ELECTION LAWS TO PROTECT VOTERS' HEALTH DURING THE PANDEMIC

The Fourteenth Amendment safeguards the “precious” and “fundamental” right to vote. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 683 (1966). Courts must balance the character and magnitude of any law burdening the right to vote against the relevant government interest served by the law. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The *Anderson-Burdick* balancing test requires the Court to measure “the character and magnitude of the asserted injury” against “the precise interests put forward by the State as justifications for the burden imposed by this rule.” *Anderson*, 460 U.S. at 789.

Recognizing that the COVID-19 pandemic has “dramatically changed” life in America, courts across the country have suspended election regulations to protect voters’ health and safety. *Libertarian Party v. Sununu*, 2020 U.S. Dist. LEXIS 133437 at *34-45 (D.N.H. July 28, 2020) (listing cases). The enjoined regulations include, *inter alia*:

- ballot access signature requirements, *id.*, *Garbett v. Herbert*, U.S. Dist. LEXIS 75853 (D. Utah Apr. 29, 2020); *Dhillon v. Wobensmith*, 202 U.S. Dist. LEXIS 135749 (D. Md. July 31, 2020); *Goldstein v. Sec. of the Commonwealth*, 484 Mass. 516 (Mass. Apr. 17, 2020),

- laws requiring in-person appearances for first-time voters, *Memphis A. Phillip Randolph Inst. v. Hargett*, 2020 U.S. Dist. LEXIS 164462 (M.D. Tenn. Sep. 9, 2020); *Esshaki v. Whitmer*, 2020 U.S. Dist. LEXIS 68254 (E.D. Mich. Apr. 20, 2020), and
- absentee ballot witness requirements, *League of Women Voters of Va. v. Va. State Bd. of Elec.*, 2020 U.S. Dist. LEXIS 79439 (W.D. Va. May 5, 2020); *Common Cause R.I. v. Gorbea*, 2020 U.S. Dist. LEXIS 135267 (D.R.I. July 30, 2020) (*aff'd Common Cause R.I. v. Gorbea*, 970 F.3d 11 (1st Cir. 2020)).

The common thread among these decisions is the burden placed on voters' and candidates' health and safety in order to exercise their First and Fourteenth Amendment rights, as applied during the COVID-19 pandemic.

II. THE DE FACTO CURBSIDE VOTING BAN VIOLATES PLAINTIFFS' FUNDAMENTAL RIGHT TO VOTE UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS APPLIED DURING THE COVID-19 PANDEMIC

A. Curbside Voting is an Established Method of Providing Voters with a Convenient and Safe Alternative to In-Person Voting

The magnitude of the public health crisis caused by the COVID-19 virus is now well-known. Doc. 250 at 6-16. No one—not even the President of the United States—is safe from it. The formidable challenge of protecting voters at the ballot box requires that public officials take every reasonable measure to allow voters with an opportunity to vote safely. What it certainly does not require is for public officials to ban a common and established practice that public health experts explicitly recommend to protect voters' health.

Curbside voting is a widely available alternative to absentee and traditional in-person voting. At least twenty states explicitly permit curbside voting by state policy, while others may offer it as a courtesy.⁴ Curbside voting is also well-known to Alabama. State Defendants do not dispute that Hale, Perry and Houston Counties offered curbside voting as an accommodation to handicapped voters, until Secretary Merrill intervened to direct officials to cease the practice. Doc. 250 at 86-87. Highlighting the common use of this practice, this past summer the League held a series of drive-up voter information clinics and provided hundreds of individuals with voter registration and absentee ballot applications, stamps, and printed instructions.

Since the outbreak of the COVID-19 pandemic, curbside voting has taken on new significance as an option for the ill and medically vulnerable to vote safely. The CDC recommends curbside voting not only as a tool to protect the medically vulnerable, but as an “alternative voting option[] for voters with symptoms, those who are sick or known COVID-19 positive” which can “minimize exposure between poll workers and voters, such as a designated polling site or curbside voting for sick voters.”⁵ This guidance is consistent with Governor Ivey’s orders

⁴ See Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 Stan. L. Rev. 1491, 1516-17 (2016).

⁵ See *Considerations for Election Polling Locations and Voters*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated Oct. 4, 2020).

permitting “drive-in” gatherings to protect individuals—especially vulnerable individuals—from in-person contact that could put them at risk from COVID-19.⁶

B. The State’s De Facto Curbside Voting Ban is a Severe Burden on Voters’ Constitutional Rights

The impact of the State’s Curbside Voting Ban is severe. Curbside voting is an established accommodation for disabled and elderly individuals, including members of organizational Plaintiffs (and indeed members of *amici curiae*). Doc. 250 at 137-38. The Curbside Voting Ban disproportionately impacts Black Alabamians, who are more likely to have a disability than white Alabamians, and are afflicted by and die from COVID-19 at stunningly disproportionate rates. Doc. 250 at 67-69, 89-90. The law’s disparate impact on these vulnerable and protected classes magnifies the burden under the *Anderson-Burdick* framework. *See League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1217 (N.D. Fla. 2018); *Ga. Coal. for the People’s Agenda v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding “severe” burden based in part on “uncontested evidence of disparate impact on a particular class of individuals”).

Curbside voting also provides those displaying COVID-19 symptoms a way to prevent spreading the virus to others at their polling location, thus reducing the

⁶ Press Release, *New ‘Safer at Home’ Health Order Eases Some COVID-10 Restrictions in Alabama While Protecting our Communities*, ALABAMA DEPT. OF PUB. HEALTH (April 28, 2020), <https://www.alabamapublichealth.gov/news/2020/04/28c.html>.

risk of voting for *all* in-person voters. Failure to implement this reasonable and effective measure will inevitably discourage voters from taking to the polls, leading to an irreparable loss of their rights. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law.”).

III. THE TWO-WITNESS AND PHOTO ID REQUIREMENTS VIOLATE PLAINTIFFS’ FUNDAMENTAL RIGHT TO VOTE UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS APPLIED DURING THE COVID-19 PANDEMIC

A. The State Has Not Taken Sufficient Action to Ensure Absentee Voters Can Vote Safely During the Pandemic

Amici applaud Secretary Merrill’s actions to expand access to absentee voting in Alabama, most significantly by allowing all voters who are concerned about their risk of COVID-19 to vote absentee in the November 3, 2020 general election. Yet this step, standing alone, is simply insufficient to provide voters with a safe alternative to voting in-person this November.

Even before the COVID-19 pandemic, Alabama was a national outlier for its uniquely burdensome absentee voting process. Nationwide only twelve states have

witness or notary requirements applicable to absentee voters.⁷ Of these, only three states, including Alabama, require absentee voters to have their signature on the envelope containing their ballot witnessed by *two* other persons. *Id.* However, North Carolina has lessened this requirement to one witness for elections in 2020 in light of the COVID-19 pandemic. *See* N.C. Sess. Laws 2020-17 §1(a). And public officials in Rhode Island entered into a consent order to suspend their witness requirement for its remaining elections in 2020. *See Gorbea*, 2020 U.S. Dist. LEXIS 135267. By enforcing its two-witness requirement during the COVID-19 pandemic, Alabama stands alone.

Alabama's photo ID requirement is also a rarity nationally. While several states require proof of a photo ID for first time voters, only four states, including Alabama, require all or nearly all absentee voters to provide a photo ID with either their absentee ballot application or absentee ballot.⁸ As a result of the photo ID and two-witness requirements, and the State's failure to take other affirmative steps to facilitate absentee voting, a recent watchdog report, which graded each

⁷ *See* Chart, *Verifying Authenticity of Absentee/Mailed Ballots, Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, NAT'L CONF. OF STATE LEGISLATURES, (July 10, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

⁸ *See Absentee Ballot Rules*, VOTE.ORG, <https://www.vote.org/absentee-voting-rules/> (last visited 10/5/2020). Other states require that a first-time voter submit a photo ID with their absentee ballot application.

state on its efforts to provide voters with the opportunity to vote by mail during the pandemic, reserved its sole failing grade of “F” for Alabama.⁹

In-person voting presents a clear and present risk to Alabama voters’ health, making absentee voting an indispensable option for many during the COVID-19 pandemic. *See* Doc. 250 at 21-23. Accordingly, this November a record share of the Alabama electorate is expected to vote absentee. At trial, the Secretary Merrill predicted that more than 150,000 Alabama voters (representing about 7% of the total votes cast in Alabama’s 2016 general election) will vote absentee in the November 3, 2020 general election. 9/14/2020 Rough Tr. at 47. This may be a substantial under-estimate, as two national surveys indicate 35% of voters intend to vote by mail.¹⁰

In light of the record number of anticipated absentee voters for the November general election, the two-witness and photo ID requirements will require tens of thousands of absentee voters to risk their health to vote. Two people or a notary cannot “witness” a voter’s signature on the ballot without some

⁹ Elaine Kamarck et al., *Voting by Mail in a Pandemic: A State-by-State Scorecard*, THE BROOKINGS INSTITUTION, <https://www.brookings.edu/research/voting-by-mail-in-a-pandemic-a-state-by-state-scorecard/>.

¹⁰ Miles Parks, *Fewer People May Vote By Mail Than Expected. That Could Mean Election Day ‘Chaos,’* NPR (Oct. 1, 2020), <https://www.npr.org/2020/10/01/916494111/fewer-people-may-vote-by-mail-than-expected-that-could-mean-election-day-chaos>.

degree of in-person social interaction. Doc. 250 at 74-79. Of the 3.8 million individual Alabamians of voting age, 555,330 live alone, and a total of 1.57 million (41.3%) live alone or with only one other person. Doc. 20-1 at 6 (citing Pl’s Ex. 36, Cooper Decl. ¶ 13). These voters do not live with two adults capable of serving as witnesses, and will ordinarily not be able to comply with the two-witness requirement without violating social distancing guidelines. Assuming an estimated 41.3% of the over 150,000 likely absentee voters this general election live alone or with only one other person, nearly 62,000 absentee voters will ordinarily not be able to comply with the two-witness requirement without violating social distancing guidelines and risking their health.¹¹ This group also includes a disproportionate number of elderly Alabamians, as 38.9% (215,966) of Alabamians living alone are age 65 and older. *Id.* ¶ 7. And 44% of Alabamians over 65 both live alone and have a disability. *Id.* ¶ 8. Both the disabled and the elderly are statistically significantly more likely to vote absentee than the general population.¹²

¹¹ This number is highly under-inclusive. In a four-person household consisting of two parents and two children, the parents will not be able to comply with the two-witness requirement without violating social distancing guidelines. In addition, not all adults will be capable of serving as witnesses. Finally, it fails to account for the countless citizens who may fear infecting a member of their household, even if they do not consider themselves to be at risk.

¹² See *EAVS Deep Dive: Early, Absentee and Mail Voting*, U.S. ELECTION ASSISTANCE COMM’N (Oct. 17, 2017), <https://bit.ly/3my4cGM> (“33 percent of voters 70 years and older voted absentee, compared to 20 percent of voters in

The photo ID requirement impacts an even larger share of the absentee voting population. In order to comply with the photo ID requirement without violating social distancing guidelines, voters must possess (1) an eligible photo ID, (2) a smartphone or scanner capable of imaging the ID, *and* (3) a printer to produce a copy. Voters who lack any of these will be forced to congregate with the general public to visit a government building to acquire an ID and/or a commercial vendor where they must pay for the necessary scanning and printing. Older voters are particularly burdened, as they are even less likely to own a computer, and more likely to require assistance with its use.¹³ The burden also falls disproportionately on Black Alabamians, with 18.9% of Black households lacking a computer, tablet, or smart phone, while only 11% of white households lack such access. Doc. 250 at 178.

B. The Two-Witness and Photo ID Requirements are a Severe Burden on Alabama Voters' Fundamental Right to Vote

The right to vote by absentee ballot is protected where meaningful alternatives are unavailable. *See O'Brien v. Skinner*, 414 U.S. 524, 530 (1974);

their thirties” and “30 percent of voters with a disability . . . voted absentee, compared to 22 percent of voters without a disability”).

¹³ In one survey, 73% of those aged 65 and older said they usually require assistance using a new electronic device. Monica Anderson and Andrew Perrin, *Tech Adoption Climbing Among Older Adults*, PEW RES. CTR. (May 17, 2017), <https://www.pewresearch.org/internet/2017/05/17/barriers-to-adoption-and-attitudes-towards-technology/>.

Am. Party of Tex. v. White, 415 U.S. 767, 795 (1984) (“[i]t is plain that permitted absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable means to vote, is an arbitrary discrimination violative of the Equal Protection Clause.”). The privilege of absentee voting is certainly “deserving of due process[.]” *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990). Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted. *See Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018); *Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978) (state’s refusal to count valid absentee and shut-in ballots unconstitutional).

In the midst of a global pandemic, in-person voting presents clear and obvious risks to voters’ health. *See* Doc. 250 at 21-23. For countless voters, in-person voting is effectively a non-option. *See Common Cause Ind.*, 2020 U.S. Dist. LEXIS 179161, at *45 (“Appearing in person is an option not available to many absentee voters, who may be disabled, seriously ill, homebound, out of the state, or remaining sequestered at home to avoid COVID-19’s devastation.”). Yet instead of providing a safe refuge from in-person voting during the pandemic, the two-witness and photo ID requirements mandate that absentee voters also must flout State and federal guidance and put their health at risk. Voters are thus forced

to make the untenable and illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease. Where in-person voting is effectively unavailable to many, the two-witness and photo ID requirements “intimately effect[] the fundamental right to vote[.]” *Id.* at *48.

Even prior to the pandemic, this Court has protected the rights of absentee voters to ensure their ballots are cast and counted. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (law denying absentee voters opportunity to cure signature mismatch “imposes at least a serious burden on the right to vote”). During the COVID-19 pandemic absentee voting has taken on new significance, and the courts have played a crucial role in suspending barriers to voting to protect voters’ health and safety. *See* § I, *supra*; *see also Common Cause Ind.*, 2020 U.S. Dist. LEXIS 179161; *League of Women Voters of Va.*, 2020 U.S. Dist. LEXIS 79439; *Gorbea* 2020 U.S. Dist. LEXIS 135267.

Defendants have characterized the burdens imposed by the two-witness and photo ID requirements as minimal. They are not. The burdens fall on any absentee voter who does not live with two adults capable of serving as witnesses, *and/or* does not own each of an eligible photo ID, a smartphone or scanner, and a printer. Courts have found that laws burdening far fewer (and a lower percentage of) voters violate *Anderson-Burdick*. *See, e.g., Ne. Ohio Coal. For Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) (enjoining state from rejecting ballots cast in

the wrong precinct, impacting less than .248% of votes cast); *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018) (enjoining state from rejecting ballots due to signature mismatch, impacting .35% of ballots); *see also League of Women Voters of N.C.*, 769 F.3d at 244 (“even one disenfranchised voter . . . is too many”). The burden is further magnified by its disproportionate impact on the elderly and/or disabled, who often rely on absentee voting out of necessity. *See Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 107 n.8 (2d Cir. 2008) (noting that for “voters who are . . . housebound” the burden of a lack of absentee voting opportunity “could be quite significant”).

Even assuming that a majority of voters “are able to comply[,]” this “does not mean that the burdens that these laws impose are constitutionally insignificant.” *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 930 (W.D. Wis. 2016); *see also Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (“The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary [photo ID] credentials easily.”). Whether the voter risks her health or simply refrains from voting, the voter suffers an irreparable injury. *See League of Women Voters of N.C.*, 769 F.3d at 247; *Thakker v. Doll*, 2020 U.S. Dist. LEXIS 59459, at *10 (M.D. Pa. Mar. 31, 2020) (there “can be no injury more irreparable” than “serious, lasting illness or death”). “Taking an

unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote.” *Gorbea*, 2020 U.S. Dist. LEXIS 135267, at *15.

C. The State’s Interests in Enforcing the Two-Witness and Photo ID Requirements are Minimal

Defendants criticize the District Court for “repeatedly second guess[ing] the State’s legitimate interests in combatting voter fraud and conducting orderly elections[,]” Def’s MFS at 15 (citing *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014)). However, the State’s interest in preventing fraud does not render these requirements unassailable. *Anderson-Burdick* requires that for Constitutional challenges to election laws, including *facial* challenges, “court[s] must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule” instead of “applying a [] ‘litmus test’ that would neatly separate valid from invalid restrictions[.]” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008). Here, the District Court appropriately evaluated the State’s interests in enforcing the two-witness and photo ID requirements and found their utility as fraud prevention measures was “marginal[.]” Doc. 250 at 130, 135; *see Gorbea*, 2020 U.S. App. LEXIS 25062, at *15 (finding the state’s “incremental interest in . . . the two-witness or notary rule[] is marginal at best”).

The federal courts regularly enjoin the enforcement of election laws as to voters who cannot comply with “reasonable effort[.]” *See Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016). Here, Plaintiffs request only a suspension of the

Challenged Requirements for a limited period (through the November 3, 2020 general election), during which no amount of “reasonable effort” will allow Alabama voters to cast a ballot without risking their health. In light of the District Court’s reasoned evaluation of the burdens against the State’s interests, the Challenged Requirements must give way to Plaintiffs’ Constitutional rights.

IV. THE DISTRICT COURT’S ORDER DOES NOT VIOLATE THE *PURCELL* PRINCIPLE

Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam) cautions that federal courts refrain from rewriting state election procedures shortly before elections so as to avoid voter confusion. However, the *Purcell* principle does not impose an arbitrary deadline beyond which federal courts are forbidden to act. Rather, it expresses the caution that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Id.* *Purcell* stands for an equitable principle, to be applied only when the facts and circumstances compel it. In this case, they manifestly do not.

This case is materially distinguishable from the Supreme Court’s recent stay of the District Court’s injunction of South Carolina’s single witness requirement for absentee voters. *Andino v. Middleton*, 592 U. S. ____ (Oct. 5, 2020). First and foremost, here the District Court correctly determined that “State defendants are judicially estopped from raising [the *Purcell*] objection.” Doc. 250 at 116.

Defendants do not dispute that the District Court correctly determined in June that relief for the November 3, 2020 general election was “speculative.” Defendants have offered no principled rule by which the District Court, assuming Plaintiffs’ rights were violated, could have granted relief between the “speculative” and “*Purcell*” windows. Defendants were properly estopped from asserting a theory which, if true, renders state actors effectively immune from judicial review of even the most blatant violations of voters’ Constitutional rights in the months and weeks prior to an election. *Id.* at 110.

The robust trial record on which the Court based its Order also distinguishes *Andino*, and nearly every other instance in which the Supreme Court has invoked *Purcell*. *Purcell* in fact stands explicitly for the principle of deference to the finder of fact. *Purcell*, 549 U. S. at 5 (admonishing the Court of Appeals for failing to accord deference to “the ruling and findings of the District Court”). The *Andino* court issued a *preliminary* injunction based on the parties’ motions and a hearing, not a full trial on the merits. *See Middleton v. Andino*, 2020 U.S. Dist. LEXIS 171431, at *27 (D.S.C. Sep. 18, 2020). The court also considered only a *single* witness requirement for absentee ballots, which is fundamentally easier to comply with and thus a lower burden on voters. *Id.* at 20. And the *Andino* court relied entirely on the Constitutional burdens the requirement posed, *id.* at 67-87, whereas here the District Court’s Order is also supported by violations of the Voting Rights

Act and Americans with Disabilities Act. *See* Doc. 250 at 179 (Plaintiffs proved that “Black voters who are at high-risk are less able to safely meet the absentee voter witness requirement than comparable White voters”).

The District Court’s Order with respect to curbside voting simply permits a voting process already allowed by Alabama State law. Similarly, the District Court’s *suspension* of the two-witness and photo ID requirements is fundamentally less likely to confuse voters or burden election officials than an affirmative obligation. When considering the suspension of Rhode Island’s two-witness requirement, the First Circuit noted, “to the extent certain voters expect the two-witness or notary requirement, we cannot imagine that it will pose any difficulty not to have to comply with it. For this reason, the consent judgment and decree poses no conflict with the sort of expectations that concerned the court in *Purcell* and no substantial specter of confusion that might deter voters from voting.” *Gorbea*, 2020 U.S. App. LEXIS 25062 at *10.

In the judgment of *amici curiae*, organizations which invest significant time and resources educating voters, the suspension of the Challenged Requirements will be a substantial benefit to Alabama voters. It will increase voter turnout, and relieve the anxiety of many seeking and hoping to vote safely this November. Voters understand, and have a right to expect, that certain election rules will be suspended

in response to a global pandemic, as they have been elsewhere. This is a reasonable expectation, which the District Court's Order protects.

CONCLUSION

For the aforementioned reasons, this Court should deny Defendants' Motion for Stay, and allow voters to exercise their fundamental right to vote without undue risk to their health and safety.

Dated: October 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This undersigned hereby certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. The undersigned hereby certifies that this brief complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding parts of the documents exempted by Fed. R. App. P. 32(f), this document contains 5,059 words.

Date: October 6, 2020

/s/ John A. Borek
John A. Borek

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury pursuant to 28 U.S.C. § 1746 that on October 6, 2020, he electronically filed the foregoing Brief via the Court's CM/ECF system, and that such filing effected service of the foregoing Brief on all counsel who are CM/ECF participants in this case.

The undersigned further certifies that on October 6, 2020, he caused true and correct copies of the foregoing brief to be served on the below-listed attorneys by deposit in U.S. mail, with first class postage prepaid:

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