No. 20-50793

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellants,

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; 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

BRIEF FOR DEFENDANTS-APPELLEES

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Certificate of Interested Persons

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellees, as governmental parties, need not furnish a certificate of interested persons.

/s/ William T. Thompson
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Statement Regarding Oral Argument

The Court has scheduled oral argument for Wednesday, October 7, 2020. Defendants agree that oral argument is appropriate for the weighty jurisdictional issues in this case. Particularly in light of the accelerated briefing schedule, oral argument will help ensure that all issues are fully explored.

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Introduction

State and local officials have taken extraordinary steps to combat this pandemic. Some people think they have gone too far. Others think they have not gone far enough. Plaintiffs are in the latter group. They argue that the pandemic makes in-person voting unsafe and that Defendants should be doing more to address that risk. But rather than fight it out in the political arena, Plaintiffs filed suit.

The district court properly granted Defendants' motions to dismiss for lack of subject-matter jurisdiction. First, Plaintiffs' claims present nonjusticiable political questions. A court could not decide Plaintiffs' claims without ruling on the prudence of the State's pandemic response. Nor could a court grant relief without micromanaging the discretionary decisions of state officials trying to promote public health and administer elections.

Second, Plaintiffs lack Article III standing. They have not even attempted to establish an injury in fact for each provision they challenge, despite binding precedent requiring it. In any event, each of Plaintiffs' standing theories depends on the likelihood of becoming infected from voting in person, but Plaintiffs have not plausibly alleged that such an injury is "certainly impending."

Third, sovereign immunity bars these claims. *Ex parte Young* allows suits to prohibit the enforcement of an unconstitutional law. It does not allow suits to compel state officials acting in their official capacities to create new law.

Statement of Jurisdiction

The district court would have had subject-matter jurisdiction under 28 U.S.C. § 1343(3), but as explained below, the district court lacked subject-matter jurisdiction due to the political question doctrine, Plaintiffs' lack of Article III standing, and sovereign immunity.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court entered a final order disposing of all claims on September 7, 2020. ROA.861. Plaintiffs Mi Familia Vota, Texas State Conference of the National Association for the Advancement of Colored People ("NAACP"), and Guadalupe Torres filed a notice of appeal on September 11, 2020. ROA.878. Plaintiff Micaela Rodriguez, however, did not appeal the dismissal of her claims. *See* Appellants' Br. 12 n.6. Thus, the Court lacks appellate jurisdiction to consider that part of the decision below. 28 U.S.C. § 2107(a).

Issues Presented

The issues presented are:

1. Whether the district court correctly dismissed Plaintiffs' claims—which ask a federal court to take over Texas's response to the pandemic in the context of in-person voting—under the political question doctrine.
2. Whether Plaintiffs have plausibly alleged Article III standing when they have not attempted to link their alleged injuries to the specific statutes they challenge and rely on speculative concerns about becoming infected while voting.

3. Whether sovereign immunity bars claims seeking to mandate the promulgation of new law rather than prohibit the enforcement of an unconstitutional law.

STATEMENT OF THE CASE

I. Texas's Response to the Pandemic

Our federal system places primary responsibility to protect the health and safety of Americans upon the States. *See* U.S. Const. amend. X; *In re Abbott*, 954 F.3d 772, 783 (5th Cir. 2020) (discussing "a state's police power to combat an epidemic"). Likewise, primary responsibility over the conduct of elections belongs to the States. *See* U.S. Const. art. I, § 4, cl. 1; U.S. Const. amend. X; *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Courts presume that States discharge these duties in good faith. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). To accomplish both these ends, the state officials charged with guiding Texas through this crisis have been assiduously monitoring COVID-19 for months and will continue to do so as long as the COVID-19 disaster continues.

On March 13, 2020, Governor Abbott declared a state of disaster in all of Texas's 254 counties. Proclamation (Mar. 13, 2020 11:20 a.m.); *see Salmon v. Lamb*, 616 S.W.2d 296, 298 (Tex. App.—Houston [1st Dist.] 1981, no writ.) (discussing Governor's emergency authority in election context).

Since the disaster declaration, State officials have adopted multiple measures to protect voters and slow the spread of COVID-19. For example, many businesses are

operating at reduced capacities,[1] and hospitals are postponing certain elective medical procedures.[2]

In the context of elections, the Governor issued proclamations increasing the time available for early voting[3] and postponed certain elections.[4] The Secretary of State maintains a webpage providing information about the pandemic,[5] including multiple election law advisories as well as "recommended health protocols" for both voters and local election officials.[6] Developed "[i]n consultation with the Texas Department of State Health Services," these protocols will "help ensure the health and safety of all voters, election office personnel, polling place workers, and poll watchers

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[1] *See* Executive Order GA-30 (Sept. 17, 2020 11:30 a.m.), https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-30.pdf.

[2] *See* Executive Order GA-31 (Sept. 17, 2020 11:30 a.m.), https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-31.pdf.

[3] *See* Tex. Gov. Proclamation (July 27, 2020 2:00 p.m.) (November 3, 2020, election); Tex. Gov. Proclamation (May 11, 2020 5:30 p.m.) (July 14, 2020, election).

[4] *See* Tex. Gov. Proclamation (Mar. 20, 2020 6:35 p.m.) (postponing the May 26, 2020 primary runoff to July 14, 2020); Tex. Gov. Proclamation (Mar. 18, 2020 10:00 a.m.) (authorizing political subdivisions to postpone elections scheduled for May 2, 2020, to November 3, 2020); Tex. Gov. Proclamation (Mar. 16, 2020 7:30 p.m.) (special election for Senate District 14 delayed until July 14, 2020).

[5] Texas Secretary of State, COVID-19 Resources for Election Officials, https://www.sos.state.tx.us/elections/covid/index.shtml.

[6] Texas Secretary of State, Health Protocols for Voters & Health Protocols for Elections, https://www.sos.state.tx.us/elections/forms/health-protocols-for-voters.pdf.

in Texas."[7] The Secretary has made clear that her "primary concern is the health and safety of voters, election workers, and local election officials and their staff."[8]

II. Plaintiffs' Suit

Plaintiffs filed this suit on July 16, 2020. ROA.16. They claimed that the coronavirus makes in-person voting risky, ROA.16 ¶ 1, and that "Defendants must make immediate changes to in-person voting protocols to" reduce that risk, ROA.20 ¶ 14. Their complaint included five counts under the Due Process Clause, the Equal Protection Clause, the First Amendment, the Fifteenth Amendment, and the Voting Rights Act, each of which seemingly challenged every Texas law affecting the safety of in-person voting for "Elections Held during the COVID-19 Pandemic." ROA.51-57.

Plaintiffs sought broad relief. Among other things, they requested an order compelling "Defendants to modify in-person voting procedures during the early voting period and on Election Day to ensure that polling sites are safe and of low risk to the health of all registered voters," including by:

- "Extend[ing] the period of early voting to begin on October 5, 2020,"
- "Open[ing] additional polling places and provid[ing] 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," and

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[7] Texas Secretary of State, Secretary Of State's Office Releases Guidance On Recommended Health Protocols For Texas Election Officials And Voters (May 26, 2020), https://www.sos.state.tx.us/about/newsreleases/2020/052620.shtml.

[8] Texas Secretary of State, Election Advisory No. 2020-19 (June 18, 2020), https://www.sos.texas.gov/elections/laws/advisory2020-19.shtml.

- Ensuring "that voters have the option of voting by hand-marking a paper ballot," even in counties that currently use only electronic ballots.

ROA.57-58.

The Governor and the Secretary moved to dismiss for lack of jurisdiction and failure to state a claim. ROA.127; ROA.150. Regarding jurisdiction, Defendants argued that Plaintiffs' claims presented nonjusticiable political questions, that Plaintiffs had not plausibly alleged Article III standing, and that sovereign immunity precluded this suit. They also argued that Plaintiffs' claims failed as a matter of law on the merits.

After hearing argument, the district court granted the motions to dismiss. ROA.861. It ruled that Plaintiffs' claims presented nonjusticiable political questions and dismissed the case without prejudice. ROA.868-76. The district court did not decide whether Plaintiffs had standing, whether Defendants were protected by sovereign immunity, or whether Plaintiffs had stated a claim.

Three of the four Plaintiffs filed a notice of appeal. ROA.878. This Court granted Plaintiffs' motion to expedite the appeal but declined to schedule argument for September 30, 2020. *See* Order (Sept. 15, 2020); Court's Notice re Oral Argument (Sept. 16, 2020). Instead, it scheduled oral argument for Wednesday, October 7, 2020. *See* Docket Text (Sept. 17, 2020).

SUMMARY OF THE ARGUMENT

The district court correctly dismissed this case for lack of jurisdiction. First, this case presents nonjusticiable political questions. Plaintiffs' claims would require federal courts to determine an acceptable level of coronavirus risk from voting in person,

the efficacy of Texas's current coronavirus response, and the best policies for reducing public-health risks while furthering the State's other interests. Those are not tasks for federal courts.

Plaintiffs' claims are nothing like traditional voting-rights claims. Instead of presenting discrete legal challenges to particular provisions of Texas law, Plaintiffs challenge the overall effect of all Texas laws relating to in-person voting. And instead of challenging alleged burdens imposed by those laws, Plaintiffs challenge the failure of those laws to relieve the pre-existing burdens imposed by the virus. Evaluating these claims would require assessing the prudence of current Texas policy, and remedying any deficiency would require micromanaging the State's pandemic response in the election context. For these reasons, there are no judicially manageable standards for evaluating Plaintiffs' claims.

Second, Plaintiffs do not have Article III standing. They have not alleged any injuries tied to the particular laws they challenge. Nor have they plausibly alleged any non-speculative risk of becoming infected while voting. The NAACP cannot claim associational standing because it has not identified any members, much less an injured one. Neither the NAACP nor Mi Familia Vota can claim diversion-of-resources standing because they have not alleged that the diversion was necessary to avoid an underlying injury in fact.

Third, sovereign immunity bars Plaintiffs' constitutional claims against the Governor and the Secretary. As this Court has recognized, the Governor issues executive orders. He does not enforce them, nor does he enforce the Election Code. As a result, the Governor is not a proper defendant under *Ex parte Young*. That narrow exception

to sovereign immunity allows a court to prohibit the enforcement of an unconstitutional law. It does not allow a court to mandate that the Governor exercise the sovereign powers of the State of Texas to change the law. The Secretary is similarly immune, regardless of any connection to the enforcement of the Election Code, because Plaintiffs seek to have a court order her to affirmatively exercise her official powers. That is inconsistent with the premise of *Ex parte Young*.

ARGUMENT

I. Plaintiffs' Claims Present Nonjusticiable Political Questions.

The district court properly dismissed this case under the political question doctrine. Since *Marbury v. Madison*, the Supreme Court has recognized that "[q]uestions, in their nature political . . . can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). Political questions are "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). Thus, a court's commitment "to say[ing] what the law is" must be matched by an equally firm commitment to recognizing when "the law is that the judicial department has no business entertaining the claim of unlawfulness." *Id.* (quotations omitted).

"Among the political question cases the Court has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].'" *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). There are no judicially discoverable and manageable standards for adjudicating Plaintiffs' claims because they would require federal courts to make a quintessentially legislative judgment: whether the

cumulative effect of Texas laws related to in-person voting sufficiently reduces the threat to public health posed by COVID-19. And if the answer to that question is no, Plaintiffs' claims would require the federal courts to determine what the Legislature should have done differently, then implement that policy determination through a mandatory injunction.

A. Under *Rucho*, Federal Courts Cannot Decide the Acceptable Level of Risk, Much Less How Best to Reduce It.

The Supreme Court's decision in *Rucho* supports the district court's cautious approach. *Rucho* held that partisan gerrymandering presents a political question for three reasons. First, "the Framers' decision to entrust districting to political entities" precluded "hold[ing] that legislators cannot take partisan interests into account." 139 S. Ct. at 2497. Thus, the relevant question is when political gerrymandering "has gone too far," not whether it is permissible at all. *Id.* (quotation omitted). Second, courts cannot "even begin to answer" whether gerrymandering "has gone too far" unless they know the "fair" baseline from which to measure departures. *Id.* at 2500-01. Third, in the gerrymandering context, "fairness" could be defined in many different ways, and "[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500.

The same logic applies here. First, the impossibility of eliminating all risk during a pandemic precludes holding that any risk is unacceptable. Thus, the relevant question is when risk becomes "too much" risk. Second, a court cannot determine whether voters face "too much" risk without making value judgments about the

policy tradeoffs among precautions that could reduce risk, election administration, and allocating scarce governmental resources. Third, there are no judicially manageable legal standards for how to value those incommensurable interests and determine a fair level of risk.

But even if a federal court could decide that a given level of coronavirus risk was unconstitutionally high, it would have no judicially manageable standards for figuring out how to reduce that risk. That is an inherently political decision about policy tradeoffs. "It is not the job of the court to determine best practices." *Miller v. Hughs*, No. 1:19-cv-1071, 2020 WL 4187911, at *6 (W.D. Tex. July 10, 2020) (dismissing under the political question doctrine). But there would be no other way to provide relief on Plaintiffs' claims.

In the end, federal courts do not answer questions that "call[] for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019). But that is what Plaintiffs' claims would require.

B. Unlike Typical Voting-Rights Cases, This Case Necessarily Implicates Public-Health Strategy and Policy Tradeoffs.

Plaintiffs emphasize that the political question doctrine is the exception, not the rule. *See* Appellants' Br. 20-21. True, the political question doctrine does not apply in ordinary cases. But this case is far from ordinary. It has four key features that make it highly unusual, each of which the district court acknowledged.

First, "Plaintiffs do not challenge the constitutionality of any specific Election Code provision." ROA.876. Instead, they "generally challenge 'Texas's election

laws' and 'Texas's election policies during the pandemic.'" ROA.876; *see also* ROA.863.

In the district court, Plaintiffs said they were challenging the "Pandemic Voting System." 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." ROA.251 n.2. On appeal, Plaintiffs have replaced the term "Pandemic Voting System" with "Challenged Election Laws," but the substance is the same. *See* Appellants' Br. 8. They still cannot provide a comprehensive list of the laws they challenge. *See id.* ("These laws include the following"); ROA.251 n.2 ("including"). That is because Plaintiffs are challenging every Texas law insofar as it allegedly affects the safety of in-person voting.

Bringing individual challenges to that many laws would be unusual, but Plaintiffs' claim is more extraordinary still. They are not trying to aggregate individual challenges into one big case. Instead, Plaintiffs are complaining about the cumulative effect all those laws and policies will have on safety. *See* Appellants' Br. 10 (arguing that Texas laws, taken "[t]ogether," will "put[] voters at serious risk of transmitting or being infected by the coronavirus"); ROA.20 ¶ 14 ("Defendants must make immediate changes to in-person voting protocols to ensure that all voters—no matter how they choose or need to vote—can do so safely and with minimal risk").

Considering all of this, the district court held that "[t]his general challenge is not within this Court's Article III power." ROA.871.

Second, Plaintiffs do not challenge alleged burdens imposed by Texas law. Instead, they challenge Texas's supposed failure to stop the virus from imposing

burdens on voters. They demand that Defendants "ensure that polling sites are safe and of low risk." ROA.57. That is why the district court described Plaintiffs' claims as relating to whether Texas has done enough to "combat[] the COVID-19 virus," not whether Texas has otherwise imposed burdens on voters. ROA.876.

In other words, "this is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote." *Coalition for Good Governance v. Raffensperger*, No. 1:20-cv-1677, 2020 WL 2509092, at *3 n.2 (N.D. Ga. May 14, 2020). "[T]he underlying burden on the right to vote emanates from a virus, which obviously was not created or imposed by Defendants." *Id.* "While Plaintiffs contend that Defendants have done a poor job of responding to that virus, the fact that the virus's provenance was not through Defendants further increases . . . the impropriety of judicial intervention." *Id.*

The same reasoning applies to Plaintiffs' discrimination claims. Plaintiffs do not allege that Texas laws impermissibly discriminate on the basis of race. They allege that Texas's race-neutral "voting procedures" will "fail to provide the necessary health and safety protections to *all* voters" and that such a failure will allow the virus to "disproportionately burden the rights of Black and Latino voters, in particular." ROA.31 ¶ 59. Their discrimination claims are premised on the idea "that the risks and harms posed by the coronavirus pandemic disproportionately affect[] communities of color," not that Texas law has disproportionate effects that would be felt absent the pandemic. ROA.56-57 ¶¶ 204, 207.

Third, Plaintiffs' claims would require a federal court to assess "the prudence of Texas's policies, plans and procedures for combating the COVID-19 virus within

the 2020 election." ROA.876. They depend on the premise that Texas law leaves them to face an "unacceptable risk" from voting in person. ROA.51 ¶ 172; *see also* ROA.55 ¶ 195 ("increased risk"); ROA.56-57 ¶¶ 204, 207 ("risks and harms posed by the coronavirus pandemic"). Deciding those claims would require a court to assess whether Defendants are "taking appropriate steps to protect the health and lives of voters," Appellants' Br. 8, and "instituting appropriate safety measures." ROA.50 ¶ 166. Article III courts have no legal standards for identifying "acceptable" levels of risk or appropriate policies for reaching those levels.

Fourth, Plaintiffs sought extraordinary relief. They wanted a federal court to "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." ROA.864. That would have required the district court "to order specific action and administer specific procedures for the administration of the 2020 election" and thereby "assume the role of the Texas legislature." ROA.871. "[E]xercis[ing] the authority Plaintiffs propose" would have required the district court to "mandate and implement its own judgment about the proper administration of elections." ROA.870-71. But there is no legal standard that would allow a court to assess the propriety of particular procedures.

Putting all of this together, the district court explained why there were no judicially manageable standards applicable to Plaintiffs' claims:

> [T]here 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.

ROA.874.

The Court further noted that other factors from *Baker v. Carr* supported its conclusion. First, the Constitution commits power over elections to state legislatures (as well as Congress), not federal courts. *See* ROA.869-71.[9] In addition, the Court held that "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." ROA.871.

The district court's analysis followed *Coalition for Good Governance v. Raffensperger*, which to the best of counsel's knowledge, is the only other federal decision considering a complaint like the one in this case. *See* No. 1:20-cv-1677, 2020 WL 2509092, at *3 (N.D. Ga. May 14, 2020). There, the plaintiffs argued that in-person voting during the pandemic was not safe enough. They sought "an order requiring polling locations to use paper ballots rather than" a "touchscreen ballot marking device." *Id.* at *1. They also sought other relief, "such as adjusting the number of

[9] For the first time on appeal, Plaintiffs argue that this factor does not apply because this case "concerns only a state agency, not another branch of federal government." Appellants' Br. 26. Because they failed to raise this argument below, *see* ROA.259-61, it is forfeited. "[A]rguments in favor of jurisdiction[] can be forfeited or waived." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 542 (5th Cir. 2019). Moreover, Plaintiffs ignore the fact that Congress is the branch of the federal government delegated authority to "make or alter [the States' electoral] Regulations." U.S. Const. art. I, § 4, cl. 1; *see Jacobson*, 2020 WL 5289377, at *24 (vacating an injunction under the political question doctrine because "the district court in this action assumed for itself the 'discretionary power over elections' that the Constitution assigns to the state and federal legislatures").

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.* at *1.

The court recognized that "executive-branch officials at all levels have undertaken measures to slow the spread of the coronavirus" and that "obviously, Plaintiffs are unsatisfied with those efforts." *Id.* at *3. The court declined to decide "whether the executive branch has done enough" because it "is a classic political question involving policy choices." *Id.* It reasoned that "ordering Defendants to adopt Plaintiffs' laundry list of so-called 'Pandemic Voting Safety Measures' would require the Court to micromanage the State's election process." *Id.* at *4. It distinguished run-of-the-mill voting cases, noting that the relief sought bore "little resemblance to the type of relief plaintiffs typically seek in election cases aimed to redress state wrongs." *Id.*

The same is true here. In this case, the district court found *Coalition for Good Governance* persuasive "[b]ecause the issues, claims and requested relief in this unique pandemic setting are similar." ROA.875.

Plaintiffs rely heavily on *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), but that case supports the district court's decision. ROA.875-86. In *Texas Democratic Party*, the plaintiffs challenged a Texas statute establishing eligibility to vote by mail. *See* Tex. Elec. Code § 82.003. They argued that it discriminated on the basis of age in a way that "r[a]n afoul of the Constitution." *Tex. Democratic Party*, 961 F.3d at 399. Resolving that appeal did not require considering "the prudence of Texas's plans for combating the Virus when holding elections." *Id.* at 398. As a

result, the court could apply "familiar and manageable" standards, under which Texas's law was upheld. *Id.* at 399; *accord Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *7-8 (5th Cir. Sept. 10, 2020).

The court specifically 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." *Tex. Democratic Party*, 961 F.3d at 398. The Court explained that such a suit necessarily "challenged the *wisdom* of Georgia's policy choices." *Id.*

As the district court recognized, "this case is more closely aligned with *Coalition for Good Governance*" than *Texas Democratic Party*. ROA.876. Plaintiffs do not present a discrete constitutional question that can be answered without "consider[ing] the prudence of Texas's plans for combating the Virus when holding elections." *Tex. Democratic Party*, 961 F.3d at 398. They challenge *all* of "the specific procedures [Texas] plan[s] to use to conduct the election, such as whether to use electronic voting machines or paper ballots," in a way that necessarily implicates "the *wisdom* of [Texas's] policy choices." *Id.*; *see* ROA.58. All of Plaintiffs' claims require the Court to "consider the prudence of Texas's plans for combating the Virus when holding the elections." *Tex. Democratic Party*, 961 F.3d at 398. Texas is already taking prudent steps, but that is not for a federal court to judge.

C. Plaintiffs Propose Using Legal Standards That Do Not Apply.

Plaintiffs argue that their claims are justiciable because they are subject to well-known legal standards. *See* Appellants' Br. 36-38. Not so. As the district court recognized, "[w]hile 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." ROA.870.

Plaintiffs suggest the *Anderson-Burdick* test for their first three claims. *See* Appellants' Br. 36-37 (Counts I-III). "The statute at issue here is unlike any law that this Court or the Supreme Court has ever evaluated under *Anderson* and *Burdick*." *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377, at *18 (11th Cir. Sept. 3, 2020). A court applying the *Anderson-Burdick* framework must "identify a burden before [the court] can weigh it." *Id.* (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment)). When a challenged "statute does not burden the right to vote, [the court] cannot engage in that kind of review." *Id.* at *19. Thus, when plaintiffs cannot show that their claims are "appropriate for examination under the *Anderson-Burdick* framework," the political question doctrine requires dismissal. *Miller*, 2020 WL 4187911, at *7.

Here, the *Anderson-Burdick* framework does not apply because Plaintiffs challenge Defendants' alleged failure to relieve them of burdens imposed by the virus rather than any burdens imposed by the laws themselves. "[T]his is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote. In other words, this is not *Burdick v. Takushi*, 504 U.S. 428 (1992), or *Anderson v. Celebrezze*, 460 U.S. 780 (1983)." *Coalition for Good Governance*, 2020 WL 2509092, at *3 n.2. "All of the election cases cited by Plaintiffs in which injunctive relief was granted involved a burden on the right to vote that was created by the Government. Not so here." *Id.*

That analysis follows the Supreme Court's general distinction between burdens imposed by the government and burdens imposed by outside forces. For example, the Supreme Court's abortion precedent holds that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris v. McRae*, 448 U.S. 297, 316 (1980). The risk from the coronavirus is "not of [Defendants'] creation." *Id.* They are doing what they can to reduce it, but Plaintiffs cannot haul them into federal court to complain that they should adopt different strategies. This principle is particularly applicable here because *Anderson-Burdick*, like the Supreme Court's abortion precedent, analyzes whether the government has imposed an "undue burden." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873-74 (1992) (citing right-to-vote cases, including *Anderson*, before concluding "[t]he abortion right is similar").

The *Anderson-Burdick* test—designed to analyze a "burden imposed by [a governmental] rule," *Burdick*, 504 U.S. at 434—cannot help a court analyze whether the government has taken enough steps to relieve voters of burdens imposed by outside forces. Plaintiffs do not argue that the Supreme Court has ever announced a test for the latter inquiry.

For their fourth and fifth claims, Plaintiffs argue that the court can apply standard anti-discrimination doctrines. *See* Appellants' Br. 37-38 (Counts IV-V). But Plaintiffs do not bring standard anti-discrimination claims that could be assessed under such standards.

The district court explained why Plaintiffs' discrimination claims (which are about an alleged failure to sufficiently combat the disparate impact of the virus) are

unlike traditional discrimination claims. "[T]here 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." ROA.873-74.

* * *

For these reasons, Plaintiffs' case boils down to one nonjusticiable question: What additional steps, if any, should the Governor and the Secretary take to reduce the virus-imposed risk of in-person voting?

To be sure, Defendants are constantly evaluating that question and others like it. Doing so requires evaluating the ever-evolving medical information from public health experts. It also requires balancing the policy merits of competing proposals along with the demands of public health, election administration, and allocating scarce governmental resources. It is not an analysis for federal courts to undertake.

II. Plaintiffs Do Not Have Article III Standing.

The district court lacked jurisdiction for an independent reason: Plaintiffs do not have Article III standing to press their claims. The Court can affirm the district court on this alternative ground without reaching the political question doctrine.

A. Plaintiffs Have Not Alleged Standing for Each Challenged Law.

"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). That requirement is based on the longstanding rule that "standing is not dispensed in gross." *Id.* (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)); *see also*

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 350-53 (2006). "To ensure that standing is not dispensed in gross, [a] court must analyze Plaintiffs' standing to challenge each provision of law at issue." *In re Gee*, 941 F.3d at 161-62; *see also Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (holding that the plaintiff "must show standing to challenge each alleged deficiency in Texas's remedial scheme").

Plaintiffs have not attempted to meet this burden. Plaintiffs' complaint does not allege provision-specific injuries in fact. At most, it asserts that Plaintiffs are injured by the cumulative effect of Texas's voting system. ROA.20-21 ¶ 20; ROA.22-23 ¶ 23; ROA.23-24 ¶ 25. For example, the Organizational Plaintiffs do not claim to have diverted resources because of any particular law or policy. Instead, they tie their alleged diversions to "Defendants' actions" or "the conduct alleged" generally. ROA.253; ROA.20 ¶ 20.

Plaintiffs do not acknowledge *In re Gee* or the requirement that they "establish standing for each and every provision they challenge." 941 F.3d at 160. Instead, Plaintiffs argue for standing based on "the Challenged Election Laws" as a whole. Appellants' Br. 45. Plaintiffs did not cite *In re Gee* in the district court either. There, they claimed standing to challenge the "Pandemic Voting System" in its entirety. *See* ROA.257. As the following examples show, Plaintiffs have not come close to plausibly alleging that each of the challenged practices will injure them.

1. Electronic Voting Machines vs. Paper Ballots: Plaintiffs allege that some, but not all, counties "require all voters to vote on electronic voting machines and . . . refuse to make hand-marked paper ballots available." ROA.43 ¶ 120. Plaintiff Torres

does not allege that she lives in such a county, *see* ROA.23 ¶ 25, nor do the Organizational Plaintiffs identify anyone who lives in such a county, *see* ROA.20-23 ¶¶ 19-23.

2. Curbside Voting: Plaintiffs complain that curbside voting is available to voters with disabilities but not other voters. ROA.47 ¶ 142. Plaintiff Torres does not allege that she will be unable to vote curbside, *see* ROA.23 ¶¶ 24-25, nor do the Organizational Plaintiffs identify anyone who wants to vote curbside but cannot, *see* ROA.23 ¶¶ 19-23. In fact, Plaintiff Rodriguez, who did not join the notice of appeal, voted curbside in the July 2020 election. *See* ROA.292 ¶ 10.

3. Voter ID: Plaintiffs speculate that some "voters without identification [will have] to visit government offices" to obtain identification. ROA.42 ¶ 116. But the complaint never alleges that Plaintiffs will have to do so, nor does it identify a voter who will. Plaintiff Torres, who has voted in past elections, presumably has the proper identification. *See* ROA.23 ¶ 25. The Organizational Plaintiffs have not identified anyone who will have to obtain identification. *See* ROA.20-23 ¶¶ 19-23.

4. Mobile Voting: Plaintiffs challenge HB 1888, which requires local governments to keep early voting polling places open longer. *See* Tex. Elec. Code § 85.062.[10] Plaintiffs speculate that some local officials will react to HB 1888 by shutting down early voting locations rather than expanding the hours. They worry that some areas "might not otherwise be able to sustain the costs of a two-week long early

[10] This law is also at issue in *Texas Democratic Party v. Hughs*, No. 20-50683 (5th Cir.).

voting polling place." ROA.41 ¶ 111. Plaintiffs fail to establish standing to challenge HB 1888 for numerous reasons.

To begin, the local officials who select early voting sites and set their hours are "independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). But even if Plaintiffs had alleged what *some* local officials might do, they have not alleged what the relevant local officials will do. Plaintiff Torres lives in Lewisville, *see* ROA.23 ¶ 25, but she does not allege that Denton County officials are shutting down early voting polling places. Nor does she allege that she wants to vote early as opposed to on Election Day, much less that her preferred location will be closed. The Organizational Plaintiffs do not identify any voter who wants to vote at an early voting polling place that local officials will close because of HB 1888.

5. Number of Poll Workers: Plaintiffs fear that there will be "poll worker shortages" in some areas, but they do not allege that any shortages will affect Plaintiffs themselves. ROA.48 ¶ 158. Plaintiff Torres does not allege that she lives in an area that will suffer from shortages, and the Organizational Plaintiffs do not identify any voter who will be affected by a shortage.

A comprehensive list of Plaintiffs' standing problems is impossible because their cumulative-effects challenge includes innumerable and unspecified provisions of law. That is why Plaintiffs bear the burden of plausibly alleging "injury to themselves" from all of the provisions they challenge. *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019); *see In re Gee*, 941 F.3d at 160. Even if they had established that

an unidentified someone, somewhere faces an injury in fact, "injury to others is irrelevant." *Stringer*, 942 F.3d at 721. Plaintiffs have not met their burden.

B. Plaintiffs' Alleged Injuries Are Speculative, Generalized Grievances.

Even if Plaintiffs could challenge Texas election law as a whole (contrary to the argument made above), their allegations of injury would still be too speculative. Plaintiffs claim standing based on "risk to the health of in-person voters." Appellants' Br. 47; *see also* ROA.256 ("the risk of infecting themselves"). But they do not allege that infection is substantially likely, much less certainly impending.

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*, 942 F.3d at 722. There must be "Plaintiff-specific" allegations showing that the risk will materialize in the future. *Id.*

As the district court recognized, Plaintiffs have not alleged that here. It concluded that "Plaintiffs' allegations are based upon conjecture and possibility, and therefore, are detached from the projected harm." ROA.874. Such "imprecise and hypothetical allegations" cannot support Article III standing. ROA.874.

Plaintiff Torres does not allege that voting in person will cause her to become infected with the coronavirus or that the relief she requests could prevent such an infection. *See* ROA.23 ¶ 25. Her declaration in the district court says that she is

"concerned that [she] will get sick," ROA.295 ¶ 18, but that is both irrelevant to the sufficiency of the complaint, *see infra* Part II.C, and insufficient to establish standing. "[S]ubjective fear" that a future event will occur "does not give rise to standing." *Clapper*, 568 U.S. at 418. "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983). But Plaintiff Torres does not allege facts showing that the "Challenged Election Laws" will cause her to be infected.

Any risk of infection will depend heavily on the actions of third parties, including both other voters and local election officials. As a result, "[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," but Plaintiffs have not alleged "facts showing [how] those choices have been or will be made." *Lujan*, 504 U.S. at 562 (quotation omitted). Instead, they have alleged that local officials "*may, in some cases*, exacerbate lines and the risk of virus transmission." ROA.17 ¶ 4 (emphasis added).

Plaintiffs never allege that the average voter, much less any particular voter, is likely to become infected from in-person voting. They allege that "dozens of people can now trace their coronavirus infections directly to having voted in person in Wisconsin." ROA.19 ¶ 11. As an initial matter, that allegation relates to a different election at a different time in a different state with different policies. Even if Wisconsin data were applicable to Texas, it would not show an imminent injury. More than 1.5

million people voted in that election.[11] Whatever the precise number of in-person voters, the "dozens" allegedly infected represent a very low infection rate. That is not enough to make an injury "certainly impending." *Clapper*, 568 U.S. at 409.

Moreover, even that analysis is based on "general data" not "Plaintiff-specific" allegations. *Stringer*, 942 F.3d at 722. As a result, Plaintiffs' claims raise only "a generalized grievance available to all Texans." *Id.*

Instead of disputing this point, Plaintiffs practically admitted it below. They criticized Defendants for "focusing only on the paragraphs of the Complaint specific to" the Individual Plaintiffs when "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." ROA.257 (emphasis added). A grievance shared by the vast majority of Texans is a generalized grievance, even if Plaintiffs claim the grievance is particularly important for certain racial or ethnic groups. *See Allen v. Wright*, 468 U.S. 737, 755-56 (1984) (rejecting an argument that would have allowed "standing [to] extend nationwide to all members of the particular racial groups").

[11] Wisconsin Secretary of State, Canvass Results for 2020 Spring Election and Presidential Preference Vote (May 4, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/Canvass%20Results%20Summary_spring%20election%20all%20contests_4_7_2020.pdf (showing that 1,555,263 people voted for a presidential candidate).

C. Plaintiffs Do Not Have Associational or Organizational Standing.

1. The NAACP Has Not Alleged Associational Standing

The NAACP claims to have associational standing based on injuries to its members. *See* Appellants' Br. 46. But Plaintiffs have not demonstrated that any NAACP members face certainly impending injuries. For the reasons explained above, individual NAACP members would lack standing, so the NAACP cannot have associational standing. *See Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019); *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010).

Such an analysis is hindered by Plaintiffs' failure to identify any members of the NAACP, but that means Plaintiffs, "[t]he part[ies] invoking federal jurisdiction" have failed to carry their "burden of establishing" standing. *Lujan*, 504 U.S. at 561. Establishing associational standing requires the NAACP to "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Indeed, this Court has applied that rule to the NAACP itself. *See City of Kyle*, 626 F.3d at 237 (requiring evidence of "a specific member").

Plaintiffs suggest that the Court should infer the existence of "at least a single member with standing" because "[t]he NAACP has more than 10,000 members." Appellants' Br. 46. Rejecting that exact reasoning, *Summers* "required plaintiffs . . . to identify members who have suffered the requisite harm." 555 U.S. at 499. The *dissent* would have "accept[ed] the organization's self-description of the activities of its members" and then determined whether "there is a statistical probability that some of those members are threatened with concrete injury." *Id.* at 497. But the majority explained that the "requirement of naming the affected members has never

been dispensed with in light of statistical probabilities." *Id.* at 498-99. Even when "it is certainly possible—perhaps even likely—that one" member would have standing, "that speculation does not suffice." *Id.* at 499.

In fact, the likelihood that a member had been injured in *Summers* was probably much higher than it is in this case. There, the plaintiff group had "700,000 members." *Summers*, 555 U.S. at 497. Here, the NAACP claims 10,000 members, not all of whom "are registered to vote in Texas." ROA.21 ¶ 22.

Below, Plaintiffs cited 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). The parties in *Hancock* had failed to cite Seventh Circuit precedent affirming dismissal on the ground that the plaintiff's complaint had "not identified any member with standing to sue." *Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008). Since *Hancock* was decided, the First Circuit, in an opinion by Justice Souter, affirmed a dismissal because "the complaint did not identify any [injured] member of the group." *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.); *see also Miller v. Hughs*, No. 1:19-cv-1071, 2020 WL 4187911, at *5 (W.D. Tex. July 10, 2020) (rejecting associational standing because "the court finds no allegation that a specific member of any of Committee Plaintiffs has been or will be unable to vote").

Finding that the NAACP has associational standing in this case would require the creation of a circuit split. But this Court is "always chary to create a circuit split."

Gahagan v. USCIS, 911 F.3d 298, 304 (5th Cir. 2018). Plaintiffs have provided no compelling reason to do so here.

Moreover, *Hancock*'s distinction between "the pleading stage" and "the summary judgment stage" is untenable in light of recent precedent. 487 F. App'x at 198 & n.5. "[T]o determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020). That is because "the essential elements of a claim remain constant through the life of a lawsuit." *Id.* To be sure, the plaintiff's evidentiary burden "may increase as a case progresses from complaint to trial" because the plaintiff will have to move from allegations to evidence. *Id.* But the underlying facts to be established—by plausible allegations in a complaint or competent evidence at summary judgment—are constant. *See In re Deepwater Horizon*, 739 F.3d 790, 799 (5th Cir. 2014) (explaining that "the elements of Article III standing are constant throughout litigation" but that "the standard used to establish these three elements is not constant").

2. Plaintiffs' Diversions of Resources Cannot Support Standing

Plaintiffs also claim organizational standing based on alleged diversion of resources, *see* Appellants' Br. 45, but their alleged diversions are self-inflicted injuries, not responses to an otherwise injurious law.

That an organization has an "interest in a problem . . . is not sufficient" for standing, "no 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). By the same token, devoting resources to a problem does not automatically

give an organization standing to demand that the government do more to address that problem. If it did, any group could "manufacture standing merely by inflicting harm on [itself]," such as by spending resources to address a problem and then complaining that it would not have had to do so if the government had already solved that problem. *Clapper*, 568 U.S. at 416 (refusing to let plaintiffs "manufacture standing"). Such a rule would allow "any sincere plaintiff [to] bootstrap standing by expending its resources in response to actions of another," an outcome this Court has already rejected. *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).

That is why a diversion of resources "in response to an allegedly injurious law can itself be a sufficient injury to confer 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). A plaintiff "must . . . show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

In this case, the complaint does not allege any underlying injury that Plaintiffs would have faced if they had not diverted their resources. Nor does their opening brief argue for any such injury. *See* Appellants' Br. 44-45.

Plaintiffs cite a series of declarations they attached to their response to the motion to dismiss. *See* Appellants' Br. 45 n.11. But declarations attached to a response brief are irrelevant to Defendants' argument that the compliant fails to plausibly allege standing. "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 . . . ." *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 533 (5th Cir. 2016) (quotations omitted); *see* ROA.868 (recognizing "the attack is facial"); Appellants' Br. 17 (same). Rule 8 requires that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). Because Plaintiffs' complaint does not plausibly allege standing, it was properly dismissed, regardless of what any declarations say. *See 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 "Plaintiffs' allegations" were "insufficient to establish Article III standing" and refusing to consider "declarations" except for "whether leave to amend should be granted").

Even if the Court considered these declarations, they would not help Plaintiffs' standing. Mi Familia Vota claims that if it "had not diverted its resources to address these gaps left by the Governor and Secretary of State, the voters it serves would have faced greater confusion and health risks, and Mi Familia Vota's mission of fostering voter education and participation would have suffered." ROA.281 ¶ 18. The NAACP similarly claims that if it "had not diverted its resources to address these gaps left by the Governor and Secretary of State's pandemic voting plan, its members would have faced greater confusion and health risks, and our mission of fostering voter education and participation would have suffered." ROA.286 ¶ 13.

As an initial matter, Organizational Plaintiffs cannot bootstrap their standing to injuries supposedly suffered by third parties. As this Court held in *Stringer*, "injury to others is irrelevant." 942 F.3d at 721. Bootstrapping is especially inappropriate

because Plaintiffs do not identify any of these third parties. In any event, Organizational Plaintiffs do not and cannot allege cognizable interests in voter turnout or education. *See Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014) (holding that an "abstract social interest in maximizing voter turnout . . . . cannot confer Article III standing"); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("NTU's self-serving observation that it has expended resources to educate its members and others regarding [a challenged law] does not present an injury in fact.").

Plaintiffs rely on *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), but that case did not consider these arguments. There, the court considered the rule "that no plaintiff may claim as injury the expense of preparing for litigation." *Id.* at 611 (discussing *City of Kyle*). And on that point, *OCA* undermines Plaintiffs' standing. Plaintiffs here rely on lobbying activities. *See* ROA.280 ¶ 8 ("We lobbied Secretary of State Hughs"); ROA.286 ¶ 11 ("We have also engaged with Texas leadership to lobby for policies").

The *OCA* court did not consider whether a diversion-of-resources injury requires an underlying harm that would otherwise satisfy Article III, as this Court and others have held in other cases. *See Zimmerman*, 881 F.3d at 390; *La Asociacion de Trabajadores de Lake Forest*, 624 F.3d at 1088. While *OCA* is precedent on the issues it considered, for issues it did not consider, it provides only "drive-by jurisdictional rulings" that have "no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that

no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). To read *OCA* more broadly would needlessly create a conflict with precedent from this Court and other courts. *See Gahagan*, 911 F.3d at 304 ("We are always chary to create a circuit split.").[12]

III. Sovereign Immunity Bars Plaintiffs' Claims.

This Court may also affirm the district court's dismissal of Plaintiffs' constitutional claims on the ground that sovereign immunity bars them. "[S]overeign immunity . . . prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). In *Ex parte Young*, the Supreme Court carved out a "narrow exception" to a State's sovereign immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996). Plaintiffs' constitutional claims cannot proceed unless they fit that narrow exception.

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[12] Plaintiffs suggest that the Court need not consider the standing of other Plaintiffs so long as one Plaintiff has standing. *See* Appellants' Br. 43. That approach may be useful when a court reviews relief that would be granted regardless of how many plaintiffs have standing, but in this case, the Court is asking whether to affirm dismissal of each Plaintiff's claims. "[N]othing in the cases addressing this principle suggests that a court must permit a plaintiff that lacks standing to remain in a case whenever it determines that a co-plaintiff has standing." *Thiebaut v. Colo. Springs Utilities*, 455 F. App'x 795, 802 (10th Cir. 2011). Here, multiple factors weigh in favor of fully considering standing: (1) any other approach "would not fully address [Defendant's] motion," (2) failing to decide standing "would leave at least some of the plaintiffs in a state of legal limbo," (3) "if one group of plaintiffs lack standing, defendants would at least be entitled to partial dismissal," and (4) "judicial economy" supports quickly deciding issues that can narrow or streamline this expedited case at an early stage. *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1092-93 (D. Ariz. 2011); *see also* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L.J. 481 (2017).

As the *Ex parte Young* Court conceived it, an unconstitutional law is "void," so the enforcement of an unconstitutional law "is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. 123, 159 (1908). As a result, the official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 160. *Ex parte Young* "rests on the premise . . . 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." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Plaintiffs' claims do not fit within that framework because Defendants do not enforce the challenged laws in the first place, and the requested relief would require Defendants to do far more than refrain from violating federal law.

A. The Governor Is Immune.

Plaintiffs admit that this case is not about stopping the Governor from enforcing any challenged law. They want the Governor to effectively create new law using his emergency powers under the Texas Disaster Act. *See* Appellants' Br. 3 (blaming Defendants for failing "to implement . . . procedures"); ROA.50 ¶ 166 ("Defendants must take swift action to amend Texas election policies."). Plaintiffs' allegations about the Governor's past actions focus on the alleged promulgation of policies, not enforcement. *See, e.g.*, ROA.39 ¶ 102 ("Governor Abbott issued a statewide mask mandate, but specifically exempted 'any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election' from the requirement."). That is because the Governor does not enforce the Election Code.

As this Court recently held, "[t]he power to promulgate law is not the power to enforce it." *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020). The *Ex parte Young* exception covers enforcement, not promulgation. "For the exception to apply, the state official, by virtue of his office, must have some connection with the *enforcement* of the [challenged] act . . . ." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (emphasis added) (quotations omitted); *see also Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) ("'some connection with the enforcement of the act' in question or [are] 'specially charged with the duty to enforce the statute' and [are] threatening to exercise that duty'").

For these reasons, this Court has held that sovereign immunity protects the Governor from lawsuits challenging his executive orders relating to the pandemic and from voting-rights claims. *See In re Abbott*, 956 F.3d at 709 ("[T]he Governor lacks the required enforcement connection to GA-09 and may not be sued for injunctive relief under the Eleventh Amendment."); *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *6 (5th Cir. Sept. 10, 2020) ("As to the Governor, we conclude he lacks a sufficient connection to the enforcement of an allegedly unconstitutional law."); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020) ("[B]ecause the Governor 'is not statutorily tasked with enforcing the challenged law[s], . . . our *Young* analysis,' at least as to him, 'ends.'").

The Governor is immune for an additional reason in this case: Plaintiffs seek affirmative relief requiring the Governor to act in his official capacity rather than negative relief preventing the Governor from acting in his official capacity. When plaintiffs seek such relief, the premise of *Ex parte Young* does not apply. A state

official ordered to exercise the powers of his office is not "stripped of his official or representative character." *Ex parte Young*, 209 U.S. at 160. The "official or representative character" of the defendant is essential to the relief being granted. Instead of trying to stop a "proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity," *id.* at 159, affirmative relief would require that the defendant proceed *with* the authority of the State.

That is why the Supreme Court has long recognized that sovereign immunity bars a claim "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). If "the [defendant] sued could satisfy the court decree only by acting in an official capacity," *Ex parte Young* is unavailable and the claim is barred by the state's sovereign immunity. *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971); *see also Jacobson*, 2020 WL 5289377, at *14; *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001).

Even if *Ex parte Young* allowed any affirmative injunctions against state officials, it would be limited to those requiring performance of ministerial duties. *See Vann v. Kempthorne*, 534 F.3d 741, 753 (D.C. Cir. 2008) (distinguishing "'discretionary' from 'ministerial' functions" in *dicta*). Plaintiffs have never argued they are seeking to compel the performance of ministerial duties. The Governor's exercise of emergency powers necessarily requires discretion. *See* Tex. Gov't Code § 418.012 (providing that "the governor may issue executive orders"); *id.* § 418.014 (providing that "[t]he governor . . . may declare a state of disaster").

The only relief Plaintiffs seek against the Governor would violate the State's sovereign immunity. Plaintiffs' constitutional claims against the Governor cannot proceed.

B. The Secretary Is Also Immune.

Plaintiffs do not point to a single enforcement action that the Secretary is taking and that they want the Court to prohibit. As with the Governor, Plaintiffs focus on the Secretary's past issuance of non-binding advisories, *see, e.g.*, ROA.38 ¶ 93, and seek to compel her to take affirmative actions going forward. *See* Appellants' Br. 3 (blaming Defendants for failing "to implement . . . procedures"); ROA.50 ¶ 166 ("Defendants must take swift action to amend Texas election policies.").

A panel of this Court recently decided that "sovereign immunity does not bar suit against the Secretary" because precedent showed that "[t]he Secretary has both a sufficient connection and special relationship to the Texas Election Code." *Tex. Democratic Party*, 2020 WL 5422917, at *6. But another panel found that this Court has not yet resolved "whether and to what extent *Ex parte Young*'s exception to sovereign immunity permits plaintiffs to sue the Secretary in an as-applied challenge to a law enforced by local officials." *Tex. Democratic Party v. Hughs*, —F.3d—, No. 20-50667, 2020 WL 5406369, at *1 (5th Cir. Sept. 9, 2020) (per curiam). The Secretary has filed a petition for rehearing en banc to resolve this issue. *See* Pet. for Reh'g En Banc, *Lewis v. Hughs*, No. 20-50654 (5th Cir. Sept. 8, 2020). The Secretary stands by the arguments made in that petition, but this panel can avoid those issues. Regardless of whether the Secretary has a sufficient connection to the enforcement of

the Election Code to allow for a negative injunction against her, sovereign immunity bars this suit.

First, Plaintiffs do not want the Secretary to stop enforcing the Election Code. They want a federal court to force the Secretary to exercise the sovereign authority of the State of Texas to create additional rules binding voters and local officials. As explained above, *Ex parte Young* does not allow that. *See, e.g.*, *Zapata*, 437 F.2d at 1026. But even if it did, Plaintiffs have not pointed to any ministerial duties they want the Secretary to perform.

Second, Plaintiffs' claims are not limited to the Election Code. For example, the mask mandate, which Plaintiffs believe should be broader, is not contained in the Election Code. *See* ROA.39 ¶ 102. It is contained in an executive order, which like other executive orders is enforced by local law enforcement, not the Secretary. The order itself spells that out: "Local 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."[13]

Third, Plaintiffs misunderstand the Secretary's state-law authority. Whatever her powers to enforce the Election Code (and they are much more limited than Plaintiffs believe, *see Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972)), she cannot disregard the rulings of the Texas Supreme Court. Plaintiffs argue that "the Secretary

[13] Executive Order GA-29, (July 2, 2020 2:30 p.m.), https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-29.pdf.

can interpret the curbside voting law, which applies when entering a polling place would create a 'likelihood of injuring the voter's health,' Tex. Elec. Code § 64.009, to include COVID-19 risk." Appellants' Br. 47-48. The interpretation of Section 64.009 is controlled by the Texas Supreme Court's interpretation of nearly identical statutory language—"likelihood . . . of injuring the voter's health" in Section 82.002(a). *See In re State*, 602 S.W.3d 549, 557 (Tex. 2020).[14]

[14] Plaintiffs rely on this Court's previous rulings that the Voting Rights Act abrogates sovereign immunity for their statutory claim. *See* Appellants' Br. 49 n.12. To the extent the Court reaches sovereign immunity, it should still rule on the *Ex parte Young* issues for Plaintiffs' constitutional claims because Plaintiffs' motion for a preliminary injunction advances only constitutional claims. *See* ROA.340 n.3. Defendants preserve the argument that the Voting Rights Act did not validly abrogate sovereign immunity, including for the claims presented in this case.

Conclusion

The Court should affirm the district court's grant of Defendants' motions to dismiss.

Respectfully submitted.

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