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' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The polling place mask mandate exemption disproportionately burdens Black and Latino voters who are more likely to be placed at risk of virus transmission while waiting in long lines with unmasked people, and who face objectively higher risks of severe illness or death if they contract COVID-19. Defendants' brief largely sidestep the merits because on the merits, Plaintiffs are likely to succeed.

The relief sought is simple and redressable by Defendants. Plaintiffs ask only that the Court excise the exemption in the Governor's Order (and the concomitant language in the Secretary's). Plaintiffs do not ask for any changes in policies or training. Plaintiffs do not ask this Court to order voters to be turned away. The relief will establish the lawful norm of mask wearing in polling places—as elsewhere in the state—and will empower county officials to protect voters. Notably, Defendants' brief is conspicuously silent about *any* plausible reason to permit poll watchers and poll workers to be unmasked, burdening Black and Latino voters worried about infection. Despite Defendants assuring the Fifth Circuit that counties can "hav[e] their poll workers wear masks," the Attorney General has since told counties they cannot, because it "contravenes" the Executive Order's exemption.[1]

Defendants have not created a safe environment for voters. In 46 states, voters can vote through a no-excuse absentee ballot if they fear infection, but not in Texas. State after state assures voters that any election worker will be masked, but not Texas. It is routine for states to offer unmasked voters free masks or curbside voting, but not Texas. Defendants' claim that its voters are no more burdened than voters elsewhere is a complete distortion. And the record turn-

[1] *Compare* Ex. A (Attorney General letter) *with* Ex. B at 10.

out also means record risk from standing in line for *hours* with unmasked poll watchers, poll workers, and voters. An injunction should issue to protect Black and Latino's voters from the disproportionate burdens of these long lines of potentially unmasked people.

I. THE RELIEF PLAINTIFFS SEEK WILL NOT DISRUPT THE ELECTION

Two-and-a-half weeks before election day, after early voting had begun, the Fifth Circuit remanded for this Court to consider an immediate injunction excising the mask exemption. The Fifth Circuit distinguished this from other relief it found could not be timely implemented. And for good reason. All Plaintiffs ask is for this Court to excise an exemption to the existing state-wide mandate. Defendants exaggerate the relief Plaintiffs seek and then claim that overblown relief is too burdensome. The limited relief Plaintiffs actually seek would simply set a state-wide rule where polling places would be no different than grocery stores. Plaintiffs do not ask for *any* required implementation. If counties choose to implement additional training, expansion of curbside voting, providing masks to the unmasked, or requiring those administering or watching the polls to wear masks—as some counties apparently wish to do, as detailed below—they would *be free to do so* if they believed it was feasible, but they would *not be required* to do so.

At oral argument, the Fifth Circuit pressed the government about what ostensible basis there could be to permit poll workers to be maskless. The government's response: "And to my knowledge, there's nothing preventing local officials from having their poll workers wear masks." Ex. B at 10.[2] That response made good sense. But it was false. In response to reports that "poll watchers, election clerks, and other individuals administering elections are being barred from executing their duties on account of not wearing a mask," the Texas Attorney

[2] *See* http://www.ca5.uscourts.gov/OralArgRecordings/20/20-50793_10-7-2020.mp3 at 30:30.

General has taken the position that it is "unlawful" and "contravenes" the Executive Order for counties to bar mask-less poll watchers or workers. Ex. A (Oct. 14, 2020 ltr.).[3]

The Attorney General's statement reflects that some counties believe requiring masks at the polls—especially for poll watchers and staff—would make their elections *less* disruptive and safer. That is consistent with press reports that Nueces, Dallas, Comal, Williamson, Travis, and Tarrant counties have all demanded that poll workers wear masks, at times prompting disputes with the state government.[4] Travis and Tarrant counties also sought to have voters wear masks. [5] And Harris County had mandated masks, but recently reversed position, likely because they felt constrained by the Attorney General's position. [6]

It would serve the orderly administration of this election, not undermine it, for these counties to be permitted to require masks. In contrast, Defendants submit declarations from just four (out of 254), counties, representing just 11% of Texas's population, that are apparently unconcerned about the disproportionate racial impact of permitting mask-less poll workers and voters at the polls.[7] Those declarations (plus one from the Secretary of State) are notable for their boilerplate language and for what they do not say: They do not list a single concern about requiring poll *watchers* or *workers* (as opposed to voters) to wear masks. They provide no

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[3] Plaintiffs obtained this Attorney General letter after submitting their October 20 motion papers.

[4] *Poll Workers Can Face Fines of $1,000 for Requiring Masks in Galveston County*, The Texan, Oct. 20, 2020, https://bit.ly/37H32ns (hereinafter "The Texan, 10/20/20"); Robert Montoya, *Republican Election Workers Fired for Not Wearing Masks,* Texas Scorecard, Oct. 20, 2020, https://bit.ly/2TlcIeQ (hereinafter "Texas Scorecard, 10/20/20).

[5] The Texan, 10/20/20; Texas Scorecard, 10/20/20

[6] The Texan, 10/20/20.

[7] *See* TX Dep't of State & Human Services, https://bit.ly/2Tl5iIn (number of counties). County- and state-level population data was obtained from https://www.census.gov/quickfacts.

explanation for why a simple mandate that treats polling places no different than other public locations would necessitate training or new procedures. They claim voters would be confused or even dissuaded from voting, but provide no reason why counties who wish to could not ask voters to put on the mask they undoubtedly have to enter grocery stores, or, in the unlikely event they refuse without a medical reason, provide voters a mask or alternative voting opportunities.

To claim Plaintiffs' motion is untimely, Defendants rely on caselaw that is inapplicable, as the Fifth Circuit implicitly recognized in remanding. To ensure an accurate and reliable count of the ballots and protect the security of an election, under the *Purcell* line of cases, courts are concerned about providing sufficient time, in advance of an election, to notify voters and election officials about ballot-related procedures. Defendants' cited cases concern rules about how votes are *cast* or *counted* and are far afield.[8] Requiring poll watchers, workers, and voters to wear masks does not affect the counting or accuracy of the vote. Moreover, Defendants have no response to Plaintiffs' argument that requiring poll workers and voters to be masked will *comfort* voters who fear voting requires risking contracting a deadly disease, not *dissuade* them.

Nor does Defendants' claim that it would somehow be inequitable to excise the mask mandate in the midst of early voting hold water. The Fifth Circuit remanded despite knowing that early voting was underway. Defendants argue, essentially, that because some Black and Latino voters may have had to risk their lives to vote already, all must be exposed to the same risk to ensure all Black and Latino voters are equally burdened in their right to vote. No case so

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[8] *See, e.g.*, *Texas All. for Retired Americans v. Hughs*, No. 20-40643, 2020 WL 5816887 (5th Cir. Sept. 30, 2020) (challenge to bill eliminating straight-ticket voting); *Richardson v. Texas Sec'y of State*, No. 20-50774, 2020 WL 6127721, at *1 (5th Cir. Oct. 19, 2020) (challenge to mail-in ballot signature-verification procedures); *Texas League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 WL 6023310 (5th Cir. Oct. 12, 2020) (challenge to where mail-in ballots could be delivered); *Texas Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020) (challenge seeking distribution of mail-in ballots to any eligible voter).

holds. Plaintiffs are not asking the Court to order Defendants to bar mask-less voters from voting, as the Court was concerned about in *Veasey v. Perry*, 769 F.3d 890, 894 (5th Cir. 2014).

II. PLAINTIFFS ARE LIKELY TO ESTABLISH A VIOLATION OF THE VOTING RIGHTS ACT

Plaintiffs are likely to establish a violation of the Voting Rights Act because the Order's stated exemption is plainly a state enactment; the Order abridges the right to vote; and the exemption disproportionately impacts Black and Latino voters.

A. The Exemption Contained in Executive Order GA-29 is a State Enactment

The exemption contained in the Order is a state enactment which constitutes a voting "standard, practice, or procedure" covered by Section 2 of the Voting Rights Act. 52 U.S.C. § 10301(a).[9] The Order's text is clear: "[T]his face-covering requirement does not apply to the following: 8. any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election." *See* Executive Order GA-29. Absent the exemption, GA-29 would treat nearly all public spaces equally with respect to the mask requirement. The very fact that the exemption was explicitly crafted to govern polling places is evidence enough that this practice—which is specifically aimed at issues affecting voting—is a state enactment sufficient to fall within the prohibitions of Section 2.

The Order's explicit carveout from the general statewide mask mandate is not the "absence of a of policy or practice." *See* Def. Brief at 24. While a generally applicable statewide mask mandate on its own could not reasonably be considered a voting procedure, the *exemption* from the Order— by its own words—creates a practice or procedure that explicitly applies to

[9] *See Allen v. State Bd. of Election*, 393 U.S. 544, 566-67 (1969) ("Indicative of an intention to give the Act the broadest possible scope, Congress expanded the language in the final version of Section 2 to include *any* voting qualifications or prerequisite to voting, or standard, or practice, or procedure." (emphasis added)) (internal citation and quotation omitted).

voting. Further, the specific polling place carveout from the statewide mandate—not the choice of third parties to come to the polls without a mask— is the state enactment which forms the basis of Plaintiffs' challenge.

B. The Exemption Contained in Executive Order GA-29 Results in the Abridgment of Black and Latino Texans' Right to Vote

The exemption abridges Black and Latino voters' voting rights. The *Veasey* Court held that a standard or practice results in the abridgment of the right to vote where Black and Latino voters "have less opportunity than other members of the electorate to *participate* in the political process." *Veasey*, 830 F.3d at 244 (emphasis added). The exemption disproportionately impacts the ability of Black and Latino Texans to participate in the political process compared to their white counterparts because they face higher risks to their health if they vote in-person *and* higher likelihood of staying at home to avoid those risks. Defendants' reliance on Seventh Circuit precedent to claim something more is required fails, because there the court specifically rejected the test used by the Fifth, Fourth, and Sixth Circuits.[10]

On the facts, much of Plaintiffs' case is undisputed. The challenged procedure places a disparate burden on Black and Latino voters in two ways: first, Black and Latino voters are more likely to forego the opportunity to vote because of the polling place exemption because of their increased risks from COVID-19; and second, Black and Latino voters who vote in-person despite the mask exemption face the disproportionate burden to their health than white counterparts.[11]

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[10] *Compare Luft v. Evers*, 963 F.3d 665, 672-73 (7th Cir. 2020) (registering "skepticism, not approval" of the test adopted by the Fourth and Sixth Circuits) *with Veasey*, 830 F.3d at 244 ("We now adopt the two-part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 'results' claims.").

[12] *See* Troisi Decl. ¶¶ 16-17.

Defendants do not meaningfully dispute (1) the overwhelming evidence that Black and Latino voters face a disproportionate health burden in relation to the pandemic, (2) that Black and Latino voters who become infected with the disease are more likely to become severely ill or die,[12] (3) that the likelihood of a person with COVID-19 being present in a crowd increases in larger crowds and/or communities with outbreaks; (4) that Black and Latino voters face longer lines at the polls, which increase the risk of COVID to them,[13] (5) as a result, Black and Latino voters are, reasonably, more likely to fear exposure to unmasked people at the polls and stay home as a result,[14] and (6) that infected people who wear masks are less likely to transmit COVID-19 to voters.[15] Moreover, Defendants' own witness, Brenda McKanna, estimates that nearly 10% of all voters in Moore County are heading to the polls without masks, a staggering number considering this year's record voter turnout.[16]

Defendants' claim that Black and Latino voters are not more likely than white voters to become infected *at the polls* is a red herring— crowds and lines do increase the likelihood of infection at the polls, particularly in the absence of a mask mandate. Moreover, when those voters become infected they are more likely to become severely ill or die, imposing a burden on them that white voters do not face.[17] And Defendants' claim that "people of all races and all ethnicities face very low and effectively identical risks," is contrary to the data in Texas and

[12] *See* Troisi Decl. ¶¶ 16-17.

[13] Pl. Brief at 21 n.32; Mi Familia Vota Decl. ¶ 17; NAACP Decl. ¶¶ 18-19; Torres Decl. ¶ 22.

[14] Pl. Ex. 4 (Stein Decl.) at 6, 9; Mi Familia Vota Decl. ¶¶ 15-16; NAACP Decl. ¶¶ 13, 15.

[15] Troisi Decl. ¶¶ 22-26.

[16] *See* Def. Ex. 4, ¶ 6.

[17] *See* Troisi Decl. ¶¶ 16-17.

nationwide: doubling one's risk of death is not "identical."[18] Data about the burden from disproportionate lack of voter identification ID cannot be compared to the burden from a disproportionate risk of *severe illness or death*.

Defendants also rely on the State's record-breaking voter turnout to highlight the effectiveness of safety precautions. Def. Brief at 7. This makes no sense. High voter turnout cannot possibly account for the Black and Latino voters who weighed the risks of in-person voting and chose to forego their right to vote. It cannot account for the burden on Black and Latino voters who had to expose themselves and their families to the increased risk of transmitting a disease which disproportionately impacts their communities in order to preserve their franchise. And the Defendants' claim certainly does not square with Texas's recent soaring number of COVD-19 cases.[19] The disproportionate health burdens faced by Black and Latino voters at the poll is precisely the kind of burden on voting that the Voting Rights Act forbids.

C. The Exemption Contained in Executive Order GA-29 Discriminates on Account of Race

GA-29's polling place exemption "produces a discriminatory result that is actionable because it interacts with social and historical conditions in Texas to cause an inequality in the electoral opportunities" enjoyed by voters belonging to a protected class. *Veasey,* 830 F.3d at 253, 256. Importantly, at this stage, Plaintiffs need only show that it is likely they will succeed in establishing that the harms from the mask exemption stem from social and historical conditions. Here, the connection is well established:[20] Because Black and Latino voters are more likely than their white counterparts to live below the poverty line, they are also more likely to have less

[18] *Compare* Def. Brief at 28 *with* Troisi Decl. ¶ 16.

[19] *See* Troisi Decl. ¶ 29

[20] Pl. Br. at 6-7.

access to affordable healthcare. Lack of affordable healthcare coupled with the reality of worse outcomes once infected with COVID-19, change the calculus dramatically for Black and Latino voters who are considering voting under the conditions created by GA-29's polling place exemption. Defendants ignore the historical discrimination that has created these conditions.[21] Further, it cannot be credibly argued the Texas legislature has been responsive to the needs of Black and Latino voters where the polling place mask exemption would undeniably exacerbate the pandemic's already disproportionate impact on Black and Latino communities.

Moreover, Defendants' claim that its mask exemption is well within the national norm is simply false. Texas is one of just *six* states where voters are forced to vote in-person notwithstanding the pandemic. In 46 states, Black and Latino voters who fear COVID-19, such as Plaintiff Torres, can request a no-excuse absentee ballot.[22] In Texas, in contrast, only statutorily-designated voters are eligible to vote by mail. *State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *2 (Tex. Oct. 7, 2020). Even among that small group of six, Texas is the outlier: Tennessee, Louisiana, and Mississippi require poll workers to wear face coverings, as do other states.[23] Texas is unique in forcing voters to be exposed to unmasked poll workers or poll

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[21] See *Veasy v. Perry*, 71 F. Supp. 3d 627, 644 (S.D. Tex. 2014) ("African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination)

[22] *See* https://www.npr.org/2020/09/14/909338758/map-mail-in-voting-rules-by-state

[23] *See* "Statement by Secretary Kyle Ardoin on Administration of Louisiana's November and December Elections" at 1, Office of the La. Sec'y of State (Sept. 2, 2020), https://bit.ly/34pzCYH (Louisiana requires poll workers to wear face coverings); "COVID-19 – Election Information" at 1, Office of the Tenn. Sec'y of State (last accessed Oct. 25, 2020, 2:14 PM), https://bit.ly/3oAGzOW (Tennessee requires poll workers to wear personal protective equipment); Miss. Exec. Order No. 1525 (Sept. 30, 2020) at 2; Patrick Magee, *Reeves lifts Mississippi's COVID-19 mask mandate, but there are some exceptions*, Biloxi Sun Herald (Sept. 30, 2020), https://bit.ly/2TrakDr (Mississippi elections staff are not exempted from state-wide

watchers. And many of the states Defendants cite are doing exactly what Plaintiffs propose counties might do here—offering voters masks, curbside voting, or other alternative procedures—without barring any voter from voting.[24]

D. The Limited Relief Plaintiffs Seek is Constitutional

Defendants cites to a hodgepodge of constitutional provisions to claim that requiring masks at polling places, as elsewhere in Texas, is somehow unconstitutional. No case so holds.

Poll workers, poll watchers, and other non-voters have no constitutional right to be at the polling place, much less be there mask-less. As to voters, Plaintiffs are not asking this Court to order that anyone be barred from voting. The relief Plaintiffs seek is far less burdensome than requiring voters to show identification, which is constitutional. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008).

Defendants' convoluted federalism argument also fails. First principles: Under the Constitution's Supremacy Clause, federal law is "the supreme Law of the Land." Congress

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mask mandates); *see also* Def. Ex. 25 at 3 (California requires election staff to wear face coverings).

[24]*See, e.g.*, Def. Ex. 29 (Ohio: "Voters not wearing a mask will be offered one to wear and if they refuse they will be asked to vote curbside."); Def. Ex. 25 at 3-4 (California: free personal protective equipment and additional safety measures); Graham Moomaw, *Masks will be strongly encouraged at Virginia polling places, but not mandatory*, Va. Mercury (Oct. 20, 2020), https://bit.ly/2HDJqW3 (Virginia: free personal protective equipment and encouragement to vote curbside if a mask cannot be worn); Cassandra Basler, *Connecticut Law Can't Force Voters to Wear Masks*, WSHU Public Radio (Oct. 7, 2020), https://bit.ly/2TlOO2O (Connecticut: free personal protective equipment, encouragement to vote curbside or to be ushered through the line if a face covering cannot be worn); Health and Safety Guidance for the November 2020 General Election, Office of the Colo. Sec'y of State (Sept. 4, 2020), https://bit.ly/3kuJ42O; (Colorado: free masks and for voters who do not socially distance, mail-in ballots are provided); Def. Ex. 30 at 1 (Wisconsin provides "designated areas of the polling place for these voters or assigning poll workers with additional [PPE] to serve these voters"); Jenna Cisneros, *Voting without masks: Infringement of rights or matter of public safety?*, Local 12 (Oct. 19, 2020), https://bit.ly/3os2Wpu (Kentucky: voters not wearing a mask will be offered a free one or asked to vote curbside).

enacted the VRA pursuant to its broad power under the Fifteenth Amendment § 2; as a result, section 2 of the VRA prohibits a broader range of conduct than the Fifteenth Amendment itself (as Defendants' own case states). *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997). Enforcing the VRA is not commandeering: "While the federal government cannot require states to implement a federal program, the federal government *can* require the states to comply with federal law." *Ivy v. Williams*, 781 F.3d 250, 254 (5th Cir. 2015), *vacated on other grounds*, 137 S. Ct. 414. Nor does enforcing the VRA violate the equal protection clause: prohibiting voting practices with racially disparate effects is well established.

Striking the mask mandate also does not overrule the State's public health determination. The Governor himself decided that masks work and ordered the mask mandate; he *wants* masks to be worn at the polls. Pl. Br. at 2. The exemption is not based on any public health rationale.

E. Plaintiffs Have a Private Cause of Action

Over fifty years ago, the Supreme Court held that the Voting Rights Act creates a private cause of action, stating that the Voting Rights Act "was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens" and [t]he achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen*, 393 U.S. 544, 556 (1969). Indeed, the Supreme Court recently reiterated that *Allen* implied a private right of action under the Voter Rights Act. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).[25]

[25] While *Ziglar* recognized that *Allen* was decided under an older approach to analyzing private causes of action, it has never overturned *Allen*, which is binding on this Court. *Ziglar,* 137 S. Ct. at 1855; *see Texas Democratic Party v. Hughs*, 2020 WL 4218227 at *6 (W.D. Tex. 2020) ("Neither the Supreme Court nor the Fifth Circuit prohibit bringing a private cause of action; many courts have recognized a private right of action; and Congress did not intend to foreclose

III. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS

A. Defendants' Standing Arguments Are Foreclosed by the Fifth Circuit's Decision

Defendants' assert that Plaintiffs lack standing. Defendants made these very same standing arguments before the Fifth Circuit as a basis to affirm the dismissal of Plaintiffs' claims and the Fifth Circuit rejected them. As the Fifth Circuit explained, Defendants "maintain that the dismissal was appropriate on other grounds as well, including . . . lack of standing. *We review all these issues de novo*." *Mi Familia Vota v. Abbott*, No. 20-50793, 2020 WL 6058290, at *3 (5th Cir. Oct. 14, 2020) (emphasis added). The Fifth Circuit thus considered Defendants' standing arguments de novo, and still remanded the Voting Rights Act claim. As a result, Defendants' standing challenge is foreclosed by "the mandate rule, a corollary of the law of the case doctrine," which "compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *Fisher v. University of Texas at Austin*, 758 F.3d 633, 639-40 (5th Cir. 2014) (where issue of standing was "squarely presented" to the Supreme Court, and Court remanded the case to be decided on the merits, *without* addressing standing, the Court's implied ruling on standing was binding on the lower court) (citation and quotation marks omitted).[26] Defendants' renewed standing arguments

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private causes of action by *also* granting the Attorney General enforcement authority") (emphasis in original).

[26] Defendants assert that a jurisdictional challenge may not be decided *sub silentio*, but that doctrine applies only where "a potential jurisdictional defect is neither noted nor discussed in a federal decision." *Cuba v. Pyland*, 814 F.3d 701, 709 (5th Cir. 2016). That principle has no application here where the alleged defect was not only "noted" and "discussed" in the Fifth Circuit decision, but the Court explicitly stated that it was reviewing the issue "de novo."

are thus foreclosed by the Fifth Circuit decision and should be summarily rejected by this Court.[27]

B. Plaintiffs Have Standing

Even if Defendants were permitted to relitigate standing, Plaintiffs have made "a 'clear showing' of standing to maintain the injunction" with regard to each Plaintiff. *Texas Democratic Party v. Abbott*, No. 20-50407, 2020 WL 6127049, at *4 (5th Cir. Oct. 14, 2020). All Plaintiffs seek the same injunction, so only one needs standing for the Court to consider the merits. *Texas v. United States*, 945 F.3d 355, 377-78 (5th Cir. 2019). Defendants primarily argue no Plaintiffs are injured, but they never cite the key binding precedent *OCA-Greater Houston v. Texas*, which instructed that the injury for standing "need not measure more than an identifiable trifle," "because the injury in fact requirement under Article III is qualitative, not quantitative, in nature." 867 F.3d 604, 612 (5th Cir. 2017) (citations and quotation marks omitted).

Defendants also misapprehend the nature of the injury suffered by Torres and the Texas NAACP's members. The injury is not contracting COVID-19. The injury is that Defendants' mask exemption burdens their right to vote more than others'. The disproportionate risk of infection that Plaintiffs —and other Black and Brown voters—face at the polls is itself the injury, an injury caused and redressable by Defendants. Texas election practices already subject many Black and Latino voters to factors that increase the risk of COVID-19 transmission, including large crowds and long wait times at the polls. In the absence of the basic protections of masks, Black and Latino voters face the excruciating choice of having to risk their health in order to

[27] The Fifth Circuit did reserve one aspect of Defendants' standing argument for consideration by this Court on remand: whether excising the polling place exemption "would redress the injuries the Plaintiffs have alleged." As explained below in Section III.B.4, the proposed excision would unquestionably redress those injuries. In all other respects, Defendants' standing arguments are foreclosed.

vote, or give up their franchise.

1. Guadalupe Torres Has Standing

Guadalupe Torres is a Latina voter in Texas, who is registered to vote, not eligible to vote by mail, and who wants to vote. Torres Decl. ¶ 3-4, 7. She contracted COVID-19 more than three months ago, which means she and her family are at risk of reinfection. Torres Decl. ¶ 9-16; Def. Ex. 18.[28] Ms. Torres has been deterred from voting early because of the risk posed to her health by voting at unsafe voting locations during the pandemic: there have been long lines at the polling places near her. Torres Decl. ¶ 23.

The disproportionate burden on Ms. Torres's right to vote—and not the virus itself—is the injury. Therefore, even if Ms. Torres—or other Black and Latino voters—chooses to vote, the act of voting does not defeat their claim. *See Lewis v. Hughs*, No. 5:20-cv-577-OLG, 2020 WL 4344432, at *9 (W.D. Tex. July 28, 2020), *aff'd and remanded*, No. 20-50654, 2020 WL 5611881 (5th Cir. Sept. 4, 2020), *order withdrawn*, No. 20-50654, 2020 WL 6066178 (5th Cir. Oct. 2, 2020) ("Individual Plaintiffs need not show that their right to vote *will* be denied. Indeed, courts find standing for voters challenging state voting requirements such as the challenged restrictions at issue here, even in situations where those voters could still vote.").

The injury that Ms. Torres will suffer if required to vote in person without a mask mandate is "actual or imminent" and not "conjectural or hypothetical." Def. Opp. at 13; *Texas Democratic Party*, 961 F.3d 389, 399 (5th Cir. 2020). There is nothing speculative about the fact that Ms. Torres will have to vote in an impending election in which masks are not required of

[28] CDC, "Duration of Isolation and Precautions for Adults with COVID-19" (updated Oct. 19, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html (cautiously suggesting that risk of reinfection "may" be lower in the first 3 months following infection, based on evidence gathered from another coronavirus).

voters, poll workers, or poll watchers.[29] When a voter wants to vote, compliance with unlawful election practices are not speculative. *People First of Ala. v. Merrill*, No. 2:20-CV-00619-AKK, 2020 WL 3207824, at *7 (N.D. Ala. June 15, 2020). Even in counties cited by Defendants, up to 1 in 10 voters go maskless to the polls.[30] Having multiple polling place options, where none provide voters the protection of mandatory masks, does not change the risks associated with voting. Ms. Torres cannot know which locations may or may not be safe at a given time.

2. NAACP Has Associational Standing

Plaintiff Texas NAACP has associational standing. The NAACP attests that it has "more than 10,000 individual dues-paying members," mostly "African-Americans" who "are registered to vote in Texas," who care deeply about voting in-person and "fear contracting coronavirus if they vote in person under the State's current COVID-safety procedures," particularly because communicates of color often must wait in long lines to vote in Texas. NAACP Decl. ¶¶ 3-4, 8-10, 13, 16.[31] Each of these members has standing for the same reasons as Ms. Torres, and thus the NAACP has associational standing on their behalf.[32] *See Texas Democratic Party v.*

[29] The present case is clearly distinguishable from the cases cited by Defendants. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). Defendants have caused Ms. Torres actual or imminent injury to her right to vote; the facts are much more analogous to the cases distinguished in *Clapper*, where standing was found. *See Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (plaintiffs had standing where illegal dumping interfered with their use of land); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-54 (2010).

[30] Defendants have provided no evidence of mask-wearing in Denton County where Ms. Torres lives, nor have Defendants indicated how many poll watchers, poll workers, and other non-voting members of the public present at the polls are not masked.

[31] Plaintiff NAACP submitted two affidavits in this case, both of which are cited in this reply. The Oct. 20, 2020 declaration will be cited as "NAACP Decl." The August 26, 2020 Declaration, Docket No. 27-2, will be cited herein as "NAACP Aug. 26 Decl." It is attached as exhibit D.

[32] Defendants invoke the "indicia of membership" test, but this test applies only where "the association seeking standing does not have traditional members[.]" *Funeral Consumers All, Inc.*

Benkiser, 459 F.3d 582, 587 (5th Cir. 2006) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (establishing test to assess associational standing).

Defendants wrongly assert that plaintiffs must satisfy two different tests. Defendants Opp. at 16. The "indicia of membership" test is appropriate only where "the association seeking standing does not have traditional members[.]" *Funeral Consumers All, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 344 n. 9 (5th Cir. 2012). The Texas NAACP has more than 10,000 traditional members, and the Supreme Court has long recognized the organization's standing to represent its "rank-and-file members." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958); *NAACP v. Button*, 371 U.S. 415, 428 (1963).

Defendants also wrongly assert that the Texas NAACP's must identify an individual named member in order to advance associational standing. This is not required. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) (associations "must allege its members, *or* any one of them, are suffering immediate threatened injury") (emphasis added); *Hunt*, 432 U.S. at 343 (finding associational standing without reference to named members); *Church of Scientology of Calif. V. Cazares*, 638 F.2d 1272 (5th Cir. 1981) ("neither unusual circumstances, inability of individual members to assert rights nor an explicit statement of representation are prerequisites"). The Texas NAACP asserts an injury manifesting from a statewide exemption to the mask mandate—one that will affect every in-person voter in Texas. And the Texas NAACP has asserted that it has more than 10,000 members in Texas, many of whom are required to vote in person. NAACP Decl. ¶ 8-9. The NAACP has plainly asserted that each of these individual voting members is

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suffering an injury-in-fact. The cases cited by Defendants are inapposite because those plaintiffs failed to identify *any* member who suffered an injury-in-fact. *NAACP v. City of Kyle, Tex*., 626 F.3d 233, 237 (5th Cir. 2010) (NAACP did not assert that any individual member was unable to purchase a residence in Kyle); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497-99 (2009) ("statistical probability" of injury insufficient, where plaintiffs provided no evidence that its members would visit the specific parcels of land at issue in that complaint).

3. Mi Familia Vota and NAACP Have Organizational Standing

Both organizational plaintiffs have standing for the exact same reason the plaintiff in *OCA-Greater Houston* did with indistinguishable facts—binding precedent Defendants ignore. "[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). As NAACP attests, "

> Because of the lack of mandates from the State, protocols vary across counties in ways that leave voters confused and unable to know the level of risk they might encounter at their polling site. For example, some counties have no real plan for how to handle voters who arrive without masks, while others plan to ask individuals not wearing masks to leave—with no mechanism to enforce this other than not issuing them a ballot. . . . The State's failure to issue uniform mandates has resulted in significant disunity and frequent flux among local polling places' plans to address coronavirus, so in order to accurately advise potential voters the Texas NAACP has had to do significant and continual outreach to local officials" and "incorporated this safety information into calls to potential voters.

NAACP Aug. 26 Decl. ¶¶ 10-11. Mi Familia Vota has similarly had to devote time and resources to its efforts to make polling places safer and to work with voters who are fearful of how and if to vote during the pandemic. Mi Familia Vota Decl. ¶¶ 19-20, 23. Both MFV and the NAACP

had to divert resources because not doing so would have deeply frustrated their organizational missions. MFV Decl. ¶ 19; NAACP Aug. 26 Decl. ¶ 12; NAACP Decl. ¶ 18.[33]

These facts create organizational standing. *See OCA-Greater Houston*, 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). As Defendants' cited case 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). The resources these organizations spent were not self-inflicted to prevent some hypothetical injury as in *Clapper*, but to address the certainly impending prospect of voters facing Defendants' election policies.[34]

4. Plaintiffs' Injuries are Redressable by Defendants

Plaintiffs' injuries are fairly traceable to and redressable by Defendants. In claiming otherwise, Defendants misstate the remedies that Plaintiffs seek and misinterpret the Fifth Circuit's decision. The Fifth Circuit, in remanding the case, distinguished the excision of text

[33] Defendants' arguments about the relatively high voter turnout in Texas so far says nothing about whether more people (particularly Blacks and Latinos) would have voted with a mask mandate, and does not impact the organizations' missions of allowing voters to *safely* vote.

[34] Defendants renew their reliance on *NAACP v. City of Kyle*, 626 F.3d 233 (5th Cir. 2010), ignoring the Fifth Circuit's explanation that 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' reliance on *Zimmerman*, which did not involve or discuss organizational standing, is also inapplicable. 881 F.3d 378, 389-90 (5th Cir. 2018) (rejecting standing for individual unaffected by the challenged law).

from GA-29 from relief that would "compel the Governor to *issue* orders." *Compare Mi Familia Vota*, 2020 WL 6058290, at *6 *with id.* at 17 (emphasis added).[35] Plaintiffs do not ask the Governor or the Secretary of State to issue orders. Plaintiffs move the court to excise language that, when implemented, violates the Voting Rights Act.[36]

Only Defendants have the power to remove the polling place exemption from Executive Order GA-29, and the related language in Election Advisory 2020-19. Local authorities cannot redress the injury alleged and proved herein; indeed, Defendants have prohibited local authorities from enforcing the mask mandate. Attorney General Paxton has even threatened enforcement action *against* county election officials for not adhering to the Governor's polling place exemption, even with regard to non-voters at polling places. Attorney General Ken Paxton Oct. 14, 2020 letter, https://bit.ly/34ryjbS.

Defendants argue that the matter is not redressable by the Defendants because counties will refuse to adhere to Defendants' election-related rules and guidance. Def. Opp. at 23.[37] This assertion is factually baseless and legally irrelevant. The counties would not be "defer[ring] to

[35] Defendants' citation to *Richardson v. Texas Sec'y of State*, No. 20-50774, 2020 WL 6127721, at *16 (5th Cir. Oct. 19, 2020) is inapposite; the court in that case was discussing sovereign immunity, which is abrogated by the Voting Rights Act. *Mi Familia Vota v. Abbott*, 2020 WL 6058290, at *5.

[36] The relief sought does not "have the effect of creating a new criminal offense," nor do Plaintiffs ask the Court to create criminal law. The cases cited by defendants are inapposite. *Whalen v. United States*, 445 U.S. 684, 689 (1980) (federal courts may not issue cumulative punishments not authorized by Congress); *New York v. United States*, 505 U.S. 144, 166 (1992) (a case brought pursuant to the Tenth Amendment).

[37] The cases upon which the defendants rely are inapposite. *Jacobson v. Florida Sec'y of State*, 974 F.3d 1236 (2020) involves a challenge brought against Florida's Secretary of State related to ballot ordering, despite the fact that local officials were charged with enforcing the allegedly unconstitutional statute. In *Pool v. City of Houston*, No. 19-20828, 2020 WL 6253444, at *1 (5th Cir. Oct. 23, 2020), the court considered whether Houston was enforcing a law that had previously been struck down as unconstitutional.

the court's reasoning," Def. Opp. at 23; they would be deferring to the statewide mask mandate that has been in place for four months, but which now would no longer include an enforceable exemption for polling places. Throughout this election season, counties have obeyed election laws and election-related proclamations by Defendant Abbott; Defendants do not present any evidence as to why counties would suddenly refuse to obey the law now. Moreover, the notion that a federal challenge to a state law must be dismissed on standing grounds, based on a state's asserted unwillingness to comply with a court order enforcing the law, has no place in our constitutional system and would impermissibly limit judicial enforcement of federal law.

5. Requested Relief Should Not Be Limited to Plaintiffs

The requested relief should be granted in full. To excise only with regard to Defendant Torres and the voting members of the Texas NAACP would be unwieldy and nowhere is required by law. When a law is held to violate the Voting Rights Act, it may be struck or modified in relevant part. *See Veasey v. Abbott*, 830 F.3d 216, 269-72 (5th Cir. 2016) (en banc) (remedy must cure the Section 2 violation and disrupt the rules as little as possible). Voting Rights Act cases need not be certified as a class action for the court to grant such relief, and the cases cited by Defendants are not VRA claims and do not demand such an outcome. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (injunction for two plaintiff topless bars); *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020) (injunction limiting abortion restrictions).

CONCLUSION

For the reasons stated above and in Plaintiffs' opening brief, this Court should excise the mask exemption in the Governor's order and make concomitant changes to the Election Advisory.

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Respectfully submitted,

/s/ Sean Lyons

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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 October 25, 2020, and that all counsel of record were served by CM/ECF.

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