No. 20-50793

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MI FAMILIA VOTA; TEXAS STATE CONFERENCE OF THE NAACP;
and GUADALUPE TORRES,

Plaintiffs-Appellants,

v.

GREG ABBOTT, Governor of the State of Texas;
and RUTH HUGHS, Texas Secretary of State,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
No. 5:20-cv-00830-JKP

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CERTIFICATE OF INTERESTED PERSONS

1. No. 20-50793; *Mi Familia Vota; Texas State Conference of the National Association for the Advancement of Colored People; and Guadalupe Torres v. Greg Abbott, Governor of the State of Texas; and Ruth Hughs, Texas Secretary of State.*

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants ("Plaintiffs") respectfully submit that adjudication of this appeal should not be delayed solely for the purpose of holding oral argument on October 7, 2020, in light of the time-sensitive nature of the appeal and (if the appeal is successful) the need to provide sufficient time for the district court to adjudicate Plaintiffs' motion for preliminary injunction and for Defendants-Appellees ("Defendants") to comply with any resulting order, prior to the November 3, 2020 election. Plaintiffs respectfully submit that, for the reasons explained fully below, the district court's decision should be summarily reversed and, if the Court concludes that the matter can be resolved prior to and without the need for oral argument, Plaintiffs waive any request for oral argument. However, Plaintiffs are prepared to appear for oral argument as currently scheduled by the Court.

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I. INTRODUCTION

As this Court has held as recently as last week, the question whether State election laws and practices unduly burden the right to vote or unlawfully discriminate against voters on the basis of race or place of residence is unquestionably one for the judiciary to resolve. The district court erroneously determined that burdens on voting become nonjusticiable political questions when they arise within the context of a public health crisis and require changes to a State's voting laws and practices (changes that the district court agreed "do not appear unreasonable and can easily be implemented to ensure that all citizens in the State of Texas feel safe and are provided the opportunity to cast their vote in the 2020 election," ROA.876). That holding misapplied the law of this Circuit and the Supreme Court, and improperly closed an important avenue for constitutional redress.

Plaintiffs are Texas voters and organizations who assert that certain Texas election statutes and policies, as well as an Executive Order issued by Texas Governor Greg Abbott, as applied in the context of the COVID-19 pandemic, unreasonably burden the right to vote by forcing Texans to choose between protecting their health, or voting in

unreasonably unsafe voting conditions. For example, by Executive Order, Governor Abbott permitted voters and poll workers to visit their polling places without masks, inexplicably exposing voters to a health danger at polling places that they do not face at Texas grocery stores. Indeed, Governor Abbott and Secretary of State Hughs have adopted a plan that causes a heightened risk of COVID-19 exposure for in-person voters, and thus does not provide safe voting opportunities for Texans. Defendants' actions mean that Texans of all ages and races will be required to choose between their vote and their health. As a result of the pandemic, Texas law subjects voters to undue burdens when requiring them, *inter alia*, to use frequently touched, rarely cleaned, and potentially contaminated electronic voting machines, and to wait in crowded physical spaces with unmasked people. Defendants are forcing millions of Texans to make a constitutionally impermissible choice: vote at your own risk, or don't vote at all.

Plaintiffs brought suit and sought a preliminary injunction to prevent this unconstitutional result and to protect Texans' right to vote. The need for corrective action is demonstrated by the severity of the pandemic in Texas, where more than 14,700 people have died of

COVID-19 in just a few months. Though all Texans are vulnerable to the disease, in Texas and nationwide, Black, Latino, and Indigenous Texans suffer disproportionate illness, hospitalization, and fatalities. Defendants have the authority to correct these problems and to implement safe and uniform voting procedures across the State of Texas that would minimize the risk of COVID-19 transmission and therefore minimize the health risk associated with voting. They have refused to do so. Instead, they have chosen to enforce laws and practices that will place millions of voters at risk. Voters should not be required to forfeit their fundamental right to vote in order to ensure that they, their families, and their communities survive the pandemic.

The district court did not reach the merits of Plaintiffs' claims, nor resolve their motion for preliminary relief. Instead, it dismissed this action under the political question doctrine. This Court held last week, in a similar case, that a challenge to Texas's vote-by-mail rules as applied during the pandemic presents constitutional questions "susceptible to judicial resolution without interfering with the political branches of Texas government." *Tex. Democratic Party v. Abbott* (*Tex. Dem. Party II*), No. 20-50407, 2020 WL 5422917, at *7 (5th Cir. Sept.

10, 2020). The same is true here. The district court's decision should be reversed.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case because Plaintiffs' claims arise under federal law (specifically, the First, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, as well as Section 2 of the Voting Rights Act, 52 U.S.C. § 10301). 28 U.S.C. § 1331. This Court has jurisdiction over this appeal of a final decision from the district court's dismissal order. 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUE

Whether the district court erred in dismissing Plaintiffs' Complaint in its entirety on the ground that it presented only nonjusticiable political questions that render all their claims unfit for resolution in federal court.

IV. STATEMENT OF THE CASE

A. Factual Background

1. The coronavirus pandemic

In January 2020, Coronavirus Disease 2019 (COVID-19), caused by the highly contagious novel coronavirus SARS-CoV-2, began spreading rapidly through the United States. ROA.24 ¶ 28. Since then,

more than 6.6 million Americans have been infected, and more than 197,000 Americans have died.[1] In Texas, there have been more than 680,000 confirmed cases, and 14,700 confirmed fatalities.[2] Texas experienced a surge of cases and fatalities over the summer, and is still averaging thousands of new infections every day.[3]

The virus spreads in two ways: through the air and through surfaces contaminated with the virus. ROA.24- ROA.25 ¶¶ 30-31. Anyone infected with the virus—regardless of whether they are experiencing symptoms—can transmit the virus for fourteen days after infection. ROA.25 ¶ 32; ROA.27 ¶ 40. To prevent virus transmission, the Centers for Disease Control and Prevention ("CDC") recommends that people practice social distancing, wash hands often, refrain from gathering in groups, avoid crowded places, and wear cloth face coverings—though the CDC warns that face coverings should be in

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[1] CDC, *Cases in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Sept. 18, 2020).

[2] Tex. Dep't of State Health Servs., *DSHS COVID-19 Dashboard*, https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83 (last visited Sept. 18, 2020).

[3] *Id.*

addition to, and not a substitution for, social distancing. ROA.25 ¶¶ 33-34.

COVID-19 does not affect everyone equally, and no one knows in advance whether or not they will suffer serious complications. While some people are asymptomatic or experience only mild symptoms, others experience damage to the lungs, heart, kidneys, and neurological complications. ROA.27 ¶¶ 40-42. They might require hospitalization, or experience long-term complications. For others, the disease is fatal. ROA.27 ¶43. Anyone who gets the disease—even if they are asymptomatic—requires weeks-long quarantine that deprives them of opportunities to work, attend school, or take care of family members. *See* ROA.26 ¶ 35 (the CDC and the Texas Department of State Health Services instruct COVID-19 patients to stay home except to seek medical care). The long-term health impacts of infection, even for those who have mild symptoms and recover quickly, are as-yet not fully known, but may include serious impairments to organ health, including the heart and lungs. ROA.27 ¶ 42.

People with good health and no underlying conditions can suffer serious COVID-19 illness, long-term complications, or both. ROA.27

¶ 42. However, the risk of serious COVID-19 illness or death is known to be higher for certain individuals, including people with underlying medical conditions including chronic lung, kidney, or liver disease, and moderate to severe asthma, and serious heart conditions; people who are immunocompromised; people with severe obesity or diabetes; and people over the age of 65. ROA.26 ¶¶ 36-37.

Black, Latino, and Indigenous communities have been disproportionately affected by the pandemic, and are likely to experience serious COVID-19 illnesses, hospitalizations, and fatalities at a disproportionate rate compared to white COVID-19 patients. *See* ROA.17- ROA.18 ¶ 5; ROA.28- ROA.30 ¶ 47-51. In Texas, Black and Latino people suffer from disproportionately higher rates of infection, and Latinos have disproportionately higher fatality rates. *See* ROA.31 ¶ 58.[4] Black and Latino neighborhoods lack sufficient access to testing sites, even in areas where outbreaks are occurring. *See* ROA.31 ¶ 57. This is unsurprising given Black and Latino people are disproportionately more likely to live in poverty in Texas, and are more

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[4] *See also DSHS COVID-19 Dashboard*, *supra,* https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83.

likely to work in essential jobs for low wages, have less access to affordable healthcare, and are more likely to live in multi-generational homes, making them disproportionately vulnerable to community spread, as well as to serious health outcomes and economic losses due to COVID-19. ROA.21- ROA.22 ¶ 22; ROA.30 ¶¶ 51-52; ROA.34 ¶ 71.

2. Texas's in-person voting laws create substantial and unnecessary risk of COVID-19 transmission

Instead of taking appropriate steps to protect the health and lives of voters, Defendants chose to enforce election laws that, as applied during this pandemic, will place in-person voters at enormous risk. These laws include the following (hereinafter the "Challenged Election Laws"):

- Executive Order GA-29: On July 2, 2020, Governor Abbott issued a state-wide executive order requiring Texans to wear face coverings (e.g., masks) in order to protect against transmission and contraction of the coronavirus. However, he specifically excluded voters, people assisting voters, poll workers, and other election administrators from this face-covering requirement.

- Texas Election Code. § 64.009: Only voters who are "physically unable to enter" polling locations are allowed to vote curbside.
- Texas Election Code § 43.007: Counties that participate in Texas's Countywide Polling Place Program are prohibited from using paper ballots; all in-person voters are required to vote on repeat-touch electronic voting machines, which serve as vectors for spreading the coronavirus.
- Texas Election Code §§ 85.062-85.063: Counties must abide by a limited and uniform period of in-person early voting and are prohibited from providing temporary or mobile early voting sites to voters. After Plaintiffs filed this lawsuit, Governor Abbott extended the early voting period by one week; mobile voting is still prohibited.[5]

Defendants have refused to take other basic precautions to protect voters at the polls. Statewide election advisories *recommend* protective

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[5] *See* Proclamation by the Governor of the State of Texas (July 27, 2020), https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_07-27-2020.pdf . Plaintiffs no longer intend to pursue preliminary relief related to early voting.

measures such as social distancing and hand-washing, but do not *require* that any polling place implement such measures, nor do they provide resources to support implementation. *See* ROA.36- ROA.39 ¶¶ 79-88, 93-101. The election advisory also gives election judges the authority to insist that voters remove their face coverings while checking voter identifications; voters who refuse will only be allowed to vote if they subsequently go to the voter registrar's office and remove their face coverings there. ROA.40 ¶ 106. Counties are not authorized to modify any of the State laws or policies in order to protect the health and safety of voters; indeed, counties have been advised to seek a court order if they require modification in order to protect voters. ROA.36 ¶¶ 80-82. And although Texas's voter identification law has a natural disaster exemption to protect voters whose ability to obtain identification is disrupted by disaster, Defendants have not made the exemption available to voters during the pandemic. ROA.43 ¶ 117.

Implementation of these laws and practices during this pandemic, particularly in the absence of required social distancing and other commonsense safety measures, puts voters at serious risk of transmitting or being infected by the coronavirus. Together, the

Challenged Election Laws, as applied during the COVID-19 pandemic, will result in overcrowding and sustained close contact between unmasked voters, and require voters to repeatedly touch common voting machine surfaces, all of which create serious risk of virus transmission. *See* ROA.37 ¶ 91; ROA.41- ROA.42 ¶ 113-14; ROA.45 ¶ 135; ROA.48 ¶ 157; ROA.50 ¶ 166. In addition, the Challenged Election Laws will result in unreasonably long delays at polling places, further exacerbating the risk of spreading the virus. ROA.42 ¶ 114; ROA.45 ¶ 135; ROA.52 ¶¶ 176-80.

These results have already occurred in other elections in Texas. For example, during the March 3, 2020 primaries in Texas—before the pandemic hit the State, ROA.33 ¶ 66—voters in major Texas cities had to wait in hours-long lines in order to vote. ROA.18 ¶ 8; ROA.48 ¶ 153. During the July primary run-off elections, several large counties closed polling places, with closures occurring as late as election day, due to poll worker shortages caused by poll worker safety concerns related to COVID-19. ROA.49- ROA.50 ¶¶ 162-63.

In November, during an election that traditionally draws millions more voters than primary and run-off primary elections, *see* ROA.48

¶¶ 154-56, Defendants' implementation of the Challenged Election Laws during the pandemic will create conditions in which the virus may be easily spread in crowds of people and via repeatedly touched shared surfaces that cannot be adequately disinfected between uses. ROA.41 ¶ 113; ROA.50 ¶ 165. This, in turn, will force some voters to give up their right to vote in order to limit their exposure to COVID-19.

B. Procedural Background

Plaintiffs Mi Familia Vota, the Texas Conference of the National Association for the Advancement of Color People ("NAACP"), Guadalupe Torres, and Micaela Rodriguez[6] filed this lawsuit, challenging the enforcement of several elements of the Texas Election Code during the pandemic; Governor Abbott's Executive Order excluding voters and others at polling places from the state-wide mask mandate; and Secretary of State Ruth Hughs's election advisories, which recommend but do not require basic health safety protocols during a public health crisis. These Challenged Election Laws, as applied during the COVID-19 pandemic, require Texans to risk their lives in order to vote.

[6] Ms. Rodriguez is not a party to this appeal.

Moreover, they discriminate against Black, Latino, and Indigenous voters.

Plaintiffs' complaint asserts five causes of action. Counts One and Three allege an undue burden on the right to vote in violation of the Fourteenth and First Amendments, respectively, claims governed by the familiar *Anderson-Burdick* framework. Count Two alleges a denial of Equal Protection under the Fourteenth Amendment based on place of residence, race, and vulnerability to COVID-19. Counts Four and Five allege violations of the Fifteenth Amendment and Section 2 of the Voting Rights Act, respectively, based on the denial of Texans' right to vote on account of race.

Defendants Hughs and Abbott each filed a Motion to Dismiss. *See* ROA.127-ROA.172. Defendants raised three jurisdictional arguments (political question, sovereign immunity, and standing) under Rule12(b)(1) of the Federal Rules of Civil Procedure, and also challenged the adequacy of the pleadings under Rule 12(b)(6). Plaintiffs filed their Opposition, as well as a Motion for Preliminary Injunction premised on Plaintiffs' claims under the First and Fourteenth Amendments for undue burden on the right to vote, and Fourteenth

Amendment for violations of the Equal Protection Clause. ROA.245-ROA.295; ROA.335-ROA.769. With their request for preliminary relief, Plaintiffs submitted four expert reports detailing the epidemiology and modes of transmission of COVID-19 (*e.g.*, by breathing near or speaking with an infected person or via contact with a surface contaminated by the virus), the results of a robust 2020 survey of over 5,800 Harris County voters describing concerns with voting during the COVID-19 pandemic, and the feasibility of permitting voting by paper ballot if requested. ROA.711-ROA.712.

After full briefing on the Motions to Dismiss and a hearing on Defendants' 12(b)(1) arguments, the district court concluded that "the requests for relief do not appear unreasonable and can easily be implemented to ensure that all citizens in the State of Texas feel safe and are provided the opportunity to cast their vote in the 2020 election." ROA.876. However, the court dismissed the case on the grounds that it presented a nonjusticiable political question, finding it implicated four characteristics of a political question, as enumerated in *Baker v. Carr*, 369 U.S. 186, 217 (1962): (1) "a textually demonstrable constitutional commitment of [the presented issues] to a coordinate political

department"; (2) "a lack of judicially discoverable and manageable standards for resolving [the presented issues]"; (3) "the impossibility of deciding [the presented issues] without an initial policy determination of a kind clearly for nonjudicial discretion"; and (4) "the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government." *Id.*; *see* ROA.869. The district court did not reach the merits of Plaintiffs' claims.

Plaintiffs appealed the dismissal order and sought expedited consideration of the district court's ruling. On September 15, 2020, this Court granted Plaintiffs' opposed emergency motion to expedite the appeal and set an expedited briefing schedule.

V. SUMMARY OF THE ARGUMENT

The district court incorrectly concluded that this case presented only nonjusticiable political questions and, in so doing, failed to follow clear and controlling Fifth Circuit and Supreme Court precedent, including two recent decisions of this Court issued, respectively, shortly before and shortly after the district court's decision. Plaintiffs allege undue burden on the right to vote and unlawful discrimination based on race and county of residence. The determination of the lawfulness of a

State's election laws and practices is constitutionally committed to the federal judiciary. Courts have developed familiar and well-established legal standards to resolve these claims. Such review does not involve policy judgments, but legal ones. Nor would adjudicating these claims express a lack of respect to other branches of government. Finally, in deciding that the case presented a political question, the district court placed inordinate weight on some of the forms of relief requested by Plaintiffs below. The district court was apparently concerned some of the requested relief would intrude on the prerogative of Texas election officials, but that does not mean the claims are not justiciable. Courts have broad discretion to fashion appropriate relief once they have determined official conduct to be unlawful.

The district court did not reach Defendants' arguments that they were entitled to Eleventh Amendment immunity and that the Plaintiffs lacked standing. If this Court reaches those questions, it should reject Defendants' arguments. Defendants are not entitled to immunity because they are the state officials responsible for and with a sufficient connection to enforcement of allegedly unconstitutional laws, and Plaintiffs seek nothing more than an injunction requiring Defendants to

conform their conduct to federal law. Further, Plaintiffs have standing because Defendants' actions burden their right to vote and Defendants are capable of redressing that injury.

VI. STANDARD OF REVIEW

This Court reviews de novo the district court's conclusion that Plaintiffs' claims present a nonjusticiable political question. *See Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 541-42 (5th Cir. 2008). When, as here, the district court dismisses a case based on jurisdictional grounds without resolving any questions of fact, this Court's review "is limited to determining whether the district court's application of the law is correct." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981); *see also* ROA.867- ROA.68 (district court considered motion to dismiss in this case a "facial" rather than "factual" attack).

VII. ARGUMENT

A. Plaintiffs' Claims Do Not Implicate Political Questions

Federal courts have a constitutional duty to exercise their subject-matter jurisdiction. A narrow exception to this rule arises under the political question doctrine, which counsels the federal judiciary to forego jurisdiction over questions deemed nonjusticiable because they are constitutionally committed to another branch of the federal

government, or for which no judicially manageable standards exist or may be discovered. The Supreme Court and federal appeals courts have rarely applied this exception to cases challenging the compliance of state election laws and practices with federal constitutional and statutory law, and have done so primarily in two narrow contexts: partisan gerrymandering and ballot ordering, which are irrelevant here.

In contrast, Plaintiffs here bring traditional and familiar claims that the Challenged Election Laws, as applied in the context of the pandemic, (1) impose an undue burden on the right to vote under the First and Fourteenth Amendments; (2) violate the Fourteenth Amendment's Equal Protection Clause by treating voters differently based on their place of residence, their race, and their vulnerability to COVID-19; and (3) discriminate on the basis of race, in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act.

As explained below, federal courts are well-equipped to adjudicate these challenges, and regularly do so. This Court recently confirmed that the pandemic does not alter the calculus: "[t]he effects of the pandemic are relevant to answering whether the law denies or abridges the right to vote, but the standards themselves do not yield to the

pandemic." *Tex. Dem. Party II*, 2020 WL 5422917, at *7. The federal courts can—and must—resolve Plaintiffs' claims.

1. **<u>Federal courts are equipped to decide whether State election laws and practices are constitutional and comply with federal statutes.</u>**

Federal courts have long entertained challenges to State election laws and practices to protect the right to vote in free and fair elections. This includes ensuring that States do not place unlawful limits on who may vote, *see, e.g., Harper v. Va. State Board of Elections*, 383 U.S. 663 (1966), and remedying State election processes that are fundamentally unfair, *see, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

The Supreme Court has repeatedly emphasized the sanctity of the right to vote, noting that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also id.* at 561-62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society . . . . [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right

is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”).

In addition to constitutional review, courts review state compliance with federal statutes. In 1965, Congress enacted the Voting Rights Act, Section 2 of which created a private federal cause of action allowing voters to challenge voting qualifications, prerequisites, standards, practices, or procedures that result in a denial or abridgement of the right to vote on the basis of race or color. *See* 52 U.S.C. § 10301. Under constitutional and statutory guarantees of fair and equal access to the ballot, federal courts have long played a central role in vindicating and preserving the right to vote.

2. **The political question doctrine is a narrow exception to the duty of the judiciary to say what the law is.**

The U.S. Constitution vests federal courts with the “province and duty . . . to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); U.S. Const. art. III. A federal court generally “has a responsibility to decide cases properly before it, even those it ‘would

gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (quoting *Cohens v. Virginia*, 19 U.S.(6 Wheat.) 264, 404 (1821)); *see also Cohens*, 19 U.S. (6 Wheat.) at 404 ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

The Supreme Court has recognized a "narrow exception to that rule, known as the 'political question' doctrine," arising in cases where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 566 U.S. at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)); *see also Baker*, 369 at 217.

The contours of modern political question doctrine were set forth in *Baker v. Carr*, in which the Supreme Court decided whether voters could challenge Tennessee's redistricting plan as unconstitutional. 369 U.S. 186 (1962). The Court ultimately held that plaintiffs could challenge—and courts could review—whether the State-created voting districts were unlawful. The Court also identified six factors that have

come to guide courts in determining whether a case presents a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

Although *Baker* provided courts with a framework for identifying cases that may be nonjusticiable, it "left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication." *Zivotofsky,* 566 U.S. at 203 (Sotomayor, J., concurring). This Court has recognized that while the *Baker* factors "provide useful analytical guideposts in our analysis, '[w]hether an issue presents a nonjusticiable political question cannot be determined by a precise formula.'" *Lane v. Halliburton*, 529

F.3d 548, 559 (5th Cir. 2008) (quoting *Saldano v. O'Connell*, 322 F.3d 365, 368 (5th Cir. 2003)).

Before declaring a case nonjusticiable, a court should perform "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12. "The Judiciary's constitutional responsibility to interpret statutes cannot be shirked simply because a decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). "Nor may courts decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches." *Zivotofsky*, 566 U.S. at 205 (Sotomayor, J., concurring).

3. Plaintiffs' claims are justiciable.

Though the coronavirus pandemic may present new circumstances, the well-developed legal standards for resolving

Plaintiffs' claims against the Challenged Election Laws do not "yield to the pandemic." *Tex. Dem. Party II*, 2020 WL 5422917, at *7. The district court relied on four of the *Baker* factors to conclude, wrongly, that the political question doctrine applied here. These factors are discussed below.

a. <u>Review of the legality of State voting laws is constitutionally committed to the courts</u>.

The Elections Clause authorizes the States and Congress to enact legislation to set the "Times, Places, and Manner" of federal congressional elections, U.S. Const. art. I, § 4, cl. 1, but Article III vests the judiciary with the power to decide the constitutionality and legality of those laws. Indeed, courts are routinely called upon to do exactly that. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (challenge to early deadline for candidate registration); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (poll taxes); *Smith v. Allwright*, 321 U.S. 649 (1944) (all-white primaries); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (elimination of same-day registration and out-of-precinct voting); *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012) (different early voting deadlines for military and nonmilitary voters). *Baker* itself, which provided the modern

articulation of the political question doctrine, permitted a voting rights challenge to proceed. 369 U.S. at 237 ("We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which [Plaintiffs] are entitled to a trial and a decision.").

In concluding otherwise, the district court misapplied the first, third, and fourth *Baker* factors, ROA.869-ROA.71, and placed an inordinate focus on certain types of relief requested by the Plaintiffs.[7] This was error.

First *Baker* Factor: The Supreme Court has held that this factor applies when the federal constitution contemplates that another federal branch—and that branch alone—is equipped to resolve certain questions. *See, e.g.*, *Nixon*, 506 U.S. at 224 (holding that challenge to the Senate's impeachment procedures raised a political question because the impeachment clause of the Constitution provides that "the Senate shall have the sole Power to try all Impeachments," and there were no judicial standards to determine what the term "try" means in

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[7] The district court determined that "[w]ithin the unique setting of this case, the first, third and fourth characteristics manifest based upon the same reasons" and so analyzed them together in its Order. *Id.*

this context). But the factor is not at issue when a legal challenge concerns only a state agency, not another branch of federal government. *See Gordon v. State of Texas*, 153 F.3d 190, 194 (5th Cir. 1998) (reversing district court's application of political question doctrine and permitting claim against State of Texas to proceed because "the potential for a clash between a federal court and other branches of the *federal* government is fundamental to the existence of a political question"); *see also Baker*, 369 U.S. at 210 ("[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'").

Nevertheless, the district court concluded that Plaintiffs impermissibly asked it to "order specific action and administer specific procedures for the administration of the 2020 election," and in so doing "ask this Court to assume the role of the Texas legislature and exercise the discretion and authority explicitly reserved to that branch." ROA.871. In so holding, the district court conflated resolution of whether Defendants' actions are *lawful* (a question that has *not* been committed to another branch of government, and is properly for the

courts to decide), with the question of what *remedies* would be available. That a finding of unlawfulness might require a State to run its elections differently—lawfully—does not convert the case into a political question or unduly intrude on the Texas legislature's prerogative. Indeed, courts routinely issue corrective, injunctive relief upon finding a violation of constitutional or statutory rights, including where, like here, emergency conditions threaten the right to vote and State officials have employed inadequate procedures denying fair access to the franchise. *See*, *e.g.*, *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (ordering Secretary of State to extend voter registration deadline following hurricane); *Ga. Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344 (S.D. Ga. 2016) (same); *NAACP State Conf. of Penn. v. Cortes*, 591 F. Supp. 2d 757 (E.D. Penn. 2008) (ordering Secretary of State to direct all County Boards of Elections in State to immediately distribute paper ballots should half or more of electronic voting machines in a precinct fail); *Idaho State Democratic Party v. Rich*, No. 1:16-cv-491 (D. Idaho Nov. 8, 2016), ECF No. 6 (ordering state officials to keep polling locations that were moved with inadequate notice open for two additional hours and to prominently display notices and issue

public service announcements or press releases to TV and radio stations advising voters of same) (attached hereto as Exhibit A).

Third *Baker* Factor: Nor is resolution of Plaintiffs' case impossible "without an initial policy determination of a kind clearly for nonjudicial discretion." ROA.869- ROA.71. Plaintiffs' claims seek a judicial determination of the legality of the Challenged Election Laws—not a policy decision about how Texas should respond to the pandemic. The Constitutional commitment relevant to Plaintiffs' claims is *not* public health management or election administration, but the federal courts' authority and obligation to review the legality of election practices and to issue appropriate relief.

The Supreme Court's decision in *Zivotofsky v. Clinton* illustrates this principle. There, a federal statute permitted American citizens born in Jerusalem to have Israel listed as their birthplace on their U.S. passports. 566 U.S. at 191. When the Secretary of State refused to comply with such a request, the plaintiff sued, asserting his rights under the statute. The D.C. Circuit held that the case presented a political question, characterizing it as one involving a judicial determination of Israel's sovereignty over Jerusalem, a question

committed exclusively to the Executive branch. *Id.* at 193-94. The Supreme Court reversed, explaining that "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches," but rather to "decide if [the plaintiff's] interpretation of the statute is correct, and whether the statute is constitutional." *Id.* at 196. Though the Constitution commits certain foreign policy decisions to the Executive, "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute." *Id.* at 197.

The Fifth Circuit reached a similar conclusion in *Texas Democratic Party v. Abbott* (*Tex. Dem. Party I*), in which the plaintiffs challenged Texas's vote-by-mail statute, which permitted voters over the age of 65 to vote by mail without any need to assert disability but required younger voters to demonstrate disability, as applied during the pandemic. 961 F.3d 389, 394 (5th Cir. 2020). Reviewing a request to stay an injunction entered by the district court, this Court confirmed that the political question doctrine did not bar the plaintiffs' claims, because to resolve the case "we must decide only whether the challenged provisions of the Texas Election Code run afoul of the

Constitution, not whether they offend the policy preferences of a federal district judge." *Id.* at 398-99. In *Texas Democratic Party II*, the Court subsequently echoed this analysis, elaborating that "no political question bars our review of the Twenty-Sixth Amendment challenge. We are tasked with determining whether Section 82.003 of the Texas Election Code violates the Twenty-Sixth Amendment as applied during the pandemic, a question susceptible to judicial resolution without interfering with the political branches of Texas government." 2020 WL 5422917, at *7.[8] Further, "[e]ven when 'matters related to a State's . . . elective process are implicated by this Court's resolution of a question,' as our resolution of this appeal will do, that 'is not sufficient to justify our withholding decision of the question.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 351-52 (1976)).

The same reasoning applies here. Plaintiffs' claims do not ask the district court to make any policy determination whatsoever. Plaintiffs have not asked the district court to decide whether Texas's in-person pandemic voting practices are the *best possible* practices, or even

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[8] The district court here did not have the benefit of the decision in *Texas Democratic Party II*, which issued two days after the district court dismissed this case.

whether they are *good* practices. All that Plaintiffs' Complaint asks the district court to decide is whether these are *lawful* practices, consistent with the Constitution and the Voting Rights Act. *Accord Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (deciding whether Texas's voter identification law was *lawful*, without opining whether the policy was good or desirable). That determination of lawfulness does not depend on a policy determination—to the contrary, it is "what courts do." *Zivotofsky*, 566 U.S. at 201.

Fourth *Baker* Factor: Finally, rendering a decision on Plaintiffs' claims would not "express[] lack of the respect due coordinate branches of government." ROA.869- ROA.71. Judicial review, in and of itself, is not an act of disrespect, but rather how our Constitutional system is designed to function. *See*, *e.g.*, *Marbury, supra*. The Supreme Court has "repeatedly rejected the view that" the fourth, fifth, or sixth *Baker* factors "are met whenever a court is called upon to resolve the constitutionality or propriety of the act of another branch of Government." 566 U.S. at 204 (Sotomayor, J., concurring) (citing *United States v. Munoz-Flores*, 495 U.S. 385, 390-91 (1990); *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969)).

Instead, the "unusual" cases applying this factor are those in which courts "properly resist calls to question the good faith with which another branch attests to the authenticity of its internal acts." *Zivotofsky*, 566 U.S. at 205 (Sotomayor, J., concurring); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 672-73 (1892) (judicial action requiring belief in a "deliberate conspiracy" between Senate and House of Representatives "to defeat an expression of the popular will" "forbidden by the respect due to a coordinate branch of the government"); *Munoz-Flores*, 495 U.S. at 409-10 (Scalia, J., concurring) ("Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding . . . matters of internal process be accepted at face value."). That is not the case here. According this factor the breadth and scope suggested by the district court's opinion would put an end to judicial review of the undertakings of other branches of government.

Requests for Relief: The district court acknowledged that "the specific causes of action Plaintiffs assert, normally, do fall within this Court's subject matter jurisdiction," ROA.870, but it concluded that "the relief and action requested and the issues to be resolved do not," *id.* For

the reasons discussed above, the district court does have jurisdiction over the causes of action asserted, the issues to be resolved, and to determine whether the relief requested is appropriate. But if the district court believed that any particular injunctive relief Plaintiffs have requested exceeded judicial bounds, *see* ROA.870- ROA.71, the proper solution would have been to fashion a more appropriate remedy—not to dismiss the case wholesale as nonjusticiable. Indeed, "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S.Ct. 2080, 2087 (2017) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008)). "In the course of doing so, a court 'need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case.'" *Id.* (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2947, at 115 (3d ed. 2013); *see also J.M. Fields of Anderson, Inc. v. Kroger Co.*, 330 F.2d 686 (5th Cir. 1964) (per curiam) (court did not err in granting broader injunction than relief sought by plaintiff).[9]

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[9] Plaintiffs' Complaint also specifically requests several traditional

Footnote continued on next page

District courts can, and do, appropriately issue injunctions directing State officials to remedy constitutionally infirm election procedures. *See Bethune-Hill v. Va. State Bd. of Elections*, 368 F.Supp.3d 872, 889 (E.D. Va. 2019) (three-judge panel) (ordering State officials to implement remedial districting plan for upcoming election after finding of race-based gerrymander); *supra,* at pp. 27-28 (collecting cases). When deciding whether to dismiss a case in its entirety under the political question doctrine, however, the inquiry focuses *not* on the specific injunctive relief requested by the plaintiff, but whether a court can apply the appropriate legal standard and issue *any* appropriate relief on any of the plaintiff's claims.

In short, none of these factors support dismissal on political question grounds.

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forms of relief that could not plausibly be construed to implicate political questions. *See*, *e.g.*, ROA.59, Prayer for Relief c ("Order Defendants to rescind or modify any voting practice or procedure deemed by this Court to unlawfully discriminate against Black, Latino, or other underserved voters on the basis of a protected characteristic, to eliminate such discrimination."), g ("Grant such other and further relief that this Court deems just and appropriate.").

b. <u>Courts have manageable and well-known standards for resolving Plaintiffs' claims.</u>

The district court further erred when it relied on the second *Baker* Factor and concluded there was a "lack of judicially discoverable and manageable standards for resolving the necessary issues" presented by Plaintiffs' Complaint. ROA.872. In reaching that conclusion, the district court did not perform, on a claim-by-claim basis, the "discriminating analysis" required, *Baker*, 369 U.S. at 211, but rather treated all claims as unmanageable in a wholesale fashion. As the following table shows, a careful review demonstrates that each count in Plaintiffs' Complaint in fact brings a familiar legal challenge to the Challenged Election Laws and presents a discrete, justiciable question for the district court that can be resolved using well-developed and known judicial standards:

Claim & Question Presented	Standard
Count One*: Undue Burden on the Right to Vote in Violation of the Due Process Clause of the Fourteenth Amendment* "During the COVID-19 pandemic, [do] Texas's election laws impose a severe burden on the right to vote without sufficient interests that justify this imposition on Texans' right to safely access the polls"? ROA.51 ¶ 170.	"[A] court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (quoting *Anderson*, 460 U.S. at 789); *see also Burdick v. Takushi*, 504 U.S. 428, 438-39 (1992).
Count Two*: Voters are Denied Equal Protection Under the Law in Violation of the Fourteenth Amendment* Will Texas's election laws cause Plaintiffs and their members or constituents to "be treated differently from similarly situated voters by [Defendants'] failures by facing increased risks of being unable to vote and/or of coronavirus infection"? ROA.55 ¶ 195.	"When a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the 'flexible standard' outlined in" *Anderson* and *Burdick*. *Obama for Am.*, 697 F.3d at 429.

Claim & Question Presented	Standard
***Count Three**: Undue Burden on the Right to Vote in Violation of the First Amendment* Will Texas's election laws cause Plaintiffs and their members or constituents to "be subject to an unjustifiable burden on their right to vote and their freedom of speech"? ROA.55- ROA.56 ¶ 200.	"Election regulations that impose a severe burden on associational rights are subject to strict scrutiny. . . . If a statute imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451-52 (2008) (quoting *Anderson*, 460 U.S. at 788).
***Count Four**: Race Discrimination in Violation of the Fifteenth Amendment* Have Plaintiffs and their members or constituents "had their right to vote abridged and denied on account of race"? ROA.56 ¶ 204.	"In *Arlington Heights*, the Supreme Court set out five nonexhaustive factors to determine whether a particular decision was made with a discriminatory purpose, and courts must perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Veasey*, 830 F.3d at 230-31 (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)).

Claim & Question Presented	Standard
***Count Five**: Race Discrimination in Violation of Section 2 of the Voting Rights Act (52 U.S.C. § 10301)* Have Plaintiffs and their members or constituents "had their right to vote abridged and denied on account of race"? ROA.57 ¶ 207.	"To prove that a law has a discriminatory effect under Section 2, Plaintiffs must show not only that the challenged law imposes a burden on minorities, but also that 'a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Veasey*, 830 F.3d at 243-44 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (emphasis omitted)).

Instead of applying these standards to the Challenged Election Laws, the district court concluded that there are no manageable standards to determine, among other things, "what safety measures should be taken and how much safety is enough." ROA.874. But this case is not challenging the number of times that poll workers must wash their hands in a day, but rather whether voters (and poll workers) are protected at all from a lethal virus transmitted primarily by human-to-human contact which can be almost fully mitigated by mask use and social distancing, and whether the failure to offer even that minimal form of protection imposes an undue burden on the right to vote.

Voting rights cases often require courts to engage in imperfect and inexact balancing tests on much less clear facts, such as determining the relative weights of a burden on the right to vote and the State interest in imposing that burden. "Rather than applying any 'litmus test' that would neatly separate valid from invalid restrictions . . . a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Crawford*, 553 U.S. at 190 (citing *Anderson*). No doubt, Plaintiffs' claims could require "hard judgment" from the district court, but the fact that a case is challenging does not mean that there are no legal standards a court can apply, as this Court has already confirmed. *Tex. Dem. Party I*, 961 F.3d at 398; *Tex. Dem. Party II*, 2020 WL 5422917, at *7; *see also People First of Ala. v. Merrill*, No. 2:20-cv-00619, 2020 WL 3207824, at *12 (N.D. Ala. June 15, 2020) (dismissing on political question grounds "would result in the court abdicating from its role to address disputes that arise under the Constitution or federal statutes" where plaintiffs "ask the court to decide whether the challenged provisions run afoul of the Constitution, the VRA, or the ADA" (citing *Tex. Dem. Party I,* 961

F.3d at 398)), *appeal filed,* No. 20-12184, *stay application granted by United States Supreme Court*, No. 20-12184.[10]

Defendants and the district court relied on the Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493-94 (2019), but that case involved partisan gerrymandering claims, which are fundamentally different. *Tex. Dem. Party I*, 961 F.3d at 398 & n.15 (observing partisan gerrymandering cases like *Rucho* are of "no help" in contexts like this one). Further, the Supreme Court appeared to struggle with partisan gerrymandering claims because they ask courts to make decisions about the appropriate allocation of power between political parties, the degree to which partisan considerations are permitted in the delineation of electoral districts, and where to draw the line on whether a person's vote counts too much or too little based on his or her political affiliation (a question of vote dilution, not burden). *See Rucho*, 139 S. Ct. at 2492.

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[10] The district court wrongly suggested that Plaintiffs must wait until voters are actually discriminated against before they can bring claims. ROA.873- ROA.74. *See Veasey*, 830 F.3d at 260 ("[W]e decline to require a showing of lower turnout to prove a Section 2 violation. . . . Requiring a showing of lower turnout also presents a problem for pre-election challenges to voting laws, when no such data is yet available.").

In contrast, here, a court merely has to decide whether the Challenged Election Laws impose an undue burden or unlawfully discriminate against voters under well-articulated legal standards that do not implicate the balance of partisan power. *Cf. Rucho*, 139 S. Ct. at 2507 ("Federal judges have no license to reallocate political power between the two major political parties."); *Jacobson v. Fla. Secretary of State*, No. 19-14552, 2020 WL 5289377 (11th Cir. Sept. 3, 2020) (holding that partisan gerrymandering and ballot ordering statutes involve partisan power imbalance and do not raise questions re: burdens on individual voting rights).

Finally, though the Supreme Court has held that *some* amount of partisan gerrymandering is constitutionally permissible, that is not the case with racial discrimination challenged by Plaintiffs. *See League of Women Voters of N.C.*, 769 F.3d at 238 ("With Section 2 [of the Voting Rights Act], Congress effectuated a 'permanent, nationwide ban on racial discrimination' because 'any racial discrimination in voting is too much.'" (quoting *Shelby County v. Holder*, 570 U.S. 529, 557 (2013)).

The district court's reliance on an unpublished out-of-circuit district court case, *Coalition for Good Governance v. Raffensperger*,

which it deemed "persuasive," ROA.874, fares no better. *See* No. 1:20-cv-1677, 2020 WL 2509092 (N.D. Ga. May 14, 2020). That case misapplied the political question doctrine for the reasons explained above. *See id.* at *3 (framing plaintiffs' as-applied challenge to Georgia election laws as asking court to decide "whether the executive branch has done enough" in its efforts "to slow the spread of the coronavirus" rather than review the challenged laws for constitutional muster).

Further, this Court recently distinguished *Coalition*, holding that case was "different in kind" and rejecting application of its reasoning. *Tex. Dem. Party I*, 961 F.3d at 398-99. Other district courts have refused to follow it in as-applied pandemic voting challenges. *See New Ga. Project v. Raffensperger*, No. 1:20-cv-01986-ELD, 2020 WL 5200930 (N.D Ga. Aug. 31, 2020), at *10 & n.18, *appeal filed*, No. 20-13360 (following *Tex. Dem. Party I* and declining to follow *Coalition*); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063, at *21-22 (M.D.N.C. Aug. 4, 2020) (same). In any case, the *Coalition* case is inapposite because it sought different and broader relief, including, for example, postponement of the election. *Coalition*, 2020 WL 2509092, at *1.

B. **This Case Satisfies Other Jurisdictional Requirements**

In dismissing the case as presenting nonjusticiable political questions, the district court declined to consider Defendants' other jurisdictional challenges based on standing and immunity. ROA.876-ROA.77. Accordingly, this Court need not address those issues in the first instance. However, should the Court find it necessary or appropriate to do so, Plaintiffs have satisfied each jurisdictional requirement as explained below.

1. **Plaintiffs have standing to bring this suit.**

If this Court reaches this question in the first instance, it should conclude that at least one Plaintiff satisfies Article III's standing requirement. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 53 n.2 (2006); *Texas v. United States*, 945 F.3d 355, 377-78 (5th Cir. 2019).

"Article III standing requires plaintiffs to demonstrate that they [1] have suffered an 'injury in fact' [2] that is 'fairly traceable' to the defendant's actions and [3] will 'likely . . . be redressed by a favorable decision.'" *Three Expo Events, L.L.C. v. City of Dallas*, 907 F.3d 333, 341 (5th Cir. 2018) (citation omitted). Defendants primarily challenged

the injury requirement in the District Court. Plaintiffs need only show an "identifiable trifle" of injury for standing. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017). "An association or organization can establish an injury-in-fact through either . . . 'associational standing' [or] 'organizational standing.'" *Id.* at 610 (citation omitted).

The NAACP and Mi Familia Vota have organizational standing based on their own injury of diverted resources. The NAACP's associational standing is derived from its members, who would have their own standing because of the burden on their right to vote. Ms. Torres has standing for the same reasons NAACP's members do.

a. <u>The NAACP and Mi Familia Vota have organizational standing.</u>

An injury for organizational standing exists when an organization goes "out of its way to counteract the effect of Texas's allegedly unlawful voter" policies. *OCA-Greater Houston*, 867 F.3d at 612. In *OCA-Greater Houston*, the organization's injury was simply "additional time and effort spent explaining the Texas provisions at issue" to voters, because those provisions caused the organization to "spend more time on each call." *Id.* at 610.

The NAACP and Mi Familia Vota allege exactly the same injury: the Challenged Election Laws have forced them to commit and divert additional resources to educate voters about how to vote safely in each county. ROA.20- ROA.23 ¶¶ 19-23.[11] These groups do not usually do work addressing polling place safety, and have had to do so only because of Defendants' enforcement of the Challenged Election Laws during this pandemic. This diversion of resources confers organizational standing. *See OCA-Greater Houston*, 867 F.3d at 612; *Scott v. Schedler*, 771 F.3d 831, 836-39 (5th Cir. 2014) (NAACP had standing when it spent more time on voter registration drives after state's failure to provide them); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (citing cases from several circuits recognizing standing with similar diversions of resources).

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[11] The NAACP and Mi Familia Vota also submitted declarations with supplemental facts supporting their standing. *See* ROA.285-ROA.87 ¶¶ 11-15; ROA.279-ROA.81 ¶¶ 5-18. In deciding a challenge to standing under Rule 12(b)(1), this Court may consider "the complaint supplemented by undisputed facts evidenced in the record" and "the court's resolution of disputed facts." *Deutsch v. Annis Enters., Inc.*, 882 F.3d 169, 173 n.1 (5th Cir. 2018) (citation omitted). Defendants did not contest the factual content of those declarations in their response.

b. <u>The NAACP has associational standing because its members have standing, and, for the same reasons, Ms. Torres has standing.</u>

The NAACP also has associational standing on behalf of its members. The NAACP is a classic membership organization, and the Supreme Court has recognized its associational standing to represent those members many times. *NAACP v. Alabama*, 357 U.S. 449, 460-66 (1958); *NAACP v. Button*, 371 U.S. 415, 428 (1963). The NAACP has associational standing if it has at least a single member with standing. *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996).

The NAACP has more than 10,000 members, including registered voters in Texas who have informed the organization that they want to vote in the upcoming election but fear COVID-19 infection at polling places. ROA.21- ROA.22 ¶ 22; ROA.282 ¶ 3; ROA.285 ¶ 10. Each of the in-person voting policies challenged in this case independently and collectively burdens the NAACP members' right to vote (by at least a "trifle," all that is required), by forcing them to choose between voting with an unjustifiably high risk of COVID-19 infection or sacrificing

their right to vote. Ms. Torres faces the same voting burdens from the Challenged Election Laws. ROA.23- ROA.34 ¶ 25; ROA.295 ¶ 18.

Requiring voters to accept the threat of serious illness or death impairs the "right to vote free of arbitrary impairment by state action." *O'Hair v. White*, 675 F.2d 680, 688 (5th Cir. 1982) (citation omitted). By creating substantial and unnecessary risk to the health of in-person voters, including NAACP members and Torres, the Challenged Election Laws, as applied during the pandemic, have burdened their right to vote, causing Article III injuries. *See id.* at 688, 691 (when voting rights are threatened, "there can be no doubt that the complaint alleges the injury in fact necessary" for standing).

Standing is satisfied.

c. Defendants can redress Plaintiffs' injuries.

Plaintiffs' injuries are redressable by Defendants. Both Defendants have the power to halt or correct the allegedly unlawful conduct and thus to reduce the burden on Plaintiffs' right to vote. For example, Defendants do not dispute that the Governor can mandate masks at polling places (as he has done for almost all other public places), and the Secretary can interpret the curbside voting law, which

applies when entering a polling place would create a "likelihood of injuring the voter's health," Tex. Elec. Code § 64.009, to include COVID-19 risk. Plaintiffs further discuss Defendants' ability to redress these harms when explaining, *infra*, why sovereign immunity does not bar this suit.

2. Plaintiffs' claims are not barred by sovereign immunity.

While Eleventh Amendment sovereign immunity typically bars private suits against non-consenting states, "a federal court does not violate state sovereignty when it orders a state official to do nothing more than uphold federal law under the Supremacy Clause." *Air Evac EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 516 (5th Cir. 2017) (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). Accordingly, under the so-called *Young* exception, private parties may bring "suits for injunctive or declaratory relief against individual state officials acting in violation of federal law." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (citation omitted).

In determining whether the *Young* exception applies, "a court need only conduct a 'straightforward inquiry into whether [the]

complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (alteration in original) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). This inquiry "does not include an analysis of the merits of the claim." *Id.* at 646. Because there is no dispute Plaintiffs' complaint alleges an ongoing violation of several provisions of the federal Constitution and the Voting Rights Act[12] (ROA.36- ROA.42), nor that Plaintiffs seek prospective injunctive relief (ROA.42- ROA.44), the *Young* exception applies to this case.

a. **Defendants have "sufficient connection" to enforcement of the challenged conduct.**

Relying on the language of *Young*, the Fifth Circuit also directs courts to determine whether the state official has "some connection with the enforcement of the [challenged] act." *Austin*, 943 F.3d at 997 (alteration in original) (quoting *Young*, 209 U.S. at 157). Whether such

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[12] Indeed, Plaintiffs' claim under the Voting Rights Act is not barred by sovereign immunity independent of the *Young* exception. As this Court has held at least twice before, "[t]he VRA, which Congress passed pursuant to its Fifteenth Amendment enforcement power, validly abrogated state sovereign immunity." *OCA-Greater Houston*, 867 F.3d at 614; *accord Fusilier v. Landry*, 963 F.3d 447, 455 (5th Cir. 2020).

connection "arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (quoting *Young*, 209 U.S. at 157). In other words, the purpose of this inquiry is to identify the "proper parties" for a lawsuit, not to immunize state officials from judicial review altogether. *See Air Evac EMS*, 851 F.3d at 517.

While "[t]his circuit has not spoken with conviction about all relevant details of the 'some connection' requirement," *Tex. Dem. Party II*, 2020 WL 5422917, at *5, it has recognized that there must be "some scintilla of 'enforcement' by the relevant state official with respect to the challenged law," *Austin*, 943 F.3d at 1002.

In this context, "'[e]nforcement typically involves compulsion or constraint." *K.P.*, 627 F.3d 124. This analysis "significantly overlap[s]" with the Court's Article III standing analysis, because if it is determined a state official *can* act and there is a significant possibility she *will* act to cause future harm, "the official has engaged in enough 'compulsion or constraint' to apply the *Young* exception." *Austin*, 943 F.3d at 1002.

As Secretary of State, Defendant Hughs is indisputably connected to enforcement of the Texas Election Code. By statute, she is the "chief election officer of the state," Tex. Elec. Code § 31.001(a), and must "obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code," Tex. Elec. Code § 31.003. She is also tasked with "tak[ing] appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes." Tex. Elec. Code § 31.005.

As explained above, Plaintiffs challenge several provisions of the Election Code during the pandemic, the administration, implementation, and enforcement of which not only are undertaken by Secretary Hughs, but also serve to constrain the rights of Texas citizens to vote under federal law. For example, Plaintiffs allege that Section 64.009 of the Election Code, which provides that only those "physically unable to enter the polling place" may be presented with a ballot at the polling place entrance or curb, unduly burdens the right to vote by forcing citizens to risk their health, safety, and lives to vote by entering crowded facilities where face coverings are not required. Should Section

64.009's application in these conditions be ruled unconstitutional, "the effect would be to require the Secretary of State to cease enforcing it." *Tex. Dem. Party II*, 2020 WL 5422917, at *6. Because "[t]he Secretary has both a sufficient connection and special relationship to the Texas Election Code," Plaintiffs' suit against her cannot be barred by sovereign immunity. *Id.*; *see also Lewis v. Hughs*, No. 20-50654, 2020 WL 5511881 (5th Cir. Sept. 4, 2020) (affirming district court determination that the Secretary of State is amenable to suit); *OCA-Greater Houston*, 867 F.3d at 613-14 (holding that the Secretary has sufficient enforcement connection to the Election Code).

As Governor, Defendant Abbott is likewise not immune from suit. By statute, he is authorized to issue, amend, or rescind executive orders, proclamations, and regulations, which "have the force and effect of law." Tex. Gov't Code § 418.012. Additionally, he "is responsible for meeting . . . the dangers to the state and people presented by disasters." Tex. Gov't Code § 418.011. Here, Plaintiffs allege that Governor Abbott's Executive Order GA-29 is unconstitutional as applied because it explicitly excludes persons at polling stations from a face-covering requirement. In so doing, the Governor has defied the scientific

consensus and Texas public health officials' own recommendations, and unduly burdened the right to vote by forcing citizens to unreasonably and unnecessarily risk exposure to the virus to vote. Because the unlawful constraint on the right to vote derives from the Governor's actions themselves, there is no other appropriate state-level defendant who can be sued in his stead. This case is therefore unlike *In re Abbott*, in which this Court held that the Governor was not a proper defendant where enforcement against violations of the challenged Executive Order was explicitly delegated to state health agencies, and those health agencies were available as alternative and more appropriate state-level defendants. 956 F.3d 696, 709 (5th Cir. 2020). In contrast, here, providing the Governor with Eleventh Amendment immunity from review of the constitutionality of his own actions would mean there is *no* way to challenge the constitutionality of Executive Order GA-29 in this context. *See Air Evac EMS*, 851 F.3d at 516 (purpose of inquiry is to determine whether the claims are brought "against *proper parties*" (emphasis added)).

Because Executive Order GA-29 constrains the Texans' right vote by exposing them to substantial risk of infection, Plaintiffs' suit is not

barred by the Eleventh Amendment. *See id.* at 519 (state officials' denial of benefits under state law sufficiently constrained plaintiff's ability exercise its rights under federal law); *K.P.*, 627 F.3d at 125 (state officials' reliance on abortion statute in denying liability protection benefits constituted enforcement of the abortion statute).

b. The nature of the prospective relief sought does not bar Plaintiffs' suit.

Defendants contend that the suit cannot proceed because Plaintiffs have sought certain "affirmative actions" by state officials. But the *Young* exception permits federal courts to "enjoin state officials to *conform their future conduct* to the requirements of federal law." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (emphasis added) (quoting *Quern v. Jordan*, 440 U.S. 332, 337 (1979)); *see, e.g.*, *Va. Office for Prot. & Advocacy*, 563 U.S. at 255-56 (applying *Young* exception where plaintiffs alleged that defendants' "refusal to produce the requested medical records violates federal law"); *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (affirming district court's remedial order to comply with the constitutional requirement to desegregate public schools under *Young*).

To argue otherwise, Defendants rely on dicta in a footnote from a seventy-year-old Supreme Court decision, *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 691 n.11 (1949). However, as this Court observed last month, whether that footnote "bars all positive injunctions under *Young* is an unsettled question that has roused significant debate." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472 n.21 (5th Cir. 2020) (citing *Vann v. Kempthorne*, 534 F.3d 741, 751-53 (D.C. Cir. 2008)). In any event, because Plaintiffs have sought at least one form of injunctive relief that does not involve such "affirmative action,"[13] this Court need not determine the propriety of other forms of relief to proceed under the *Young* exception. *Id.*; *see also Lewis v. Hughs*, No. 5:20-CV-00577-OLG, 2020 WL 4344432, at *8

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[13] *See*, *e.g.*, ROA.57, Prayer for Relief a. iii ("Allow counties to offer extended, temporary, and/or mobile early voting locations with flexible hours and days"), a.iv ("Suspend the requirement that curbside voters must qualify as having a disability or, alternatively, order that any voter may identify as 'disabled' due to the threat that the coronavirus poses to his or her health and life, for the purpose of being found eligible to vote curbside"), ROA.58, Prayer for Relief a.vii ("Prohibit the closure of polling places currently scheduled to be available on Election Day") , c ("Order Defendants to rescind or modify any voting practice or procedure deemed by this Court to unlawfully discriminate against Black, Latino, or other underserved voters on the basis of a protected characteristic, to eliminate such discrimination").

(W.D. Tex. July 28, 2020) (rejecting Secretary's argument that federal courts may not issue injunctions requiring "affirmative action"), *aff'd and remanded*, 2020 WL 5511881 (5th Cir. Sept. 4, 2020).

VIII. CONCLUSION

Plaintiffs respectfully request that the Court reverse the district court's order granting Defendants' motion to dismiss and dismissing Plaintiffs' Complaint, and remand this case for further proceedings.

Dated: September 18, 2020 Respectfully submitted,

s/Sean M. Lyons , Sean M. Lyons

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* Application for admission forthcoming or pending

CERTIFICATE OF SERVICE

I certify that on September 18, 2020, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. I further certify that: (1) any required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

s/Sean M. Lyons , Sean M. Lyons
Sean M. Lyons

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) of Federal Rule of Appellate Procedure because it contains 10,777 words, excluding the portions of the brief exempted by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced Century Schoolbook 14-point font.

s/Sean M. Lyons , Sean M. Lyons
Sean M. Lyons

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IDAHO STATE DEMOCRATIC PARTY,

Plaintiff,

v.

CHRISTOPHER RICH in his official capacity as Clerk of the County of Ada of the State of Idaho, LAWERENCE DENNEY in his official capacity as Secretary of State of Idaho,

Defendants.

Case No. 1:16-cv-00491-BLW

ORDER

Before the Court is Plaintiff's Motion Temporary Restraining Order and Emergency Injunctive Relief (Dkt. 2). This matter was argued with all parties represented by counsel at 4:00 p.m. on November 8, 2016. For the reasons expressed from the bench at the conclusion of the hearing, the court will GRANT the requested relief in part and direct the following.

THEREFORE, IT IS HEREBY ORDERED as follows:

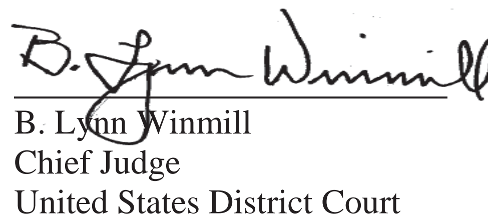
1. Plaintiff's Motion for Temporary Restraining Order and Emergency Injunctive Relief (Dkt. 2) is GRANTED in part and DENIED in part.

2. Defendants shall take such steps as are necessary to keep the poll locations for Ada County Precincts 1602, 1711, 1806, 1810, and 1901 open until 9:00 p.m. tonight, November 8, 2016.

3. Defendants are directed to prominently display, no later than 7:00 p.m. tonight, November 8, 2016, a notice at each of the original polling locations for Ada County Precincts 1602, 1711, 1806, 1810, and 1901 indicating: (1) the extended voting hours for these affected poll locations; (2) the newly designated poll locations for these precincts.

4. Defendants are directed to issue a public service announcement or press release to local TV and radio stations advising of the extended hours for the affected precincts. Notice by social media is sufficient. Such notice shall clearly indicate that the extended hours shall apply only to Ada County Precincts 1602, 1711, 1806, 1810, and 1901.

DATED: November 8, 2016



B. Lynn Winmill
Chief Judge
United States District Court

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
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September 19, 2020

Mr. Sean M. Lyons
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No. 20-50793 Mi Familia Vota, et al v.
Greg Abbott, Governor, et al
USDC No. 5:20-CV-830

Dear Mr. Lyons,

Because of the expedited briefing schedule and pending oral argument set in this matter, you must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 **by Tuesday, September 22, 2020.** Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

If your brief was insufficient and required corrections, the paper copies of your brief must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk

By: ________________________
Rebecca L. Leto, Deputy Clerk
504-310-7703

cc: Mr. Evan J. Ballan
Mr. Todd Lawrence Disher
Mr. Matthew Hamilton Frederick
Mr. Eric Alan Hudson
Mr. Patrick K. Sweeten
Mr. William Thomas Thompson