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

MI FAMILIA VOTA, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MICAELA RODRIGUEZ and GUADALUPE TORRES, Plaintiffs v. GREG ABBOTT, Governor of Texas; RUTH HUGHS, Texas Secretary of State, Defendants.	NO. 5:20-cv-00830

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

I. INTRODUCTION

A pandemic that has killed 11,576 Texans (and counting)[1] has threatened every aspect of our lives. State health officials, the Centers for Disease Control and Prevention, and experts nationwide encourage people to stay home, avoid crowds, and take precautions to avoid getting or transmitting the novel coronavirus. If Defendants do not address Texas's election laws and policies to make in-person voting safe during the pandemic, in-person voting will be unlawfully impeded during early voting and on Election Day (November 3, 2020).

Fortunately, there are scientifically established ways to make voting safer: transmission of the coronavirus can be minimized by wearing masks, avoiding close proximity with others, and limiting physical contact with communal surfaces. For Texans at risk of serious illness from the coronavirus disease 2019 (COVID-19), these mitigation steps are particularly important. But the coronavirus has also proven deadly and capable of causing serious injury even to people considered low-risk, presents as-yet unknown long-term health risks for all infected, and has disproportionately impacted communities of color. All Texas voters must have an opportunity to safely go to the polls.

Despite this serious threat and the feasibility of COVID-19-related safety precautions—which even the State of Texas's public health officials acknowledge—the plans the Governor and Secretary of State (Defendants here) have adopted in connection with the November general election (early vote and Election Day) (the "Pandemic Voting System")[2] defies all public health

[1] *See* CDC, Cases in the U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Aug. 26, 2020).

[2] Plaintiffs adopt the phrase "Pandemic Voting System" for ease of reference. This encompasses Texas election law and processes as applied to in-person voting during COVID-19, including: (1) Authorizing counties to open only half the legally required polling places under the countywide polling place program, Tex. Elec. Code § 43.007(f); (2) prohibiting the use of paper ballots in counties in the countywide polling place program, Tex. Elec. Code § 43.007; (3) limiting the

Footnote continued on next page

advice. Indeed, their system falls far short of the States' own statements identifying best practices for voting during a pandemic. This situation unduly burdens Texans' right to vote by forcing voters to make a choice either to exercise the franchise, or to stay at home to protect their health and safety and that of their loved ones. It also discriminates against voters on the basis of their location within the state, their health status, and their race. That is unlawful.

Plaintiffs bring five causes of action challenging Texas's voting system as applied during the pandemic: violations of the First Amendment and the Due Process Clause of the Fourteenth Amendment for undue burden on the right to vote (Counts 1 and 3); the Equal Protection Clause of the Fourteenth Amendment for discriminatory treatment of voters based on the jurisdiction in which they reside, their health status, and their race (Count 2); and race discrimination in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301 (Counts 4 and 5). Because Plaintiffs have standing and each claim is adequately pled, Defendants' motions to dismiss (ECF No. 19 ("Hughs Mot."); ECF No. 20 ("Abbott Mot.")) should be denied.

II. PLAINTIFFS EACH HAVE STANDING

"Article III standing requires plaintiffs to demonstrate that they [1] have suffered an

---

Footnote continued from previous page
early voting period and prohibiting mobile early voting sites, Tex. Elec. Code §§ 85.062-63; (4) a voter identification law that requires voters to obtain identification and allow poll workers to physically handle the identification, Tex. Elec. Code § 63.001(c); and (5) a law limiting curbside voting to individuals who cannot physically enter polling locations, Tex. Elec. Code § 64.009. New election-related policies during the pandemic include: (1) A face covering mandate that specifically *exempts* people at polling places, Executive Order GA-29; (2) an order that expands the early voting period but does not extend hours or offer mobile voting options, Governor's July 27, 2020 Proclamation; (3) Election advisories that recommend but do not require social distancing and other safety measures at the polls, *see* Election Advisory No. 2020-14; and (4) Election advisories that affirm that no changes have been made to existing election laws, even where such laws might lead to unsafe conditions for voters during the pandemic, *see* Election Advisory No. 2020-14 (advising counties to seek a court order to authorize exceptions to the voting procedures as necessary to address COVID-19).

'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). "An association or organization can establish an injury-in-fact through either … 'associational standing' [or] 'organizational standing.'" *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). Article III is satisfied if any one Plaintiff has standing for each claim. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 53 n.2 (2006).

A. Mi Familia Vota and the NAACP Have Organizational Standing

"[A]n organization has standing to sue on its own behalf where it devotes resources to counteract a defendant's allegedly unlawful practices." *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014) (citation omitted). Defendants contend that the organizational Plaintiffs—Mi Familia Vota ("MFV") and the Texas State Conference of the National Association for the Advancement of Colored People ("NAACP")—have not sufficiently alleged a diversion of resources. Hughs Mot. 3-5; Abbott Mot. 3-5. However, as stated in the Complaint (ECF No. 1, "Compl.") and as supplemented by their declarations,[3] the organizational Plaintiffs do allege injuries-in-fact. As a result of Defendants' actions, MFV "has had to divert personnel, time, and resources . . . . to try to protect Latino and immigrant communities from contracting coronavirus on Election Day." Compl. ¶ 20; *see also* MFV Decl. ¶¶ 5-18. The NAACP has also "diverted resources from other programs and initiatives in order to assist the NAACP's members and constituents, and the public generally, in Texas with overcoming the burdens imposed on their right to vote." Compl. ¶ 23; *see also* NAACP Decl. ¶¶ 11-15. These resource expenditures have gone well beyond

[3] Plaintiffs submit the declarations of Angelica Razo ("MFV Decl."), Gary L. Bledsoe ("NAACP Decl."), Micaela Rodriguez ("Rodriguez Decl."), and Guadalupe Torres ("Torres Decl."), concurrently herewith.

either organization's routine activities, and beyond lobbying. Both MFV and the NAACP had to divert resources in this way because not doing so would have deeply frustrated their organizational missions. MFV Decl. ¶ 18; NAACP Decl. ¶¶ 4, 13. Plaintiffs' allegations are sufficient to establish organizational standing. *See OCA*, 867 F.3d at 612; *Scott*, 771 F.3d at 836-39 (NAACP had standing when it spent more time on voter registration drives after state's failure to provide them); *Lewis v. Hughs*, No. 5:20-CV-00577-OLG, 2020 WL 4344432, at *10 (W.D. Tex. July 28, 2020) (NAACP's educational efforts to counteract restrictions' effect on right to vote conferred standing); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (citing cases recognizing standing with similar diversions of resources).

Defendants' reliance on *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010)—to suggest Plaintiffs are required to identify "specific projects that [they] had to put on hold or otherwise curtail in order to respond" to Defendants' actions—misrepresents the law. *See* Hughs Mot. 4-5; Abbott Mot. 4-5. As the Fifth Circuit explained, its "remark in *City of Kyle*" about identifying specific projects was merely "an example of how to satisfy" organizational standing—*not* a minimum requirement. *OCA*, 867 F.3d at 612. Defendants' citation to *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018), is similarly inapposite. There, the Fifth Circuit simply held that an individual lacked standing to challenge a law he was never subjected to. *Id.* at 389.

B. The NAACP Has Associational Standing

At Least One NAACP Member Has Standing: As Defendants acknowledge, the NAACP need only have a single member with standing to prevail. *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996); Hughs Mot. 3; Abbott Mot. 3. The NAACP has more than 10,000 members, including registered voters in Texas who are at risk for COVID-19 and thus face a burden on their right to vote. Compl. ¶ 22; NAACP Decl. ¶ 3.

Numerous members of the NAACP inform the organization that they fear infection if they exercise their right to vote under Texas's unsafe Pandemic Voting System. NAACP Decl. ¶ 10. By creating substantial and unnecessary risk to the health of in-person voters, including NAACP members, and thus burdening the right to vote, Defendants have caused an Article III injury.[4] *See O'Hair v. White*, 675 F.2d 680, 688, 691 (5th Cir. 1982) (when voting rights are threatened, "there can be no doubt that the complaint alleges the injury in fact necessary" for standing); *Lewis*, 2020 WL 4344432, at *9 (standing satisfied in voting rights challenges "even in situations where those voters could still vote"). And Defendants have the power to redress this injury. *See infra* § II.D. Thus, because at least one of its members has standing, the NAACP has standing. *Cf. Lewis*, 2020 WL 4344432, at *10 (finding associational standing in voting rights case).

Defendants also suggest that the NAACP must "identify" or allege "specific members" with individual standing. Hughs Mot. 3; Abbott Mot. 3. As the Fifth Circuit has made clear, there is no requirement "that an NAACP branch must identify a particular NAACP member *at the pleading stage*" to establish associational standing. *Hancock Cnty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012). Because, as explained above, Plaintiffs have alleged that NAACP members are in fact burdened by Defendants' Pandemic Voting System, Defendants' cited authorities are inapplicable. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497-99 (2009) ("statistical probability" of injury insufficient); *City of Kyle*, 626 F.3d at 237 (mere possibility of injury insufficient).[5]

[4] Standing is separate from the merits. The standing inquiry asks simply whether the Defendants have burdened individuals' right to vote *at all*. *See Lewis*, 2020 WL 4344432, at *8 (Article III "injury 'need not be substantial' or anything more than an 'identifiable trifle,' as Article III's requirement is 'qualitative, not quantitative in nature.'") (quoting *OCA*, 867 F.3d at 612). Whether the extent of the burden is unlawful is a subsequent merits question.

[5] In a footnote Defendants suggest the NAACP does not satisfy the "indicia of membership" test, Abbott Mot. 3 n.3, but that test is used only "[i]f the association seeking standing does not have

Footnote continued on next page

Prudential Standing Exists When Associational Standing Exists: Defendants argue that the organizational Plaintiffs must also demonstrate statutory standing to bring claims under 42 U.S.C. § 1983 and Section 2 of the Voting Rights Act. Hughs Mot. 5; Abbott Mot. 5. But "the successful assertion of associational standing (both organizational and representational) fulfills prudential standing concerns and obviates the need to apply concepts of third-party standing as to the associations." *Veasey v. Perry*, 29 F. Supp. 3d 896, 905 (S.D. Tex. 2014) (finding NAACP had associational (and organizational) standing for Section 1983 and Section 2 claims); *accord Lewis*, 2020 WL 4344432 at *10 n.2 (rejecting same argument by Secretary of State); *see also Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010) (associational standing for section 1983 claim); *OCA*, 867 F.3d at 607 (associational standing for VRA Section 208 claim, which like Section 2 creates a right protecting individuals). The cases cited by Defendants on prudential standing are inapplicable because they all involved *individuals*—not membership organizations—asserting the rights of other individuals. *See* Hughs Mot. 5-6; Abbott Mot. 5-6.

C. Plaintiffs Rodriguez and Torres Have Standing

Just like NAACP members, the individual Plaintiffs, Ms. Rodriguez and Ms. Torres, adequately allege an injury-in-fact traceable to and redressable by the Defendants. Both are registered voters in Texas who intend to vote on Election Day and whose only option under Texas law is voting in person. Compl. ¶¶ 24-25. Both face the risk of infecting themselves and elderly relatives at high risk for serious illness due to COVID-19. *Id.* As extensively detailed in

Footnote continued from previous page
traditional members[.]" *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 344 n.9 (5th Cir. 2012); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977) (test developed for plaintiff that "has no members at all"). The NAACP is a traditional membership organization, Compl. ¶ 22, with standing to represent its "rank-and-file members," as the Supreme Court has long recognized. *See NAACP v. Alabama*, 357 U.S. 449, 459 (1958); *NAACP v. Button*, 371 U.S. 415, 428 (1963). Defendants' cited cases are inapposite.

the Complaint, Defendants' adoption of a Pandemic Voting System with unsafe in-person voting procedures places a severe, imminent, and actual burden on voters like Ms. Rodriguez and Ms. Torres. *See, e.g.*, Compl. ¶¶ 89-92, 111, 113-63. Requiring voters to accept the threat of serious illness or death to vote impairs the "right to vote free of arbitrary impairment by state action." *O'Hair*, 675 F.2d at 688 (citation omitted). Voters have standing to challenge such impairment "even in situations where these voters could still vote." *Lewis*, 2020 WL 4344432, at *9.

Defendants challenge the individual Plaintiffs' standing—arguing Ms. Rodriguez fails to "identify anything that may dissuade her from voting" and Ms. Torres is only "concerned about the *possibility* that she may catch COVID-19" and transmit it—by focusing only on the paragraphs of the Complaint specific to them. *See* Hughs Mot. 6-7; Abbott Mot. 6-7. But read together, the allegations in the full Complaint amply describe how the voting rights of all Texans ineligible to vote by mail (particularly Latino voters like Ms. Rodriguez and Ms. Torres) risk being severely burdened by Defendants' Pandemic Voting System. *See* Compl. ¶¶ 111, 113-64.

As to Ms. Rodriguez, the Complaint details exactly which "procedures in place … make voting practically impossible because they create a serious risk of virus transmission": limited early voting, long lines, protocols that require poll workers to handle voters' identification and voters to touch electronic voting machines, no paper ballots, limited curbside voting, reductions of polling places, and insufficient poll workers. *See* Compl. ¶¶ 24, 108-64. Plaintiffs' Prayer for Relief explains exactly what steps would alleviate the burden on Ms. Rodriguez. *Id.* at 42-44. Ms. Rodriguez's intent is clear: she would vote if her polling place were safe. *Id.* ¶ 24; *see also* Rodriguez Decl. ¶¶ 7, 27 ("I want to vote" but "I am very worried about voting in person").

Similarly, Ms. Torres's injuries are not "conjectural." Hughs Mot. 7. As one court recently explained, when an individual intends to vote on Election Day, compliance with the

state's burdensome election protocols "is not speculative; it is 'certainly impending.'" *People First of Ala. v. Merrill*, No. 2:20-CV-00619-AKK, 2020 WL 3207824, at *7 (N.D. Ala. June 15, 2020) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). COVID-19 has already caused serious consequences for Ms. Torres and her family. While she does not "feel safe voting in person during the pandemic," she doesn't "want to give up [her] right to vote, either." Torres Decl. ¶ 18.

D. Defendants Can Redress the Alleged Violations and Make Voting Safe

As top officials in the state, Defendants contend they lack the power to fix the problems Plaintiffs identify, instead leaving the health and safety of Texans to the individual plans, budgets, and abilities of local officials. That argument is specious. The Secretary "is the 'chief election officer of the state' and is instructed by statute to 'obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code.'" *OCA*, 867 F.3d at 613-14 (citing Tex. Elec. Code §§ 31.001(a), 31.003).[6] Judge Garcia recently rejected the exact same redressability argument by the Secretary: "Because the challenged restrictions are all found in the Texas election code, their invalidity is undoubtedly both fairly traceable to and redressable by the Secretary." *Lewis*, 2020 WL 4344432, at *10. The relevant election protocols at issue in this case are also in the Texas Election Code, so the same reasoning applies. *See* Compl. ¶¶ 108-10, 121, 142 (citing limits in Texas Election Code).

The Governor also has the power to redress at least some of Plaintiffs' grievances, as exemplified by his issuance of a partial mandate requiring residents to wear masks but exempting

[6] Defendants' attempt to distinguish *OCA* as involving a facial challenge, as opposed to as-applied, makes little sense. Plaintiffs are not challenging the manner in which local officials are implementing the State's policies or procedures, they are challenging the State's policies and procedures themselves. Defendants are responsible for the state-wide interpretation, guidance, application, and operation of the election laws.

polling sites, Compl. ¶ 102, and as explained further below, *see* § III, *infra*.

III. THIS CASE DOES NOT PRESENT POLITICAL QUESTIONS

Plaintiffs ask this Court to determine that Texas's Pandemic Voting System (comprised of provisions of the Texas Election Code and other specific election policies), as applied during the pandemic, violate the Constitution and the VRA. Defendants argue that the Court is not equipped to adjudicate these claims because the lawfulness of their activities is in fact a "political question." But as the Fifth Circuit recently held, "[t]he standards for resolving such [voting rights] claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rights." *Texas Democratic Party v. Abbott*, 961 F.3d 389, 398-99 (5th Cir. 2000) (rejecting applicability of political question doctrine where plaintiffs alleged Texas's mail-in voting plans during pandemic were unconstitutional). The same is true here. Plaintiffs are not asking the Court to develop its own election policies or to weigh two different lawful policies; they are asserting that Texas's policies are unlawful and unconstitutional as applied during the pandemic. Indeed, although Defendants now argue that these types of questions are non-justiciable, they themselves have urged local counties to take similar issues to court.[7]

Defendants assert that the case involves political questions because the administration of elections has been committed to Congress and state legislatures, rather than courts. Abbott Mot. p. 8 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962); U.S. Const. art. I, § 4, cl. 1). But as the Court in *Baker* explained, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Baker*, 369 at 209. Indeed, "[w]hen challenges to state

[7] *See* Election Advisory No. 2020-14, regarding COVID-19 (Coronavirus) Voting and Election Procedures, https://www.sos.state.tx.us/elections/laws/advisory2020-14.shtml (advising counties to "consider seeking a court order to authorize exceptions to the voting procedures outlined in certain chapters of the Texas Election Code" as "[a] court order could provide for modifications to other voting procedures as necessary to address the impact of COVID-19 within the jurisdiction").

action respecting matters of 'the administration of the affairs of the State and the officers through whom they are conducted' have rested on claims of constitutional deprivation which are amenable to judicial correction, [a court may] act[] upon its view of the merits of the claim." *Baker*, 369 U.S. at 229 (footnote omitted); *see also Saldano v. O'Connell*, 322 F.3d 365, 369-70 (5th Cir. 2003) (explaining that a case is not non-justiciable just because the court's "determination may touch on political issues"). Specifically with regard to elections, "federal courts routinely entertain suits to vindicate voting rights." *Texas Democratic Party*, 961 F.3d at 399.

Defendants also incorrectly claim that "Plaintiffs' Complaint calls upon the Court to make 'an initial policy determination of a kind clearly for nonjudicial discretion.'" Abbott Mot. 9-10 (quoting *Baker*, 369 U.S. at 217). But Plaintiffs are not debating best practices nor asking the Court to make any initial policy determinations. *See Baker*, 369 U.S. at 217. Plaintiffs have asserted that Defendants' application of current election laws and Defendant Abbott's inadequate mask mandate violate Plaintiffs' rights under the Constitution and the Voting Rights Act. The legal tests for these causes of action are "judicially discoverable and manageable standards for resolving" the constitutional deprivations caused by Defendants' current election laws and related policies. *Id. See also Texas Democratic Party*, 961 F.3d at 399.

The cases cited by Defendants are inapposite. For example, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), concerned the training of National Guard members, not voting rights. With regard to elections, Defendants cite several partisan gerrymandering cases, the facts of which are substantially dissimilar to the present case.[8] Finally, Defendants rely on *Coalition for Good*

[8] Defendants cite *Agre v. Wolf*, 284 F. Supp. 3d 591 (E.D. Pa), *appeal dismissed as moot*, 138 S. Ct. 2576 (2018), *appeal dismissed sub nom. Scarnati v. Agre*, 138 S. Ct. 2602 (2018). In that case, plaintiffs challenged a partisan gerrymandered redistricting plan under the Elections

Footnote continued on next page

Governance v. Raffensperger, No. 1:20-cv-1677, 2020 WL 2509092 (N.D. Ga. May 14, 2020), an unpublished out-of-circuit decision from the Northern District of Georgia. Defendants overstate the similarities between the relief sought in *Coalition* and the relief sought by the Plaintiffs. In *Coalition*, the Plaintiffs sought, among other requested relief, to move the election date; to replace the state's voting system; and to revise mail-in voting procedures, none of which are sought in the present case. *Id.* Moreover, the district court's ruling was based on its assessment that the plaintiffs' claims arose out of their dissatisfaction with the state's "measures to slow the spread of the virus." *Id.* at *3. This is a substantially different type of challenge than the claims presented by Plaintiffs in the present case. Here, as in *Texas Democratic Party*, the Complaint alleges application of the Texas Election Code and current election policies violate the plaintiffs' constitutional rights—a claim that is squarely within this court's jurisdiction, and the relief sought is both judicially discoverable and manageable. *See Baker*, 369 U.S. at 217; *Texas Democratic Party*, 961 F.3d at 399.

IV. DEFENDANTS ARE NOT IMMUNE

A. *Ex Parte Young* Applies to Plaintiffs' Requests for Injunctive Relief

"[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. Texas, Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 516 (5th Cir. 2017). This principle and exception to the Eleventh Amendment trace to the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123, 159 (1908). It "permits private parties to seek 'injunctive or declaratory relief against individual state officials acting in violation of federal law.'" *Lewis*, 2020 WL

Footnote continued from previous page
Clause, which is not at issue in the present case. Moreover, that court specifically noted that the role of courts in election matters "is primarily limited to enforcing the guarantees of the First Amendment and the Fourteenth Amendment's Equal Protection Clause," both of which have been raised in the present case. *Agre*, 284 F. Supp. 3d at 599.

4344432, at *7 (quoting *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013)). For the exception to apply, "a suit must (1) be brought against state officers who are acting in their official capacities; (2) seek prospective relief to redress ongoing conduct; and (3) allege a violation of federal, not state, law." *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 424 (5th Cir. 2020).

The *Ex parte Young* exception applies to both preventive injunctions and injunctions that require affirmative action by state officials. *See Lewis*, 2020 WL 4344432, at *8; *see also McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (state officials may be enjoined to "conform their future conduct" to federal law (citation omitted)); *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020). Because Plaintiffs "allege that the challenged restrictions are ongoing violations of federal law, and the relief they seek is prospective. . . . [T]he complaint falls under the *Ex parte Young* exception to sovereign immunity." *Lewis*, 2020 WL 4344432, at *8; *see also Curling v. Sec'y of State of Ga.*, 761 F. App'x 927, 933 (11th Cir. 2019) ("[S]ettled precedent . . . allows *Ex parte Young* suits when state officials' inaction allegedly harms constitutional rights.").

Because Congress has abrogated state sovereignty in the Voting Rights Act, Defendants have no claim of Eleventh Amendment immunity with regard to the Plaintiffs' VRA claim. *See OCA*, 867 F.3d at 614; *see also Mixon v. Ohio*, 193 F.3d 389, 398-99 (6th Cir. 1999); *Ala. State Conf. of the NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020).

B. <u>The Secretary of State Is Not Immune</u>

For the *Young* exception to apply, the defendant state official must "have 'some connection' to the state law's enforcement and threaten to exercise that authority." *Air Evac EMS*, 851 F.3d at 517 (quoting Ex *parte Young*, 209 U.S. at 157). "'Enforcement' typically involves compulsion or constraint." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (citation

omitted). This analysis has a "significant[] overlap" with the Article III standing analysis: when "it's been determined that an official can act, and there's a significant possibility that he or she will act to harm a plaintiff, the official has engaged in enough 'compulsion or constraint' to apply the *Young* exception." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019).

Plaintiffs challenge Texas's Pandemic Voting System, which Defendant Hughs has a substantial connection with enforcing. *See* Tex. Elec. Code § 31.001(a) (Secretary of State is "the chief election officer of the state"); Tex. Elec. Code § 31.003 (Secretary charged with "obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of this code and of the election laws outside this code"); Tex. Elec. Code § 31.005(a) (Secretary tasked with "tak[ing] appropriate action to protect the voting rights of the citizen of this state from abuse by the authorities administering the state's electoral processes"); Tex. Elec. Code § 31.005(b) ("the secretary may order the person [violating voter rights] to correct the offending conduct"). Moreover, Plaintiffs' legal theory arises from the notion that their voting rights have been burdened—*i.e.*, constrained—by Defendant Hughs' actions.

Despite this, Defendant Hughs suggests that the Governor, the legislature, and local officials are solely responsible for making and enforcing election law. Hughs Mot. 11. But the Fifth Circuit has rejected this argument. *See OCA*, 867 F.3d at 613 ("The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serve as the 'chief election officer of the state.'" (footnote omitted)); *Texas Democratic Party*, 961 F.3d at 401 ("*Young* is satisfied as to the Secretary of State," finding that the *Ex parte Young* lawsuit applied to both a facial and an as-applied challenge); *see also Lewis*, 2020 WL 4344432 (same).

C. The Governor Is Not Immune

Defendant Governor Abbott also has the requisite connection to the Pandemic Voting System challenged here. The governor has emergency powers that authorize him to "issue executive orders, proclamations, and regulations and amend or rescind them," which "have the force and effect of law," Tex. Elec. Code § 418.012, and he may also effect and suspend laws, and order special elections. Tex. Elec. Code §§ 418.016, 41.0011. He has exercised those authorities during the pandemic. *See, e.g.*, Proclamation (July 27, 2020), https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_07-27-2020.pdf (extending early voting); Executive Order GA-29 (July 2, 2020), https://www.sos.state.tx.us/texreg/pdf/backview/0717/0717gov.pdf (exempting voters and poll workers from a face covering mandate); Executive Order GA-23 (May 18, 2020), https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-23.pdf (prohibiting jurisdictions from imposing penalties for failure to wear a face covering). Governor Abbott has controlled the means of enforcing his COVID-19 disaster orders, including by limiting available penalties for violating executive or local orders, suspending all laws that might allow local officials to confine individuals for violating orders issued in response to the COVID-19 disaster, and superseding any local order inconsistent with his own. *Id*. He is directly involved with adopting a voting plan that fails to protect voters' rights, and which burdens their right to vote—a "constraint" tied to the Governor which falls within the *Young* exception. *K.P.*, 627 F.3d at 124; *see also Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980), *adhered to*, 658 F.2d 93 (3d Cir. 1980) (finding that *Ex parte Young* applied to the Defendants whose duties were ministerial, because "[u]nder Ex Parte Young the inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights").

In re Abbott, 956 F.3d 696 (5th Cir. 2020), cited by Defendants, is inapplicable. There, the plaintiffs were abortion providers challenging an executive order limiting their ability to perform medical procedures, including abortions, during the pandemic. The problem there was that the order in question was "enforced by health and law enforcement officials and not the Governor." 956 F.3d at 709. The type of enforcement considered there—prosecution under an unlawful rule—is not at issue here. Instead, Plaintiffs allege a burden/constraint on their right to vote caused by Governor Abbott's actions. There is no analog to a threatened prosecution here. Plaintiffs seek affirmative actions squarely within the responsibilities of the named Defendants.

D. Plaintiffs' Claims Do Not Implicate Special Sovereignty Interests

The limited circumstances that create an exception to the *Ex parte Young* doctrine are not present here because the plaintiffs' constitutional claims and requested relief do not impinge on the state's special sovereignty interests.

In *Idaho v. Coeur d'Alene Tribe of Idaho*, the Supreme Court concluded that while

> [a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction. . . . [T]his case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereign interests. . . . The suit would diminish even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

521 U.S. 261, 281-82 (1997). The Supreme Court has since clarified that except in rare circumstances, in making an *Ex parte Young* determination "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) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296); *see also Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (*Verizon Maryland*

"limited the reach of *Coeur d'Alene*"); *Hill v. Kemp*, 478 F.3d 1236, 1258-59 (10th Cir. 2007) (citing *Verizon Maryland* to overrule *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1193-94 (10th Cir. 1998)).

The unusual circumstances of *Coeur d'Alene Tribe* are not present here. The fact that relief may require Defendants to expend resources does not mean that the case implicates the state's special sovereignty interests. The *Ex parte Young* exception "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken v. Bradley*, 433 U.S. 267, 289 (1977). "State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974); *see also Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) ("[C]ompliance with the terms of prospective injunctive relief will often necessitate the expenditure of state funds."). These costs may be sizeable, as in *Milliken*, where the relief ordered state officials to "eliminate a de jure segregated school system." 433 U.S. at 289. While the *Ex parte Young* doctrine does not allow for retroactive monetary relief, *see Edelman*, 415 U.S. at 668, Plaintiffs in this case request no retroactive relief.

None of the cases cited by the Defendants indicate that the special sovereign interest analysis in *Coeur* should be applied to the present Complaint. *MCI Telecommunication Corp. v. Bell Atlantic Pennsylvania* expressly noted that the *Coeur d'Alene* exception applied only to "special, essential, or fundamental sovereignty [such as] a state's title, control, possession, and ownership of water and land," and specifically concluded that the special sovereignty interest of

the state is not implicated where "the ability of a state to make and carry out its regulatory decisions" is interrupted." 271 F.3d 491, 508, 514 (3d Cir. 2001); *see also AT&T Commc'n v. BellSouth Telecomm. Inc.*, 238 F.3d 636, 648 (5th Cir. 2001) (continuing to apply a traditional application of *Ex parte Young*). *Barton v. Summers*, 293 F.3d 944, 951 (6th Cir. 2002) addressed an attempt to recovery money damages, and control dispersal of state funds where Congress has expressly allowed states to allocate such funds at their discretion, neither of which is at issue here. And *ANR Pipeline*, 150 F.3d at 1194 is both inapplicable and has since been overruled by *Hill*, 478 F.3d at 1258-59.

Defendants also cite to *Curling v. Secretary of State of Georgia*, 761 F. App'x 927, 934 (11th Cir. 2019). But in that case, the Court explicitly found that "there is nothing unusual about Plaintiffs' case that would necessitate summoning *Coeur d'Alene Tribe*'s exception. Undoubtedly, *Ex parte Young* suits are permitted when the plaintiff alleges that state election officials are conducting elections in a manner that does not comport with the Constitution." *Curling*, 761 F. App'x at 933-34. Here, as in *Curling*, the Plaintiffs seek injunctive and declaratory relief against unconstitutional election policies, which presents nothing so unusual as to raise special sovereign interests. *Id.* The Supreme Court, the Fifth Circuit, and other appellate courts have consistently resisted an expansion of *Coeur d'Alene Tribe*, and Defendants have produced no evidence that anything other than a "straightforward" *Ex parte Young* inquiry is appropriate here. *See Verizon Md.*, 535 U.S. at 645.

V. PLAINTIFFS STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

A. Undue Burden Claims Under the First and Fourteenth Amendments

Plaintiffs allege Defendants' Pandemic Voting System leaves voters without a safe option for exercising their fundamental right to vote, in violation of the First and Fourteenth Amendments. Compl. ¶¶ 165, 167-86. Defendants' mischaracterization of Plaintiffs' claims as

an effort to vote "by any means of their choosing" or to "oversee the administrative details of a local election," understates the threat of COVID-19 to voters and the public and misconstrues Plaintiffs' allegations.[9] Hughs Mot. 16-17; Abbott Mot. 15-17. These claims are not about voters' mere inconvenience, nor about administrative minutia. They are about the fact that Texas's Pandemic Voting System forces voters to put their lives at risk in order to vote at all.

The *Anderson-Burdick* framework that governs this claim requires the court to "weigh the character and magnitude of the asserted injury to [Plaintiff's] First and Fourteenth Amendment rights . . . against 'the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). But this weighing of interests presents a merits question. At the pleading stage, "it is sufficient … that Plaintiffs have alleged that [the challenged scheme has] burdened their voting rights." *League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1288 (N.D. Fla. 2018); *see also Lewis v. Hughs*, No. 5:20-CV-00577-OLG, 2020 WL 4344432 (W.D. Tex. July 28, 2020) (denying Texas's motion to dismiss undue burden claims despite State's asserted interest). Plaintiffs have plainly made such allegations.

The current voting conditions in Texas place an unconstitutional burden on Plaintiffs by threatening their lives and health, and that of their families. Compl. ¶¶ 4, 11, 24, 25, 172, 165. Plaintiffs allege Defendants' Pandemic Voting System and the resulting conditions force voters to choose between their civic duty and their well-being. Among these conditions are: the limited

[9] Indeed, the cases that Defendants rely on are inapposite here. For instance, three of the cases Defendants cite—*Johnson v. Hood*, 430 F.2d 610 (5th Cir. 1970), *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), and *Pettengill v. Putnam Cnty. R-1 Sch. Dist., Unionville, Mo.*, 472 F.2d 121, 122 (8th Cir. 1973)—do not even consider First and Fourteenth Amendment undue burden claims. Rather, as the court in *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981), acknowledge, these cases concern "insubstantial election irregularities." But Texas's System is not a mere "irregularity," and there is nothing "insubstantial" about the potentially lethal risk Defendants would force Texan voters to face.

availability of paper ballots, the reduced locations of voting places, limited voting booths, insufficient early voting opportunities, insufficient poll workers and personal protective equipment at the polls; and a lack of available alternatives, such as curbside voting. Compl. ¶¶ 114, 115-16, 119, 121, 141, 142, 146, 162-63. Plaintiffs specifically allege that these conditions, individually and collectively, burden voters (Compl. ¶¶ 114, 115-16, 122, 148-151, 163), that these burdens are severe (Compl. ¶ 117), and that the State has no legitimate interest in imposing them (Compl. ¶ 185). Even if Defendants did identify such an interest—which they do not—weighing that interest against the harms Plaintiffs have alleged is not proper at the motion to dismiss stage. *See Hughs*, 2020 WL 4344432, at *14.

Defendants puzzlingly contend that access to the ballot is not a right protected by the First and Fourteenth Amendments. Hughs Mot. 16; Abbott Mot. 16. But "voting is of the most fundamental significance under our constitutional structure." *Burdick*, 504 U.S. at 433. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP*, 357 U.S. at 460. For decades, courts have applied the *Anderson-Burdick* framework where election regulations impede voters' Fourteenth and First Amendment rights. *See, e.g., Crawford v. Marion Cnty. Elec. Bd*, 553 U.S. 181, 190-91 (2008); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Texas Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996). That is the standard that applies here, where Plaintiffs allege, and have sufficiently pleaded, that Defendants have imposed severe burdens on Plaintiffs' right to vote. Compl. ¶¶ 165, 167-86. Plaintiffs have adequately pleaded their undue burden claims.

B. Equal Protection Claim Under the Fourteenth Amendment

Under the Equal Protection Clause, "a citizen has a constitutionally protected right to

participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. In reviewing such equal protection claims, courts apply the same *Anderson-Burdick* standard described above. *See Crawford*, 553 U.S. at 189-91; *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012). Plaintiffs assert three theories under the Equal Protection Clause: (1) differential treatment of voters based on where they live, (2) differential treatment between voters who face severe health risks during the pandemic and those who do not, and (3) differential treatment of voters based on race. The first two theories, subject to the *Anderson-Burdick* framework described above, are addressed here.

Failure to Enact Adequate Statewide Standards: Defendants' Pandemic Voting System violates the Equal Protection Clause by effectively denying voters the fundamental right to vote based where they happen to reside in. *Bush*, 531 U.S. at 110; *see, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 466, 477-78 (6th Cir. 2008) (statewide voting system with "non-uniform standards, process, and rules" sufficient to support equal protection claim); *Lewis*, 2020 WL 4344432, at *14-15 (ballot receipt deadline and signature match requirement "treat Texans differently depending on where they live"); *Black v. McGuffage*, 209 F. Supp. 2d 889, 897-99 (N.D. Ill. 2002) (state law permitted local jurisdictions to select their own voting systems). Defendants' system largely defers implementation of in-person voting procedures to local election authorities without establishing minimum standards to ensure voters are treated similarly. *See* Compl. ¶¶ 77-107. For example, Defendants' recommendation that local officials

"consider seeking a court order to authorize exceptions" to in-person voting laws (Compl. ¶ 82); Defendants' policy regarding the relocation or closure of polling locations (Compl. ¶ 85); and Defendants' refusal to establish statewide standards to minimize the spread of the coronavirus for in-person voting (Compl. ¶¶ 83-84, 86-88, 95-98), have resulted and will result in disparate treatment of voters based on where they live. *See, e.g.*, Compl. ¶¶ 149-51 (polling location closures caused excessive lines during March primaries); ¶¶ 161-63 (insufficient staffing led to polling location closures during July primaries).

Plaintiffs allege more than just the "larger crowds and longer lines" Defendants contend are insufficient to give rise to constitutional injury. Hughs Mot. 18; Abbott Mot. 17-18. In the context of an ongoing pandemic, Defendants' Pandemic Voting System imposes severe and unequal burdens on its citizens. Indeed, when voters are forced to wait several hours to vote due to inequitable allocation of resources or inadequate training of poll workers—precisely the types of conditions Plaintiffs allege here—courts have found their right to vote severely burdened. *See League of Women Voters of Ohio*, 548 F.3d at 477-78. Whether these burdens are outweighed by the State's interests goes to the merits of Plaintiffs' claims, which will be subject to balancing of considerations under the *Anderson-Burdick* standard. At the pleading stage, Plaintiffs' allegations are sufficient to support the inference that Defendants have "fail[ed] to ensure uniform standards across all counties." *Lewis*, 2020 WL 4344432, at *15.

Disparate Treatment of At-Risk Voters: Plaintiffs also state an equal protection claim with respect the disparate treatment of voters who face severe health risks as compared to voters who do not face such risks during the pandemic. For the reasons set forth in Section V.A, *supra*, Texans with underlying medical conditions in particular (including chronic lung disease, chronic kidney disease, liver disease, moderate to severe asthma, serious heart conditions, obesity, and

diabetes), as well as those who frequently come in contact with these at-risk individuals (e.g., essential workers, health care professionals, and people who live with or care for elderly or disabled individuals), will face significant risk—not only to become ill but to further spread the virus—by leaving their homes to vote. *See* Compl. ¶ 36. And as the pandemic worsens across the country, with the number of known infections in Texas rising dramatically over the past several months (Compl. ¶¶ 62-69), these burdens are only becoming more severe under Defendants' voting system. Indeed, as of August 19, 2020, Texas ranked near the top among states with the most reported cases per capita over a seven-day period.[10] Accordingly, Plaintiffs' equal protection claim is adequately pled.

C. Racial Discrimination Under the Fourteenth and Fifteenth Amendments

The Fourteenth and Fifteenth Amendments prohibit racial discrimination in voting where state officials "acted with a discriminatory purpose." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997); *Veasey v. Abbott*, 888 F.3d 792, 807-08 (5th Cir. 2018) (Graves, J., concurring in part). While Defendants are correct that "disparate racial impacts, *standing alone*, do not violate the Constitution" (Hughs Mot. 17; Abbott Mot. 17 (emphasis added)), a discriminatory purpose "may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Accordingly, courts should consider several factors in determining whether a state action was unconstitutionally motivated by discriminatory purpose: the impact or effect of an official decision, particularly where it falls more heavily on one race than another; the historical background of the decision; departures from normal procedural or substantive norms; and the

[10] Christina Maxouris, Eric Levenson & Nicole Chavez, *Georgia, Texas and Florida Lead the Country in Coronavirus Cases Per Capita*, CNN (Aug. 19, 2020), https://www.cnn.com/2020/08/19/health/us-coronavirus-wednesday/index.html.

sequence of events leading up to the decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

The complaint is replete with facts supporting a plausible inference of racially discriminatory intent, particularly with respect to Black and Latino voters, consistent with the *Arlington Heights* framework. *See, e.g.*, Compl. ¶¶ 47-59, 70-76 (explaining disparate health and economic impacts on Black and Latino voters); ¶¶ 60-61 (describing Texas's "long and sordid history of racial discrimination impeding the right to vote"); ¶¶ 77-107 (describing events leading to and including Defendants' policies of deliberate inaction). At the pleading stage, these allegations are sufficient to support claims of racial discrimination under the Equal Protection Clause of the Fourteenth Amendment and under the Fifteenth Amendment. *See, e.g.*, *Veasey v. Perry*, 29 F. Supp. 3d at 916 (denying motion to dismiss Fourteenth and Fifteenth Amendment claims); *Carcaño v. Cooper*, 350 F. Supp. 3d 388, 419-20 (M.D.N.C. 2018) (holding plaintiffs "have plausibly alleged" facts supporting *Arlington Heights* factors). Moreover, "[w]hile Defendants dispute the truth or significance of those facts and their weight . . . the resolution of those questions is a matter for trial that cannot be disposed of in the context of a Rule 12 motion." *Veasey v. Perry*, 29 F. Supp. 3d at 921.

D. Section 2 of the Voting Rights Act

Section 2 prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). "The essence of a § 2 claim is 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." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). "[P]roof of discriminatory results alone" is sufficient to establish a Section 2 violation. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). Plaintiffs have

pleaded exactly that: the Complaint explains in detail how social and historical conditions discriminating against Black and Latino Texans have interacted with Defendants' inadequate and unsafe Pandemic Voting System. *See, e.g.*, Compl. ¶¶ 47-61 (explaining disparate impact of Defendants' actions on voters of color). The result is that Texas has posed an unacceptable safety risk to Black and Latino voters, burdening their ability to participate in the political process. Compl. ¶¶ 205-07.[11]

Relying on the Eleventh Circuit's recent decision in *Greater Birmingham Ministries v. Secretary of State for Alabama*, 966 F.3d 1202, 1233-34 (11th Cir. 2020), Defendants contend Section 2 requires Plaintiffs to allege causation separate from facts supporting the so-called *Gingles* factors. Hughs Mot. 20; Abbot Mot. 20. But Defendants neglect to mention (and even the Eleventh Circuit tacitly acknowledges) this approach has been expressly rejected by the Fifth Circuit, which held that the "*Gingles* factors should be used to help determine whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination." *Veasey v. Abbott*, 830 F.3d 216, 245 (5th Cir. 2016) (en banc). Plaintiffs amply allege a causal connection between Defendants' Pandemic Voting System and the historic and social conditions in Texas that result in a denial of the right to vote on the basis of race. Compl. ¶ 51 (describing unequal societal opportunities for Black and Latino Texans for jobs, housing, and healthcare); *id.* ¶ 60 (describing racially polarized; *see also Gingles*, 478 U.S. at 36-37; *Veasey v. Perry*, 29 F. Supp. 3d at 918 (recognizing § 2 claim where Plaintiffs pled *Gingles* factors and "[did] not rely on disparate impact alone").

Defendants complain that Plaintiff have not "draw[n] any lines" between voting in Texas

[11] *Cf. Chisom*, 501 U.S. at 408 (Scalia, J., dissenting) (noting § 2 violation would occur if "a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites," because "blacks would have less opportunity *to participate* in the political process than whites" (internal quotation marks omitted)).

and a higher risk of coronavirus exposure for minority voters. Hughes Mot. 20; Abbott Mot. 20. This argument ignores the detailed allegations that Defendants fail to adequately address on the risks associated with the pandemic, which result in a disproportionate burden on communities of color. Additionally, "[t]he issue of a causal link to discriminatory practices is a matter of fact, not to be adjudicated under Rule 12." *Veasey v. Perry*, 29 F. Supp. 3d at 920. Finally, Plaintiffs allege that Defendants' Pandemic Voting System improperly burdens Black and Latino voters unless enjoined by the Court. Plaintiffs need not wait for Fall in-person voting to see whether minority turnout is in fact depressed; that Defendants' actions might be offset by other factors that increase turnout "does not mean the voters kept away were any less disenfranchised." *Veasey v. Abbott*, 830 F.3d at 260 (noting such a requirement would "present[] problems for pre-election challenges to voting laws, when no such data is yet available").[12]

VI. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendants' motion. If the Court determines that any portion of Defendants' motion should be granted, Plaintiffs respectfully request leave to amend.

[12] Defendants also complain that Plaintiffs' pleadings reference facts about States other than Texas, but information about turnout in other elections held during the pandemic is informative in this unprecedented situation. *See* Compl. ¶¶ 11-12. Further, Plaintiffs' Complaint contains numerous, detailed allegations about Texas: Defendants' Pandemic Voting System (Compl. ¶¶ 6-7, 77-107), Texas's experience with the coronavirus pandemic (Compl. ¶¶ 53-59, 62-68), and Texas's legacy of social and historical discrimination (Compl. ¶¶ 6, 51, 60-61), which form the basis of Plaintiffs' claims. Additionally, Texas has failed to adequately collect race data for coronavirus victims. *See* Compl. ¶¶ 52-53, 58; *but see* Compl. ¶¶ 55-57 (limited available data still shows disparate impact on people of color in Texas). The State should not now benefit from its own failure to properly monitor the spread of the disease, limiting the data available in this case.

Dated: August 26, 2020

Respectfully submitted,

/s/ *Kelly M. Dermody*

Kelly M. Dermody (pro hac vice)
Yaman Salahi (pro hac vice)
Mike Sheen (pro hac vice)
Evan Ballan (pro hac vice)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
kdermody@lchb.com
ysalahi@lchb.com
msheen@lchb.com
eballan@lchb.com

Avery S. Halfon (pro hac vice)
LIEFF CABRASER HEIMANN & BERNSTEIN LLP
250 Hudson Street, 8th Floor
New York, NY 10013
Telephone: (212) 355-9500
Facsimile: (212) 355-9592
ahalfon@lchb.com

Madeline Gomez (pro hac vice)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
222 2nd Avenue South, Suite 1640
Nashville, TN 37201
Telephone: (615) 313-9000
Facsimile: (615) 313-9965
mgomez@lchb.com

Sean Lyons, State Bar No. 00792280
Clem Lyons, State Bar No. 12742000
LYONS & LYONS, P.C.
237 W. Travis Street, Suite 100
San Antonio, Texas 78205
Telephone: (210) 225-5251
Telefax: (210) 225-6545
sean@lyonsandlyons.com
clem@lyonsandlyons.com

Courtney Hostetler (pro hac vice)
John Bonifaz (pro hac vice)
Ben Clements (pro hac vice)
Ronald Fein (pro hac vice)
FREE SPEECH FOR PEOPLE
1320 Centre Street, Suite 405
Newton, MA 02459
Telephone: (617) 249-3015
chostetler@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org
rfein@freespeechforpeople.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on August 26, 2020, and that all counsel of record were served by CM/ECF.

/s/ *Kelly M. Dermody*
Kelly M. Dermody