

No. 20-50907

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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

*v.*

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

*Defendants-Appellants.*

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**PLAINTIFFS-APPELLEES' OPPOSITION TO  
MOTION FOR EMERGENCY STAY PENDING APPEAL**

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## **CERTIFICATE OF INTERESTED PERSONS**

1. No. 20-50907; *Mi Familia Vota, Texas State Conference of the National Association for the Advancement of Colored People, and Guadalupe Torres v. Greg Abbott, Governor of Texas, and Ruth Hughs, Texas Secretary of State.*
2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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## INTRODUCTION

Following this Court’s instructions—issued while voting was underway—on remand, the district court entered an injunction against the Governor’s polling place exemption from the statewide mask mandate. The court found the polling place exemption disproportionately burdens Black and Latino voters because they suffer more severe health impacts from COVID-19. Because Texas already has a statewide mask mandate, the district court appropriately found no confusion would result from a limited order treating polling places no differently than grocery stores and almost all other public places.

Strikingly, Texas’s emergency motion omits all mention of the district court’s invalidation of the exemptions for *poll watchers and election officials*. Because Texas enunciates no harm from the district court’s Order as to poll watchers and workers, the motion necessarily fails as to them. As to voters, Texas re-imagines the district court’s limited order as a sweeping limitation of voting that does not exist. Nowhere does the Order require voters to “be turned away from the polls,” and Plaintiffs repeatedly made clear they were *not* seeking such

relief. Instead, the court’s opinion simply empowers county officials to protect voters’ safety: “Those citizens who arrive at a polling site while not wearing a facial mask will be easily recognized and options for compliance or redirection are not complicated or extensive.” SA.0526.<sup>1</sup> The options available to counties for maskless voters are already well recognized by Defendants’ own County Administrator witnesses. Defs’ App.301.

The balance of the equities supports protecting voters from infection, removing the disproportionate burdens on Black and Latino voters, and ensuring election day is not a super-spreader event. There is no basis to stay the district court’s well-reasoned decision.

## **STATEMENT OF THE CASE**

### **I. FACTUAL BACKGROUND**

When the district court struck the Governor’s exception for masks at polling stations, more than 828,000 Texans had been infected, and 17,000 had died from Coronavirus Disease 2019 (COVID-19).<sup>2</sup> Texas

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<sup>1</sup> All citations to “SA” refer to Plaintiffs-Appellees’ “Supplemental Appendix,” dated Oct. 29, 2020.

<sup>2</sup> Tex. Dep’t of State Health Services Covid Dashboard, <https://bit.ly/2Y5wuxG> (last accessed Oct. 20, 2020, 2:16 PM).

had averaged more than 4,100 COVID-19 cases per day, with a 24% increase in the rolling average. SA.0064 ¶ 29. More than 470 people had died the previous week.<sup>3</sup>

Face coverings play a crucial role in protecting Texans from COVID-19. While a mask confers some protection on the wearer, its primary protection is to limit transmission of the disease. SA.0050-62 ¶¶ 2, 20, 22-23. The main route of transmission is through the air. SA.0054 ¶¶ 11, 13. “[T]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread.” SA.0063 ¶ 26.

Governor Abbott himself recognizes face coverings are crucial to preventing COVID-19 transmission. In Executive Order GA-29 (the “Order”), he noted that “requiring the use of face coverings is a targeted response that can combat the threat to public health using the least restrictive means,” and that “wearing a face covering is important not

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<sup>3</sup> Tex. Dep’t of State Health Services Covid Dashboard, <https://bit.ly/2Y5wuxG> (last accessed Oct. 20, 2020, 2:16 PM); CDC Covid Data Tracker, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last accessed Oct. 20, 2020, 2:13 PM).



only to protect oneself, but also to avoid unknowingly harming fellow Texans.” SA.0095. But the Order exempts:

8. any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election, but wearing a face covering is strongly encouraged.

SA.0096. As drafted, this exemption leaves voters and poll workers more vulnerable to disease while voting than shopping.

The danger from the Governor’s polling place exemption is compounded by Defendants’ failure to take other reasonable precautions to create a safe environment for voters. Against CDC guidance, Defendants have not significantly spread out voting over different methods, times, and locations.<sup>4</sup> While 44 states allow voters to request no-excuse absentee ballots,<sup>5</sup> Texas is one of just six states that allows only statutorily-designated voters to be eligible to vote by mail. Tex. Elec. Code § 82.001-.007. Even among that small group, Texas is the outlier: Tennessee, Louisiana, and Mississippi require poll workers

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<sup>4</sup> See SA.0328.

<sup>5</sup> See SA.0461.

to wear face coverings, as do other states.<sup>6</sup> The discriminatory burden is also exacerbated by other aspects of Texas's elections process, including: (1) reliance on frequently touched voting machines that are difficult and time consuming to be disinfected; (2) the limited availability of curbside voting; (3) the limited availability of early voting; (4) Texas's prohibition against mobile or temporary early voting sites; (5) the reduction of polling places, requiring voters to travel further and vote with more voters per polling place; and (6) that Defendants merely recommend—but do not require—polling places to adhere to social distancing, *see* Election Advisory No. 2020-14, <https://www.sos.texas.gov/elections/laws/advisory2020-14.shtml>.

Indeed, there have been widespread reports of overcrowding of polling places and reports of infected poll workers (necessitating the closure of polling locations<sup>7</sup>), further exacerbating risk to voters.

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<sup>6</sup> *See* SA.0475 (Louisiana requires poll workers to wear face coverings); SA.0450 (Tennessee requires poll workers to wear personal protective equipment); SA.0481 (Mississippi elections staff are not exempted from state-wide mask mandates); *see also* Defts' App. 423.

<sup>7</sup> *SW Fort Worth Voting Center Closed After Poll Worker Tests Positive for COVID-19* (Oct. 26, 2020) <https://bit.ly/3oEEGjY>; *Lewisville Polling Center Closed After Clerk Tests Positive for COVID-19* (Oct. 15, 2020), <https://bit.ly/3jELqLh>.

Black and Latino voters are disproportionately likely to experience long wait times to vote and likely to live in communities with COVID-19 outbreaks. SA.0038 ¶ 17; SA.0042 ¶¶ 7, 16, 19; SA.0069¶¶ 19, 22. Long lines mean that voters will have to wait in close proximity with unmasked people for extended periods, substantially increasing their chances of contracting the disease. SA.0054 ¶ 11. Under these conditions, an injunction striking the polling place exemption from the statewide mask mandate is critically important for Black and Latino voters who want to exercise their franchise, but who are at disproportionate risk of infection and serious COVID-19 complications.

In Texas and throughout the United States, Black and Latino people are far more likely to be infected with COVID-19, and once infected, more likely to be hospitalized or die of the disease, than white people. SA.0058-60 ¶¶ 16-19. Nationwide, Black and Latino people are more than *four times* more likely to be hospitalized than white people. SA.0058. When adjusted for age, the COVID-19 mortality rate for Black and Latino Texans is more than twice and four times as high,

respectively, as the rate for white people. SA.0060.<sup>8</sup> “[N]early 1 in 3 black Americans know someone personally who has died of covid-19, far exceeding their white counterparts.”<sup>9</sup>

Social and historic conditions of inequity have led to these disparate pandemic outcomes.<sup>10</sup> Texas has a “uncontroverted and shameful history” of state-sponsored voter suppression of Black and Latino residents. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014), *aff’d in part, rev’d in part, Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc). Historic discrimination continues to drive inequality and limit opportunities for Black and Latino people in Texas,<sup>11</sup> Ongoing discrimination; lack of healthcare access (Black and Latino Texans are far more likely to be uninsured compared to white Texans and to forego health care due to costs<sup>12</sup>); economic disparities that meant that racial and ethnic minorities are “disproportionately

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<sup>8</sup> SA. 153.

<sup>9</sup> SA. 262 (the comparable data for other groups is “17 percent of adults who are Hispanic and 9 percent who are white”).

<sup>10</sup> SA.199.

<sup>11</sup> *See, e.g.*, SA489-494 (series tracking the way in which historic and ongoing housing segregation limits Black Texans’ access to economic opportunities); SA.423.

<sup>12</sup> SA.431.

represented in essential work settings” and less likely to be able to work from home or have paid sick days; gaps in education; income, and wealth; and issues with housing that lead to crowded housing conditions all contribute to increased transmission and worse outcomes from COVID-19. *Id.* As a result, and in the absence of a mask mandate at polling places, Black and Latino voters must vote—or decide whether they can take on the risk of voting—under conditions that create high risk of virus transmission, knowing that they are at greater risk for serious or fatal COVID-19 illness than white Texans.

## II. PROCEDURAL HISTORY

Two weeks ago, this Court affirmed dismissal of Plaintiffs’ constitutional claims, but reversed on the Voting Rights Act (VRA) claim and remanded for the district court to determine whether the “exemption from wearing a mask in public places contained in Executive Order GA-29 for poll workers, voters, and others in polling places violated Section 2 of the [VRA].” *Mi Familia Vota v. Abbott*, No. 20-50793, 2020 WL 6058290, at \*7 (5th Cir. Oct. 14, 2020) (“Remand Order”). This Court distinguished this relief from others it found “futile”

so close to the election. *Id.* This Court granted Plaintiffs' motion to immediately issue the mandate.

After full briefing, the district court held a nearly four-hour evidentiary hearing on Plaintiffs' preliminary injunction motion. The court considered 72 exhibits admitted per the parties' stipulation, including testimony (by declaration) from ten witnesses.<sup>13</sup>

The district court's 35-page opinion resolved the three remanded questions: whether the VRA was violated, redressability, and the effect on the ongoing election. SA.0498 (citing Remand Order). Plaintiffs' injury is redressable, the court reasoned, because "as the author and executive who promulgated the Executive Order, Governor Abbott holds the power to omit any portion found to be in violation of the Voting Rights Act as racially discriminatory in its application." SA.0507. On the merits, the district court credited (1) multiple Plaintiffs' testimony about fears of contracting coronavirus from unmasked poll workers and voters and (2) an epidemiologist's testimony about minority groups' "increased risk of severe outcomes" from COVID-19 infection. SA.0514-

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<sup>13</sup> Plaintiffs ordered the transcript on an expedited basis, but it has not yet been prepared. D. Ct. Dkt. 70.

16. The Court found the “declarations establish a prima facie case that Exemption 8 has a discriminatory effect on Black and Latino voters because they have less opportunity than other members of the electorate to participate in the political process.” SA0516-19.

The district court found the requested relief was consistent with *Purcell v. Gonzalez*, 549 U.S. 1 (2006), because neither the “security and integrity of an election process,” nor the “accurate and reliable count of the ballots” are at issue. SA0524. After “carefully measur[ing] the evidence presented by the State,” it found that the injunction will cause minimal to no confusion as it “will result in a familiar and consistent mandate that is required in most public settings and that has been in place since July.” SA0525-26.

The district court refused to stay its decision: “Because Plaintiffs seek to protect a most important and fundamental civil right, a stay of this Court’s ruling would not promote the public interest without injuring other parties to a greater degree.” SA0528.

## ARGUMENT

Stay pending appeal is an “extraordinary remedy.” *Belcher v. Birmingham Trust Nat’l Bank*, 395 F.2d 685, 685 (5th Cir. 1968) (denying stay pending appeal). Appellants do not warrant such remedy. A stay is not required under *Purcell*, 549 U.S. 1, and Appellants have not carried their burden to show a likelihood of success, irreparable injury, that Appellees will not be substantially harmed, or that the stay will serve the public interest. *See Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992).

### I. **PURCELL DOES NOT SUPPORT A STAY.**

After Texas’s early voting period began, this Court remanded for the district court to consider an immediate injunction excising the polling place exemption. the Court gave to the district court the determination of whether “such a remedy would not materially or substantially affect the ongoing election.” SA0510. The district court made factual findings, on an evidentiary record, that it would not. And Defendants do not even claim the injunction as to poll workers or poll watchers will disrupt the election—it will not.



This Court and the district court correctly recognized that the relief sought in this case is distinct from the relief sought in the cases Defendants cite. *See* SA0511; SA0524-25 (citing cases). Those cases challenge election laws that govern how people vote, election security, or how ballots are counted. *See e.g., Tex. Alliance for Retired Americans v. Hughs*, No. 20-40643, 2020 WL 5816887 (5th Cir. Sept. 30, 2020) (straight-ticket voting); *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (absentee ballot deadlines); *Democratic Nat’l Comm. v. Wis. State Legislature*, No. 20A66, 2020 WL 6275871 (U.S. Oct. 26, 2020) (absentee ballot deadlines); *Merrill v. People First of Ala.*, No. 20A67, 2020 WL 6156545 (U.S. Oct. 21, 2020) (curbside voting). “[T]ypical court actions that do not pass the *Purcell* principle touch on the protection of the security and integrity of an election process, or involve the . . . count of ballots.” SA0524. Here, the injunction will only ensure that an existing statewide mask mandate extends to poll watchers, poll workers, and voters.

The district court correctly found that the injunction will neither confuse voters nor keep them from voting. *Purcell*, 549 U.S. at 4-5.

Indeed, it *resolves* voter confusion. During oral argument before this Court earlier this month, Defendants asserted that counties can require election officials to wear masks while administering elections.<sup>14</sup> But this is contrary to the language of the exemption, and, shortly after Defendants made that contrary assertion to this Court, Attorney General Paxton informed all county election officials that it is unlawful to mandate masks for poll watchers and election officials. SA.0095 (citing GA-29). Before the district court, defense counsel stated that the Secretary of State disagrees with the Attorney General. Texas's own diverging orders are sowing confusion that the injunction will correct.

As the district court noted, Defendants' declarations demonstrate that counties are prepared to handle voters who refuse to wear masks. SA.0525. The injunction, however, will substantially limit the number of people who require such different treatment.

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<sup>14</sup> See [http://www.ca5.uscourts.gov/OralArgRecordings/20/20-50793\\_10-7-2020.mp3](http://www.ca5.uscourts.gov/OralArgRecordings/20/20-50793_10-7-2020.mp3) at 30:30.

## II. DEFENDANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS<sup>15</sup>

### A. Plaintiffs have standing

Defendants argue that Plaintiffs lack Article III standing because “the Governor does not ‘enforce the executive order at issue’” and therefore Plaintiffs “injuries are not traceable to or redressable by Defendants.” Mot. at 10.<sup>16</sup> Defendants made precisely this legal argument before this Court as a basis to affirm the dismissal of Plaintiffs’ claims and this Court rejected it. As the Court explained, Defendants “maintain that the dismissal was appropriate on other grounds as well, including . . . lack of standing. *We review all these issues de novo.*” Remand Order at \*3 (emphasis added). The Court thus considered Defendants’ standing arguments de novo, and still remanded the Voting Rights Act claim.

This Court remanded for consideration by the district court the factual question of whether excising the polling place exemption “would

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<sup>15</sup> This Court uses a deferential “abuse of discretion” standard for reviewing a grant of a preliminary injunction, and “clear error” review for the “district court’s findings of fact.” *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014).

<sup>16</sup> As to the Governor, Texas does not challenge that Plaintiffs’ injury is *traceable* to the Governor’s action, and only challenges redressability. Mot. at 10-11. *See infra* note 17 (district court’s order did not address Secretary’s Advisory).

redress the injuries the Plaintiffs have alleged.” *Id.* But the argument Defendants now make does not rely on any facts or information presented to the district court on remand. It relies solely on the legal argument already made to and rejected by this Court. Defendants’ arguments concerning redressability are thus 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. Univ. of Tex. 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).

In any event, the district court independently addressed these arguments and correctly concluded that Plaintiffs have standing to challenge the Order’s polling-place exemption under the VRA. SA.0502-

08.<sup>17</sup> The district court’s injunction redresses Plaintiffs’ injuries by excising the polling place exemption which causes those injuries. Applying the existing mask mandate to polling places will reduce the discriminatory burden on Plaintiffs’ voting rights by providing that the Governor’s statewide mask mandates applies to polling locations.

Consistent with the Remand Order, the district court tailored its injunction *not* to require “enforcement” by Defendants, but to “excise” those portions of the Executive Order exempting polling places from the mask mandate. Remand Order at \*7 (instructing that “district court might excise that provision” if it found doing so would redress Plaintiffs’ injuries). Notwithstanding Defendants’ novel arguments to the contrary, this Court’s directive in the Remand Order and the district court’s decision implementing that Order represent proper and routine judicial enforcement of federal law. *See, e.g., Texas v. United States*, 809

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<sup>17</sup> Defendants argue that Plaintiffs’ injury is not traceable to, or redressable from, the Secretary. Because this Court remanded for consideration on the merits the VRA claim based on the mask exemption as to *both* Defendants, this legal argument is likewise foreclosed by the law of the case. In any event, the argument is academic at this juncture, because the district court denied the relief Plaintiffs sought concerning the Secretary’s Election Advisory; the relief granted was directed only to the Governor’s Order.

F.3d 134, 178 (5th Cir. 2015) (affirming nationwide injunction against federal immigration policies), *affirmed by equally divided court, United States v. Texas*, 136 S. Ct. 2271, 2272 (2016); *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 7852331, at \*2 (N.D. Tex. Oct. 18, 2016) (affirming nationwide injunction requested by Texas against federal officials); *Whole Woman’s Health v. Paxton*, No. 17-51060, 2020 WL 6218657, at \*10 (5th Cir. Oct. 13, 2020) (affirming district court’s injunction of Tex. Health & Safety Code §§ 171.151-.154). Defendants’ discussions of whether court rulings striking down laws actually remove the unlawful text from the lawbooks is beside the point; federal courts can rule that state provisions of law are *ultra vires* and no longer enforceable “law,” which is exactly what the district court’s order did.<sup>18</sup>

## **B. The Polling Place Exemption Violates the Voting Rights Act**

Exemption 8 in GA-29 is a voting practice within the meaning of Section 2 and has a disparate effect on the right to vote. Defendants’

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<sup>18</sup> Defendants argue that the district court’s order would “create crimes,” Mot. at 13 n.4, but the district court explained why that is incorrect, SA.0500, SA.0507-08. In any event, this argument is likewise precluded by this Court’s holding in the Remand Order that the district court could properly excise the polling place exemption.

arguments to the contrary are without merit. The district court had ample evidence to conclude that Plaintiffs are likely to succeed in proving that Exemption 8 has a discriminatory effect.

Nowhere in its brief does Texas acknowledge that this Court must “evaluate the district court’s discriminatory effect finding for clear error.” *Veasey*, 830 F.3d at 249-250. This Court must accept the district court’s findings that are “plausible in light of the record viewed in its entirety.” *Id.* at 229-230 (citation and internal quotation omitted).

#### **1. The Exemption Is Subject to the VRA.**

The Order provides that the “face-covering requirement does not apply” to “any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election.” Executive Order GA-29. Though Defendants prefer to frame this exemption as the “*absence* of a prerequisite,” Mot. at 13, that is belied by the text of the Order. The exemption “limit[s] citizens’ access to the ballot,” *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment), by explicitly permitting at polling stations what is forbidden in virtually all other public places in Texas: the spread of a potentially lethal virus

by people who are not wearing masks. Moreover, the exemption pre-empts local Texas officials from taking steps to protect voters, even from their own staff or poll watchers. Attorney General Paxton, for example, cited Exemption 8 in GA-29 in prohibiting county election officials from requiring poll workers and poll watchers to wear masks. SA.0210.

## **2. The Court's Order Does Not Obstruct Voting.**

Through a fanciful interpretation of the District Court's narrow ruling, Texas claims that the District Court's order somehow makes it harder for people to vote. It does no such thing. The District Court's order ensures that no one is required to choose between voting and their health by extending to polling places a mask-wearing requirement that already applies across the state.

As an initial matter, Texas simply ignores—and states no quarrel with—the Order's requirement that poll watchers and workers must wear masks.

But even as it applies to voters, the mask mandate is no different from other rules that limit communication, apparel, and other voter behavior at polling places. *See, e.g.*, Tex. Penal Code § 46.03(2)



(prohibiting weapons at polling places); Tex. Elec. Code § 63.001(c) (voter identification requirement); Texas Elec. Code § 61.010(a) (no badges or emblems relating to a candidate, measure, or political party); 85.036 (no electioneering at early voting sites). A voter wearing a political t-shirt will be asked to put on a different shirt before voting; similarly, a voter can be asked to put on a mask before voting. The difference, of course, is that masks will lift a burden from Black and Latino voters who may otherwise have to forgo voting to avoid a particularly high risk of contracting COVID-19. And voters, like poll watchers and workers, likely own and are used to wearing masks.

Moreover, voters that do not have a mask, or who refuse to comply with the mandate,<sup>19</sup> may still vote. The district court's opinion does not require local officials to turn voters away. Officials may wish to steer maskless voters to curbside voting or isolated machines, or simply move them through the line quickly. Indeed, this approach is one that Bexar County and other counties already take—undercutting any suggestion

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<sup>19</sup> The mask mandate does not apply to people with medical exemptions or who live in counties exempt from the mask mandate and the district court's order did not affect those provisions.

that a mask requirement for voters imposes an impermissible prerequisite to voting.

**3. Texas Fails to Establish Clear Error in the District Court's Finding of Discriminatory Effect.**

The district court relied on competent evidence in determining that Plaintiffs are likely to succeed in demonstrating the mask exemption has a discriminatory effect on minority groups that “have less opportunity than other members of the electorate to participate in the political process and to election representatives of their choice.” SA.0519. The District Court credited epidemiologist Dr. Cathy Troisi’s testimony that racial and ethnic minorities face an increased risk of severe COVID-19 infections and outcomes; and that gatherings at polling places contribute to virus spread, for which “masks are a critical precaution to prevent.” SA.0516, SA.0518.

The district court also credited Plaintiffs’ declarations about their credible fear of voting due to their risk of exposure in polling place crowds and their higher risk of serious outcomes. SA0512-14. Defendants attack the findings by Professor Robert Stein of Rice University, which the district court did not cite as a basis for its

findings. Regardless, Defendants mischaracterize these findings and ignore that Professor Stein found that 72.9% of voters surveyed stated that a mask requirement would impact their decision to vote, SA0120, and African American and Latino voters were more likely to say it would have a *substantial* impact (72.4% and 59.4%, respectively, compared to 51.9% of White voters), SA.0122.

Contrary to Texas's suggestion, Plaintiffs are not required to establish a reduction in voter turnout.<sup>20</sup> *Veasey*, 830 F.3d at 260 (“[W]e decline to require a showing of lower turnout to prove a Section 2 violation.”). Nor are Plaintiffs required to present evidence of COVID-19 rates specifically related to polling places, an impossible task before an election. As Dr. Troisi testified, the virus will spread at polling places as at other sites of congregation; congregation for more than fifteen minutes substantially increases infection rates; once infected, minorities are more likely to suffer severe adverse consequences due to racial and socioeconomic disparities; and masks limit transmission,

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<sup>20</sup> Texas claims that counties with high proportions of Latino voters have had high turnout. This speaks only to turnout county-wide, not to the turnout of minorities themselves or whether such turnout would be greater but for the mask exemption.

most effectively when worn by infected persons. Whereas Texas claims COVID-19 is not disproportionately fatal for African-American Texans, the appropriate analysis, as Dr. Troisi testified, considers age-adjusted data; that data demonstrates that the mortality rate for Blacks and Latinos is twice and four times as high, respectively, than for white people in Texas. SA.0058-60 ¶¶ 16-19.<sup>21</sup> The district court was entitled to credit that epidemiologist, particularly because Texas presented no expert to refute her conclusions.

Based on the record, Texas fails to demonstrate that the District Court's finding of discriminatory effect was implausible.

**4. Texas Election Policy, Not the District Court, Makes Texas An Outlier.**

Texas makes a specious and unfounded argument that the district court “prevent[s] a mask-less voter from casting a ballot,” and that the injunction is inconsistent with laws in other states. Mot. at 17. Texas is an outlier state—but not for the reasons Defendants assert. Texas is one of just 6 states that is not allowing no-excuse mail-in voting during

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<sup>21</sup> See Plaintiffs also submitted evidence from the Texas Medical Association showing gross disparities in mortality rates by race for Texas. SA.0202.

the pandemic. *See supra* at 4-5. Of those 6 states, 3 join a number of other states in requiring poll workers to wear masks.<sup>22</sup> Moreover, many states—including those that already offer no-excuse absentee ballots—require masks, or require the swift separation of maskless voters from other voters. Texas is one of the very few states that provides voters with *no other option to vote* than to stand with maskless poll workers, poll watchers, and fellow voters. SA.0210.

### **III. A STAY WILL SUBSTANTIALLY HARM PLAINTIFFS AND DISSERVE THE PUBLIC INTEREST**

Defendants’ proposed stay will substantially harm Plaintiffs by reinstating a discriminatory burden on their right to vote.

Defendants identify no reason the voting public should have to interact with unmasked poll workers (who can ask voters to remove their masks to verify their identity) or poll watchers, nor any reason as to why a stay is warranted with regard to the district court’s order as applied to poll workers or poll watchers.

It is also well settled that the “holding of an upcoming election in a manner that will violate the Voting Rights Act constitutes irreparable

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<sup>22</sup> *See* SA.0475; SA.0450.

harm to voters.” *United States v. Berks Cnty.*, Pa., 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) (collecting cases); *see also Casarez v. Val Verde Cnty.*, 957 F. Supp. 847, 864-65 (W.D. Tex. 1997) (VRA violation would result in irreparable harm); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir.), *stay denied*, 137 S. Ct. 28 (2016) (VRA § 2 violation would result in irreparable harm). “[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

The district court correctly found that the injunction is necessary to ensure that Plaintiffs do not continue to be harmed by the “disparate impact Exemption 8 has on Black and Latino citizens because it precludes an opportunity to vote.” SA.0521. A stay will strip Plaintiffs of the protections that the injunction affords them, again rendering the act of voting an unsafe, risky practice that disproportionately harms Black and Latino voters.

A stay also will disserve the public. As Governor Abbott has acknowledged, universal use of masks is critically important to preventing asymptomatic and pre-symptomatic infected individuals from spreading COVID-19. The injunction ensures that people at polling places must follow the sensible statewide mask mandate that has been in place since July.<sup>23</sup>

In addition to public health benefits, the public has an interest in resolving a serious Voting Rights Act violation. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (right to vote is of particular public importance because it is “preservative of all rights”); *United States v. Metro. Dade Cnty., Fla.*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993); *Harris v. Graddick*, 593 F. Supp. 128, 136 (N.D. Ala. 1984). “[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve.” *Casarez*, 957 F. Supp. at 865 (quoting *Nobby Lobby, Inc. v. City of*

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<sup>23</sup> The injunction will not interfere with other exemptions in GA-29; for example, individuals with a medical exemption will not be required to wear a mask and will be safer at the polls because others around them will now be masked.

*Dallas*, 767 F. Supp. 801, 821 (N.D. Tex. 1991), *aff'd*, 970 F.2d 82 (5th Cir. 1992).

The injunction will serve the public without posing any serious burden upon voters. As detailed above, voters already follow rules about what they can wear or bring to, the polls that protect public safety and election integrity. *See supra* at 19-20. The mask mandate is not onerous, is already in force throughout Texas, and has enormous public health benefits. Moreover, the few voters who insist on violating the mask mandate can still be allowed to vote. Bexar County (among others) and a number of other states already have such procedures in place. And, of course, poll watchers and poll workers are not the same as voters.

#### **IV. DEFENDANTS WILL NOT SUFFER IRREPARABLE INJURY**

Defendants will not suffer irreparable harm. The injunction does not disrupt Governor Abbot's ability to issue orders related to the public health, respond to an emergency, or enforce its laws. And while Defendants "ha[v]e an interest in seeing its [orders] enforced," where, as here, the court finds that the executive order has a discriminatory



impact on Black and Latino voters, “that interest can weigh only weakly in [Defendants’] favor.” *Patino v. City of Pasadena*, 229 F. Supp. 3d 582, 590-91 (S.D. Tex. 2017). That is particularly true here, where Governor Abbott has urged voters to wear masks at polling places. The rights of voters to vote without risking their lives far outweigh whatever limited harm might come to Defendants. *See id.* at 590.

### CONCLUSION

Appellees respectfully request that the Court deny Defendants-Appellants’ motion for emergency stay.

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Respectfully submitted,

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I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on October 29, 2020, and that all counsel of record were served by CM/ECF.

/s/ Sean Lyons

Sean Lyons

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/s/ Sean Lyons

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*Counsel for Appellees*

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October 29, 2020