No. 19A1063

In the Supreme Court of the United States

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 under this Court's framework for assessing challenges to election laws.

1. First, Respondents do not seriously argue that the district court's injunction can be squared with this Court's "repeated[] emphasi[s] that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Instead, Respondents argue that *Purcell* was motivated by the concern that a circuit court had entered an injunction that a district court refused to enter. But, of course, the *Purcell* principle applies to *all* "lower federal courts," not just circuit courts. *Id.* Indeed, the recent stay application out of Wisconsin should have been denied if the Court thought that Respondents' argument had merit. *But see id.* ("The District Court's order granting a preliminary injunction is stayed.").

Respondents thus try to turn *Purcell* upside down. In their what's-done-is-done view, maybe the district court should not have altered the rules of an ongoing election, but allowing the original rules to go back into effect would cause confusion. *See* Resp. 34-35. Again though, the same could be said in *Republican National Committee*, 140 S. Ct. 1205, yet this Court entered a stay. And rewarding plaintiffs by allowing them to lock in unmerited alterations of elections laws would be a bizarre application of *Purcell* that would encourage more last-minute litigation and confusion.

2. Respondents' arguments on the merits similarly confirm that the district court has misapplied this Court's precedent. This Court has recognized that States

have a strong interest in deterring voter fraud and promoting public confidence in elections, for surely the right to vote includes the right to vote in an election where "safeguards exist to deter [and] detect fraud [and] to confirm the identity of voters." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). Thus, Alabama voters must submit a photo ID with their application for an absentee ballot and have two witnesses (or a notary) sign the envelope in which they return the ballot.

Respondents (at 30) contend that the witness requirement does not sufficiently further the State's interests because it might not deter or help detect every instance of voter fraud. But that is not the test. And the way the requirement may help is not hard to imagine. If the same person or same handwriting is seen again and again for witnesses, or witnesses' names do not match their addresses, the State has far more evidence of voter fraud than under the district court's preferred policy of just asking the same voter (or fraudster) to sign *two* pieces of paper instead of one.

Respondents also contend (at 29) that the photo ID requirement can be scrapped because absentee ballot applicants must also supply their drivers license number or last four digits of their social security number. But the State need not submit evidence to substantiate the reasonable conclusion that it is harder for a fraudster to obtain copies of voters' IDs than their personal identifying information.

Against the State's weighty interests, Respondents contend that it has been all but impossible to safely obtain a photocopy or a witness signature over the last 100-plus days. The State, of course, noted that a voter could easily and safely step outside to meet a masked witness. Respondents assert that "there is no evidence that"

Peebles (who is not eligible to vote on July 14) or members of People First (none of whom have been identified) "could engage in the State Defendants' proposed choreography." Resp. 27. But Respondents thus underscore why their claims should have failed, for there is no evidence that they *cannot* take such steps to safely comply with Alabama law. (And, in fact, there *is* evidence Peebles could go outside to meet a witness; he says he left home to vote on March 3, 2020, and that he'd do it again to vote curbside. D. Ct. Doc. 16-45 at 8-9.) Because Respondents "have advanced a broad attack on the constitutionality of" Alabama's laws, "they"—not the State—"bear a heavy burden of persuasion." *Crawford*, 553 U.S. at 200. They failed to meet it.[1]

3. As for Respondents' claim that Secretary Merrill's "ban" on curbside voting violates the ADA, they again assert that curbside voting is a reasonable accommodation because, "other than minor logistical concerns related to implementation, curbside voting would not fundamentally alter Alabama law." Resp. 36. This is pure speculation. The Secretary of State's office explained that the (many) logistical concerns in implementing curbside voting are anything but "minor." *See* App. 27-28; D. Ct. Doc. 34-1 at 24. Respondents have offered no evidence to counter that assessment.

Finally, contra Respondents' assertion otherwise, state law does indicate that the photo ID requirement is an essential eligibility requirement of having an absentee

[1] Respondents dispute the relevance of the 100-plus days they have had to safely obtain their ballots by arguing they were subject to "a strict Stay-at-Home order in March and April." Resp. 27-28. But Alabama's stay-at-home order was not put into effect until April 4, 2020, *see* Stay-at-Home Order, https://bit.ly/2BX7i4q, and it expired on April 30, *see* Safer-at-Home Order, https://bit.ly/2NOi8Mu.

ballot counted. It says so in the statute: "[A]n absentee ballot shall not be issued unless the required identification is submitted with the absentee ballot application." Ala. Code § 17-9-30(b); *see also id.* § 17-9-30(c); *Townson v. Stonicher*, 933 So. 2d 1062, 1065-67 (Ala. 2005). That the State offers certain exemptions from the photo ID requirement to comply with federal law does not make the requirement any less essential for other voters. The exception is limited and required, and the general rule applicable to everyone else is right there in the statute—unlike the PGA's "walking rule" in *PGA Tour, Inc. v. Martin*, where there was "nothing in the Rules of Golf that either forbid[] the use of carts or penalize[d] a player for using a cart," and where the rule relied on by the PGA was "based on an optional condition buried in an appendix to the Rules of Golf." 532 U.S. 661, 685 (2001).

4. That leaves Respondents to make the baseless claim that the "State Defendants are not harmed" by an injunction that prevents the State from enforcing its laws. Resp. 6. But States have an "easily identified" interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). The State enforces its photo ID and witness requirements through absentee election managers, and when the district court enjoined AEMs from enforcing State law, the court harmed the State.

Respondents contend that the State cannot seek relief from this Court because "it is a basic rule that a party may not appeal from a judgment in its favor." Resp. 15 (citing *Mathias v. Worldcom Techs., Inc.*, 535 U.S. 682, 684 (2002)). But the *Mathias*

Court dismissed a writ of certiorari as improvidently granted because it determined "that petitioners were the prevailing parties below, and seek review of uncongenial findings not essential to the judgment and not binding upon them in future litigation." 535 U.S. at 684. Here, the State does not seek review of stray findings; it seeks a stay of the district court's *injunctions*—i.e., its preliminary judgment—because it is the holdings of the court that harm Applicants. *Cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980) (explaining that an "appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III").

Likewise, Respondents fault the State for invoking sovereign immunity below and seeking relief from the district court's orders. Resp. 16. But there is nothing incongruous about this. *See Lapides v. Bd. of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613, 620 (2002). Unlike the State of Georgia in *Lapides* (upon which Respondents rely), which "voluntarily agreed" to invoke the jurisdiction of the federal courts by removing state-law claims to which it had already waived immunity in state court, Alabama did not choose to come to federal court. *See* 535 U.S. at 619. Instead, Respondents sued the State, and though the State has asserted that it is not a proper party below, it remains a defendant that Respondents have sued, but one which they say cannot get relief from the district court's judgment in the very action to which Respondents have made it a party. That is not what *Lapides* prohibits.

CONCLUSION

This Court should stay the district court's injunction.

Dated: July 2, 2020

Respectfully submitted,

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