

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Texas Democratic Party, Gilbert Hinojosa, §
Chair of the Texas Democratic Party, §
Joseph Daniel Cascino, Shanda Marie §
Sansing, and Brenda Li Garcia, §
Plaintiffs, §

v. §

Civil Action No. 5:20-CV-00438-FB

Greg Abbott, Governor of Texas, §
Ken Paxton, Attorney General of Texas, §
Ruth Hughs, Texas Secretary of State, §
Dana Debeauvoir, Travis County Clerk, and §
Jacquelyn F. Callanen, Bexar County §
Elections Administrator, §
Defendants. §

DEFENDANT RUTH HUGHS'S MOTION TO DISMISS

Defendant Ruth Hughs, in her official capacity as Texas Secretary of State, respectfully seeks the dismissal of the claims asserted against her in Plaintiffs' First Amended Complaint (Doc. 9).¹ For the reasons discussed below, the *Pullman* abstention doctrine calls for this Court to delay a ruling in this case pending the related state court litigation; the political question doctrine precludes the Court from resolving Plaintiffs' claims; sovereign immunity bars Plaintiffs' claims for injunctive relief; Plaintiffs lack standing; and Plaintiffs' claims fail on the merits.

BACKGROUND

A. Texas law allows voters to vote by mail only in limited circumstances.

Most Texas voters vote in person, either during early voting or on election day. Voters may apply to vote by mail in only one of four instances—if they: (1) anticipate being absent from their

¹ The Secretary of State is the only State Defendant whose answer deadline is today, and accordingly, she is the only State Defendant filing a motion to dismiss at this juncture. The remaining State Defendants—the Governor and the Attorney General—will file their respective motions to dismiss when those motions are due.

county of residence; (2) have a disability that prevents them from appearing at the polling place; (3) are 65 or older; or (4) are confined in jail. TEX. ELEC. CODE §§ 82.001-.004. “Disability” for the purposes of the Election Code is defined to allow a qualified voter to vote by mail if the “voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.” *Id.* § 82.002(a).

B. The Texas Democratic Party brought suit in state court.

On March 23, 2020, the Texas Democratic Party (TDP) and two voters sued Travis County Clerk Dana Debeauvoir and the Secretary of State, seeking a declaration that the definition of “disability” in Section 82.002(a) of the Texas Election Code applies to all voters who “believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease.” Doc. 10-3 at 7 (quoting state court petition). Plaintiffs voluntarily dismissed their state court case against the Secretary, *id.* at 8 n.7, and the State of Texas subsequently intervened in the case for certain, specified purposes.²

On April 17, 2020, after an evidentiary hearing, the Travis County district court ordered that any Texas voter “without established immunity [to COVID-19] meet[s] the plain language definition of disability” in the Texas Election Code, and thus, is eligible to apply for a mail-in ballot in the upcoming 2020 elections. Doc. 10 at 5. That order was immediately appealed, superseded, and thus stayed. Tex. R. App. P. 29.1(b). The Fourteenth Court of Appeals issued a new order, pursuant to Texas Rule of Appellate Procedure 29.3, which temporarily allowed the Travis County district court’s order defining “disability” under Section 82.002(a) of the Texas Election Code to take effect on May 14, 2020. *See* Doc. 86. But on May 15, 2020, the Texas Supreme Court granted the State’s emergency

² Texas law takes a broader, more flexible view of intervention than does the Federal Rules of Civil Procedure. *See State v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015) (describing the “expansive” intervention standard in Texas). As a result, Texas’s limited intervention did not result in it becoming a full defendant in the Travis County action.

motion for temporary relief and issued a stay of the Fourteenth Court of Appeals's order pursuant to Texas Rule of Appellate Procedure 29.3.

Relatedly, *In re State of Texas*, No. 20-0394, in which the State has sought mandamus relief against five counties involving their compliance with the Texas Election Code, was argued in the Texas Supreme Court on May 20, 2020, with a decision to follow shortly thereafter. The case squarely addresses the interpretation of Section 82.002(a) of the Texas Election Code. *See* Doc. 50-1.

C. Plaintiffs brought overlapping claims in this court.

Hedging against an unfavorable outcome in State court, Plaintiffs TDP, its Chair Gilberto Hinojosa, and three voters filed this action on April 7, 2020. *See* Doc. 1. Plaintiffs contend that the State of Texas's "Election Conditions," a term the complaint never defines, violate the Voting Rights Act, the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments, and are void for vagueness. Doc. 9 ¶¶ 79–110.

The Secretary defended against Plaintiffs' motion for preliminary injunction (Doc. 10) at the hearing on May 15, 2020, and now seeks the dismissal of Plaintiffs' claims in their entirety.³

ABSTENTION

Though Plaintiffs' current claims sound in federal law, they cannot be resolved without reference to the question posed in state court: whether fear of contracting COVID-19 constitutes a "disability" under the Texas Election Code. That question is squarely presented in the state court litigation and is currently before Texas's civil court of last resort. In light of uncertainty about a predicate question of state law, this Court should abstain under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). "The *Pullman* case establishes two prerequisites for *Pullman* abstention: (1) there

³ The Secretary of State preserves all arguments made in response to Plaintiffs' motion for preliminary injunction whether or not specifically repeated here. Moreover, to the extent the arguments herein have been rejected by the Court, the Secretary respectfully requests reconsideration of those arguments in light of the posture of this motion to dismiss and the allegations in Plaintiffs' amended complaint. *Cf. Holoway v. Triola*, 172 F.3d 866, 866 (5th Cir. 1999) ("A district court may reconsider and reverse a previous interlocutory order at its discretion.").

must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised.” *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980).

Plaintiffs have done all they can to manufacture uncertainty about eligibility to vote by mail under Texas law. If the Supreme Court of Texas permits broader eligibility to vote by mail, its ruling would put Plaintiffs’ claims “in a different posture,” if not moot them entirely. *Id.* That is because if the plaintiffs in prevail in state court, all Texas voters could be eligible to vote by mail. In turn, Plaintiffs’ constitutional claims here, which are based on the alleged disparities between voters who can vote by mail and voters who cannot in the unique context of COVID-19, will be moot.

Even if some claims might remain in the aftermath of the state courts’ interpretation of state law, that does not counsel against abstention: to the extent the State court litigation “would not ‘avoid in whole or in part the necessity for federal constitutional adjudication,’ it might ‘at least materially change the nature of the problem.’” *Jackson*, 617 F.2d at 431 (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)); *see also Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009) (noting abstention standard that the state court proceedings “substantially modify the federal constitutional question”); *Brooks v. Walker Cty. Hosp. Dist.*, 688 F.2d 334, 338 (5th Cir. 1982) (abstaining because “clarification of” state law “may have a considerable impact on the posture and ultimate resolution of . . . federal issues”).

COVID-19 has generated new issues for courts. Just last month, a federal court recognized the need for abstention in these extraordinary circumstances. Rather than decide federal constitutional questions, Judge Rosenthal abstained because “relevant state law is uncertain and will impact any argument in this court.” *Russell v. Harris Cnty.*, 2020 WL 1866835, at *13 (S.D. Tex. Apr. 14, 2020). “[D]elicate considerations of federalism and separation of powers support abstention in this complex, rapidly evolving situation.” *Id.*

The same reasoning applies here. Texas officials need space to enact policies that are responsive to and take full consideration of the evolving COVID-19 situation. Moreover, elected officials are better-equipped than courts to grasp the range of public health and social issues at play and craft appropriate policies to address them. And this is precisely their role in our representative democracy. For these reasons, this case presents an almost textbook illustration of the *Pullman* abstention doctrine. *See Harris Cnty. Comm’r Court v. Moore*, 420 U.S. 77, 84 (1975) (“Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law.”). Accordingly, Plaintiffs’ claims should be dismissed without prejudice until the state court proceedings conclude. *See id.* at 88 (explaining that because the Texas Supreme Court has ruled that “it cannot grant declaratory relief under state law if a federal court retains jurisdiction over the federal claim,” “we direct the District Court to dismiss the complaint”).

MOTION TO DISMISS STANDARD

In addition to dismissal on abstention grounds, the Secretary seeks dismissal of the claims against her for lack of jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). “A case is properly dismissed for lack of subject matter jurisdiction when the court lacks statutory or constitutional power to adjudicate the case.” *Home Builders Ass’n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). And the party seeking to invoke jurisdiction bears the burden of demonstrating its existence. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). “[A] court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction.” *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009).

In a motion to dismiss under Rule 12(b)(6), the court must “accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *Great Plains Tr. Co. v. Morgan Stanley*

Dean Witter & Co., 313 F.3d 305, 312–13 (5th Cir. 2002) (internal quotation marks and citation omitted); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). “While a complaint . . . does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do[.]” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations, quotation marks, and brackets omitted).

POLITICAL QUESTION DOCTRINE

This case should be dismissed, first and foremost, because it presents political questions about the adequacy of the State’s response to COVID-19. Sometimes “the judicial department has no business entertaining [a] claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (quotation omitted). Such claims present nonjusticiable “political questions” because they are “outside the courts’ competence and therefore beyond the courts’ jurisdiction.” *Id.* “Among the political question cases the Court has identified are those that lack ‘judicially discoverable and manageable standards for resolving [them].’” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Rucho held that partisan gerrymandering presented a political question for three reasons. First, “the Framers’ decision to entrust districting to political entities” precluded “hold[ing] that legislators cannot take partisan interests into account.” *Id.* at 2497. Thus, the relevant question is when political gerrymandering “has gone too far,” not whether it is permissible at all. *Id.* (quotation omitted). Second, courts cannot “even begin to answer” whether gerrymandering “has gone too far” unless they know the “fair” baseline from which to measure departures. *Id.* at 2500–01. Third, in the gerrymandering context, “fairness” could be defined in different ways, and “[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.” *Id.* at 2500. Similar concerns are at play in this case, which turns

(at its core) on whether it is fair to ask voters to abide by Texas's normal voting rules during this election cycle.

Indeed, the night before the preliminary injunction hearing in this case, the Northern District of Georgia dismissed a similar challenge to a state's allegedly inadequate response to managing its elections in light of the COVID-19 pandemic. See *Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092 (N.D. Ga. May 14, 2020). In that case, the plaintiffs sought a wide range of relief related to in-person and absentee ballots. *Id.* at *1. The court dismissed the plaintiffs' claims pursuant to the political question doctrine. As the court explained, the "Framers of the Constitution did not envision a primary role for the courts in managing elections, but instead reserved election management to the legislatures." *Id.* at *3. In the absence of "pellucid proof provided by plaintiffs that a political question is not at issue, courts should not substitute their own judgments for state election codes." *Id.* And whether the executive branches had done enough to combat COVID-19 was a "classic political question involving policy choices." *Id.* The court noted that "there are no discernable and manageable standards to decide issues such as how early is too early to hold the election or how many safety measures are enough." *Id.* And "ordering Defendants to adopt Plaintiffs' laundry list of so-called 'Pandemic Voting Safety Measures' would require the Court to micromanage the State's election process." *Id.* at *4.

The same reasoning applies with equal vigor here. Plaintiffs rely on a number of scientific studies to contend that elections in person cannot be held safely without also allowing a significant number of voters to vote by mail. Doc. 9 ¶¶ 3–9. In making those claims, Plaintiffs essentially ask this Court to determine whether the State's efforts to combat COVID-19 in the context of elections have been adequate. There is no discernable measure or standard of "how many safety measures are enough," and the Court cannot begin to answer that question without substituting its judgment for

the judgment of the actors charged with making those decisions. For these reasons, the political question doctrine applies, and it renders Plaintiffs' claims non-justiciable.

SOVEREIGN IMMUNITY

It is unclear what actions Plaintiffs seek to enjoin, and against whom they request that injunction to apply. As best the Secretary can discern, Plaintiffs challenge the "Election Conditions" that are a result of the COVID-19 pandemic, because they seek to enjoin the Defendants from "giving any effect to the requirements of these Election Conditions, including enjoining Defendants from conducting any elections utilizing these Election Conditions." Doc. 9 ¶ 113. The Secretary surmises from these allegations that Plaintiffs seek to enjoin enforcement of some provisions of the Texas Election Code, or, at a minimum, modify how they are enforced. But because the Secretary does not enforce the relevant provisions of the Texas Election Code, Plaintiffs' claims against her are barred by immunity.

"[T]he principle of state-sovereign immunity generally precludes actions against state officers in their official capacities, subject to an established exception: the *Ex parte Young* doctrine." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (citation omitted). Thus, Plaintiffs' claims fail unless they fit that exception. *Ex parte Young* "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation" *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted).

As a consequence, *Ex parte Young* applies only when the defendant enforces the challenged statute. The "the general duty to see that the laws of the state are implemented" held by a statewide official (such as the Governor, Attorney General, or Secretary of State) is insufficient. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quotation marks omitted). Instead, the named defendant

must have a “particular duty to enforce the statute in question *and* a demonstrated willingness to exercise that duty.” *Id.* (emphasis added; quotation marks omitted). As the Fifth Circuit has recently emphasized, even when a government official “*has* the authority to enforce” a challenged statute, a plaintiff still must show the official “is likely to do [so] here.” *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). That is, without evidence that the named defendant is likely to enforce the law against these plaintiffs, the government official “lacks the requisite connection to the enforcement of” the challenged law. *Id.* (quotations omitted).

Although the Election Code charges the Secretary of State with “obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of this code,” TEX. ELEC. CODE § 31.003, it does not provide her the power to receive application for mail-in ballots, review those applications, or provide mail-in ballots. *See, e.g.*, Tex. Elec. Code §§ 84.007(b), 86.001 (providing for Early Voting Clerks to implement the vote-by-mail provisions at the local level). Nor does it empower her to coerce local officials in their performance of those tasks. Instead, it authorizes the Secretary to “assist and advise all election authorities with regard to the application, operation, and interpretation of this code.” *Id.* § 31.004(a). Thus, the Secretary “maintain[s] an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties.” *Id.* § 31.004(b). The Secretary’s other powers would not allow her to coerce a local official in a case like this. *E.g., id.* § 31.005. Because she neither enforces the mail-in-ballot rules herself nor controls local officials’ enforcement, the Secretary lacks the requisite connection to the challenged law for purposes of *Ex parte Young*.

Instead, early-voting clerks are responsible for conducting early voting and must “review each application for a ballot to be voted by mail.” *Id.* § 86.001 (a). For most state- and county-wide elections, the county clerk or elections administrator is the early-voting clerk, while “[t]he city secretary is the early voting clerk for an election ordered by an authority of a city.” *Id.* § 83.005. Each early-voting

clerk is responsible for determining whether an application to vote by mail complies with all requirements, providing notice and cure instructions to a voter who submits a noncompliant application, and “provid[ing] an official ballot envelope and carrier envelope with each ballot provided to a voter” who properly completes an application. *Id.* §§ 86.001(a), .008, .009, .002(a). Thus, the counties and political subdivisions, not State officials, are responsible for administering early voting in Texas.

But even if the Secretary could control local officials’ enforcement of the early voting laws, a federal court could not order her to exercise such power. The *Ex parte Young* exception is limited to prohibitory injunctions “prevent[ing] [a state official] from doing that which he has no legal right to do.” 209 U.S. at 159. It does not authorize mandatory injunctions directing “affirmative action.” *Id.*; see also *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949) (“Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.”). Thus, sovereign immunity bars “cases where the [defendant] sued could satisfy the court decree only by acting in an official capacity.” *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971); see also *Jacobson v. Fla. Sec’y of State*, -- F.3d --, 2020 WL 2049076, at *13 (11th Cir. Apr. 29, 2020) (explaining that “an injunction ordering the Secretary to promulgate a rule . . . would have raised serious federalism concerns” and that “it is doubtful that a federal court would have authority to order it”). Because that is true here, Plaintiffs cannot overcome the Secretary’s immunity.⁴

⁴ To the extent that the Plaintiffs’ claims would require this Court to order state officials to comply with state (as opposed or in addition to) federal law, it is also barred by the principles announced in *Pennhurst State School and State Hospital v. Halderman*, 465 U.S. 89 (1984); *Valentine v. Collier*, 956 F.3d 797, 802 (5th Cir. 2020) (“TDCJ also is likely to succeed on appeal insofar as the district court enjoined the State to follow its own laws and procedures.”).

STANDING

For several reasons, Plaintiffs lack standing. First, Plaintiffs have failed to establish any cognizable injury and are essentially seeking an impermissible advisory opinion. They imply that they will be exposed to or contract COVID-19 at a polling site if they are required to vote in person, but those assertions are inherently speculative and ignore the measures that State and local officials will take, and indeed, have already taken, to ensure the safety of voters at polling locations. Plaintiffs' allegations are therefore insufficient to confer standing. *See, e.g., Galveston Open Gov't Project v. U.S. Dep't of Hous. & Urban Dev.*, 17 F. Supp. 3d 599, 606 (S.D. Tex. 2014) ("Unless and until someone who is going to be directly affected by the rebuilt public housing believes they are suffering an injury attributable to unlawful conduct, there is no 'case' or 'controversy' to resolve."). Moreover, no Plaintiff has standing to pursue a race discrimination claim. Indeed, in their amended complaint, the three named Plaintiffs have not even pleaded membership in a protected racial group, let alone how they are being discriminated against on account thereof. Accordingly, Plaintiffs lack standing to sue for racial discrimination that they do not even plausibly allege or describe.

With respect to Plaintiff TDP and its Chair, the complaint does not establish any basis upon which this Court can infer that the TDP has standing. TDP lacks associational standing because it has not identified any injured members. First, TDP has not established that it even has members within the meaning of the associational standing test. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977) (requiring "indicia of membership"). TDP has not alleged that its purported members "elect leadership, serve as the organization's leadership, and finance the organization's activities, including the case's litigation costs." *Tex. Indigenous Council v. Simpkins*, 2014 WL 252024, at *3 (W.D. Tex. Jan. 22, 2014). Nor they do not allege that those individuals "participate in and guide the organization's efforts." *Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation*

Ctr. Bd. of Trustees, 19 F.3d 241, 244 (5th Cir. 1994). The allegation that some of the individual Plaintiffs voted in a Democratic primary election is insufficient. *See* Doc. 9 ¶¶ 71–73.

Second, even if the individual Plaintiffs were members of TDP, they lack standing for the reasons explained above and below. Without injured members, TDP cannot have associational standing.⁵ *See Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019).

TDP also does not have organizational standing. An organization lacks organizational standing unless it satisfies the same Article III requirements applicable to individuals: injury in fact, causation, and redressability. *E.g., NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (citing *Lujan*, 504 U.S. at 560–61). In an appropriate case, an organization can establish an injury in fact by showing that the challenged law conflicts with the organization’s mission and “perceptibly impair[s]” its activities. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

If an organization avoids the impairment of its activities by spending additional resources to combat the effects of the challenged law, then the “drain on the organization’s resources” may constitute an injury in fact. *Id.*; *see City of Kyle*, 626 F.3d at 238. But a diversion of resources is not a cognizable injury in fact unless the plaintiff “would have suffered some other injury if it had not diverted resources to counteracting the problem.” *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *see Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017) (“[A]ny resources [the organizational plaintiff] used to counteract the lack of a privacy impact assessment—an assessment in which it has no cognizable interest—were a self-inflicted budgetary choice that cannot qualify as an injury in fact.” (quotation omitted)). That is because a plaintiff “cannot manufacture standing by choosing to make

⁵ *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), does not help Plaintiffs. That case found associational standing based on an identified candidate who “step[ped] into the shoes of” the TDP “after the primary election” and pursued a claim that a candidate from other party was improperly included on the ballot, thereby harming her prospects of winning an election. *Id.* at 588. Standing is claim specific, and *Benkiser* does not stand for the proposition that a party always has standing to challenge election rules.

expenditures based on” an alleged harm that does not itself qualify as an injury in fact. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (2013).

TDP’s claims fail on both theories. It has not established what “Election Conditions” in Texas they are actually challenging, let alone how those “Election Conditions” cause TDP any cognizable injury-in-fact. In TDP’s motion for preliminary injunction, Plaintiffs claim they are “injured by the uncertainty of the laws associated with voting by mail[.]” Doc. 10 at 6–7. By TDP’s own admission, the injury is uncertain and therefore speculative, and the Party and its leaders therefore lack standing. *See Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)) (to have standing, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision”).

Plaintiffs also cannot establish standing to sue the Secretary. As discussed above, acceptance or rejection of an application to vote by mail falls to local, rather than State, officials. Thus, Plaintiffs’ asserted injuries are not “fairly traceable to the challenged action of the defendant”; rather, they are “the result of the independent action of some third party not before the court.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation and alterations omitted). And the impact of the statutory scheme on a plaintiff is irrelevant for standing purposes; what matters is whether the named defendants enforce that scheme. *See Okpalobi*, 244 F.3d at 426 (majority op.) (dismissing claims for lack of standing and explaining that courts should not “confuse[] *the statute’s* immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the *defendants*”); *see also Paxton*, 943 F.3d at 1002 (finding that it was “unlikely that the [plaintiff] had standing” to sue a state official who did not have the power to enforce the challenged statute).⁶

⁶ *OCA-Greater Houston v. Texas* does not help Plaintiffs because it found standing only for “facial” claims and only when there is “no private right of action.” 867 F.3d 604, 613 (5th Cir. 2017). Here, Plaintiffs bring several as-applied claims, and there is a relevant private right of action. Losing candidates can bring election contests to challenge the application of the statute. *See TEX. ELEC. CODE* § 221.003.

Moreover, the Secretary did not cause any of the circumstances arising from the COVID-19 pandemic. In other words, she did not cause the “Election Conditions” that form the basis of Plaintiffs’ claims. She is thus not a proper defendant, because Plaintiffs challenge events that are wholly outside her control. *Cf. Raffensberger*, 2020 WL 2509092, at *3 n.4 (noting in the context of the political question doctrine that “[t]he real problem here is COVID-19, which all but the craziest conspiracy theorists would concede is not the result of any act or failure to act by the Government. And that fact is important when weighing the Defendants’ management of the election.”).

RULE 12(B)(6) DISMISSAL MOTION

A. Plaintiffs have not pleaded viable race discrimination claims.

On the merits, Plaintiffs claim in Counts One through Three of their amended complaint that “Election Conditions” in the State of Texas discriminate on the basis of race and language minority in violation of the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment. Doc. 9 ¶¶ 79–85. These bare-bones allegations do not put any defendant on notice of the basis for the claims against them. For example, there is no explanation of how the Secretary of State is discriminating on the basis of race or even which protected groups are allegedly being discriminated against. The complaint contains only legal conclusions devoid of any sufficient factual support. *See Evans v. City of Meridian, Miss.*, 630 F. App’x 312, 315 (5th Cir. 2015) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements’ are not sufficient to survive a motion to dismiss” (citation omitted)). Because they do not meet their burden of alleging plausible claims for relief, those claims should be dismissed.

B. Plaintiffs have not pleaded viable *Anderson/Burdick* claims.

Counts Four and Five of Plaintiffs’ amended complaint assert that the State has unconstitutionally burdened Plaintiffs’ right to vote, and also thereby violated Plaintiffs’ free speech rights. *See* Doc. 9 ¶¶ 86–94. In recent decades, the Supreme Court has evaluated First and Fourteenth

Amendment challenges to state election laws under the “*Anderson/Burdick*” framework. *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 420 U.S. 780 (1983). Under this standard, courts “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). State rules that impose a severe burden on constitutional rights must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* “Lesser burdens, however, trigger less exacting review, and a State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable nondiscriminatory restrictions.’” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations omitted).

For the same reasons Plaintiffs’ race discrimination claims fail, so too do their *Anderson/Burdick* claims. Plaintiffs fail to identify the burden on their right to vote, or grapple with how the State’s efforts to ensure voter safety at the polls will reduce the risk of COVID-19 transmission at polling sites throughout Texas. And, as the federal district court in Georgia noted, Plaintiffs’ claims are fundamentally different than the typical *Anderson/Burdick* allegation in that “this is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote.” *See Raffensberger*, 2020 WL 2509092, at *3 n.4. Any burden on the right to vote, which the complaint does not describe, was not created by the government. *See id.*

In any event, the “the State . . . has a significant interest in enforcing its enacted laws.” *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 742 (S.D. Miss. 2014). Moreover, States must regulate elections uniformly “if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process[.]” *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Thus, the State’s important interests in maintaining the rule of law, preventing fraud, and

ensuring the orderly administration of elections suffices to establish the constitutionality of Texas's election laws, especially in the face of Plaintiffs' bare-bones and unspecific allegations of violations of the First and Fourteenth Amendments.

Accordingly, Plaintiffs' First and Fourteenth Amendment claims fail to state claims for relief.

C. Plaintiffs' Twenty-Sixth Amendment claim fails.

The Twenty-Sixth Amendment provides that the "right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1. Texas Election Code section 82.003, which allows voters who are 65 or older to vote early by mail, does not "deny or abridge" anyone's right to vote. It is therefore subject to rational-basis review, which it easily satisfies.

No one, least of all the State, disputes that "voting is of the most fundamental significance under our constitutional structure." *Burdick*, 504 U.S. at 433 (citations and quotation marks omitted). "It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Id.* Consequently, "State action making it easier for some electors to vote—such as providing them an extended deadline to register for absentee ballots—doesn't make it harder to vote for electors that don't get the same benefit." *Mays v. LaRose*, 951 F.3d at 783 (6th Cir. 2020).

It is perhaps unsurprising, then, that "there is no constitutional right to an absentee ballot." *Id.* at 792 (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-09 (1969)). *See also, e.g., Ray v. Texas*, 2008 WL 3457021 (E.D. Tex. 2008) ("It is well-settled that voting by absentee ballot is not a fundamental right requiring strict scrutiny analysis.") (citing *McDonald*, 394 U.S. 802); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. at 209 (Scalia, J., concurring in the judgment) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.").

In *McDonald*, the Supreme Court recognized the clear distinction between the right to register to vote and cast a ballot, and the ability to utilize a state’s absentee-ballot machinery. 394 U.S. at 807. The Court explained that “absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise[.]” *Id.* That the jailed plaintiffs in *McDonald* were unable to vote by mail did not implicate the right to vote because it did not “preclude[] [the plaintiffs] from voting” via other methods. *Id.* at 808; *id.* at 807 (“It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. . . .”). Thus, laws allowing certain groups to vote by mail cannot fairly be said to *deny* the franchise to those groups not included, and any burden on the fundamental right to vote is minimal and therefore subject to rational basis review. *See id*; *see also, e.g., Burdick*, 504 U.S. at 433.

Under rational basis review, so long as the distinctions made in the challenged law bear a rational relationship to a legitimate governmental end, the law must be upheld. *Id.* at 809. The Texas Election Code’s distinction between those aged 65 and over and those under 65 for purposes of voting by mail is rational. Even outside the context of COVID-19, individuals aged 65 and over (as a group) face unique challenges in attending the polls. For example, many live in nursing homes and have limited mobility.⁷ The State’s decision to allow older Texans to vote by mail without extending that privilege to everyone is a rational way to facilitate exercise of the franchise for Texans who are more likely to face everyday barriers to movement, outings, and activity than younger people.

Even if the stricter *Anderson/Burdick* standard applies, section 82.003 meets that standard. “To deem ordinary and widespread burdens severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of the States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.” *Cranford*, 553 U.S. at 197 (plurality). “The Constitution does

⁷ *See* Long Term Care, Texas Health and Human Services, *available at* <https://hhs.texas.gov/services/aging/long-term-care> (estimating that as many as 70 percent of people turning 65 can expect to use some form of long-term care during their lives).

not require that result, for it is beyond question that the States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Id.* (quotations omitted). The Texas Legislature has not provided for universal mail-in balloting, and the Constitution allows the Legislature that choice.

As the Supreme Court has explained:

There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id. at 196. Given Texas’s interest in ensuring uniform, orderly elections that are carried out consistent with State law, commanding election officials across 254 counties to hastily cobble together a universal vote-by-mail system in time for this year’s elections without the care and planning required risks widespread chaos. The Supreme Court has also stated that “[w]hile [the interest in the integrity and legitimacy of representative government] is closely related to the State’s interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Id.* at 197.

Plaintiffs apparently believe it is irrational to allow mail-in voting for a limited class of people while also wanting to prevent election fraud. In fact, Texas’s system limits the class of eligible mail-in voters at a level that allows the State to monitor the process for fraudulent activity. If Texas suddenly and drastically expands the ability to vote by mail to every single adult citizen in the State, its ability to detect and prosecute election fraud will be greatly diminished by the deluge of mail ballots. Despite Plaintiffs’ claims to the contrary, the approach that has been carefully and extensively considered in the Texas Legislature is a perfectly logical balancing of these interests.

As explained above, Section 82.003 in no way hampers Plaintiffs’ fundamental right to vote.

Rather, it provides another avenue to cast a ballot for members of a community more likely to face special challenges voting in person. Under *Anderson/Burdick*, therefore, Section 83.003 places no burden upon *Plaintiffs'* ability to cast a vote.

For these reasons, Plaintiffs' Twenty-Sixth Amendment claim fails as a matter of law.

D. The Texas Election Code is not unconstitutionally vague.

Plaintiffs' "void-for-vagueness" claim in Count Six does not put the Secretary on notice of which specific provision of the Texas Election Code is unconstitutionally vague, nor attempt to meet the very high threshold to make such a claim. The Fifth Circuit has explained that the "void-for-vagueness doctrine has been primarily employed to strike down criminal laws," and that in the civil context, "the statute must be 'so vague and indefinite as really to be no rule at all.'" *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000) (quoting *Senior Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1036 (11th Cir. 1992)).

As the Fifth Circuit has noted, a "statute is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case." *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001); *see also Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. 1980) ("A provision need not . . . be cast in terms that are mathematically precise; it need only give fair warning of the conduct proscribed, in light of common understanding and practices."). That is because the void-for-vagueness doctrine "does not ordain the unconstitutionality of a statute that two lawyers may read differently, nor does it mean that persons subject to the law may bank against . . . inconsistent decisions." *Nautilus Ins. Co. v. Int'l House of Pancakes, Inc.*, 622 F. Supp. 2d 470, 481 (S.D. Tex. 2009) (citation omitted). "[N]either absolute uniformity of interpretation, nor total absence of ambiguity is semantically or practically achievable, or, it necessarily follows [.] constitutionally required." *Id.* (citation omitted).

Plaintiffs allege that “[t]he Texas Election Code surrounding mail ballot eligibility are poorly defined, enforced, and understood.” Doc. 9 ¶ 96. This conclusory allegation, which does not even specify which provisions of the Election Code are at issue, does not meet Plaintiffs’ burden to put the Secretary on notice of the claims against her. *See* Fed. R. Civ. P. 8(a). Plaintiffs do not expand on this allegation or explain how any particular provision of the Election Code is unconstitutionally vague. Accordingly, Plaintiffs have failed to state a valid “void-for-vagueness” claim in Count Six of their complaint.

Moreover, Plaintiffs’ “as-applied” void-for-vagueness claim should not—indeed, cannot—be resolved prior to the resolution of the State court proceedings, which should ultimately provide clarity on the proper construction of Section 82.002(a) in the context of the COVID-19 pandemic, as Plaintiffs more specifically challenge in their motion for preliminary injunction. The *Pullman* abstention doctrine therefore applies with full force to this claim in particular.

E. Plaintiffs do not allege that the Secretary has intimidated voters.

Finally, Plaintiffs’ allegations regarding voter intimidation in Count Eight of their complaint (misabeled as a second Count Seven) appear directed exclusively towards the Attorney General. *See* Doc. 9 ¶¶ 104–110. Plaintiffs do not specifically mention the Secretary in that cause of action in their complaint, and there are no specific allegations (nor could there be) that the Secretary has somehow intimidated voters.

Accordingly, to the extent Plaintiffs’ Section 1985 voter intimidation claim is asserted against the Secretary, it should be dismissed.

CONCLUSION

The Court should dismiss this suit without prejudice under the *Pullman* abstention doctrine. Alternatively, Plaintiffs’ claims should be dismissed for lack of jurisdiction or for failure to state a claim for which relief can be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief for General Litigation Division

/s/ Michael R. Abrams _____

MICHAEL R. ABRAMS
Texas Bar No. 24087072
ANNE MARIE MACKIN
Texas Bar No. 24078898
CORY A. SCANLON
Texas Bar No. 24104599
Assistant Attorneys General
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 | FAX: (512) 320-0667
michael.abrams@oag.texas.gov
anna.mackin@oag.texas.gov
cory.scanlon@oag.texas.gov

Counsel for State Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2020 a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Michael R. Abrams _____

MICHAEL R. ABRAMS
Assistant Attorney General