

No. 18-10151

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

GREATER BIRMINGHAM MINISTRIES, *et al.*,
Plaintiffs-Appellants,

v.

JOHN MERRILL, in his official capacity as the Alabama Secretary of State,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama, No. 2:15-cv-02193-LSC

**BRIEF OF AMICUS CURIAE SOUTHERN POVERTY LAW CENTER,
ALABAMA LEGISLATIVE BLACK CAUCUS, LEAGUE OF WOMEN
VOTERS OF ALABAMA, ADELANTE ALABAMA WORKER CENTER,
ALABAMA ARISE, CENTRAL ALABAMA FAIR HOUSING CENTER,
LOW INCOME HOUSING COALITION OF ALABAMA, AND
MONTGOMERY PRIDE UNITED
IN SUPPORT OF PLAINTIFFS-APPELLANTS
GREATER BIRMINGHAM MINISTRIES, *ET AL.***

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

Pursuant to Federal Rule of Appellate Procedure 26.1 and related Eleventh Circuit Local Rules, *amici curiae* hereby certify that in addition to the Certificates of Interested Persons and Corporate Disclosure Statements submitted by Plaintiffs-Appellants Greater Birmingham Ministries and Defendant Appellee-John Merrill, in his official capacity as the Alabama Secretary of State, the following is a complete list of all trial judges, attorneys, associates, persons, firms, partnership, or corporations that have an interest in the outcome of this case or appeal:

A. Interested Parties

1. Adelante Alabama Worker Center
2. Alabama Arise
3. Alexander, Louise – Alabama House of Representatives, the Alabama
Legislative Black Caucus
4. Boyd, Barbara – Alabama House of Representatives, the Alabama
Legislative Black Caucus
5. Bracy, Napoleon – Alabama House of Representatives, the Alabama
Legislative Black Caucus
6. Buskey, James – Alabama House of Representatives, the Alabama
Legislative Black Caucus

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7. The Central Alabama Fair Housing Center
8. Chestnut, Prince – Alabama House of Representatives, the Alabama Legislative Black Caucus
9. Clarke, Adline – Alabama House of Representatives, the Alabama Legislative Black Caucus
10. Coleman, Merika – Alabama House of Representatives, the Alabama Legislative Black Caucus
11. Daniels, Anthony – Alabama House of Representatives, the Alabama Legislative Black Caucus
12. Drummond, Barbara – Alabama House of Representatives, the Alabama Legislative Black Caucus
13. England, Chris – Alabama House of Representatives, the Alabama Legislative Black Caucus
14. Forte, Berry – Alabama House of Representatives, the Alabama Legislative Black Caucus
15. Givan, Juandalynn – Alabama House of Representatives, the Alabama Legislative Black Caucus
16. Grimsley, Dexter – Alabama House of Representatives, the Alabama Legislative Black Caucus

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17. Hall, Laura – Alabama House of Representatives, the Alabama Legislative Black Caucus
18. Hollis, Rolanda – Alabama House of Representatives, the Alabama Legislative Black Caucus
19. Holmes, Alvin – Alabama House of Representatives, the Alabama Legislative Black Caucus
20. Howard, Ralph – Alabama House of Representatives, the Alabama Legislative Black Caucus
21. Jackson, Thomas – Alabama House of Representatives, the Alabama Legislative Black Caucus
22. Knight, John F., Jr. – Alabama House of Representatives, the Alabama Legislative Black Caucus
23. Lawrence, Kelvin – Alabama House of Representatives, the Alabama Legislative Black Caucus
24. The League of Women Voters of Alabama
25. The Low Income Housing Coalition of Alabama
26. McCampbell, A.J. – Alabama House of Representatives, the Alabama Legislative Black Caucus
27. McClammy, Thad – Alabama House of Representatives, the Alabama Legislative Black Caucus

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28. Montgomery PRIDE United
29. Moore, Mary – Alabama House of Representatives, the Alabama Legislative Black Caucus
30. Rogers, John W. – Alabama House of Representatives, the Alabama Legislative Black Caucus
31. Scott, Rod – Alabama House of Representatives, the Alabama Legislative Black Caucus
32. The Southern Poverty Law Center
33. Warren, Pebblin – Alabama House of Representatives, the Alabama Legislative Black Caucus
34. Coleman-Madison, Linda – Alabama Senate, the Alabama Legislative Black Caucus
35. Dunn, Priscilla – Alabama Senate, the Alabama Legislative Black Caucus
36. Figures, Vivian – Alabama Senate, the Alabama Legislative Black Caucus
37. Sanders, Hank – Alabama Senate, the Alabama Legislative Black Caucus
38. Singleton, Bobby D. – Alabama Senate, the Alabama Legislative Black Caucus
39. Smitherman, Rodger M. – Alabama Senate, the Alabama Legislative Black Caucus

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B. Corporate Disclosure Statement

Counsel for *Amici* further certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ Samuel Brooke

Samuel Brooke

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INTERESTS OF *AMICI CURIAE*

Adelante Alabama Worker Center (“Adelante”) is a non-profit organization that unites low-wage and immigrant workers and their families to defend their rights, promote their dignity, and pursue justice for all. Adelante regularly works in coalition with other civil rights groups in Alabama to challenge attempts by state and private actors to undermine the legal rights, shared prosperity, and political power of working-class people of color.

Alabama Arise (“Arise”) is a statewide nonprofit, nonpartisan coalition of 144 congregations and organizations working to improve public policies affecting low-income Alabamians. Arise’s agenda spans a broad range of issues reflecting Alabama’s shameful legacy of racial and economic inequity and disenfranchisement. Arise’s advocacy rests on the belief that the voices of ordinary citizens—especially those long silenced or ignored—are integral to our democracy. Because barriers to the ballot are antithetical to that belief, Arise opposes Alabama’s voter ID law and any other measures that result in diminished civic participation.

The **Alabama Legislative Black Caucus** (“ALBC”) is composed of all African-American members of the Alabama Legislature. ALBC seeks to represent the interests of all Alabamians, particularly people of color. ALBC successfully opposed efforts to enact a photo ID law for over a decade, until HB 19 was

rammed through the 2011 Regular Session over the opposition of every ALBC member. ALBC has been actively engaged in litigation seeking to enforce the voting rights of Alabamians of color, including *Alabama Legislative Black Caucus v. Alabama* and *Lewis v. Bentley*.

The **Central Alabama Fair Housing Center** (“CAFHC”) is a non-profit civil rights agency created in 1995 to ensure equal housing opportunity for all people living in central Alabama regardless of race, color, national origin, religion, gender, family status, or disability. CAFHC provides services in 29 counties, many of them rural, that lack access to adequate transportation, healthcare, grocery stores, and employment opportunities. CAFHC clients face burdens trying to accomplish many daily activities including, at times, obtaining adequate photo ID required to vote.

The **League of Women Voters of Alabama** is a non-partisan, volunteer, community-based organization, affiliated with the U.S. League of Women Voters, that promotes political responsibility by encouraging Alabamians to participate actively in government and the electoral process. Since its founding, the League has actively engaged in advocacy asserting that voting and fair elections are fundamental rights for all citizens.

The **Low Income Housing Coalition of Alabama**’s mission is to increase housing opportunities for Alabamians with the greatest financial need. It is the sole

statewide organization dedicated to increasing affordable housing resources for Alabamians living in poverty. Voting access needs to be improved in Alabama, especially for people living in poverty. Whenever possible, barriers to voting should be removed to reduce the current participation gaps in the democratic process.

Montgomery PRIDE United provides resources and support to sexual and gender minorities who already experience discrimination in every aspect of their lives. As citizens who are entitled to all rights afforded under the constitution, Montgomery PRIDE United opposes Alabama's voter ID law because it further discriminates against people of color and those living in poverty by making it increasingly difficult to obtain IDs and to simply vote.

The **Southern Poverty Law Center** ("SPLC") is a non-profit organization dedicated to protecting the civil rights of society's most vulnerable members. SPLC has an interest in ensuring every citizen is afforded an equal opportunity to elect the representatives of their choice. SPLC works in states previously covered by Section 5 of the Voting Rights Act of 1965 and on behalf of communities that are often the targets of voter suppression tactics. SPLC is dedicated to supporting every voter's equal access to the ballot box.

All parties consented to the filing of this *amicus* brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part, and that no person or

entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Alabama has a long and often violent history of suppressing and denying the votes of people of color. Alabama embraced slavery from before its founding. It served as the birthplace of the Confederacy, and even after the Civil War sought to enforce myriad Jim Crow laws intended to deny communities of color the right to vote. Alabama’s historical hostility to voters of color is inescapable.

Yet the District Court avoided confronting this history by erroneously determining that Alabama’s photo ID law does not prevent *anyone* from voting, thus evading the fact-intensive inquiry required in challenges brought under Section 2 of the Voting Rights Act (“VRA”). The experiences of many Alabamians run contrary to the District Court’s finding that “it is so easy to get a photo ID in Alabama, no one is prevented from voting.” *Greater Birmingham Ministries v. Merrill (GBM)*, No. 2:15–cv–02193, 2018 WL 348009, at *17 (N.D. Ala. Jan. 10, 2018). The District Court ignored evidence presented by Plaintiffs and a growing body of social science research demonstrating that low-income voters, voters who lack access to transportation, voters experiencing homelessness, voters with felony convictions, and transgender voters—all of whom are disproportionately Black¹ in Alabama—face significant barriers to obtaining a photo ID and using it to vote once obtained.

¹ “Black” is capitalized in this brief to refer to people of the African diaspora; “white” is not capitalized because it does not refer to a shared identity or ethnicity.

Relying on the erroneous conclusion that anyone can obtain and use a photo ID in Alabama, the District Court ruled that the intent and impact of Alabama’s photo ID law are irrelevant. But to determine the impact of Alabama’s photo ID law, the court must consider the political context in which it operates, which cannot be separated from the state’s troubling history of race-based vote denial. The District Court failed to consider that Alabama’s photo ID law perpetuates the state’s historical policy of government-sanctioned subordination of people of color—albeit now couched as a race-neutral measure to ensure electoral integrity—which inflicts an “expressive harm” on voters of color.

Accordingly, *Amici* encourage this Court to reverse the District Court’s grant of summary judgment and to compel a trial on the merits.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Alabama’s Photo ID Law Has a Substantial, Discriminatory Impact on Voters of Color.

The District Court erred by concluding that, despite Plaintiffs’ expert testimony on the tens of thousands of Alabama voters without a photo ID and more than 68,000 Alabama voters with material discrepancies on their photo IDs, not one of these voters is truly impacted by Alabama’s photo ID law. The District Court summarily stated that the impact of Alabama’s photo ID law derives not from the number of people who lack photo ID nor those who possess only a contestable photo ID, but rather from the ease with which the District Court itself

believes a registered voter may obtain a photo ID. *GBM*, 2018 WL 348009, at *12 (“[I]n the end, Dr. Siskin’s estimate does not matter . . . it is so easy to get a photo ID in Alabama, *no one* is prevented from voting.”) (emphasis original). Such a determination is inappropriate at summary judgment, particularly in fact-driven voting cases. *See Wright v. Sumter Cnty. Bd. of Elections & Registration*, 657 Fed. Appx. 871, 872 (11th Cir. 2016) (holding that district court erred by making credibility determination at summary judgment where court disregarded parts of expert’s calculations to find Plaintiffs had not established measure violated Section 2 of VRA); *Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm’rs*, 775 F.3d 1336, 147-49 (11th Cir. 2015) (holding that district court erred at summary judgment in Section 2 case where court “clearly rejected the deposition testimony of [defendant’s] expert and accepted the deposition testimony of [plaintiffs’] expert”).

In reality, voters in historically politically-disenfranchised groups, including voters of color, low-income voters, transgender voters, and voters with felony convictions, continue to lack a photo ID because of impediments they face to obtaining one in the manner prescribed in Alabama. And many voters who do possess a photo ID believe it is not acceptable at the polls, and will not attempt to vote.

A. Thousands of Formerly-Incarcerated Alabamians Are Eligible to Register to Vote, but Lack Photo ID.

Thousands of people previously disenfranchised by Alabama's felony disenfranchisement law—a remnant of the post-Reconstruction South enacted to disenfranchise Black Americans—are now able to register to vote, but will face significant obstacles to doing so because of Alabama's photo ID law. In response to a recent lawsuit challenging the law, the Alabama legislature clarified and defined the crimes that disqualify a person from voting due to felony conviction, re-enfranchising thousands of voters. *See Thompson v. Alabama*, No. 2:16-CV-783-WKW, 2017 WL 3223915 (M.D. Ala. July 28, 2017) (discussing Act 2017-378, adding Ala. Code § 17-3-30.1 to clarify Ala. Const., art. VIII, § 177(b)).

Those who have lost the right to vote by operation of Alabama's felony disenfranchisement law are disproportionately Black. In 1980, 8.4% of the Black voting age population was disenfranchised by Alabama's felony disenfranchisement law, but by 2016, that number had increased to 15.11%. Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016* Figs. 6-7 (2016), <https://goo.gl/pJcufH> (last visited Feb. 6, 2018). Alabama's Black voting age population is disenfranchised at double the rate of the state's overall disenfranchisement rate of 7.62%. *Id.* Fig. 2.

Although thousands of Alabamians are potentially re-enfranchised, affected persons still must obtain an acceptable photo ID to vote. This is a difficult

proposition for people just leaving prison or with a prior felony conviction. If the person's driver's license or non-driver ID expired while they were incarcerated, neither these nor their inmate identification card can be used at the polls as photo ID. See Ala. Secretary of State, *Valid ID at the Polls*, <http://sos.alabama.gov/alabama-votes/photo-voter-id/valid-ids> (last visited Feb. 6, 2018). People with felony convictions already face permanent or temporary obstacles to obtaining "federal welfare benefits, educational grants, public housing . . . employment as well as employment-related licensing," on reintegration into their community. Michael Pinard et al., *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. Rev. L. & Soc. Change 585, 586-87 (2006). Adding the hurdle of obtaining a voter ID to vote makes it less likely this group will seek out and obtain compliant ID and creates yet another obstacle to reintegration and civic engagement. See section B, *infra*.

The impact of Alabama's photo ID law on the recently re-enfranchised is most acutely felt by Black would-be voters. More than half of Alabama's prison population is Black, and one in 25 adult Black men in Alabama is in prison. Ashley Nellis, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 5 (2016), <https://goo.gl/26rNjP>. Criminal records, even for relatively minor offenses, fuel poverty and inequality by creating barriers to employment, housing, public assistance, education and training, and building good

credit. *See generally* Rebecca Vallas et al., *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, Ctr. For Am. Progress (2014), <https://goo.gl/43af4K>. A criminal record is thus a direct cause and consequence of poverty, one that disproportionately affects Alabama's Black community. Poverty, in turn, creates additional barriers to obtaining compliant photo ID.

B. Alabama's Photo ID Law Disenfranchises Other Historically-Marginalized Voters Including, *Inter Alia*, Low-Income Voters, Transgender Voters, and Voters Experiencing Homelessness.

Social science research has established a common-sense proposition—the more barriers to voting that exist, the less likely even eligible voters will choose to vote. *See, e.g.*, William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62(1) *Am. Pol. Sci. Rev.* 25, 25-42 (1968). Photo ID laws generally discourage people from voting because would-be voters, particularly low-income voters, often mistakenly believe that they do not possess an accepted photo ID. Baker Inst. for Pub. Policy, *The Texas Voter ID Law and the 2014 Election: A Study of Texas's 23rd Congressional District 1* (2015), <https://goo.gl/GgHLNu>.

The impact of a photo ID law like Alabama's extends beyond disparate possession of photographic identification. One study of the 2000 to 2006 general elections found a substantial negative relationship between more stringent ID laws and voting for less-educated and low-income voters. R. Michael Alvarez et al., *The*

Effect of Voter Identification Laws on Turnout 19 (Cal. Instit. of Tech., Soc. Sci., Working Paper No. 1267, 2007). Likewise, a survey of registered voters in Wisconsin who did not vote in the 2016 presidential election found that 77% of those prevented from voting had voted in the 2012 election, and most people who said they did not vote because they lacked ID actually possessed a qualifying ID. Press Release, Kenneth Mayer, *Voter ID Study Shows Turnout Effects in 2016 Wisconsin Presidential Election*, (Sept. 25, 2017), <https://goo.gl/FDZ4cn>. Unsurprisingly, the burdens of photo ID “fell disproportionately on low-income and minority populations.” *Id.*

This is especially true in Alabama—the sixth poorest state in the nation—where more than 18.5% of Alabamians live below the poverty line. Alabama Possible, *2017 Alabama Poverty Data Sheet* (2017), <https://goo.gl/9yVjGM>. The District Court determined that “[i]nsofar as it is less convenient for the poor to get an ID than it is for those who have greater means, that is as true for poor whites as it is for poor minority voters.” *GBM*, 2018 WL 348009, at *21. But the District Court overlooks the pivotal correlation between poverty and race, and the clear racial disparity in who is poor in Alabama. *See Alabama Possible, supra*. Of the nearly 900,000 people living in poverty in Alabama in 2017, 31.2% were Black and 33.6% were Latino. *Id.* Only 13.7% were white, even though Alabama’s total population is 69.3% white, 26.8% Black, and 4.2% Latino. *Id.*; U.S. Census

Bureau, Quick Facts: Alabama, <https://www.census.gov/quickfacts/AL> (last visited Feb. 8, 2018). The correlation between race and poverty can be traced to the state's history of politically, economically, and socially disenfranchising people of color. *See, e.g.,* Connor Sheets, *Too Poor to Vote: How Alabama's 'New Poll Tax' Bars Thousands of People from Voting*, AL.com, Oct. 6, 2017, <https://goo.gl/KYdMyQ> (Black prospective voters with felony convictions “are 9.4 percent less likely to be eligible to vote in Alabama because of outstanding fines, fees and restitution”).

Alabama's photo ID law also creates unique barriers for transgender voters, who in Alabama, and nationwide, are disproportionately Black. *See* Andrew R. Flores et al., The Williams Inst., *Race & Ethnicity of Adults Who Identify as Transgender in the United States* 3 (2016), <https://goo.gl/joontv> (Alabama's general adult population is 69% white and 25% Black, whereas the transgender adult population is 60% white and 32% Black). The National Transgender Discrimination Survey (“NTDS”) found that 27% of transgender citizens who have transitioned have no form of ID that accurately reflects their gender. Jody L. Herman, The Williams Inst., *The Potential Impact of Voter Identification Laws on Transgender Voters* 4 (2012), <https://goo.gl/s6iaf7>. Of the transgender citizens who possess a driver's license, 40% have yet to update it to reflect changes in their names, gender identities, or appearances. *Id.* at 2.

These disparities are more pronounced in traditionally-disenfranchised communities. While 27% of transgender respondents lacked ID that accurately reflected their gender, people of color, youth, students, those with low incomes, and respondents with disabilities were more likely than other respondents to lack updated identification documents or records. *Id* at 4. Black respondents lacked updated documents or records at the second highest rate among racial and ethnic groups in the NTDS (37%). *Id*.

Transgender persons attempting to obtain a driver's license that accurately reflects their gender identity must first change their name with the Social Security Administration and then submit both a court order for a name change and documentation signed by a surgeon verifying they completed gender reassignment surgery. *See* Social Security Admin., *How Do I Change My Gender on Social Security's Records?*, <https://goo.gl/dyMwcn> (last visited Jan. 31, 2018); Ala. Law Enf't Agency, *Frequently Asked Questions*, <https://goo.gl/d7vJwp> (last visited Jan. 31, 2018). The voter is then advised to update the name on her Alabama license within 30 days of receiving a legal name change. Nat'l Ctr. for Transgender Equality, *ID Documents Center – Alabama*, <https://goo.gl/siyMJv> (last visited Feb. 24, 2018). This is problematic not only because of the significant time and cost associated with the process, but also because it *requires* a specific medical procedure, even though most transgender persons report not having any form of

gender-confirming surgery. See Complaint ¶¶ 52–54, *Corbitt v. Taylor*, No. 2:18-cv-00091-MHT-GMB (M.D. Ala. Feb. 6, 2018), <https://goo.gl/1c8z5c>.

Alabama is one of only nine states that require proof of surgery to issue an accurate driver’s license to a transgender person. American Ass’n of Motor Vehicle Adm’rs, *Resource Guide on Gender Designation on Driver’s Licenses and Identification Cards* 25 (2016), <https://goo.gl/KdNkGo>. This requirement is especially pernicious because it prevents many transgender Alabamians from obtaining a driver’s license “without disclosing highly sensitive information, risking discrimination and attack, compromising their own health and wellbeing, and endorsing a message about their gender with which they strongly disagree.” Complaint ¶ 3, *Corbitt*, No. 2:18-cv-00091-MHT-GMB. Thus, transgender Alabamians who do not undergo surgery cannot obtain a photo ID that accurately reflects their gender to vote.

And even though Alabama law allows voters without a photo ID to submit a regular ballot if two election officials attest to their identity in an affidavit, for transgender people “this is an equally onerous requirement as it necessitates subjective identification by a poll worker.” Taylor N.T. Brown et al., *The Williams Inst., Voter ID Laws and Their Added Costs for Transgender Voters* 2 n.4 (2016), <https://goo.gl/HuYnJN>. Subjective identification is problematic for transgender

persons because, for a variety of reasons, election officials in their community may not understand or accept transgender identity or presentation.

People experiencing homelessness also face significant barriers to obtaining a compliant ID in the manner prescribed in Alabama. In Alabama, approximately 3,793 people experienced homelessness in 2017. U.S. Dep't of Hous. & Urban Dev., *The 2017 Annual Homeless Assessment Report to Congress* 78 (2017), <https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf>. Of those, 1,137 were unsheltered. *Id.* According to the National Coalition for the Homeless, many people experiencing homelessness lack the appropriate identification documents required to register or vote, and many of those who remain unsheltered incorrectly believe they need an established residence to register. Nat'l Coal. for the Homeless, *Legal Issues*, <https://goo.gl/k7HbQj> (last visited Jan. 31, 2018).

Moreover, individuals experiencing homelessness may lack the resources necessary—like access to a computer and Internet—to obtain a voter ID from the Mobile ID unit, a service the District Court summarily found is readily available to anyone who could not otherwise access an ALEA office or their local Board of Registrars. *GBM*, 2018 WL 348009, at *21. For example, the permanent voter ID card is mailed to a voter's residential address within ten business days, and for the Mobile ID unit to come to a voter, the voter must request this service through the

Secretary of State's website. *Id.* at 18-19. These provisions require access to resources many individuals experiencing homelessness necessarily lack such as a residential address, access to a computer, and access to the Internet.

Although state-specific data is lacking, Black Americans are overrepresented in the national population of individuals experiencing homelessness. Marian Moser Jones, *Does Race Matter in Addressing Homelessness? A Review of the Literature*, 8 *World Med. & Health Pol'y* 139 (2016) (reviewing 34 social and behavioral science research articles studying homelessness and race between 1985 and 2015). And people living in extreme poverty in Alabama are disproportionately Black. *See Alabama Possible, 2017 Alabama Poverty Data Sheet, supra*. A trial on the merits would allow Plaintiffs to present information about the burdens faced by Alabamians experiencing homelessness who cannot obtain photo or voter ID and demonstrate that this group is disproportionately composed of people of color.

C. The Court Erroneously Assumed that People Who Lack Access to Transportation Can Utilize the Defendant's Mobile ID Unit.

Individuals without transportation cannot readily utilize Defendant's Mobile ID unit, contrary to the District Court's finding. The District Court's order explains that "[p]overty, household wealth, and racial demographics were not factors considered when scheduling locations for Mobile ID unit visits." *GBM*, 2018 WL 348009, at *7. Since 2014, the Mobile ID unit operated fewer than four hours a day

and issued fewer than 300 voter IDs annually. *Id.* It has made fewer than 10 home visits. *Id.*

Moreover, access to both a computer and the Internet are integral to requesting a home visit by the Mobile ID unit. *Id.* at *7-8. Based on the 2015 American Community Survey (“ACS”) one-year estimates, 27.1% of Black and 23.6% of Hispanic households do not have a computer, and 41.8% of Black households and 41.2% of Hispanic households do not have a high-speed Internet subscription. *Id.* at *11. This compares to 16.2% of white households that do not have a computer and 27.7% of white households without a high-speed Internet subscription. *Id.* Even if a voter can request a visit, she must request a date at least two weeks in advance, and cannot request a time. The Mobile ID unit’s requirement that citizens block-off an entire day, two weeks in advance, is significant. Many citizens are engaged in non-traditional employment, work on an ad-hoc, as-needed basis, and must survive paycheck to paycheck. See, e.g., Nancy Dahlberg, *The Gig Economy is Big and Here to Stay: How Workers Survive and Thrive*, Chicago Tribune, Sept. 6, 2017, <https://goo.gl/uSNSFG>. To obtain a voter ID, these workers must forfeit a day of critical income. The Defendant did not consider the significant limitations poverty, household wealth, and racial demographics have in Alabama when scheduling locations for Mobile ID unit

visits, and the unit is not operating to the benefit of low-income communities and communities of color. *See GBM*, 2018 WL 348009, at *12-13.

Had the District Court properly denied Defendant's motion for summary judgment, it would have found that the half-hearted efforts of the Defendant's Mobile ID unit do not ameliorate the myriad barriers facing low-income, disproportionately-Black voters in Alabama who lack adequate photo ID. At the intersection of Alabama's historically politically-disenfranchised communities are people who struggle to obtain photo ID. Black and Latino Alabamians who have a low household income, have a felony conviction, are transgender, are homeless, or have little or no access to transportation all face tangible burdens to obtaining compliant photo ID. They deserve their day in court.

II. The District Court Erred by Failing to Consider the Historical Context in Which Alabama's Photo ID Law Operates.

By erroneously granting summary judgment and dismissing Plaintiffs' claim under Section 2 of the VRA ("Section 2"), the court failed to conduct the "searching practical evaluation of the past and present reality" to determine whether Alabama's photo ID law has a discriminatory effect, as required in Section 2 cases. *Fayette*, 775 F.3d at 1343. The court should have considered Alabama's extensive history of race-based voting discrimination, among other factors, to determine how Alabama's photo ID law interacts with historical discrimination to deny and abridge the right to vote on the basis of race.

Summary judgment is often inappropriate in Section 2 cases because the Supreme Court and Eleventh Circuit require lower courts undertake a heavily fact-driven legal analysis, including evaluating the social and historical context in which a challenged measure operates. *Fayette*, 775 F.3d at 1343 (internal citations omitted) (reversing summary judgment in Section 2 case because “courts are required to ‘consider all relevant evidence,’ conduct a ‘searching practical evaluation of the past and present reality’ of the challenged electoral system, and ‘gradually draw [] together a picture . . . of the political process [through] circumstantial evidence’”).

Specifically, courts look to “the history of voting-related discrimination in the State or political subdivision; . . . the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . . [and] the extent to which the minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process” among other factors, to determine the impact of a challenged measure. *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (endorsing analysis set out in Senate Report to 1982 amendments to Section 2).

Alabama’s history of denying Black Americans the vote is as old as the state itself. The document creating the state in 1819 only granted suffrage to white male

citizens. Ala. Const. of 1819, art. III, § 5 (1819). Following Reconstruction, Alabama legislators met with the explicit purpose of rolling back the Reconstruction-era gains of Black Americans without attracting federal attention. Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 Ala. L. Rev. 67, 68 (2001). The delegates segregated Alabama schools, abolished the state Board of Education, and limited the taxation powers of state, county, and municipal governments to reduce funding for public schools and other state services relied upon by Black Americans. *Id.*

With the state's 1875 constitution came new measures to more subtly disenfranchise Black Americans, including gerrymandering and gubernatorial appointments to formerly elected offices. *Id.* at 69. And an 1893 election law permitted voter registration only in the month of May, listed candidates alphabetically without party identification, and required voters to present voter identification. *Id.* These measures had a pervasive racial impact because Black voters were more likely to be illiterate, a consequence of racial disparities in the provision and quality of education in Alabama. *See, e.g., United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110 (1978).

The 1901 Alabama Constitution—which governs Alabama to this day—ratified as prerequisites to voting a \$1.50 annual poll tax, an English literacy test, and ownership of either 40 acres or property worth at least \$300. Amy Erickson,

Selma to Selma: Modern Day Voter Discrimination in Alabama, 35 Law & Ineq. 75, 78-79 (2017), <https://goo.gl/ENbeH1>. As legislators explicitly stated, “[d]isfranchising blacks and maintaining white supremacy were the central purposes of the 1901 Constitution.” *Knight v. Alabama*, 458 F.Supp.2d 1273, 1284 (N.D. Ala. 2004), *aff’d*, 476 F.3d 1219 (11th Cir. 2007). Before these measures were ratified, there were 181,000 registered Black male voters; post-ratification, that number shrunk to fewer than 5,000. Erickson, *supra*, at 79; *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1063-64 (S.D. Ala. 1982) (“[T]he disfranchising constitution of 1901 . . . [was] promoted as good government reform[].”).

Even though most of the white supremacist provisions of the 1901 Constitution have been struck down by federal courts, Alabama has refused to adopt a new constitution. William H. Stewart, *The Tortured History of Efforts to Revise the Alabama Constitution of 1901*, 53 Ala. L. Rev. 295 (2001). Remarkably, the constitutional provisions restricting the voting rights of Black Americans remained part of Alabama’s constitution until 1996. Erickson, *supra*, at 79.

And it was the violence employed by agents of the state of Alabama to prevent Black Americans from exercising their right to vote that catalyzed passage of the VRA in 1965. *Id.* at 80-81. Only 53 years ago on “Bloody Sunday,” Alabama police officers violently beat protestors as they attempted to march in Selma in support of Black voting rights. Barbara Arnwine et al., *Martin Luther*

King's Call to 'Give Us the Ballot' is as Relevant Today as it was in 1957, The Nation, Jan. 25, 2018, <https://goo.gl/qfzKNU>. Black Alabamians sacrificed their livelihoods and sometimes their lives for access to the ballot.

Despite federal intervention, Alabama never ceased its attempts to restrict access to the ballot. From 1965 until 2013, Alabama was covered by Section 5 of the VRA because of the state's long history of racial discrimination in voting. Section 5 was enacted as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 94-196, at 57-58 (1975)). In the last twenty years Section 5 was in place, the state of Alabama or subdivisions thereof attempted to pass 48 voting measures; the Justice Department rejected each requested measure because the requesting jurisdiction could never demonstrate it had neither a discriminatory purpose nor effect on voters of color. U.S. Dep't of Justice, *Voting Determination Letters for Alabama*, <https://goo.gl/E6mNhu> (last visited Feb. 14, 2018). Five of the rejected measures would have created a voter ID requirement. *Id.*

Just days after the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), which struck down Section 5's coverage formula, Alabama implemented its photo ID law. *See* Bob Johnson, *Alabama Officials Say Voter ID*

Law Can Take Effect, The Gadsden Times, June 26, 2013, <https://goo.gl/494f9Z>. Shortly thereafter, the Governor and the Secretary of the Alabama Law Enforcement Agency (“ALEA”) announced ALEA would permanently close 31 part-time driver’s license-issuing offices, including offices in eight of eleven contiguous counties where more than 130,000 eligible voters reside, nearly half of whom were Black, and where the Black poverty rate was 41%. Ari Berman, *Alabama, Birthplace of Voting Rights Act, Is Once Again Gutting Voting Rights*, The Nation, Oct. 1, 2015, <https://goo.gl/qpLPzJ>. Under protest, the Governor shortly after announced that rather than close completely, the 31 affected ALEA offices would remain open one day per month. *GBM*, 2018 WL 348009, at *8. In its civil rights investigation into the closures, the U.S. Department of Transportation concluded that “African Americans residing in the Black Belt region of Alabama are disproportionately underserved by ALEA’s driver licensing services, causing a disparate and adverse impact on the basis of race.” Mem. of Agreement Btwn. the U.S. Dep’t of Transp. and the Ala. Law Enf’t Agency 1 (Dec. 22, 2016), <https://www.transportation.gov/briefing-room/MOA-between-us-department-transportation-and-alabama-law-enforcement>.

Here, because the District Court erroneously granted summary judgment, the court did not conduct the “searching practical evaluation of the past and present reality,” *Fayette*, 775 F.3d at 1343, or look to the “history of voting-related

discrimination” in Alabama before dismissing Plaintiffs’ Section 2 claim. *Gingles*, 478 U.S. at 43-46. Had the District Court undertaken this analysis, it would have established a picture of the political system in which Alabama’s photo ID law operates that evidences the continuation of Alabama’s unmistakable policy of denying and abridging the votes of people of color.

III. The District Court Should Have Considered the “Expressive Harm” Intended and Inflicted on Black and Latino Citizens by Alabama’s Photo ID Law.

The District Court should also have considered the expressive harm inflicted on voters of color by Alabama’s photo ID law, which purports to address a non-existent problem and simply builds on a long tradition of racially-motivated barriers to the Alabama voting process.

An expressive harm is “one that ‘results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.’” Richard H. Pildes et al., *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 Mich. L. Rev. 483, 506-07 (1993); *see also Bush v. Vera*, 517 U.S. 952, 1053-54 (1996) (Souter, J., dissenting) (discussing and agreeing where attitude expressed is inferiority between races); *accord Shaw v. Hunt*, 517 U.S. 899, 923-24 (1996) (Stevens, J., dissenting) (noting the Court “permitted generalized claims of harm resulting from state-sponsored messages to

secure standing under the Establishment Clause”). Expressive harm is an extension of the long-established principle that the “central mandate [of the Equal Protection Clause] is racial neutrality in governmental decisionmaking.” *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citing, *inter alia*, *Brown v. Board of Education*, 347 U.S. 483 (1954)). *Brown v. Board* held that *de jure* racial school segregation was unconstitutional “even though the physical facilities and other ‘tangible’ factors may be equal” 347 U.S. at 493. “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494; *accord Stout v. Gardendale Bd. of Educ.*, No. 17-12338, 2018 WL 827855, at *17 (11th Cir. Feb. 13, 2018) (internal citations omitted) (municipality cannot break away from county school system where “the secession would send messages of inferiority to black schoolchildren”). In striking down Montgomery’s bus segregation ordinance, a three-judge district court held that the equal protection principle announced in *Brown v. Board* applies in areas beyond education. *Browder v. Gayle*, 142 F. Supp. 707, 716-17 (M.D. Ala.) (three judge court), *aff’d*, 352 U.S. 903 (1956).

The doctrine of “separate but equal” imposed a stigma on Black persons that was the same kind of expressive harm denounced by the *Shaw v. Reno* line of cases. 509 U.S. 630 (1993). In *Shaw v. Reno*, a group of white plaintiffs challenged

North Carolina’s redistricting plan, alleging the plan was so irregular on its face that it was clearly designed to differentiate electors on the basis of race. *Id.* Even though the resulting plan did not dilute the voting strength of any voters, the Supreme Court found the redistricting plan violated the Equal Protection Clause because “state legislation that expressly distinguishes among citizens on account of race—whether it contains an explicit distinction or is ‘unexplainable on grounds other than race,’” is subject to strict scrutiny. *Id.* at 631 (internal citations omitted); *see also Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967) (holding federal court may set aside result of state election when racial discrimination occurs that is “gross, spectacular, [and] completely indefensible” because “there are certain discriminatory practices which, apart from demonstrated injury . . . so infect the processes of the law as to be stricken down as invalid”); *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960) (holding Alabama statute removing almost all Black voters from city bounds unconstitutional because state action amounted to discriminatory deprivation of “the municipal franchise” even though no voter was denied right to vote).

But the expressive harms of Alabama’s photo ID law, unlike the racial classification harm to the white plaintiffs in *Shaw v. Reno*, also subordinates its victims. “[A] government action can subordinate people because of their race or ethnic community without inflicting any tangible harm—or resulting in any further

subordination.” Jeffrey S. Helmreich, *Putting Down: Expressive Subordination and Equal Protection*, 59 UCLA L. Rev. Discourse 112, 118 (2012). “[P]olicies and actions that subordinate a distinct group, even if only expressively or symbolically, help exclude that group from full and equal participation in the political process by reinforcing a sense that the group is subordinate both within the group and among those participating in its subordination.” *Id.* at 122.

Expressive subordination can be more harmful to its victims than a law’s tangible consequences. For example, in *Loving v. Virginia*, 388 U.S. 1 (1966), the Court found an anti-miscegenation law unconstitutionally harmful because of its “endorsement of white supremacy.” *Id.* at 1, 7. *Loving v. Virginia* and *Brown v. Board* exemplify the anti-subordination principle of equal protection. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 Va. L. Rev. 1267, 1272-73, 1293 (2011) (citing Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv. L. Rev. 1470, 1472-73 (2004)); see also *Palmer v. Thompson*, 403 U.S. 217, 235-37 (1971) (Douglas, J., dissenting).

While Alabama’s photo ID law is facially neutral, a reasonable factfinder could conclude, based on Alabama’s history and the circumstances surrounding the bill’s passage, that it was enacted to send a message to voters of color perpetuating their inferior political status. *GBM*, 2018 WL 348009, at *3-4, 15; Ex. I Kousser

Decl. at 60-127, *GBM*, 2018 WL 348009 (No. 2:15-cv-02193). The 1901 Constitution that continues to govern Alabama embodies the fundamental expressive harm, white supremacy. “And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.” *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (quoting John B. Knox, president of the 1901 convention). The primary function of maintaining the 1901 Constitution is to inflict expressive harm on Black—and now Latino—residents, and to remind them that Alabama’s historical policy of marginalizing people of color has not been repudiated. Pursuant to this constitutional policy, Alabama maintained a system of *de jure* disfranchisement of its Black citizens that lasted until well after passage of the VRA. *Underwood*, 471 U.S. at 229-30; *accord Knight*, 458 F. Supp. 2d at 1284; *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1358-59 (M.D. Ala. 1986); *Bolden*, 542 F. Supp. at 1063; *see also Flynt, supra*, at 67. “What is most remarkable is not that reactionary forces so completely dominated constitution-making in 1901 but that a century later the edifice they constructed has been modified only by federal court decisions and not by Alabama citizens, who either had too great a stake in the system, or were too uninformed, or too powerless to remove ‘Alabama’s shame.’” *Flynt, supra*, at 76. Until relatively recently, attempts to amend the state constitution to remove language banning interracial marriage, segregating schools, and requiring the

payment of a poll tax as a suffrage requirement failed in the legislature. Ex. I Kousser Decl. at 60-61, *GBM*, 2018 WL 348009 (No. 2:15-cv-02193). But legislators who supported the photo ID law also fought to defeat those amendments. *Id.*

The District Court should have fully considered the extensive direct and circumstantial evidence of invidious intent behind the enactment of Alabama's photo ID law, including the state's long history of subordinating people of color, not only because of the concrete harm the law inflicts on its intended Black and Latino victims, but because of the expressive harm directed at them by a law that claims to address a non-existent problem and perpetuates the state's long documented policy of denying communities of color the right to vote. To fail to do so perpetuates the exclusion of the law's targets from full and equal participation in the political process and diminishes the populace's confidence in the judiciary.

CONCLUSION

In dismissing the real burdens Alabamians face in attempting to exercise their right to vote, avoiding factual development of the impact of Alabama's photo ID law as evidenced by the state's history of race-based voting discrimination, and ignoring the expressive harm caused by a law passed to perpetuate white supremacy, the District Court erred, and its opinion conveys a message to historically politically-disenfranchised communities in Alabama that have been

hardest hit by this discriminatory law that their struggle remains inconsequential and the very real burdens they testified to can be denied without further examination. Such a determination is prohibited at the summary judgment stage.

Amici respectfully request this Court reverse the District Court's summary judgment order in favor of the Defendant-Appellee and remand the case for a trial on the merits.

DATED this February 28, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C), I hereby certify that:

1. the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. Local Rule 32-4; and
2. the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is in 14-point proportionally spaced Times New Roman typeface.

Dated: February 28, 2018

/s/ Samuel Brooke
Samuel Brooke

CERTIFICATE OF SERVICE

I certify that on February 28, 2018, the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to all counsel of record.

I also certify that on this same date, pursuant to 11th Cir. R. 31-3, seven copies of the foregoing document were sent to the Clerk of the Court by first-class mail, postage prepaid.

/s/ Samuel Brooke

Samuel Brooke