No. 20-50793

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MI FAMILIA VOTA, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and GUADALUPE TORRES,

Plaintiffs-Appellants,

v.

GREG ABBOTT, Governor 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

PLAINTIFFS-APPELLANTS' OPPOSED EMERGENCY MOTION TO EXPEDITE APPEAL

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 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 Rule 28.2 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.

Defendants-Appellees	**Counsel**
Greg Abbott, Governor of Texas	Ken Paxton, Att'y Gen. Texas
Ruth Hughs, Texas Secretary of State	Jeffrey C. Mateer
	Ryan L. Bangert
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	Todd Lawrence Disher
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Plaintiffs-Appellants	**Counsel**
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	Kelly M. Dermody
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	Ben Clements
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/s/ *Sean Lyons*
Counsel of Record for
Plaintiffs-Appellants

I. INTRODUCTION

Plaintiffs-Appellants ("Plaintiffs") respectfully move, in accordance with Federal Rule of Appellate Procedure 27, Fifth Circuit Rule 27.5 and Fifth Circuit Rule 27.3, to expedite briefing and hearing of this appeal. Plaintiffs respectfully and in accordance with Fifth Circuit Rule 27.3 submit the above-captioned motion as an emergency motion, and respectfully request a decision by September 16, 2020.

Plaintiffs filed a complaint in the district court challenging certain of Texas's election laws applicable to the forthcoming November 3, 2020 election on the basis that those laws, as applied during the ongoing pandemic, unconstitutionally burden the right to vote by requiring voters to expose themselves to an unreasonable and avoidable risk of contracting COVID-19 to vote, and are impermissibily discriminatory under the Constitution and the Voting Rights Act. Given the urgency of their claims, Plaintiffs sought a preliminary injunction from the district court on several of their constitutional claims and requested a court order directing Defendants-Appellees ("Defendants") to take certain common-sense actions to protect voters during the upcoming election—including, *inter alia*, requiring persons at polling places to wear masks and allowing voters to vote curbside without having to enter enclosed and crowded physical spaces. The district court

did not reach the merits of the motion for preliminary relief because it dismissed the case for lack of subject matter jurisdiction under the political question doctrine.

Good cause exists to expedite this appeal under Circuit Rule 27.5 because Plaintiffs' request for preliminary relief will be mooted and their constitutional rights defeated if the motion is not decided before the November 3, 2020 election. *See United States v. Hinds County School Bd.*, 417 F.2d 852, 857 (5th Cir. 1969) (noting that appeal in school desegregation case was expedited to permit a resolution on the merits before the start of the school year). Moreover, the district court erred as a matter of law. As this Court's precedent of just days ago confirms, the questions presented by the Plaintiffs are justiciable and properly within the jurisdiction of the court. *See Texas Democratic Party v. Abbott*, 961 F.3d 389, 398-99 (5th Cir. 2020) [hereinafter "*Texas Democratic Party I*]; *Texas Democratic Party v. Abbott*, No. 20-50407 (5th Cir. Sept. 10, 2020) [hereinafter "*Texas Democratic Party II*"], slip op. at 15-16 (concluding that resolution of the constitutional question is "susceptible to judicial resolution," even if it implicates matters of the State's elective process).

Good cause to expedite in this case also supports Plaintiffs' request for emergency review of this motion. Absent an emergency ruling that will enable briefing and consideration of the appeal prior to the November 3, 2020 elections, Plaintiffs will suffer a loss of constitutional rights that "constitutes irreparable

injury." *Deerfield Medical Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B, 1981) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Accordingly, Plaintiffs respectfully ask that the Court issue a ruling on their Emergency Motion to Expedite Appeal by Wednesday, September 16, 2020. Further, Plaintiffs respectfully request that the Court direct Plaintiffs to file their opening brief on or before September 18, Defendants to file their response brief on or before September 24 (the fourth business day following the filing of Plaintiffs' opening brief), and Plaintiffs to file their reply brief on or before September 28 (the fourth calendar day following the filing of Defendants' response brief), and that the Court either resolve this appeal on the briefs or schedule a special argument session on or before September 30, 2020.

Defendants oppose this motion.

II. BACKGROUND

On July 16, 2020, Plaintiffs filed this lawsuit, challenging the application of several elements of the Texas Election Code during the pandemic: Texas Election Code § 43.007(f), which authorizes certain counties to open only half the legally-required polling places; Texas Election Code § 43.007, which prohibits the use of paper ballots in certain counties participating in the countywide polling place program; Texas Election Code § 85.062-63, which sets the early voting period and prohibits mobile early voting locations; Texas Election Code § 63.001(c), which

authorizes poll workers to physically handle voter identification; and Texas Election Code § 64.009, which Defendants interpret to limit curbside voting to individuals who cannot physically enter polling locations. Plaintiffs also challenge Defendant Governor Abbott's Executive Order exempting polling places from the state-wide mandate that face coverings must be worn in almost all other public places. Executive Order GA-29.[1]

Together, these statutes (as applied during the ongoing pandemic) and the Governor's Executive Order require Texans to risk their lives in order to vote by requiring them to enter physical spaces where others may be unmasked; to use surfaces touched by hundreds of other voters and which cannot be adequately disinfected between uses; and to enter crowded and enclosed physical spaces to vote rather than vote from the safety of their vehicles under Texas's curbside voting program. Moreover, they are likely to harm Black, Latino, and Indigenous voters more than others, as Black, Latino, and Indigenous people have been disproportionately harmed by the COVID-19 pandemic, are statistically at greater risk of serious illness and death if contracted, and are also more likely to reside in

[1] Plaintiffs also challenge the Governor's July 27, 2020 Proclamation that failed to extend early voting hours or offer mobile voting, and Election Advisory No. 2020-14, which recommended but did not require social distancing and other safety measures at polls and advised counties to seek court orders if they sought to change their voting procedures to implement safety measures.

parts of Texas where overcrowding of polls (and thus risk of contracting COVID-19) is most likely to occur due to the limited number of polling stations.

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 based on race.

Defendants Hughs and Abbott each filed a Motion to Dismiss. *See* Dkt. 19, 20.[2] Defendants raised three justiciability arguments (political question, sovereign immunity, and standing) under Federal Rule of Civil Procedure 12(b)(1), and also challenged the adequacy of the pleadings under Federal Rule of Civil Procedure 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. Dkt. 27, 29.[3] The motion was

[2] Defendant Governor Abbott's Motion to Dismiss and Defendant Secretary of State Hughs's Motion to Dismiss are attached as Exhibit B and C, respectively.
[3] Plaintiffs' Opposition to the Motion to Dismiss is attached as Exhibit D.

supported by three expert declarations, including an epidemiologist who opined that Texas's election practices would expose voters to risk of COVID-19 infection; two elections experts who opined that this risk could be substantially reduced through common-sense and feasible measures like printing additional paper ballots, permitting curbside voting, and opening additional polling sites to reduce crowds; and a political scientist at Rice University who submitted data from a public survey supporting the conclusion that voters were likely to view Texas's current election laws as placing an undue burden on their right to vote.

Defendants filed their reply in support of their motions to dismiss on September 2, 2020.[4]

On August 8, 2020, after a hearing on Defendants' Motions to Dismiss, the district court dismissed the case on jurisdictional grounds, concluding that it presented a non-justiciable political question.[5] Order, Dkt. 44. The district court did not reach the merits of Plaintiffs' claims or requests for preliminary relief. However, it remarked 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." Order, Dkt. 44 at 16.

[4] Defendants' reply brief is attached as Exhibit E.
[5] District Court Memorandum Opinion and Order is attached as Exhibit A.

Plaintiffs appealed the dismissal order and now seek expedited consideration of the district court's ruling so that, if successful on appeal, Plaintiffs have an opportunity to pursue preliminary relief in the district court prior to the November 3, 2020 election.

III. ARGUMENT

A. Good Cause Exists to Expedite The Appeal

There is good cause to expedite this appeal. Without expedited review, a ruling from this Court will come *after* the November 3, 2020 general election. If the district court's decision is ultimately reversed, a decision after the election will be too late to resolve the merits of Plaintiffs' request for preliminary relief to protect the rights of millions of Texans whose only option now is to vote in high-risk and unsafe conditions during the November 3, 2020 general election. *See United States v. Hinds County School Bd.*, 417 F.2d 852, 857 (5th Cir. 1969) (noting that appeal in school desegregation case was expedited to permit a resolution on the merits before the start of the school year); *see also Ohio Democratic Party v. Husted*, 834 F.3d 620, 624 (6th Cir. 2016) (noting that motion to expedite appeal was granted "so the matter may be resolved prior to the November general election"); *Daily Herald Co. v. Munro*, 758 F.2d 350, 354 (1984) (Norris, J., concurring) (noting that expedited appeal was granted "because of the upcoming election"). Moreover, the issues raised by the appeal have already been briefed by the parties in connection with the motion to dismiss below.

Further, the district court's decision is inconsistent with clear Fifth Circuit precedent, which this Court reaffirmed just last week in *Texas Democratic Party II*, No. 20-50407 (5th Cir. Sept. 10, 2020). In *Texas Democratic Party*, the Court rejected the argument (advanced by the same defendants in this case) that a constitutional challenge to the Texas rules governing vote by mail as applied during the pandemic presented a "non-justiciable political question." The Court held that the question of whether Texas election practices violate constitutional provisions is "a question susceptible to judicial resolution." *Id.* at 15. "Even when 'matters related to a State's . . . elective process are implicated by this Court's resolution of the question,' as our resolution of this appeal will do, that 'is not sufficient to justify our withholding decision of the question.'" *Id.* at 15-16 (quoting *Elrod v. Burns*, 427 U.S. 347, 351-52 (1976)).

This Court and the U.S. Supreme Court have long articulated the exact legal tests to be applied to Plaintiffs' claims here, confirming that legal standards exist that courts are perfectly capable of applying to resolve the dispute on its merits. Counts One and Three allege an undue burden on the right to vote, and are evaluated under the well-established *Anderson-Burdick* framework, *see Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Count Two is evaluated under familiar equal protection jurisprudence, *see*, *e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) and *Bush v. Gore*, 531 U.S. 98, 104

(2000). Counts Four and Five are evaluated under well-articulated tests for alleged violations of the Fifteenth Amendment and Section 2 of the Voting Rights Act, *see Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

In short, Plaintiffs' claims require the court to "decide only whether the challenged provisions of the Texas Election Code [and, here, Executive Order GA-29] run afoul of the Constitution, not whether they offend the policy preferences of a federal district judge. The standards for resolving such claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rigths." *Texas Democratic Party I*, 961 F.3d at 398-99; *see also Texas Democratic Party II*, No. 20-5040, slip. op. at 16 ("[j]udicially discoverable and manageable standards exist to help [the court] determine whether the law runs afoul" of the Constitution). The fact of the pandemic does not shield defendants from the court's jurisdiction: "[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." *Texas Democratic Party II*, No. 20-50407, slip op. at 16. As in *Texas Democratic Party II*, the present case raises "[a] constitutional issue at its core," and the court's analysis "[will] not turn on policy determinations from Texas's executive and legislative officials." *Id*.

The voters of Texas deserve to have the issues in this case resolved on the merits before the election. There is good cause to expedite this appeal.

B. Plaintiffs' Motion Is Urgent and Requires Emergency Consideration

Plaintiffs request that the court consider and grant this Emergency Motion to Expedite Appeal on an emergency basis. Without prompt resolution of the motion, plaintiffs will suffer irreparable harm. A ruling by Wednesday, September 16, is necessary to ensure that expedited briefing may be completed, the appeal resolved and, if Plaintiffs prevail, the district court have sufficient time to adjudicate the preliminary injunction motion in advance of the November 3, 2020 general election.

As discussed *supra*, the Plaintiffs' request for preliminary relief will protect the constitutional rights of millions of Texans who must vote in person during the November 3, 2020 general election, provided that such relief may be granted ahead of the election. "Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law." *De Leon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015). The urgency is clear here, where Plaintiffs' voting rights are implicated. "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if

nothing is done to enjoin this law." *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

IV. CONCLUSION

Plaintiffs-Appellants respectfully request that the Court grant this emergency motion by September 16, 2020, or as soon as possible.

Dated: September 14, 2020

Respectfully submitted,

/s/ *Sean Lyons*
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Counsel for Plaintiffs-Appellants
* Application for admission forthcoming

CERTIFICATE OF COMPLIANCE WITH RULE 27.3

In accordance with 5TH CIR. R. 27.3, the undersigned counsel hereby certifies that:

1. Before filing this motion, the undersigned counsel contacted the clerk's office and Defendant-Appellees to advise them of Plaintiffs-Appellants' intent to file this Emergency Motion.

2. The facts stated herein supporting emergency consideration of this motion are true and complete.

3. Plaintiffs-Appellants request that the court consider and grant this Emergency Motion to Expedite Appeal on an emergency basis. Without prompt resolution of the motion, plaintiffs will suffer irreparable harm. A ruling by Wednesday, September 16, is necessary to ensure that expedited briefing may be completed, the appeal resolved and, if Plaintiffs prevail, the district court have sufficient time to adjudicate the preliminary injunction motion in advance of the November 3, 2020 general election. Plaintiffs-Appellants request the Court's review of this Emergency Motion by Wednesday, September 16, or as soon as possible.

4. Copies of the relevant order of the district court and all relevant pleadings and briefs filed by the parties in district court are attached in the Appendix to this motion, filed separately.

5. This motion is being served at the same time it is being filed.

/s/ *Sean Lyons*
Sean Lyons

Counsel for Plaintiffs-Appellants

CERTIFICATE OF CONFERENCE

In accordance with 5TH CIR. R. 27.3 and 27.4, the undersigned counsel contacted Defendants-Appellees concerning this Emergency Motion for Expedited Appeal. The Defendants-Appellees are opposed to the Emergency Motion for Expedited Appeal and will file a response.

/s/ *Sean Lyons*
Sean Lyons

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on September 14, 2020, and that all counsel of record were served by CM/ECF.

/s/ *Sean Lyons*
Sean Lyons

Counsel for Plaintiffs-Appellants

CERTIFICATE OF ELECTRONIC COMPLIANCE

I certify that (1) the 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 for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ *Sean Lyons*
Sean Lyons

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of FED. R. APP. P. 27(d)(2)(A) because it contains 2,377 words, excluding the parts exempted by rule.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Sean Lyons
Sean Lyons

Counsel for Plaintiffs-Appellants

September 14, 2020

APPDENDIX

EXHIBIT A

UNITED STATES DISTRICT COURT
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, GUADALUPE TORRES,

No. SA-20-CV-00830-JKP

Plaintiffs,

v.

GREG ABBOTT, GOVERNOR OF TEXAS; AND RUTH HUGHS, TEXAS SECRETARY OF STATE;

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court are Defendants Greg Abbott and Ruth Hughes's Motions to Dismiss and Plaintiffs' Response thereto. *ECF Nos. 19, 20, 27*. Because each Motion to Dismiss presents identical arguments on the issue pertinent to this Memorandum Opinion and Order, the Court will analyze and rule on these two motions together.

Upon consideration, the Court concludes it lacks subject matter jurisdiction to adjudicate this action. Accordingly, Defendants' Motions to Dismiss for lack of subject matter jurisdiction shall be GRANTED. Due to this finding, the Court will not reach the substantive merits of the remainder of issues raised in Defendants' Motions to Dismiss. Plaintiffs' Motion for Preliminary Injunction is DENIED as moot without reaching the substantive merits. All other pending motions are DENIED as moot. The Clerk is directed to close this case.

Background

Plaintiffs, Mi Familia Vota, Texas State Conference of the National Association for the Advancement of Colored People, Micaela Rodriguez and Guadalupe Torres, seek to protect from deterrence a most important civil liberty: the right to vote for all people. In light of the public health crisis caused by the COVID-19 pandemic, Plaintiffs contend the election procedures in place create unsafe conditions at polling sites which will unconstitutionally preclude certain protected classes of people from voting in the upcoming election on November 3, 2020 ("the 2020 election"). Plaintiffs bring this action to ensure "practical and constitutionally-required measures that both protect the public health and guarantee the right to vote" to all Texas citizens.

In their Complaint, Plaintiffs contend Black, Latino, and Native American voters are disproportionately affected by the pandemic, experiencing higher incidences of COVID-19 infection, hospitalization, and fatalities. At the same time, these racial classes face greater risk to their health by voting because there exist fewer polling sites in their communities and because many Texas counties require all voters use electronic voting machines, restricting those eligible to utilize the options of curbside and mail-in ballots. Because the increased health risk and physical health barriers will *de facto* force voters out of the political process, Plaintiffs contend Defendants must implement election procedures known to protect the public health.

However, Plaintiffs contend, to date, Texas Director of Elections Keith Ingram declines to approve changes to Texas's in-place voting procedures in all forms, that is, in-person, absentee, early voting, curbside voting or mail-in ballots. While acknowledging that in-person voting might not be an "available option for all voters, including those affected by quarantines," Director Ingram will not authorize changes to voting laws or procedures, but instead, recommends county officials "consider seeking a court order to authorize exceptions to the voting procedures outlined in certain

chapters of the Texas Election Code." Director Ingram further recommends county officials take action to ensure the safety of voters while at the polling sites and to prevent spread of the virus during voting, but he does not require any procedures or modifications to the allocation of polling sites or early voting. At the same time, HB 1888 (effective September 2019) prohibits counties from opening mobile early voting places with flexible locations, hours, and days.[1] Plaintiffs state that prior to the passage of HB 1888, county election officials could open mobile and temporary early voting sites for limited periods of time in parts of the county that might not otherwise be able to sustain the costs of a two-week long early voting polling place.

Plaintiffs argue the health risks created by the COVID-19 pandemic, transposed upon the legislative and executive branch officials' refusal to mandate admitted election procedures necessary to protect public health, create numerous burdens on the right to vote. Without citing specific Election Code provisions or laws, Plaintiffs contend, generally, "Texas's election laws impose a severe burden on the right to vote" and "Texas's election policies during the pandemic will unlawfully abrogate and abridge the constitutionally protected right to vote." These resultant burdens and dangers include: (1) the requirement to physically touch and exchange physical identification documents; (2) the requirement to stand in the same physical space of multiple prior voters and physically touch voting machines which cannot be disinfected between uses; (3) the limited availability of handmarked paper ballots which make the voting process considerably safer; (4) the limited availability of curb-side voting, which drastically reduces the potential exposure of voters; (5) the limited availability of early voting which reduces long lines on Election Day; (6) the reduction of polling places, increasing the risk that voters will need to travel long distances, take public transportation, or carpool with others, thus exacerbating the risk of infection; and (7) the

[1] *See* Texas Election Code, Title 7, § 85.062, 85.063.

likely overcrowding of polling places, further exacerbating the risk of infection due to such overcrowding.

As a result, Plaintiffs argue Black, Latino and Native American voters in Texas will be forced to face a constitutionally unacceptable choice: exercising their right to vote - or - protecting their own lives and the lives of their loved ones and community.

For these reasons, Plaintiffs assert causes of action of: (1) Undue burden on the right to vote in violation of the due process clause of the Fourteenth Amendment as applied to elections held during the COVID-19 pandemic; (2) Denial of Equal Protection under the law in violation of the Fourteenth Amendment as applied to elections held during the COVID-19 pandemic; (3) Undue burden on the right to vote in violation of the First Amendment as applied to elections held during the COVID-19 pandemic; (4) Race discrimination in violation of the Fifteenth Amendment (42 U.S.C. § 1983) as applied to elections held during the COVID-19 pandemic; and (5) Race discrimination in violation of Section 2 of the Voting Rights Act (52 U.S.C. § 10301) as applied to elections held during the COVID-19 pandemic. In filing this action, Plaintiffs request this Court establish procedures which will ensure the election process is as safe as possible to protect all Texas voters from being exposed to or contracting COVID-19 while at a polling site. To protect those in designated higher-risk categories, Plaintiffs seek modification of early, in-person and curbside voting procedures through declaratory relief. Plaintiffs request this Court declare and order Defendants:

a. Extend the period of early voting to begin on October 5, 2020;

b. Require voters, poll-workers, persons assisting voters, and any other person at a polling site to wear a mask;

c. Provide masks to persons who do not already have one, with exceptions only for individuals who cannot wear masks due to a disability;

d. Allow counties to offer extended, temporary, and/or mobile early voting locations with flexible hours and days;

e. 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, solely for the purpose of being found eligible to vote curbside;

f. Open additional polling places and provide enough voting booths and poll workers at each polling place to ensure that voters are not required to wait more than twenty minutes to vote;

g. Staff all polling places with a sufficient number of poll workers to keep voter lines to less than 20 minutes, including by actively recruiting new poll workers who are not at high risk for serious illness due to COVID-19;

h. Prohibit the closure of polling places currently scheduled to be available on election day. Should a polling place need to be closed or moved to meet health and safety requirements, require that a new polling place be made available within the same voting precinct.

i. In counties that use electronic voting machines, including counties that participate in the Countywide Polling place Program, make available a sufficient number of both paper ballots and electronic voting machines to allow voters the option of voting by hand-marking a paper ballot or by voting on the electronic voting machine;

j. Revise voter identification requirements to allow voters to show identification without requiring poll workers to physically handle identification or documentation;

k. Apply the natural disaster exception for this election during the pandemic to allow voters to sign affidavits regarding the natural disaster exception at the polling place;

l. Ensure poll workers are given protective gear, including masks and gloves, in sufficient quantity to allow poll workers to change protective gear frequently;

m. Provide poll workers with ample opportunity to wash their hands.

In addition, Plaintiffs request this Court:

a. Order Defendants to enable counties that need to revise election policies to protect voters' health to do so, provided the proposed revisions do not violate any relief ordered by this Court;

b. 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;

c. Order that all such relief be extended until there are no existing cases of coronavirus in the state of Texas, or until there is a vaccine freely and readily available to all Texans, whichever comes sooner;

d. Award Plaintiffs reasonable attorneys' fees and costs; and

e. Retain jurisdiction to ensure all Defendants' ongoing compliance with the foregoing orders.

On August 19, 2020, the Court held a status conference to discuss pending issues and matters that are the subject of this litigation as well as any matters that might be resolved by general agreement or settlement. On August 26, 2020, Plaintiffs moved for a preliminary injunction. *ECF No. 29*. On September 4, 2020, the Court held a hearing on Defendants' Motions to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule 12(b)(1) and for failure to state a claim pursuant to Federal Rule 12(b)(6).

Motions to Dismiss for Lack of Subject Matter Jurisdiction

Defendants move to dismiss this action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).[2] Defendants argue Plaintiffs assert causes of action that present nonjusticiable political questions over which this Court has no subject matter jurisdiction and seek remedies which this Court has no authority or jurisdiction to administer.[3]

[2] The Motion to Dismiss asserts it is filed pursuant to Federal Rule of Civil Procedure 12(b)(6). However, at the hearing held on August 19, 2020, Defendants clarified this portion of the motion to be filed pursuant to Federal Rule 12(b)(1).

[3] In the Fifth Circuit, the issue whether a case presents a nonjusticiable political question concerns the Court's subject-matter jurisdiction. *See Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 948 (5th Cir. 2011); *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 398 & n.14 (5th Cir. 2020). This Court recognizes the Supreme Court in *Baker v. Carr* distinguished "nonjusticiability" from lack of subject matter jurisdiction, stating, "[i]n the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." Whereas, with regard to subject matter jurisdiction, "Article III, § 2, of the Federal Constitution provides that 'The judicial Power shall

Legal Standard

Federal courts hold limited jurisdiction, possessing only the power authorized by the Constitution and statute, which may not to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When analyzing its jurisdiction, a Court must presume a suit lies outside this limited jurisdiction. The burden of establishing subject matter jurisdiction rests with the party seeking to invoke it. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001).

A Court must dismiss a cause for lack of subject matter jurisdiction "when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Assn. of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Federal Rule 12(b)(1) provides the means for a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b)(1). "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Dismissal of a case based upon lack of subject matter jurisdiction is not a determination of the merits. *Id.*

In examining a Federal Rule 12(b)(1) motion, the district court is empowered to weigh the evidence and consider disputed facts. *See Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981); *See Montez v. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir. 2004). The extent of the Court's consideration of disputed facts depends upon whether the jurisdictional attack is "facial" or "factual". *See Williamson*, 645 F.2d at 413; *Superior MRI Servs., Inc. v. Alliance Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015). If the defendant submits affidavits, testimony, or other

extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." *See Baker v. Carr*, 369 U.S. 186, 211 (1962).

evidentiary materials, the jurisdictional attack is factual, rather than facial. *Williamson*, 645 F.2d at 413; *Superior MRI Servs., Inc*., 778 F.3d at 504. If, as here, the Defendant does not submit evidentiary matters with a Federal Rule 12(b)(1) motion to dismiss, the attack is facial, which requires the Court to construe the allegations of the Complaint as true. *Williamson*, 645 F.2d at 413; *United of Omaha Life Ins. Co. v. Womack-Rodriguez*, SA-19-CV-0814-JKP, 2020 WL 2513573, at *4 (W.D. Tex. May 15, 2020).

Analysis

Article III of the Constitution limits federal courts' authority to determination of "Cases" and "Controversies." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493–94 (2019). This limitation is interpreted to mean federal courts can address only questions "capable of resolution through the judicial process." *Id*.; *Flast v. Cohen*, 392 U.S. 83, 95 (1968). In some cases, the question presented is not capable of resolution through the judicial process because it is entrusted to another political branch or involves no judicially enforceable rights. *Rucho*, 139 S. Ct. at 2494; *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004). In such a case the claim is said to present a "political question" and to be nonjusticiable because the presented issues of law and questions are beyond the scope of this separation of power. *Marbury v. Madison*, 5 U.S. 137, 170, 177 (1803). This, "the political-question doctrine", is rooted in and protects the separation of powers by preventing federal courts from overstepping their constitutionally defined role. *Baker v. Carr*, 369 U.S. 186, 210 (1962).

A case must be dismissed under the political-question doctrine if it would require the Court to decide a question with one of the following characteristics: (1) a textually demonstrable constitutional commitment of the presented issues to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving the presented issues; or (3) the impossibility of deciding the presented issues 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. *Baker*, 369 U.S. at 217 (citing *Marbury v. Madison*, 5 U.S. at 170).

This case, and more specifically the issues to be decided and action requested of this court through the relief sought, possesses four characteristics indicative of a nonjusticiable political question: (1) a textually demonstrable constitutional commitment of the administration of elections and implementation of election procedures to state legislatures and Congress; (2) a lack of judicially discoverable and manageable standards for measuring the efficacy of the requested changes to election procedures in reducing public health risk and ensuring the appropriate parties comply with the requested standards; (3) the impossibility of deciding the danger to the public health of the current election procedures and the reduction of such risk created by the requested relief without an initial policy determination of a kind clearly for nonjudicial discretion; and (4) the impossibility of this court's undertaking the requested independent resolution without expressing lack of the respect due coordinate branches of government.

(1) Factors (1) Constitutional Commitment to State Legislature and Congress; (3) Impossibility of Determination Without a Nonjudicial Policy Determination; and (4) Resolution Demonstrates Lack of the Respect Due Coordinate Branch

Within the unique setting of this case, the first, third and fourth characteristics manifest based upon the same reasons. Therefore, they will be discussed together.

First, "[t]he Elections Clause has two functions: upon the States it imposes the duty to prescribe the time, place, and manner of electing [federal] Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Arizona v. Inter*

Tribal Council of Arizona, Inc., 570 U.S. 1, 7-8 (2013); U.S. Const. art. I, § 4, cl. 1. Thus, the Elections Clause commits the "time, place, and manner" administration of federal congressional elections to state legislatures and to Congress. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. at 7-8; *Baker*, 369 U.S. at 217; U.S. Const. art. I, § 4, cl. 1. Thereby, the state legislature holds "broad power" to prescribe the procedural mechanisms for holding congressional elections; however, it may not use this broad power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-834 (1995).

In this context, the term "manner" "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. at 833. These matters are among the numerous procedural safeguards necessary to enforce the fundamental right to vote and to ensure elections are "fair and honest," and "some sort of order, rather than chaos, is to accompany the democratic process," *Cook*, 531 U.S. at 523–24; *Smiley*, 285 U.S. at 366; *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Here, the actions Plaintiffs request this Court take to ensure the safety of voters in the 2020 election fall within the "manner" of elections administration designated to state legislators. While the specific causes of action Plaintiffs assert, normally, do fall within this Court's subject matter jurisdiction, the relief and action requested and the issues to be resolved do not. Should it exercise the authority Plaintiffs propose, the Court would mandate and implement its own judgment about

the proper administration of elections, thereby encroaching upon the "constitutional commitment" of the administration of elections to the state legislatures and to Congress. *Baker*, 369 U.S. at 217. By asking this Court to order specific action and administer specific procedures for the administration of the 2020 election, Plaintiffs ask this Court to assume the role of the Texas legislature and exercise the discretion and authority explicitly reserved to that branch.

Assumption of this role would necessarily convey a "lack of the respect due coordinate branches of government." Additionally, Plaintiffs' requests would require this Court to make an initial policy determination clearly designated for nonjudicial discretion. Analysis of the causes of action asserted necessarily requires determination of the danger to the public health of the current election procedures, and disparate impact, if any, on protected classes of citizens to devise and determine proper procedures to reduce this public health risk. In doing so, this Court would override any policy decisions to micromanage Texas's election process.

This Court is not asked to decide the constitutionality of a specific statute or specific election policies. Instead, Plaintiffs generally challenge "Texas's election laws" and "Texas's election policies during the pandemic." This general challenge is not within this Court's Article III power. This Court concludes the administration of elections and determination and implementation of election procedures are constitutionally committed to the state legislative branch and its designated governmental bodies. In accord, any directive would also require an initial policy determination outside of judicial discretion and require an undertaking that would inherently demonstrate a lack of respect due the legislative branch and its designated governmental actors.

Based upon a finding of these three characteristics, the Court concludes this case presents a nonjusticiable political question.

Factor (2): Lack of Judicially Discoverable and Manageable Standards for Resolution

Next, the lack of judicially discoverable and manageable standards for resolving the necessary issues also precludes this Court from addressing the causes of action asserted and imposing the specific relief Plaintiffs seek. As stated previously, Plaintiffs enumerate seven dangers and burdens on the 2020 election created by the election policies in place. Some allegations supporting these enumerated burdens and the alleged constitutional violations include:

- Defendants' failure to provide sufficient opportunities for early voting, to open additional polling locations, or to permit voting by paper ballot are all likely to contribute to public distrust in the safety of polling locations as well as very long voting lines;

- Plaintiff Micaela Rodriguez plans to vote in the November 2020 elections, but may not be able to do so if the procedures in place for elections make voting practically impossible because they create a serious risk of virus transmission;

- The disproportionate infection rate and the more severe health consequences that Black and Latino people face from the coronavirus mean that voting procedures that fail to provide the necessary health and safety protections to all voters in the context of this pandemic will disproportionately burden the rights of Black and Latino voters, in particular. Thus, Texas's voting procedures abridge and deny the equal rights of Black and Latino communities to participate in the voting process on account of their race;

- Defendants refuse to revise voting procedures regarding early voting, paper ballots, and the number of polling places to enable counties to minimize health risks of contracting a potentially deadly illness while ensuring sufficient access to the ballot. If unchanged, these voting procedures will put the lives and health of voters at risk, and will force voters to choose between exercising their right to vote or contracting a potentially deadly illness;

- Texas election policies will place individuals who vote in counties that use universal electronic voting machines at high risk of contracting the coronavirus. The insufficient availability of voting machines and absence of hand-marked paper ballot options at many polling sites will require hundreds of voters to vote on the same machines—and therefore touch the same common surfaces . . . increasing the risk of coronavirus transmission;

- Cleaning each machine properly will take time—potentially increasing delays and the amount of time voters congregate waiting to vote, in turn

increasing the risk that voters will be unable to vote during their available time windows and increasing the risk of coronavirus transmission. If a poll worker uses the wrong cleaner, accidentally touches a button during cleaning, uses too much liquid cleaner, or does not clean according to manufacturer instructions, the machine could break or malfunction, increasing the same risks described above. If the machine is not cleaned after each person casts a ballot, the coronavirus will remain on the machine's surfaces, such as the screen or keypad, and can be contracted by the next voter;

- Defendants' failure to provide the option to vote using hand-marked paper ballots and to expand the number of people who can vote simultaneously will create unnecessary and substantial risk of overcrowding and long lines, require people to vote on frequently touched surfaces that are difficult and time-consuming to disinfect, and thereby unlawfully burden voters' exercise of the franchise;

- If hand-marked paper ballots are made available to voters, it will reduce the burden on electronic voting machines, limit lines, provide poll workers with more time to clean the machines properly without causing back-ups or delays, minimize the number of people breathing on and around the machines, and increase the likelihood that voters who need or prefer to use electronic voting machines will have prompt access to a disinfected machine that has not been handled or breathed on by hundreds of other voters;

To cure the enumerated dangers and burdens, Plaintiffs request this Court enter an order of declaratory relief to include suspending the requirement that curbside voters must qualify as having a disability; open and provide enough voting booths and poll workers to ensure voters do not wait more than twenty minutes to vote; make available a sufficient number of both paper ballots and electronic voting machines to allow voters the option of voting by hand-marking a paper ballot or by voting on the electronic voting machine; provide poll workers with ample opportunity to wash their hands, and; enable counties that need to revise election policies to protect voters' health to do so.

While this Court accepts as true all allegations in Plaintiffs' Complaint to determine this Motion to Dismiss, in the context of litigation, there are no judicially discoverable and measurable standards to ultimately determine if and which current election practices are discriminatory to

Black, Latino and Native American citizens because COVID-19 has a disparate effect on these protected classes. Plaintiffs' allegations are based upon conjecture and possibility, and therefore, are detached from the projected harm. In addition, there are no judicially manageable standards to determine a reasonable amount of poll workers and polling sites; to monitor wait times and adjust personnel; to determine what safety measures should be taken and how much safety is enough, and; what time frame is early enough for early voting to cure the speculated improprieties. *See Rucho,* 139 S. Ct. at 2500-01 (rejected efforts to have a federal court articulate the definition of "fairness" and "how much is too much" in the context of partisan gerrymandering). Because these burdens and dangers are based upon imprecise and hypothetical allegations and projected harm, Plaintiffs do not present any judicially enforceable rights upon which this Court can administer manageable standards for resolution.

For these reasons, the Court concludes this case presents a nonjusticiable political question.

Persuasive Authority Pertaining to Parties' Arguments

Similarly, in a persuasive case, *Coalition for Good Governance v. Raffensperger*, the Plaintiffs complained the COVID-19 pandemic made in-person voting unsafe unless election officials adopted various changes to both in-person and mail-in voting. *See Coalition for Good Governance v. Raffensperger,* No. 1:20-cv-1677, 2020 WL 2509092, at *1 (N.D. Ga. May 14, 2020)(appeal filed June 26, 2020). There, as here, the Plaintiffs requested the Georgia District Court provide similar declaratory relief related to in-person voting by issuing an Order requiring polling locations to use paper ballots, adjusting the number of voting stations, expanding early voting, implementing curbside voting and temporary mobile voting centers, streamlining voter check-in, offering state-provided personal protective equipment ("PPE"), and increasing physical distancing. *Id*. The

Georgia Court concluded the issues presented to justify the specific declaratory relief requests were constitutionally committed to a coordinate political department and there was a lack of judicially discoverable and manageable standards for resolving the issues raised. *Id*. at *3-*4. The Georgia Court reasoned the Elections Clause "commits the administration of elections to Congress and state legislatures—not courts. The Framers of the Constitution did not envision a primary role for the courts in managing elections, but instead reserved election management to the legislatures. Absent pellucid proof provided by plaintiffs that a political question is not at issue, courts should not substitute their own judgments for state election codes." *Id*. at *3. Because the issues, claims and requested relief in this unique pandemic setting are similar, this Court finds *Coalition for Good Governance* to be persuasive.

The issues to be determined and relief requested in this case are distinguished from those in *Texas Democratic Party v. Abbott*, upon which Plaintiffs rely to support their position. *See Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). In *Texas Democratic Party*, the Fifth Circuit distinguished *Coalition for Good Governance* because "[t]hat challenge was directed at the specific procedures Georgia planned to use to conduct the election, such as whether to use electronic voting machines or paper ballots," and found that suit necessarily "challenged the wisdom of Georgia's policy choices." *Id*. at 398-99. However, the issue before the Fifth Circuit did not require "consider[ing] the prudence of Texas's plans for combating the Virus when holding elections," which it found improper. Instead that court was appropriately asked to "decide only whether the challenged provisions of the Texas Election Code run afoul of the Constitution." *Id*. The Court held "[t]he standards for resolving such claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rights." *Id*.

Here, Plaintiffs do not challenge the constitutionality of any specific Election Code provision, but challenge the prudence of Texas's policies, plans and procedures for combating the COVID-19 virus within the 2020 election. Plaintiffs generally challenge "Texas's election laws" and "Texas's election policies during the pandemic." Thus, as the Fifth Circuit explained in *Texas Democratic Party v. Abbott*, this case is more closely aligned with *Coalition for Good Governance*.

CONCLUSION

This Court is cognizant of the urgency of Plaintiffs' concerns and does respect the importance of protecting all citizens' right to vote. Within its authority to do so, this Court firmly resolves to prevent any measure designed or disguised to deter this most important fundamental civil right. At the same time, the Court equally respects and must adhere to the Constitution's distribution and separation of power. To that end, the Elections Clause of the Constitution specifically commits the administration and management of federal legislative elections to the Texas legislative branch. Further, the issues to be resolved lack judicially discoverable and manageable standards. Consequently, determination of the causes of action asserted and requests for relief in this action would require this Court to overstep its constitutionally defined role, and therefore, present nonjusticiable political questions which this Court lacks subject matter jurisdiction to determine and impose remedy.

Albeit, the requests for relief do not appear unreasonable and can easily be implemented to ensure all citizens in the State of Texas feel safe and are provided the opportunity to cast their vote in the 2020 election. Unfortunately, under the confines of this procedural posture, Defendants' Motions to Dismiss for lack of subject matter jurisdiction are GRANTED on this issue alone. Because this Court lacks subject matter jurisdiction, the Court will not reach or decide the

remaining substantive issues raised in Defendants' Motion to Dismiss. Plaintiffs' Motion for Preliminary Injunction is DENIED as moot without reaching any substantive issues. All other pending motions are DENIED as moot. The Clerk is directed to close this case.

It is so ORDERED.
SIGNED this 7th day of September, 2020.

JASON PULLIAM
UNITED STATES DISTRICT JUDGE

EXHIBIT B

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; AND RUTH HUGHS, TEXAS SECRETARY OF STATE,
Defendants.

Civil Action No. 5:20-cv-00830

THE TEXAS GOVERNOR'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs seek federal oversight of the Texas election system for the unknowable duration of the COVID-19 pandemic.[1] They request an astounding number of changes to Texas's election laws and propose an astounding degree of federal incursion into the minutiae of election administration.

The State of Texas—like its sister states—is responding to the pandemic with the best solutions that fit within the statutory and constitutional limits that applied before COVID-19, that have applied during COVID-19, and that will continue to apply after this pandemic ends. But for every solution the State has recommended for upcoming elections, Plaintiffs propose problems. Whether it is concern over paper ballots, complying with voting deadlines, or having to show up at a polling place, Plaintiffs claim that anything and everything the State of Texas does is unconstitutional. And not only is it unconstitutional, say Plaintiffs, it is tinged with racism. Not so.

Plaintiffs' views on best practices for elections during a pandemic do not set the constitutional floor, let alone state a claim for relief that this Court should entertain. This Court should dismiss this case for at least five reasons. *First*, no plaintiff adequately alleges facts supporting standing to bring their claims. *Second*, Plaintiffs present nonjusticiable political questions. *Third*, sovereign immunity bars Plaintiffs' claims because the *Ex parte Young* exception does not apply. *Fourth*, *even if*, *Ex parte Young* otherwise applied, the exception to the exception—namely the invasion of Texas's special sovereignty interests—should place this case outside the orbit of *Ex parte Young*. *Fifth*, even if Plaintiffs could hurdle the manifold jurisdictional problems presented by their suit, they still failed to state a claim for relief under a constitutional or statutory theory.

For all these reasons, the Court should dismiss Plaintiffs' Complaint for lack or jurisdiction or, alternatively, for failure to state a claim.

[1] Dkt. No. 1 at p. 44 ("Order that all such relief be extended until there are no existing cases of coronavirus in the State of Texas; or until there is a vaccine freely and readily available to all Texans, whichever comes sooner.").

ARGUMENT AND AUTHORITIES

I. No standing exists to bring this suit against the Governor of Texas

A. Standing principles

"[S]tanding is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation omitted). Courts persistently inquire into standing because "[w]ithout jurisdiction the court cannot proceed *at all* in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quotation omitted) (emphasis added). At the pleading stage, the individual plaintiffs must "clearly . . . allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016) (quotation omitted). Specifically, a plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant; and (3) that is likely to be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

The organizational plaintiffs have two avenues to allege standing: (1) associational[2] or (2) organizational. *See NAACP v. City of Kyle*, 626 F.3d 233, 237-38 (5th Cir. 2010). Organizational standing requires that the plaintiff establish injury, causation, and redressability. *Id.* For associational standing, the organization must show (1) that its members would independently have standing; (2) that the interests the organization is protecting are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006).

Neither the organizational plaintiffs nor the individual plaintiffs alleged sufficient facts to demonstrate standing to challenge what they allege are unconstitutional burdens on the right to vote.

[2] Plaintiff Mi Familia Vota, unlike Plaintiff NAACP, did not allege that it is suing on behalf of itself and its members. *Compare* Dkt. No. 1 ¶¶ 19-21 (describing Mi Familia Vota's standing allegations), *with id.* ¶ 22 (explaining that the NAACP "brings this action on its own behalf and on behalf of its members and constituents"). Fairly read, Mi Familia Vota is alleging only organizational standing, whereas NAACP is alleging both organizational and associational standing.

B. The NAACP does not have associational standing

The NAACP failed to plead associational standing. A plaintiff cannot have associational standing unless one of its members would have standing to sue individually. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Thus, demonstrating standing would require the NAACP to "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Indeed, the Fifth Circuit has applied this rule to the NAACP itself. *See NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (requiring evidence of "a specific member").

Because the NAACP has not alleged the existence of specific members, let alone specific members with individual standing, their claims should be dismissed. *See Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.); *Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008).

The only individuals identified in the Complaint are Micaela Rodriguez and Guadalupe Torres, but the Complaint does not allege that either are members of the NAACP. *See* Dkt. No. 1 ¶¶ 24-25. Even if they were members, however, they could not support associational standing because they lack individual standing for the reasons explained below.[3]

C. Neither Mi Familia Vota nor the NAACP has organizational standing

An organization has direct organizational standing only if it satisfies the same Article III requirements applicable to individuals: injury-in-fact, causation, and redressability. *City of Kyle*, 626 F.3d at 237. That an organization has an "interest in a problem . . . is not sufficient" for standing, "no

[3] The complaint refers to the NAACP's "members and constituents," Dkt. No. 1 ¶ 22, but it does not plausibly allege facts satisfying the "indicia of membership" requirements from *Hunt*, 432 U.S. at 344. That requires members who "elect leadership, serve as the organization's leadership, and finance the organization's activities, including the case's litigation costs." *Tex. Indigenous Council v. Simpkins*, No. 5:11-cv-315, 2014 WL 252024, at *3 (W.D. Tex. Jan. 22, 2014). The NAACP has not alleged facts showing it has such members. It never alleges that its purported members and constituents "participate in and guide the organization's efforts," *Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994), much less that they "alone finance [the NAACP's] activities, including the costs of this lawsuit," *Hunt*, 432 U.S. at 344.

matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

The NAACP bases its standing on an alleged "diversion of resources," but such a diversion can support standing only if "the change in plans [is] in response to a reasonably certain injury imposed by the challenged law." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013); *see also La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) ("[A plaintiff] must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem.").

In this case, the NAACP's alleged diversion of resources relates to lobbying, but this does not qualify as a cognizable injury it would suffer for purposes of organizational standing. The NAACP allegedly "initiat[ed] campaigns calling on Election Officials to" take various actions. Dkt. No. 1 ¶ 23. But an organization lacks standing "when the only 'injury' arises from the effect of the regulations on the organizations' lobbying activities." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005); *see also City of Kyle*, 626 F.3d at 238 (rejecting standing because "Plaintiffs have not explained how the[ir] activities . . . differ from the HBA's routine lobbying activities").

Further, the NAACP has "not identified any specific projects that [it] had to put on hold or otherwise curtail in order to respond to the" laws it challenges. *City of Kyle*, 626 F.3d at 238. The NAACP has "only conjectured that the resources" it diverted "could have been spent on other unspecified [NAACP] activities." *Id.* at 239. That is not enough. *See Def. Distributed v. U.S. Dep't of State*, No. 1:15-cv-372, 2018 WL 3614221, at *4 (W.D. Tex. July 27, 2018).

Mi Familia Vota lacks standing for the same reasons. Like the NAACP, Mi Familia Vota claims to suffer from a self-inflicted "diversion of resources" without identifying any cognizable injury in fact

that the diversion was necessary to avoid. *See* Dkt. No. 1 ¶ 20. And like the NAACP, Mi Familia Vote has "not identified any specific projects that [it] had to put on hold or otherwise curtail in order to respond to the" laws it challenges. *City of Kyle*, 626 F.3d at 238. Instead, it has "only conjectured that the resources" it diverted "could have been spent on other unspecified [] activities." *Id.* at 239.

Both the NAACP and Mi Familia Vota allege that their missions include encouraging voting. *See* Dkt. No. 1 ¶ 19 ("Mi Familia Vota encourages voter registration and participation); *id.* ¶ 23 ("[T]he NAACP engages in voter education and registration"). But the "abstract social interest in maximizing voter turnout . . . cannot confer Article III standing." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014). To the extent Plaintiffs claim an interest in the political consequences of which potential voters vote, they lack standing because federal courts do not hear "case[s] about group political interests." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018).

D. The organizational plaintiffs also lack third-party standing

Even if the organizational plaintiffs had Article III standing, they would still lack statutory standing. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 nn.3-4 (2014). Section 1983 provides a cause of action only when *the plaintiff* suffers "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. It does not provide a cause of action to plaintiffs claiming an injury based on the violation of a *third party's* rights. *See Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) ("[L]ike all persons who claim a deprivation of constitutional rights, [plaintiffs] were required to prove some violation of their personal rights.").

Section 1983 "incorporates . . . the Court's 'prudential' principle that the plaintiff may not assert the rights of third parties," but it omits the "exceptions" that occasionally overrode the prudential doctrine. David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45. When "[t]he alleged rights at issue" belong to a third party, rather than the plaintiff, the plaintiff lacks statutory

standing, regardless of Article III standing. *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011); *see also Conn v. Gabbert*, 526 U.S. 286, 292–93 (1999).[4]

Here, the organizational plaintiffs premise their claims on the right to vote. But the organizational plaintiffs are artificial entities that do not have voting rights. "It goes without saying that political parties, although the principal players in the political process, do not have the right to vote." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002). The organizational plaintiffs are necessarily asserting the rights of third parties.

The organizational plaintiffs therefore lack statutory standing to sue under Section 1983. Because this follows from the statute itself, exceptions from "prudential standing principles do not apply." *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016); *see also* Currie, 1981 Sup. Ct. Rev. at 45. But even if the organizational plaintiffs could invoke prudential-standing exceptions, their Complaint does not do so. Plaintiffs do not allege that they have "a 'close' relationship with" voters, and there is no reason to think voters face any "hindrance" to protecting their "own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (noting the Supreme Court has generally "not looked favorably upon third-party standing").

E. The individual plaintiffs' alleged harm does not establish standing

Micaela Rodriguez "plans to vote in the November 2020 elections" but alleges that "she may not be able to do so *if the procedures in place for elections* make voting practically impossible[.]" Dkt. No. 1 ¶ 24. Guadalupe Torres, on the other hand, does not want to vote in person because she lives at home with her parents, and alleges that her father is at "high risk for COVID-19 illness." Dkt. No. 1 ¶ 25. That is the sum total of the individual plaintiffs' standing allegations.

[4] Section 2 of the Voting Rights Act also concerns a particular "citizen," not third parties. 52 U.S.C. § 10301(a). To the extent it implies a private cause of action (which the Governor does not concede), it does so in favor of the individual voter injured, not non-voters suing to vindicate third parties' rights.

"[P]laintiffs must establish standing *for each and every provision they challenge*." *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) (emphasis added). Here, Ms. Rodriguez does not identify anything that may dissuade her from voting and, in fact, says she plans to vote barring some unidentified, unknown procedure that may make voting practically impossible. Ms. Rodriguez cannot establish standing to challenge the volumes of law and policy that the Plaintiffs purport to challenge with the vague assertion that she may decide it's too dangerous to vote at some point in the future.

Similarly, Ms. Torres's allegation that she may decline to vote because she is not eligible to vote by mail is similarly lacking. Ms. Torres cannot rely on a conjectural harm to a third-person to establish her standing to bring a lawsuit. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("First, *the plaintiff* must have suffered an 'injury in fact' . . ."). Ms. Torres does not allege that she cannot vote or will not vote, nor does she allege that any specific action by any named defendant will cause her not to vote. She alleges that because she is concerned about the *possibility* that she may catch COVID-19 and the *possibility* that she may pass that along to someone else, she would prefer to vote by mail. That alleged harm is too attenuated and conjectural to satisfy Article III standing. *Clapper*, 568 U.S. at 409.

F. The Plaintiffs' harms are not traceable to or redressable by the Governor

As explained below in Section III(A), the Governor does not enforce the various laws and policies that Plaintiffs challenge. For that reason, the Governor does not cause—and relief ordered against him would not redress—Plaintiffs' asserted injuries. Plaintiffs' complaint "confuses [a] *statute*'s immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the *defendants*." *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc). In the interest of brevity, the Governor thus asserts that this Court's analysis under *Ex parte Young* also bears on the standing analysis. *See City of Austin v. Paxton*, 943 F.3d 993, 1003 (5th Cir. 2019).

II. This case presents nonjusticiable political questions

While courts have authority to "say what the law is," there are some questions that are "in their nature[,] political" that are beyond the scope of Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 177 (1803). In *Coalition for Good Governance v. Raffensperger*, the plaintiffs complained that COVID-19 made in-person voting unsafe unless election officials adopted various changes to both in-person and mail-in voting. No. 1:20-cv-1677, 2020 WL 2509092, at *1 (N.D. Ga. May 14, 2020). They sought some of the same relief that Plaintiffs here seek, including "an order requiring polling locations to use paper ballots." *Id.* But the court concluded the plaintiffs' claims presented "a classic political question"—"whether the executive branch has done enough." *Id.* at *3. "[T]here are no discernable and manageable standards" that would allow a court "to decide issues such as how early is too early to hold the election or how many safety measures are enough." *Id.* The same is true here.

The political-question doctrine is rooted in the separation of powers. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Any one of six factors can render a case nonjusticiable under this doctrine:

> [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.

Baker, 369 U.S. at 217. Cases that require the court to decide a political question must be dismissed for lack of jurisdiction. *Id.* at 217. The scope of the requested relief implicates at least three of the six indicia of a nonjusticiable political question.

First, the Elections Clause commits the administration of elections to coordinate departments—Congress and state legislatures—not courts. *Baker*, 369 U.S. at 217; U.S. Const. art. I, § 4, cl. 1. "Plaintiffs ask this Court to assume the roles of state and federal legislatures, urging us to exercise the discretion that has been explicitly reserved to those political bodies." *Agre v. Wolf*, 284 F.

Supp. 3d 591, 596 (E.D. Pa. 2018) (three-judge court). The Elections Clause and the history of its adoption demonstrate that "the Framers did not envision such a primary role for the courts." *Id.* at 599. The "manner" of conducting elections includes "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). These are reserved to the state legislatures. Courts should focus on enforcement of the First and Fourteenth Amendments, which are "generally unobtrusive to States in promulgating election regulations." *Agre*, 284 F. Supp. 3d at 599.

As discussed above, Plaintiffs' Complaint seeks a court order directing the exact manner of the conduct of elections—something specifically committed to other parts of government. Plaintiffs' Complaint requires this Court to replace Texas's Election Code with this Court's own judgment about the proper administration of elections (or more specifically implement Plaintiffs' preferred election measures), in violation of the "textually demonstrable constitutional commitment of the issue" to state legislatures and to Congress. *Baker*, 369 U.S. at 217; *Agre*, 284 F. Supp. 3d at 620.

Second, Plaintiffs acknowledge that executive-branch officials at all levels have undertaken measures to slow the spread of the coronavirus. *See, e.g.,* Dkt. No. 1 ¶¶ 62, 77, 102. But Plaintiffs believe the measures taken so far are insufficient to protect the health of the individuals involved in the upcoming election. As a result, Plaintiffs' Complaint calls upon the Court to make "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Determinations like that are clearly entrusted to the State. *See In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020).

Plaintiffs' Complaint requires this Court to determine that the officials charged by statute with making decisions in a declared health emergency have not sufficiently exercised those powers for the benefit and protection of Texas voters. That determination is required before this Court can reach the merits of Plaintiffs' claims. Thus, in order to decide Plaintiffs' claims, this Court must "reconsider what are essentially policy choices," *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C.

Cir. 2010) (en banc), made by the Governor under his authority to respond to the declared public health emergency. This Court is not being asked to decide the constitutionality of a discrete statute, *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012), but to second-guess the policy determinations of executive-branch officials in response to COVID-19. Because Plaintiffs' Complaint requires the Court to reconsider the policy decisions of officials from other branches before it can address Plaintiffs' claims, it presents nonjusticiable political questions that are not within the jurisdiction of this Court to decide.

Third, even if this Court did not have to determine the proper policy for a response to the current pandemic, there are still no "judicially discoverable and manageable standards" that this Court can apply to Plaintiffs' claims. Much like cases alleging partisan gerrymandering, where courts were called upon to decide the definition of "fairness" and then "how much is too much," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500-01 (2019), Plaintiffs ask this Court to define "safety" in the context of an election and then answer "how much is not enough"? *See id.*; *Jacobson v. Fla. Sec'y of State*, 957 F.3d. 1193, 1218 (11th Cir. 2020) (Pryor, J., concurring). The judiciary is ill-equipped to handle these questions that involve the "complex, subtle, and professional decisions" required to conduct elections because of the lack of manageable standards. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Ultimately, Plaintiffs' Complaint "poses basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2500; *see also Ctr. for Biological Diversity v. Trump*, 2020 WL 1643657, at *10-11 (D.D.C. Apr. 2, 2020).

III. Plaintiffs' constitutional claims are barred by sovereign immunity[5]

Ex parte Young allows suits for injunctive or declaratory relief against state officials, provided they have sufficient "connection" to enforcing an allegedly unconstitutional law. *City of Austin*, 943 F.3d at 997. Otherwise, the suit is effectively against the state itself and barred by sovereign

[5] The Fifth Circuit recently suggested that Section 2 of the Voting Rights Act abrogates sovereign immunity. *See Fusilier v. Landry*, 963 F.3d 447, 455 (5th Cir. 2020). The Governor preserves the argument that that case was wrongly decided.

immunity. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). If the official sued is not "statutorily tasked with enforcing the challenged law," then the requisite connection is absent and "our *Young* analysis ends." *City of Austin*, 943 F.3d at 998 (citation omitted).

A. The Governor does not administer elections

Plaintiffs sued Governor Abbott in his official capacity but make only passing reference to him in the Complaint. Plaintiffs point to the state-wide mask mandate issued by Governor Abbott in July of this year that exempted voting sites. Dkt. No. 1 ¶ 102. Governor Abbott did issue Executive Order GA-29—related to the use of face coverings during the COVID-19 pandemic, on July 2, 2020, but Governor Abbot does not *enforce* GA-29, making *Ex parte Young* inapplicable to him. Tex. Exec. Order No. GA-29, *available at*, https://gov.texas.gov/uploads/files/press/EO-GA-29-use-of-face-coverings-during-COVID-19-IMAGE-07-02-2020.pdf (last visited August 4, 2020).

GA-29 requires "[e]very person in Texas" to "wear a face covering over the nose and mouth when inside a commercial entity or other building or space open to the public, or when in an outdoor public space, wherever it is not feasible to maintain six feet of social distancing from another person not in the same household" with certain exceptions that include voting locations. *Id.* at 2. GA-29 goes on to provide that "[l]ocal law enforcement and other local officials, as appropriate, can and should enforce this executive order, Executive Order GA-28, and other effective executive orders, as well as local restrictions that are consistent with this executive order and other effective executive orders." *Id.* at 3.

The Fifth Circuit recently explained while addressing another of Governor Abbott's executive orders that Chapter 418 of the Texas Government Code is the font of Governor Abbott's authority. *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020). Noting that the power to promulgate is not the same as the power to enforce, the Fifth Circuit explained that the Governor has authority "to 'issue,' 'amend,' or 'rescind' executive orders, not to 'enforce' them." *Id.* The court relied on language

authorizing *others* to enforce the executive order to hold that Governor Abbott does not fly within *Ex parte Young*'s orbit. *Id.* So too here.

GA-29 imposes penalties for failure to comply with the mandate and authorizes "local law enforcement" and "local officials" to enforce the executive order, not the Governor. Because Governor Abbott lacks sufficient connection to the enforcement of GA-29, the *Ex parte Young* exception does not apply, and Governor Abbott may not be sued for injunctive relief under the Eleventh Amendment. *See id.*

The same reasoning would hold for *any* mandatory injunction. "The power to promulgate law is not the power to enforce it," regardless of whether Plaintiffs complain that the Governor has issued an executive order they do not like or that he has not issued an executive order they would like. *Id.* The *Ex parte Young* exception is limited to injunctions "prevent[ing] [a state official] from doing that which he has no legal right to do." *Ex parte Young*, 209 U.S. at 159. It does not authorize injunctions directing "affirmative action." *Id.* Sovereign immunity bars constitutional claims "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949), including "cases where the [defendant] sued could satisfy the court decree only by acting in an official capacity." *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971); *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001). Thus, the Court cannot order "the [Governor] to promulgate a rule requiring [local election officials] to [perform their duties] contrary to" currently existing law. *Jacobson*, 957 F.3d at 1211–12.

B. Alternatively, Plaintiffs' requested election precautions would impinge on Texas's special sovereignty interests

Ex Parte Young does not apply—and thus a suit is barred by the Eleventh Amendment—when a plaintiff's requested relief against state officials "implicates special sovereignty interests" of the state. *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 281 (1997). In order to implicate the special sovereignty

interests of the state, the type of relief sought must implicate the "sovereignty interests and funds *so significantly*" that the *Ex Parte Young* exception does not apply. *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (emphasis added). Without question, they are implicated here.

Most courts applying *Coeur d' Alene Tribe* have done so in the context of real property. *See, e.g.*, *Hollywood Mobile Estates Ltd. v. Cypress*, 415 F. App'x 207, 211 (11th Cir. 2011). In determining if special sovereignty interests are implicated in other contexts, courts have looked to whether (1) the injunctive relief would involve an area that "derives from [the state's] general sovereign powers," *MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 515 (3d Cir. 2001); (2) the suit seeks to interfere "with the allocation of state funds" as opposed to "incidental expenditures" involved in complying with an injunction, *Barton v. Summers*, 293 F.3d 944, 949, 951 (6th Cir. 2002); or (3) the suit sought to "rewrite [the state's] property tax code with respect to its application against [] personal property," *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1194 (10th Cir. 1998). In this case, all three of these criteria are instructive and support sovereign immunity.

To determine the sovereignty interests of states to conduct elections, this Court need only look to the Constitution. The Elections Clause, art. I, § 4, cl. 1, specifies that the "Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof." This provision was based on the "plain proposition" identified by the Framers that "*every government ought to contain in itself the means of its own preservation.*" The Federalist No. 59 (Alexander Hamilton) (emphasis in original). Leaving the manner of regulating state elections in the hands of the states made sense because allowing the federal government to regulate elections for states would be "an unwarrantable transposition of power, and [] a premeditated engine for the destruction of the State governments." *Id.*

The Supreme Court has likewise repeatedly recognized the sovereign interests of states conducting their own elections: "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. S.F. Cty.*

Democratic Cent. Comm., 489 U.S. 214, 231 (1989)). In denying a challenge to a state election practice, Justice Scalia relied in part on "the Constitution's express commitment of the task [of running elections] to the States." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461, 468 (1991). Similarly, this Court should do so here.

Plaintiffs' Complaint invades the sovereignty interests of the State of Texas by seeking an order "directing the precise way in which Texas should conduct voting." The Eleventh Circuit recently questioned whether that such broad-reaching relief could render *Ex parte Young* inapplicable to cases involving elections processes. *See Curling v. Worley*, 761 F. App'x 927, 934 (11th Cir. 2019) (per curiam). Plaintiffs here are not merely asking a federal court to closely scrutinize state laws whose very design infringes on the rights of voters. Rather, Plaintiffs seek to have this Court supervise the administrative details of a local election.

Plaintiffs' proposed overhaul of Texas's election procedures would be a judicial declaration that would "diminish, even extinguish," *Coeur d' Alene Tribe*, 521 U.S. at 282, the State's and nonparty counties' power to control:

- The period of early voting;
- How and whether voters, poll-workers, persons assisting voters, and any other person at a polling site wear a mask and requiring the State to pay for masks for persons who do not already have one;
- Determine whether counties can offer extended, temporary, or mobile early voting locations with flexible hours and days;
- Requirements 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;
- Opening additional polling places and determining the number of voting booths and poll workers at each polling place;
- The number of staff at polling places;
- Waiting times for voting;
- Poll worker recruiting activities;
- How many polling locations local elections officials can open or close;
- Whether and how to provide electronic voting and paper ballots;

- Determine voter identification requirements;
- Determine how poll workers should physically handle identification or documentation;
- Determine whether to apply the natural disaster exception to the pandemic, and allow voters to sign affidavits regarding the natural disaster exception at the polling place;
- Require elections officials to procure protective gear, including masks and gloves, in sufficient quantity to allow poll workers to change protective gear frequently;
- Dictate when poll workers can and should wash their hands;
- Free county officials from any strictures of Texas law when crafting elections procedures, provided the procedures comply with the directives of the Court; and,
- 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.

Dkt. No. 1 at Prayer. Plaintiffs also request that this Court's supervision over elections last until Texas can demonstrate that no coronavirus cases exist in the State or until a vaccine is provided to voters for free upon demand.

Without question, Plaintiffs' proposed relief directly attacks the state's general sovereign powers to regulate elections, as discussed above. *Bell Atl.-Pa.*, 271 F.3d at 514. Plaintiffs' proposed relief would also interfere with state funds by *specifically* requiring state payment for the relief sought. *Barton*, 293 F.3d at 949, 951.

In effect, Plaintiffs ask this Court to rewrite Texas's Election Code and then supervise Texas's election system until the eradication of COVID-19. *ANR Pipeline Co.*, 150 F.3d at 1194. If Plaintiffs' proposed rewrite of Texas's Election Code and invitation to perpetually monitor and direct Texas's elections does not implicate the special sovereignty interests of the State in a way violative of the Eleventh Amendment, it is difficult to conceive a situation where *Coeur d' Alene Tribe* would apply to *any* election case.

IV. Plaintiffs fail to state a claim upon which relief can be granted

A. Plaintiffs did not state a procedural or substantive due process claim

Plaintiffs do not have a right to vote by any means of their choosing. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Of course, Plaintiffs do not claim that their right to vote has been extinguished

or diluted. What they are really arguing about is the process or method by which voters will cast in-person or mail-in ballots in upcoming elections while COVID-19 persists. Indeed, Plaintiffs' proposed remedies focus almost exclusively on procedural measures from drive-thru voting to using paper ballots instead of electronic voting machines. Dkt. No. 1 at 42-44.

First, Plaintiffs cannot state a claim under the Due Process Clause because the desire to vote using the procedures Plaintiffs propose is not "life, liberty, or property" under the Fourteenth Amendment. In *Johnson v. Hood*, "voters whose ballots were rejected" argued that they "had been deprived of due process of law" because the procedures had been "arbitrary." 430 F.2d 610, 611-12 (5th Cir. 1970) (per curiam). The Fifth Circuit rejected their claim because "even an improper denial of the right to vote for a candidate for a state office achieved by state action is not a denial of a right of property or liberty secured by the due process clause." *Id.* at 612 (quotation omitted); *cf. Johnson v. Bredesen*, 624 F.3d 742, 752 (6th Cir. 2010) ("[N]o authority recognizes the right to vote in federal elections as a privilege or immunity of United States citizenship."). If the right to vote at all is not "life, liberty, or property," as the Fifth Circuit held, then the desire to vote using Plaintiffs' proposed safety measures cannot be "life, liberty, or property" either.

Second, Texas's procedures for voting are well justified, not unconstitutional. Procedural due process claims require the court to balance the private interest at stake, the risk of an "erroneous deprivation of such interest through the procedures used," potential alternatives, and the government's interest involved, including the "fiscal and administrative burdens" that accompany Plaintiffs' requested relief. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Plaintiffs have not plausibly alleged that the State's procedures lead to an unacceptable risk of erroneous deprivations. They have not alleged anything about the fiscal and administrative burdens of various competing proposals.

To the extent Plaintiffs allege a substantive due process claim, their claim still fails. "[F]ederal courts will not intervene to . . . supervise the administrative details of a local election." *Curry v. Baker*,

802 F.2d 1302, 1314 (11th Cir. 1986). Courts reject substantive due process claims that would require becoming "engulfed in the morass of election details." *Id.* at 1316. Only in extraordinary circumstances not plausibly alleged here could a federal court entertain a request "to oversee the administrative details of a local election." *Pettengill v. Putnam Cty. R-1 Sch. Dist., Unionville, Mo.*, 472 F.2d 121, 122 (8th Cir. 1973); *see also Duncan v. Poythress*, 657 F.2d 691, 701 (5th Cir. Unit B 1981).

Both substantive and procedural due process claims require plaintiffs to allege some government action interferes with their rights. However, Plaintiffs have not identified offensive statutes or regulations, but only vaguely asserted that the existence of COVID-19 creates a risk to voting under laws in place long before COVID-19 became an issue. This omission is fatal to their due process claims. Plaintiffs complain there is a *risk* of voting in person, but "[t]he real problem here is COVID-19, which all but the craziest conspiracy theorists would concede is not the result of any act or failure to act by the Government." *Coalition for Good Governance*, 2020 WL 2509092, at *3 n.2.

B. Plaintiffs' equal protection claim also fails

Plaintiffs do not allege intentional discrimination in their suit. Rather, they assert that people in minority communities are impacted more heavily by COVID-19 because they may have longer drives, wait times, or lines for in-person voting. However, even assuming Plaintiffs could show an increased impact, disparate racial impacts, standing alone, do not violate the Constitution. See *Washington*, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."). Even if they did, Plaintiffs do not plausibly allege disparate impact on minority communities.

Instead, Plaintiffs assert that some voters will face larger crowds and longer lines, subjecting them to a greater risk of contracting COVID-19. Courts have routinely rejected lines and crowds as a significant harm to a constitutional right—particularly when there is no evidence of improper intent.

For example, in *Common Cause Indiana v. Marion County Election Board*, the Southern District of Indiana categorized difficulties such as longer lines and wait times as "nonsevere, nonsubstantial, or slight burden on the general right to vote as a matter of law." 311 F. Supp. 3d 949, 966 (S.D. Ind. 2018), *vacated and remanded*, 925 F.3d 928 (7th Cir. 2019); *see also Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004).

Alleging that the longer lines (not a constitutional concern) should prod the State to do more (not a constitutional imperative) does not amount to a violation of the Equal Protection clause.

To the extent Plaintiffs invoke the *Anderson-Burdick* doctrine, their claim still fails. Those cases utilize a sliding scale balancing test that weighs the "character and magnitude" of the alleged burden against the government's interest in the challenged law. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). "If a State's election law imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

But the *Anderson/Burdick* analysis does not apply outside the context of specific state action. Plaintiffs cite no cases to the contrary. *See Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 190 n.8 (2008) (photo identification requirement); *Burdick*, 504 U.S. at 434 (statutory prohibition on write-in candidates); *Anderson*, 460 U.S. at 789 (early filing deadline). In essence, Plaintiffs urge this Court to make the state "do more."[6] But a government's willingness to exceed its statutory obligations does not provide a constitutional basis to require the government go further. *See Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections*, 1:20-cv-912, 2020 WL 1031897, at *7 (N.D. Ga. Mar. 3, 2020). There is no constitutional imperative to provide the additional protections Plaintiffs seek.

[6] This is also true of Plaintiffs' tag-along First Amendment claim. Because the burden analysis on the free speech claim Plaintiffs raise mirrors the burden analysis addressed here, Plaintiffs have failed to allege a claim of an unconstitutionally burdensome state action that impinges on their right to vote.

Moreover, the Supreme Court has always analyzed "the magnitude of burdens . . . categorically and [has] not consider[ed] the peculiar circumstances of individual voters or candidates." *Crawford*, 553 U.S. at 206 (Scalia, J., concurring in the judgment). Here, Plaintiffs cannot establish that Texas's procedures impose any "categorical" burdens. In any event, even if the Court could focus on individual voters, Plaintiffs have not identified any individual voters facing severe burdens. Instead, they point to various conditions that vary from polling place to polling place. How widespread will the virus be? Where will polling places be located? Who will operate them? What systems will individuals use to vote? The answers to all of these questions, and more, will change from location to location. Plaintiffs cannot use *Anderson-Burdick* to complain that some combinations of conditions and policies in some unspecified locations will be problematic for some unspecified voters.

C. Plaintiffs' fail to state a Fifteenth Amendment claim

A Fifteenth Amendment claim requires the plaintiff to plausibly allege discriminatory intent or effect. But here, Plaintiffs have affirmatively alleged the opposite. Plaintiffs complain that Defendants acted "*despite* knowledge that the risks and harms posed by the coronavirus pandemic disproportionately affected communities of color." Dkt. No. 1 ¶ 204 (emphasis added). This allegation is not plausible for the reasons explained below, but even if it were, turning a blind eye to disparate impact is not unconstitutional discriminatory intent. Discriminatory intent requires action "because of, *not merely in spite of*, [the action's] adverse effects upon an identifiable group." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quotation omitted) (emphasis added).

In any event, Plaintiffs have not plausibly alleged discriminatory intent or effect by any Defendants under the framework established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Though they argue that the virus has a disparate impact, they do not allege that any actions taken by Defendants do. *See, e.g.*, Dkt. No. 1 ¶ 47. Plaintiffs allege nothing about "[t]he historical background of the decision[s]" they challenge or "[t]he specific sequence of

events leading up to the challenged decision[s]." *Arlington Heights*, 429 U.S. at 267. Plaintiffs never suggest there have been "procedural" or "[s]ubstantive departures" that might suggest discrimination. *Id.* Nor do they say anything about "[t]he legislative or administrative history." *Id.* at 268.

D. Plaintiffs' Section 2 claim also fails

"Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect." *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005). Rather, Section 2(b) "make[s] clear that an application of the results test requires an inquiry into the totality of the circumstances." *Chisom v. Roemer*, 501 U.S. 380, 394 (1991). This analysis turns on whether the challenged law violates Section 2(a) because it deprives minority voters of an equal opportunity to participate in the electoral process *and* to elect representatives of their choice.

To state a claim for vote denial under Section 2, (1) the challenged law has to "result in" the denial or abridgement of the right to vote; and, (2) the denial or abridgement of the right to vote must be "on account of race or color." In other words, the challenged law must have *caused* the denial or abridgement of the right to vote on account of race. *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 2020 WL 4185801, at *22 (11th Cir. 2020). Disparate impact is not enough. *Id.* (collecting cases). While Plaintiffs allege that there have been issues in other states, Dkt. No. 1 ¶¶ 11-12, Plaintiffs do not draw any lines between voting experiences in Texas and a higher incidence of COVID-19 amongst any group of voters, let alone any minority groups. What's more, experience in other states does not speak to the interplay between *Texas* voters and *Texas* practices. In sum, Plaintiffs failed to allege any facts that would support a vote denial claim under Section 2 of the Voting Rights Act.

CONCLUSION

The Governor respectfully requests that the Court dismiss Plaintiffs' claims.

Date: August 12, 2020

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on August 12, 2020, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

EXHIBIT C

IN THE WESTERN 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; AND RUTH HUGHS, TEXAS SECRETARY OF STATE,
Defendants.

Civil Action No. 5:20-cv-00830

THE SECRETARY'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs seek federal oversight of the Texas election system for the unknowable duration of the COVID-19 pandemic.[1] They request an astounding number of changes to Texas's election laws and propose an astounding degree of federal incursion into the minutiae of election administration.

The State of Texas—like its sister states—is responding to the pandemic with the best solutions that fit within the statutory and constitutional limits that applied before COVID-19, that have applied during COVID-19, and that will continue to apply after this pandemic ends. But for every solution the State has recommended for upcoming elections, Plaintiffs propose problems. Whether it is concern over paper ballots, complying with voting deadlines, or having to show up at a polling place, Plaintiffs claim that anything and everything the State of Texas does is unconstitutional. And not only is it unconstitutional, say Plaintiffs, it is tinged with racism. Not so.

Plaintiffs' views on best practices for elections during a pandemic do not set the constitutional floor, let alone state a claim for relief that this Court should entertain. This Court should dismiss this case for at least five reasons. *First*, no plaintiff adequately alleges facts supporting standing to bring their claims. *Second*, Plaintiffs present nonjusticiable political questions. *Third*, sovereign immunity bars Plaintiffs' claims because the *Ex parte Young* exception does not apply. *Fourth*, *even if*, *Ex parte Young* otherwise applied, the exception to the exception—namely the invasion of Texas's special sovereignty interests—should place this case outside the orbit of *Ex parte Young*. *Fifth*, even if Plaintiffs could hurdle the manifold jurisdictional problems presented by their suit, they still failed to state a claim for relief under a constitutional or statutory theory.

For all these reasons, the Court should dismiss Plaintiffs' Complaint for lack or jurisdiction or, alternatively, for failure to state a claim.

[1] Dkt. No. 1 at p. 44 ("Order that all such relief be extended until there are no existing cases of coronavirus in the State of Texas; or until there is a vaccine freely and readily available to all Texans, whichever comes sooner.").

ARGUMENT AND AUTHORITIES

I. No standing exists to bring this suit against the Secretary of State

A. Standing principles

"[S]tanding is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation omitted). Courts persistently inquire into standing because "[w]ithout jurisdiction the court cannot proceed *at all* in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quotation omitted) (emphasis added). At the pleading stage, the individual plaintiffs must "clearly . . . allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016) (quotation omitted). Specifically, a plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant; and (3) that is likely to be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

The organizational plaintiffs have two avenues to allege standing: (1) associational[2] or (2) organizational. *See NAACP v. City of Kyle*, 626 F.3d 233, 237-38 (5th Cir. 2010). Organizational standing requires that the plaintiff establish injury, causation, and redressability. *Id.* For associational standing, the organization must show (1) that its members would independently have standing; (2) that the interests the organization is protecting are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006).

Neither the organizational plaintiffs nor the individual plaintiffs alleged sufficient facts to demonstrate standing to challenge what they allege are unconstitutional burdens on the right to vote.

[2] Plaintiff Mi Familia Vota, unlike Plaintiff NAACP, did not allege that it is suing on behalf of itself and its members. *Compare* Dkt. No. 1 ¶¶ 19-21 (describing Mi Vota Familia's standing allegations), *with id.* ¶ 22 (explaining that the NAACP "brings this action on its own behalf and on behalf of its members and constituents"). Fairly read, Mi Vota Familia is alleging only organizational standing, whereas NAACP is alleging both organizational and associational standing.

B. The NAACP does not have associational standing

The NAACP failed to plead associational standing. A plaintiff cannot have associational standing unless one of its members would have standing to sue individually. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Thus, demonstrating standing would require the NAACP to "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Indeed, the Fifth Circuit has applied this rule to the NAACP itself. *See NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (requiring evidence of "a specific member").

Because the NAACP has not alleged the existence of specific members, let alone specific members with individual standing, their claims should be dismissed. *See Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.); *Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008).

The only individuals identified in the Complaint are Micaela Rodriguez and Guadalupe Torres, but the Complaint does not allege that either are members of the NAACP. *See* Dkt. No. 1 ¶¶ 24-25. Even if they were members, however, they could not support associational standing because they lack individual standing for the reasons explained below.[3]

C. Neither Mi Vota Familia nor the NAACP has organizational standing

An organization has direct organizational standing only if it satisfies the same Article III requirements applicable to individuals: injury-in-fact, causation, and redressability. *City of Kyle*, 626 F.3d at 237. That an organization has an "interest in a problem . . . is not sufficient" for standing, "no

[3] The complaint refers to the NAACP's "members and constituents," Dkt. No. 1 ¶ 22, but it does not plausibly allege facts satisfying the "indicia of membership" requirements from *Hunt*, 432 U.S. at 344. That requires members who "elect leadership, serve as the organization's leadership, and finance the organization's activities, including the case's litigation costs." *Tex. Indigenous Council v. Simpkins*, No. 5:11-cv-315, 2014 WL 252024, at *3 (W.D. Tex. Jan. 22, 2014). The NAACP has not alleged facts showing it has such members. It never alleges that its purported members and constituents "participate in and guide the organization's efforts," *Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994), much less that they "alone finance [the NAACP's] activities, including the costs of this lawsuit," *Hunt*, 432 U.S. at 344.

matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

The NAACP bases its standing on an alleged "diversion of resources," but such a diversion can support standing only if "the change in plans [is] in response to a reasonably certain injury imposed by the challenged law." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013); *see also La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) ("[A plaintiff] must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem."). In this case, the NAACP does not identify any cognizable injury it would suffer if it did not divert its resources.

Moreover, the NAACP alleged diversion of resources relates to lobbying. The NAACP allegedly "initiat[ed] campaigns calling on Election Officials to" take various actions. Dkt. No. 1 ¶ 23. But an organization lacks standing "when the only 'injury' arises from the effect of the regulations on the organizations' lobbying activities." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005); *see also City of Kyle*, 626 F.3d at 238 (rejecting standing because "Plaintiffs have not explained how the[ir] activities . . . differ from the HBA's routine lobbying activities").

Further, the NAACP has "not identified any specific projects that [it] had to put on hold or otherwise curtail in order to respond to the" laws it challenges. *City of Kyle*, 626 F.3d at 238. The NAACP has "only conjectured that the resources" it diverted "could have been spent on other unspecified [NAACP] activities." *Id.* at 239. That is not enough. *See Def. Distributed v. U.S. Dep't of State*, No. 1:15-cv-372, 2018 WL 3614221, at *4 (W.D. Tex. July 27, 2018).

Mi Familia Vota lacks standing for the same reasons. Like the NAACP, Mi Familia Vota claims to suffer from a self-inflicted "diversion of resources" without identifying any cognizable injury in fact

that the diversion was necessary to avoid. *See* Dkt. No. 1 ¶ 20. And like the NAACP, Mi Familia Vote has "not identified any specific projects that [it] had to put on hold or otherwise curtail in order to respond to the" laws it challenges. *City of Kyle*, 626 F.3d at 238. Instead, it has "only conjectured that the resources" it diverted "could have been spent on other unspecified [] activities." *Id.* at 239.

Both the NAACP and Mi Familia Vota allege that their missions include encouraging voting. *See* Dkt. No. 1 ¶ 19 ("Mi Familia Vota encourages voter registration and participation); *id.* ¶ 23 ("[T]he NAACP engages in voter education and registration"). But the "abstract social interest in maximizing voter turnout . . . cannot confer Article III standing." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014). To the extent Plaintiffs claim an interest in the political consequences of which potential voters vote, they lack standing because federal courts do not hear "case[s] about group political interests." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018).

D. The organizational plaintiffs also lack third-party standing

Even if the organizational plaintiffs had Article III standing, they would still lack statutory standing. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 nn.3-4 (2014). Section 1983 provides a cause of action only when *the plaintiff* suffers "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. It does not provide a cause of action to plaintiffs claiming an injury based on the violation of a *third party's* rights. *See Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) ("[L]ike all persons who claim a deprivation of constitutional rights, [plaintiffs] were required to prove some violation of their personal rights.").

Section 1983 "incorporates . . . the Court's 'prudential' principle that the plaintiff may not assert the rights of third parties," but it omits the "exceptions" that occasionally overrode the prudential doctrine. David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45. When "[t]he alleged rights at issue" belong to a third party, rather than the plaintiff, the plaintiff lacks statutory

standing, regardless of Article III standing. *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011); *see also Conn v. Gabbert*, 526 U.S. 286, 292–93 (1999).[4]

Here, the organizational plaintiffs premise their claims on the right to vote. But the organizational plaintiffs are artificial entities that do not have voting rights. "It goes without saying that political parties, although the principal players in the political process, do not have the right to vote." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002). The organizational plaintiffs are necessarily asserting the rights of third parties.

The organizational plaintiffs therefore lack statutory standing to sue under Section 1983. Because this follows from the statute itself, exceptions from "prudential standing principles do not apply." *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016); *see also* Currie, 1981 Sup. Ct. Rev. at 45. But even if the organizational plaintiffs could invoke prudential-standing exceptions, their Complaint does not do so. Plaintiffs do not allege that they have "a 'close' relationship with" voters, and there is no reason to think voters face any "hindrance" to protecting their "own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (noting the Supreme Court has generally "not looked favorably upon third-party standing").

E. The individual plaintiffs' alleged harm does not establish standing

Micaela Rodriguez "plans to vote in the November 2020 elections" but alleges that "she may not be able to do so *if the procedures in place for elections* make voting practically impossible[.]" Dkt. No. 1 ¶ 24. Guadalupe Torres, on the other hand, does not want to vote in person because she lives at home with her parents, and alleges that her father is at "high risk for COVID-19 illness." Dkt. No. 1 ¶ 25. That is the sum total of the individual plaintiffs' standing allegations.

[4] Section 2 of the Voting Rights Act also concerns a particular "citizen," not third parties. 52 U.S.C. § 10301(a). To the extent it implies a private cause of action (which the Secretary does not concede), it does so in favor of the individual voter injured, not non-voters suing to vindicate third parties' rights.

"[P]laintiffs must establish standing *for each and every provision they challenge*." *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) (emphasis added). Here, Ms. Rodriguez does not identify anything that may dissuade her from voting, and in fact, says she plans to vote barring some unidentified, unknown procedure that may make voting practically impossible. Ms. Rodriguez cannot establish standing to challenge the volumes of law and policy that the Plaintiffs purport to challenge with the vague assertion that she may decide it's too dangerous to vote at some point in the future.

Similarly, Ms. Torres's allegation that she may decline to vote because she is not eligible to vote by mail is similarly lacking. Ms. Torres cannot rely on a conjectural harm to a third-person to establish her standing to bring a lawsuit. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("First, *the plaintiff* must have suffered an 'injury in fact' . . ."). Ms. Torres does not allege that she cannot vote or will not vote, nor does she allege that any specific action by any named defendant will cause her not to vote. She alleges that because she is concerned about the *possibility* that she may catch COVID-19 and the *possibility* that she may pass that along to someone else, she would prefer to vote by mail. That alleged harm is too attenuated and conjectural to satisfy Article III standing. *Clapper*, 568 U.S. at 409.

F. The Plaintiffs' harms are not traceable to or redressable by the Secretary

As explained below in Section III, the Secretary of State does not enforce the various laws and policies that Plaintiffs challenge. For that reason, the Secretary does not cause—and relief ordered against her would not redress—Plaintiffs' asserted injuries. Plaintiffs' complaint "confuses [a] *statute*'s immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the *defendants*." *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc). In the interest of brevity, Secretary asserts that this Court's analysis under *Ex parte Young* also bears on the standing analysis. *See City of Austin v. Paxton*, 943 F.3d 993, 1003 (5th Cir. 2019).[5]

[5] Although the Fifth Circuit has, in circumstances not applicable here, found standing to sue the Secretary for claims of "facial invalidity," that ruling has no applicability to the inherently local as-applied claims in this case. *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017).

II. This case presents nonjusticiable political questions

While courts have authority to "say what the law is," there are some questions that are "in their nature[,] political" that are beyond the scope of Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 177 (1803). In *Coalition for Good Governance v. Raffensperger*, the plaintiffs complained that COVID-19 made in-person voting unsafe unless election officials adopted various changes to both in-person and mail-in voting. No. 1:20-cv-1677, 2020 WL 2509092, at *1 (N.D. Ga. May 14, 2020). They sought some of the same relief that Plaintiffs here seek, including "an order requiring polling locations to use paper ballots." *Id.* But the court concluded the plaintiffs' claims presented "a classic political question"—"whether the executive branch has done enough." *Id.* at *3. "[T]here are no discernable and manageable standards" that would allow a court "to decide issues such as how early is too early to hold the election or how many safety measures are enough." *Id.* The same is true here.

The political-question doctrine is rooted in the separation of powers. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Any one of six factors can render a case nonjusticiable under this doctrine:

> [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.

Baker, 369 U.S. at 217. Cases that require the court to decide a political question must be dismissed for lack of jurisdiction. *Id.* at 217. The scope of the requested relief implicates at least three of the six indicia of a nonjusticiable political question.

First, the Elections Clause commits the administration of elections to coordinate departments—Congress and state legislatures—not courts. *Baker*, 369 U.S. at 217; U.S. Const. art. I, § 4, cl. 1. "Plaintiffs ask this Court to assume the roles of state and federal legislatures, urging us to exercise the discretion that has been explicitly reserved to those political bodies." *Agre v. Wolf*, 284 F.

Supp. 3d 591, 596 (E.D. Pa. 2018) (three-judge court). The Elections Clause and the history of its adoption demonstrate that "the Framers did not envision such a primary role for the courts." *Id.* at 599. The "manner" of conducting elections includes "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). These are reserved to the state legislatures. Courts should focus on enforcement of the First and Fourteenth Amendments, which are "generally unobtrusive to States in promulgating election regulations." *Agre*, 284 F. Supp. 3d at 599.

As discussed above, Plaintiffs' Complaint seeks a court order directing the exact manner of the conduct of elections—that is specifically committed to other parts of government. Plaintiffs' Complaint requires this Court to replace Texas's Election Code with this Court's own judgment about the proper administration of elections (or more specifically implement Plaintiffs' preferred election measures), in violation of the "textually demonstrable constitutional commitment of the issue" to state legislatures and to Congress. *Baker*, 369 U.S. at 217; *Agre*, 284 F. Supp. 3d at 620.

Second, Plaintiffs acknowledge that executive-branch officials at all levels have undertaken measures to slow the spread of the coronavirus. *See, e.g.,* Dkt. No. 1 ¶¶ 62, 77, 102. But Plaintiffs believe the measures taken so far are insufficient to protect the health of the individuals involved in the upcoming election. As a result, Plaintiffs' Complaint calls upon the Court to make "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Determinations that are clearly entrusted to the State. *See In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020).

Plaintiffs' Complaint requires this Court to determine that the officials charged by statute with making decisions in a declared health emergency have not sufficiently exercised those powers for the benefit and protection of Texas voters. That determination is required before this Court can reach the merits of Plaintiffs' claims. Thus, in order to decide Plaintiffs' claims, this Court must "reconsider what are essentially policy choices," *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C.

Cir. 2010), made by the Governor under his authority to respond to the declared public health emergency. This Court is not being asked to decide the constitutionality of a discrete statute, *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012), but to second-guess the policy determinations of executive-branch officials in response to COVID-19. Because Plaintiffs' Complaint requires the Court to reconsider the policy decisions of officials from other branches before it can address Plaintiffs' claims, it presents nonjusticiable political questions that are not within the jurisdiction of this Court to decide.

Third, even if this Court did not have to determine the proper policy for a response to the current pandemic, there are still no "judicially discoverable and manageable standards" that this Court can apply to Plaintiffs' claims. Much like cases alleging partisan gerrymandering, where courts were called upon to decide the definition of "fairness" and then "how much is too much," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500-01 (2019), Plaintiffs ask this Court to define "safety" in the context of an election and then answer "how much is not enough"? *See id.*; *Jacobson v. Fla. Sec'y of State*, 957 F.3d. 1193, 1218 (Pryor, J., concurring). The judiciary is ill-equipped to handle these questions that involve the "complex, subtle, and professional decisions" required to conduct elections because of the lack of manageable standards. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Ultimately, Plaintiffs' Complaint "poses basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2500; *see also Ctr. for Biological Diversity v. Trump*, 2020 WL 1643657, at *10-11 (D.D.C. Apr. 2, 2020).

III. Plaintiffs' constitutional claims are barred by sovereign immunity[6]

Ex parte Young allows suits for injunctive or declaratory relief against state officials, provided they have sufficient "connection" to enforcing an allegedly unconstitutional law. *City of Austin*, 943 F.3d at 997. Otherwise, the suit is effectively against the state itself and barred by sovereign immunity. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). If the official sued is

[6] The Fifth Circuit recently suggested that Section 2 of the Voting Rights Act abrogates sovereign immunity. *See Fusilier v. Landry*, 963 F.3d 447, 455 (5th Cir. 2020). The Secretary preserves the argument that that case was wrongly decided.

not "statutorily tasked with enforcing the challenged law," then the requisite connection is absent and "our *Young* analysis ends." *City of Austin*, 943 F.3d at 998 (citation omitted).

A. *Ex parte Young* does not apply to the Secretary of State in this case

Implementing safe procedures for voting depends on the actions of local officials, not the Secretary. The Secretary does not enforce executive orders pertaining to the COVID-19 pandemic, nor does promulgate executive orders that restrict or expand the application of state laws.

The power to promulgate executive orders rests with the Governor's office. *See In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020); *see also* Tex. Gov't Code § 418.012. The Secretary of State does not have any such authority and does not run local elections. *See, e.g., Lightbourn v. Cty. of El Paso*, 118 F.3d. 421, 428 n.7 (5th Cir. 1997) ("[A]lthough the Texas Election Code designates the Secretary the chief elections official in Texas, the Secretary does not conduct elections."). That distinction matters because the Plaintiffs are not challenging any discrete statute in this lawsuit. Rather, the Plaintiffs are asking that the Secretary of State amend state law and policy. Dkt. No. 1 ¶ 166 ("Defendants must take swift action to amend Texas election policies"); *see also* Dkt. No. 1 ¶¶ 167-207 (causes of action).

That distinction notwithstanding, Plaintiffs point to Election Advisory No. 2020-14, which "clarified, but authorized no changes to, the state's laws and rules regarding late voting early voting, or curbside voting." Dkt. No. 1 ¶ 80. Nor did the Secretary "authorize changes to voting laws or procedures" considering the impact of COVID-19. Dkt. No. 1 ¶ 81. In fact, the Plaintiffs rattle through 9 paragraphs pointing out that the Secretary of State has not unilaterally amended Texas's election laws because of COVD-19 or required local election administrators to change how they administer elections. Dkt No. 1 ¶¶ 80-89.

The reason for that is simple: the Texas Secretary of State does not have authority to change state law. Only the Governor can issue executive orders under state law and only the Texas Legislature has authority to write laws. Nor does the Secretary have authority to conduct local

elections. *See Lightbourn*, 118 F.3d.at 428 n.7. That is the statutorily mandated task of local officials. *Id.* ("[T]he state's 3,000 or so political subdivisions run general and special elections, while the political parties conduct primary elections. In addition, the Secretary does not pick polling sites for elections. Instead, counties and political subdivisions select the location of polling places for general and special elections; county chairs of political parties select polling sites for primary elections.").

Plaintiffs likely will point to *OCA-Greater Houston v. Texas* for the proposition that the Secretary is the chief election officer of the state. 867 F.3d 604 (5th Cir. 2017). Although the court found the Secretary to be a proper defendant in that case, its reasoning does not apply here. First, sovereign immunity had been abrogated, *see id.* at 614, so *OCA-Greater Houston* does not affect the Secretary's *Ex parte Young* argument in this case. Second, *OCA-Greater Houston* distinguished *Okpalobi* on the ground that *Okpalobi* involved a private right of action. *See OCA-Greater Hous.*, 867 F.3d at 613. This case involves a private right of action too. Plaintiffs seek tightened local responses to the COVID-19 pandemic but want this Court to force the Secretary to do the tightening. As noted above, the Secretary has no ability to rewrite state law or issue executive orders. In any event, the extent of the Secretary's power must be determined on a case-by-case basis. *See, e.g., Lightbourn*, 118 F.3d. at 428 n.7. As a result, *OCA-Greater Houston*'s ruling on that issue cannot extend beyond the record and briefing before that court. Third, *OCA-Greater Houston* involved "facial" claims, not the as-applied claims brought here.

At bottom, what the Plaintiffs want the Secretary cannot deliver: a rewrite of the State's election laws. Because Plaintiffs have not identified any enforcement by the Secretary of State that they want to prohibit, their claims against the Secretary are outside of the *Ex parte Young* exception to sovereign immunity.

B. Alternatively, Plaintiffs' requested election precautions would impinge on Texas's special sovereignty interests

Ex Parte Young does not apply—and thus a suit is barred by the Eleventh Amendment—when a plaintiff's requested relief against state officials "implicates special sovereignty interests" of the

state. *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 281 (1997). In order to implicate the special sovereignty interests of the state, the type of relief sought must implicate the "sovereignty interests and funds *so significantly*" that the *Ex Parte Young* exception does not apply. *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (emphasis added). Without question, they are implicated here.

Most courts applying *Coeur d' Alene Tribe* have done so in the context of real property. *See, e.g., Hollywood Mobile Estates Ltd. v. Cypress*, 415 F. App'x 207, 211 (11th Cir. 2011). In determining if special sovereignty interests are implicated in other contexts, courts have looked to whether (1) the injunctive relief would involve an area that "derives from [the state's] general sovereign powers," *MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 515 (3d Cir. 2001); (2) the suit seeks to interfere "with the allocation of state funds" as opposed to "incidental expenditures" involved in complying with an injunction, *Barton v. Summers*, 293 F.3d 944, 949, 951 (6th Cir. 2002); or (3) the suit sought to "rewrite [the state's] property tax code with respect to its application against [] personal property," *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1194 (10th Cir. 1998). In this case, all three of these criteria are instructive and support sovereign immunity.

To determine the sovereignty interests of states to conduct elections, this Court need only look to the Constitution. The Elections Clause, art. I, § 4, cl. 1, specifies that the "Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof." This provision was based on the "plain proposition" identified by the Framers that "*every government ought to contain in itself the means of its own preservation.*" The Federalist No. 59 (Alexander Hamilton) (emphasis in original). Leaving the manner of regulating state elections in the hands of the states made sense because allowing the federal government to regulate elections for states would be "an unwarrantable transposition of power, and [] a premeditated engine for the destruction of the State governments." *Id.*

The Supreme Court has likewise repeatedly recognized the sovereign interests of states conducting their own elections: "A State indisputably has a compelling interest in preserving the

integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). In denying a challenge to a state election practice, Justice Scalia relied in part on "the Constitution's express commitment of the task [of running elections] to the States." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461, 468 (1991). Similarly, this Court should do so here.

Plaintiffs' Complaint invades the sovereignty interests of the State of Texas by seeking an order "directing the precise way in which Texas should conduct voting." The Eleventh Circuit recently questioned whether that such broad-reaching relief could render *Ex parte Young* inapplicable to cases involving elections processes. *See Curling v. Worley*, 761 F. App'x 927, 934 (11th Cir. 2019) (per curiam). Plaintiffs here are not merely asking a federal court to closely scrutinize state laws whose very design infringes on the rights of voters. Rather, Plaintiffs seek to have this Court supervise the administrative details of a local election.

Plaintiffs' proposed overhaul of Texas's election procedures would be a judicial declaration that would "diminish, even extinguish," *Coeur d' Alene Tribe*, 521 U.S. at 282, the State's and nonparty counties' power to control:

- The period of early voting;
- How and whether voters, poll-workers, persons assisting voters, and any other person at a polling site wear a mask and requiring the State to pay for masks for persons who do not already have one;
- Determine whether counties can offer extended, temporary, or mobile early voting locations with flexible hours and days;
- Requirements 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;
- Opening additional polling places and determining the number of voting booths and poll workers at each polling place;
- The number of staff at polling places;
- Waiting times for voting;
- Poll worker recruiting activities;

- How many polling locations local elections officials can open or close;
- Whether and how to provide electronic voting and paper ballots;
- Determine voter identification requirements;
- Determine how poll workers should physically handle identification or documentation;
- Determine whether to apply the natural disaster exception to the pandemic, and allow voters to sign affidavits regarding the natural disaster exception at the polling place;
- Require elections officials to procure protective gear, including masks and gloves, in sufficient quantity to allow poll workers to change protective gear frequently;
- Dictate when poll workers can and should wash their hands;
- Free county officials from any strictures of Texas law when crafting elections procedures, provided the procedures comply with the directives of the Court; and,
- 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.

Dkt. No. 1 at Prayer. Plaintiffs also request that this Court's supervision over elections practices last until Texas can demonstrate that no coronavirus cases exist in the State or until a vaccine is provided to voters for free upon demand.

Without question, Plaintiffs' proposed relief directly attacks the state's general sovereign powers to regulate elections, as discussed above. *Bell Atl.-Pa.*, 271 F.3d at 514. Plaintiffs' proposed relief would also interfere with state funds by *specifically* requiring state payment for the relief sought. *Barton*, 293 F.3d at 949, 951.

In effect, Plaintiffs ask this Court to rewrite Texas's Election Code and then supervise Texas's election system until the eradication of COVID-19. *ANR Pipeline Co.*, 150 F.3d at 1194. If Plaintiffs' proposed rewrite of Texas's Election Code and invitation to perpetually monitor and direct Texas's elections does not implicate the special sovereignty interests of the State in a way violative of the Eleventh Amendment, it is difficult to conceive a situation where *Coeur d' Alene Tribe* would apply to *any* election case.

IV. Plaintiffs fail to state a claim upon which relief can be granted

A. Plaintiffs did not state a procedural or substantive due process claim

Plaintiffs do not have a right to vote by any means of their choosing. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Of course, Plaintiffs do not claim that their right to vote has been extinguished or diluted. What they are really arguing about is the process or method by which voters will cast in-person or mail-in ballots in upcoming elections while COVID-19 persists. Indeed, Plaintiffs' proposed remedies focus almost exclusively on procedural measures from drive-thru voting to using paper ballots instead of electronic voting machines. Dkt. No. 1 at 42-44.

First, Plaintiffs cannot state a claim under the Due Process Clause because the desire to vote using the procedures Plaintiffs propose is not "life, liberty, or property" under the Fourteenth Amendment. In *Johnson v. Hood*, "voters whose ballots were rejected" argued that they "had been deprived of due process of law" because the procedures had been "arbitrary." 430 F.2d 610, 611-12 (5th Cir. 1970) (per curiam). The Fifth Circuit rejected their claim because "even an improper denial of the right to vote for a candidate for a state office achieved by state action is not a denial of a right of property or liberty secured by the due process clause." *Id.* at 612 (quotation omitted); *cf. Johnson v. Bredesen*, 624 F.3d 742, 752 (6th Cir. 2010) ("[N]o authority recognizes the right to vote in federal elections as a privilege or immunity of United States citizenship."). If the right to vote at all is not "life, liberty, or property," as the Fifth Circuit held, then the desire to vote using Plaintiffs' proposed safety measures cannot be "life, liberty, or property" either.

Second, Texas's procedures for voting are well justified, not unconstitutional. Procedural due process claims require the court to balance the private interest at stake, the risk of an "erroneous deprivation of such interest through the procedures used," potential alternatives, and the government's interest involved, including the "fiscal and administrative burdens" that accompany Plaintiffs' requested relief. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Plaintiffs have not plausibly alleged that the State's procedures lead to an unacceptable risk of erroneous deprivations. They have not alleged anything about the fiscal and administrative burdens of various competing proposals.

To the extent Plaintiffs allege a substantive due process claim, their claim still fails. "[F]ederal courts will not intervene to . . . supervise the administrative details of a local election." *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). Courts reject substantive due process claims that would require becoming "engulfed in the morass of election details." *Id.* at 1316. Only in extraordinary circumstances not plausibly alleged here could a federal court entertain a request "to oversee the administrative details of a local election." *Pettengill v. Putnam Cty. R-1 Sch. Dist., Unionville, Mo.*, 472 F.2d 121, 122 (8th Cir. 1973); *see also Duncan v. Poythress*, 657 F.2d 691, 701 (5th Cir. Unit B 1981).

Both substantive and procedural due process claims require plaintiffs to allege some government action interferes with their rights. However, Plaintiffs have not identified offensive statutes or regulations, but only vaguely asserted that the existence of COVID-19 creates a risk to voting under laws in place long before COVID-19 became an issue. This omission is fatal to their due process claims. Plaintiffs complain there is a *risk* of voting in person, but "[t]he real problem here is COVID-19, which all but the craziest conspiracy theorists would concede is not the result of any act or failure to act by the Government." *Coalition for Good Governance*, 2020 WL 2509092, at *3 n.2.

B. Plaintiffs' equal protection claim also fails

Plaintiffs do not allege intentional discrimination in their suit. Rather, they assert that minority community are impacted more heavily by COVID-19 because they may have longer drives, wait times, or lines for in-person voting. However, even assuming Plaintiffs could show increased impact, disparate racial impacts, standing alone, do not violate the Constitution. See *Washington*, 426 U.S. at 242 ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."). Even if they did, Plaintiffs do not plausibly allege disparate impact on minority communities.

Instead, Plaintiffs assert that some voters will face larger crowds and longer lines, subjecting them to a greater risk of contracting COVID-19. Courts have routinely rejected lines and crowds as a significant harm to a constitutional right—particularly when there is no evidence of improper intent. For example, in *Common Cause Indiana v. Marion County Election Board*, the Southern District of Indiana categorized difficulties such as longer lines and wait times as "nonsevere, nonsubstantial, or slight burden on the general right to vote as a matter of law." 311 F. Supp. 3d 949, 966 (S.D. Ind. 2018), *vacated and remanded*, 925 F.3d 928 (7th Cir. 2019); *see also Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004).

Alleging that the longer lines (not a constitutional concern) should prod the State to do more (not a constitutional imperative) does not amount to a violation of the Equal Protection clause.

To the extent Plaintiffs invoke the *Anderson-Burdick* doctrine, their claim still fails. Those cases utilize a sliding scale balancing test that weighs the "character and magnitude" of the alleged burden against the government's interest in the challenged law. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). "If a State's election law imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

But the *Anderson/Burdick* analysis does not apply outside the context of specific state action. Plaintiffs cite no cases to the contrary. *See Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 190 n.8 (2008) (photo identification requirement); *Burdick*, 504 U.S. at 434 (statutory prohibition on write-in candidates); *Anderson*, 460 U.S. at 789 (early filing deadline). In essence, Plaintiffs urge this Court to make the state "do more."[7] But a government's willingness to exceed its statutory obligations does not provide a constitutional basis to require the government go further. *See Gwinnett Cty. NAACP v.*

[7] This is also true of Plaintiffs' tag-along First Amendment claim. Because the burden analysis on the free speech claim Plaintiffs' raise mirrors the burden analysis addressed here, Plaintiffs have failed to allege a claim of an unconstitutionally burdensome state action that impinges on their right to vote.

Gwinnett Cty. Bd. of Registration & Elections, 1:20-cv-912, 2020 WL 1031897, at *7 (N.D. Ga. Mar. 3, 2020). There is no constitutional imperative to provide the additional protections Plaintiffs seek.

Moreover, the Supreme Court has always analyzed "the magnitude of burdens . . . categorically and [has] not consider[ed] the peculiar circumstances of individual voters or candidates." *Crawford*, 553 U.S. at 206 (Scalia, J., concurring in the judgment). Here, Plaintiffs cannot establish that Texas's procedures impose any "categorical" burdens. In any event, even if the Court could focus on individual voters, Plaintiffs have not identified any individual voters facing severe burdens. Instead, they point to various conditions that vary from polling place to polling place. How widespread will the virus be? Where will polling places be located? Who will they be operated by? What systems will individuals use to vote? The answers to all of these questions, and more, will change from location to location. Plaintiffs cannot use *Anderson-Burdick* to complain that some combinations of conditions and policies in some unspecified locations will be problematic for some unspecific voters.

C. Plaintiffs' fail to state a Fifteenth Amendment claim

A Fifteenth Amendment claim requires the plaintiff to plausibly allege discriminatory intent or effect. But here, Plaintiffs have affirmatively alleged the opposite. Plaintiffs complain that Defendants acted "*despite* knowledge that the risks and harms posed by the coronavirus pandemic disproportionately affected communities of color." Dkt. No. 1 ¶ 204 (emphasis added). This allegation is not plausible for the reasons explained below, but even if it were, turning a blind eye to disparate impact is not unconstitutional discriminatory intent. Discriminatory intent requires action "because of, *not merely in spite of*, [the action's] adverse effects upon an identifiable group." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quotation omitted) (emphasis added).

In any event, Plaintiffs have not plausibly alleged discriminatory intent or effect by any Defendants under the framework established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Though they argue that the virus has a disparate impact, they

do not allege that any actions taken by Defendants do. *See, e.g.*, Dkt. No. 1 ¶ 47. Plaintiffs allege nothing about "[t]he historical background of the decision[s]" they challenge or "[t]he specific sequence of events leading up to the challenged decision[s]." *Arlington Heights*, 429 U.S. at 267. Plaintiffs never suggest there have been "procedural" or "[s]ubstantive departures" that might suggest discrimination. *Id.* Nor do they say anything about "[t]he legislative or administrative history." *Id.* at 268.

D. Plaintiffs' Section 2 claim also fails

"Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect." *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005). Rather, Section 2(b) "make[s] clear that an application of the results test requires an inquiry into the totality of the circumstances." *Chisom v. Roemer*, 501 U.S. 380, 394 (1991). This analysis turns on whether the challenged law violates Section 2(a) because it deprives minority voters of an equal opportunity to participate in the electoral process *and* to elect representatives of their choice.

To state a claim for vote denial under Section 2, (1) the challenged law has to "result in" the denial or abridgement of the right to vote; and, (2) the denial or abridgement of the right to vote must be "on account of race or color." In other words, the challenged law must have *caused* the denial or abridgement of the right to vote on account of race. *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 2020 WL 4185801, at *22 (11th Cir. 2020). Disparate impact is not enough. *Id.* (collecting cases). While Plaintiffs allege that there have been issues in other states, Dkt. No. 1 ¶¶ 11-12, Plaintiffs do not draw any lines between voting experiences in Texas and a higher incidence of COVID-19 amongst any group of voters, let alone any minority groups. What's more, the experiences of other states do not speak to the interplay between *Texas* voters and *Texas* practices. In sum, Plaintiffs failed to allege any facts that would support a vote denial claim under Section 2 of the Voting Rights Act.

CONCLUSION

The Secretary respectfully requests that the Court dismiss Plaintiffs' claims.

Date: August 10, 2020

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on August 10, 2020, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

EXHIBIT D

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

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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

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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

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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. <u>The NAACP Has Associational Standing</u>

<u>At Least One NAACP Member Has Standing:</u> 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

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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

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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

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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

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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,

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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.

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EXHIBIT E

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; AND RUTH HUGHS, TEXAS SECRETARY OF STATE,
Defendants.

Civil Action No. 5:20-cv-00830

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTIONS TO DISMISS

I. This Case Presents Nonjusticiable Political Questions

Defendants moved to dismiss on the ground that Plaintiffs' claims present political questions. *See* Dkt. No. 19 at 8–10; Dkt. No. 20 at 8–10. The most on-point case is *Coalition for Good Governance v. Raffensperger*, in which the court dismissed because "the plaintiffs' claims presented "a classic political question"—"whether the executive branch has done enough" to make in-person voting safe. No. 1:20-cv-1677, 2020 WL 2509092, at *3 (N.D. Ga. May 14, 2020). That is the essence of Plaintiffs' complaint here too. *See* Dkt. No. 1 ¶ 14 (demanding "immediate changes to in-person voting protocols to ensure that all voters . . . can do so safely").

Plaintiffs rely on *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2000), but its discussion of *Coalition for Good Governance* highlights why this case is not justiciable. In *Texas Democratic Party*, the Fifth Circuit distinguished *Coalition for Good Governance* as "different in kind" because "[t]hat challenge was directed at the specific procedures Georgia planned to use to conduct the election, such as whether to use electronic voting machines or paper ballots." 961 F.3d at 398. The Fifth Circuit

explained that such a suit necessarily "challenged the wisdom of Georgia's policy choices" but that the issue before the Fifth Circuit did not require "consider[ing] the prudence of Texas's plans for combating the Virus when holding elections." *Id.*

Here, Plaintiffs are suing about "specific procedures," including "whether to use electronic voting machines or paper ballots." *See* Dkt. No. 1 at 43. All of Plaintiffs' claims require the Court to "consider the prudence of Texas's plans for combating the Virus when holding the elections." Texas is already taking prudent steps,[1] that is not for a federal court to judge. This Court should therefore dismiss Plaintiffs' claims because they present political questions.

II. Plaintiffs Lack Standing

A. Plaintiffs Have Not Established Standing for Each Provision They Challenge

"It is now beyond cavil that plaintiffs must establish standing for each and every provision they challenge." *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) (per curiam). Instead of trying to meet this burden, Plaintiffs claim standing to challenge the "Pandemic Voting System" as a whole. *See* Dkt. No. 27 at 5–7. To be clear, there is no "Pandemic Voting System" under state law. Plaintiffs coined the term to refer to all "Texas election law and processes as applied to in-person voting during COVID-19." *Id.* at 1 n.2. Thus, Plaintiffs attempt to challenge all of Texas election law in contravention of the longstanding rule that "standing is not dispensed in gross." *In re Gee*, 941 F.3d at 160 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 (1996)).

"To ensure that standing is not dispensed in gross, the district court must analyze Plaintiffs' standing to challenge each provision of law at issue." *Id.* at 161–62. But Plaintiffs have not provided provision-specific allegations. Consider three examples:

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[1] *See, e.g.*, Gov. Greg Abbott, *Proclamation* (July 27, 2020), https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_07-27-2020.pdf; Tex. Sec'y of State, *Election Advisory No. 2020-14* (Apr. 6, 2020), https://www.sos.state.tx.us/elections/laws/advisory2020-14.shtml; Tex. Sec'y of State, *Health Protocols*, https://www.sos.state.tx.us/elections/forms/health-protocols-for-voters.pdf.

- Electronic Voting Machines vs. Paper Ballots: Plaintiffs allege that some, but not all, counties "require all voters to vote on electronic voting machines and to refuse to make hand-marked paper ballots available." Dkt. No. 1 ¶ 120. The Individual Plaintiffs do not allege that they live in such a county, *see id.* ¶¶ 24–25, nor do the Organizational Plaintiffs identify any members who live in such a county, *see id.* ¶¶ 19–23.[2]

- Curbside Voting: Plaintiffs complain that curbside voting is available to voters with disabilities but not other voters. *See id.* 1 ¶ 142. The Individual Plaintiffs do not allege that they will be unable to vote curbside, *see id.* ¶¶ 24–25, and the Organizational Plaintiffs do not identify any members who want to vote curbside but cannot, *see id.* ¶¶ 19–23. In fact, at least one Plaintiff voted curbside in the July 2020 election. *See* Dkt. No. 27-3 ¶ 10.

- Voter ID: Plaintiffs speculate that *some* "voters without identification [will have] to visit government offices" to obtain identification. Dkt No. 1 ¶ 116. But Plaintiffs never allege that *they* will. Having voted in past elections, they presumably have the proper identification. *See id.* ¶¶ 24–25. Plaintiffs have thus failed to establish "injury to themselves." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019) (holding "injury to others is irrelevant").

Plaintiffs bore the burden of establishing "standing to challenge each provision of law at issue." *In re Gee*, 941 F.3d at 161–62. They did not even try to do so.

B. The Individual Plaintiffs Lack Standing

The Individual Plaintiffs claim standing based on "the risk of infecting themselves" while voting. Dkt. No. 27 at 6. Such a speculative possibility cannot support standing. The Supreme Court has "repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotations and brackets omitted). This is a strict requirement. Even when a risk has materialized "in the past," and even when "general data" show the risk going forward, that is not enough. *Stringer v. Whitley*, 942 F.3d 715, 722 (5th Cir. 2019). There must be "Plaintiff-specific" allegations that the risk will materialize in the future. *Id.* Plaintiffs have not alleged that here.

[2] The Organizational Plaintiffs did not divert resources because of any particular law or policy. Instead, they tie they diversions to "Defendants' actions" or "the conduct alleged" generally. Dkt. No. 27 at 3; Dkt. No. 1 ¶ 20.

C. Mi Familia Vota and the NAACP Do Not Have Standing

The NAACP cannot have associational standing because it has not identified a member facing a certainly impending injury in fact. *See* Dkt. No. 19 at 3; Dkt. No. 20 at 3. Plaintiffs cite an unpublished opinion in which the court was "aware of no precedent holding that an association must set forth the name of a particular member in its complaint." *Hancock Cty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012). Defendants have already cited cases holding exactly that. *See, e.g.*, *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.) (dismissing because "the complaint did not identify any [injured] member of the group"). Plaintiffs suggest the Court should infer the existence of at least one injured member because "[t]he NAACP has more than 10,000 members," Dkt. No. 27 at 4, but the Supreme Court rejected standing based on "a statistical probability" when the plaintiff group had "700,000 members." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Plaintiffs also lack organizational standing. As Defendants explained in their motions to dismiss, "a diversion [of resources] can support standing only if 'the change in plans [is] in response to a reasonably certain injury imposed by the challenged law.'" Dkt. No. 20 at 4 (quoting *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018)). Plaintiffs attempt to distinguish *Zimmerman* on its facts, *see* Dkt. No. 27 at 4, but they do not address the cases applying the same rule in other contexts. *See* Dkt. No. 19 at 4; Dkt. No. 20 at 4.

Implicitly acknowledging the inadequacy of their complaint, Plaintiffs submitted declarations to address other standing issues. *See* Dkt. No. 27.1-.4. But declarations attached to a response brief cannot take the place of plausible factual allegations. "Where, as here, the movant mounts a 'facial attack' on jurisdiction based only on the allegations in the complaint, the court simply considers the sufficiency of the allegations in the complaint because they are presumed to be true." *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 533 (5th Cir. 2016) (quotation omitted); *see also In re Apple iPhone Antitrust Litig.*, No. 4:11-cv-6714, 2013 WL 4425720, at *6–7 (N.D. Cal. Aug. 15, 2013) (dismissing because the

court granted a motion to dismiss because "Plaintiffs' allegations" were "insufficient to establish Article III standing" and refusing to consider "declarations" except for "whether leave to amend should be granted").[3]

III. *Ex Parte Young* Does Not Apply

A. The Governor Does Not Enforce the Laws at Issue

Plaintiffs point out that Governor Abbott has authority to issue executive orders responsive to the current pandemic and suggest that such authority is sufficient to invoke *Ex parte Young*. Dkt. No. 27 at 21. The Fifth Circuit rejected that argument in *In re Abbott*, 956 F.3d 696 (5th Cir. 2020). "The power to promulgate law is not the power to enforce it," regardless of whether Plaintiffs complain that the Governor has issued an executive order they do not like or that he has not issued an executive order they would like. *Id.*

Plaintiffs argue that the "type of enforcement considered" in *In re Abbott*, "prosecution under an unlawful rule," "is not at issue here." Dkt. No. 27 at 15. Far from helping Plaintiffs, the fact that "[t]here is no analog to a threatened prosecution here" simply confirms that *Ex parte Young* does not apply. *Ex parte Young* "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation . . . ." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). For these reasons, Plaintiffs cannot bring their suit against the Governor.

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[3] Plaintiffs argue that the rule against third-party standing does not apply because they have associational and organizational standing. *See* Dkt. No. 27 at 6. Plaintiffs cite Fifth Circuit cases in which the rule against third-party standing was "neither brought to the attention of the court nor ruled upon" but "merely lurk[ed] in the record," meaning they do not "constitute precedents" on that issue. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). But when the Second Circuit squarely confronted the issue, it held that an associational plaintiff "does not have standing to assert the rights of its members" because "the rights [Section 1983] secures [are] personal to those purportedly injured." *League of Women Voters of Nassau Cty. v. Nassau Cty. Bd. of Sup'rs*, 737 F.2d 155, 160 (2d Cir. 1984).

B. Plaintiffs Cannot Sue the Secretary Either

Plaintiffs do not point to a single enforcement action that the Secretary is taking and that they want the Court to enjoin. Instead, they dispute the Secretary's understanding of her authority under state law. *Compare* Dkt. 27 at 11–12, *with* Dkt. 19 at 10–12. Even if Plaintiffs were right (they are not), that would not establish that the Secretary has "a demonstrated willingness to exercise" the power Plaintiffs claim she has. *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014); *see also City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (holding *Ex parte Young* did not apply because the plaintiffs had "not show[n] that [the state official was] likely to" bring an enforcement action).

Plaintiffs also "overlook[] the elemental fact that a state official cannot be enjoined to act in any way that is beyond his authority to act in the first place." *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (en banc). The Secretary does not have the authority to implement Plaintiffs' changes.

* * *

"Sovereign immunity bars constitutional claims 'if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign,' including 'cases where the [defendant] sued could satisfy the court decree only by acting in an official capacity.'" Dkt. No. 20 at 12 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949), *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971)). Plaintiffs do not respond to either *Larson* or *Zapata*. They argue that "state officials may be enjoined to 'conform their future conduct' to federal law." Dkt. No. 27 at 12. True, a negative injunction can prohibit future conduct inconsistent with federal law, but that is not what Plaintiffs seek. They want Defendants to affirmatively exercise their governmental powers. "Any such relief would [raise] serious federalism concerns . . . ." *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1212 (11th Cir. 2020). Federal courts cannot compel state officials to exercise official powers committed to their discretion.

IV. Plaintiffs Failed to State a Claim

A. Defendants Are Not Violating the Due Process Clause

Under Fifth Circuit precedent, the right to vote is not a liberty or property interest that implicates the Due Process Clause. Dkt. No. 19 at 16; Dkt. No. 20 at 16. Plaintiffs apparently find that "puzzling[]" because "courts have [long] applied the *Anderson-Burdick* framework." Dkt. No. 27 at 19. The answer is simple: *Anderson-Burdick* is not a due process doctrine. *See Anderson v. Celebrezze*, 460 U.S. 780, 787 n.7 (1983) (First Amendment and Equal Protection Clause).

Even if Plaintiffs' decisions about whether to vote implicated liberty or property interests, any deprivation is attributable to Defendants, rather than Plaintiffs' own choices and the pandemic. Courts "cannot hold private citizens' decisions to stay home for their own safety against the State." *Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020) (per curiam).

Plaintiffs also rely on substantive due process cases like *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. Unit B Sept. 28, 1981). Dkt. No. 27 at 18 n.9. Those cases do not apply here and are not good law in any event. *Duncan* considered a narrow question: whether substantive due process is violated "if state officials refuse to call an election as required by state law." *Id.* at 696. The court issued an equally narrow holding: State officials may not "disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment." *Id.* at 704. The *Duncan* plaintiffs were "not asking the federal courts to . . . enter into the details of the administration of an election." *Id.* at 703 (quotation and parentheses omitted). "Their request [wa]s far simpler and more basic: they ask for the election itself, as required by state law." *Id.*

In this case, Plaintiffs do not allege that Defendants are prohibiting anyone from voting, much less cancelling an entire election. They complain about the details for administering the election. To be sure, administrative details matter, but they "do not rise to the level of constitutional deprivation." *Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985).

In any event, *Duncan* is not good law. Subsequent Supreme Court precedent precludes applying *Duncan* here. Plaintiffs do not allege that the behavior they challenge "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). Also, Plaintiffs' claimed right—the right to have elections administered according to their proposals—is not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Moreover, Plaintiffs contend they have textually explicit sources for their voting-rights claims: the First Amendment and the Equal Protection Clause. Thus, they cannot rely on the "generalized notion of 'substantive due process.'" *Graham v. Connor*, 490 U.S. 386, 395 (1989) (rejecting a substantive due process claim "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct").

B. Plaintiffs' Equal Protection Claim Fails

Plaintiffs divide their Equal Protection Claim into three theories. *See* Dkt. No. 27 at 20. None can succeed. First, Plaintiffs argue there is "differential treatment of voters based on where they live." *Id.* At best, discrimination on the basis of geography would trigger rational-basis review. *See, e.g.*, *Phillips v. Snyder*, 836 F.3d 707, 719 (6th Cir. 2016); *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 363 (D.C. Cir. 2007). But Plaintiffs do not argue that they can succeed under that level of scrutiny, with good reason. Allowing local officials to tailor policies to their local circumstances makes sense. After all, conditions vary across the State.

Plaintiffs rely on *Bush v. Gore*, 531 U.S. 98 (2000), but that highly unusual case "[wa]s limited to the present circumstances." *Id.* at 109. The Court was concerned only with "a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards." *Id.* It distinguished situations in which "local entities" have "develop[ed] different systems for implementing elections." *Id.* Here, Plaintiffs complain, not about a state court

ordering a recount, but about "local election authorities" "implement[ing]" procedures differently. Dkt. No. 27 at 20.

Second, Plaintiffs argue there is "differential treatment between voters who face severe health risks during the pandemic and those who do not." Dkt. No. 27 at 20. But it is the virus, not Defendants, that treats at-risk voters differently. In fact, State and local officials are doing what they can to minimize the risks to all Texans, including those especially at risk. "The real problem here is COVID-19, which all but the craziest conspiracy theorists would concede is not the result of any act or failure to act by the Government." *Coalition for Good Governance*, 2020 WL 2509092, at *3 n.2.

Third, Plaintiffs argue there is "differential treatment of voters based on race." Dkt. No. 27 at 20. "Under extant precedent purposeful discrimination requires more than intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effects upon an identifiable group." *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009) (quotations omitted). Here, Plaintiffs agree that Defendants acted "*despite*," not because of, any disparate impact. Dkt. 19 at 19 (quoting Dkt. No. 1 ¶ 204); Dkt. 20 at 19 (same). Plaintiffs offered no response to this argument. It is sufficient to support dismissal of Plaintiffs' intentional discrimination claims under both the Fourteenth and Fifteenth Amendments.

C. Plaintiffs' Claims Fail under *Anderson-Burdick*

To the extent Plaintiffs' claims are subject to the *Anderson-Burdick* framework, they have failed to state a claim. They improperly seek relief against an entire election system, rather than individual laws or policies. "A remedy directed at the diffuse cumulative effects of [Texas's] election regime would invite, essentially, a rewrite of the state's election laws. That would be an unwarranted intervention by a federal court into an area reserved to the state legislature." *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 951 (W.D. Wis. 2016), *aff'd in part, vacated in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). The *Anderson-Burdick* test cannot be applied to Texas's entire

election system. That would turn federal courts into the primary regulators of elections when the Constitution gave that responsibility to state legislatures. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing U.S. Const. art. I, § 4).

D. Plaintiffs' VRA Claim Cannot Succeed

Plaintiffs argue their Section 2 claim is about "an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Dkt. No. 27 at 23 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). But Plaintiffs have not alleged a causal connection between which representatives will be elected and the challenged practices as a whole, much less any one of them. "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 51 n.17.

CONCLUSION

The Defendants respectfully request that the Court dismiss Plaintiffs' claims.

Date: September 2, 2020

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on September 2, 2020, and that all counsel of record were served by CM/ECF.

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