

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.

On 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

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF LEAGUE OF
WOMEN VOTERS OF ALABAMA AND AMERICAN ASSOCIATION OF
UNIVERSITY WOMEN IN SUPPORT OF RESPONDENTS AND IN
OPPOSITION TO APPLICANTS' EMERGENCY APPLICATION FOR STAY
AND BRIEF *AMICI CURIAE* OF LEAGUE OF WOMEN VOTERS OF
ALABAMA AND AMERICAN ASSOCIATION OF UNIVERSITY WOMEN IN
SUPPORT OF RESPONDENTS AND IN OPPOSITION TO APPLICANTS'
EMERGENCY APPLICATION FOR STAY**

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Amici Curiae Leave of Women Voters of Alabama and American Association of University Women (collectively, the “*Amici*”) respectfully move for leave to file the enclosed brief as *amici curiae* in support of Plaintiffs-Respondents and in opposition to Defendants-Applicants’ application for a stay (i) without 10 days’ advance notice to the parties of *Amici*’s intent to file as ordinarily required by Sup. Ct. R. 37.2(a), and (ii) in an unbound format on 8½-by-11-inch paper rather than in booklet form. Defendants-Applicants filed their emergency application for stay on October 15, 2020. In light of the expedited briefing schedule of this matter, it is not feasible to provide 10 days’ notice to the parties. Notwithstanding, all parties have consented to *Amici* filings in this action.

As more fully set forth in the below Argument and Statement of Interest, the *Amici* have a strong interest in the outcome of this application to stay the district court's injunction and have a fundamental interest in ensuring that Alabama safeguard the integrity of the election process without forcing residents to choose between the right to vote and their health. The *Amici* are organizations which educate, register and mobilize voters of all political persuasions to ensure they can exercise their right to vote. The *Amici* also litigate to protect these rights when they are threatened. Accordingly, the *Amici* have a unique and distinct perspective on the harms asserted by the Defendants-Applicants and the enclosed brief includes relevant material not brought to the attention of the Court by the parties and may be of considerable assistance to the Court. See Sup. Ct. R. 37.1.

Defendants-Applicants' application is in effect 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 *Amici* therefore seek leave to file this brief in support of Respondents to demonstrate that Defendants-Applicants' requested stay will not result in irreparable harm or contravene the public interest.

CONCLUSION

This Court should grant *Amici* leave to file the enclosed brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF *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.

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 to its member-adopted Public Policy Program, AAUW supports vigorous enforcement of and full access to civil and constitutional rights, including expanding voting rights.

SUMMARY OF ARGUMENT¹

Amici curiae join Plaintiffs-Respondents in opposing Defendants-Applicants’ Emergency Application for Stay of the District Court’s order entered following a bench trial enjoining the Secretary of State’s *de facto* ban on curbside voting (the “curbside voting ban”) for the November 3, 2020 general election. Defendants-Applicants’ Application is in effect 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 Emergency Application for Stay (hereinafter “Def’s EAS”) filed by Applicants John H. Merrill, in his official capacity as Secretary of State for the State of Alabama, and the State of Alabama (“Defendants”).

The curbside voting ban unconstitutionally burdens Plaintiffs’ and countless other Alabama voters’ fundamental right to vote as applied during the COVID-19 pandemic. Curbside voting is a common voter accommodation, explicitly authorized in the majority of U.S. states and practiced in several Alabama counties before Alabama Secretary of State John Merrill intervened to stop the practice. It is explicitly recommended as a method to protect voters’ health by the CDC, and

¹ *Amici* state that this brief was not authored in whole or in part by any party or their counsel, and no person other than *amici*, their members, or their counsel contributed any money intended to fund the preparation and submission of this brief.

consistent with Alabama Governor Kay Ivey's emergency orders encouraging the use of drive-up and drive-in services, particularly for the State's most vulnerable residents. As an accommodation used disproportionately by the elderly and disabled, it lays a heavy and inequitable burden on those Alabama voters most susceptible to serious illness or even death if they contract the COVID-19 virus. And because voters' other options for casting their ballot, either by traditional in-person voting or by absentee ballot, require voters to flout State and federal health guidelines, these options are effectively unavailable without unreasonable risks to their health and safety. Should the State's curbside voting ban remain in effect for the November 3, 2020 general election voters will be forced to make an impossible choice: violate State and federal health and social distancing guidelines, or forfeit their fundamental right to vote.

The district court's order allows local election officials to determine for themselves whether they have the capacity and resources to offer this common accommodation to voters. It presents minimal logistical challenges, which in any case local officials are best posed to address. As the District Court found, Defendants' claims are unsupported by the record, and belied by the 29 other U.S. states that explicitly authorize curbside voting. While the State has a legitimate interest in preventing fraud and preserving ballot integrity, it has no interest in enforcing a ban that is not required by any State law, and is inconsistent with the Secretary of State's established practices affording Alabama counties discretion to accommodate voters

as State law permits. Any marginal value the curbside voting ban offers to the State can and must temporarily give way in light of the extraordinary risks to voters' health during the pandemic.

Finally, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is no barrier to the relief granted here. The State does not seek to enforce its duly enacted laws, but rather to ban a lawful and established practice. It does so in a manner inconsistent with administrative tradition in Alabama, which permits County officials to accommodate voters in a variety of ways at their discretion. Curbside voting is one among many accommodations local election administrators routinely make on behalf of disabled voters, and in any case voters reasonably expect and anticipate accommodations to protect their health and safety during the COVID-19 pandemic. And critically, the district court's September 30, 2020 order (the "Order") was issued after a full trial and extensive briefing, and is therefore entitled to the deference that *Purcell* itself admonishes the federal courts to observe.

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

ARGUMENT

I. 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. Defendant's Appendix to the EAS at 13-23 (hereinafter "Def's App."). 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 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. Prior to the pandemic, fully twenty nine states explicitly permitted curbside voting statewide or in specific counties, while others may offer it as a courtesy.² The Department of Justice recommends curbside voting as an accommodation for disabled voters,³ and curbside voting is among the most common

² See Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 Stan. L. Rev. 1491, 1516-17 (2016).

³ *Solutions for Five Common ADA Access Problems at Polling Places*, U.S. Department of Justice, available at https://www.ada.gov/ada_voting/voting_solutions_ta/polling_place_solutions.htm (last

means by which states accommodate disabled voters at otherwise inaccessible polling locations.⁴ These accommodations are a substantial benefit to the elderly. Two out of five U.S. adults age 65 and older have a disability.⁵

Curbside voting is also established in Alabama. 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. Def's App. at 93-94. Highlighting the routine use of this practice, this past summer the League held a series of drive-up voter information clinics to provide hundreds of individuals with voter registration and absentee ballot applications, stamps, and printed instructions.⁶

Since the outbreak of the COVID-19 pandemic curbside voting has taken on new significance, particularly as an option for the ill and medically vulnerable to vote safely. Recognizing the need for this accommodation during the COVID-19 pandemic,

visited Oct. 14, 2020) (listing measures states can take to make polling places accessible in compliance with the Americans with Disabilities Act).

⁴ Belt, *supra* FN 2 at 1516-17. For instance, in 2001, when states made accommodations for disabled voters to access polling locations, 56% of these accommodations included providing access to curbside voting.

⁵ *Disability Impacts All of Us*, Centers for Disease Control and Prevention, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last updated Sept. 16, 2020).

⁶ Ethan Fitzgerald, League of Women Voters holding drive-through voter registration, absentee application clinics, WHNT (Aug. 15, 2020), <https://whnt.com/news/league-of-women-voters-holding-drive-through-voter-registration-absentee-application-clinics/>.

certain jurisdictions across the country, including Arkansas,⁷ Ohio,⁸ Wisconsin,⁹ and Wyoming,¹⁰ have taken certain steps to ensure that curbside voting is available to voters. These actions follow CDC recommends which present curbside voting 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.”¹¹ Similarly, Alabama Governor Kay Ivey’s April 3 Stay-at-Home order and her series of “Safer at Home” orders permit “drive-in” gatherings to protect individuals—particularly vulnerable individuals—from in-person contact that could put them at risk from COVID-19.¹² The Governor’s June 30 order also requires restaurants and senior centers to offer curbside services to protect the health and safety of high-risk people.¹³

⁷ Rick Klein & MaryAlice Parks, *The Note: Voting in Age of Coronavirus Gets Uncertain Test Runs*, ABC NEWS (Mar. 31, 2020), <https://abcnews.go.com/Politics/note-voting-age-coronavirus-uncertain-test-runs/story?id=69877935>.

⁸ Rick Rouan, *Ohio Offering Curbside Voting, Extending Absentee Deadline for Those in Hospital in Wake of Coronavirus*, USA TODAY (Mar. 16, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/03/16/coronavirus-ohio-offering-curbside-voting-states-head-polls-tuesday/5058230002/>.

⁹ *Early Voting: Where You Can Still Cast a Ballot In-Person Before the April 7 Election in the Milwaukee Area*, MILWAUKEE JOURNAL SENTINEL (Mar. 31, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/03/31/coronavirus-wisconsin-where-you-can-still-vote-early/2883706001/>.

¹⁰ Quinn Scanlan, *States Focus on Alternatives to In-Person Voting as They Move Forward with Primaries Amid Coronavirus Pandemic*, ABC NEWS (Mar. 20, 2020), <https://abcnews.go.com/Politics/states-focus-alternatives-person-voting-move-forward-primaries/story?id=69688445>.

¹¹ *Considerations for Election Polling Locations*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated June 22, 2020).

¹² Press Release, *Safer At Home Order* (April 28, 2020), <https://www.alabamapublichealth.gov/news/2020/04/28c.html>.

¹³ Press Release, *Governor Ivey Issues Amended Safer at Home Order* (June 30, 2020), <https://governor.alabama.gov/newsroom/2020/06/governor-ivey-issues-amended-safer-at-home-order-3/>.

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

The federal courts have long stood as a bulwark safeguarding the “precious” and “fundamental” right to vote as guaranteed by the First and Fourteenth Amendments. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 683 (1966). Under this Court’s *Anderson-Burdick* balancing test, 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 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.

While there is no constitutional right to vote in a particular manner, the Constitution does not permit states to prohibit a specific method of voting where other options are effectively unavailable. *See O’Brien v. Skinner*, 414 U.S. 524, 529 (1974) (stressing that “the Court’s disposition of the claims in McDonald rested on failure of proof” that alternative means of voting were unavailable); *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (permitting claim by Philadelphia pretrial detainees seeking absentee ballots to proceed).

For elderly and disabled Alabama voters who rely upon curbside voting, alternative options for casting their ballot are for practical purposes unavailable, as they necessarily rely on exposing themselves to the general public in violation of State

and federal health guidelines. The incumbent risks associated with casting a ballot in-person are by now well-known, and exhaustively documented by the district court. Def's App. at 28-33. And while voters with disabilities may move to the front of the line at their polling place, Ala. Code § 17-9-13(c), this does nothing to accommodate disabled voters assigned to polling places that is not handicapped-accessible, and only marginally reduces the time the voter spends in a crowded, indoor environment where the risk of COVID-19 infection is highest.¹⁴ Voters who believe that it would be impossible or unreasonable to vote in-person due may vote absentee. *See* Ala. Admin Code r. 820-2-3.06-.04ER (July 17, 2020). However, absentee voters must have their absentee ballot envelope witnessed by two other persons, and must provide a copy of a valid photo ID with their absentee ballot application.¹⁵ Any voter who does not live with two other adults capable of serving as witnesses, or lacks access to a smartphone and printer in their home, will be required to interact with strangers in order to cast their ballot. Because these accommodations require the same in-person interaction that federal and State health experts counsel against, they do not appreciably lessen the burden of the curbside voting ban on Alabama voters.

As a result, Secretary Merrill's curbside voting ban deprives vulnerable Alabama voters of their one opportunity to vote safely during the pandemic, requiring elderly and disabled individuals, including members of organizational Plaintiffs and

¹⁴ *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).

¹⁵ Ala. Code §§ 17-9-30, 17-11-4; Ala. Code § 17-11-9.

members of *amici curiae*, to make an impossible choice between risking their health or foregoing their fundamental right to vote. As noted previously, the ban falls disproportionately on the disabled and medically vulnerable, who are both more likely to require accommodations in order to vote, and more vulnerable to suffering serious health consequences, or even death, should they become infected. The curbside voting ban also 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. Def’s App. at 74-76, 96-97. This burden, substantial in and of itself, takes on additional constitutional significance due to its disparate impact on particular classes of individuals. *See Common Cause Ind. v. Marion Cty. Election Bd.*, 311 F. Supp. 3d 949, 969 (S.D. Ind. 2018) (the election board’s one location had a disparate impact “on voters who lack the financial means or flexible schedules . . . to surmount the obstacles of time and expense imposed[.]”); *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1217 (N.D. Fla. 2018) (Florida prohibition on all on-campus facilities serving as early voting sites—including type of facilities expressly permitted by Florida’s Early Voting Statute—had a “disparate impact” on “Florida’s youngest voters” and was “constitutionally untenable.”); *Georgia Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1255 (N.D. Ga. 2018) (finding substantial likelihood of success on “severe” burden based in part on “uncontested evidence of disparate impact on a particular class of individuals”).

Nor is the burden imposed by the ban limited to those who wish to cast their ballot from their vehicle. According to the CDC, curbside voting provides any voter displaying COVID-19 symptoms a way to cast their ballot while also preventing the spread of the virus to others at their polling location, thus reducing the risk of voting for *all* in-person voters.¹⁶ Conversely, the failure to provide voters with the option to vote curbside will increase the risk to all voters' health, and will inevitably discourage some voters from taking to the polls at all, 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.").

C. The State Has No Interest Sufficient to Justify a Ban on a Lawful and Established Practice to Protect Voters' Health During the Pandemic

Defendants cite numerous bases for staying the District Court's injunction, arguing that curbside voting "is no safer than absentee voting, [] would come with a host of logistical issues, and would undermine the State's interests in having uniform elections[.]" Def's EAS at 25. These arguments are meritless, and were properly rejected by the District Court and Eleventh Circuit Court of Appeals.

This Court has properly and repeatedly held that states may exercise their emergency powers to protect the public's health and safety during these

¹⁶ *See Considerations for Election Polling Locations and Voters*, *supra* FN 14.

unprecedented times. *See South Bay United Pentecostal Church*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)) (“Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect.”). However, this deference simply has no application where the State acts without any pretense or evidence that it does so in the interest of public health. Defendants’ Application fails to provide so much as a single reason that curbside voting will “cause a host of ... safety problems[,]” Def’s EAS at 25, nor did Defendants present evidence to this effect over the course of a two week trial and multiple briefs to the district court. In contrast, the CDC explicitly encourages States to adopt curbside voting to protect voter health,¹⁷ and Alabama’s governor encourages “drive-in” gatherings to protect vulnerable individuals from in-person contact.¹⁸ Defendants do not claim that Secretary Merrill’s curbside voting ban considered the impact of the ban on public health. Indeed, because the ban was imposed well before the pandemic, it was almost certainly imposed without such considerations.¹⁹ “[T]he Secretary’s expertise in administering Alabama’s election law[,]” App. 16, simply does not extend to matters of public health.

¹⁷ *See Considerations for Election Polling Locations and Voters*, *supra* FN 14.

¹⁸ Safer At Home Order, *supra* FN 12.

¹⁹ Ainsley Allison, *Secretary of State’s Office Shuts Down Curbside Voting in Hale County*, ABC NEWS (November 8, 2016), <https://abc3340.com/news/election/secretary-of-states-office-shuts-down-curbside-voting-in-hale-county>.

Further, the district court's order, which prohibited Secretary Merrill from outlawing an otherwise lawful voter accommodation, in no way prevents the Secretary from "performing his duties to 'provide uniform guidance for election activities,' Ala. Code § 17-1-3(a)[.]" Def's EAS at 3. Should this Court uphold the Order, Secretary Merrill's office will have every right and authority to provide guidance to those Alabama counties regarding how they can provide curbside voting in an efficient, cost-effective manner that complies with Alabama law. It is therefore well within Defendants' power to ensure that local election officials will not be "on their own to determine whether and how to implement curbside voting[.]" Def's EAS at 23. It is *amici curiae's* sincere hope that the Secretary will provide this guidance.

Regardless, Alabama's local election managers, many of whom implemented curbside voting in Alabama before Secretary Merrill intervened to ban the practice, are in the best position to understand whether and to what extent they should offer this accommodation on November 3. In addition to local expertise, Alabama's counties today have unprecedented access to funds provided by the CARES Act to assist with "improving the administration of elections for federal office, which can include expenditures that would protect staff and poll workers, secure physical locations, and address unexpected expenses due to the COVID-19 pandemic during a

federal election.”²⁰ Counties have already availed themselves of these resources,²¹ along with over \$5.5 million the Secretary of State’s office has made available to reimburse counties for November 3 general election expenses.²²

While there are unknowns associated with implementing any voter accommodation, Defendants do not and cannot credibly argue that these difficulties are insurmountable. Such a claim is belied by the experience of the majority of U.S. states which offer curbside voting in some form, and by the prior experience of various counties *in Alabama itself*.²³ For these reasons, the Order should stand.

II. 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

²⁰ *Guidance on Use of HAVA Funds for Expenses Related to COVID-19*, U.S. ELECTION ASSISTANCE COMMISSION, <https://www.eac.gov/election-officials/guidance-use-hava-funds-expenses-related-covid-19#We-expect-to-experience-an-increase-in-personnel-costs-for-the-Absentee-Election-Managers-due-to-the-COVID-19-pandemic.-Our-run-off-was-postponed-from-03/31/20-to-07/14/20-which-greatly-extends-the-required-work-time-for-the-AEMs.-Would-it-be-permissible-to-use-a-portion-of-the-2020-HAVA-funds-to-help-cover-this-increased-personnel-cost?> (last visited October 17, 2020).

²¹ Lydia Nusbaum, *Counties spend thousands of dollars to prepare for election during COVID-19*, WTVY.COM (July 10, 2020) <https://www.wtv.com/2020/07/13/counties-spend-thousands-of-dollars-to-prepare-for-election-during-covid-19/>.

²² *Application for Election Expense Funding Related to COVID-19 for the November 3, 2020 General Election*, ALABAMA SECRETARY OF STATE <https://www.sos.alabama.gov/application-election-expense-covid19> (last visited October 17, 2020).

²³ Def’s App. at 93-94; Belt, *supra* FN 2.

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. Here, the Order comes after a full trial on the merits, prohibiting a state officer from outlawing an otherwise legal voter accommodation, in a manner that provides local election officials with discretion to determine whether they will offer an accommodation recommended by state and federal health experts in the midst of a pandemic. If *Purcell* prohibits the district court from granting relief under these facts, state actors will be effectively immune from judicial review of even the most blatant violations of voters’ Constitutional rights in the months and weeks prior to an election.

This Court has been called on several occasions to issue a stay of an injunction suspending existing state law enacted by the peoples’ duly elected representatives. *See, e.g., Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. ____ (2020) (slip op., at ____) (holding that Wisconsin absentee ballots must be postmarked by election day “as state law would necessarily require.”) The Court has never before been called upon to stay an injunction which merely prohibits administrative officials from outlawing an otherwise permissible voter accommodation. This distinction is crucial. This Court has stated clearly that the state has an interest in the ability to “enforce its duly enacted” laws. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)). The state’s interest in enforcement is based on the laws it enforces being “duly enacted”

by the peoples’ elected representatives. However, when the state acts without clear legislative authorization, the state’s interest in enforcement is necessarily diminished. Here, the trial court reasonably determined that Secretary Merrill sought to ban a practice that violated no law, and in a manner inconsistent with his office’s general practices of election administration. Def’s App. at 143-68. Secretary Merrill’s authority to “provide uniform guidance for election activities[.]” Ala. Code § 17-1-3(a), does not extend to plenary authority to interpret Alabama election law, and does not immunize his actions from Constitutional scrutiny.

This case also stands apart for the full and robust factual record developed by the trial court, in contrast to the more typical case in which district courts, in the interest of time, have acted on a partial record to grant statewide relief. The deference owed to the district court’s detailed factual findings is central to the reasoning of *Purcell* itself, where this Court admonished the Court of Appeals for failing to accord deference to “the ruling and findings of the District Court[.]” 549 U.S. at 5. Here, the district court issued its Order following a two-week trial on the merits, and voluminous briefing by all parties. The robust factual record and testing of the parties’ claims distinguishes this case from nearly every instance in which this Court has invoked *Purcell* to stay a change in election laws made in the weeks before an election. For instance, this Court’s recent stay regarding South Carolina’s single witness requirement for absentee ballots in *Andino v. Middleton*, 592 U.S. ____ (Oct. 5, 2020), followed from 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). 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 the Americans with Disabilities Act. Def’s App. at 175 (“the curbside voting ban violates Title II of the ADA as applied in the COVID-19 pandemic. . .”).

The relief granted by the district court in this case is modest, merely allowing Alabama counties to decide for themselves whether curbside voting is appropriate, consistent with Alabama law. The Order has the practical benefit of empowering local election managers, who best positioned to determine, for instance, if they have sufficient poll workers at a particular cite to service voters from their vehicles. It is also consistent with Alabama’s established tradition of providing local officials with substantial discretion to accommodate voters, even if these accommodations are not explicitly provided for by Alabama law. For example, Defendants admit they in fact *encourage* absentee election managers (“AEMs”) to hold events in nursing homes, college campuses, or parking lots to process and collect absentee ballots, even though the Alabama Code provides that “[t]he county commission shall designate the place or office where [the AEM’s] duties shall be performed.” *See* Def’s App. at 166 (citing Ala. Code § 17-11-2). These efforts mirror those of the League, which routinely holds voter registration and educational events in community centers to facilitate voters’ participation in the political process. If these practices do not confuse voters, neither

will empowering local election managers to implement (or not implement) curbside voting at their discretion.

Finally, this case raises questions of basic fairness that will determine when, if ever, voters are entitled to vindicate their rights in the federal courts prior to an election. Defendants do not dispute that the district court correctly determined in June that relief for the November 3, 2020 general election was “speculative.” In the intervening months, the trial court made every effort to accommodate Defendants’ requests for discovery, witnesses, and briefing. After acquiescing in this manner, the district court reasonably determined that “State defendants are judicially estopped from raising [the *Purcell*] objection.” Def’s App. at 118. Defendants object to this ruling, but 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, while still accommodating Defendants’ rights to due process. *Amici curiae* have serious concerns that Defendants’ theory, if true, will render 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, and will discourage civic organizations like *amici* from fulfilling their mission to protect voters’ rights via the federal courts.

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’s citizens. 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 reasons set forth above, *amici* urge the Court to deny Defendants' Emergency Application for a Stay.

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Respectfully submitted,

s/Michael C. Keats
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