No. 20-50793

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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I. INTRODUCTION

Amidst a pandemic involving a highly contagious virus and in which federal and Texas public health officials recommend wearing a mask to reduce transmission of the virus, Governor Abbott specifically exempted polling places from his mask-wearing mandate. Thus, Texas citizens who do not qualify to vote by mail (the vast majority) must be willing to congregate with people who are not wearing masks in order to cast their ballots. These voters also must be willing to touch surfaces that have been touched by hundreds of others (and that have not been disinfected), and to wait for long periods of time in closed physical spaces with crowds of other voters where social distancing is not required and may not be possible. These are the conditions Defendants force on Texas's in-person voters even now, when the State has 764,642 confirmed cases, including 2,998 newly reported on September 26, 2020 alone, reflecting a 31% increase in new daily cases over the past fourteen days.[1]

[1] *See Texas Covid Map and Case Count*, N.Y. Times, https://www.nytimes.com/interactive/2020/us/texas-coronavirus-cases.html (last visited Sept. 27, 2020).

These laws and practices place a burden on the right to vote, which is subject to judicial review to determine whether that burden is unlawful—just as a court would be able to review the burden from a law that placed all polling places in a flood-zone during a hurricane. If Defendants had their way, federal courts would be powerless to resolve the constitutional questions presented by Defendants' actions when taken during unique or unusual health and safety conditions. Defendants' position is meritless.

Plaintiffs' challenge to the Governor's Executive Order excluding polling sites from the mask mandate, to take just one example, presents three concrete legal questions under the *Anderson-Burdick* framework, each readily resolvable by the courts. First, does the rule create a burden on the right to vote under the *Anderson-Burdick* framework? Second, is the burden trivial or substantial? Third, if the burden is substantial, has the State advanced sufficient justifications for it?

Courts are capable of deciding these questions (and those relating to claims of racial discrimination), which do not become non-justiciable simply because they implicate the administration of elections or require review of election laws and practices. Defendants' argument to the

contrary would transform the "narrow exception" of the political question doctrine into a loophole that swallows legitimate court review. The district court erred in adopting that argument, and its judgment should be reversed.

Defendants' arguments regarding standing and sovereign immunity fare no better. Plaintiffs identified the specific laws they are challenging, and explained how each law individually causes them harm by burdening the right to vote. The alleged burdens are both caused and redressable by the Defendants, who have a sufficient connection to enforcement of the challenged election laws to be named in this lawsuit and therefore are not entitled to Eleventh Amendment immunity.

II. PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE JUSTICIABLE AND REQUIRE COURT INTERVENTION

A. A Voting Rights Claim Is Not a Political Question Merely Because It Arises in the Context of a Pandemic.

Defendants argue that the pandemic renders this case non-justiciable, but they fail to address this Court's holding in *Texas Democratic Party v. Abbott* (*Tex. Dem. Party II*) that, in an as-applied challenge like this one, "the 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." *See* No. 20-50407, 2020 WL 5422917, at *7-8 (5th Cir. Sept. 10, 2020) (holding the political question doctrine "does not bar our review of the plaintiffs' as-applied challenge" to Texas's vote-by-mail statute). Nor do they address the holding in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), that federal courts can (and must) determine the constitutionality of statutes without rendering judgment as to underlying policy decisions. *See Zivotofsky*, 566 U.S. at 197 ("[T]here is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute.").[2]

Here, as in *Texas Democratic Party II*, "the standards [of Plaintiffs' legal claims] do not yield to the pandemic." 2020 WL 5422917, at *7. Those standards are set forth in Plaintiffs' opening

[2] Relying on *Center for Biological Diversity v. EPA*, Defendants wrongly argue that Plaintiffs waived their argument that the first *Baker* factor is inapplicable because this case involves a state agency rather than a coordinate branch of federal government. *See* Defs.' Br. 14 n.9. *Center for Biological Diversity*, however, discussed forfeiture of an issue raised for the first time in a reply brief, not an opening brief. *See* 937 F.3d 533, 542 (5th Cir. 2019) ("Petitioners forfeited their informational-injury argument by failing to include it in their opening brief."). That is not the case here; Defendants had an opportunity to respond.

brief. *See* Pls.' Br. 36-38. The *Anderson-Burdick* framework governs three of Plaintiffs' claims, and it simply requires the district court to determine whether the challenged election laws impose a burden on the right to vote (*e.g.*, requiring voters to expose themselves to a known hazard without basic safety precautions), whether that burden is trivial or substantial, and whether that burden is justified by a legitimate state interest. *See*, *e.g.*, *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996). Plaintiffs' claims alleging unlawful discrimination are also governed by known standards. *See* Pls.' Br. 37-38.

Rather than explain why *Texas Democratic Party II* does not control here, Defendants rely on the Supreme Court's partisan gerrymandering decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), and the Eleventh Circuit's decision concerning ballot-ordering statutes, *Jacobson v. Fla. Secretary of State*, No. 19-14552, 2020 WL 5289377 (11th Cir. Sept. 3, 2020). As Plaintiffs explained in their opening brief (in arguments Defendants ignore), the particular and unique questions raised by partisan gerrymandering claims are not at issue here. Pls.' Br. 40-41. Defendants fail to recognize that this Court recently explained that both *Rucho* and *Jacobson* are of "no help" in

cases like this one which allege a law "make[s] it more difficult for individuals to vote." *Texas Democratic Party v. Abbott* (*Tex. Dem. Party I*), 961 F.3d 389, 398 & n.15 (5th Cir. 2020).

Indeed, *Rucho* and *Jacobson* are fundamentally different in kind: *Rucho* involves vote dilution caused by considerations that are not prohibited *per se* (partisan considerations, unlike racial considerations); and *Jacobson* involved allegations that ballot ordering may give some candidates an unfair advantage. Neither case involved allegations of laws and practices making it harder or dangerous to vote. Further, *Rucho* raised questions about the balance of partisan power in districting decisions that this case does not. *See Rucho*, 139 S. Ct. at 2507, 2549.

Decades of jurisprudence elaborating the *Anderson-Burdick* framework and the framework for discrimination claims also differentiate this case from the partisan gerrymandering context. *Rucho* served as the capstone of unsuccessful efforts by the federal courts to identify a manageable standard to determine when partisan gerrymandering crosses the line, *see* 139 S. Ct. at 2497-98. By contrast,

the Supreme Court has long recognized the standards used to assess the claims this case presents. *See* Pls.' Br. 36-38.

Defendants argue that *Rucho* precludes adjudication of Plaintiffs' claims because they ask a court to decide whether a particular burden (here, a heightened risk to voter health) is "too much."[3] If Defendants were right, *no* claim alleging an undue burden under *Anderson-Burdick* would be justiciable because voting *always* involves a burden, and courts must *always* decide whether the burden in question is too much. Contrary to Defendants' position, *Anderson-Burdick* guides courts on how to balance and decide the issues. This case is no different. *See*, *e.g.*, *Harding v. Edwards*, No. 20-495-SDD-RLB, 2020 WL 5543769 (M.D. La. Sept. 16, 2020) (under *Anderson-Burdick*, concluding that restrictions on mail-in voting impose a burden on the right to vote during the pandemic by exposing voters to the risk of contracting the

[3] Defendants also argue, vaguely and without elaboration, that Plaintiffs "do not bring standard anti-discrimination claims that could be assessed under" existing standards, such as the *Gingles* factors used to analyze Section 2 claims under the Voting Rights Act. Defs.' Br. 18-19. This assertion is baseless for the reasons set out in Plaintiffs' prior briefing.

virus, and concluding the state's asserted interests did not justify the burden).[4]

While adjudicating voting burden cases may not always be easy, courts have the authority and competence to do so. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (courts must "make the hard judgment that our adversary system demands" (internal quotation marks omitted)). Indeed, this Court has decided multiple cases under the *Anderson-Burdick* framework. *See*, *e.g.*, *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387-88, 393 (5th Cir. 2013); *Tex. Indep. Party*, 84 F.3d at 182-87; *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 896 (5th Cir. 2012).

Avoiding Fifth Circuit and Supreme Court precedent, Defendants instead rely on *Coalition for Good Governance v. Raffensperger*, No. 1:20-cv-1677, 2020 WL 2509092 (N.D. Ga. May 14, 2020), whose reasoning has been repudiated by subsequent courts, including this one in *Texas Democratic Party I*. *See* 961 F.3d at 398-99. *Coalition* was

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[4] Further, the premise of Defendants' argument that it is "impossibl[e]" to "eliminat[e] all risk [from voting] during a pandemic," Defs.' Br. at 9, is false. Other states have enabled all voters to submit votes by mail to provide citizens the option of avoiding all health risk associated with congregating at in-person voting sites. Texas has eschewed that option.

wrongly decided for the reasons set forth above, and has been rejected by other courts in cases Defendants do not address. *See* Pls.' Br. 42; *see also Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 5591590, at *23 (D.S.C. Sept. 18, 2020) (in as-applied challenge based on the pandemic, rejecting *Coalition* as well as the district court's decision here), *appeal filed* No. 20-2022 (4th Cir.), *rehearing en banc granted* (Dkt. 37, Sept. 24, 2020).

Further, that a challenge to election laws and practices may implicate the choices made by political decisionmakers operating within a political environment does not convert the challenge into a political question. Indeed, the *Anderson-Burdick* framework specifically obliges courts to consider the State's policy justification underlying a challenged law. *Crawford*, 553 U.S. at 190. Similarly, claims under Section 2 of the Voting Rights Act are analyzed in part by considering "whether the policy underlying" the challenged voting practice or procedure is "tenuous." *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986); *see also Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (evaluating Texas's voter ID law by considering both the burden the law

imposed on voters and the State's stated policy rationale of preventing voter fraud).

B. Defendants Mischaracterize Plaintiffs' Claims.

Defendants echo the district court's inaccurate statement that Plaintiffs "do not challenge the constitutionality of any specific Election Code provision." Defs.' Br. 10 (quoting ROA.876). In fact, Plaintiffs identified the specific provisions of Texas's Election Code they challenge, as well as an Executive Order issued by Defendant Abbott, in their Complaint, *see* ROA.39 ¶ 102, ROA.40-ROA.50 ¶¶ 108-66, their opposition to Defendants' motion to dismiss, *see* ROA.251-ROA.252 & n.2, and their opening brief on appeal, *see* Pls.' Br. 8-9. Defendants' professed ignorance deserves no credit, nor does their suggestion that Plaintiffs' use of the words "include" or "including" is somehow confusing. *See* Defs.' Br. 11. Similarly, Defendants' suggestion that Plaintiffs' use of the shorthand "Pandemic Voting System" or "Challenged Election Laws" somehow renders the complaint a non-justiciable challenge to "every Texas law" (Defs.' Br. 11) is frivolous. Plaintiffs specifically defined both of those terms in their briefing by reference to the specific laws at issue. *See* ROA.251-ROA.252 & n.2

(defining "Pandemic Voting System"); Pls.' Br. 8-9 (defining "Challenged Election Laws").[5]

Defendants also misconstrue Plaintiffs' claims, suggesting erroneously that Plaintiffs are only challenging the lawfulness of the practices collectively. Instead, Plaintiffs' Complaint alleges that the election laws and practices "*individually* and cumulatively" violate Plaintiffs' rights. ROA.50 ¶ 165 (emphasis added); *see also* Pls.' Br. 46 ("Each of the in-person voting policies challenged in this case *independently* and collectively burdens the NAACP members' right to vote." (emphasis added)).

Defendants suggest that challenging multiple election laws and practices in a single case is "unusual." Defs.' Br. 10. Of course, "unusual" is not "non-justiciable," but regardless, voting rights cases commonly challenge multiple provisions in a single lawsuit. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (challenging multiple provisions of voting bill including

[5] Plaintiffs' briefing in the District Court referenced all the election laws challenged in the Complaint, while Plaintiffs' opening brief on appeal highlighted a subset of those challenged laws, without conceding any claims.

elimination of same-day voter registration; elimination of out of precinct voting; reduction of early-voting days; increase in at-large observers at polls; elimination of county discretion to extend poll hours; and implementation of voter identification requirements). By Defendants' logic, issues that are justiciable when challenged in separate lawsuits inexplicably become non-justiciable when aggregated into a single suit, divesting the judiciary of subject-matter jurisdiction.[6] This is not the law.

Likewise, Defendants' claim that Plaintiffs "do not challenge alleged burdens imposed by Texas law," Defs.' Br. 11, ignores the explicit basis for this lawsuit. *See, e.g.*, ROA.17 ¶ 4 (Texas election policies "will create inordinate burdens on the right to vote"), ROA.18 ¶ 6 ("[T]hese election practices will impose an unconstitutional burden on the right to vote."); ROA.19 ¶ 10 ("Defendants' actions . . . unlawfully burden Texans' right to vote."); ROA.38 ¶ 92 ("Defendants' actions will place a severe burden on voters and county election officials.").

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[6] As Defendants note in their brief, another case currently pending challenges one of the laws at issue in this case without creating a political question. *See* Defs.' Br. 21 & n.10 (citing *Tex. Democratic Party v. Hughs*, No. 20-50683 (5th Cir.)).

C. Plaintiffs Challenge Burdens Caused by Defendants' Actions During the Pandemic, Not the Pandemic Itself.

Defendants argue that Plaintiffs' case cannot proceed because the harm to voters does not result from their election laws and practices but from the "outside force" of the coronavirus. This fundamentally misunderstands the concept of an as-applied challenge, which by its nature must be considered in context. Consider *Veasey*, in which Plaintiffs argued that Texas's voter ID law was unconstitutional as applied because of the onerous and unequal obstacles Black and Latino voters faced in obtaining the requisite identification. 830 F.3d 216. In that case, it was Texas's law that created a burden for voters (the identification requirement), but it was outside considerations (the processes for obtaining compliant identification and the resulting disproportionate impact of the law) that defined the *magnitude* of that burden.[7]

[7] Indeed, an "effects" claim under Section 2 of the Voting Rights Act specifically contemplates the role of "outside forces": a court reviewing a Section 2 claim must consider the disparate impact of a voting practice or procedure as it "interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both." *Veasey*, 830 F.3d at 245.

Similarly, here, the Challenged Election Laws are unlawful because the burdens they impose on voters are unjustifiably severe given the realities of the pandemic. If Defendants' position were adopted, it would mean they could not be sued for placing a polling site adjacent to a toxic waste spill if the state itself did not cause the spill. But that is not the law. As Plaintiffs demonstrated, courts can and do order state actors to implement appropriate relief in the wake of a natural disaster. *See* Pls.' Br. 27-28; *see also, e.g.*, *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (ordering Secretary of State to extend voter registration deadline following hurricane). The one case upon which Defendants rely, *Harris v. McRae*, addresses neither voting nor the political question doctrine, but instead addresses (*on the merits*) the inapposite issue of whether the government is required to provide financial support to enable abortion access to indigent individuals. 448 U.S. 297, 316 (1980).

Plaintiffs are not alleging that Texas has not done enough, as a general matter, to confront the pandemic. Rather, they allege that the Challenged Election Laws, as enforced in the context of a pandemic, impermissibly burden the right to vote by requiring Texans to accept an

unreasonable and preventable risk to their health and safety in order to vote. It is within the province of the courts to decide the issue.

III. PLAINTIFFS EACH HAVE STANDING

Plaintiffs have standing because they have specified exactly which provisions of Texas law they challenge, Pls.' Br. 8-9, and have alleged that each of those provisions injures them as voters and voter-education organizations, *see* ROA.20-ROA.24. So long as at least one Plaintiff has standing for each claim, the merits of all claims will need to be considered, contrary to Defendants' suggestion that pruning out plaintiffs would somehow "narrow or streamline this expedited case." Defs.' Br. 32 n.12; *see also Texas v. United States*, 945 F.3d 355, 377-78 (5th Cir. 2019).

A. The NAACP and MFV Have Organizational Standing.

Like the plaintiff in *OCA-Greater Houston v. Texas*, the Texas State Conference of the NAACP ("NAACP") and Mi Familia Vota ("MFV") have organizational standing because their "primary mission is voter outreach and civic education, particularly 'getting out the vote' among [their] members." 867 F.3d 604, 610 (5th Cir. 2017); *see* ROA.20-ROA.22. Further, their "claimed injury-in-fact" is "the 'additional time and effort spent explaining the Texas provisions at issue'" to voters

"because 'addressing the challenged provisions frustrates and complicates [their] routine community outreach activities.'" *OCA*, 867 F.3d at 610; *see* ROA.20-ROA.22. Because there is no distinction between the facts here and those in *OCA*, *OCA* controls. Defendants' arguments to the contrary fail for several reasons.

First, Defendants assert Plaintiffs have no cognizable interest in their missions of voter education and participation, but this Circuit and others have repeatedly held otherwise. *See OCA*, 867 F.3d at 612 (organizational standing existed because "the Texas statutes at issue 'perceptibly impaired' OCA's ability to 'get out the vote' among its members" by consuming extra time and resources); *Scott v. Schedler*, 771 F.3d 831, 836-39 (5th Cir. 2014) (NAACP had standing when it spent more time on voter registration drives due to state's conduct); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (citing several circuits). Ignoring this Circuit's law, Defendants cite two non-binding and irrelevant cases that involved no diversion of additional resources "beyond those normally expended" for "ordinary program costs." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434

(D.C. Cir. 1995); *see also Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014) (no diversion of resources).

Second, Defendants argue that NAACP and MFV somehow "bootstrap their standing to injuries supposedly suffered by third parties." Defs.' Br. 30. To the contrary, Plaintiffs allege injury to themselves, as explained above.[8] That these organizations' missions (and their lawsuit) might also benefit others is irrelevant to their standing. *See OCA*, 867 F.3d at 612 (organization's diversion of resources "toward mitigating [the challenged provision's] real-world impact on OCA's members and the public" generated standing); *cf. Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("Art. III judicial power exists . . . even though the court's judgment may benefit others collaterally."). Defendants' "bootstrapping" concept relies on a case that rejected standing "where the only resources 'lost' are the legal costs of the particular advocacy lawsuit," which is irrelevant because Plaintiffs do not allege injury from the costs of this suit. *Ass'n for Retarded*

[8] Plaintiffs primarily allege injury by diversion of resources, not lobbying as Defendants suggest, but regardless *OCA* did not say lobbying expenses are not cognizable injuries. *See* 867 F.3d at 612.

Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs., 19 F.3d 241, 244 (5th Cir. 1994).

Third, Defendants are wrong that the diversion of resources here was self-inflicted. The NAACP and MFV have gone "out of [their] way to counteract the effect of Texas's allegedly unlawful voter" practices, "[f]or instance" when they "undertook to educate voters" (or otherwise worked to ameliorate in-person voting danger), which "consumed [their] time and resources in a way they would not have been spent absent the Texas law[s]." *OCA*, 867 F.3d at 612. These resources are not aimed at preventing "hypothetical future harm that is not certainly impending" but rather at mitigating in-person voting burdens (*e.g.*, inability to vote curbside due to fear of COVID) that Texas voters will certainly face in the next six weeks. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (rejecting standing via expenditures to avoid risk of government surveillance that was not certainly impending). Unlike *Clapper*, where the feared surveillance might never happen, the election here is unquestionably impending and will be conducted under Defendants' challenged election laws and practices unless a court orders otherwise.

Defendants attempt to argue that *OCA* is not binding precedent because it did not consider a separate purported requirement that organizational plaintiffs must allege an underlying harm separate from diverted resources. But the case Defendants cite explains an organization is injured "when it suffer[s] 'both a diversion of its resources and a frustration of its mission.'" *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). *OCA* found organizational standing for the same reason. 867 F.3d at 610 (diversion of plaintiff's resources "addressing the challenged provisions *frustrates* . . . its routine community outreach activities," *i.e.*, its "*mission*" (emphases added)); *see also* ROA.21-ROA.22 (alleging frustration of mission). The only other case Defendants cite for this argument is *Zimmerman v. City of Austin*, which did not involve or discuss organizational standing. 881 F.3d 378, 389-90 (5th Cir. 2018) (rejecting standing for individual unaffected by the challenged law).

B. The NAACP Has Associational Standing.

The NAACP also has standing because at least one of its members does. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir.

2006); *see also* ROA.285 (declaration of NAACP president regarding concerns by members registered to vote in Texas about voting in person); ROA.289-ROA.90 (letter from NAACP's Missouri City, Texas branch discussing members' voting burdens there).[9]

Defendants' arguments otherwise all boil down to the inaccurate assertion that the NAACP fails to identify any members who would have standing. As explained further in Section III.C, *infra*, all NAACP members registered in Texas who intend to vote in-person are burdened by Defendants' challenged election laws and practices. Additionally, the NAACP produced a letter from its Missouri City branch identifying burdens on members there. ROA.289-ROA.90.

The NAACP does not rely on "statistical probability" to establish standing, and it need not "name names." *Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 197-98 (5th Cir. 2012) (finding

[9] Defendants are simply incorrect that Plaintiffs cannot rely on facts outside of the Complaint to demonstrate standing. *See Deutsch v. Annis Enters., Inc.*, 882 F.3d 169, 173 n.1 (5th Cir. 2018); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.,* 73 F.3d 546, 557 (5th Cir. 1996) ("[W]e have held that affidavits similar to those submitted by the Sierra Club were sufficient to satisfy the 'injury in fact' requirement . . . ."); *Warth*, 422 U.S. at 501 (standing may be supported by affidavit).

associational standing simply because "the NAACP branch pleaded that its members included [affected] voters"). None of the cases cited by the Defendants rejected associational standing because Plaintiffs neglected to name affected members; in these cases, the courts rejected associational standing because of a lack of allegations or evidence that members with standing existed at all. *See* Defs.' Br. 26-27. Therefore, *Hancock*'s holding, and associational standing here, creates no circuit split.

C. Each Challenged Provision Will Injure Plaintiffs.

Plaintiffs challenge multiple policies that affect *all* Texans voting in-person, including Torres and the NAACP's voter members.[10] *See* Pls.' Br. 8-9 (listing challenged laws).

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[10] Defendants incorrectly argue that because many Texans are injured by Defendants' challenged election laws and practices, their injuries are uncognizable generalized grievances. "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016) (citing mass torts where injuries are "widely shared" but "each individual suffers a particularized harm"); *see also Hassan v. City of New York*, 804 F.3d 277, 291 (3d Cir. 2015) ("[T]o deny standing to persons who are in fact injured, simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." (citation omitted)).

First, Defendants ignore Plaintiffs' challenge to the Governor's exclusion of polling places from his mask mandate in their arguments against Plaintiffs' standing. *See*, *e.g.*, ROA.289 (Missouri City NAACP members reporting insufficient "mask wearing protocols" at New Territory polling place). This act unquestionably burdens every in-person Texas voter, including Torres and the NAACP's members in Missouri City and throughout the State.

Second, Defendants' enforcement of Texas Election Code § 64.009 burdens Plaintiffs, including Torres and many of the NAACP's voter members, because it forces them all to unnecessarily stand in lines where risk of COVID transmission is highest instead of permitting them to vote curbside.[11]

Third, contrary to Defendants' assertion, the NAACP identifies members who live in a county requiring all voters to use electronic

[11] Defendants' argument that Torres might be able to vote curbside is specious. Defendants have taken the position that Texas Election Code § 64.009 does not allow curbside voting based on fear of COVID, and Torres is physically capable of entering polling places. Similarly, no realistic analysis could conclude that not a single NAACP member is capable of physically entering a polling place; the NAACP could readily identify such a person if the Court's standing conclusion hinged on this question, but the law imposes no such requirement.

voting machines. Its Missouri City members are in Fort Bend County, which is part of the Countywide Polling Place Program that prohibits the use of paper ballots.[12] *See* ROA.43 (citing Tex. Elec. Code Ann. § 43.007(d)). Defendants' refusal to permit paper ballots or require any cleaning standards for repeatedly touched electronic machines burdens voting by unduly increasing the risk of COVID transmission in such counties. ROA.43-ROA.46.

Fourth, HB 1888's limit on in-person mobile voting sites' hours applies to every county and thus burdens Torres and the NAACP's Texas members by making it more difficult for counties to spread voters out among polling places to reduce COVID risk.

Each challenged law and practice has also burdened the NAACP and MFV by forcing them to expend additional resources in response. *See OCA*, 867 F.3d at 610. And the organizations allege (and Defendants do not contest) that these laws and practices will continue to cause them to divert additional resources through the November election. ROA.21-ROA.22.

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[12] https://www.sos.state.tx.us/elections/laws/countywide-polling-place-program.shtml (last visited Sept. 28, 2020).

Despite Defendants' assertions to the contrary, Plaintiffs do not ask this court to "dispense[] [standing] in gross." *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) (per curiam) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Plaintiffs do not argue that the Challenged Election Laws only become unlawful when viewed cumulatively. Plaintiffs allege *each* challenged law independently creates an unconstitutional burden on their right to vote and, accordingly, seek relief that will address *each* law.

The cases Defendants cite are not relevant here. In *Gee*, abortion providers challenged Louisiana's system of abortion regulation, including provisions that do not do anything (*e.g.*, the statute's title) and provisions that could not or did not injure plaintiffs. *Id.* at 162-63. The Fifth Circuit rejected the providers' argument that "the provisions taken as a whole were unconstitutional, even if the individual provisions were not." *Id.* at 156. In *DaimlerChrysler Corp. v. Cuno*, the Supreme Court held that injury related to plaintiffs' municipal taxes "did not entitle them to seek a remedy as to the state taxes." 547 U.S. 332, 349 (2006). And in *Lewis v. Casey*, the Supreme Court reversed a post-trial order granting relief to twenty-two prisoners, because the

district court found actual injury on the part of only one plaintiff, but granted system-wide relief unrelated to that prisoner or his injury. 518 U.S. at 357-58. Notably, however, the Supreme Court explained that "[t]he general allegations in the complaint . . . may well have sufficed to claim injury by named plaintiffs," but that point was no longer relevant as the case had progressed "beyond the pleading stage." *Id.* at 357.

Here Plaintiffs have adequately pled standing as to each claim. Therefore, Defendants are wrong to suggest that this case is one where "Plaintiffs challenge[] legal provisions that do not injure them now and could not ever injure them." *In re Gee*, 941 F.3d at 156.

D. Plaintiffs' Injuries Are Not Speculative.

Defendants mischaracterize the alleged injury as COVID infection itself, whereas the injury in fact is the *burden on voting* due to the unnecessary *risk* of COVID infection caused by Defendants' challenged laws and practices. That burden is not speculative because Torres and the NAACP's members will certainly face *some* extra burden (at least a "trifle," *OCA*, 867 F.3d at 612) on their right to vote in the impending election due to each of Defendants' challenged laws and practices. *See People First of Ala. v. Merrill*, No. 2:20-CV-00619-AKK, 2020 WL

3207824, at *7 (N.D. Ala. June 15, 2020) (rejecting similar speculativeness argument). Further, Defendants' speculativeness argument does not address the NAACP and MFV's diversion of resources, which has already occurred and will continue through the election. *See* ROA.21-ROA.22.

IV. DEFENDANTS ARE NOT IMMUNE FROM SUIT

Defendants concede this action cannot be dismissed solely on immunity grounds because the Voting Rights Act abrogates sovereign immunity for claims brought thereunder (Defs.' Br. 38 n.14). *See OCA*, 867 F.3d at 614; *accord Fusilier v. Landry*, 963 F.3d 447, 455 (5th Cir. 2020).

With respect to Plaintiffs' remaining causes of action, Defendants contend the *Young*[13] exception does not apply to Plaintiffs' suit against them because (1) "Defendants do not enforce" the Challenged Election Laws, and (2) Plaintiffs' requested relief is affirmative in nature. (Defs.' Br. 33-38.) But the law compels no such conclusion here. As explained in Plaintiffs' opening brief and below, Secretary Hughs has a sufficient connection to enforcement of the Election Code, and Governor Abbott

[13] *Ex parte Young*, 209 U.S. 123 (1908).

has a sufficient connection to enforcement of Executive Order GA-29 (the mask mandate).

A. Defendants' Conduct Sufficiently Constrains the Rights of Texas Voters.

Defendants urge this Court to adopt an unreasonably narrow and stringent view of the directive in *Young* that state officials must have "some connection with the enforcement of the [challenged] act." *See City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (quoting *Young*, 209 U.S. at 157). But rather than requiring an affirmative "enforcement action" as Defendants suggest (Defs.' Br. 36), this Circuit has repeatedly held that there need only be "some scintilla of enforcement"—*i.e.*, "compulsion or constraint"—by state officials. *Austin*, 943 F.3d at 1002 (internal quotation marks omitted); *accord Tex. Dem. Party II*, 2020 WL 5422917, at *5. Nor does the law require a direct law enforcement proceeding; conduct in reliance on or consistent with the challenged laws is enough. *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017); *K.P. v. LeBlanc*, 627 F.3d 115, 124-25 (5th Cir. 2010). A sufficient connection—between the Secretary and the Election Code, and between the Governor and Executive Order GA-29—is clearly present in this case.

Secretary Hughs suggests the law is not settled with respect to her immunity from as-applied challenges to the Election Code. Defs.' Br. 36. But just this month, this Court twice held she is amenable to such suits. *See Tex. Dem. Party II*, 2020 WL 5422917, at *6 ("The Secretary has both a sufficient connection and special relationship to the Texas Election Code."); *Lewis v. Hughs*, No. 20-50654, 2020 WL 5511881, at *1 (5th Cir. Sept. 4, 2020). Secretary Hughs's disagreement with those holdings (and petition for rehearing en banc in *Lewis*) provides no basis to depart from the Court's reasoned conclusions.

Secretary Hughs also complains she is somehow without power to "interpret" the Election Code; that role, she argues, belongs solely to the Texas Supreme Court. Defs.' Br. 37-38. But this argument, aside from being precluded by this Court's holding in *Texas Democratic Party II*, is contradicted by the Election Code itself, which places on her the statutory duty to "obtain and maintain uniformity in the application, operation, and *interpretation* of this code and of the election laws outside this code." Tex. Elec. Code § 31.003 (emphasis added); *see also OCA*, 867 F.3d at 613. In any event, Plaintiffs are not asking Secretary Hughs to "interpret" the Election Code here. Instead, where application

of Challenged Election Laws is deemed unconstitutional, she should "cease enforcing" them. *Tex. Dem. Party II*, 2020 WL 5422917, at *6.

In asserting immunity from challenges to his Executive Order, Governor Abbott points to cases in which this Court has barred suit. Defs.' Br. 34. But those cases are distinguishable from the facts here. First, unlike in *In re Abbott*, Plaintiffs here do not allege that Governor Abbott is enforcing Executive Order GA-29 against voters in the prosecutorial sense. 956 F.3d 696, 709 (5th Cir. 2020). To the contrary, it is the Executive Order itself, and particularly its exclusion of polling places from its scope, that renders voting dangerous during the pandemic and thus serves to constrain the Texas citizens' right to vote. And Governor Abbott has not delegated his power to constrain voting rights to another state agency that would be a more appropriate state defendant here. *See id.*

Second, *Texas Democratic Party II* and *Morris v. Livingston* are inapposite because Plaintiffs do not allege Governor Abbott is enforcing any provision of a Texas statute in the prosecutorial sense. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (holding Texas Department of Criminal Justice "is the agency responsible for [Tex.

Gov't Code § 501.063's] administration and enforcement"); *Tex. Dem. Party II*, 2020 WL 5422917, at *6 (holding Governor Abbott "lacks a sufficient connection to" Tex. Elec. Code § 82.003). Nor is the Governor a proper defendant here merely by virtue of some "general duty to see that the laws of the state are implemented." *Morris*, 739 F.3d at 746. Accordingly, because the unlawful constraint derives from Governor Abbott's conduct itself, he is not immune from suit. To conclude otherwise would mean *no one* in Texas could be sued for the Governor's actions in this context, and thus there would be no judicial forum to determine the constitutionality of the Executive Order. *See Air Evac EMS*, 851 F.3d at 516 (purpose of *Young* inquiry is to identify "proper parties" to suit).

B. The *Young* Exception Does Not Preclude Affirmative Injunctive Relief.

"[S]overeign immunity does not turn entirely on the relief sought." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020). Yet Defendants continue to cling to a footnote from a seventy-year-old Supreme Court decision, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949), for the proposition that sovereign immunity bars suit where so-called "affirmative action" is

requested. Defs.' Br. 35. *Larson* did not involve a state defendant or discuss the Eleventh Amendment at all, let alone the *Young* doctrine. Rather, in *Larson*, the plaintiff sought an injunction against a *federal* officer, the head of the War Assets Administration, over a contract dispute, to prohibit the agency from selling or delivering coal to anyone other than the plaintiff. *Id.* at 684. The Supreme Court affirmed dismissal of the suit as barred by sovereign immunity, in part because the plaintiff did not allege the agency head had acted in violation of the Constitution. *Id.* at 690-91; *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (*Young* exception applies where "complaint alleges an ongoing violation of *federal law*" (emphasis added) (citation omitted)). In a footnote, the *Larson* Court observed that "a suit may fail . . . if the relief requested . . . will require affirmative action by the sovereign . . . ." 337 U.S. at 691 n.11. As Defendants fail to acknowledge, this Court recently determined that the *Larson* footnote—which was unrelated to the facts at issue and unnecessary to the Court's disposition—is quintessential dicta. *Green Valley*, 969 F.3d at 472 n.21 (citing *Vann v. Kempthorne*, 534 F.3d 741, 751-53 (D.C. Cir. 2008)).

Even if it were not dicta, the footnote's authority as a blanket prohibition of all positive injunctive relief is at best "an unsettled question." *Green Valley*, 969 F.3d at 472 n.21. Indeed, Defendants' position is belied by the footnote text, which states that suits for affirmative injunctive relief "*may* fail and not that they *must* fail." *Saine v. Hosp. Auth. of Hall Cty.*, 502 F.2d 1033, 1036 (5th Cir. 1974) (emphases added) (internal quotation marks omitted). And it ignores decades of jurisprudence permitting suits against state officials "to *conform their future conduct* to the requirements of federal law." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (emphasis added) (citation omitted). *See, e.g.*, *Va. Office for Prot. & Advocacy v. Stewart* , 563 U.S. 247, 255-56 (2011) (applying *Young* exception where defendants' "refusal to produce the requested medical records violates federal law"); *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (affirming remedial order to desegregate public schools); *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 387 (5th Cir. 2014) (holding "the School Board remained subject to affirmative obligations" under prior school desegregation order); *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 322 (5th Cir. 2008) (holding a claim for

reinstatement pursuant to the Family and Medical Leave Act cognizable under *Young*).

At bottom, even assuming Defendants are right, the *Larson* footnote cannot bar this suit because at least *some* of Plaintiffs' requested relief falls indisputably within the boundaries of the *Young* exception. If successful, Plaintiffs' claims require, at minimum, that a court declare the Challenged Election Laws unconstitutional, and that Defendants "cease enforcing" them. *Tex. Dem. Party II*, 2020 WL 5422917, at *6. That is sufficient for purposes of applying the *Young* exception.

V. CONCLUSION

The Court should reverse the district court's order granting of Defendants' motions to dismiss.

Dated: September 28, 2020 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 28, 2020, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. I further certify that: (1) any required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(ii) of Federal Rule of Appellate Procedure because it contains 6,418 words, excluding the portions of the brief exempted by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced Century Schoolbook 14-point font.

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