

No. 20A67

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.

RESPONSE IN OPPOSITION TO 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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TRIAL TRANSCRIPT EXCERPTS

September 11, 2020

CASE NO. 2:20-cv-00619-AKK

PEOPLE FIRST OF ALABAMA, et al.,

v.

JOHN MERRILL, et al.,

THE COURT: Any issues that anyone wants me to address this morning before we begin?

MR. DAVIS: I don't think so. From the State Defendants' perspective, we'd appreciate the opportunity to speak with Plaintiffs' Exhibit's counsel maybe this evening about how long you expect to go on Monday so we'll know how much witnesses we need to have up and prepared to testify on Monday.

THE COURT: That makes sense. Okay, folks. If you don't need me, we will -- looks like all systems are go. We will start officially in eight minutes. Thanks, everyone for being here this morning, obviously.

THE COURT: Are Plaintiffs ready to proceed?

MS. MERLE: Yes, Your Honor.

THE COURT: Who is your first witness?

MS. MERLE: Your Honor, Plaintiffs call Secretary of State for the State of Alabama and request permission to treat him as an adverse witness party under the Rule 611.

THE COURT: Secretary Merrill, you are on, sir. Good morning.

THE WITNESS: Good morning, Judge.

officer.

Q. And that -- the safety it provides -- that face masks provide, that would extend to polling precincts as well?

A. Counselor, it's my understanding that extends to all environments in which people are present.

Q. And because of this, your office has actually encouraged poll workers to wear face masks, correct?

A. Not only have since we encouraged it, we have provided resources for them to be able to do so.

Q. But poll workers are not required to wear face masks in polling precincts, correct?

A. Counselor, no one in the State of Alabama is required to wear a face mask anywhere. There is no statutory authority that defines that.

Q. Are poll workers required to wear face masks in polling precincts, yes or no, Secretary?

A. No individual is required to wear a face mask anywhere.

Q. I'm asking about poll workers specifically --

A. Yes, ma'am. We encourage poll workers to wear face masks and other protective gear.

Q. But they are not required to?

A. Nobody in the State of Alabama is required to.

Q. You've received -- since the July 14th election, you received a complaint about unsafe polling precincts including poll workers not wearing masks during the election, correct?

Q. This is PX 150. And you see it's from a Mobile County official sent to a number of individuals including yourself, Secretary?

A. I see that.

Q. And then the last line of the first paragraph, it states, "in Mobile County, many of the polling locations that create the biggest issues with the CDC guidelines serve predominantly minority communities;" is that correct?

A. That's what Mark Erwin said in this email.

Q. Did you respond to Mark Erwin concerning this?

A. I did not respond to Mark Erwin myself related to this. Any communication related to this issue would have come from my assistant but probably could have come directly from my legal counsel, Hugh Evans.

Q. And you don't know either way whether Hugh Evans responded?

A. Hugh responds to every inquiry that comes to our office. How he responded to it, I can't say whether it would be through an email, other written communication, or verbal communication either in person or through a telephonic device.

MS. MERLE: Eric you can take that down. Thank you.

Q. Secretary, I want to ask you a couple questions about electronic poll books?

A. Yes.

Q. Currently, there's 35 counties in Alabama that have

electronic poll books?

A. Actually, there's more than 60 now.

Q. Is your office providing for every county to have a poll book before the November election?

A. We have offered that opportunity to all 67 counties. 35 -- counselor, 35 counties already had them. They had purchased those over the past four years going back to 2016 when we introduced them. And we made them available to the other counties in the state hopefully to have them fully implemented by November the 3rd. But that's not going to be the case because all of them have not agreed to accept that offer that we've made where we will pay for the item of their choice to be delivered to them and implemented for the administration of the election.

Q. Do you know which counties did not accept the poll books?

A. I don't have that list with me today.

Q. But did you testify that over 60 counties have the poll book currently?

A. That is correct. The last number that I had from our office was that 60 had committed to use the electronic poll book on Election Day, November the 3rd. And the other seven that have not, have made that decision on their own. They have constantly said we do not wish to accept this at this time.

Q. Secretary, I want to switch to curbside voting. And if I refer to curbside voting as allowing a voter to vote at their assigned precinct but within their car, whether they call ahead or the poll

worker is waiting outside but they are allowed to vote in their car, do you think that that is what I am referring to when I say curbside voting?

A. I do.

Q. Okay. And you are aware of instances of curbside voting being provided by county officials in Alabama, correct?

A. I have been made aware of that in the past.

Q. And one instance was in Perry County?

A. One of those instances that was reported to me was in Perry County.

Q. One instance was in Hale County; is that correct?

A. That is correct.

Q. And one instance was in Chilton County, correct?

A. I am not aware of that.

Q. So you are aware of Perry and Hale County instances?

A. That is correct.

Q. So focusing first on Perry County, that was in 2018, correct?

A. That was when it was reported to me.

Q. And in that case, two employees in your office, Ed Packard and Hugh Evans, they were the individuals actually on site when they learned of the curbside voting happening in Perry County?

A. That is correct.

Q. Okay. And those two employees, Mr. Packard and Mr. Evans, they informed the poll workers that curbside voting was not allowed in Alabama and they needed to cease and desist, correct?

A. That is correct. That's what was reported to me.

Q. And you think that Mr. Packard and Mr. Evans, you think that their actions in stopping curbside voting in Perry, you think that was -- you agree with the steps they took to stop that from happening?

A. That is correct. It's their charge to make sure that the law in Alabama is followed. That is not state law in Alabama to permit curbside voting.

Q. And you agreed with their decision to stop curbside voting even though you don't know what disability the voter had?

A. That is correct.

Q. And the disability that the voter had, that was not relevant to whether curbside voting should be allowed or not?

A. That is correct. Because we only care about abiding by the law.

Q. And you don't know whether the polling precinct where this was occurring at, you don't know whether it was accessible to individuals with disabilities, correct?

MR. DAVIS: I wish to lodge an objection on the record. I do not believe it has been established that the voter in question had a disability. And, now, I apologize, Ms. Merle. I'm not sure I understood the question that you were trying to ask after that.

THE COURT: There's nothing in the record that the voter had a disability. But the question is fair. Then the next question, I guess will lodge a similar objection. The question was if that

particular polling place was accessible to persons with disabilities. Same objection, Mr. Davis?

MR. DAVIS: If the question is just whether Secretary Merrill is aware of the accessibility of the polling place, I do not have an objection to him responding to what personal knowledge he has about that.

THE COURT: Okay. Mr. Secretary, you may answer the question, sir.

THE WITNESS: Judge, I have no knowledge of that.

Q. (BY MS. MERLE:) In this instances in Perry County, you don't know if somebody else had signed the poll list for the voter, correct?

A. I do not.

Q. And you don't know whether ballot secrecy was compromised during the curbside voting?

A. I do not.

Q. You don't know whether the curbside voting that was going on in Perry County, whether it was causing any traffic flow issues at that precinct?

A. I do not.

Q. You did not hear complaints from the election officials that were providing curbside voting that the accommodation was not feasible?

A. I did not.

Q. Do you know the general racial demographics of Perry

County?

A. I do. I know that Perry county is a predominantly minority-majority county.

Q. The other instance of curbside voting was in Hale County in 2016?

A. That is correct.

Q. And in this instance, the constituent actually called you directly with the instance of curbside voting, correct?

A. That is correct.

Q. And when the constituent called you, they informed you that voters were voting from their car. That's what the -- yes. That voters were from voting from their car?

A. That is correct.

Q. And you called Hale County probate judge, Judge Crawford; is that correct?

A. That is correct.

Q. And you told Judge Crawford to cease and desist curbside voting?

A. Well, I asked Judge Crawford if he was familiar with the incident that had been introduced to me, and he said he was. And then I asked him under what authority granted to him in the Alabama code or the constitution was he able to offer that as a service to the voters. And he responded that it was a convenience for the voter. And then I asked him again to what authority granted to him in the Alabama code or the constitution

was he allowed to do that. And he could not cite a provision in the code or the constitution where he was able to do that.

And then I asked him to immediately cease and desist, and he said that he would. Because I also told him if I needed to call Kenneth -- that's Sheriff Kenneth Ellis who is the sheriff in Hale County -- to offer assistance for him, I would be happy to do so, and he told me that that would not be necessary.

Q. So when you were having this conversation with Judge Crawford, did you ask whether the voters that were being provided the service, did you ask whether they had disabilities?

A. I did not.

Q. That wasn't relevant to your consideration about whether curbside should be --

A. No, I did not know, and I did not care because it's against the law. There is no provision in the code or the constitution that provides for curbside voting. And, you know, it's interesting because I've had people that have asked me before about whether or not it matters related to the person's ability or disability. And the reason that's important to me personally is because my father was an amputee and spent the last part of his life in a wheelchair, which I took care of him whenever I could. My mother did for several years. But the reason I introduce that to you is because it's not important if it's not allowed by law. It doesn't matter what the status of the individual is. Period. Only thing that matters is the law.

Q. And you don't know if the polling precinct that you were talking to Judge Crawford about -- you don't know whether the polling precinct was accessible to --

A. I do not.

Q. And you had no indication that someone other than the voters had signed the poll list?

A. I do not know.

Q. And you had no information about ballot secrecy being compromised?

A. I have not.

Q. And you didn't know whether there was traffic flow issues from curbside being provided?

A. I do not. I just know it was against the law.

THE COURT: Karen, can we figure out who else needs to be muted, please. Secretary Merrill and to the lawyers, please accept our apologies for that outburst. We will try to see if we can pinpoint the source and mute that microphone.

Ms. Merle, you may continue.

Q. (BY MS. MERLE:) As far as you are aware, Secretary, Judge Crawford has not provided curbside voting again after you called him and -- yes. He hasn't provided curbside voting again as far as you are aware?

A. Not to my knowledge.

Q. And do you know the racial demographics of Hale County?

A. I do. Hale County is a minority-majority county. It is a

neighbor to me in Tuscaloosa County. And both Judge Crawford and Sheriff Ellis are both African-Americans. And you didn't ask this but so is Judge Anderson in Perry.

THE COURT: Folks, I don't know if we're going to be able to solve this mystery. Everyone's microphones are off except for Ms. Merle and the Secretary's and mine. I know federal Zoom is a bit more secure than public Zoom. So, hopefully, this is not a sign of some hack. But please continue, and I'll keep my fringes crossed.

MS. MERLE: Yes, Your Honor.

Q. And, Secretary, you've testified -- let me ask it this way. Curbside voting is not discussed in the Alabama code, correct?

A. That's correct.

Q. Is it your understanding as the chief election official that voters are allowed to receive assistance from poll workers?

A. Yes. That is allowable.

MS. MERLE: Your Honor, at this time, I'd pass the witness.

THE COURT: Okay. Thank you. For the Defendants, are you going to examine Secretary Merrill now or defer for your case? Mr. Davis?

MR. DAVIS: Your Honor, for the sake of efficiency, we would prefer to go ahead and do that at this time.

THE COURT: You may.

MR. DAVIS: Thank you. And, Your Honor, before I begin, does the Court have a preference for when we take our morning

Q. Do they have to make several trips, or can they complete the process in one visit to the absentee election manager?

A. Yes, sir, they can complete the process in one visit.

Actually, counselor, in most instances when I vote, I actually vote absentee in person. And I will do what you've just described which is what I did for the March 3rd primary. I actually returned my absentee ballot by mail for the July 14th runoff and returned it in March when it -- right after it was mailed to me. And I will most likely return the November 3rd general election ballot through the mail as well.

Q. Would it be permissible for the absentee election manager to hold an event outside of his or her office to allow people to come in and complete the absentee voting process?

A. Oh, absolutely. And it is something we encouraged. As a matter of fact, we have communication with the circuit clerks and the absentee election managers to make sure they know that this is something they should consider in their county. Most recently, counselor, last Thursday I was making a presentation to 100 black women in the State of Alabama. They have a chapter in Huntsville, and they'd ask me to be their speaker. And one of the individuals that was on the call -- it was a Zoom call similar to what we're doing today -- said to me, why can't we get people to come to Alabama A&M and actually have an in-person voting day for the absentee process. And --

MS. MERLE: Go object to the hearsay in Secretary Merrill's

testimony.

THE COURT: Overruled.

THE WITNESS: Judge, I thought I was the one that experienced it. So it wasn't hearsay. It was me talking.

THE COURT: Overruled, sir. You may answer.

THE WITNESS: Okay. Thank you, Judge.

So, nevertheless, I told them, I said, look, not only is this something that can happen, it's something you should consider doing. I should you need to contact Debra Keizer, who is the circuit clerk and absentee election manager in Madison County, and tell her you'd like her to pick a day that's convenient for her on her schedule to come to Alabama A&M, and y'all host a day. I said, furthermore, you really need to invite the students at the University of Alabama Huntsville and the students from Oakwood and the students from Calhoun to come to your campus and have a bulldog party day and have hot dogs and Coca-Colas and just have a voting day all day for people that want to come and participate there. And they said, we could do that? I said, of course.

I said, absentee election manager's office is where the absentee election manager is. We see absentee election managers going to nursing homes, assisted living facilities, and other locations like that. But I believe we should think outside the box in all the things that we do as long as they're permissible by law. And this is. And that's why I suggested it to them. I know

they've been in contact with the probate judge and with the circuit clerk.

And, counselor, they are currently working on making that happen in Madison County.

Q. (BY MR. DAVIS:) Now, if a voter gets in touch with the absentee election manager and asks the AEM to meet him or her in the parking lot, for example, says, I'm going to have trouble getting up to your office, completed myself absentee ballot application, could you come down so I could hand it to you from my car, is it your understanding that that would be permissible?

A. Absolutely.

MS. MERLE: Objection.

THE WITNESS: And not only that --

THE COURT: Secretary, hold on for a minute, please. What's the objection, ma'am?

MS. MERLE: Speculation and also personal knowledge.

THE COURT: Okay. With the caveat that the Secretary will explain why he knows that for a fact, I will allow the answer.

THE WITNESS: Yes, sir. Thank you, Judge. The absentee election manager can receive the absentee ballot, or an assistant absentee election manager, anyone that is legally charged with proper custody of the ballot could receive that from the voter regardless of where they were. If they were at a grocery store, the nursing home, the parking lot as you asked, any location where the chain of custody is not broken from the voter to the

Now, you asked me earlier, if I'm remembering correctly, counselor, whether or not someone could be assisted in voting. And they can. That is permissible by law. And the assistance that's necessary will be provided at whatever level as needed. I also think it's important to note that in an ADA compliant environment, which all of our polling sites are, that our intent and desire is for the individual, the voter, to be able to cast their ballot independently.

Q. And if the voter has a disability that does not allow for them to independently feed the tabulation machine, that would not break the chain of custody if they got assistance in feeding the tabulation machine, correct?

A. Not if it were done in accordance with prescribed procedure as far as assistance is concerned. I can't really imagine a situation like you're talking about but --

Q. You can't imagine a person with a disability not being able to feed a tabulation machine?

A. No, I -- counselor, that's you saying that. What I'm saying to you is I can't imagine a situation where the voter would not be able to do what they wanted to do as far as completing their ballot and putting the ballot in the tabulator without being right there with the person who's assisting them. But I also think it's important to know that any instance that might be one that the individual with a disability would feel as though their situation was compromised, that individual can vote through the absentee

TRIAL TRANSCRIPT EXCERPTS

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doing that in their case when they get it. But all right.

I think that I have resolved all of the motions in the sense that I have agreed to carry them all to review specific testimony related to these motions. And then obviously, the Defendants can renew the motions at the end of their cases as well. So I am ready to go forward with the evidentiary phase of the Defendants' case. Let's break until 11 a.m. and then we will begin.

MR. ENGELHARDT: Your Honor. I'm sorry to interrupt you. I just want to make sure before we left, if it's all right, I wanted to orally join the State's motion in regard to the poll tax too.

THE COURT: Duly noted.

MR. WEBB: And, Your Honor, our clients, Lee, Lowndes, and Wilcox, wanted to join the arguments made by the Mobile County Defendants.

THE COURT: Thank you all. We are in recess until 11 a.m. Who will be the first witness?

MS. HOLIFIELD: I believe that will be Judge Davis, Your Honor.

THE COURT: Thank you. Judge Davis, are you on, sir? We will start at 11:00.

JUDGE DAVIS: Good morning. Yes, I'm here. And I'm ready, willing, and able.

THE COURT: Thank you.

(Recess.)

THE COURT: Hello again, everyone. We may begin.

Mr. Speegle, Mr. Hale, who is doing the direct?

MR. SPEEGLE: It's me, Judge.

THE COURT: You may. Judge Davis, I know you are used to swearing people in. Can I get you to raise your right hand please so we can swear you in.

(Witness sworn.)

THE COURTROOM DEPUTY: Please state and spell your first and last name for the record.

THE WITNESS: My first name is Mallory. My last name is Davis.

THE COURTROOM DEPUTY: Could you spell it for me, Mr. Davis.

THE WITNESS: Mallory is M-A-L-L-O-R-Y. Davis is D-A-V-I-S.

THE COURTROOM DEPUTY: What city and state do you reside in, Mr. Davis?

THE WITNESS: I reside in Mobile, Alabama.

THE COURT: Thank you. Mr. Speegle, you may begin, sir.

MR. SPEEGLE: Thank you, Your Honor. Can you hear me fine?

THE COURT: Your microphone needs to be unmuted.

MR. SPEEGLE: Well, when I do that, we're going to hear feedback. I'm on the judge's microphone.

THE COURT: You're coming in faintly. Let me see. On my end.

MR. SPEEGLE: I'll try and be -- but I think we're going to get

Q. Okay. Great.

MS. ZARAGOZA: And actually, Eric, if you could take us to the next page. My apologies. Okay.

Q. So do you see the bottom paragraph there, Judge Davis?

MS. ZARAGOZA: Oh, you can zoom out, Eric, in light of Judge Davis's screen, please. Thank you. Okay.

Q. And so you determined that 46 precincts could not accommodate the same number of election officials who had worked in the March primary locations; is that correct?

A. Yes.

Q. Okay. And so for those locations, you would not have been able to accommodate any voters; is that correct?

A. Yes.

Q. Okay.

A. Or very few -- none or very few.

Q. And for many locations, you determined that they could only accommodate a handful of voters inside at a time in compliance with the CDC's social distancing guidelines and so that would be maintained?

A. Correct.

Q. Okay. Now, you testified that you were able to change some of those poll locations that could not comply with the CDC guidelines, right?

A. Yes. The county commission did. Not me. The county commission did it in consultation with me would perhaps be the

best way to be accurate.

Q. Okay. Thank you for clarifying. But for several polls, there were no other known facilitates in those precincts that could be an alternative location, correct?

A. Correct. Four.

Q. Okay. So you notified the Attorney General's office about these concerns prior to sending the letter on the screen, correct?

A. I notified the Secretary of State's office and the Governor's office. I believe the Attorney General's office was copied with the letters. I also submitted an Attorney General's opinion request to the Alabama Attorney General regarding some of these matters.

Q. Okay.

MS. ZARAGOZA: Eric, could you please bring up PX 407.

Okay.

Q. And do you recognize this document, Judge Davis?

A. Yes.

Q. Okay. What is this document?

A. This is my response to Mr. Jim Davis, who is an Assistant Attorney General in the AG's office regarding the proposals that I submitted to Governor Ivey for her consideration in terms of a possible modification of her emergency decree. The two things that I had recommended to Governor Ivey that she consider were, one, authorizing counties -- all Alabama counties to be able to utilize what is referred to as -- commonly referred to as the voting center concept for polls, and, two, to authorize us to use

fewer poll workers in the runoff election than we had utilized in the primary election. Mr. Davis had sent an email in response to that, and that was my response back to him.

Q. Okay. And you informed the Attorney General's office including Jim Davis that you were concerned you couldn't conduct the runoff elections at most of your current precinct polls?

A. Yes.

Q. Okay. And so you stated that you recommended voting centers; is that correct?

A. That was a concept -- yes. What I'm referring to is that the code of Alabama, the election code enables counties to have what are called voting centers instead of a poll in each precinct. What a voting center is, is where you have voters from more than one precinct voting at the same place. And the way that we thought this would work in some locations in Mobile County is that we could -- while one precinct may not have -- one precinct may have CDC issues -- and typically, these were small precincts, very small geographic areas with a few number of voters. If we could utilize the voting center concept and have them vote at an adjacent poll -- the poll of an adjacent precinct that was a much larger facility, then we could comply with the CDC guidelines better and easier that way.

And so I was -- to be able to utilize the voting center concept of elections provided by the Alabama election code, you have to

have -- the county has to have -- the legislature has to have adopted local legislation that enables the counties to utilize the voting center concept. And in Mobile County, we do not have that enabling -- we have not had that enabling legislation. So we don't have that ability in Mobile County to do that. Now, some other counties do have that ability. But we don't in Mobile County.

Q. And what counties do have that?

A. Oh, I can't tell you the specific counties, ma'am. I'm sorry. But I -- everything I can tell you would be hearsay in terms of numbers.

Q. That's okay. Fair enough. And in this letter, you conveyed in light of, you know, what you've testified to just now that these matters -- so, for example, with voting centers -- were beyond your control?

A. That's correct. Because I --

Q. Okay. And if you may answer in yes-or-no questions. And apologies. I know we are running short on time. Thank you.

MR. SPEEGLE: Your Honor, I would object to counsel instructing this witness --

THE COURT: I don't think in this instance she is. I think Judge Davis -- at least as I read his response, he was just going to explain again that Mobile cannot do it on its own. He needed the legislature to ask -- I mean to act. I think that's where he was headed.

THE WITNESS: Your Honor, there was something else besides that that I was going to note.

THE COURT: Well, then you may. You may answer the question then.

THE WITNESS: The county commission makes those decisions as to polls and voting centers, not the probate judge as the chief election officer.

Q. (BY MS. ZARAGOZA:) Okay. Thank you. And so you notified in this letter as well that you would be sending formal letters to Secretary Merrill and others, correct?

A. Correct, if there was no action.

Q. Okay. And so in fact, you did send a letter to Secretary Merrill which was PX 389 which has been entered into evidence, correct?

A. Correct.

Q. Okay. So no action was taken on your recommendation; is that correct?

A. No, that's incorrect.

Q. Okay. So you just testified that you would send the letter if no action was taken, and you sent the letter; is that correct?

A. Oh, I sent the letters. But then there was action taken after I sent the letters, within a week.

Q. Okay. Thank you. So you've testified that you were ultimately unable to change several of the polling sites that were not complying with CDC guidelines; is that correct?

A. Yes.

Q. Okay. And you testified that you had four polling locations at which you rented and erected air-conditioned tents, correct?

A. The county commission made those arrangements, yes.

Q. Okay. So you worked with the county commission to provide those tents, correct?

A. Yes, ma'am.

Q. Okay. And some of the election process occurred in those outdoor tents, correct?

A. Correct.

Q. And you testified earlier about the three steps in the voting process. And that first step of the voting process is the registration check-in process where the voter signs in, and the poll worker checks ID, correct?

A. Correct.

Q. Okay. And that first step of the voting process took place within some of the tents, correct?

A. Correct.

Q. And you testified that prior to procuring the e-poll books, there's a second step of the voting process where the voter signs the poll list; is that correct?

A. Well, the poll list, the clerk list is completed, and then they're handed their ballot. That's all done at the second stage.

Q. Okay. So a voter is handed their ballot at the second step. And you are not sure, but the second step of the voting process

may have happened inside some of the tents, correct?

A. It's my appreciation that all of the handling of the ballots occurred inside facilities, not in a tent.

Q. Okay.

MS. ZARAGOZA: Eric, could you please pull up Judge Davis's deposition, page -- excuse me. You can just pull up the deposition. Okay.

Q. And, Judge Davis, do you see is that it says "remote deposition of Judge Don Davis on the front page"?

A. Yes.

Q. And do you see that it has a date, the 19th day of August at the end of that first paragraph there?

A. Yes.

Q. Okay.

MS. ZARAGOZA: Eric, could you please take us to page 65. Thank you.

Q. So -- here we go. Starting at line 11. Can you read that, Judge Davis?

A. Well, line 11, the question is "so what took place outside and what took place inside?"

Q. Okay. And could you read your answer, please?

A. "Well, I believe the registration check-in process would have taken place inside within the tent the first step of the procedure. There could be a poll where the second step took place under the tent, but I don't believe so. The second step at our polls, the

second station at our polls is where the voter signs the poll list. The clerk prints the voter's name on the clerk list, and a third clerk hands the voter their ballot."

Q. Okay. And then it continues.

MS. ZARAGOZA: So, Eric, could you go to the next page.

Okay.

Q. So could you read your answer? It's a continuation of the question from 1 through 12, please.

A. I'm sorry. What do you want me to read?

Q. Apologies.

MS. ZARAGOZA: Eric, could you just put page 66 on the screen. Thank you. Just don't want any of the text to get cut off.

Q. Your answer continuing -- the question whether the second step might have happened in the tent. You can read beginning at line 1, please.

A. Okay. Line 1. Answer. "We working with the county commission as to the tent matter aspect of our operations -- but we also vest -- and we reviewed these matters with the inspectors of the polls where this is going to occur. But we also tell the inspectors that, we give them some leeway in terms of how they operate their poll on Election Day. If they felt on Election Day it was better to have the second station of the poll within the tent area and if there was enough space for it utilizing the CDC guidelines, it could have occurred. I don't know that it did. I'm just saying it could have. I'm not aware of it happening, but it

could have."

Q. Thank you, Judge Davis.

MS. ZARAGOZA: And, Eric, you can take that down.

Q. So just so I understand your testimony, your deposition testimony correctly, poll inspectors have some leeway in terms of how they operate their poll on Election Day, correct?

A. A little bit.

Q. Okay. And you testified that they could have had the second stage occur in the tent and that the second stage is where the voter receives a ballot; is that correct?

A. Yes.

Q. Okay. And the Alabama code doesn't say whether voters can undertake steps one or two of the voting process in a tent; is that correct?

A. The tent was located at the designated -- officially designated site for the poll as designated by the county commission.

Q. But Alabama code is silent as to whether step one or step two of the voting process can take place in a tent; is that correct?

A. There is no specific reference that I'm aware of to tents in the Alabama election code.

Q. Okay. Now, you testified that you -- in discussing curbside voting, that you had test uniformity from one polling place to another. But you only provided tents at four locations, correct?

A. The county commission did, yes, ma'am.

witnesses we had scheduled for today would be pushed to tomorrow. And then we'll have some of the Mobile County officials. The others we hope will testify on Thursday. I think we're still okay.

THE COURT: Okay. Thank you, Mr. Davis.

Mr. Helms, good afternoon.

THE WITNESS: Good afternoon, Your Honor.

THE COURT: Mr. Davis, are you doing Mr. Helms's direct?

MR. DAVIS: I am, and I'm ready, Your Honor.

THE COURT: Okay. Mr. Helms, can I get you to raise your right hand, please, so you can be sworn in.

(Witness sworn.)

THE COURTROOM DEPUTY: Please state and spell your first and last name for the record.

THE WITNESS: Clay Helms, C-L-A-Y, H-E-L-M-S.

THE COURTROOM DEPUTY: What city and state do you reside in, Mr. Helms?

THE WITNESS: Sorry. I didn't get that.

THE COURTROOM DEPUTY: What city and state do you reside in?

THE WITNESS: Montgomery, Alabama.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Mr. Davis.

MR. DAVIS: Thank you.

Q. Where do you work, Mr. Helms?

A. Correct, yes, ma'am.

Q. Okay. And their responsibilities include working with county commissions to designate polling places; is that correct?

A. That's correct.

Q. And as long as the way in which probate judges manage in-person voting locations is lawful, you defer to local election officials on how to handle voting logistics; is that correct?

A. As long as it's lawful, yes, ma'am.

Q. But if a probate judge were conducting an election in a manner that the Secretary viewed as unlawful, your office would intervene; is that correct?

A. Yes, ma'am.

Q. And this is the same for if an absentee election manager or circuit clerk were conducting the election in a manner that the Secretary viewed as unlawful, your office would intervene; is that correct?

A. Yes, ma'am.

Q. And with respect to assessing what is and is not lawful as far as election management and election procedures, would you agree that county election officials defer to the Secretary of State's office regarding what is and is not lawful?

MR. DAVIS: Object to the form. I'm not sure that's been established in testimony. Mr. Helms only spoke of guidance.

THE COURT: Overruled. Mr. Helms, you can answer if you understand the question, sir.

THE WITNESS: Can you ask it again, Ms. Reed, just so I can --

Q. (BY MS. REED:) Absolutely. In general, would you agree that county election officials defer to your office regarding what is and is not lawful administration of elections?

A. County probate judge or county election officials rely on us for guidance on carrying out their duties. Now, in terms of the law, I wouldn't say we so much as interpret the law for them. The law is the law, and they carry out the law. If they have questions on administrative guidance, that's what we're there for. Kind of yes and no, I guess. I'm sorry. That's not a greater answer.

Q. No, that works. Thank you. Now, regarding absentee voting requirements specifically, you testified about the Secretary of State's emergency rule allowing voters who fear contracting COVID-19 to vote absentee. Do you recall that?

A. Yes, ma'am.

Q. And that rule you testified currently runs through the end of the year, you believe?

A. We have multiple emergency rules pertaining to the individual elections themselves. So the last one I remember if I remember correctly goes to at least November 17th, and I thought there was one that went to as far as December 15th. So, yes, ma'am.

Q. Okay. Okay. And you are aware that there are elections after the November 3rd general election, correct? You just testified there's that one December 15th?

Q. Uh-huh. And do you understand -- is it your understanding that the majority of counties will have electronic poll books ahead of the or for the November 3rd general election?

A. I think at this point, we are in the high 50s. A lot of those have been very recent. So again, you're taking a county that is just learning a brand new program countywide with electronic poll books. And in this scenario, you're also asking them to move it outside and offer something that's never been offered from a countywide standpoint or statewide standpoint in the history of the state. So just because they have them doesn't mean you want to tack on a brand new program to completely destroy their ability to carry out an election.

Also depending on the brand of electronic pollbook, they are connected to a stand which cannot be removed. So you are toting around something that's twice as large as a briefcase. You're going to tote that in and out of a polling place? So I just wouldn't get too hung up on 50-plus counties have poll books, therefore, yay, it's all going to work out. There's a lot more specificity to it.

Q. Well, why don't we do a couple things. One, I want to walk through the prior instances of curbside voting which we have discussed previously. So you've previously identified instances in Perry, Hale, and Chilton County; is that right?

A. You know, I tried to remember that. I don't remember of an instance in Chilton County. I'm not aware of anything on that. Not saying it didn't happen. But I'm more aware of Perry and