

IN THE
Supreme Court of the United States

JOHN H. MERRILL, ALABAMA SECRETARY OF STATE, *et al.*,
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 AND BRIEF OF THE AMERICAN
DIABETES ASSOCIATION, AARP, AARP FOUNDATION, PARALYZED
VETERANS OF AMERICA, NATIONAL DISABILITY RIGHTS NETWORK,
DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY
RIGHTS ADVOCATES, AND DISABILITY RIGHTS NORTH CAROLINA AS
AMICI CURIAE IN OPPOSITION TO THE EMERGENCY
APPLICATION FOR STAY**

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The American Diabetes Association, AARP, AARP Foundation, Paralyzed Veterans of America, National Disability Rights Network, Disability Rights Education and Defense Fund, Disability Rights Advocates, and Disability Rights North Carolina (collectively, “*Amici*”) respectfully move for leave to file the accompanying brief as *Amici Curiae* in opposition to the application for a stay without 10 days’ advance notice to the parties of *Amici*’s intent to file as ordinarily required by Sup. Ct. R. 37.2(a).

Applicants filed their emergency application for a stay in this matter on October 15, 2020. In light of the compressed deadline for responses set by the Court, it was not feasible to provide 10 days’ notice to the parties. Nonetheless, both applicants and respondents have consented to the filing and *Amici*, who urgently desire to be heard on the application, request that the Court grant this motion.

Curbside voting is an accommodation for voters with disabilities that is widely implemented throughout the country. At stake in the application to stay is whether individual Alabama counties—consistent with longstanding practice and in compliance with the requirements of the Americans with Disabilities Act of 1990 (“ADA”)—can decide for themselves whether to accommodate voters with disabilities in the upcoming election by offering curbside voting services that fully comply with state election law. Further, because the upcoming election will occur in the midst of a global pandemic and the curbside option permits voters to maintain social distancing, the impact of the application is greatly amplified: nearly 1.6 million Alabama voters—nearly half the state’s electorate—are at high risk of exposure to, and potential serious illness and death from, COVID-19, and therefore “qualified individuals with disabilities” within the meaning of the ADA.

Amici's interest here is therefore twofold: *Amici* possess substantial expertise concerning accommodations such as curbside voting for voters with disabilities, and a substantial number of impacted voters are members or constituents of *Amici*'s organizations. As organizations dedicated, respectively, to Americans age 50 and older, Americans affected by diabetes, veterans of the armed forces who have experienced spinal cord injury or dysfunction, and people with other disabilities, *Amici* offer their expertise on (1) the substantial burdens faced by all voters with disabilities in the November 2020 general election as a result of COVID-19, (2) the substantial burdens faced by the large proportion of Alabama voters who are medically vulnerable, (3) the need for reasonable accommodations to make Alabama's voting services accessible to those voters in the November 2020 general election, (4) the practical ease of providing reasonable accommodations to vulnerable voters, such as curbside voting, and—critically—(5) the proper application of Title II of the Americans with Disabilities Act in these unique circumstances.

While *Amici* acknowledge that this Court “strongly discourage[s]” *amicus* briefing “in connection with emergency applications,” *Amici* seek leave to file because this application will, for all practical purposes, decide this issue on the merits. It is highly unlikely that either this Court or the Court of Appeals for the Eleventh Circuit will reach the merits of this issue prior to the upcoming election, and after the election the relief sought will be moot. The circumstances of this case are unique and urgent. Receiving *Amici*'s brief will neither undermine the Court's policies nor delay expedited consideration of the matter.

Wherefore, *Amici* urge the Court to grant their motion for leave to file.

Dated: October 19, 2020

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIESII

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CURBSIDE VOTING IS A COMMON, EASILY IMPLEMENTED
ACCOMMODATION THAT SUBSTANTIALLY MITIGATES THE RISK TO
MEDICALLY VULNERABLE VOTERS WHO CAST THEIR BALLOTS IN-PERSON
ON ELECTION DAY 3

II. PERMITTING ALABAMA COUNTIES TO DECIDE WHETHER TO OFFER
CURBSIDE VOTING IS A REASONABLE ACCOMMODATION FOR THE 1.6
MILLION ALABAMA VOTERS WHO ARE AT HEIGHTENED RISK FROM
COVID-19 AND ENTITLED TO RELIEF UNDER TITLE II 7

III. ENJOINING ENFORCEMENT OF THE CURBSIDE VOTING BAN DOES NOT RUN
AFOUL OF *PURCELL*..... 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

<i>Am. Ass’n of People with Disabilities v. Harris</i> , 647 F.3d 1093 (11th Cir. 2011)	9
<i>Andino v. Middleton</i> , No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020).....	11
<i>Clarno v. People Not Politicians Oregon</i> , No. 20A21, 2020 WL 4589742 (U.S. Aug. 11, 2020).....	11
<i>Disabled in Action v. Bd. of Elections in City of New York</i> , 752 F.3d 189 (2d Cir. 2014)	9
<i>Fraihat v. U.S. Immigration & Customs Enforcement</i> , 445 F. Supp. 3d 709 (C.D. Cal. 2020)	8
<i>Hernandez v. New York State Bd. of Elections</i> , No. 20-cv-4003, 2020 WL 4731422 (S.D.N.Y. Aug. 14, 2020)	9
<i>League of Women Voters of Fla., Inc. v. Detzner</i> , 314 F. Supp. 3d 1205 (N.D. Fla. 2018)	15
<i>Little v. Reclaim Idaho</i> , 140 S. Ct. 2616 (2020).....	11
<i>Mary Jo C. v. New York State and Local Ret. Sys.</i> , 707 F.3d 144 (2d Cir. 2013)	12
<i>Nat’l Ass’n of the Deaf v. Fla.</i> , 945 F.3d 1339 (11th Cir. 2020)	12
<i>Nat’l Fed’n of the Blind v. Lamone</i> , 813 F.3d 494 (4th Cir. 2016)	9, 12
<i>People First of Ala. v. Sec’y of State for Ala.</i> , 815 F. App’x 505 (11th Cir. 2020).....	10
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006).....	2, 12, 15
<i>Ray v. Franklin Cty. Bd. of Elections</i> , No. 08-CV-1086, 2008 WL 4966759 (S.D. Ohio Nov. 17, 2008)	13
<i>Republican Nat’l Comm. v. Democratic Nat’l Comm.</i> , 140 S. Ct. 1205 (2020).....	11

<i>Schaw v. Habitat for Humanity of Citrus Cty., Inc.</i> , 938 F.3d 1259 (11th Cir. 2019)	8
<i>Silver v. City of Alexandria</i> , 2020 WL 3639696 (W.D. La. July 6, 2020)	8
<i>Spitzer v. City of Delaware</i> , 82 F. Supp. 2d 12 (N.D.N.Y. 2000)	13
<i>Spitzer v. Cty. of Schoharie</i> , 82 F. Supp. 2d 19 (N.D.N.Y. 2000)	13
<i>Tennessee v. Lane</i> , 541 U.S. 509 (2004)	10
<i>U.S. Airways v. Barnett</i> , 535 U.S. 391 (2002)	8
<i>United Spinal Ass’n v. Bd. of Elections in City of New York</i> , 882 F. Supp. 2d 615 (S.D.N.Y. 2012), <i>aff’d sub nom. Disabled in Action v. Bd. of Elections in City of New York</i> , 752 F.3d 189 (2d Cir. 2014)	14
<i>United States v. Georgia</i> , 546 U.S. 151 (2006)	8
<i>Veasey v. Perry</i> , 135 S. Ct. 9 (2014)	12
Statutes and Regulations	
28 C.F.R. § 35	5, 8, 9, 14
42 U.S.C. § 12131	8
42 U.S.C. § 12132	8
Ala. Code § 17-1-3	10
Other Authorities	
Alabama Department of Public Health, <i>Characteristics of Laboratory-Confirmed Cases of Covid-19</i> , Oct. 2, 2020, https://www.alabamapublichealth.gov/covid19/assets/cov-al-cases- 100220.pdf	6
Rabia Belt, <i>Contemporary Voting Rights Controversies Through the Lens of Disability</i> , 68 Stan. L. Rev. 1491 (2016)	4
Angelo Carfi et al., <i>Persistent Symptoms in Patients After Acute COVID-19</i> , 324 JAMA 6 (July 2020), https://jamanetwork.com/journals/jama/fullarticle/2768351	6

Chad D. Cotti et al., <i>The Relationship between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary</i> , NBER Working Paper No. 27187 (revised Aug. 2020), https://www.nber.org/papers/w27187.pdf?sy=187	5
<i>Deciding to Go Out</i> , Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html	5
Christopher R. Deluzio et al., <i>Ensuring Safe Elections</i> , Brennan Center for Justice (Apr. 30, 2020), https://www.brennancenter.org/sites/default/files/2020-04/2020_04_5StateCostAnalysis_FINAL.pdf	4
Department of Justice, <i>ADA Checklist for Polling Places</i> , https://www.ada.gov/votingchecklist.pdf	13
Department of Justice, <i>Project Civic Access Fact Sheet</i> , https://www.ada.gov/civicfac.htm (last visited Oct. 16, 2020).....	4
Department of Justice, <i>Solutions for Five Common ADA Access Problems at Polling Places</i> , https://www.ada.gov/ada_voting/voting_solutions_ta/polling_place_solutions.htm (last visited Oct. 14, 2020)	14
<i>Drive Thru Voting</i> , Election Division of the Harris County Clerk’s Office, https://harrisvotes.com/drivethruvoting	4
Dana W. Flanders et al., <i>The association of voter turnout with county-level coronavirus disease 2019 occurrence early in the pandemic</i> , <i>Annals of Epidemiology</i> , Vol. 49, Sept. 2020, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7328545/#bib17	5
Veronique Greenwood, <i>How the Aging Immune System Makes Older People Vulnerable to COVID-19</i> , <i>N.Y. Times</i> , Sept. 8, 2020, https://www.nytimes.com/2020/09/08/health/covid-aging-immune-system.html	6
Wyatt Koma et al., <i>How Many Adults are at Risk of Serious Illness if Infected with Coronavirus?</i> , Kaiser Family Foundation (Apr. 2020), http://files.kff.org/attachment/Data-Note-How-Many-Adults-Are-at-Risk-of-Serious-Illness-If-Infected-with-Coronavirus.pdf	6
North Carolina State Board of Elections, <i>Curbside Voting</i> , https://www.ncsbe.gov/voting/help-voters-disabilities/curbside-voting	4
Order of the State Health Officer Suspending Certain Public Gatherings Due to the Risk of Infection by COVID-19 (Amended Sept. 30, 2020), https://governor.alabama.gov/assets/2020/09/Safer-at-Home-Order-Final-9.29.20.pdf ..	6, 7, 10
<i>People with Certain Medical Conditions</i> , Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last updated Oct. 16 2020).....	6

Settlement Agreement Between the United States of America and Jefferson County, Alabama Regarding the Accessibility of Polling Places, effective Oct. 27, 2016, <https://www.justice.gov/usao-ndal/press-release/file/905967/download> 13

South Carolina Election Commission, *Voters with Disabilities*, <https://www.scvotes.gov/voters-disabilities> 4

Erin K. Stokes et al., *Coronavirus Disease 2019 Case Surveillance — United States, January 22–May 30, 2020*, 69 Morbidity and Mortality Weekly Report (June 19, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6924e2-H.pdf>..... 5

United States Election Assistance Commission, *Innovative Practices and New Solutions*, https://www.eac.gov/sites/default/files/electionofficials/inpersonvoting/innovative_practices_and_new_solutions.pdf 5

United States Election Assistance Commission, *Preparing for In-Person Voting During Covid-19; Voting Location Requirements*, https://www.eac.gov/sites/default/files/document_library/files/In-Person%20Voting%20-%20Building%20Requirements%20%28004%29.pdf 4, 5

Jonathan M. Wortham et al., *Characteristics of Persons Who Died with COVID-19 – United States, February 12–May 18, 2020*, 69 Morbidity and Mortality Weekly Report (June 19, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6928e1-H.pdf> 6

STATEMENT OF INTEREST¹

The American Diabetes Association, AARP, AARP Foundation, Paralyzed Veterans of America, National Disability Rights Network, Disability Rights Education & Defense Fund, Disability Rights Advocates, and Disability Rights North Carolina (together, “*Amici*”) are organizations dedicated to the health, welfare, and social and political participation of Americans who, because of their medical condition, age, or mobility impairment, face a level of risk from COVID-19 that far exceeds the risk faced by the general population. As such, *Amici* have an urgent interest in opposing the emergency application because if it is granted, it would permit the Alabama Secretary of State to enforce a categorical ban on curbside voting, a legal and straightforward optional service that is routinely used and is sometimes necessary to accommodate voters with disabilities at polling sites. That result would endanger and potentially disenfranchise many of *Amici*’s Alabamian members and constituents in the November 2020 general election.² In the longer term, *Amici* fear it would undermine the rights of far more of their members and constituents because it would permit a state election official to unilaterally obstruct local and county officials from determining how best to meet their obligations under the Americans with Disabilities Act of 1990 (“ADA”) without any basis in state law. It would also subvert the well-accepted application of the ADA and undermine the robust and hard-won protections for Americans with disabilities that the statute affords.

¹ *Amici* certify that no party’s counsel authored this brief in whole or in part and that no person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

² AARP has nearly 38 million members, including over 409,000 members in Alabama. The American Diabetes Association has over 500,000 members, including 12,600 Alabamians. The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for people with disabilities. The P&A and CAP agencies, which exist in every state and territory, and for a Native American consortium, were established by Congress to protect the rights of people with disabilities through legal support, advocacy, referral, and education.

Amici neither support nor oppose any party in this litigation.

SUMMARY OF ARGUMENT

Purcell v. Gonzalez, 549 U.S. 1 (2006), on which applicants principally rely, does not counsel in favor of granting a stay because the injunction applicants challenge neither alters any Alabama election rule nor threatens to confuse voters. The injunction does not suspend the operation of an Alabama statute or require any agent of the state to act. Nor does it change any election requirement or deadline. It merely permits local officials to make up their own minds regarding whether to implement curbside voting as an accommodation for people with disabilities. These kinds of responsive, local decisions and adjustments regarding how to make voting accessible to voters with disabilities are commonplace and required by federal law. Denying Alabama counties flexibility to consider curbside voting as an accommodation in the COVID-19 pandemic would defy voter expectations and cause confusion. In contrast, denying applicants' request would preserve the *status quo* for Alabama voters on election day.

Curbside voting is exactly what it sounds like—voters receive, execute, and return ballots from inside their vehicles with minimal contact with poll workers and no contact with other voters. Curbside voting is a recognized and long-standing reasonable accommodation for voters whose disability makes it difficult or inadvisable to enter their polling place. In a pandemic where social distancing is critical to prevent infection and contain spread, curbside voting has unsurprisingly become a valuable method of in-person voting. For the approximately 1.6 million Alabama voters whose medical condition or age places them at high risk for serious illness or death from COVID-19, a county's decision to offer curbside services in November may prevent disenfranchisement.

As applicants concede, these medically vulnerable Alabamians are “qualified individuals with disabilities” under Title II of the Americans with Disabilities Act (“Title II”). Alabama’s traditional in-person voting program is not readily accessible to medically vulnerable voters because of their heightened risk from COVID-19. The existence of Alabama’s absentee voting program does not eliminate or reduce Alabama’s obligation under Title II to make its *in-person voting* program accessible. As the district court held in a decision that reflects a thorough analysis of the facts presented at trial, permitting counties to provide curbside voting services is a reasonable accommodation for voters casting their ballots in person during the pandemic.

The injunction applicants challenge does not implicate the concerns articulated in *Purcell*. First, it does not “alter” any Alabama election rule or statute. The district court enjoined the Alabama Secretary of State from categorically forbidding—without any basis in Alabama law—individual counties from offering a reasonable accommodation to voters with disabilities. Second, even if curbside voting did alter Alabama election law, implementing it as an optional accommodation “on the eve of an election” would not result in voter confusion, *Purcell*’s primary concern. Accommodations like this have been the norm for more than twenty years, and many are routinely implemented *during* elections. Voters with disabilities rely upon those accommodations, and voters without disabilities are accustomed to them. There is no realistic possibility that a curbside voting *option* (if offered) would confuse or deter Alabama voters.

ARGUMENT

I. CURBSIDE VOTING IS A COMMON, EASILY IMPLEMENTED ACCOMMODATION THAT SUBSTANTIALLY MITIGATES THE RISK TO MEDICALLY VULNERABLE VOTERS WHO CAST THEIR BALLOTS IN-PERSON ON ELECTION DAY

Curbside voting is not novel. For close to twenty years, the Department of Justice

(“DOJ”) has sanctioned its use to cure voting-related violations of the ADA.³ Curbside voting services exist in at least twenty-nine states,⁴ often as an accommodation for voters with disabilities.⁵ Implementation varies by jurisdiction according to the needs and capacity of the particular polling site.⁶ The estimated associated costs of implementation are remarkably low.⁷

Multiple jurisdictions have implemented curbside voting in response to the pandemic.⁸ According to the Centers for Disease Control and Prevention (“CDC”), the COVID-19 risks associated with in-person interactions increase if they involve: (i) “new people (*e.g.*, those who don’t live with you)”; (ii) a large number of people; (iii) indoor spaces; (iv) physical proximity; (v) duration; and (vi) “[b]eing in a group with people who aren’t social distancing or wearing

³ DOJ, *Project Civic Access Fact Sheet*, <https://www.ada.gov/civicfac.htm> (last visited Oct. 16, 2020).

⁴ Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 *Stan. L. Rev.* 1491, Appendix (2016) (summarizing results of 50-state survey); *see also* Appendix (providing URLs for select state and county curbside voting programs).

⁵ *See, e.g.*, South Carolina Election Commission, *Voters with Disabilities*, <https://www.scvotes.gov/voters-disabilities> (“Any voter who, because of physical handicap or age (65 or older), cannot enter the polling place in which he is registered to vote, or is unable to stand in line to vote, may vote outside that polling place in the closest available parking area utilizing the vehicle in which he has driven or has been driven to the polls.”); North Carolina State Board of Elections, *Curbside Voting*, <https://www.ncsbe.gov/voting/help-voters-disabilities/curbside-voting> (“In 2020, every voting site in North Carolina offers curbside voting for voters who are unable to enter the voting place without physical assistance due to age or disability.”); *see also* Appendix.

⁶ *See, e.g.*, U.S. Election Assistance Commission, *Preparing for In-Person Voting During Covid-19; Voting Location Requirements*, at 3, *available at* https://www.eac.gov/sites/default/files/document_library/files/In-Person%20Voting%20-%20Building%20Requirements%20%28004%29.pdf (During the 2020 primary elections, “officials in Iowa, Wisconsin, and Virginia highlighted their use of curbside voting to the EAC. Officials in Kentucky worked to make this option available at locations that could provide that capability.”).

⁷ Christopher R. Deluzio et al., *Ensuring Safe Elections*, Brennan Center for Justice (Apr. 30, 2020), at 14–21, *available at* https://www.brennancenter.org/sites/default/files/2020-04/2020_04_5StateCostAnalysis_FINAL.pdf.

⁸ *See, e.g.*, *Drive Thru Voting*, Election Division of the Harris County Clerk’s Office, <https://harrisvotes.com/drivethruvoting> (“Drive Thru Voting (DTV) was created in the wake of the COVID-19 pandemic as a safer, socially-distant alternative to walk-in voting for all voters.”); *see also* Appendix.

masks.”⁹ Traditional in-person voting—*i.e.*, walking into a polling site and waiting in line with strangers to cast a ballot—typically present all of these risk factors. Statistical analyses demonstrate a positive correlation between in-person voter turnout and COVID-19 infection rates in Wisconsin¹⁰ and Michigan.¹¹ Curbside voting, in contrast, does not present these risk factors, and the CDC and the United States Election Assistance Commission have recommended it for that reason. Applicants’ App. 32.¹²

Curbside voting is a particularly valuable option in this election for voters at heightened risk from COVID-19. For people with certain preexisting medical conditions (including diabetes, a disability under the ADA, *see* 28 C.F.R. § 35.108(d)(2)(iii)), people with certain other disabilities, and “older people”—who are independently at higher risk *and* more likely to have one or more of the preexisting conditions determined by the CDC to increase COVID-19 risk—the likelihood of serious illness, long-term symptoms, and death is *substantially* higher than for everyone else. Applicants’ App. 17–App. 20.¹³ Approximately 40% of COVID-19 deaths

⁹ *Deciding to Go Out*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html> (last updated Sept. 11, 2020).

¹⁰ Chad D. Cotti et al., *The Relationship between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary*, NBER Working Paper No. 27187 (revised Aug. 2020), at 14–15, available at <https://www.nber.org/papers/w27187.pdf?sy=187>.

¹¹ Dana W. Flanders et al., *The association of voter turnout with county-level coronavirus disease 2019 occurrence early in the pandemic*, *Annals of Epidemiology*, Vol. 49, Sept. 2020, at 42–49, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7328545/pdf/main.pdf>.

¹² *See also* U.S. Election Assistance Commission, *Preparing for In-Person Voting During Covid-19; Voting Location Requirements*, at 1, available at https://www.eac.gov/sites/default/files/document_library/files/In-Person%20Voting%20-%20Building%20Requirements%20%28004%29.pdf; U.S. Election Assistance Commission, *Innovative Practices and New Solutions*, https://www.eac.gov/sites/default/files/electionofficials/inpersonvoting/innovative_practices_and_new_solutions.pdf.

¹³ *See also, e.g.*, Erin K. Stokes et al., *Coronavirus Disease 2019 Case Surveillance — United States, January 22–May 30, 2020*, 69 *Morbidity and Mortality Weekly Report*, at 763, Table 3 (June 19, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6924e2-H.pdf> (Those at increased risk

nationwide—and over 40% of COVID-19 deaths in Alabama¹⁴—have been people with diabetes.¹⁵ And nearly *half* of the Alabama electorate has one or more of the high-risk medical conditions identified by the CDC.¹⁶

The public health mandate to medically vulnerable Alabamians—like all medically vulnerable Americans—is to stay home and avoid unnecessary in-person interactions.

Applicants’ App. 9. On September 30, 2020, Governor Kay Ivey again extended the “Safer at Home” order (now in effect through November 8), which directs all Alabamians—and “especially vulnerable persons” such as those with diabetes and other “serious underlying health conditions”—to “[m]inimiz[e] travel outside the home.”¹⁷ The Safer at Home Order also

are hospitalized six times as often and die twelve times as often.); Angelo Carfi et al., *Persistent Symptoms in Patients After Acute COVID-19*, 324 JAMA 6, 603–605 (July 2020), available at <https://jamanetwork.com/journals/jama/fullarticle/2768351>; Veronique Greenwood, *How the Aging Immune System Makes Older People Vulnerable to COVID-19*, N.Y. Times, Sept. 8, 2020, <https://www.nytimes.com/2020/09/08/health/covid-aging-immune-system.html>.

¹⁴ Alabama Dep’t of Public Health, *Characteristics of Laboratory-Confirmed Cases of Covid-19*, Oct. 2, 2020, available at <https://www.alabamapublichealth.gov/covid19/assets/cov-al-cases-100220.pdf>.

¹⁵ Jonathan M. Wortham et al., *Characteristics of Persons Who Died with COVID-19 – United States, February 12–May 18, 2020*, 69 Morbidity and Mortality Weekly Report, at 926, Table 2 (June 19, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6928e1-H.pdf>.

¹⁶ Wyatt Koma et al., *How Many Adults are at Risk of Serious Illness if Infected with Coronavirus?*, Kaiser Family Foundation (Apr. 2020), at 6, available at <http://files.kff.org/attachment/Data-Note-How-Many-Adults-Are-at-Risk-of-Serious-Illness-If-Infected-with-Coronavirus.pdf> (43.1% of adults in Alabama—approximately 1.6M adults—are at high risk of serious illness if infected with coronavirus). Medical conditions identified by the CDC as putting adults of any age at “increased risk of severe illness from the virus that causes COVID-19” include: heart, lung and kidney conditions, cancer, immunocompromised states, and obesity, among others. See *People with Certain Medical Conditions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Oct. 16 2020).

¹⁷ Order of the State Health Officer Suspending Certain Public Gatherings Due to the Risk of Infection by COVID-19 (Amended Sept. 30, 2020), ¶ 1, available at <https://governor.alabama.gov/assets/2020/09/Safer-at-Home-Order-Final-9.29.2020.pdf> (hereinafter “Safer at Home Order”).

“end[s]” all “regular programs at Senior Citizen centers” in Alabama and “urge[s]” those facilities to provide “needed meals via curbside pick-up or delivery.”¹⁸

The Alabama Secretary of State has not implemented similar precautions to the state’s in-person voting program. Alabama exacerbates the risk of traditional in-person voting by *exempting* voters from its statewide facial-covering requirement.¹⁹ Secretary Merrill confirmed at trial that he took steps to ensure that un-masked voters were admitted to polling sites in Alabama’s July runoff election. *See Applicants’ App.* 34.

Secretary Merrill has also categorically refused to allow polling sites to offer curbside services as an accommodation. He testified at trial that he intervenes to stop curbside accommodations at polling sites, *irrespective* of the voter’s disability status, the accessibility of the polling site, and whether the curbside service is delivered in a manner that comports with all state election requirements.²⁰

II. PERMITTING ALABAMA COUNTIES TO DECIDE WHETHER TO OFFER CURBSIDE VOTING IS A REASONABLE ACCOMMODATION FOR THE 1.6 MILLION ALABAMA VOTERS WHO ARE AT HEIGHTENED RISK FROM COVID-19 AND ENTITLED TO RELIEF UNDER TITLE II

The elements of a *prima facie* violation of Title II of the ADA are well established: plaintiffs must demonstrate that they are qualified to receive a service, program or activity provided by a public entity, that they have a disability, and that the service is not “readily accessible” to them because of their disability. *See United States v. Georgia*, 546 U.S. 151, 153–

¹⁸ *Id.* ¶ 13.

¹⁹ *Id.* ¶ 2.d.1.

²⁰ For example, the Secretary testified that he did not “know” or “care” whether voters receiving curbside service in Hale County had disabilities when he called the Hale County Probate Judge during the 2016 election and instructed him to “immediately cease and desist” from providing that accommodation. Respondents’ App. Secretary Merrill testified further that he did not know whether the polling precinct at issue was accessible, whether there was any indication that someone other than the voter had signed the poll list or that ballot secrecy had been compromised, or whether traffic flow was disrupted. *Id.*

54 (2006) (citing 42 U.S.C. §§ 12131, 12132); 28 C.F.R. § 35.150. If they satisfy those elements, plaintiffs are entitled to a “reasonable” modification to that service, unless defendants can “demonstrate why the requested accommodation would cause undue hardship” or result in a “fundamental alteration” of the service offered. *Schaw v. Habitat for Humanity of Citrus Cnty., Inc.*, 938 F.3d 1259, 1265 (11th Cir. 2019) (citing *U.S. Airways v. Barnett*, 535 U.S. 391, 401–02 (2002)); *see also* 28 C.F.R. §§ 35.130(b)(7)(i), 35.164.

Voters who are unable to enter their polling place due to disability or age have the right to reasonable accommodations in any election. Alabama voters unable to enter their polling place because they are at heightened risk from COVID-19 have a *prima facie* claim under Title II for the November 2020 general election. Applicants concede that they are “qualified individuals with a disability” under Title II and that they face substantially greater risks voting in-person than do other voters. *See* Emergency Appl. at 23.²¹ Applicants nevertheless argue that medically vulnerable Alabama voters do not have a claim under Title II because: (1) they can vote absentee²²; (2) they are excluded from in-person voting because of their personal choices; and (3) the requested accommodation fundamentally alters Alabama election laws. *Id.* at 23–25. None of these arguments has merit.

²¹ As they must. As the district court correctly concluded—*see* Applicants’ App. 147–App. 149—heightened medical vulnerability to COVID-19 is a “disability” under the ADA because it “substantially limit[s]” multiple “major life activities.” *Silver v. City of Alexandria*, 2020 WL 3639696, at *4 (W.D. La. July 6, 2020) (rejecting argument that pre-existing impairments were not a “disability” because “they [were] only COVID-related” and explaining that the disability determination “cannot be looked at in a vacuum”); *Fraihat v. U.S. Immigration & Customs Enforcement*, 445 F. Supp. 3d 709, 747–48 (C.D. Cal. 2020) (finding that people with medical conditions that increase COVID-19 risk are likely individuals with disabilities under the Rehabilitation Act).

²² In reality, of course, not all Alabama voters can vote absentee. Voters who do not have a permanent mailing address or whose address recently changed generally cannot participate in absentee programs. Other voters will not receive absentee ballots in time due to mail delays. Still others need or strongly prefer to vote in-person and on election day, whether to request accommodation or assistance, to acquire all available information about the candidates before making a final decision, or because they believe in-person voting is more secure

First, Title II prohibits denying voters with disabilities access to in-person voting simply because there exists a “permissibly separate or different program[] or activit[y]” such as absentee voting. 28 C.F.R. § 35.130(b)(2). “Indeed, to assume the benefit is anything less—such as merely the opportunity to vote at some time and in some way—would render meaningless the mandate that public entities may not afford persons with disabilities the services that are not equal to that afforded others.” *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 199 (2d Cir. 2014) (internal citation and quotation marks omitted); *see also Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016) (rejecting applicants’ approach because it “would undermine the purpose of the ADA and its implementing regulations”); *Hernandez v. N.Y. State Bd. of Elections*, No. 20-cv-4003, 2020 WL 4731422, at *8 (S.D.N.Y. Aug. 14, 2020) (“[I]t would be intolerable and legally incorrect to conclude that the relevant service, program or activity is voting generally, and not absentee voting particularly.”).²³

Second, diabetes and other conditions that significantly increase COVID-19 risk are hardly chosen by those who live with them. *Every* exposure to COVID-19 puts those medically vulnerable voters at substantial risk. There is no dispute on that point. And the district court found that, unsurprisingly, the “vast majority” of high-risk Alabamians are complying with CDC guidance and the Safer at Home Order. Applicants’ App. 27. High-risk voters who by necessity

²³ The Eleventh Circuit’s decision in *Am. Ass’n of People with Disabilities v. Harris*, 647 F.3d 1093 (11th Cir. 2011) is not to the contrary. The only issue decided in *Harris* was that voting machines are not “facilities” for the purpose of certain DOJ regulations that implement Title II because they are “temporary, movable objects.” *Id.* at 1103. On that basis alone, the court reversed an injunction in plaintiffs’ favor. *Id.* The *Harris* court’s statement that plaintiffs were “able to participate in the [County’s] voting program” refers only to the district court’s finding that plaintiffs were in fact able to use the challenged machines. Applicants’ citation to 28 C.F.R. § 35.150(a) is similarly misguided. That regulation provides: “A public entity shall operate *each* service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities” (emphasis added). When read together with 28 C.F.R. § 35.103(b)(2), there is no basis in that regulation to limit the service Alabama offers to “voting” rather than “in-person voting,” and applicants cite no authority to the contrary.

engage in *some* in-person interactions during the pandemic do not waive the ADA’s promise of equal access to government services. And prior in-person interactions do not reduce the risk of traditional in-person voting.²⁴

Third, enjoining Secretary Merrill’s *de facto* ban on curbside voting *cannot* constitute a “fundamental alteration” under Title II because it requires nothing and “merely allows counties to implement voting procedures that comply with Alabama law.” *People First of Ala. v. Sec’y of State for Ala.*, 815 F. App’x 505, 515 (11th Cir. 2020) (concurring opinion). Applicants’ assertion that the district court’s injunction is a “gag order,” Emergency Appl. at 15, which “enjoin[s] the Secretary of State from performing his duties to ‘provide uniform guidance for election activities,’” *id.* at 3 (quoting Ala. Code § 17-1-3(a)), is incorrect on its face. The injunction does no such thing, and Secretary Merrill remains free to provide guidance, support, and supervision. He is enjoined *only* from “prohibiting counties from establishing curbside voting procedures that otherwise comply with state and federal election law.” Applicants’ App. 4. Furthermore, site-by-site variation in the methods of delivering in-person voting services is both unremarkable and par for the course in Alabama. Secretary Merrill testified at trial that seven of Alabama’s 67 counties will not use electronic poll books in November because those counties “have not agreed to accept” the Secretary’s offer to provide and implement that service, which was a decision those counties “made . . . on their own.”²⁵

²⁴ Indeed, by mischaracterizing the needs of medically vulnerable voters as willful refusals to “go out in public,” *see* Emergency Appl. at 24, and by asserting that those voters should be “content” with the service available, *see* Emergency Mot. for Administrative Stay and Stay Pending Appeal, *People First of Ala. v. Merrill*, No. 20-12184 (11th Cir. June 17, 2020), at 5, applicants have perpetuated the very “animus,” “impermissible stereotypes,” and “pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including . . . voting,” which Title II was specifically enacted to redress. *Tennessee v. Lane*, 541 U.S. 509, 515, 525 (2004) (internal citations omitted).

²⁵ Respondents’ App.

III. ENJOINING ENFORCEMENT OF THE CURBSIDE VOTING BAN DOES NOT RUN AFOUL OF *PURCELL*

The analysis in Part II is a straightforward application of the ADA. It is required by the text of the statute and its implementing regulations, and it comports with the history of its application and interpretation. Unsurprisingly, accommodations like curbside voting are frequently ordered and adopted to cure accessibility impediments and thereby satisfy the requirements of Title II—including on the eve of an election. The modest relief granted here simply protects local officials from an unwarranted obstruction of their ability to accommodate individual voters. It is precisely for these reasons that *Purcell*'s concerns are not present here. This Court should not upend more than two decades of settled disability rights law by granting the application for a stay.

Title II accommodations like curbside voting typically do not “alter” election rules within the meaning of *Purcell*. The recent cases in which this Court has stayed lower court orders pursuant to *Purcell* have overwhelmingly involved court-ordered modifications to state election law. *See Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020) (South Carolina witness requirement for absentee ballots); *Clarno v. People Not Politicians Oregon*, No. 20A21, 2020 WL 4589742, at *1 (U.S. Aug. 11, 2020) (Oregon state constitution requirements for ballot initiatives); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (Idaho statutory requirements for ballot initiatives); *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (per curiam) (implied postmark date requirement in statutory ballot receipt date requirement).²⁶ In contrast, Title II accommodations merely adjust the method

²⁶ *See also Veasey v. Perry*, 135 S. Ct. 9 (2014) (Texas voter identification provisions); *Purcell*, 549 U.S. 1 (Arizona proof of citizenship and voter identification requirements).

of delivering a government service; they do not “change the ‘nature’ of the service whatsoever.” *Nat’l Ass’n of the Deaf v. Fla.*, 945 F.3d 1339, 1351 (11th Cir. 2020).²⁷

The injunction at issue here is no exception. It merely enables Alabama counties to decide for themselves whether allowing individuals with disabilities to vote from their vehicles is appropriate, so long as they do so in a manner consistent with Alabama law. Voters will be provided the same ballot they would have been provided inside the polling place. Their vehicle becomes their voting booth, and they are subject to all rules applicable to voters inside traditional voting booths. And as noted above, applicants are wrong about the one change they allege the injunction effects—the injunction does not enjoin Alabama’s Secretary of State from providing uniform guidance to polling places concerning curbside voting.

But even if the injunction here did “alter” Alabama’s election rules, its similarity to countless Title II accommodations means that *Purcell* could not possibly forbid its issuance. The danger highlighted by *Purcell* was that “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.” 549 U.S. at 4–5. Confusion cannot ensue among voters when the court order maintains rather than upends voter expectations. Thirty years after the passage of the ADA, “last-minute” accommodations for voters with disabilities have become commonplace.

²⁷ Of course, “the mere fact of a state statutory requirement” does not—without more— “insulate[] public entities from making otherwise reasonable modifications to prevent disability discrimination.” *Nat’l Fed’n of the Blind*, 813 F.3d at 508; accord *Mary Jo C. v. New York State and Local Ret. Sys.*, 707 F.3d 144, 163 (2d Cir. 2013) (“If all state laws were insulated from Title II’s reasonable modification requirement solely because they were state laws . . . the ADA would be powerless to work any reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and no matter how minimal the costs of doing so.”). That distinction is of no moment here because Secretary Merrill’s *de facto* curbside voting ban is not a state law requirement at all.

Take, for example, the many prescriptions in the DOJ’s ADA Checklist for Polling Places.²⁸ Those listed under the heading “Temporary Remedies” are by their very nature intended to provide last-minute accommodations “on Election Day” to voters with disabilities because poll workers do not have the time to implement permanent solutions. These include installing portable ramps and traffic cones, and they make polling sites more accessible.²⁹

Polling sites have similarly been required to provide accommodations to voters on the eve of an election, including in Alabama counties, and there have been no reports of voter confusion. The 2016 Settlement Agreement between the DOJ and Jefferson County, for example, required the latter to implement temporary accessibility measures less than two weeks before the November 2016 general election.³⁰ When necessary and feasible, courts have also ordered without incident comparable “last-minute” accommodations to ensure voting is accessible to individuals with disabilities. *See e.g., Spitzer v. City of Delaware*, 82 F. Supp. 2d 12, 18 (N.D.N.Y. 2000) (mandating ADA compliance 27 days prior to presidential primary election and enumerating measures that were feasible to implement on that time frame); *Spitzer v. Cty. of Schoharie*, 82 F. Supp. 2d 19, 25 (N.D.N.Y. 2000) (same); *Ray v. Franklin Cty. Bd. of Elections*, No. 08-CV-1086, 2008 WL 4966759, at *6 (S.D. Ohio Nov. 17, 2008) (mandating ADA compliance for absentee ballot deficiency cure procedure 9 days *after* November 2008 election).

Indeed, with respect to emergency circumstances that render polling sites inaccessible to voters with disabilities, the ADA *requires* reasonable “last-minute” adjustments. *See United Spinal Ass’n v. Bd. of Elections in City of New York*, 882 F. Supp. 2d 615, 622 (S.D.N.Y. 2012),

²⁸ DOJ, *ADA Checklist for Polling Places*, available at <https://www.ada.gov/votingchecklist.pdf>.

²⁹ *Id.* at 14–15.

³⁰ Settlement Agreement Between the United States of America and Jefferson County, Alabama Regarding the Accessibility of Polling Places, effective Oct. 27, 2016, available at <https://www.justice.gov/usao-ndal/press-release/file/905967/download>.

aff'd sub nom. Disabled in Action v. Bd. of Elections in City of New York, 752 F.3d 189 (2d Cir. 2014) (defendants' failures to remedy polling site accessibility problems reported on election day constituted a Title II violation); 28 C.F.R. § 35.150.³¹

These measures did not create voter confusion, and it cannot be that courts ordering them have repeatedly violated *Purcell*. Rather, their frequency strongly suggests that voters consider the accommodation of voters with disabilities part and parcel of their voting experience. They do nothing to undermine the integrity of elections and are not perceived to do so.

The same is true of the accommodation authorized here. Curbside options do not affect the procedure for “indoor” voting. Voters are in no way obligated to engage with curbside options, and counties are not obligated to offer them. Curbside voting procedures are simple. No advance voter preparation or education is required, and there are no associated changes to any printed forms or instructions. Where offered, curbside options *encourage* older and medically vulnerable Americans to vote because they provide a measure of reassurance that voting is not gambling with their health. Indeed, for many voters, the *absence* of reasonable accommodations to ensure that people with disabilities can participate equally and in-person on election day would upset their expectations and cause both “confusion” and considerable distress.

Applicants suggest that, notwithstanding how typical this accommodation would be, the Court should nevertheless stay its operation because the injunction amounts to a power grab by an unelected judge with little expertise. But it cannot be that a routine application of Title II is outside the purview of the federal judiciary, especially where the authority of the Alabama state

³¹ See also DOJ, *Solutions for Five Common ADA Access Problems at Polling Places*, available at https://www.ada.gov/ada_voting/voting_solutions_ta/polling_place_solutions.htm (last visited Oct. 14, 2020) (enumerating “temporary measures” that may be “necessary” to make polling places accessible).

legislature is not at issue.³² To the contrary, it is Secretary Merrill that overreaches. Elected Alabama *county* officials are far better positioned than the Secretary to determine if curbside voting in their precincts would be feasible and appropriate in the pandemic, and they have historically made such decisions with and without judicial oversight, in order to meet their Title II obligations. *See League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1220 (N.D. Fla. 2018) (“[A] local supervisor of elections is in a better position to evaluate the parking situation at potential sites than [the Florida Secretary of State].”).

CONCLUSION

For the reasons stated herein, *Amici* respectfully submit that this Court should deny the emergency application for a stay.

Dated: October 19, 2020

Respectfully submitted,

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³² In *Purcell*, this Court concluded that the appellate court’s failure to “give deference to the discretion of the District Court” was “error.” 549 U.S. at 5. Here, by contrast, the Court of Appeals for the Eleventh Circuit afforded appropriate deference to the District Court’s extensive factual findings and legal conclusions, when it declined to stay the injunction prohibiting Secretary Merrill from enforcing his *de facto* curbside voting ban in the November general election.

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APPENDIX

Select Jurisdictions Offering Curbside or Drive-Thru Voting Services

- (1) Arizona (statewide). Permitted for voters who are unable to enter the polling location. *See* <https://azsos.gov/elections/voting-election>.
- (2) Arkansas (Jefferson County). Permitted for all voters. *See* <https://abcnews.go.com/Politics/note-voting-age-coronavirus-uncertain-test-runs/story?id=69877935>.
- (3) California (statewide). Permitted for voters with disabilities. *See* <https://voterguide.sos.ca.gov/voter-info/assistance-for-voters-w-disabilities.htm>.
- (4) Colorado (statewide). Permitted for all voters. *See* <https://www.sos.state.co.us/pubs/elections/files/COVID19guidance.pdf>.
- (5) Connecticut (statewide). Permitted for temporarily incapacitated voters. *See* <https://portal.ct.gov/SOTS/Election-Services/Voter-Information/Voters-with-Disabilities-Fact-Sheet>.
- (6) District of Columbia (select Vote Centers). Permitted for voters who are unable to enter a Vote Center due to a disability, seniority, or illness. *See* <https://www.dcboe.org/Voters/How-to-Vote/Voter-Assistance>.
- (7) Hawaii (statewide). Permitted for voters unable to leave their vehicles. *See* <https://elections.hawaii.gov/wp-content/uploads/2015/03/FS518VS002-Voter-Assistance.pdf>.
- (8) Idaho (statewide). Permitted for voters who are unable to enter the polling place. *See* <https://sos.idaho.gov/elect/clerk/Manuals/Idaho%20Election%20Handbook.pdf>.
- (9) Illinois (statewide). Permitted for all voters. *See* <https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=21690>.
- (10) Iowa (statewide). Permitted for voters with disabilities. *See* <https://sos.iowa.gov/elections/voterinformation/accessibility.html>.
- (11) Kansas (statewide). Permitted for the elderly and voters with disabilities. *See* https://www.kssos.org/elections/12elec/Kansas_Election_Officer_handbook_for_disability_accessibility.pdf.
- (12) Kentucky (Anderson and Livingston Counties). Permitted for all voters. *See* <https://andersoncountyclerk.ky.gov/Documents/WAYS%20TO%20VOTE%20IN%20GENERAL%20ELECTION.pdf>; <https://www.wpsdlocal6.com/news/livingston-county->

offering-drive-thru-voting-on-election-day/article_8c3ab334-b28a-11ea-bbeb-57c3bc1e7dc7.html.

- (13) Michigan (statewide). Permitted for voters who are unable to enter the polling location. *See* https://www.michigan.gov/documents/sos/Managing_Your_Precinct_on_Election_Day_391790_7.pdf.
- (14) Minnesota (statewide). Permitted for voters who cannot enter the polling place for any reason, including concerns for their health. *See* <https://www.sos.state.mn.us/election-administration-campaigns/elections-calendar/2020-elections-and-covid-19/>.
- (15) Mississippi (statewide). Permitted for voters with disabilities. *See* <https://www.sos.ms.gov/Elections-Voting/TrainingDocs/Executive%20Committee%20Election%20Day%20Operations%20LAB.pdf>.
- (16) Missouri (statewide). Permitted for voters with limited mobility. *See* <https://www.sos.mo.gov/elections/goVoteMissouri/howtovote>.
- (17) Montana (statewide). Permitted for voters who are unable to enter the polling location. *See* <https://sosmt.gov/elections/disabilities/>.
- (18) Nebraska (statewide). Permitted for voters who are unable to enter the polling place. *See* <https://sos.nebraska.gov/elections/accessible-voting>.
- (19) New Hampshire (statewide). Permitted for voters who are unable to enter the polling place. *See* <https://sos.nh.gov/elections/voters/voting-with-disabilities/>.
- (20) North Carolina (statewide). Permitted for voters who are unable to enter the voting place without physical assistance due to age or disability. *See* <https://www.ncsbe.gov/voting/help-voters-disabilities/curbside-voting>.
- (21) Ohio (statewide). Permitted for voters who are unable to enter a polling location and voters who are symptomatic or concerned about exposure to COVID-19 or voters who refuse to wear a face covering. *See* <https://www.sos.state.oh.us/globalassets/elections/eoresources/peo-training/peotrainingmanual.pdf>.
- (22) Oklahoma (Creek County). Permitted for physically disabled voters who are unable to enter the polling place. *See* http://www.creekcountyonline.com/electionboard_files/voter_assistance.htm.
- (23) South Carolina (statewide). Available to voters who, because of physical handicap or age (65 and older), cannot enter the polling place or are unable to stand in line to vote. *See* <https://www.scvotes.gov/voters-disabilities>.

- (24) Texas (statewide). Permitted for voters who are physically unable to enter the polling place without personal assistance or likelihood of injury to their health. Also permitted for voters who have signs or symptoms of COVID-19. *See* <https://www.sos.state.tx.us/elections/forms/covid/curbside-voting-a-english.pdf>.
- (25) Utah (multiple counties). Curbside ballot drop-boxes available to all voters. *See* <https://ssl.utahcounty.gov/dept/clerk/aud/elections/Curbside.html>.
- (26) Vermont (statewide). Permitted for all voters who need accommodations to assist them with voting. *See* <https://sos.vermont.gov/elections/voters/accessible-voting/>.
- (27) Virginia (statewide). Permitted for voters with physical disabilities or aged 65 or older. *See* <https://www.elections.virginia.gov/casting-a-ballot/accessible-voting/>.
- (28) West Virginia (statewide). Permitted for voters who cannot leave their vehicles to vote if the polling place is not otherwise accessible, and no voters are waiting inside the polling place. *See* <https://sos.wv.gov/FormSearch/Elections/Administrators/West%20Virginia%20Voters%20with%20Disabilities.pdf>.
- (29) Wisconsin (statewide). Permitted for voters who are unable to enter the polling place due to disability. *See* https://elections.wi.gov/sites/elections.wi.gov/files/2020-09/Election%20Day%20Manual%20%282020-09%29_0.pdf.