APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States
Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
Clerk

No. 20-50407

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA; JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING; BRENDA LI GARCIA,

Plaintiffs–Appellees,

versus

GREG ABBOTT, Governor of the State of Texas; RUTH HUGHS, Texas Secretary of State; KEN PAXTON, Texas Attorney General,

Defendants–Appellants.

Appeal from the United States District Court
for the Western District of Texas

Before SMITH, COSTA, and HO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The United States is mired in a pandemic involving a virus that can cause serious illness and sometimes death. Local officials are working tirelessly to "shap[e] their response to changing facts on the ground," knowing that the appropriate response is "subject to reasonable disagreement." *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 U.S. LEXIS 3041, at *3 (U.S. May 29,

2020) (mem.) (Roberts, C.J., concurring in the denial of injunctive relief).

"Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.* (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). Either overlooking or disagreeing with that admonition, the district judge *a quo* suspects that—referring to the defendant state officials—"[t]here are some among us who would, if they could, nullify" the promises of the Declaration of Independence and "forfeit[] the vision of America as a shining city upon a hill." He resolves to take matters into his own hands.

In an order that will be remembered more for audacity than legal reasoning, the district judge intervenes just weeks before an election, entering a sweeping preliminary injunction that requires state officials, *inter alia*, to distribute mail-in ballots to any eligible voter who wants one. But because the spread of the Virus[1] has not given "unelected federal jud[ges]"[2] a roving commission to rewrite state election codes, we stay the preliminary injunction pending appeal.

I.

To help ensure the health of Texas voters while protecting the integrity of the state's elections, Governor Greg Abbott declared that, among other

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[1] We refer to the relevant virus and the disease it causes as "the Virus."

[2] *S. Bay*, 2020 U.S. LEXIS 3041, at *3 (Roberts, C.J., concurring) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

things, the May 2020 primary runoff elections would be postponed to July 14, 2020; that the period for "early voting by personal appearance" would be doubled; and that election officials would issue further guidance to election workers and voters on social distancing and other precautionary measures.[3]

The plaintiffs—the Texas Democratic Party, its chair, and various individual voters—allege that such actions aren't enough. They sued Texas Governor Greg Abbott, Secretary of State Ruth Hughs, and Attorney General Ken Paxton,[4] in state court, seeking injunctive and declaratory relief that, as a matter of Texas law, those eligible to vote by mail include all "eligible voter[s], regardless of age and physical condition . . . if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease." Specifically, the plaintiffs claimed, such voters suffer from a "disability" under Texas election law because a lack of immunity to the Virus constitutes a "physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter's health." TEX. ELEC. CODE § 82.002.

Thus began within the Texas judiciary a saga of sorts. First, the state trial court granted the plaintiffs a preliminary injunction. Texas intervened and filed

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[3] Governor Abbott also declared a state of disaster for the whole state on March 13, 2020.

[4] Except where relevant to distinguish among the defendants, we refer to them collectively as the "state officials."

a notice of interlocutory appeal, which, under Texas law, superseded and stayed the injunction.[5]

Weeks later, General Paxton issued a statement directed at "County Judges and County Election Officials," writing that

> [b]ased on the plain language of the relevant statutory text, fear of contracting [the Virus] unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail. Accordingly, public officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to [the Virus] . . . .
>
> To the extent third parties advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting [the Virus] without an accompanying qualifying disability, such activity could subject those third parties to criminal sanctions [citing TEX. ELEC. CODE §§ 84.0041, 276.013].

The plaintiffs successfully moved the Texas Court of Appeals to reinstate the injunction, which the Texas Supreme Court stayed pending its resolution of the state's mandamus petition.

Shortly thereafter, the plaintiffs filed this case against Governor Abbott, General Paxton, Secretary Hughs, the Travis County Clerk, and the Bexar County Elections Administrator. The plaintiffs claim

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[5] *See* TEX. R. APP. P. 29.1(b); *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 805 (Tex. 2014) (Willett, J.).

that Texas's rules for voting by mail (1) discriminate by age in violation of equal protection and the Twenty-Sixth Amendment; (2) restrict political speech under the First Amendment; and (3) are unconstitutionally vague.[6] The plaintiffs further posit that General Paxton's open letter was a threat constituting voter intimidation, an act in furtherance of a conspiracy to deny the plaintiffs' civil rights. *See* 42 U.S.C. § 1985. The plaintiffs seek a declaration to such effect and an injunction preventing the state officials from enforcing Texas's vote-by-mail rules as written.

Quoting the Declaration of Independence, the Gettysburg Address, the Bible, and various poems, the district court, on May 19, 2020, granted the plaintiffs a preliminary injunction ordering that "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of [the Virus]"—which, as the district court itself recognizes, would effectively be *every* Texas voter—"can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances." Further, the court enjoined the state officials from "issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with [its] Order."

The district court suggests that, by requiring able-bodied, young voters who are present in the

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[6] The plaintiffs also claim that the restrictions impermissibly discriminate and abridge voting rights based on race, language, and "disability" status. In their motion for a preliminary injunction, however, they mentioned those claims only in passing.

county to visit the polls in person when they may possibly contract the Virus (notwithstanding doubled early voting and other precautionary measures), the state officials wished "to return to the not so halcyon and not so thrilling days of yesteryear of the Divine Right of Kings," "the doctrine that kings have absolute power because they were placed on their thrones by God and therefore rebellion against the monarch [was] always a sin." "One's right to vote should not be elusively based on the whims of nature," the court opined, and therefore "[c]itizens should have the option to" vote by mail. Otherwise, according to the district court, "our democracy and the Republic would be lost and government of the people, by the people and for the people [should] perish from the earth."[7]

In support, the district court held that the plaintiffs are likely to succeed on the merits of all their claims. As for the age-related claims, the court opined that accommodating older voters with the option to vote by mail but requiring younger voters to vote in person "disproportionate[ly] burden[s]" younger voters without any conceivably "rational basis" or "any legitimate or reasonable [state] interest," evincing only that "older voters [are] valued more than [their] fellow citizens of younger age."

Regarding the vagueness claims, the court noted—without waiting (predictably for only a few days) for the Texas Supreme Court to interpret its own state's election law—that "[t]he multiple

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[7] We note as an aside that no one in Texas—irrespective of race, age, or disability status—was granted the option to vote by mail until as late as 1933. *See* Act of Jan. 30, 1933, 43rd Leg., R.S., ch. 4, § 1, 1933 TEX. GEN. LAWS 5, 5–6.

constructions of [the Texas Election Code] by [General] Paxton and the state court fail to provide people of ordinary intelligence a reasonable opportunity to understand if they are unqualified to access a mail ballot."

Finally, the court concluded that General Paxton's statements publicly disagreeing with the Texas lower courts and accordingly informing election officials likely constituted voter intimidation and an unconstitutional restriction of the plaintiffs' political speech.

Regarding the balance of harms, the district court "conclude[d] that any harm to [the state officials] [wa]s outweighed by the continued injury to Plaintiffs if an injunction d[id] not issue." The injunction did not harm the state officials at all: "No harm occurs when the State permits all registered, legal voters the right to vote by utilizing the existing, safe method that the State already allows for voters over the age of 65." According to the district court, the fact that "[b]etween 2005 [and] 2018"—when, of course, far fewer than literally all Texas voters were eligible to vote by mail—"there were 73 prosecutions out of millions of votes cast" indicates not that voter fraud is difficult to detect and prosecute but instead that "vote by mail fraud is [not] real." And, in any event, because maintaining safety while vindicating constitutional rights is within the public interest, it is, according to the district court, also within the public interest "to prevent [Texas] from violating the requirements of federal law."

The state officials filed an emergency motion for a stay pending appeal, and this motions panel granted a temporary administrative stay to consider carefully

the motion for stay pending appeal.[8] In the interim, the Texas Supreme Court, without dissent, largely accepted General Paxton's proffered interpretation of the Texas Election Code. *In re State*, No. 20-0394, 2020 Tex. LEXIS 452, at *2 (Tex. May 27, 2020) (Hecht, C.J.).[9] The court held that it "agree[d] with the State that a lack of immunity to [the Virus] is not itself a 'physical condition' that renders a voter eligible to vote by mail within the meaning of [TEX. ELEC. CODE] § 82.002(a)." *Id.* at *29.

We now stay the preliminary injunction pending appeal.

II.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009). Whether to grant a stay is committed to our discretion. *See Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019). We evaluate "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 426. "The first two

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[8] *Hinojosa v. Abbott*, No. 20-50407, 2020 U.S. App. LEXIS 16713 (5th Cir. May 20, 2020) (per curiam).

[9] Also in the interim, we received helpful submissions from the parties and useful briefs of *amici curiae* from the States of Louisiana and Mississippi, jointly; the NAACP Legal Defense and Educational Fund, Inc.; Travis County Clerk Dana DeBeauvoir; Harris County, Texas; a long list of healthcare professionals; and five military veterans. The court is grateful for the assistance of these distinguished *amici*.

factors are the most critical." *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (per curiam). "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

III.

When evaluating the first factor, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken*, 556 U.S. at 434 (quotation marks omitted). Indeed, in the mine run of appeals, "*likelihood* of success remains a prerequisite,"[10] and a "presentation of a substantial case . . . alone is not sufficient."[11] In a limited subset of cases, a "movant need only present a substantial case on the merits" if (1) "a *serious legal question* is involved" and (2) "the balance of the equities weighs *heavily* in favor of granting the stay."[12]

A.

The state officials claim three jurisdictional bars: (1) The plaintiffs' claims present a nonjusticiable

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[10] *United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 361 (5th Cir. 2013) (per curiam) (emphasis added and brackets omitted) (quoting *Ruiz v. Estelle*, 666 F.2d 854, 857 (5th Cir. 1982)).

[11] *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992) (per curiam); *see also Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011) ("[Movant] argues that a finding that he is likely to succeed on the merits is not necessary if the balance of the equities is strongly in his favor . . . . Our caselaw, however, is to the contrary.").

[12] *Arnold v. Garlock, Inc.*, 278 F.3d 426, 439 (5th Cir. 2001) (emphasis added); *see also Weingarten*, 661 F.3d at 910 ("[T]his court determined that the four-factor test [for a stay] must be fully applied except where there is a serious legal question involved and the balance of equities heavily favors a stay.").

political question; (2) the plaintiffs lack standing; and (3) the claims are barred by sovereign immunity.[13] We address each in turn.

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[13] In addition to their jurisdictional points, the state officials maintain that the district court should have abstained under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Because the Texas Supreme Court has since ruled in the state officials' favor as to the meaning of "disability" under the Texas Election Code, that issue is moot. Nevertheless, the district court's decision to forge ahead despite an intimately intertwined—and, at that time, unresolved—state-law issue was not well considered.

"For *Pullman* abstention to be appropriate it must involve (1) a federal constitutional challenge to state action and (2) an unclear issue of state law that, if resolved, would make it unnecessary for us to rule on the federal constitutional question." *Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009) (ellipses omitted). The second factor is flexible—it is satisfied if the constitutional questions will be "substantially modified," *id.*, or otherwise "present[ed] in a different posture," *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980).

The district court's reasons for not abstaining are suspect. The court stated that "resolution by the State court [would] not [have] render[ed] this case moot nor [have] materially alter[ed] the constitutional questions presented." But at the time of its ruling, the opposite was true. The plaintiffs raised federal constitutional challenges to Texas's vote-by-mail scheme, and the Texas Supreme Court's determination as to whether lack of immunity to the Virus equaled a "disability" was bound to alter how the constitutional issues would be presented.

If the plaintiffs had succeeded before the Texas Supreme Court, all Texas voters could have applied to vote by mail under the disability provision. *See* TEX. ELEC. CODE § 82.002. Moreover, the plaintiffs' void-for-vagueness, voter-intimidation, and First Amendment claims all turn in substantial part on how the Texas Supreme Court was to interpret that disability provision. That much should have been obvious, given that the

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The state officials—supported by Louisiana and Mississippi as *amici*—assert that this case is a nonjusticiable political question, because the plaintiffs "essentially ask the federal courts to determine whether the State's efforts to combat [the Virus] in the context of elections have been adequate."[14] In their view, "no manageable standard exists to resolve whether the State has done enough to protect voters from this pandemic." Relatedly, Louisiana and Mississippi suggest that the district court could not have reached its decision without first having made an impermissible policy determination. For support, the state officials and their *amici* rely primarily on a recent district court case challenging Georgia's plans for holding upcoming primary

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district court itself felt the need to interpret the disability provision.

The district court relied almost exclusively on cases from the Eleventh Circuit. But whatever that court has held, *we* have stated that "traditional abstention principles apply to civil rights cases," *Romero v. Coldwell*, 455 F.2d 1163, 1167 (5th Cir. 1972) (abstaining in a voting-rights case), including election-law cases involving important and potentially dispositive [sic] state-law issues, *see, e.g., Moore*, 591 F.3d at 745–46 (ballot-access case); *United States v. Texas*, 430 F. Supp. 920, 927–31 (S.D. Tex. 1977) (three-judge court). The district court's ruling turned our jurisprudence on its head.

[14] The plaintiffs suggest that the state officials waived this contention. Not so. Questions of justiciability are jurisdictional and non-waivable. *See Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 948 (5th Cir. 2011) ("[T]he concept of justiciability, as embodied in the political question doctrine, expresses the jurisdictional limitations imposed upon federal courts by the case or controversy requirement of Article III." (quotation marks and brackets omitted)).

elections. *See Coal. for Good Governance v. Raffensperger*, No. 1:20-CV-1677-TCB, 2020 WL 2509092 (N.D. Ga. May 14, 2020).

That contention is unlikely to gain traction. The *Coalition* case is different in kind.[15] That 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. *Id.* at *1. In other words, the suit challenged the *wisdom* of Georgia's policy choices. But to resolve this appeal, we need not—and will not—consider the prudence of Texas's plans for combating the Virus when holding elections. Instead, we must decide only whether the challenged provisions of the Texas Election Code run afoul of the Constitution, not whether they offend the policy preferences of a federal district judge. The standards for resolving such claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rights.[16]

2.

The state officials contend that they are likely to show that the plaintiffs lack standing.[17] "To establish

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[15] The other cases on which the state officials and their *amici* rely—most notably, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which involved partisan gerrymandering, and *Jacobson v. Florida Secretary of State*, 957 F.3d 1193, 1212–23 (11th Cir. 2020) (W. Pryor, J., concurring), which involved the allocation of the top position on the state's paper ballots—are also of no help.

[16] *See, e.g., Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (considering constitutional challenge to Texas's voter-identification law).

[17] The state officials raise a standing problem only as to the plaintiffs' challenges to Texas's vote-by-mail provisions, for

standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, No. 17-1712, 2020 WL 2814294, at *2 (U.S. June 1, 2020). The state officials assert that the plaintiffs cannot satisfy the last two prongs, because "[a]cceptance or rejection of an application to vote by mail falls to local, rather than state, officials."

Our precedent, however, poses a significant obstacle. In *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612–13 (5th Cir. 2017), we considered a challenge to Texas Election Code section 61.033, which requires an interpreter to "be a registered voter of the county in which the voter needing the interpreter resides." Texas averred that the second and third standing factors were not satisfied, because the plaintiff's injury was caused by local election officials—who determined whether a voter could serve as an interpreter—not the state or its Secretary of State. *Id.* at 613. The panel rejected that position, holding that the "invalidity of a Texas election statute is, without question, fairly traceable to and redressable by . . . its Secretary of State, who serves as the 'chief election officer of the state.'" *Id.* (quoting TEX. ELEC. CODE § 31.001(a)).

So too here. Texas's vote-by-mail statutes are administered, at least in in the first instance, by local

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which Governor Abbott and Secretary Hughs could be potential enforcers. The state officials do not contend that the plaintiffs lack standing to press their voter intimidation or First Amendment claims against General Paxton.

election officials.[18] But the Secretary of State has the duty to "obtain and maintain uniformity in the application, operation, and interpretation of" Texas's election laws, including by "prepar[ing] detailed and comprehensive written directives and instructions relating to" those vote-by-mail rules. TEX. ELEC. CODE § 31.003. And the Secretary of State has the power to "take appropriate action to protect" Texans' voting rights "from abuse by the authorities administering the state's electoral processes."[19] Based on that, the state officials have not shown—at least as to the Secretary of State—that they are likely to establish that the plaintiffs lack standing.

That analysis applies with far less force, however, to Governor Abbott. *OCA-Greater Houston*, 867 F.3d at 613, was a suit against *only* the state of Texas and its Secretary of State. The Texas Election Code delegates enforcement power for the vote-by-mail provisions to "early voting clerk[s]," subject to control by the Secretary of State. *See* TEX. ELEC. CODE § 86.001(a). Those rules provide no role for the Governor.

The plaintiffs disagree, pointing to several of the Governor's actions that they believe demonstrate his "extensive enforcement with respect to state elections."[20] But those actions—all of which

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[18] *See* TEX. ELEC. CODE § 83.005 ("The city secretary is the early voting clerk for an election ordered by an authority of a city."); *id.* § 86.001(a) ("The early voting clerk shall review each application for a ballot to be voted by mail.").

[19] *Id.* § 31.005(a). That includes the power to issue orders and, if necessary, seek a temporary restraining order, injunction, or writ of mandamus. *Id.* § 31.005(b).

[20] Those actions include Governor Abbott's (1) changing the date of the special election for State Senate District 14, (2)

addressed *when* an election was to be held, not *how* it was to be conducted—were exercises of the Governor's *emergency powers*, not any authority given him by the Texas Election Code. Because the plaintiffs have pointed to nothing that outlines a relevant enforcement role for Governor Abbott, the plaintiffs' injuries likely cannot be fairly traced to him. *See Thole*, 2020 WL 2814294, at *2.

3.

The state officials aver that they are "likely to show that the preliminary injunction is barred by sovereign immunity."

a.

Generally, state sovereign immunity precludes suits against state officials in their official capacities. *See City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). The important case of *Ex parte Young*, 209 U.S. 123 (1908), is an exception to that baseline rule, but it permits only "suits for prospective . . . relief against state officials acting in violation of *federal* law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (emphasis added). It does not sanction suits targeted at *state*-law violations. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124–25 (1984).

To be sued, state officials must "have 'some connection' to the state law's enforcement," *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 517 (5th Cir. 2017), which ensures that "the suit is [not] effectively against the state itself," *In re Abbott*, 956

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allowing political subdivisions to postpone elections originally scheduled for May 2, 2020, to November 3, 2020, and (3) postponing the May 26, 2020, primary runoff to July 14, 2020.

F.3d 696, 708 (5th Cir. 2020). The precise scope of the "some connection" requirement is still unsettled,[21] but the requirement traces its lineage to *Young* itself.[22] We do know, though, that it is not enough that the official have a "*general* duty to see that the laws of the state are implemented." *Morris*, 739 F.3d at 746 (emphasis added). And "[i]f the official sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent and our *Young* analysis ends." *Abbott*, 956 F.3d at 709 (quotation marks omitted).

Moreover, a mere connection to a law's enforcement is not sufficient—the state officials must have taken some step to enforce. But how big a step? Again, the line evades precision. One panel observed that "'[e]nforcement' typically involves compulsion or

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[21] Our decisions are not a model of clarity on what "constitutes a sufficient connection to enforcement." *Austin*, 943 F.3d at 999 (quotation marks and alteration omitted). In *Okpalobi v. Foster*, 244 F.3d 405, 414–15 (5th Cir. 2001) (en banc) (quotation marks omitted), a plurality recognized that *Young* mandates that the state officials "have some connection with the enforcement of the act in question or be specially charged with the duty to enforce the statute and be threatening to exercise that duty." But a later panel declined to follow that "specially charged" requirement, specifically because it determined that *Okpalobi* was not binding precedent. *See K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). A separate panel quoted a different part of *Okpalobi* as setting forth the proper standard. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014).

[22] *See Young*, 209 U.S. at 157 ("[I]t is plain that [a state] officer must have *some connection* with the enforcement of the [relevant state law], or else [the suit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party." (emphasis added)).

constraint." *K.P.*, 627 F.3d at 124. Another defined it as "a demonstrated willingness to exercise" one's enforcement duty. *Morris*, 739 F.3d at 746. But the bare minimum appears to be "some scintilla" of affirmative action by the state official. *Austin*, 943 F.3d at 1002.

Finally, there is "significant overlap" between our standing and *Young* analyses. *Air Evac*, 851 F.3d at 520. "[I]t may be the case that an official's connection to enforcement is satisfied when standing has been established," because if an "official *can* act, and there's a significant possibility that he or she *will* . . . , the official has engaged in enough compulsion or constraint to apply the *Young* exception." *Austin*, 943 F.3d at 1002 (emphasis added) (quotation marks and alteration omitted).

b.

The state officials assert that, for three reasons, *Young* is not satisfied: (1) The district court lacked jurisdiction to order the state officials to comply with state law; (2) because none of the state officials "enforces the mail-in ballot rules," they lack the "requisite connection" to be sued; and (3) General Paxton's statements do not constitute threats of enforcement sufficient to invoke *Young*. None of those notions is likely to carry the day.

The pleadings belie the state officials' first contention. The complaint seeks to prevent the enforcement of provisions of the Texas Election Code that the plaintiffs believe violate the Constitution. The plaintiffs are not hoping to secure a "consistent application of state law"; to the contrary, their case before the *state* courts focused solely on state-law issues.

The second contention also runs into a significant roadblock. As we recognized above, our precedent suggests that the Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to support standing. *See OCA-Greater Hous.*, 867 F.3d at 613. That, in turn, suggests that *Young* is satisfied as to the Secretary of State. *See Austin*, 943 F.3d at 1002. But, as discussed above, because the Governor "is not statutorily tasked with enforcing the challenged law[s], . . . our *Young* analysis," at least as to him, "ends." *Abbott*, 956 F.3d at 709 (quotation marks omitted).

Finally, though the state officials' third contention raises a close question, they have not shown that they are likely to succeed. They acknowledge that General Paxton "has concurrent jurisdiction with local prosecutors to prosecute election fraud." And a state attorney general's sending letters threatening enforcement is enough to satisfy *Young*.[23] Such action goes beyond merely making a public statement that a law will be enforced.[24] Though the state officials maintain that

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[23] *See NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 393–95 (5th Cir. 2015). We have recognized that *NiGen* "did not explicitly examine [General] Paxton's 'connection to the enforcement' of the [state statute]." *Austin*, 943 F.3d at 1001. Nevertheless, "the fact that Paxton sent letters threatening enforcement of the [state statute] makes it clear that he had not only the authority to enforce [it], but was also constraining the [plaintiff's] activities, in that it faced possible prosecution." *Id.*

[24] *See Abbott*, 956 F.3d at 709 ("[O]ur cases do not support the proposition that an official's public statement alone establishes authority to enforce a law, or the likelihood of his doing so, for *Young* purposes.").

General Paxton's letters did not constitute enforcement threats, *NiGen* prevents the officials from making the necessary "strong showing" that their position is *likely* to be vindicated. *Nken*, 556 U.S. at 426.

B.

We turn to the constitutional claims. Texas Election Code § 82.003 generously provides those aged sixty-five and older with the option to vote by mail, but the district court held that that provision violates equal protection as applied. The state officials will likely show that it does not.

1.

"States . . . have broad powers to determine the conditions under which the right of suffrage may be exercised," *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959), and Texas has long allowed certain groups, including persons aged sixty-five and over, to vote early by mail.[25]

Not everyone has that privilege, however, so with the Virus spreading, Texas plans to implement measures to protect those who go to the polls. Those measures include the bread and butter of social distancing, such as protective masks for election workers, plentiful cleaning wipes and hand sanitizer, cotton swabs for contacting touch screens, and floor

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[25] *See* TEX. ELEC. CODE §§ 82.001–82.004, 82.007; *In re State*, 2020 Tex. LEXIS 452, at *21 (noting that Texas first permitted early voting in 1917 and a mail ballot in 1933). An absentee ballot for those sixty-five and older was first allowed in 1975. *Id.* at *22.

decals inside the polling places that show where voters should stand.[26]

The plaintiffs demand that Texas go further. They complain that the state violates the Equal Protection Clause of the Fourteenth Amendment in failing to extend the vote-by-mail privilege to them.

The plaintiffs' theory comes in two flavors. First, they assert (rightly) that section 82.003 facially discriminates on the basis of age, and they conclude (wrongly) that strict scrutiny applies. Second, they stress that because the statute doesn't permit them to vote by mail during this pandemic, it unlawfully burdens their fundamental right to exercise the franchise.

The district court had no trouble agreeing with the plaintiffs, hurling invectives at what it apparently saw as the state officials' harebrained justifications for gifting older but not younger voters with a vote by mail. The district judge concluded that strict scrutiny applies, because section 82.003 supposedly places a severe burden on the plaintiffs' right to vote, as voters who trek to the polls risk exposure to the Virus.

In so doing, the court rejected Texas's asserted interests in giving older citizens special protection and in guarding against election fraud. "Both reasons, even taken at face-value [*sic*], fail to outweigh the burden voters will face in exercising

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[26] *Id.* at *26 ("[A]s [Texas] highlights, authorities planning elections are working in earnest to ensure adherence to social distancing, limits on the number of people in one place, and constant sanitation of facilities.").

their right to vote before the threat of [the Virus] can be realistically be [*sic*] contained."

The district court opined, in the alternative, that the statute would fail even rational-basis review—a standard under which a law enjoys "a strong presumption of validity." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). "There is no rational state interest," the district court informed the state officials, "in forcing the majority of . . . voters to visit polls in-person [*sic*] during a novel global pandemic, thus jeopardizing their health (and the health of all those they subsequently interact with)." Neither is there a valid "interest in fencing out voters under the age of 65 [on a theory that] it would introduce rampant fraud, while allowing older voters to utilize mail ballots and allowing the alleged rampant fraud therewith." No stranger to rank speculation, the judge then accused Texas of seeking to disenfranchise a certain "sector of the population because of the way they [*sic*] may vote."[27]

2.

The state officials will likely prove error, because the district court ignored the case that squarely governs the equal-protection issue: *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 803 (1969) (Warren, C.J.).[28] Under *McDonald*, rational-basis review will probably apply, and section 82.003 stands.

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[27] This is an extremely serious accusation that calls into question the judge's even-handedness. In the interest of time and space, we let it pass without further comment.

[28] Amazingly, the district court cites *McDonald* but once—and only to summarize Texas's arguments.

a.

In *McDonald*, the Court held that an Illinois statute that denied certain inmates mail-in ballots did not restrict their right to vote. *Id.* at 807. Instead, it burdened only their asserted right to an absentee ballot, because there was no evidence that the state would not provide them another way to vote. *Id.* at 807–08. Put differently, there was no indication that the inmates were "in fact *absolutely prohibited* from voting by the State[.]" *Id.* at 808 n.7 (emphasis added). The absentee rules did "not themselves deny [the inmates] the exercise of the franchise; nor, indeed, d[id] Illinois' Election Code so operate as a whole[.]" *Id.* at 807–08.

The *McDonald* Court therefore applied rational-basis review, not strict scrutiny, and easily upheld the absentee-ballot scheme. *Id.* at 808–11. The state's refusal to give the inmates a mail ballot was not irrational, "particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may [have been] extremely difficult, if not practically impossible." *Id.* at 809–10.

b.

The state officials will likely succeed in showing that *McDonald* controls. Texas has similarly decided to give only some of its citizens the option to vote by mail.[29] That statutory scheme, which is "designed to

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[29] *See* TEX. ELEC. CODE §§ 82.001–82.004, 82.007; *see also In re State*, 2020 Tex. LEXIS 452, at *21 ("The history of absentee voting legislation in Texas shows that the Legislature has been both engaged and cautious in allowing voting by mail.").

make voting more available to some groups who cannot easily get to the polls," does not itself "deny" the plaintiffs "the exercise of the franchise." *Id.* at 807–08. The plaintiffs are welcome and permitted to vote, and there is no indication that they "are in fact absolutely prohibited from voting *by the State*." *Id.* at 808 n.7 (emphasis added). So the right to vote is not "at stake," *id.* at 807, and rational-basis review follows, *id.* at 807–11.

In the hopes of securing heightened scrutiny, the plaintiffs take a swing at distinguishing *McDonald*. They assert that here, unlike in *McDonald*, there is evidence that section 82.003 affects their ability to vote, given the risks of venturing outside the home to vote in person. Relatedly, they theorize that unlike the statute in *McDonald*, the Texas statute, TEX. ELEC. CODE § 82.003, distinguishes among voters on the basis of a supposedly unlawful basis (age). The plaintiffs also suggest that *McDonald* is out of tune with more recent voting-rights jurisprudence.

The state officials will likely succeed in rebutting those contentions. It is true that "the Court's disposition of the claims in *McDonald* rested on a failure of proof," *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974), but that cuts against the plaintiffs, not for them. The very same "failure[s] of proof" exist here, because, as explained, there is no evidence that Texas has prevented the plaintiffs from voting by all other means. *Id.*

The Virus, to be sure, increases the risks of interacting in public. But, under *McDonald*, a state's refusal to provide a mail-in ballot does not violate equal protection unless—again—the state has "in fact

absolutely prohibited"[30] the plaintiff from voting.[31] Texas permits the plaintiffs to vote in person; that is the exact opposite of "absolutely prohibit[ing]" them from doing so.[32]

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[30] *McDonald*, 394 U.S. at 808 n.7; *see also id.* at 809. In another place, the *McDonald* Court states the rule, a bit differently, as whether the "statutory scheme has an impact on [the plaintiffs'] ability . . . to vote." *Id.* at 807. But the Court spoke twice of an "absolute[] prohibit[ion]," and *McDonald*'s follow-on cases quote and apply that language. *See O'Brien*, 414 U.S. at 529–30; *Goosby v. Osser*, 409 U.S. 512, 521 & 521 n.7 (1973). *McDonald*, 394 U.S. at 808, also referred to whether the state had "in fact precluded" the vote. In any event, in this context, there is no relevant difference between the various formulations, because Texas's decision to allow those aged sixty-five and older to vote by mail does not "impact" the plaintiffs' ability to vote.

[31] *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 (Minn. 2003) ("In *McDonald*, the Court concluded that an Illinois statute that denied unconvicted jail inmates absentee ballots did not restrict the inmates' right to vote . . . because there was no evidence that jail officials would not provide another means . . . to vote.").

[32] The plaintiffs urge that, in *Veasey*, 830 F.3d at 216, we—in the plaintiffs' words—"rejected Texas's argument that the provision of one form of voting justifies deprivation of another form of voting, here, mail-in voting." But *Veasey* stated only that Texas's provision of a mail-in ballot did not make up for the burdens that its voter-identification law placed on voting in person. *See id.* at 255 ("The district court did not clearly err in finding that mail-in voting is not an acceptable substitute for in-person voting in the circumstances presented by this case."). *Veasey* nowhere said that the state must provide everyone multiple ways to vote. And here, unlike in *Veasey*, the *state* has not placed any obstacles on the plaintiffs' ability to vote in person. That distinction is precisely the one that *McDonald*, 394 U.S. at 807, 808 n.7, 809, relied on in concluding that rational-basis review was appropriate. *Veasey* is inapposite.

"Ironically, it is [Texas's] willingness" to afford flexibility to older citizens "that has provided [the plaintiffs] with a basis for arguing that the provision[]" discriminates. *McDonald*, 394 U.S. at 810–11. The Constitution is not "offended simply because some" groups "find voting more convenient than" do the plaintiffs because of a state's mail-in ballot rules. *Id.* at 810. That is true even where voting in person "may be extremely difficult, if not practically impossible," because of circumstances beyond the state's control, such as the presence of the Virus.[33]

McDonald's progeny drives the point home. In *Goosby*, 409 U.S. at 521, the Court distinguished *McDonald* on the ground that "the Pennsylvania statutory scheme absolutely prohibit[ed the plaintiffs] from voting." Similarly, in *O'Brien*, 414 U.S. at 530, the plaintiffs were "denied any alternative means of casting their vote," so *McDonald* did not control. Thus, in both *Goosby* and *O'Brien*, the absentee rules were suspect only because the state had prevented the vote.[34] The mail-in ballot, in

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[33] *McDonald*, 394 U.S. at 810. The Court gave examples of persons who, for reasons beyond the state's control, might not be able to make it to the polls on election day, such as a doctor called in for emergency work. *See id.* at 810 n.8. The court implied that a state's failure to provide such persons with an absentee ballot is not irrational. *Id.* at 809–10 ("Illinois could . . . make voting easier . . . by extending absentee voting privileges to those in [the inmates'] class. Its failure to do so, however, hardly seems arbitrary, particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible.").

[34] *See also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969) (distinguishing *McDonald* on the ground

other words, was the plaintiffs' only shot at exercising the franchise. The same is not true here.

The plaintiffs fare no better in trying to distinguish *McDonald* by pointing out that section 82.003 discriminates based on age. True, in *McDonald*, 394 U.S. at 807, rational-basis scrutiny applied partly because the statute did not discriminate on the basis of race or wealth. But section 82.003 also does not differentiate on impermissible equal-protection grounds, given that age is not a suspect class.[35]

Though they complain of age discrimination, the plaintiffs next assail *McDonald* for being too aged.[36] Decided in 1969, *McDonald* supposedly "predates most of the Supreme Court's modern voting rights jurisprudence." At bottom, the plaintiffs think that *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), have put *McDonald* in the grave.

Yet the Supreme Court abrogates its cases with a bang, not a whimper, and it has never revisited *McDonald*.[37] Because *McDonald* "has direct

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that "[t]he present appeal involves an absolute denial of the franchise").

[35] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). Of course, the Twenty-Sixth Amendment is relevant to age discrimination in voting; the plaintiffs' claim under it is covered below.

[36] We resist the flippant observation that solicitude for old precedent is like accommodation to older voters.

[37] *See, e.g.*, *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."); *see also*

application in [this] case, . . . the Court of Appeals should follow" it, "leaving to [the High] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

Regardless, the Court has not discarded *McDonald*, *sub silentio* or otherwise. By the time *McDonald* was handed down, the basic doctrinal framework was in place, and *McDonald* has not become an albatross since. Indeed, "[b]y 1969, . . . the Supreme Court had been stating that voting was a fundamental right stretching back more than eight decades. The Warren Court itself had repeatedly employed strict scrutiny to examine infringements on the franchise."[38] *Anderson*, for its part, does not cite (much less overrule) *McDonald*, and *Burdick* cites it favorably.[39] *McDonald* lives.

c.

Because the plaintiffs' fundamental right is not at issue, *McDonald* directs us to review only for a rational basis, under which "statutory classifications will be set aside only if no grounds can be conceived

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League of United Latin Am. Citizens v. Abbott, 951 F.3d 311, 317 (5th Cir. 2020) (referencing and applying that principle).

[38] Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1154 (2012) (footnote omitted); *see Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (noting that the right to vote is "a fundamental political right, because [it is] preservative of all rights").

[39] *See generally Anderson*, 460 U.S. 780 (not mentioning *McDonald*); *see also Burdick*, 504 U.S. at 434 (citing *McDonald* with approval).

to justify them."[40] The law need only "bear some rational relationship to a legitimate state end." *McDonald*, 394 U.S. at 809.

The state officials are likely to show that section 82.003's age distinction survives. As the state notes, "[e]ven outside the context of [the Virus], individuals aged 65 and over . . . face unique challenges in attending the polls," so "[t]he State's decision to allow older Texans to vote by mail without extending that ability to everyone is a rational way to facilitate exercise of the franchise for Texans who are more likely to face everyday barriers to movement."

We agree. Texas has a proper interest in helping older citizens to vote, and its decision to permit them to do so by mail is a rational way to satisfy that "laudable state policy." *McDonald*, 394 U.S. at 811. If anything, the Virus's existence proves the reasonableness of Texas's approach, given that older persons have a greater risk of becoming seriously ill or dying from it, as the record demonstrates.[41]

The district court held (in the alternative) that section 82.003 has no rational basis. But it is the court's analysis that is short on rationality. There is

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[40] *McDonald*, 394 U.S. at 809; *see also Beach Commc'ns, Inc.*, 508 U.S. at 315 ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it[.]" (quotation marks omitted)).

[41] *See also In re State*, 2020 Tex. LEXIS 452, at *3 ("Indications are that people who are over 65 years old or that have pre-existing medical conditions are at a higher risk of being very sick from the disease." (citing *Coronavirus Disease 2019 (COVID-19)*, TEX. DEP'T OF STATE HEALTH SERVS., https://www.dshs.texas.gov/coronavirus/, *available at* https://perma.cc/95N8-CUYR (captured May 28, 2020))).

not a single principle of rational-basis review that the district court got right.

Take one example. Even though a court must uphold the law if there is any conceivable basis for it, *see, e.g.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam), the district court instead tried to divine Texas's true intent. Shooting in the dark, the court guessed that Texas wanted to "forc[e] . . . voters to visit polls in-person [*sic*] during a novel global pandemic, thus jeopardizing their health" and to "fenc[e] out from the franchise a sector of the population because of the way they [*sic*] may vote." This kind of drive-by speculation about the state's covert motives is utterly impermissible and finds no support in this record.[42] Instead of searching for a conceivable basis for the rules, the court jerry-rigged some straw men and proceeded to burn them.

The district court also forgot that the legislature can "take one step at a time, addressing itself to the phase of the problem which seems most acute," *Beach Commc'ns*, 508 U.S. at 316, without worrying that a rogue district judge might later accuse it of drawing lines unwisely.[43] Undeterred, the court reasoned that

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[42] *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (holding that the legislature need not "actually articulate at any time the purpose or rationale supporting its classification"); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision[.]" (quotation marks omitted)). And as observed, *supra*, it is a grave and malicious accusation for a district judge to make.

[43] *See Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012) ("[T]he Constitution does not require the [state] to draw the perfect line nor even to draw a line superior to some other

it is absurd for Texas to "fenc[e] out voters under the age of 65" from a mail-in ballot because of frets about fraud "while allowing older voters to u[se] mail ballots," thereby risking the same "rampant fraud."

The district judge should know that that is not how rational-basis review works. *See McDonald*, 394 U.S. at 809. Texas may take one bite at the apple;it need not swallow it whole. *See, e.g.*, *Fritz*, 449 U.S. at 179. That "the line might have been drawn differently . . . is a matter for legislative, rather than judicial, consideration." *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003).

The policy merits of Texas's voting procedures were not before the district court, even though the Virus has raised the stakes. "[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319 (1993) (quotation marks omitted). Instead, the Constitution gives the states authority over "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, § 4, cl. 1, "which power is matched by state control over the election process for state offices," *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). "[T]he right to vote in any manner" is therefore not "absolute," *Burdick*, 504 U.S. at 433, because "[c]ommon sense, as well as constitutional law, compels the conclusion

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line it might have drawn. It requires only that the line actually drawn be a rational line."); *Fritz*, 449 U.S. at 179 ("Where, as here, there are plausible reasons for [the legislature's] action, our inquiry is at an end. . . . This is particularly true where the legislature must necessarily engage in a process of line-drawing."); *McDonald*, 394 U.S. at 809.

that government must play an active role in structuring elections[.]"[44]

It was not for the district judge to disparage Texas's response to the Virus and constitutionalize his favored version of the Election Code. *See, e.g.*, *Heller*, 509 U.S. at 319. The state officials will therefore likely demonstrate error.

C.

The well-respected logic of *McDonald* applies equally to the Twenty-Sixth Amendment claim, so the state officials are likely to show that the district court erred in finding for the plaintiffs.

The Twenty-Sixth Amendment is not a major player in federal litigation.[45] Ratified in 1971, it states that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1. It also gives Congress enforcement power. *See id.* § 2. Consistent with its plain language, there is plenty of evidence that the Amendment's

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[44] *Burdick*, 504 U.S. at 433; *see also* Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 836 (2005) ("[T]he [Supreme] Court has been reluctant to apply strict scrutiny in challenges to restrictions on the franchise that the Court views as impacting only the administration of elections—in particular, when a challenge is of a particular voting procedure." (quotation marks omitted)).

[45] *See, e.g.*, Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1170 (2012) ("[T]he Twenty-Sixth Amendment has received scant attention. It has been applied in only one Supreme Court case and a handful of state and lower federal court cases." (footnote omitted)).

most immediate purpose was to lower the voting age from twenty-one to eighteen.[46]

The district court seemed to agree with the plaintiffs' notion that the summary affirmance in *Symm v. United States*, 439 U.S. 1105 (1979) (mem.), proves that strict scrutiny governs Twenty-Sixth Amendment claims. But that reads *Symm*'s four words—"[t]he judgment is affirmed"—to stand for too much. "A summary disposition affirms only the judgment of the court below, and no more may be

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[46] *See, e.g.*, Fish, *supra*, at 1184–95 (reviewing the history underlying the passage and speedy ratification of the Twenty-Sixth Amendment); Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1131 (2019) ("With the 1972 presidential elections looming, Congress returned to the effort to expand the franchise to youth in state and local elections via constitutional amendment. A sense of urgency arose . . . based on the inherent unfairness that would result in allowing young people to vote in federal races but not state or local races[.]").

We do not necessarily imply that the Twenty-Sixth Amendment is toothless to do anything beyond lowering the voting age. Some say that its plain language sweeps more broadly—and some say the opposite. *Compare* Fish, *supra*, at 1176 (analyzing the Twenty-Sixth Amendment's text and contending that it did more than "exclusively lower[] the voting age"), *with* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 91 (1991) ("The speed of [the Twenty-Sixth Amendment's passage] was a tribute to its proponents' success in explaining that they had a very narrow object: the problem was simply to guarantee eighteen-year-olds the vote that Congress had sought to assure by [a statute held unconstitutional in *Oregon v. Mitchell*, 400 U.S. 112 (1970)]. . . . All [the Amendment] did was change the voting age from twenty-one to eighteen. Nobody looked upon it as something more."). Because *McDonald*'s logic effectively controls the Twenty-Sixth Amendment claim, we need not dive into this historical debate.

read into [it] than was essential to sustain that judgment." *Anderson*, 460 U.S. at 784 n.5. The affirmance prevents us "from coming to opposite conclusions" only "on the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

The only precise issue in *Symm* (as relevant here) was whether it violates the Twenty-Sixth Amendment to mandate that a student meet heightened residency requirements as a condition for being registered to vote. *See United States v. Texas* ("*Symm*"), 445 F. Supp. 1245, 1251 (S.D. Tex. 1978) (three-judge court), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105 (1979) (mem.). The *Symm* district court[47] held that it so violated. *Id.* at 1261. But the court nowhere stated that strict scrutiny applies anytime a voting-procedure rule—no matter the context—makes an age distinction. Even if it had, such a broad decree would not have been essential to the judgment. *See Anderson*, 460 U.S. at 784 n.5. The state officials will therefore likely succeed in showing that *Symm* does not require strict scrutiny for the Twenty-Sixth Amendment claim.

Instead, employing *McDonald*'s logic leads inescapably to the conclusion that rational-basis review applies. If a state's decision to give mail-in ballots only to some voters does not normally implicate an equal-protection right to vote, *see McDonald*, 394 U.S. at 807–08, then neither does it implicate "[t]he right . . . to vote" of the Twenty-Sixth Amendment. There is no reason to treat the latter differently. Indeed, *McDonald*'s logic applies neatly to

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[47] The Supreme Court heard *Symm* on direct appeal from the district court.

the Twenty-Sixth Amendment's text—which was ratified two years after *McDonald*—because the Amendment similarly focuses on whether the *state* has "denied or abridged" the right to vote.

As above, there is no evidence that *Texas* has denied or abridged that right; properly qualified voters may exercise the franchise. So what "is at stake here" is "not the right to vote . . . but a claimed right to receive absentee ballots." *McDonald*, 394 U.S. at 807. Rational basis therefore likely applies, *see id.* at 807–08, and, for reasons now familiar, the Texas Election Code's vote-by-mail rules live to see another day, *see* TEX. ELEC. CODE§ 82.003.

The Virus's emergence has not suddenly obligated Texas to do what the Constitution has never been interpreted to command, which is to give everyone the right to vote by mail. So as to the equal protection and Twenty-Sixth Amendment claims, the state officials are substantially likely to prove error.

D.

The district court concluded that the plaintiffs are likely to succeed on their void-for-vagueness claim. The state officials, in turn, are likely to show the opposite.

"A statute is unconstitutionally vague if it does not give a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited[.]'" *United States v. Bird*, 124 F.3d 667, 683 (5th Cir. 1997) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). "The void-for-vagueness doctrine has been primarily employed to strike down criminal laws." *Groome Res. Ltd. v. Par. of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000). "In the civil context, the statute must be so vague and

indefinite as really to be no rule at all." *Id.* (quotation marks omitted).

That is not so here, nor do the plaintiffs allege that it is. Texas law provides an adequate definition of "disability": "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." TEX. ELEC. CODE § 82.002(a). That provision—which was at issue in the related state-court litigation—is hardly so unclear as not to establish a rule at all. Even under a more stringent standard, the Texas definition is specific enough to provide notice.

E.

The state officials are likely to show that the voter-intimidation claim is meritless. The plaintiffs asserted that claim under 42 U.S.C. § 1985(3), which prohibits, *inter alia*, conspiracies "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." "To state a claim under . . . § 1985(3), a plaintiff must allege: (1) a conspiracy involving two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States." *Hilliard v. Ferguson*, 30 F.3d 649, 652–53 (5th Cir. 1994).

For several reasons, the state officials will likely succeed. To start, there is no conspiracy involving two or more persons. "It is a long-standing rule in this circuit that a 'corporation cannot conspire with itself any more than a private individual can, and it is the

general rule that the acts of the agent are the acts of the corporation.'" *Id.* at 653 (quoting *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952)). In the plaintiffs' motion for preliminary injunction, they complained that "General Paxton has worked in concert with employees . . . in issuing his threats." Paxton cannot conspire with his employees for purposes of § 1985(3).

Additionally, the state officials will likely show that General Paxton did not deprive anyone of the equal protection of the laws. To the contrary, the plaintiffs seek to prohibit General Paxton from communicating truthfully about Texas law. And by characterizing his comments as "threats," the district judge undermined freedom of speech, rule of law, and the power of public officials to participate in public discourse.

F.

The state officials likely will show that General Paxton did not threaten the free-speech rights of these plaintiffs or anyone else. Under Texas law, it is a crime for voters to submit knowingly false applications to vote by mail or for third parties to encourage voters to do so. *See* TEX. ELEC. CODE §§ 84.0041, 276.013. Because the Texas Supreme Court interpreted "disability" not to include lack of immunity to the Virus, *In re State*, 2020 Tex. LEXIS 452, at *2, it is a crime to encourage voters to indicate that they are disabled merely because they lack immunity.

We need not decide today whether the First Amendment allows for prosecutions based on encouraging others to submit knowingly false applications to vote by mail. No one has been charged

with a crime, and the plaintiffs do not seek relief—declaratory or otherwise—asserting a right against such prosecutions.[48] But what the plaintiffs *do* contend is that General Paxton violated their First Amendment rights solely by expressing his professional interpretation of the law—an interpretation that now has been vindicated by the state's highest civil court. To the extent that General Paxton's comments represent governmental speech, they are "not barred by the Free Speech Clause." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

The plaintiffs are not *sui generis* in their free speech protections. The preliminary injunction prohibiting General Paxton from "issuing any guidance, pronouncements, threats of criminal prosecution or orders" itself threatens his personal right to comment on matters of public concern. The Texas Attorney General enjoys no less robust a right to participate in the marketplace of ideas than does anyone else, including the plaintiffs. *See, e.g.*, *Bond v. Floyd*, 385 U.S. 116, 133–35 (1966).

IV.

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[48] The plaintiffs' proffered theory is not that they have been denied a First Amendment right to encourage illegal activity. Instead, they suggest that it is perfectly legal under Texas law to apply to vote by mail by citing a "disability" based only on a fear of contracting the Virus. The Texas Supreme Court has ruled otherwise. *See In re State*, 2020 Tex. LEXIS 452, at *2. Again, had the district court chosen to abstain, the issue would certainly have been "present[ed] in a different posture"—if at all. *Palmer*, 617 F.2d at 428. But the court did not abstain, and we decline to consider arguments that are not before this court and were not presented to the district court.

As to "whether the [stay] applicant[s] will be irreparably injured absent a stay," *Nken*, 556 U.S. at 426, the state officials have easily met their burden. "When the State is seeking to stay a preliminary injunction, it's generally enough to say [that] any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Valentine*, 956 F.3d at 803 (quotation marks and brackets omitted). The Texas legislature has articulated criteria for vote-by-mail eligibility, *see* TEX. ELEC. CODE §§ 82.001–82.004, 82.007, which the Texas Supreme Court has held not to include a mere lack of immunity to the Virus, *In re State*, 2020 Tex. LEXIS 452, at *2. "The district court's injunction prevents the State from effectuating the Legislature's choice and hence imposes irreparable injury." *Valentine*, 956 F.3d at 803.

The subject and timing of the injunction render that injury particularly acute.

> [U]nder our Constitution[,] . . . the States are given the initial task of determining the qualifications of voters who will elect members of Congress. . . . Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections . . . .

Storer v. Brown, 415 U.S. 724, 729–30 (1974) (citing U.S. CONST. art. I, §§ 2, 4).

This injunction strikes at the core of Texas's regulation of voting. It effectively requires that all voters be allowed to vote by mail, immediately and fundamentally affecting primary runoffs for which in-person voting begins in a matter of weeks. Perhaps, as the district court suggested, all "[c]itizens should have the option to" vote by mail as a matter of public policy, maybe they shouldn't. But an order *requiring* Texas to institute such a policy against its will presents significant, irreparable harm, which is precisely why the Supreme "Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). "That is especially true where, as here, . . . local officials are actively shaping their response to changing facts on the ground." *S. Bay*, 2020 U.S. LEXIS 3041, at *3 (Roberts, C.J., concurring).

V.

We consider "whether issuance of the stay will substantially injure the other parties interested in the proceeding," *i.e.*, the plaintiffs. *Nken*, 556 U.S. at 426.

It will not. "There is no doubt that [the Virus] poses risks of harm to all Americans, including" Texas voters. *Valentine*, 956 F.3d at 804. But our decision is limited to determining irreparable harm *not* in denying the plaintiffs' requested relief outright but in temporarily staying the injunction pending a full appeal. Given the great likelihood that the state officials will ultimately succeed on the merits,

combined with the undeniable, irreparable harm that the injunction would inflict on them—factors that we consider "the most critical," *id.* at 801—we hold that the balance of harms weighs in favor of the state officials.

VI.

We have no trouble concluding that staying the injunction is "where the public interest lies." *Nken*, 556 U.S. at 426. The district court relied solely on a Ninth Circuit case for the proposition that "it is in the public interest not [*sic*] to prevent the State from violating the requirements of federal law." But "[b]ecause the State is the appealing party, its interest and [aforementioned] harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). And even so, "[a] temporary stay here, while the court can consider argument on the merits, will minimize confusion among both voters and trained election officials"—a goal patently within the public interest given the "extremely fast-approaching election date." *Id.*

Just days after themselves obtaining an injunction intervening in forthcoming elections, the plaintiffs ambitiously suggest that *we* should now refrain from intervening ourselves, given "the proximity of a forthcoming election and the mechanics and complexities of state election laws."[49] That invocation "reminds us of the legal definition of chutzpah: . . . a young man, convicted of murdering his parents, who argues for mercy on the ground that

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[49] *Veasey v. Perry*, 769 F.3d 890, 893 (5th Cir. 2014) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

he is an orphan."[50] In any case, we "would prefer not to [intervene], but when a lower court"—at the plaintiffs' behest—erroneously "intervenes and alters the election rules so close to the election date, our precedents indicate that [we], as appropriate, should correct that error." *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

* * * * *

The state officials' motion to stay the preliminary injunction pending appeal is GRANTED. The injunction, in all its particulars, is STAYED pending further order of this court.

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[50] *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991); *see also Marks v. Comm'r*, 947 F.2d 983, 986 (D.C. Cir. 1991) (per curiam) (applying the "chutzpah doctrine" to "fugitives from criminal prosecution" who "turn[ed] around and blame[d] the Commissioner for not finding them" (quotation marks omitted)).

JAMES C. HO, Circuit Judge, concurring:

These are difficult times. Many have suffered enormous loss. Many worry about what is coming next. To lose the ability to vote in an upcoming election due to fear of the pandemic would be beyond heartbreaking for citizens who are already hurting, for it is "a right they will *never* be able to recover." *Stringer v. Whitley*, 942 F.3d 725, 726 (5th Cir. 2019) (Ho, J., concurring).

State officials have responded by adopting various measures to ensure safety at the polls. If Plaintiffs believe these measures will not be enough, and that only mail-in ballots will suffice, that is understandable. But it is beyond our purview. Under the Constitution, it is a policy decision for the Texas Legislature to make. *See* U.S. CONST. art. I, § 4; *see also McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969) (same).

We do not suspend the Constitution during a pandemic. That includes our constitutional structure of government. "Just as other government officials must not exceed their rightful power in extraordinary circumstances, this Court also must not do so"—lest "we abandon the Constitution at the moment we need it most." *In re Salon a La Mode*, __ S.W.3d __, __ (Tex. 2020) (Blacklock, J., concurring). Even—indeed, especially—in times of strife, fidelity to our Constitution must endure and guide us through the crisis.

I agree that we should grant a stay of the preliminary injunction pending appeal and thus join Judge Smith's powerful opinion for the court.

I.

The right to vote is fundamental to our constitutional democracy. But it means nothing if your vote doesn't count. And it won't count if it's cancelled by a fraudulent vote—as the Supreme Court has made clear in case after case. "Every voter's vote is entitled to be counted"—and that means every vote must be "protected from the diluting effect of illegal ballots." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). "[P]rotection of the integrity of the ballot box is surely a legitimate state concern." *O'Brien v. Skinner*, 414 U.S. 524, 534 (1974) (Marshall, J., concurring). There should be "no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.).

As Justice Stevens noted, "the risk of voter fraud" is "real." *Id.* And "it could affect the outcome of a close election." *Id.* "[F]lagrant examples of such fraud . . . have been documented throughout this Nation's history by respected historians and journalists." *Id.* at 195 (collecting examples).[1]

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[1] Moreover, separate and apart from combating voter fraud, states have another reason to adopt anti-fraud measures—to maximize public confidence. "[P]ublic confidence in the integrity of the electoral process has *independent significance*, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197 (plurality op. of Stevens, J.) (emphasis added). As the Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, observed, "the 'electoral system *cannot inspire public confidence* if no safeguards exist to deter or detect fraud or to confirm the identity of voters.'" *Id.* (emphasis added).

What's more, courts have repeatedly found that mail-in ballots are particularly susceptible to fraud. In *Crawford*, the plurality noted "Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor"—a fraud "perpetrated using absentee ballots." *Id.* at 195. And it observed that "much of the fraud" that has occurred in various elections nationwide "was actually absentee ballot fraud or voter registration fraud." *Id.* at 195 n.12. It cited an amicus brief that found "extensive problems with absentee ballot fraud" in various elections—including a 1997 Miami election that "was overturned on the basis of absentee ballot fraud." Brief of Amici Curiae The Brennan Center for Justice et al., at 12. Where voter fraud has been detected, "it generally takes the form of organized fraud," including "use of fraudulent absentee or mail-in ballots." *Id.* at 19. *See also id.* at 21 (noting "thousands of incidents of possible absentee ballot fraud").[2]

Numerous members of our court have likewise concluded that "mail-in ballot fraud is a significant threat"—so much so that "the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting." *Veasey v. Abbott*, 830 F.3d 216, 239, 256 (5th Cir. 2016) (en banc). *See also id.* at 263 ("[M]ail-in voting . . . is far more vulnerable

[2] Similarly, Justice Souter observed that mail-in voting is "less reliable" than in-person voting. *See Crawford*, 553 U.S. at 212 n.4 (Souter, J., dissenting) ("'election officials routinely reject absentee ballots on suspicion of forgery'"); *id.* at 225 ("absentee-ballot fraud . . . is a documented problem in Indiana").

to fraud."); *id.* (recognizing "the far more prevalent issue of fraudulent absentee ballots").[3]

There is no suggestion that these widely held concerns about voter fraud will not be present during the pandemic. So if there is to be expansion of mail-in voting notwithstanding these findings, our Constitution and precedents remind us that it must be done by legislators, not judges.

II.

For nearly a century, mail-in voting has been the exception—and in-person voting the rule—in Texas. Under Texas law, only certain groups—including the disabled, the elderly, certain persons confined in jail, and voters who will be absent from the jurisdiction

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[3] Another judge in our circuit who closely studied efforts to combat voter fraud likewise acknowledged the "general agreement that voting fraud exists with respect to mail-in ballots." *Veasey v. Perry*, 71 F. Supp. 3d 627, 653 (S.D. Tex. 2014). In fact, "there appears to be agreement that voter fraud actually takes place *in abundance* in connection with absentee balloting." *Id.* at 641 (emphasis added). "[T]here was universal agreement that a much greater risk of fraud occurs in absentee balloting, where some campaign workers are known to harvest mail-in ballots through several different methods, including raiding mailboxes." *Id.* at 676. Put simply: "Mail-in ballots are not secure." *Id.*

Moreover, mail-in voting not only "has an increased incidence of fraud" but also "a lower level of public confidence"—echoing the discussion of the importance of public confidence in *Crawford*. *Id.* at 677. There is "substantial testimony" that voters are "highly distrustful of the mail-in ballot system." *Id.* at 676. *See*, *e.g.*, *id.* at 641 (citing testimony from voters who "do not trust that their vote will be properly counted if they have to vote by absentee ballot"); *id.* at 677 (citing testimony from voters that "expressed . . . distrust of voting by mail" because "'mail ballots have a tendency to disappear'").

during the voting period—may vote by mail. *See* TEX. ELEC. CODE §§ 82.001–82.004, 82.007.

Plaintiffs claim that Texas law is unconstitutional. They offer two theories for why judges, rather than legislators, should expand mail-in voting: (1) voters fear going to public polling places due to the pandemic, and (2) Texas law discriminates on the basis of age. I address each theory in turn.

A.

First, Plaintiffs contend that, due to the pandemic, voters fear going to public polling places. Their concerns are very real, and very well taken.

But under governing Supreme Court precedent, expanding access to mail-in voting to redress personal hardship—as opposed to state action, *O'Brien*, 414 U.S. at 525–27, 529–31—is a policy matter for the Legislature, not the courts. *See*, *e.g.*, *McDonald*, 394 U.S. at 809; *see also* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.").

In *McDonald*, a group of eligible voters in county jail could not go to the polls, either "because they are charged with nonbailable offenses" or "because they have been unable to post the bail imposed by the courts." 394 U.S. at 803. Nor did they qualify for mail-in ballots under state law. So they sued under the Equal Protection Clause. But the Court rejected their claim. And that decision likely forecloses the equal protection claim presented here as well.

As the Court explained, absentee voting is "designed to make voting more available to some groups who cannot easily get to the polls." *Id.* at 807.

So such laws increase options—not restrictions. They "do not *themselves* deny [voters] the exercise of the franchise." *Id.* at 807–08 (emphasis added).

Of course, there will always be other voters for whom, through no fault of the state, getting to the polls is "difficult" or even "impossible." *Id.* at 810. *See also id.* at 810 n.8 (collecting examples). But as the Court explains, that is a matter of personal hardship, not state action. For courts to intervene, a voter must show that *the state* "has in fact precluded [voters] from voting"—that the voter has been "prohibited from voting by the State." *Id.* at 808 & n.7.

The plaintiffs in *McDonald* failed to make this showing. As the Court observed, "the record is barren of any indication that the State might not, for instance, furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.* at 808 n.6. *Cf. O'Brien*, 414 U.S. at 529–31 (noting failure to provide alternative measures stated in *McDonald*).

The record here is, if anything, even stronger for the state than in *McDonald*. There is affirmative evidence here that officials are taking various steps to ensure safety at the polls—measures familiar to anyone who has recently visited a grocery store. According to a sworn declaration, they include:

- "training election workers on best practices for setting up polling locations for social distancing, including determining maximum capacity inside the voting areas,"

- "[p]roviding a table-mounted Plexiglas protective shield at each voter check-in station,"
- "[p]roviding protective masks for all election workers,"
- "[p]roviding sanitizing wipes and hand sanitizer to each location in sufficient quantities as to accommodate voter turnout and equipment sanitation needs,"
- "[p]roviding social distancing floor decals to polling places to ensure safety recommendations are practiced inside and outside the location,"
- "[o]ffering cotton swabs to voters to use as a disposable stylus for marking their ballot selections on the touch screen ballot marking device,"
- "[p]lacing additional election workers in polling places to assist with changes relating to . . . the safety measures," and
- "[p]reparing for increased curbside voting traffic at polling places."

In sum, election officials "are working in earnest to ensure adherence to social distancing, limits on the number of people in one place, and constant sanitation of facilities." *In re State of Texas*, __ S.W.3d __, __ (Tex. 2020).

So this is not a case of official intransigence, as in *O'Brien*, 414 U.S. at 525–27. Tellingly, neither Plaintiffs nor the district court even mention *O'Brien*, and they invoke *McDonald* only in passing. They

instead focus their attention on the Twenty-Sixth Amendment—a claim to which I will now turn.[4]

B.

Plaintiffs contend that, separate and apart from the pandemic, the Texas absentee ballot law expressly discriminates on the basis of age, because it permits all persons over the age of 65 to vote by mail, but does not provide that same automatic right to those under 65.

The Twenty-Sixth Amendment forbids discrimination in voting "on account of age." Similarly, the Fifteenth Amendment forbids discrimination in voting "on account of race." The text of the Fifteenth Amendment closely tracks the text of the Twenty-Sixth Amendment. And it would presumably run afoul of the Constitution to allow only voters of a particular race to vote by mail. *See McDonald*, 394 U.S. at 807 (offering vote-by-mail on the basis of race would trigger "more exacting judicial scrutiny").

Plaintiffs do not mention the Fifteenth Amendment here, however. Nor do any of the amici. Moreover, the majority opinion correctly observes that the Supreme Court has said little to date about

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[4] Plaintiffs suggest that *McDonald* is an old decision that "predates most of the Supreme Court's modern voting rights jurisprudence." The suggestion seems uncharitable to the respected Justices who decided *McDonald*. *See*, *e.g.*, *O'Brien*, 414 U.S. at 531–33 (Marshall, J., concurring) (applying *McDonald*, which he joined). Courts continue to treat *McDonald* as the law of the land. *See*, *e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (citing *McDonald*); *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (same); *Martinez v. Mukasey*, 519 F.3d 532, 545 (5th Cir. 2008) (same).

the Twenty-Sixth Amendment, and that the closest analogy available under current precedent is the *McDonald* approach to the Fourteenth Amendment. That is surely right. I would simply add that, even if one were to assume that Texas law violates the Twenty-Sixth Amendment, the preliminary injunction is likely flawed for another reason.

The Supreme Court has repeatedly held that "there are 'two remedial alternatives' . . . when a statute benefits one class . . . and excludes another from the benefit." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017). The remedy must provide equal treatment, of course. But equal treatment can be achieved either by "withdrawal of benefits from the favored class" or by "extension of benefits to the excluded class." *Id.* "How equality is accomplished . . . is a matter on which the Constitution is silent." *Id.* (quotations omitted).

So how do courts decide which remedy to order? Do we "level up" (everyone gets to vote by mail) or "level down" (no one gets to)? To decide, courts must determine "what the legislature would have willed had it been apprised of the constitutional infirmity." *Id.* at 1699 (quotations omitted). We look to "the legislature's intent, as revealed by the statute at hand." *Id.* If "the discriminatory exception consists of *favorable* treatment for a discrete group," we "strik[e] the discriminatory exception" and "extend[] the general rule . . . to cover the previously favored group." *Id.*

These principles readily apply here. Under Texas law, in-person voting is the rule, and mail-in voting is the exception. And that is consistent with the judicial consensus that "fraud is much greater in the mail-in

ballot context than with in-person voting." *Veasey*, 830 F.3d at 239 (en banc).

So if Plaintiffs are entitled to relief, it is presumably the "leveling-down" injunction noted by Texas—an injunction "requiring all to vote in person," not one "extend[ing] mail-in voting to those under 65." As then-Judge Ginsburg once put it: "[W]hich would the political branches choose? It would take a court bolder than this one to predict . . . that extension, not invalidation, would be the probable choice." *Olsen v. DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989).

If Plaintiffs have a legal theory to justify a "leveling-up" injunction, they did not offer one here. Nor did the district court. So a stay is warranted.[5]

* * *

Our charge here is simple. As the majority opinion points out, and the Supreme Court recently reaffirmed: "[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error." *RNC v. DNC*,

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[5] Surely Plaintiffs do not *want* a "leveling-down" injunction—after all, depriving the elderly of mail-in voting would seem antithetical to the spirit of their lawsuit. But it may be the only relief courts are authorized to provide, in the event Plaintiffs ultimately prevail on the merits of their claim. *Compare*, *e.g.*, *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) ("[B]y affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court . . . erred."), *with Morales-Santana*, 137 S. Ct. at 1701 n.29 ("That Morales-Santana did not seek this outcome does not restrain the Court's judgment. The issue turns on what the legislature would have willed."). The parties have not briefed this issue, so I express no opinion here.

140 S. Ct. 1205, 1207 (2020). The district court demonstrably erred here, and in more ways than one—as the majority opinion extensively documents. Most notably, the district court ignored virtually the entire body of governing Supreme Court precedent relevant to this case, including *McDonald*, *O'Brien*, and *Morales-Santana*. So the state is likely to prevail in this appeal. I concur.

GREGG COSTA, Circuit Judge, concurring in the judgment:

This was a textbook case for *Pullman* abstention. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). The district court ruled just one day before the Supreme Court of Texas was hearing argument on a mandamus petition asking what counts as a "disability" under the mail-in ballot law. That forthcoming interpretation of state law could have made any federal constitutional ruling "unnecessary." *Id.* at 500.

All the hallmarks for *Pullman* abstention were present. The definition of disability was an "unsettled question[] of state law." 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4242 (3d ed. 2020). The answer to that question could have obviated the need for a federal constitutional ruling. *Id.* There was "already pending a state court action that [was] likely to resolve the state questions without the delay of having to commence proceedings in state court." *Id.* That parallel state case had already reached the state's highest court, which could provide a definitive answer on the meaning of state law. *See id.* (noting that abstention is more appropriate when there is a direct route to obtaining an answer from the state's highest court rather than having to "litigate[] through the entire state hierarchy of courts"). And with the state court's expediting its case, there would still be time for the federal court to rule if it needed to after the state court decision.

Plaintiffs' main push back against all of this is to argue that *Pullman* does not apply to voting rights cases. But we have applied *Pullman* to First and Fourteenth Amendment challenges in the related

context of election disputes. *See Moore v. Hosemann*, 591 F.3d 741, 742–43, 745–46 (5th Cir. 2009) (abstaining because an "election dispute[] . . . based on an interpretation of uncertain state law . . . should be resolved at the state level before [the Fifth Circuit] consider[s] wading into a constitutional thicket"). And the Supreme Court has rejected a civil rights exception for this abstention doctrine. *Harrison v. NAACP*, 360 U.S. 167, 169, 176–78 (1959); *see also* 17A WRIGHT AND MILLER § 4242 (explaining that while language in "later" Supreme Court opinions "lends some support to the notion that there should not be abstention in civil rights cases, . . . it is clear that there is no rule to this effect"). The best refutation of a categorical civil rights exception is the very case that gave rise to the abstention doctrine—*Pullman* was an equal protection challenge to a Texas Railroad Commission order preventing African-American porters from working on sleeping cars. 312 U.S. at 497–98.

Although there is no full civil rights carve out for *Pullman* abstention, the importance of the constitutional right asserted can counsel against abstention. *See* 17A WRIGHT AND MILLER § 4242 n.41 (citing First Amendment cases that highlight this principle). And the importance of that right may become decisive in the abstention analysis when there is a chance that waiting for a state court pronouncement will deprive the federal court of an opportunity to vindicate it. But that is why the timing of the parallel litigation made this such a strong case for abstaining. The Supreme Court of Texas was hearing its case on an expedited basis. That made it very likely the state court would rule in time for the federal court to then consider any remaining constitutional questions.

Indeed, it took the state court just a week to rule, so we now have the benefit of its decision. *See In re State of Texas*, No. 20-0394, 2020 Tex. LEXIS 452 (Tex. May 27, 2020). Its ruling may not have eliminated the federal constitutional claims, but it still shows the wisdom of waiting for an imminent interpretation of a state law before determining whether that law offends the Constitution. Although the Supreme Court of Texas held that "a lack of [COVID] immunity alone" does not qualify as a disability, it also stated that "a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability." *Id.* at *26. In denying mandamus, the decision also explained that a voter need not "declare the nature of the underlying disability" and that Texas law "place[s] in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition." *Id.* at *28–29. The court further concluded that county clerks and election administrators "do not have a ministerial duty, reviewable by mandamus, to look beyond the application to vote by mail." *Id.* at *29.

These clarifications of Texas law may warrant the withdrawal of some claims or perhaps the additions of others. At a minimum, *In re Texas* changes the complexion of the federal litigation, especially the aspects of this case focused on the statements of state, county, and party officials about mail-in voting. For example, wouldn't it now be accurate for county clerks or campaign officials to tell voters that they get to determine "whether in-person voting will cause a likelihood of injury due to a physical condition"? *Id.*

A stay is thus warranted because the district court should have waited for the state supreme court ruling and should now evaluate the federal claims against that definite interpretation of state law. Maybe its result will be the same; maybe it won't. But this important issue should be resolved based on a full and accurate understanding of the relevant state law.

We should end this administrative stay decision with that threshold procedural error. But despite recognizing that the district court should have abstained, *see* Maj. Op. at 9 n.13, the majority goes on to address other procedural issues and the merits. In doing so, it makes the same mistake the district court did: reaching "unnecessary" constitutional questions. *Pullman*, 312 U.S. at 500.

In addition to its perhaps more obvious interest in promoting "harmonious relation[s] between state and federal authority," *Pullman*, 312 U.S. at 501; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997), *Pullman* is an example of the broader principle that a federal court should address constitutional questions only when necessary. *Pullman*, 312 U.S. at 500; 17A WRIGHT & MILLER § 4242; *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–56 (1936) (Brandeis, J., concurring). Because an interpretation of state law might eliminate or at least impact the constitutional issue, a federal court that does not wait for an imminent state court ruling risks publishing an advisory opinion.

That same principle counsels against our delving into the merits of the case in this stay decision. "[I]f it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d

786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment). Because the failure to abstain alone supports a stay, merits discussion at this stage is unnecessary. It is also premature before the district court considers the claims in light of the now-determined issue of state law. The need for restraint is greater still at the stay stage as an opinion is not binding on the panel that will handle the appeal of the injunction. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013). What is good for the district court should be good for the appellate court.

* * *

COVID-19 has touched every aspect of our society. That includes the workings of our government. For the first time in its history, the Supreme Court has heard remote oral arguments. For the first time ever, in the House of Representatives members have voted remotely by proxy. So it is not surprising that citizens claim that they too should be able to vote remotely.

These plaintiffs are not challenging measures elected officials have taken to combat COVID-19. *But see* Maj. Op. at 2 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). Instead they are asking whether constitutional and statutory protections for voting rights require measures to ensure access to the ballot that is the lifeblood of our democracy—in particular, the ability to cast ballots by mail as hundreds of thousands of Texans have done in recent elections without significant fraud concerns. *See, e.g.*, *Early Voting – November 4, 2016*, TEX. SEC'Y OF STATE, https://www.sos.texas.gov/ elections/ early voting /2016/ nov4.shtml (reporting 311,324 "cumulative by mail voters" for early voting in the

2016 general election). These important questions deserve to be answered in the first instance on a full understanding of state law followed by appellate review with the benefit of oral argument and panel deliberation. Fortunately, there is still time for that.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY, GILBERTO HINOJOSA, Chair of the Texas Democratic Party, JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, and BRENDA LI GARCIA,

Plaintiffs,

V.

GREG ABBOTT, Governor of Texas, KEN PAXTON, Texas Attorney General, RUTH HUGHS, Texas Secretary of State, DANA DEBEAUVOIR, Travis County Clerk, and JACQUELYN F. CALLANEN, Bexar County Elections Administrator,

Defendants.

FILED
May 19 2020
Clerk, U.S. District Clerk
Western District of Texas
By /s/ _____
Deputy

Civil Action No. SA-20-CA-438-FB

ORDER REGARDING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

We hold these truths to be self-evident, that all men are created equal, that they are

> **endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.**

THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).

Two hundred forty-four years on, Americans now seek Life without fear of pandemic, Liberty to choose their leaders in an environment free of disease and the pursuit of Happiness without undue restrictions.

> **We the People of the United States, in Order to form a more perfect Union . . . .**

U.S. CONST. pmbl.

Of the 3,929,214 original Americans, "We the People" as the new sovereign with the power to prevent a new despot belonged in the hands of only 235,753 white males who owned property.[1]

Over time the franchise grew to include all white males,[2] African-American men,[3] and women.[4] Without that evolving expansion, "We the People" are mere words on 200 year old parchment.

There are some among us who would, if they could, nullify those aspirational ideas to return to the not so halcyon and not so thrilling days of yesteryear of the Divine Right of Kings,[5] trading our birthright as a sovereign people for a modern mess of governing pottage in the hands of a few and forfeiting the vision of America as a shining city upon a hill.[6]

PROCEDURAL BACKGROUND

Now before the Court is plaintiffs' assertion that current public health circumstances require an expansion of how votes are cast to prevent the spread of COVID-19. Plaintiffs would have the Court

interpret "disability" to include lack of immunity from COVID-19 and fear of infection at polling places. Plaintiffs seek a preliminary injunction to enlarge the use of voting by mail in lieu of close quarters in-person voting.

Texas law allows voting by mail for absentees (those who will be away from home for all of early voting and on election day), voters age sixty-five or older, and those with a "disability" which prevents them from voting in person. Tex. Elec. Code § 81.001-.004.

On April 17, 2020, a Travis County state court judge determined that any Texas voter without established immunity to COVID-19 meets the plain language definition of disability in the Texas Election Code, and thus, is eligible to apply for a mail in ballot in the upcoming July 2020 run off elections. Attorney General Paxton has appealed the ruling. He also threatened election administrators and voters with criminal prosecution if they followed the state court order.

Plaintiffs filed this federal suit on April 7, 2020. They allege the failure to allow voters under the age of sixty-five to vote by mail during the pandemic violates their federal constitutional rights. On April 29, 2020, plaintiffs filed a motion for preliminary injunction seeking to enjoin defendants from denying mail-in ballots to otherwise eligible voters under the age of sixty-five and to enjoin defendants from threatening to initiate criminal prosecutions to those seeking or providing mail-in ballots.

On May 13, 2020, the state defendants filed a petition for writ of mandamus with the Texas Supreme Court seek a determination that election

administrators have a duty to reject applications for mail in ballots which claim disability under the Texas Election Code based solely on the generalized risk of contracting a virus. The state court order has been stayed pending further proceedings in the state appellate courts, and no ruling has issued either on the appeal or the petition for writ of mandamus.

Plaintiffs' motion for preliminary injunction is ripe for review by this Court. The state defendants filed a response in opposition to the motion, Bexar County Elections Administrator Jacquelyn F. Callanen filed a response, plaintiffs filed a reply, and amici curiae briefs were filed by several organizations.

In order to secure a preliminary injunction, plaintiffs must establish the following four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445(5th Cir. 2009). Plaintiffs contend they have met their burden of proof because defendants' interpretation of the disability provision allowing vote by mail—which would exclude those who seek to avoid possible exposure to the coronavirus from the disability authorization—subjects voters under the age of sixty-five to unconstitutional burdens not levied on voters age sixty-five or older.

The state defendants respond that the resolution of the state court litigation will invariably alter this closely-related federal proceeding. They therefore argue that the abstention doctrine applies and this

Court should decline to hear plaintiffs' claims at this juncture. The state defendants further contend that plaintiffs lack standing and have not met their burden to show they are entitled to a preliminary injunction.

Plaintiffs reply that they have standing to bring suit and that abstention is not warranted because resolution by the state courts will not render this case moot or materially alter the constitutional questions presented. Plaintiffs also reurge their arguments that they have met their burden to show substantial likelihood of success on the merits of their claims under the First, Fourteenth and Twenty-Sixth Amendments of the United States Constitution; irreparable injury to plaintiffs outweighs the threatened harm to defendants if the injunction is denied; and granting the injunction will not disserve the public interest. For a more expansive view of the parties' positions, please see Appendix B.

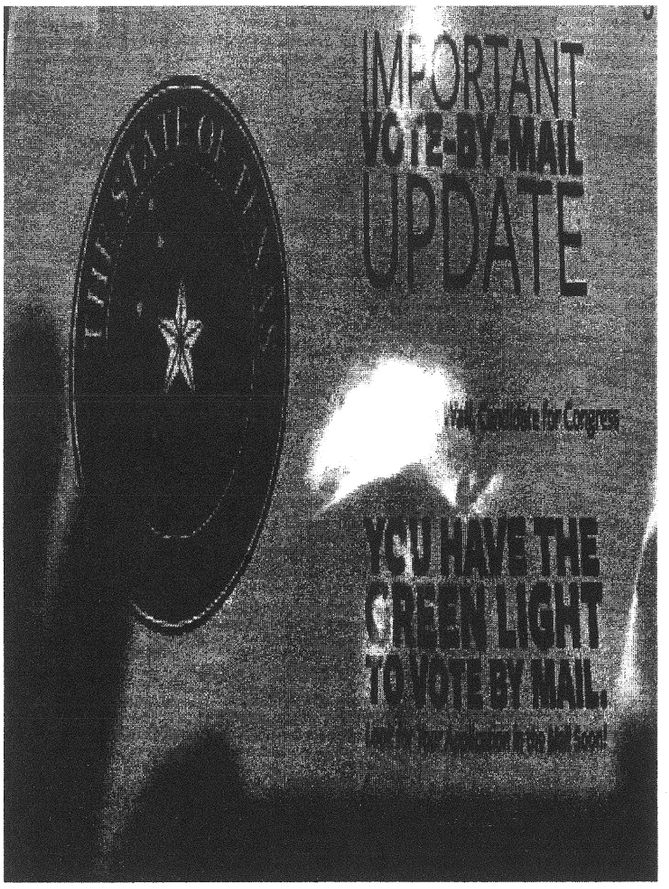
DISCUSSION

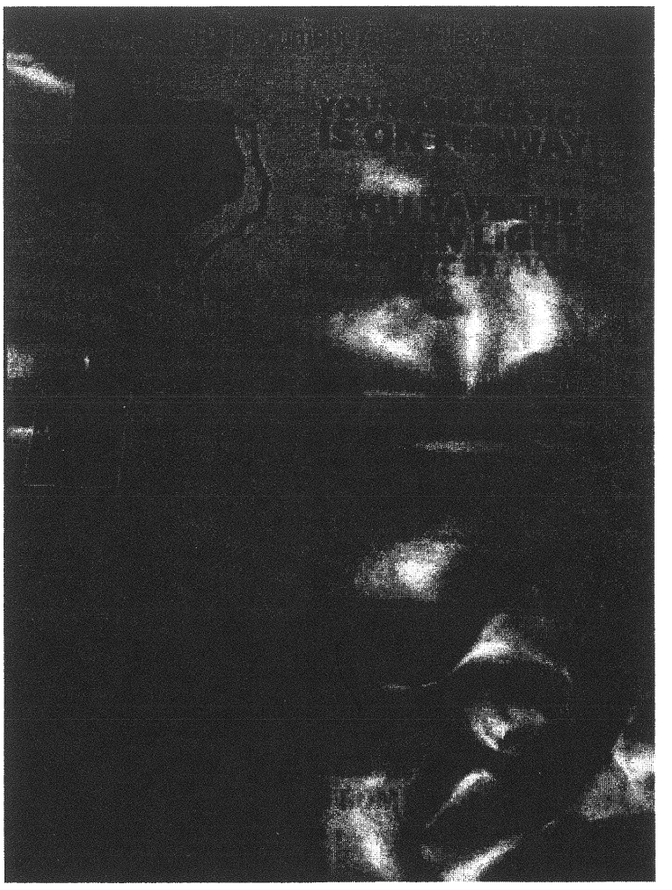
For those who have recently awakened from a Rip Van Winkle sleep, the entire world is mostly without immunity and fearfully disabled. Moreover, Governor Abbott, the State of Texas, and the federal government have issued guidance concerning prevention of the spread of the virus which speaks in terms of social distancing.[7] Plaintiffs say in-person voting makes social distancing difficult if not impossible.

In order to implement in-person voting, poll workers, many of whom are in an at-risk category, are also exposed to the COVID-19 virus.[8] The Court has concerns for the health safety of those individuals as well.

Other states have recognized the dangers of in-person voting and have implemented vote by mail procedures,[9] a process recently used by the President of the United States.[10]

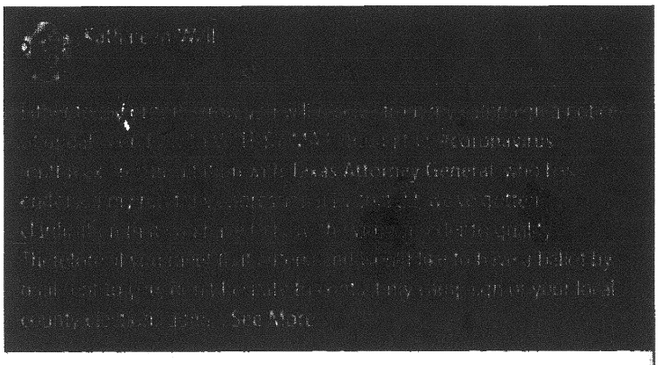
The confusion concerning vote by mail eligibility is exemplified in plaintiffs' Exhibit 35, campaign material for a Republican candidate endorsed by Attorney General Paxton, who urges voters to use mail ballots based on COVTD-19 concerns authorized by Secretary of State guidance, but subsequently advises that a voter must have the virus based on Attorney General Paxton's advice letter dated April 14, 2020. See docket no. 10, Exhibit 2 (explaining Attorney General Paxton's conclusion that based on the plain language of the relevant statutory text "fear of contracting COVID-19 does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail."). Confusion also reigns because plaintiffs have not received requested guidance nor can the Court find any guidance from the Secretary of State. The lack of clarity is evidenced in Exhibit 35:





+1 (844) 505-3072 ›

Hi this is Alex w/Kathaleen Wall for Congress. Due to Covid19, the campaign is mailing you absentee ballot applications, so you will have the option to safely vote! If you haven't received your app or need help, contact the campaign or find more info at kathaleenwall.com. Have you filled out & mailed back your app yet?



KEN PAXTON
ATTORNEY GENERAL of TEXAS

AG Paxton, Voting by Mail Based on Disability Reserved for Texans With Actual Illness or Medical Problem Rendering

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Equally vague and confusing are Attorney General Paxton's prior opinions. Compare Op. Tex. Att'y Gen No. KP-0009 (2015) (determining that no special definition of "disability" is required to use mail in ballot) and contrast Op. Tex. Att'y Gen. No. KP-0149 (2017) (determining that sexual deviant under age sixty-five meets definition of disabled under Texas Election Code §§ 82.001 - .004) with Attorney General Paxton' s advice letter of April 14, 2020 (determining that fear of contracting COVID-19 does not meet the definition of "disability" to use mail in ballot). Such contradictory opinions are at best duplicitous and at worst hypocritical.

Defendants raise the specter of widespread voter fraud if mail ballots are employed but cite little or no evidence of such in states already doing so. Texas truth is to the contrary, Between 2005 to 2018, there were 73 prosecutions out of millions of votes cast.[11] The Court finds the Grim Reaper's scepter of pandemic disease and death is far more serious than an unsupported fear of voter fraud in this sui generis experience. Indeed, if vote by mail fraud is real, logic dictates that all voting should be in person. Nor do defendants explain, and the Court cannot divine, why older voters should be valued more than our fellow citizens of younger age. U.S. CONST. amend. XIV § 1 ("No State shall. . . deny to any person within its jurisdiction the equal protection of the laws."); Tex. Elec. Code § 82.003 ("A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day.").

In a previous case, the evidence has shown that there is no widespread voter fraud.[12] The Court has great confidence in the ability of election administrators and law enforcement to prevent or

prosecute, with evidence and probable cause, the infinitesimal events of voter fraud, none of which are likely to affect election outcomes.

Attorney General Paxton has publicly expressed a willingness to pursue criminal charges against these election administrators and law enforcement officials. The state defendants point out that, in 2019, this Court dismissed a claim against Attorney General Paxton based on statements that he made in a press release, noting that the plaintiffs there could not sustain a claim based on "an alleged intimidating press release." *Texas League of United Latin Am. Citizens v. Whitley*, Case No. 5:l9-CA-00074-FB, docket no. 131 (W.D. Tex. Mar. 27, 2019) (Biery, J.). The Court finds that threatening legal voters and election administrators with criminal prosecution is not the same as issuing a political press release directed at alleged illegal voters. *See* docket no. 10, Exhibit 2 (Attorney General Paxton's advisory letter threatening voting administrators with criminal prosecution if they "advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19" and threatening voters with criminal prosecution if they cause a ballot to be obtained under "false pretense" of "disability" based fear of COVID-19); *see also Whitley*, docket no. 61-3.

The Twenty-Sixth Amendment of the United States Constitution provides:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The Texas Election Code allows citizens over sixty-five without a disability to vote by mail.[13] Thus, the

Texas vote by mail statute provides for the health safety of mail ballots for those 65 years of age and older but not those 64 years, 364 days and younger. The Court finds no rational basis for such distinction and concludes the statute also violates the clear text of the Twenty-Sixth Amendment under a strict scrutiny analysis.[14]

The Texas Election Code defines "disability" as a "physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of injuring the voter's health.[15] Disability is also defined as "a physical or mental condition that limits a person's movements, senses, or activities."[16] Clearly, fear and anxiety currently gripping the United States has limited citizens' physical movements, affected their mental senses and constricted activities, socially and economically. A new study shows COVID-19's psychological toll: distress among Americans has tripled during the pandemic compared to 2018. Jean M Twenge and Thomas E. Joiner, Mental Distress Among US. Adults During the COVID-19 Pandemic (May 15, 2020) (downloaded from https://mfr.osf.io/render?urlhttps://osf.io/downloadl5eb43O25a2.pdf (last visited May 18, 2020).[17] The evidence also shows voters are right to be fearful and anxious about the risk of transmission to their physical condition. Texas saw the largest single-day jump in coronavirus cases since the pandemic began this past Saturday.[18] The Court finds such fear and anxiety is inextricably intertwined with voters' physical health. Such apprehension will limit citizens' rights to cast their votes in person.[19] The Court also finds that lack of immunity from COVID-19 is indeed a physical condition.

One's right to vote should not be elusively based on the whims of nature. Citizens should have the option to choose voting by letter carrier versus voting with disease carriers. "We the People" get just about the government and political leaders we deserve, but deserve to have a safe and unfettered vote to say what we get.[20] The governed merit more than a Tillichian leap of faith in leaders elected by a small minority of the population as it was in 1789.[21]

> For want of a nail the shoe was lost.
> For want of a shoe the horse was lost.
> For want of a horse the rider was lost.
> For want of a rider the message was lost.
> For want of a message the battle was lost.
> For want of a battle the kingdom was lost.
> And all for the want of a horseshoe nail.[22]

For want of a vote, our democracy and the Republic would be lost and government of the people, by the people and for the people shall perish from the earth.

Accordingly, for the reasons stated herein, the findings made herein, the additional background in Appendix B and the Findings of Fact and Conclusions of Law in Appendix C, all attached hereto and made a part hereof, the preliminary injunction is GRANTED as follows:

Though Republican voters are not parties to this case, the Court finds it would discriminate against Republicans not to afford them the same health safety precautions of voting by mail. Accordingly, the Court *sua sponte* concludes this Order shall extend to allow Republican voters to vote by mail as well should they claim disability because of lack of immunity from or fear of contracting COVID-19.

Based on the state defendants' assertion of the abstention doctrine and lack of standing, plaintiffs' response thereto and for the reasons stated in the expanded findings in Appendix C, the Court concludes the abstention doctrine is not applicable and plaintiffs have standing to bring this suit.

The Court finds plaintiffs have met their burden to show a likelihood of success on the merits, a substantial threat of irreparable injury if the injunction is not issued, the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and that granting the injunction will not disserve the public interest.

IT IS ORDERED that during the pendency of pandemic circumstances:

(1) Any eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances;

(2) Defendants Dana Debeauvoir and Jacquelyn Callanen and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation with them may not deny a mail in ballot to any Texas voter solely on the basis that the voter does not otherwise meet the eligibility criteria outlined in Texas Election Code §§ 82.001 - 82.004;

(3) Defendants Dana Debeauvoir and Jacquelyn Callanen their agents, servants, employees, representatives, and all person or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from refusing to accept and tabulate any mail ballots received from voters solely

on the basis that the voter does not otherwise meet the eligibility criteria outlined in Texas Election Code §§ 82.00 1 - 82.004;

(4) Defendant Secretary of State Hughs is ordered pursuant to the power granted her under state law to ensure uniformity of election administration throughout the state, to use her lawful means to ensure this Order has statewide, uniform effect;

(5) All defendants and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation are enjoined from issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order. This Order does not prevent defendants and their agents and employees from prosecuting cases of voter fraud where evidence and probable cause exist;

(6) Each of the defendants, acting through the appropriate state or local agency, shall publish a copy of this Court's Order on the appropriate agency website and that the state defendants shall circulate a copy of this Court's Order to the election official(s) in every Texas County; and

(7) No cash bond shall be required of plaintiffs.

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until a Judgment is issued in this matter or until such time as the pandemic circumstances giving rise to this Order subside.

IT IS FINALLY ORDERED that defendants may petition this Court, upon giving notice and opportunity to be heard to plaintiffs, that the Order

should be dissolved for any reason, including that the state courts have resolved issues of a matter of state law that render this injunction unnecessary or because the pandemic circumstances giving rise to it have subsided.

It is so ORDERED.

SIGNED this 19th day of May, 2020.

Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX A

Endnotes

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[1] At the time of the first presidential election in 1789, there were 3,929,214 million Americans. Https://www.census.gov /history/through the decades/fast facts/l 790_fastfacts.html (last visited April 13, 2020). Only white, male property owners 6% of the population were eligible to vote. Https://www.archives.gov /exhibits/charters/ charters_of_freedom __ 3 .html (last visited April 13, 2020).

[2] The 1828 presidential election was the first in which non-property-holding white males could vote in the vast majority of states. North Carolina was the last state to end the practice in 1856. Stanley Engerman & Kenneth Sokoloff, *The Evolution of Suffrage Institutions in the New World* 16, 35 (February 2005), http://www.economics.yale.edu.org/UploadedPDF/sokoloff-050406.pdf (last visited April 13, 2020).

[3] U.S. CONST. amend. XV. Though in practice their votes were suppressed by poll taxes, violence and intimidation. Https://www.history.com.topics /early-20th-century-us/jim-crow-laws (last visited April 14, 2020); see also 42 U.S.C. § 1973 (The Voting Rights Act of 1965); 42 U.S.C. § 2000d, et seq. (The Civil Rights Act of 1964).U.S. CONST. amend. XV. Though in practice their votes were suppressed by poll taxes, violence and intimidation. Https://www.history.com.topics/early-2Oth-century-us/jim-crow-laws (last visited April 14, 2020); see also 42 U.S.C. § 1973 (The Voting Rights Act of 1965); 42 U.S.C. § 2000d, et seq. (The Civil Rights Act of 1964).

[4] U.S. CONST. amend. XIX.

[5] "The Divine Right of Kings" is the doctrine that kings have absolute power because they were placed on their thrones by God and therefore rebellion against the monarch is always a sin. Https://www.oxfordreference.comlview/1 01093 .oi/ authority.20 110810104754564 (last visited April 27, 2020).

[6] On January 11, 1989, President Ronald Reagan referred to America as a "shining city" upon a hill during his farewell speech to the nation:

> I've spoken of the shining city all my political life, but I don't know if I ever quite communicated what I saw when I said it. But in my mind it was a tall, proud city built on rocks stronger than oceans, wind-swept, God-blessed, and teeming with people of all kinds living in harmony and peace; a city with free ports that hummed with commerce and creativity. And if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here. That's how I saw it, and see it still.

Https://www.reaganlibrary.archives.gov (last visited May 10, 2020). "A city upon a hill" is a phrase derived from Jesus's Sermon on the Mount:

> You are the light of the world. A city set on a hill cannot be hidden. Nor do people light a lamp and put it under a basket, but on a stand, and it gives light to all in the house. In the same way, let your light shine before others, so that they may see your good works

> and give glory to your Father who is in heaven.

Matthew 5:14-16. This scripture was cited at the end of Puritan John Winthrop's lecture, "A Model of Christian Clarity," delivered on March 21, 1630, at Holyrood Church in Southampton, England, before the first group of Massachusetts Bay colonists embarked on the ship Arbella to settle Boston. He said:

> For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us. So that if we shall deal falsely with our God in this work we have undertaken, and so cause Him to withdraw His present help from us, we shall be made a story and a by-word through the world.

JOHN WINTHROP, THE JOURNAL OF JOHN WINTHROP 1630-1649 1 n.1 (Harvard University Press 1996) (1630).

[7] Https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-to-expand-openings-of-certain-businesses-and-activities.gov (last visited May 10, 2020); https://dshs.texas.gov/coronavirus/default.aspx (last visited May 10, 2020); https://cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited May 10, 2020); https://whitehouse.gov/ openingamerica.gov (last visited May 10, 2020).

[8] Https://www.pewresearch.org (explaining that "[a]mid COVID-19 risk to seniors, a majority of poll workers are . . . age 61 or older") (last visited May 5, 2020).

[9] All active voters in Georgia were mailed absentee ballot request forms after the Republican governor and Democratic Party agreed to move the run off elections due to COVID-19. Https:/ /www.ajc/news / state-regional-govt-politics/georgia-mail-absentee-ball ot-requests.html (last visited April 27, 2020). Currently, registered voters automatically receive a ballot by mail in five states: Oregon, Washington, Utah, Colorado and Hawaii. Seven states have switched to allow all voters to vote by mail with extended deadlines during the pandemic: Alaska, Wyoming, Ohio, Kansas, Delaware, Hawaii and Rhode Island. Other states, such as Florida and Arizona, are encouraging voting by mail. In Pennsylvania, the governor entered an order allowing voters concerned about the coronavirus to request an absentee ballot. Three other states have expanded the option to vote by mail due to COVID-19: Indiana, New Jersey and Maryland. Https://nytimes. com/article/2020-campaign-primary-calendar-coronavirus.html (last visited May 10, 2020).

[10] Https://www.sun-sentinel.com/news/politics/fl-ne-donald - trump - palm – beach – county - voter.html (last visited May 11, 2020).

[11] Robert Brischetto, Ph.D., a former executive director of the San Antonio-based Southwest Voter Research Institute, who was writing for the San Antonio Express News, found that over a thirteen year period from 2005 to 2018, there were 73 persons identified as adjudicated in election fraud cases in Texas. He noted:

> Almost half of the cases involved the improper use of absentee ballots, where voter fraud occurs most often. The rules for

> handling, transporting and mailing absentee ballots are very specific and very elaborate in Texas. While there were a couple of cases of forging and filling out absentee ballots for others, most were violations involving possessing, collecting, transporting and assisting in the submission of absentee ballots. Many of those violations might have been avoided with more training of election officers and education of voters on the handling and mailing of absentee ballots.

Robert Brischetto, *Texas' Desperate Search for Fraudulent Voters*, SAN ANTONIO EXPRESS NEWS, Mar. 19, 2019, https://www.mysanantonio.com/opinion/com mentary/article/Texas-desperate-search-for-fraudulent-voters-13674630.php (last visited Apr. 27, 2020).

[12] From *Texas League of United Latin Am. Citizens v. Whitley*:

> The evidence has shown in a hearing before this Court that there is no widespread voter fraud. **The challenge is how to ferret the infinitesimal needles out of the haystack of 15 million Texas voters.** The Secretary of State through his dedicated employees, beginning in February 2018, made a good faith effort to transition from a passive process of finding ineligible voters through the jury selection system in each county to a proactive process using tens of thousands of Department of Public Safety driver license records matched with voter registration records. Notwithstanding good intentions, the road to a solution was inherently paved

> with flawed results, meaning perfectly legal naturalized Americans were burdened with what the Court finds to be ham-handed and threatening correspondence from the state which did not politely ask for information but rather exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us.

Civil Action No. SA-19-CA-74-FB, (docket no. 61 at page 1) (bold emphasis added).

[13] Tex. Elec. Code §§ 81.001 – .004.

[14] The rational basis standard is implemented pursuant to *Anderson v. Celebrezze*, 420 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Alternatively, defendants' interpretation of the statute does not meet the heightened standard set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), or the strict scrutiny standard set forth in *Lynch v. Donnelly*, 465 U.S. 668, 687 n.13 (1984), as applied in *United States v. Texas,* 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd sub nom., Symm v. United States*, 439 U.S. 1105 (1979).

[15] Tex. Elec. Code § 81.002(a).

[16] Https://www.oxforddictionary.com/us/definition.disability.com (last visited May 11, 2020).

[17] This new study suggests that the COVID-19 pandemic will substantially change daily life in ways which will have a negative impact on mental health. Researchers at San Diego State University and Florida State University compared a nationally representative online sample of 2,032 American adults in late April 2020, to 19,330 American adults

who participated in the April 2018 National Health Interview Survey, to measure mental distress. Although the study has not yet undergone peer review and formal publication, its preliminary data showed that American adults in April 2020 were 8 times more likely to fit criteria for serious mental illness (27.7% v. 3.4%) and 3 times more likely to fit criteria for moderate or serious mental illness (70.4% v. 22.0%) compared to the 2018 sample.

[18] Texas reported 1,801 new coronavirus cases on Saturday, May 16, 2020, https://www.dshs.texas.gov (dashboard) (last visited May 16, 2020), reportedly marking the States' largest single-day jump since the start of the COVID-19 pandemic. Https://www.houstonchronicle.com/news/article/massive-jump-in-COVID-19-cases.html (last visited May 18, 2020).

[19] *See American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders* (5th ed. 2013) (explaining that mental health disorder is condition which affects thinking, feeling, behavior, or mood and which deeply impacts daily functioning).

[20] *Dutmer v. City of San Antonio*, 937 F. Supp. 587, 589, 595 (W.D. Tex. 1996) (Biery, J.) ("If history judges the [San Antonio] term limits movement an idea whose time should not have come, the evolutionary experiment called democracy includes the right to make mistakes and, ultimately, delivers just about the kind of government voters deserve . . . . Those who believe the [term limits] Ordinance a malignancy on the body politic may have to await the appearance of symptoms to attempt persuasion of a majority to perform corrective surgery at the ballot box.").

[21] PAUL TILLICH, DYNAMICS OF FAITH (Harper Collins Publishers Inc. 1957).

[22] Benjamin Franklin included a version of this proverb in *Poor Richard's Almanac* when the American colonies were at odds with the English Parliament. Benjamin Franklin, *Poor Richard's Almanac* 275 (1758) (G.P. Putman's Sons eds. 1889). During World War II, this verse was framed and hung on the wall of the Anglo-American Supply Headquarters in London. Https://www.citidel.edu.com (last visited May 1, 2020).

APPENDIX B
OVERVIEW

The Texas Election Code §§ 82.001-.004 restricts access to voting by mail through explicit age-based eligibility criteria. Voters age sixty-five and older can vote by mail without an excuse while voters under the age of sixty-five can do so only if they fit within very limited exceptions. Plaintiffs allege in this lawsuit that the age restriction is unconstitutional and that the State cannot justify with an adequate basis its decision to grant voters age sixty-five and older additional voting rights than those under age sixty-five.

However, in the motion for preliminary injunction, plaintiffs seek only preliminary relief on their as-applied challenge. Plaintiffs argue they are entitled to a preliminary injunction because the vote by mail provisions, as interpreted by Texas Attorney General Paxton, violate the Twenty-Sixth Amendment in the circumstances of the pandemic now facing the state and the country. Plaintiffs assert that, during the pandemic, Attorney General Paxton's strict interpretation of the disability exemption for vote by mail to exclude those who wish to avoid possible exposure to the coronavirus subjects voters under the age of sixty-five to unconstitutional burdens not levied on voters age sixty-five or older.

Meanwhile, plaintiffs contend the State gives voters no benchmark of which pre-existing medical conditions allow them to vote with the disability exception and no standard exists for how election officials would enforce the line the State wishes to draw. Plaintiffs assert that the failure of the State to provide a safe vote by mail option for voters under age sixty-five under these pandemic circumstances—while providing that safe option widely to those sixty-five

and older—abridges the right to vote on account of age and violates the Twenty-Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs also contend that Attorney General Paxton violated their rights to free speech. In response to a state court order finding that state law permits every eligible voter to vote by mail amid the COVID-19 pandemic, Attorney General Paxton publicly stated that third parties who advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19 could subject those third parties to criminal sanctions. Plaintiffs assert that Attorney General Paxton's letter is presently harming their right to vote, and indeed threatens political speech with criminal prosecution, in violation of the First Amendment. Plaintiffs further argue that Attorney General Paxton's conduct violates their right to be free from voter intimidation as guaranteed by the Voting Rights Act. Finally, plaintiffs seek injunctive relief based on their claim that Attorney General Paxton's interpretation of the Texas Election Code renders the statute unconstitutionally vague because it is not clear which voters qualify to vote by mail under its provisions.

The state defendants respond that plaintiffs have not met their preliminary injunction burden, which is to show a substantial likelihood of success on the merits on each claim, sufficient harm to plaintiffs and undue harm to defendants, and that it serves the public interest to grant the injunction. They submit that it is safe for all voters to vote in person in the midst of this pandemic. The state defendants also argue that abstention is warranted in this case because there are ongoing state court proceedings. They further contend that they are entitled to sovereign immunity

and plaintiffs lack standing because the state defendants do not enforce the Texas Election Code.

Plaintiffs reply that they have met their preliminary injunction burden. They further argue that this Court should not abstain because they have cognizable federal constitutional claims which will not be addressed in the state court proceedings and the failure to remedy them would cause irreparable harm. Plaintiffs further contend the state defendants cannot claim sovereign immunity because of their connections to the enforcement of the Texas Election Code. Finally, plaintiffs maintain they meet the requirements for Article III standing because each has suffered and will continue to suffer legally cognizable injuries because of defendants' actions.

BACKGROUND

Given the current pandemic conditions and their effects on election procedure, on March 27, 2020, some of the plaintiffs in this case filed an original petition and application for temporary injunction in a Texas state court to determine the application of state law. Plaintiffs argued § 82.002 of the Texas Election Code allows voters to elect to cast their ballots by mail under the circumstances of this pandemic. Section 82.002 of the Texas Election Code provides:

> Sec. 82.002. DISABILITY. (a) A qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health.

Tex. Elec. Code § 82.002. Section 82.003 of the Election Code states that "[a] qualified voter is eligible for early

voting by mail if the voter is 65 years of age or older on election day." TEX. ELEC. CODE § 82.003. Plaintiffs contended that participating in social distancing to prevent the spread of COVID-19 is "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." They therefore requested a declaration that Texas Election Code § 82.002 "allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of the virus or disease." Plaintiffs also sought a temporary injunction requesting that the Texas Secretary of State and the Travis County Clerk "be enjoined to accept and tabulate any mail-in ballots received from voters in an upcoming election who believe that they should practice social distancing in order to hinder the known or unknown spread of a virus or disease."

Shortly after the state court case was filed, the Texas Democratic Party and three voters brought this federal suit on April 7, 2020. The complaint states that, "[i]n the event the state courts find that vote by mail is permitted for all voters over the age of eighteen who are social distancing," plaintiffs ask this Court to "ensure compliance with federal law by providing a remedy." Plaintiffs allege this case should proceed so that the Court can timely determine "the constitutional rights of these plaintiffs and be in a position to do so in the event the state court rulings serve to harm these federal rights and/or the state court proceedings are delayed thus preventing timely state resolution of the state law issue." Their complaint asserts claims of age, race and language-minority discrimination, as

well as violations of the right to free speech under the First Amendment, vagueness in violation of the Fourteenth Amendment, and intimidation in violation of the Voting Rights Act.

A hearing was held in the state court case on plaintiffs' motion for a temporary injunction on April 15, 2020. Medical experts testified that they expect pandemic conditions to persist throughout the summer months and into the fall. Texas law allows voting by mail for absentees (those who will be away from home for all of early voting and on election day), voters age sixty-five or older, and those with a disability that prevents them from voting in person. As noted, plaintiffs argued that social distancing is a "disability" for purposes of voting by mail. The response presented by Assistant Attorneys General in that case was that the courts have no jurisdiction, pandemic conditions might change by July and Governor Abbott might provide direction to protect voters and the public.

Even as the hearing was concluding, Texas Attorney General Ken Paxton released an advisory letter to the chair of the House Elections Committee, threatening prosecution of any voter who voted by mail without a narrowly defined "physical condition" constituting a "disability." He threatened "criminal sanctions" as well for any election official advising such a vote. In the letter, Attorney General Paxton gave a non-official, advisory opinion regarding whether or not the risk of transmission of COVID-19 would entitle Texas voters to cast a mail-in ballot. The letter states: "We conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a

disability under the Election Code for purposes of receiving a ballot by mail."

On April 17, 2020, two days after the hearing, Travis County District Judge Tim Sulak ruled that in the context of the COVID-19 pandemic, all Texas voters who are not immune from the virus are eligible to apply for mail ballots under the "disability" provision of state election law. The temporary injunction order, which is imposed through July 27, states that "it is reasonable to conclude that voting in person while the virus is still in general circulation presents a likelihood of injuring the voter's health and therefore any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code section 82.002."

In response to the state court order, Attorney General Paxton stated:

> I am disappointed that the district court ignored the plain text of the Texas Election Code to allow perfectly healthy voters to take advantage of special protections made available to Texans with actual illness or disabilities. This unlawful expansion of mail-in voting will only serve to undermine the security and integrity of our elections and to facilitate fraud. Mail ballots based on disability are specifically reserved for those who are legitimately ill and cannot vote in-person without needing assistance or jeopardizing their health. Fear of contracting COVID-19 does not amount to a sickness or physical condition as required by state law.

That same day, Texas Attorney General Ken Paxton filed notice a notice of appeal with the Third Court of Appeals. The Third Court of Appeals transferred the case to the Fourteenth Court of Appeals which ruled that the state court injunction shall remain in full force and effect pending the conclusion of the appeal. During this same time period, Attorney General Paxton filed a petition for writ of mandamus asking the Texas Supreme Court to determine that election administrators have "a duty to reject applications for mail-in ballots that claim 'disability' under Texas Election Code section 82.002(a) based solely on the generalized risk of contracting a virus." The appellate case and petition for writ of mandamus remain pending for disposition in the state courts.

On April 29, 2020, plaintiffs filed a motion for a preliminary injunction with this Court seeking to expedite the process, stating that "[t]he Rule of Law has broken down in the State of Texas, and it has become clear that the federal courts will have to ensure basic constitutional protections for the U.S. Citizens within." Plaintiffs contend that, in the days since the state court ruling, counties around the state have begun to comply; many counties have posted notice on their websites that they are accepting vote by mail applications in compliance with Judge Sulak's ruling; and city and school district elections going forward in early May are accepting vote by mail applications in compliance with Judge Sulak's ruling. Plaintiffs argue that "[a]fter waiting well more than a week watching the state election apparatus turn to comply with the state court order and after watching tens of thousands of Texans submit vote by mail applications, defendants appear willing to allow the circumstances where the State's judicial branch has so

far reached one view of the law while, at least part of, the executive branch of state government threatens prosecution for complying with the Court order." Therefore, plaintiffs contend:

> Texas citizens can no longer have confidence that the executive branch of the State will comply with the Rule of Law. Now, even if the State is never successful in overturning the state court order, the Attorney General has shown he will not comply with orders of his state's judiciary. Furthermore, Texans will continue to reasonably fear that the executive branch will not comply with state court rulings and/or that they could be subjected to criminal prosecution for attempting to vote by mail. Under these circumstances, the State is no longer functioning to protect the federal rights of U.S. citizens, and even if it were to begin to do so, voters can have no confidence their rights will be preserved. Moreover, the behavior of the executive branch of Texas government threatens to upset the State's election apparatus which is largely complying with the state court order and where the State is successful in strong arming local officials to defy the state court order, election procedures throughout the State will be administered non-uniformly.

Accordingly, plaintiffs seek an injunction order blocking state officials from denying a mail-in ballot to any Texas voter who applies for a mail-in ballot because of the risk of transmission of COVID-19, and enjoining defendants, including Attorney General Paxton, from issuing threats or seeking criminal prosecution of voters

and others advising voters on mail ballot eligibility based on the risk of transmission of COVID-19.

The state defendants respond that the state court temporary injunction order conflicts with the Texas Election Code's plain text and "threatens to destabilize the State's carefully crafted framework governing the conduct of elections." They argue the resolution of the state court litigation will invariably alter this closely related federal proceeding. For this reason, the state defendants contend the *Pullman* abstention doctrine applies and this Court should decline to hear plaintiffs' claims at this juncture. The state defendants also argue:

> Plaintiffs' motion for preliminary injunction also exhibits fatal jurisdictional and substantive defects. None of the state defendants—Greg Abbott, Governor of Texas, Ken Paxton, Texas Attorney General, or Ruth Hughs, Texas Secretary of State—enforce the provisions of the Election Code at issue. Sovereign immunity therefore bars plaintiffs' claims for injunctive relief against those officials on the basis of those provisions. For related reasons, plaintiffs lack standing to sue the state defendants. And on the merits, plaintiffs have not met their burden of showing that current or unknown future circumstances will prevent voters from safely exercising the franchise via in-person voting in July or November of this year. The known science of COVID-19 is constantly evolving, and with it, our understanding of how elected officials can continue to contain the spread of COVID-19 throughout the State—including, as relevant here, at polling places.

Accordingly, the state defendants request that the Court abstain from ruling on plaintiffs' claims until the conclusion of the pending state court litigation. Alternatively, they argue plaintiffs' motion for preliminary injunction should be denied because plaintiffs have failed to make the required showing to obtain the extraordinary injunctive relief they request.

VOTING BY MAIL IN TEXAS

Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. *See* Tex. Elec. Code § 82.001, *et seq.* A voter is qualified to vote by mail if he or she (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him or her from appearing at the polling place; (3) is sixty-five or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-004. Voters apply to vote by mail with a mail ballot application sent to the early voting clerk. The early voting clerk is responsible for conducting early voting and must "review each application for a ballot to be voted by mail." Tex. Elec. Code § 86.001(a). An early voting ballot application must include the applicant's name, the address at which the applicant is registered to vote, and an indication of the grounds for eligibility for voting by mail. Tex. Elec. Code § 84.002. Mail ballot applicants must certify that "the information given in this application is true, and I understand that giving false information in this application is a crime." Tex. Elec. Code § 84.011. Section 84.0041 makes it a crime to "knowingly provide false information on an application for ballot by mail." Tex. Elec. Code § 84.0041.

If the voting clerk determines the applicant is entitled to vote by mail, the voting clerk shall provide

the voter a ballot by mail. Tex. Elec. Code § 86.001. If the applicant is not eligible to vote by mail, the voting clerk shall reject the application and give notice to the applicant. *Id.* A rejected applicant is not entitled to vote by mail. *Id.* July 2, 2020, is the deadline for an early voting clerk to receive an application to vote by mail for the upcoming July 14, 2020, Democratic Party run-off election. Tex. Elec. Code § 84.007(c). In their motion for preliminary injunction, plaintiffs state that "[m]ail ballots are expected to start being sent to voters, in response to their request on May 24, 2020," and that "thousands of vote by mail applications are pouring in now."

Plaintiffs maintain that in the last month many Texas counties, including some of the most populous, have been following the state district court's order interpreting state law in a way that allows all eligible voters, regardless of age and without immunity to COVD-19, to vote by mail, and its injunction enforcing that order. They allege many mail ballots have already been submitted under this order.

When voters submit absentee ballots, they are asked to check a box to indicate which eligibility criteria they meet but not asked to provide more detailed reasoning. Plaintiffs maintain the record shows—and defendants have not suggested otherwise—that it would be impossible to disaggregate the absentee ballots that were submitted pursuant to risk of contracting coronavirus during the past several weeks from other qualifying absentee ballots. Meanwhile, plaintiffs have not yet submitted their applications for a mail ballot to participate in the Democratic primary runoff election because they fear prosecution and they fear the state courts will

ultimately determine that if they vote a mail ballot, their vote will not be counted.

The State is taking steps to impose measures that would make in person voting safer during these pandemic elections. Plaintiffs argue that, even with these measures implemented at the local level, the State still has no way to ensure the non-transmission of the virus at crowded in-person polling locations. Recent history has shown that medical professionals in even the most carefully monitored medical environments have fallen ill and died from virus infections. Plaintiffs state that, although the State's efforts toward encouraging increased in-person voting protections are at least a step in the right direction, they also inevitably will slow the election process and limit the rate at which voters can be processed. At the same time, plaintiffs contend the process will be slowed from another direction because fewer election workers will be present.

Plaintiffs point out that the evidence additionally shows that many election workers did not report as scheduled on election day during the March primary elections because of the possibility of contracting the virus. Further, the recent evidence from the Wisconsin election shows that people did in fact contract the virus during in person voting, and this occurred in a state that does not require an excuse to vote by mail. The State responds with some studies that conclude that the rate of virus infection was not meaningfully changed by voting activity in Wisconsin. Presumably, there are a number of factors that drive virus infection rates and determining one cause from others is a challenging task indeed, particularly given our present state of knowledge about coronavirus spread. Regardless of the rate of growth in Wisconsin after the election, defendants do not deny that some individuals have

been found to have contracted coronavirus due to their exposure at polling locations.

PRELIMINARY INJUNCTION
STANDARD OF REVIEW

In order to secure a preliminary injunction, plaintiffs must establish the following four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). None of these elements, however, is controlling. *Florida Med. Ass 'n v. United States Dept of Health, Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979). Rather, this Court must consider the elements jointly, and a strong showing of one element may compensate for a weaker showing of another. *Id.*

THE ARGUMENTS OF THE PARTIES

Plaintiffs contend they have established a substantial likelihood of success on the merits of their as-applied claims relating to: (1) age discrimination in violation of the Twenty-Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment; (2) vagueness in the Texas Election Code's definition of "disability" in violation of the Due Process Clause of the Fourteenth Amendment; (3) voter intimidation in violation of 52 U.S.C. § 10307(b); and (4) the denial of free speech in violation of the First Amendment of the United States Constitution. Plaintiffs further argue they will suffer irreparable injury if the injunction is not granted, their substantial injury outweighs the threatened harm to defendants, and granting the

preliminary injunction will not disserve the public interest. The state defendants disagree plaintiffs have met their burden. The state defendants also contend that plaintiffs lack standing and that the Court should abstain from hearing plaintiffs' arguments because of the pending state court proceedings.

Likelihood of Success on the Merits

Plaintiffs' Age Discrimination Claims Under the Twenty-Sixth and Fourteenth Amendments

The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1. The Equal Protection Clause of the Fourteenth Amendment "is essentially a mandate that all persons similarly situated must be treated alike." *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) (internal quotation omitted). Plaintiffs argue that § 82.002(a) of the Texas Election Code abridges their right to vote based on their age in violation of the Twenty-Sixth Amendment and discriminates against them based on age in violation of the Fourteenth Amendment. Specifically, plaintiffs argue that when in-person voting becomes physically dangerous, age-based restrictions on mail ballot eligibility become constitutionally unsound. With regard to the applicable standard of review, plaintiffs argue strict scrutiny applies. *Symm v. United States*, 439 U.S. 1105 (1979); *see also United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978). They contend Texas is unable to present a compelling state interest in "imposing arbitrary obstacles on voters on account of age when Texas election law does not clearly demand this result during this pandemic." If the Court declines to engage

in strict scrutiny, plaintiffs argue it should apply the *Arlington Heights* framework which evaluates: (1) the impact of the official action and whether it bears more heavily on one group than another; (2) the historical background of the decision; (3) the specific sequence of events leading up to the decision challenged in the case, including departures from normal procedures in making decisions and substantive departures; and (4) contemporary statements made by the governmental body which created the official action. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). Plaintiffs contend Attorney General Paxton's interpretation of the law related to mail ballot eligibility in Texas is: (1) discriminatory to every voter under the age of sixty-five and untenable given the COVID-19 pandemic, and (2) the official decision by the Attorney General to threaten to enforce that law in the most disenfranchising and severe manner possible, through criminal sanction, is strong evidence of invidious discrimination.

The state defendants respond that § 82.003 does not "deny or abridge" plaintiffs' right to vote and therefore the challenged statute should be evaluated under the elevated *Anderson-Burdick* rational basis standard of review. *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 420 U.S. 780 (1983). Under this rational basis review, as long as the distinctions made in the challenged law bear a rational relationship to a legitimate governmental end, the law must be upheld. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969). The state defendants maintain that the decision to limit voting by mail to older Texans is rational because individuals aged sixty-five and over are more susceptible to COVID-19, and it is related to legitimate

governmental interests including the prevention of voter fraud. Accordingly, the state defendants argue that plaintiffs have not shown a likelihood that they will prevail on their Twenty-Sixth and Fourteenth Amendment claims.

Plaintiffs' Claim Under the First Amendment

Plaintiffs argue their right to vote has been violated by Attorney General Paxton's threats of criminal prosecution. Because the speech at issue is fully protected First Amendment activity, and the burden on this speech is heavy, plaintiffs contend the Court should apply the strict scrutiny standard of review. Citing the reasons stated in support of their age discrimination claim, plaintiffs contend they are likely to succeed on their free speech claim.

The state defendants respond that Texas Attorney General Paxton has not threatened plaintiffs' right to free speech. They argue plaintiffs' accusation misapprehends the Attorney General's responsibilities to enforce state statutes and the letter he sent in fulfillment of those responsibilities. The state defendants also argue that "an injunction prohibiting Attorney General Paxton from threatening voters or voter groups with criminal or civil sanction for voting by mail or communicating with or assisting voters in the process of vote by mail" would violate his rights to comment on matters of public concern. The state defendants therefore contend that plaintiffs have not shown a likelihood of success on their First Amendment claim.

Plaintiffs' Void for Vagueness Claim

Plaintiffs note that the Texas Democratic Party and some of the plaintiffs in the instance case maintained in the state court proceeding that state law allows all voters, regardless of age, to vote by mail

because they have a "disability" based on the risk of transmission of COVID-19. They also noted that, although the state court agreed with plaintiffs, Attorney General Paxton holds a different interpretation. Plaintiffs argue that these factual conditions result in an environment where the "public cannot reasonably determine what state law allows." They therefore argue that Attorney General Paxton's interpretation renders the Texas Election Code unconstitutionally vague in violation of the Fourteenth Amendment because it is not clear which voters qualify to vote by mail under its provisions. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also Johnson v. United States*, 135 S. Ct. 2551, 2556-58 (2015); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

The state defendants respond that plaintiffs' void-for-vagueness claim fails because this doctrine has been primarily applied to strike down criminal laws and Attorney General Paxton's interpretation of the statute does not render it to be "so vague and indefinite as really to be no rule at all." *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000). They also contend Attorney General Paxton's interpretation of the statute does not result in a constitutional violation because he was merely giving his opinion about the statute's construction. *See Ford Motor Co. v. Texas Dept' of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. 1980). The state defendants therefore conclude that plaintiffs have not shown a likelihood of success on the merits of their vagueness argument.

Voter Intimidation

Plaintiffs argue Attorney General Paxton has made the extraordinary choice to upend the rule of law, disturb the state judiciary from fulfilling its mission, and to outwardly intimidate rightful voters and the third parties who assist voters in elections. He stated: "[T]o the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041." This advisory opinion was made just as a state court ruled that Texas voters are entitled to a mail-in ballot because of the risk of transmission of COVID-19. Hours later, Attorney General Paxton stated that expanding mail ballot eligibility to all Texans "will only serve to undermine the security and integrity of our elections." Plaintiffs contend that these statements operate to discourage voters from seeking mail-in ballots because of their fear of criminal sanction or victimization by fraud in violation of 52 U.S.C. § 10307.

The state defendants respond that Attorney General Paxton did not intimidate plaintiffs or any other voters. They argue the communication merely states the law regarding the giving of false information in connection with a request for a ballot by mail. Accordingly, the state defendants maintain that plaintiffs have not shown that their voter intimidation claim is likely to succeed on the merits.

Irreparable Injury and Harm

Plaintiffs argue they are irreparably injured if an injunction is not granted and their harm outweighs any harm to the defendants. They note that voting is a constitutional right for those that are eligible, and

contend that the violation of constitutional rights for even a minimal period of time constitutes an irreparable injury which justifies granting their motion for preliminary injunction. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B. Nov. 1981) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). In addition, plaintiffs contend that forcing voters to unnecessarily risk their lives in order to practice their constitutional rights while allowing other voters a preferred status so they do not have to face this same burden, is also irreparable injury. They assert: (1) there is no harm to the State allowing registered, legal voters the right to vote in the safest way possible, (2) the State has no interest in forcing voters to choose between their well being and their votes, and (3) the State has no interest in allowing a situation where "the Attorney General can sow confusion, uneven election administration and threaten criminal prosecution" under these circumstances.

The state defendants respond that injunctive relief at this point in the election cycle is improper. They note that the Supreme Court "has repeatedly emphasized that lower courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). The state defendants also argue that plaintiffs cannot establish an irreparable injury because "they have not proven that they will be deprived of the safe exercise of the franchise in the State's upcoming elections."

Public Interest Considerations

Plaintiffs contend "the public is best served by both preserving the public health of Texans and by fervent and competitive races for public office." They argue it is the public policy of the State of Texas to

construe any constitutional or statutory provision which restricts the right to vote liberally, and there is no justification nor public interest in denying the ballot to eligible voters. Furthermore, plaintiffs argue it is always in the public interest to prevent violations of individuals' constitutional rights, and to prevent the State from violating the requirements of federal law. Plaintiffs also contend that protecting the right to vote is of particular public importance because it is "preservative of all rights." *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Accordingly, plaintiffs contend they have met all the requirements for a preliminary injunction.

The state defendants respond that an injunction would undermine the public interest. They argue "the equitable factors of the injunctive relief analysis tilt heavily against the issuance of an injunction, especially the overbearing one Plaintiffs ask the Court to adopt." The state defendants assert that the State has a weighty interest in the equal, fair, and consistent enforcement of its laws. *Maryland v. King*, 567 U.S. 1301, 1303 (2012). They further maintain that the inability of Texas to enforce its duly enacted laws clearly inflicts irreparable harm on the State. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). The state defendants assert that interest is especially potent in the middle of a global health crisis and that "if citizens lose confidence in the evenhanded application of the State's election laws in these precarious times, the foundations of our system of representative government will weaken." Accordingly, they contend plaintiffs' motion for preliminary injunction should be denied.

Standing to Bring Suit

The state defendants argue plaintiffs are unlikely to prevail on their claims against them under the Fourteenth and Twenty-Sixth Amendments because they do not enforce Texas Election Code § 82.002 or § 82.003, and are immune from suit. For related reasons, the state defendants also argue plaintiffs lack standing to bring their claims against the state defendants.

Plaintiffs respond that the state defendants' immunity argument is meritless. Specifically, plaintiffs maintain that all of the state defendants have a sufficient connection to the enforcement of the Texas Election Code. They contend that in light of the admissions in this case, including threats of criminal prosecution, this argument bears little credibility. Plaintiffs also argue that each meets the requirements for Article III standing because each has suffered and will continue to suffer legally cognizable injuries because of defendants' actions. Accordingly, plaintiffs contend this Court should proceed to hear their motion for preliminary injunction.

Abstention

The state defendants contend that, though plaintiffs' current claims sound in federal law, they cannot be resolved without answering the question posed in state court: whether fear of contracting COVID-19 constitutes a "disability" under the Texas Election Code. They contend that question is squarely presented in the state court litigation and will soon be considered by the Texas Supreme Court. In light of uncertainty about a predicate question of state law, the state defendants argue that this Court should abstain under *Railroad Commission of Texas v. Pullman*, 312 U.S.

496 (1941). "The *Pullman* case establishes two prerequisites for *Pullman* abstention: (1) there must be an unsettled issue of state law, and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980). With regard to the second factor, the state defendants contend resolution by the state court will render this case moot or materially alter the constitutional claims presented.

Plaintiffs respond that "the abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). Plaintiffs also argue that abstention in this case is improper because the state law determination will not moot nor present in a different posture the federal constitutional questions raised by plaintiffs. Plaintiffs further contend that, "regardless of whether the challenged provision of Texas Election Code is resolved in Texas state court, and there is no indication that such clarification will come soon," Texas voters are "waking every day to make the choice to request a mail ballot and have it rejected (and be criminally prosecuted) or wait further and potentially request the ballot too late or do so with an avalanche of others that overloads the electoral system." Plaintiffs maintain that the orderly administration of the election requires resolution now because: (1) the question of whether the current circumstances violate the United States Constitution remains and must be answered by this Court; (2) the July run-off election is weeks away; and (3) there "is no guarantee that the state court proceedings will have resolved the issue before this

election leaving plaintiff's federal constitutional rights in limbo." Accordingly, plaintiffs argue this Court should not abstain from ruling on their motion for preliminary injunction.

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FINDINGS OF FACT

I. COVID-19 is an Immediate Danger to all Texans

1. COVID-19 infection is caused by the SARS-CoV-2 virus and is spread by passing through mucous membranes. Ex. 21 at p. 2.

2. Coronavirus is spread through droplet transmission. These droplets are produced through coughing, sneezing, and talking. Ex. 21 at p. 3. Ex. 22 p. 14. Ex. 22 at p. 16-17.

3. The virus can be spread when an infected person transmits these droplets to a surface like a polling machine screen. Ex. 21 at p. 3. Ex. 22 p. 72-73.

4. It is highly likely that COVID-19 will remain a threat to the public both in July and through November. Ex. 6 at p. 3. Even if virus transmission and prevalence do decline over the summer months, it remains likely that they will resurge in the fall and winter. Ex. 28 at p. 7.

5. Reported illnesses have ranged from mild symptoms to severe illness and death. The most common symptoms include fever, dry cough, and shortness of breath. Ex. 21 at p. 2-3. Other identified symptoms include muscle aches, headaches, chest pain, diarrhea, coughing up blood, sputum production, runny nose, nausea, vomiting, sore throat, confusion, loss of senses of taste and smell, and anorexia. Due to the respiratory impacts of the disease, individuals may need to be put on oxygen, and in severe cases, patients may need to be intubated and put on a ventilator. Ex. 28 at p. 3.

6. Anyone can be infected with the novel coronavirus. Ex. 21 at p. 3-4. Ex. 22 at p. 21.

7. Certain groups, such as those over 60 years of age and those with certain underlying medical conditions, are at higher risk of serious illness and death should they be infected. Ex. 21 at p. 3.

8. People of every age are at risk of serious illness and possible death. Ex. 28 at p. 3.

9. The Latino community is particularly vulnerable to infection, hospitalization, and death resulting from COVID-19, due to a combination of high prevalence of underlying medical conditions and socioeconomic conditions that make contracting the disease more likely. Ex. 28 at p. 4.

10. Any place where people gather and cannot maintain physical distancing, such as a polling place, represents a heightened danger for transmission of COVID-19 disease. Ex. 21 at p. 3. Ex. 22 p. 14.

11. Crowding and exposure to a range of surfaces at the polls make polling places likely transmission sites for the virus. Ex 21. at p. 2-3. Ex. 22 p. 14.

12. Polling places will likely remain transmission sites for the virus, even if election officials use all reasonable preventive measures. Ex. 22 at p. 72. Ex. 22 at p. 64-70.

13. Requiring voters to remain in close proximity to other voters and election workers for lengthy periods of time, particularly at polling locations with long lines and extended wait times would place them at risk of contracting or spreading COVID-19. Ex. 28 at p. 8.

14. This would be particularly true for those who are at a greater risk of complications and death from COVID-19, including the elderly, immunocompromised, and people with underlying health conditions, including many members of the Latino community. E. 28 at p. 8.

15. However, data to date in Texas demonstrate higher than expected infection rates in younger persons. Ex. 45. Ex. 22 at p. 42-44.

16. Some infected persons do not appear to have any symptoms although they may still be able to infect others. Ex. 21 at p. 3. Ex. 23 at p. 5.

17. Meanwhile, other people with no pre-existing conditions are dying of stroke without ever displaying the typical COVID-19 symptoms. Ex. 28.

18. COVID-19 has become one of the leading causes of death in the United States. Ex. 48 at p. 1-2.

19. As of May 13, 2020, Texas has 41,048 reported cases of COVID-19.1 Ex. 44 at p.1.

20. As of April 25, 2020, the highest number of reported cases of COVID-19 in Texas are among 50 to 59-year-olds and 40 to 49-year-olds, with 2,568 reported cases and 2,620 reported cases, respectively. Ex. 45 at p. 1.

21. 20 to 29-year-olds represent 2,183 cases, while those aged 65 to 74 make up 1,292 reported cases in Texas. As of May 13, the State has seen 1,133 deaths from the virus. Ex. 44 at p. 1. Ex. 45 at p. 1.

22. Herd Immunity occurs when a high percentage of people in a community become immune to an infectious disease. This can happen through natural infection or through vaccination. In most cases,

80-95% of the population needs to be immune for herd immunity to take place. Ex. 21 at p. 5.

23. "Herd Immunity" will not reduce the risk of COVID-19 during the 2020 elections. Ex. 21 at p. 6-7.

24. An FDA-approved vaccine will be available for at least 12-18 months. Therefore, a vaccine will not reduce the risk of COVID-19 during the 2020 elections. Ex. 21 at p. 4-5.

II. Voting by Mail Is Safe with No Risk of COVID-19 Transmission

25. There is no evidence the virus can be spread by paper, including mail. Ex. 21 at p. 7.

26. Voting by mail would prevent virus transmission between voters standing in line, signing in, and casting votes, as well as between voters and election workers. Ex. 21 at p. 7. Ex. 22 at p. 72-73. Ex. 22 at p. 183. Ex. 22 at p. 201.

27. Voting by mail would eliminate viral transmission through contamination of environmental surfaces like voting machines. Ex. 21 at p. 7. Ex. 22 p. 72. Ex. 22 at p. 252-253.

28. Due to the pandemic, voting by mail is much safer for the public than voting in person. Ex. 6 at p. 3. Ex. 22 at p. 182. Ex. 22 at p. 192-193. Ex. 22 at p. 234. Ex. 22 at p. 237.

Background of Voting by Mail in Texas

29. Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. *See* Tex. Elec. Code Ch. 82.

30. A voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other

physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-4. Ex. 1 at p. 2. Ex. 22 at p. 214. Ex. 22 at p. 243-244. Ex. 22 at p. 250.

31. Voters apply to vote by mail with a mail ballot application which they send to the early voting clerk. Tex. Elec. Code §§ 84.001.

32. The early voting clerk is responsible for conducting early voting and must "review each application for a ballot to be voted by mail." Tex. Elec. Code § 86.001(a).

33. An early voting ballot application must include the applicant's name and the address at which the applicant is registered to vote and an indication of the grounds for eligibility for voting by mail. Tex. Elec. Code § 84.002.

34. The applicant for a mail ballot must certify that "the information given in this application is true, and I understand that giving false information in this application is a crime." Tex. Elec. Code § 84.011.

35. It is a crime to "knowingly provide false information on an application for ballot by mail." Tex. Elec. Code § 84.0041.

36. If the clerk determines the applicant is entitled to vote by mail, the clerk shall provide the voter a ballot by mail. Tex. Elec. Code § 86.001.

37. If the voter is not entitled to vote by mail, the clerk shall reject the application and give notice to the applicant. *Id.*

38. A rejected applicant is not entitled to vote by mail. *Id.*

39. July 2 is the deadline for an early voting clerk to receive an application to vote by mail for the upcoming July 14, 2020 Democratic Party Run-Off. *See* Tex. Elec. Code § 84.007(c). Ex. 13 at p. 11.

40. Mail ballots are expected to start being sent to voters in response to their requests on May 30, 2020. Ex. 13 at p. 9.

41. Thousands of vote-by-mail applications are being sent to early voting clerks across Texas. Ex. 46 at p. 4-5.

Election Officials Need Clarity to Prepare for Imminent Elections

42. Governor Abbott has set both the date of the special election for Senate District 14 in Bastrop and Travis Counties and the Democratic Primary Run-Off election in all 254 Counties on July 14, 2020. Ex. 7 at p. 1. During both the primary and the November General Election state election law requires all ballot information be complete by 74 days before the election. Ex. 7 at p. 1. During that time, clerks must do all of the following:

- proof ballot submissions, order races appropriately, merge with many jurisdictions appearing on the ballot;
- work with ballot companies to lay out for printing multiple ballot styles;
- program ballot scanners, controllers, and related technology;
- prepare ballot carriers for vote by mail applications and returned ballots for the use of signature verification committees and ballot boards;

- hire election workers for polling locations, early voting locations, and central counting;
- train all workers;
- determine polling locations for election day and early voting, negotiate contracts with locations;
- manage payroll issues of dozens to thousands of temporary workers; and,
- manage delivering and picking up equipment while keeping it secure and free from tampering before, during and after the polling locations open and close. Ex. 7 at p. 1-2.

43. Prior to the commencement of the instant litigation, election administrators sought guidance from the Secretary of State regarding the threat of COVID-19 and the ability of voters to obtain mail-ballots. Ex. 24 at p. 7. The Secretary did not provide such definitive guidance.

44. On April 6, 2020, the Secretary of State issued Election Advisory 2020-14, which left the interpretation of the disability statute up to local election officials. This advisory remains the only guidance from the Secretary of State to election officials pending the resolution of Defendants' appeal of that litigation. It does not provide guidance to election officials if their interpretation is correct or if counties should have a uniform interpretation of the statute. Ex. 1 at p. 2-4.

45. The State of Texas' Fourteenth Court of Appeals has ordered that the appeal in in the state court case will be submitted by June 12, 2020, 32 days prior to the primary runoff election date and 20 days prior to the vote-by-mail application deadline for that election. Ex. 38 at p. 2.

46. On May 13, 2020, the State of Texas filed a Petition for Writ of Mandamus in the Texas Supreme Court against only some of the counties in Texas and the Petition seeks to collaterally attack the state district court injunction order while not including Plaintiffs as real parties in interest. Ex 42. Sequence of Events Since the Outbreak in Texas. On May 15, 2020, the Justices again blocked mail-in voting requests for people worried about contracting COVID-19, overturning the appellate court order from earlier in the week. The Texas Supreme court did not provide an explanation for issuing the stay.

47. On March 13, 2020, Defendant Abbott declared that COVID-19 poses an imminent threat of disaster. Ex. 2 at p. 2.

48. On March 19, 2020, Dr. John W. Hellerstedt, Commissioner of the Department of State Health Services, declared a state of public health disaster. The disaster declaration provided that people not gather in groups larger than 10 members and limit social contact with others by social distancing or staying six feet apart. Ex. 4 at p. 1.

49. On March 19, 2020, Defendant Abbott closed schools temporarily. He also closed bars and restaurants, food courts, gyms and massage parlors. Ex. 3 at p. 3.

50. On April 27, 2020, Defendant Abbott issued a new order that purports to open the state's business affairs, in "phases." Ex. 43 at p. 1. He has indicated that case testing will be monitored and that if and when cases begin to increase, the opening will be slowed and/or reversed.

51. Dr. Deborah Leah Birx, the Coronavirus Response Coordinator for the White House

Coronavirus Task Force, has stated that "social distancing will be with us through the summer to really ensure that we protect one another as we move through these phases." Ex. 47 at p. 12.

52. The Texas Secretary of State only gives guidance to local election administrators about how the election laws apply. An advisory issued by the Secretary of State's Office instructed counties to begin preparing for larger than normal volumes of vote by mail while also giving guidance to local officials to seek court orders, as appropriate, to adjust election procedures. Ex. 24 at p. 9.

53. In order to seek clarity of the requirements of state law, some of these Plaintiffs sought declaratory and injunctive relief in Texas district court in *Travis County. Democratic Party v. DeBeauvoir,* et al., No. D-1-GN-20-001610 (201st Dist. Ct., Travis Cty., Tex. filed March 20, 2020).

54. Texas intervened and asserted a Plea to the Jurisdiction based on standing, ripeness, and sovereign immunity. Ex. 33 at p. 2.

55. Texas argued in its Plea to the Jurisdiction that vote by mail administration is a county-level decision. Ex. 33 at p. 3.

56. On April 15, the state court heard the plaintiffs' temporary injunction motion and Texas' plea to the jurisdiction. The state court verbally announced the denial of the plea to the jurisdiction and the granting of the temporary injunction.

57. In response to the oral order, Defendant Paxton made public a letter he had sent to the Chair of the House Committee on Elections of the Texas House of Representatives. Ex. 55 at p. 1-5.

58. In the letter, Defendant Paxton gave a non-official, advisory opinion regarding whether the risk of transmission of COVID-19 would entitle Texas voters to cast a mail-in ballot. He stated: "We conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Election Code for purposes of receiving a ballot by mail." Ex. 55 at p. 3.

59. In a statement accompanying the publication of the letter, General Paxton said: "I am disappointed that the district court ignored the plain text of the Texas Election Code to allow perfectly healthy voters to take advantage of special protections made available to Texans with actual illness or disabilities. This unlawful expansion of mail-in voting will only serve to undermine the security and integrity of our elections and to facilitate fraud. Mail ballots based on disability are specifically reserved for those who are legitimately ill and cannot vote in-person without needing assistance or jeopardizing their health. Fear of contracting COVID-19 does not amount to a sickness or physical condition as required by state law." Ex. 55 at p. 1. Ex.35.

60. This statement and the actions of the State contributed to the uncertainty that voters and early voting clerks face in administering upcoming elections.

61. The letter also threatened political speech by Texas Democratic Party ("TDP" or "the Party") and other political actors in the state. Ex. 55 at p. 5.

62. The letter stated: "To the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could

subject those third parties to criminal sanctions imposed by Election Code section 84.0041." Ex. 55 at p. 5.

63. The public statements and actions of the Defendant Paxton create a reasonable fear by voters that they will be prosecuted. Ex. 8 at p. 7.

64. On May 1, 2020 after counties were following Judge Sulak's order, Defendant Paxton issued another Guidance Letter which again purported to threaten Texans with criminal prosecution for following Judge Sulak's order. Ex. 34.

65. Given the public statements and actions by Defendant Paxton, a voter would reasonably fear that he or she would face criminal sanction if he or she checks the disability box on a mail ballot application because of the need to avoid the potential contraction of the virus. Ex. 8 at p. 7.

66. Given the public statements and action by Defendant Paxton, third party political actors such as TDP have a reasonable fear of criminal sanction for assisting voters to apply for mail in ballots in order to avoid exposure to COVID-19. Ex. 55 at p. 5.

Texas Is a Large, Diverse State Whose Voters Need Protection

67. Texas is a large state, with a diverse pool of voters. As of July 1, 2019, there are 28,995,881 Texans. Ex. 29. People over the age of 65 are 12.6% of the population, or about 3,653,481 people. *Id.* Children below the age of 18 are 25.8% of the population, or 7,480,937 people. *Id.* Texans between age of 18 and 65 are 61.6% of the population, or 17,861,463 people. *Id.* On January 23, 2020, the Secretary of State announced that Texas had set a new state record of registered voters with 16,106,984 registered voters. *Id.*

Plaintiffs

a. Texas Democratic Party

68. The TDP is a political party formed under the Texas Election Code.

69. The TDP is the canvassing authority for many of the imminent run-off elections to be held on July 14, 2020.

70. The election of July 14 is, in part, to determine runoff elections and therefore award the Democratic Party Nominations to those who prevail. Ex. 24 at p. 13.

71. TDP is the political home to millions of Texas voters and thousands of Texas' elected officials.

72. The TDP expends resources to try to help its eligible voters vote by mail. Ex 7. 24 and 29.

73. TDP is injured by the uncertainty of the laws associated with voting by mail because of the expenditure of financial resources used to help its members vote by mail, and the potential disfranchisement of its members. Ex 7. 24 and 29.

74. TDP is harmed by the state forcing it to award its nominations in an undemocratic process. Ex 7. 24 and 29.

b. Gilberto Hinojosa

75. Gilberto Hinojosa is the elected Chair of the TDP. He is one of the administrators of the upcoming run-off elections for the Texas Democratic Party. Ex. 24 at p. 4. He is the head of the canvassing authority for the July run-off elections and is the leader of the Party by and through his statutory and rule-based powers.

76. Chair Hinojosa is also a registered voter in Texas.

77. Chair Hinojosa is injured by the Defendants, because of the uncertainty of Texas law s regarding qualifications to vote by mail.

c. Joseph Daniel Cascino

78. Joseph Daniel Cascino is a Travis County voter who voted in Democratic primary election on March 3, 2020. Ex. 10 at p. 1.

79. He intends to vote by mail in the upcoming run-off and general elections. Ex. 10 at p. 1-2.

80. He is not 65 years of age or older. Ex. 10 at p. 1.

81. He intends to be in Travis County during the early vote period and Election Day. Ex. 10 at p. 1.

82. He has not been deemed physically disabled by any authority. Ex. 10 at p. 1.

83. He wishes to vote by mail because of the risk of transmission by COVID-19 at polling places. Ex. 10 at p. 2.

d. Shanda Marie Sansing

84. Shanda Marie Sansing is a Travis County voter who voted in Democratic primary election on March 3, 2020. Ex. 9 at p. 1.

85. She intends to vote by mail in the upcoming run-off and general elections. Ex. 9 at p. 1-2.

86. She is not 65 years of age or older. Ex. 9 at p. 1.

87. She intends to be in Travis County during the early vote period and Election Day. Ex. 9 at p. 1.

88. She has not been deemed physically disabled by any authority. Ex. 9 at p. 1.

89. She wishes to vote by mail because of the risk of transmission by COVID-19 at polling places. Ex. 9 at p. 2.

e. Brenda Li Garcia

90. Brenda Li Garcia is a Bexar County voter who has voted in Democratic primary, run-off, and general elections in the past. Ex. 30.

91. She intends to vote by mail in the upcoming run-off and general elections. Ex. 30.

92. She is not 65 years of age or older. Ex. 30.

93. She intends to be in Bexar County during the early vote period and Election Day. Ex. 30.

94. She has not been deemed physically disabled by any authority. Ex. 30.

95. She wishes to vote by mail because of the risk of transmission by COVID-19 at polling places. Ex. 30.

Defendants

a. The Honorable Gregg Abbott

96. The Honorable Gregg Abbott is the Governor of Texas and a defendant in this case.

97. He is the chief executive officer in this State. Tex. Const. Art. IV § 1.

b. The Honorable Ruth Hughs

98. The Honorable Ruth Hughs is the Secretary of State of Texas and its chief election officer. Tex. Elec. Code § 31.001.

99. Secretary Hughes has injured the plaintiffs by creating a lack of clarity and probable lack of uniformity in application of the election laws relating to mail ballot eligibility throughout the State.

c. The Honorable Ken Paxton

100. The Honorable Ken Paxton is the Attorney General of Texas and its chief legal officer. Tex. Const. Art. IV § 22.

101. The Attorney General of Texas may investigate and assist local jurisdictions in prosecuting election-related crimes. Tex. Elec. Code §§ 273.001 (d); 273.002.

102. Recently, General Paxton has issued a letter threatening "third parties [who] advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code." Ex. 55 at p. 5.

103. General Paxton has created a lack of clarity and probable lack of uniformity in application of the election laws relating to mail ballot eligibility throughout the State. Ex. 35.

104. General Paxton's letter also threatens U.S. citizens for exercising their right to vote. Ex. 55 at p. 5. See also, Ex. 34.

d. The Honorable Dana DeBeauvoir

105. The Honorable Dana DeBeauvoir is the Travis County Clerk. Ex. 15 at p. 1.

106. She is the early voting clerk for the upcoming run-off and general elections.

107. Clerk DeBeauvoir has been ordered by a Texas district court to issue voters like the plaintiffs a mail ballot. Ex. 49 at p. 5-6.

e. Ms. Jacquelyn Callanen

108. Ms. Jacquelyn Callanen is the elections administrator for Bexar County.

109. She is the administrator of the run-off and general elections in Bexar County.

110. She is the early voting clerk that will grant or deny mail ballots to applicants in the coming elections.

CONCLUSIONS OF LAW

I. All Plaintiffs Have Standing

1. This Court concludes that Plaintiffs have standing in this case because they all face an imminent risk of harm, the harm they face is fairly traceable to Defendants' conduct, and that harm is redressable by this Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

2. Plaintiff Texas Democratic Party faces an imminent risk of harm as a result of the Defendants' interpretation of the Texas Elec Code. § 82.001-4. and Defendants' refusal to follow the Texas state court order permitting voters to access absentee ballots due to fear of COVID-19. The Texas Democratic Party will be conducting their own run-off elections to determine who the organization chooses as their standard bearer. Ex. 24 at p. 14: 10-24. The Texas Democratic Party has an interest in ensuring that their election is conducted in a manner that would not disenfranchise voters nor put voters at risk of death and is harmed because under the Attorney General's interpretation of the

statute and inability to follow the Texas state court law, the party's ability to run their primary is diminished. Ex. 24 at p. 15. An organization may establish injury-in-fact if the "defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *NAACP v. City of Kyle*, 626 F.3d. 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The Texas Democratic Party's purpose is to promote Democratic candidates and facilitate elections for the party, promote voter participation among its members and the public more broadly (Ex. 29), and the interest the Party seeks to protect through this litigation are therefore germane to its purpose. This harm is plainly traceable to the Defendants who are refusing to follow the state court order and threatening voters who request or use an absentee ballot due to COVID-19 with prosecution. Accordingly, the Texas Democratic Party has standing to sue Defendants. *See Lujan*, 504 U.S. at 560-61.

3. The Texas Democratic Party also has standing to challenge the actions at issue both on behalf of its members and its own behalf. An organization may establish injury-in-fact if the "defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *NAACP v. City of Kyle,* 626 F.3d. 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The Texas Democratic Party's purpose is to promote Democratic candidates and facilitate elections for the party, promote voter participation among its members and the public more broadly (Ex.

29), and the interest the Party seeks to protect through this litigation are therefore germane to its purpose.

4. Plaintiff Gilberto Hinojosa faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4, and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Hinojosa is a registered Democrat, is planning to vote in the July 14th, 2020 runoff election, and is the elected Chair of the Texas Democratic Party. Hinojosa is one of the administrators of the Texas Democratic Party run-off elections. Ex. 24 at p. 4. He is the head of the canvassing authority and is the leader of the Party by and through his statutory and rule-based powers. Texas Election Code § 163.003-004. Hinojosa is injured by the Defendants because the uncertainty of Texas law's regarding qualifications to vote by mail and the Attorney General's threat of prosecution of those who access vote by mail ballots, even those permitted through the Texas state court order. Ex. 49 at p. 4-6. Ex. 55 at p. 1-5. Ex. 34 at p. 1-3. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Gilberto Hinojosa has standing to sue Defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-6I (1992).

5. Plaintiff Joseph Daniel Cascino faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4. and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to

the COVID-19 pandemic. Cascino is a registered Democrat and Travis County voter who intends to vote by mail in the July 2020 run-off election and general election due to the risk of transmission by COVID-19. Ex. 10 at p. 1-2. Cascino is not 65 years of age, intends to be in Travis County during the early voting period and Election Day, and has not been deemed physically disabled by any authority. Ex. 10 at p. 1. Cascino is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise him. He is further injured by the threat of unjust prosecution by Attorney General Paxton. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-I9 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Joseph Daniel Cascino has standing to sue Defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992).

6. Plaintiff Shanda Marie Sansing faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4. and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Sansing is a registered voter in Travis County and has voted in Democratic primary, run-off elections, and general elections in the past. Ex. 9 at p. 1. She intends to vote by mail in the upcoming run-off elections and general elections. Ex. 9 at p. 1-2. She is not 65 years of age, intends to be in Travis County during the early vote period and Election Day, and has not been deemed disabled by any authority. Ex. 9 at p. 1. Sansing wishes to vote by

mail due to the risk of transmission of COVID-19 at in-person polling places. Ex. 9 at p. 2. She is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise her. She is further injured by the threat of unjust prosecution by Attorney General Paxton. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Shanda Marie Sansing has standing to sue Defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992).

7. Plaintiff Brenda Li Garcia faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4. and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Ex. 30. Garcia is a Bexar County voter. Id. She has voted in the Democratic primary, run-off elections, and general elections in the past and intends to vote by mail in the upcoming run-off and general elections. *Id.* She is not 65 years of age or older. Id. She intends to be in Bexar County during the early voting period and Election Day. *Id.* She wishes to vote by mail because of the risk of transmission and contraction of COVID-19 at in-person polling places. *Id.* She is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise her. She is further injured by the threat of unjust prosecution by Attorney General Paxton. The evidence before this Court demonstrates that counties view the orders of

the Attorney General as mandatory, *id.,* and thus, an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Brenda Li Garcia has standing to sue Defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992).

8. The claims asserted in this case do not require individualized proof as to every affected voter and cases that involve injunctive relief such as that sought here do not normally require individual participation. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

9. The Texas Democratic Party has organizational standing to sue on its own behalf because Defendants' illegal acts not permitting voters to access mail ballots under the Texas state court order and under Texas Election Code and Attorney General Paxton's threats to prosecute voters, impair the Texas Democratic Party's ability to engage in its projects by forcing the organization to divert resources to counteract those illegal actions, such as by educating voters on their ability to access absentee ballots. Ex. 7, 24 and 29. Resource diversion is a concrete injury traceable to the Defendants I conduct and redress can be provided by granting this injunction. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). And the Fifth Circuit has affirmed that "an organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct; hence, the defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *NAACP v. City of Kyle*,

Tex., 626 F.3d 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp.*, 455 U.S. at 379).

10. Further, all individual Plaintiffs have made clear in their declarations that they not only do intend to vote in the upcoming elections, but they intend to do so through absentee ballots and will be disenfranchised due to fear of COVID-19 if unable to access mail ballots or prosecuted for accessing these ballots. Ex. 9 at p. 1-2. Ex. 10 at p. 1-2 and Ex. 30. The evidence before this court satisfies any requirement that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *See Gill v. Whitford*, 138 S. Ct. 1916,1929 (2018).

11. Plaintiffs also satisfy the causation requirement of standing. *KP. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (citations omitted) ("Because State Defendants significantly contributed to the Plaintiffs' alleged injuries, Plaintiffs have satisfied the requirement of traceability."). Defendants' actions would significantly contribute, if not wholly cause, Plaintiffs' alleged injuries, i.e., their inability to exercise their constitutional right to vote.

II. A Preliminary Injunction Should Issue against Defendants while the Case Proceeds

12. This Court concludes that Plaintiffs should be granted a preliminary injunction pursuant to its as-applied claims relating to: (1) the 26th Amendment of the U.S. Constitution; (2) vagueness in violation of the "Due Process" clause of the 5th and 14th Amendments; (3) voter intimidation in violation of 52 U.S.C. § 10307(b); and (4) the First Amendment of the U.S. Constitution.

13. Plaintiffs should be granted a preliminary injunction, because they have satisfied the four

requirements for such an injunction to issue: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).

a. Plaintiffs Are Likely to Succeed on the Merits of their Claims

i. Plaintiffs Are Likely to Succeed on their 26th Amendment Claim

14. The Twenty-Sixth Amendment states, "[t]he right of citizens of the United State, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on the account of age" (U.S. Const. amend. XXIV, § 1), and forbids the abridgement or denial of the right to vote of young voters by singling them out for disparate treatment. *See Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971).

15. Courts presented with claims arising under the Twenty-Sixth Amendment must apply strict scrutiny. *See United States v. Texas.*, 445 F. Supp. 1245, 126 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105 (1979) (determining that a Texas registrar had violated the Twenty-Six Amendment by imposing burdens on students wishing to register to vote and providing that "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny"); *see also Lynch v. Donnelly*, 465 U.S. 668, 687 n. 13

(1984) (holding that laws, statutes, or practices that are "patently discriminatory on its face" will receive strict scrutiny.); *League of Women Voters of Fla., Inc. v. Detzner,* 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (finding that the Twenty-Sixth Amendment provides an "added protection to that already offered by the Fourteenth Amendment"). Under strict scrutiny, the burden is on the State to justify that its policy, statute, or decision is narrowly tailored to serve a compelling state interest. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 (2006).

16. Texas statute creates two classes of voters, those under the age of 65 who cannot access a mail ballot under this law and those over the age of 65 who can access mail ballots. Texas. Election Code § 82.003 states that "a qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day." Those aged 65 and older are permitted to access mail ballots under this law on the account of their age alone, and those younger than 65 face a burden of not being able to access mail ballots on account of their age alone.

17. Plaintiffs complain that younger voters bear a disproportionate burden because the age restrictions of Tex. Elec. Code § 82.003, that Tex. Elec. Code § 82.003 is a government classification based on age and discriminates against voters under the age of 65 based on age, and that Tex. Elec. Code § 82.003 is prima facie discriminatory under all circumstances.

18. However, in the Preliminary Injunction proceeding, Plaintiffs only seek relief, as applied during the pandemic.

19. The Court concludes, that during the COVID-19 pandemic, younger voters bear a disproportionate

burden because the age restrictions of Tex. Elec. Code § 82.003, that Tex. Elec. Code § 82.003 is a government classification based on age and discriminates against voters under the age of 65 based on age, and that Tex. Elec. Code § 82.003 violates the 26th Amendment, as applied, during the COVID-19 pandemic.

20. COVID-19 has become one of the leading causes of death in the United States. Data to date in Texas demonstrates higher than expected infection rates in younger persons. General Paxton has threatened to prosecute voters under the age of 65 who use mail ballots under the disability exemption as provided by the state court ruling. Ex. 8 at p. 7. Thus, younger voters who are just as at risk to contract COVID-19 are forced to choose between risking their health by voting in-person or facing criminal prosecution by Defendant Paxton.

21. As a result of Defendants I actions, the right of people below the age of 65 to vote is uniquely threatened and burdened solely based on their age. Thus, this Court concludes that Tex. Elec. Code § 82.003 classification of voters by age is discriminatory, as applied, because it erects an obstacle to the franchise for younger voters.

22. Defendants have attempted to meet their burden of showing that their actions here satisfy strict scrutiny, and they failed to do so. They presented no evidence that demonstrates a compelling governmental interest and instead provided confusing and conflicting reasoning behind why the state would bar younger voters from accessing mail ballots during a global, deadly pandemic. The State Is interest is particularly attenuated in this case, given that the data show that Texas aged under 65 comprise a

majority of the COVID-19 cases reported. Ex. 45 at p. 1.

23. In fact, the State's given reasoning would increase the harm to the public health and safety of not only those Texans who are under the age of 65 and who would be unable to vote by mail, but also the safety of any Texans (even those over 65) who interact with individuals who voted in person because they were unable to vote by mail and who were exposed to the COVID-19 virus.

24. Put simply, there is no compelling interest in imposing arbitrary obstacles on voters on account of their age in these circumstances, and thus Defendants' conduct thus fails to meet strict scrutiny.

25. This Court concludes that Plaintiffs have established that they are likely to succeed on their as applied Twenty-Sixth Amendment claim.

26. Alternatively, even if strict scrutiny does not apply, defendants' conduct is unconstitutional as it intentionally discriminates against voters on the basis of age.

27. Where they have not applied strict scrutiny, federal courts have evaluated claims under the Twenty-Sixth Amendment using the *Arlington Heights* framework. *See e.g. One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp.3d 896, 926 (W.D. Wis. 2016) (finding that the Twenty-Sixth Amendment's text is "patterned on the Fifteenth Amendment . . . suggest[ing] that *Arlington Heights* provides the appropriate framework.").

28. Under the *Arlington Heights* test, the Court infers discriminatory intent through (1) the impact of the official action and whether it bears more heavily on one group than another; (2) the historical back-

ground of the decision; (3) the specific sequences of events leading up to the decision challenged in the case, including departures from normal procedures in making decisions and substantive departure; and (4) contemporary statements made by the governmental body who created the official action. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

29. Defendants' decision to interpret the law in a discriminatory fashion and threaten criminal prosecution against those who advance a different determination is discriminatory particularly to voters under the age of 65. That decision bears more heavily on voters under 65 especially during the COVID-19 pandemic, because if they are unable to access mail ballots, they will be forced to risk their lives, the lives of their loved ones, and the lives of the public at-large in order to vote. The refusal to extend access to mail ballots to younger voters affirmatively disenfranchises thousands of Texas voters simply on the account of age. Voters age 65 and older will not face the same burden on the right to vote because they are able to access mail ballots and vote from the safety of their home, away from potential COVID-19 carriers and spreaders. Voters under the age of 65 bear the burden of this application of the law more heavily than voters aged 65 and older because they will not be able to vote from the safety of their homes. Thus, the impact of the official action bears more heavily on younger voters than another group—older voters.

30. The background of Defendants' decision also leads this Court to conclude there was discriminatory intent. Initially, a district court granted voters in Texas relief to vote absentee due to COVID-19 by a Texas state court judge. Ex. 49, p. 4-6. Despite this

state court order, Attorney General Paxton issued an advisory, non-official opinion threatening to prosecute people and groups who complied with the state court ruling. Ex. 55. Defendant Paxton called the state court ruling an "unlawful expansion of mail-in voting." General Paxton further opined that to help or advise a voter to seek a mail-in ballot pursuant to this provision of the Election Code was a crime. Defendant Paxton's decision to threaten criminal sanctions is strong evidence of invidious discrimination.

31. Further, Defendants' actions regarding the state court proceedings are a departure from the legal norm and policy procedure. The Attorney General rarely, if ever, "opine[s] through the formal opinion process on questions ... that are the subject of pending litigation." In a highly unusual manner, Defendant Paxton circumvented the State's judicial process by announcing that he would criminally prosecute voters in defiance of the emerging court order. These significant departures from normalcy were all in service of preventing legal, registered voters from casting ballots without exposing themselves to a deadly virus.

32. Thus, *Arlington Heights* factors have been satisfied as to Defendants' conduct, and Plaintiffs have established that they are likely to succeed on their claim that Tex. Elec. Code § 82.003 impermissibly discriminates on the basis of age, as applied, in violation of the Twenty-Sixth Amendment. The Court also finds there is no rational basis for allowing voters 65 and over to mail-in their ballots while denying eligibility to voters less than 65.

ii. The Plaintiffs Will Succeed on Their Denial of Free Speech Claim

33. This Court concludes that Plaintiffs are likely to prevail to prevail on their denial of free speech claim.

34. Voters enjoy a "Right to Vote" as a form of political speech. Political speech, including the right to vote, is strongly protected as a "core First Amendment activity." *League of Women Voters v. Detzner*, 863 F. Supp.2d at 1158.

35. When determining whether there has been a violation of this right, the Court inquires as to (1) what sort of speech is at issue, and (2) how severe of a burden has been placed upon the speech. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Strict scrutiny is applied if the law "places a severe burden on fully protected speech and associational freedoms." *Lincoln Club v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). "[V]oting is of the most fundamental significance under our constitutional structure," meaning the speech at issue is fully protected First Amendment activity. *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

36. Political speech is at issue here. If not for Defendants' conduct, Plaintiff TDP (and other campaigns and political groups) would be engaging in communications with voters concerning who is eligible to and how to vote by mail. Defendant Paxton has outwardly threatened to prosecute these communications. Ex. 55 at p. 3. Defendant Paxton has also threatened to criminally prosecute voters who do not meet his construction of the statutory conditions to vote absentee who attempt to vote by mail.

37. Meanwhile, at least one candidate for the Republican Nomination for a seat in Congress has issued mailers encouraging all voters, regardless of Age, to vote by mail and her statements allege that she did so with advice from Defendant Paxton. Ex. 35. There is no evidence this Republican candidate is being criminally investigated or prosecuted or the county where much of the district at issue in the campaign is located, has been targeted by Defendant Paxton's letters and Texas Supreme Court Petition.

38. These circumstances leave the Democratic Party and its candidates unsure whether only Democrats will be prosecuted.

39. These circumstances, the evidence shows, hinders the free exchange of political speech.

40. The burden on this speech is severe. Under Defendant Paxton's interpretation of state law, voters face the choice between casting their ballot and paying the price of criminal prosecution. Especially given the visibility of the fallout from the Wisconsin primary election, voters are deeply fearful.

41. Defendants' conduct does not meet strict scrutiny, and thus Plaintiffs have established that they are likely to succeed on their claim that their right to freedom of political speech was denied. Indeed, Defendants' conduct cannot stand under any potential First Amendment standard.

42. Even were the state courts to clarify the disability provision in favor of voters under the age of 65, in a timely fashion, which seems unlikely, the threats of prosecution, now widely disseminated, would not be completely cured.

iii. The Plaintiffs Will Succeed on Their Void for Vagueness Claim

43. This Court concludes that Plaintiffs are likely to succeed on their void for vagueness claim.

44. A statute violates the Fourteenth Amendment on the basis of vagueness if its terms "(1) 'fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'authorize or even encourage arbitrary and discriminatory enforcement.'" *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). When a statute infringes upon basic First Amendment freedoms, "a more stringent vagueness test should apply." *Id.* at 246.

45. Criminal enactments are subject to a stricter vagueness standard because "the consequences of imprecision are . . . severe." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U. S. 489, 498-499 (1982). Voters can face criminal prosecution under Tex. Elec. Code § 84.0041, and thus a stricter vagueness standard applies to it. The law must be specific enough to give reasonable and fair notice in order to warn people to avoid conduct with criminal consequences. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). A statute must also establish minimal guidelines to govern enforcement. *Id.* at 574.

46. Tex. Elec. Code § 82.001-4 concerns the right to vote, which is a form of political speech protected under the First Amendment. Thus, a more stringent vagueness test applies here as the statute infringes upon basic First Amendment freedoms and voters are threatened with criminal prosecution.

47. Tex. Elec. Code § 82.001-4 provides that a voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election

day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-4. Tex. Elec. Code § 82.002(a) states "a qualified voter is eligible for early voting by mail if the voter has a sickness of physical condition that prevents the voters from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." Id. A Texas state court judge has stated that § 82.002(a) definition includes persons who are social distancing because of COVID-19.

48. Defendant Paxton has issued varying and contradictory interpretations of Tex. Elec. Code § 82.001-4. Prior to the pandemic, Defendant Paxton advised that there was no specific definition of disability required to be met in order to qualify to use an absentee ballot. Op. Tex. Att'y Gen. No. KP-0009 (2015). Defendant Paxton has also previously opined that a court-ruled sexual deviant under the age of 65 meets the definition of "disabled" under this statute. Op. Tex. Att'y Gen. No. KP- 0149 (2017).

49. Defendant Paxton's recent interpretations of Tex. Elec. Code § 82.001-4 renders the statute vague as it is unclear which voters qualify to vote using a mail ballot under the law. The statute itself does not clearly define the phrase "physical condition that prevents the voters from appearing at the polling place on election day." Tex. Elec. Code § 82.001-4. The multiple constructions of Tex. Elec. Code § 82.001-4 by Defendant Paxton and the state court fail to provide people of ordinary intelligence a reasonable opportunity to understand if they are unqualified to access a mail ballot, and authorize and encourage arbitrary and discriminatory enforcement.

50. Every day that goes by, Texans are being subjected to criminal prosecuting threat if they are under age 65 and seek to vote by mail before the July 2 deadline.

51. The statute does not establish minimal guidelines to govern enforcement by Defendants or other state actors. Defendant Paxton has threatened to prosecute elected officials and voters who access mail ballots as provided by the state court because of the COVID-19 pandemic. He issued a letter stating that "No the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041." Defendant Paxton's repeated assertions of prosecution of voters and threatening of election officials who seek to comply with a state court order is evidence of a lack of guidelines.

52. Voters have received conflicting instructions on their ability to access mail ballots; one from the Texas judiciary that orders voters who fear COVID-19 to qualify for a mail ballot and instructions from Defendant Paxton which threatens voters who follow the Texas court order with prosecution.

53. Due Process has been violated as the interpretation by Defendant Paxton and the Election Code itself provide no definitive standard of conduct and instead provides Defendants with unfettered freedom to act on nothing but their own preference and beliefs.

54. Tex. Elec. Code § 82.001-4 is unconstitutionally vague in violation of the Fourteenth Amendment Due Process Clause.

55. Plaintiffs have established that they are likely to succeed on their claim that the State's interpreta-

tion of the law and the law itself are unconstitutionally vague in violation of the Due Process Clause.

iv. The Plaintiffs Will Succeed on Their Voter Intimidation Claim

56. This Court concludes that Plaintiffs are likely to succeed on their voter intimidation claim.

57. Title 42 U.S.C. § 1985, part of the Civil Rights Act of 1871, "creates a private civil remedy for three prohibited forms of conspiracy to interfere with civil rights under that section." *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 149 (5th Cir. 2010).

58. Plaintiff must prove the following elements for a claim under § 1985(3): (1) a conspiracy of two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or deprives her of a right or privilege of a United States citizen. *See Hilliard v. Ferguson*, 30 F.3d 649, 652–53 (5th Cir. 1994).

59. The right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by the provision of 42 U.S.C. § 1985(3) pertaining to conspiracies to deprive persons of rights or privileges. *See* 42 U.S.C. § 1985(3) (preventing persons from conspiring to "prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner"); *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958.

60. Voters are legally entitled access to the franchise, and the right to vote is a fundamental right.

Reynolds v. Sims, 377 U.S. 533, 561-562 (1964). This right entitles voters to access to the franchise free from unreasonable obstacles. *See Common Cause Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *see also Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014).

61. Defendants have worked in concert with others in threatening criminal prosecution, an act in furtherance of this conspiracy to deprive access to the franchise from legal, rightful voters. This has injured Plaintiffs, and this injury has been caused by state officials acting in concert with others to prevent legal voters from casting a ballot free from fear of risk of transmission of a deadly illness or criminal retribution.

62. Defendant Paxton issued an advisory opinion just as a state court was ruling that Texas voters are entitled to a mail-in ballot because of the risk of transmission of COVID-19. Ex. 55 at p.1. In this advisory opinion, Defendant Paxton wrote: "[T]o the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041." Ex. 55 at p. 5. He also claimed that expanding mail ballot eligibility to all Texans "will only serve to undermine the security and integrity of our elections." Defendant Paxton's statements operate to discourage voters from seeking mail-in ballots because of their fear of criminal sanction or victimization by fraud, and have the intention and the effect of depriving legally eligible voters' access to the franchise.

63. Plaintiffs are likely to succeed on the merits of their claim that Defendant Paxton's official actions amount to voter intimidation in violation of Title 42 U.S.C. § 1985(3).

v. The Defendants Violated the Equal Protection Clause of the 14th Amendment

64. The Defendants, who are state actors and/or acting under color or law as administrators of elections, have violated the Equal Protection Clause of the Fourteen Amendment by creating an unconstitutional burden on the fundamental right to vote for those under the age of 65.

65. The Equal Protection Clause "is essentially a mandate that all persons similarly situated must be treated alike." *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996). When a "challenged government action classifies or distinguishes between two or more relevant groups," courts must conduct an equal protection inquiry to determine the validity of the classifications. *Quth v. Strauss*, 11 F.3d 488, 491 (5th Cir. 1993).

66. First, Defendants have unconstitutionally burdened Plaintiffs' right to vote as set forth under the *Anderson-Burdick* analysis.

67. Because voting is a fundamental right *(Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966)), state election laws or enactments that place a burden on the right to vote are evaluated under the Anderson-Burdick analysis. Under that analysis, a court must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by the rule." *Burdick v. Takushi*, 504 U.S. at 434. If the burden on the right to vote is severe, a court will apply strict scrutiny. The classification created by the state must promote a compelling governmental interest and be narrowly tailored to achieve this interest if

it is to survive strict scrutiny. *Plyer v. Doe*, 457 U.S. 202, 216-17 (1982).

68. Under strict scrutiny, Defendants are unable to supply any legitimate or reasonable interest to justify such a restriction. Defendants' proffered interests in denying millions of Texans a mail-in ballot amidst a pandemic are that (1) mail-in ballots are a special protection for the aged or disabled and (2) mail ballots enable election fraud. Both reasons, even taken at face-value, fail to outweigh the burden voters will face in exercising their right to vote before the threat of COVID-19 can be realistically be contained. Moreover, Defendants fail to explain why, under their advanced interests, that older voters are so highly valued above those of younger voters that the rampant fraud Defendants claim mail-in voting provides is justified.

69. Further, the statutory interpretation espoused by Defendants is not narrowly tailored enough to serve the proffered interests. Texas Election Code § 82.001, *et seq.*, extends the "special protection" of a vote by mail-in ballot to not just the aged or disabled but also to voters confined in jail, voters who have been civilly committed for sexual violence, and voters who are confined for childbirth.

70. Second, mail-in ballots have built-in protections to ensure their security, including many criminal penalties for their misuse—protections that Defendant Paxton has publicly expressed a willingness to pursue. Tex. Elec. Code § 86.001, *et seq.* "Even under the least searching standard of review we employ for these types of challenges, there cannot be a total disconnect between the State's announced interests and the statute enacted." *Veasey v. Abbott*, 830 F.3d 216, 262 (5th Cir. 2016) (citing *St. Joseph*

Abbey v. Castille, 712 F.3d 215, 225-26 (5th Cir. 2013)).

71. Even if this Court finds that this statute should receive only rational basis review, as is appropriate where the burden is found to be more minimal, Defendants cannot proffer any rational state interest to justify their statutory interpretation. There is no rational state interest in forcing the majority of its voters to visit polls in-person during a novel global pandemic, thus jeopardizing their health (and the health of all those they subsequently interact with). There is certainly no rational interest in fencing out voters under the age of 65 because it would introduce rampant fraud, while allowing older voters to utilize mail ballots and allowing the alleged rampant fraud therewith. Nor do Defendants have a rational state interest in fencing out from the franchise a sector of the population because of the way they may vote. "'The exercise of rights so vital to the maintenance of democratic institutions' . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *United States v. Texas,* 445 F. Supp. 1245, 1260 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105 (1979). Furthermore, the State has no interest in allowing a situation where the Attorney General can sow confusion, uneven election administration and threaten criminal prosecutions on these circumstances.

72. Thus, this Court concludes that Defendants, who are state actors and/or acting under color or law as administrators of elections, have violated the Equal Protection Clause of the Fourteen Amendment by creating an unconstitutional burden on the fundamental right to vote for those under the age of 65.

b. Without Preliminary Relief, Plaintiffs Are Suffering Irreparable Harm

73. This Court concludes Plaintiffs are suffering irreparable harm in the absence of injunctive relief.

74. Voting is a constitutional right for those that are eligible, and the violation of constitutional rights for even a minimal period of time constitutes irreparable injury justifying the grant of a preliminary injunction. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B. Nov. 1981) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *DeLeon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), *aff'd sum nom. DeLeon v. Abbot*, 791 F3d 619 (5th Cir. 2015) ("Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law."); see also *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

75. In addition, forcing voters to unnecessarily risk their lives in order to practice their constitutional rights while allowing other voters a preferred status so that they do not have to face this same burden, is also irreparable injury.

76. Leaving the elections. conditions as they are is itself a harm. TDP and these individual voters are held up, every day by the conflicting state court order and Attorney General's Paxton's guidance. If the Plaintiff voters apply for ballots by mail, right now, as they would otherwise be entitled to do, they subject themselves to criminal investigation. If they wait, they may miss the deadline, risk their application or ballot do no

travel in the mail timely or otherwise gets held up with a last minute rush of vote by mail applications. Meanwhile, TDP is unable to counsel and advise its members as to who can vote in its primary runoff and how.

c. The Continued Injury if the Injunction is Denied Outweighs Any Harm that Will Result if the Injunction is Granted

77. This Court concludes that any harm to Defendants is outweighed by the continued injury to Plaintiffs if an injunction does not issue.

78. As explained above, the injury Plaintiffs are suffering in the absence of an injunction, is severe.

79. No harm occurs when the State permits all registered, legal voters the right to vote by utilizing the existing, safe method that the State already allows for voters over the age of 65. The Court also concludes that the local election administrators will suffer no undue burden if vote-by-mail is expanded.

III. Preliminary Relief Will Serve the Public Interest

80. This Court concludes that the injunctive relief that Plaintiffs seek will not disserve the public interest, and, to the contrary, will serve the public interest because it will protect prevent violation of individuals' constitutional rights and will prevent additional cases of a deadly infectious disease that has already taken the lives of over a thousand Texans.

81. It is "always" in the public interest to prevent violations of individuals' constitutional rights, *Deerfield Med. Ctr.*, 661 F.2d at 338-39, and it is in the public interest not to prevent the State from violating the requirements of federal law. *Valle del Sol Inc. v. Whiting*, 732 F .3d 1006, 1029 (9th Cir. 2013); *c.f.*

Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (stating that protecting the right to vote is of particular public importance because it is "preservative of all rights.") (citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

82. Moreover, it is the public policy of the State of Texas to construe any constitutional or statutory provision which restricts the right to vote liberally: "[a]ll statutes tending to limit the citizen in his exercise of this right should be liberally construed in [the voter's] favor." *Owens v. State ex rel. Jennett*, 64 Tex. 500, 502 (1885). The public policy the State's executive branch attempts to advance in this case does not appear clearly in any state legislative enactment.

83. Thus, an injunction against Defendants will serve the public interest.

IV. Abstention is not Warranted

Abstention here is not warranted because resolution by the State court will not render this case moot nor materially alter the constitutional questions presented. Plaintiffs allege injury of their federal constitutional rights in addition to injuries arising from the ambiguity of state law. A Texas state court has already interpreted the ambiguity of Texas' election code and many counties are complying. Yet, General Paxton's letter ruling is preventing meaningful political speech, confuses mail ballot applicants and leaves these voters having to risk criminal prosecution if they seek to protect their health by voting by mail. Meanwhile, vote by mail applications are being submitted daily and many counties, cities, and school districts are complying with Judge Sulak's ruling. Under these circumstances, abstaining from exercising federal court jurisdiction is not warranted.

Moreover, "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). In fact, the stay of federal decision is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) (quoted in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976)). As such, "abstention is the exception rather than the rule . . . ." *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981).

Pullman abstention must be "narrow and tightly circumscribed" and is "to be exercised only in special or 'exceptional' circumstances." *Duke v. James*, 713 F.2d 1506, 1510 (11th Cir. 1983). Nonetheless, "voting rights cases are particularly inappropriate for abstention," *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000), because in voting rights cases plaintiffs allege "impairment of [their] fundamental civil rights" *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). Abstention is even more inappropriate where the inevitable delay it will cause could preclude resolution of the case before the upcoming elections. *Detzner*, 354 F. Supp. 3d at 1284 (citing *Harman*, 380 U.S. at 537).

In this case, time is of the essence—the runoff election is mere weeks away, and the 2020 general election comes not long after. There is no guarantee that state court proceedings will be completed in time and given the Attorney General's defiance of the state district court ruling, a final state court ruling would not fully vindicate Plaintiffs' federal constitutional rights.

Even if Defendants' reading of Tex. Elec. Code § 82.003 was plausible, it is not the sole, mandatory reading of the text, and the constitutional avoidance canon requires that it be rejected. "[W]hen one interpretation of a law raises serious constitutional problems, courts will construe the law to avoid those problems so long as the reading is not plainly contrary to legislative intent." *Pine v. City of West Palm Beach*, 762 F.3d 1262, 1270 (11th Cir. 2014). Resolution of the state court matters is neither "diapositive of the case" before this Court nor would its resolution "materially alter the constitutional questions presented" by Plaintiffs' claims. *Siegel*, 234 F.3d at 1174.

Presuming the Texas Supreme Court upholds the lower court's reading of Tex. Elec. Code §§ 82.001-4, and even if the Executive branch of the Texas government complies with this reading, this does not properly counsel for abstention. To find otherwise is to depend upon a series of questionable "mights." *See Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1322 (11th Cir. 2017) (relying on *United States v. Stevens,* 559 U.S. 469, 480 (2010), for the proposition that courts should not decline to enforce constitutional rights in reliance on the "benevolence" of enforcing officials). Additionally, even if this series of "mights" come to pass, that would not change the constitutional questions presented in this case. Plaintiffs allege that Texas' election code is prima facie discriminatory in violation of the United States Constitution, which is a matter only this Court can resolve.

Abstention would take considerable time and meanwhile these Plaintiffs' constitutional speech, right to assemble as a political party and to vote, are all harmed. Abstention is inappropriate in this case, for the same reason that it is "particularly inappropriate"

in voting cases. *See Siegel*, 234 F.3d at 1174. Constitutional "deprivations may not be justified by some remote administrative benefit to the State." *Harman*, 380 U.S. at 542. Therefore, Plaintiffs' injuries are redressable by this Court and abstention is not appropriate.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Texas Democratic Party, Gilbert Hinojosa, Chair of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia,	§	[ECF Document 91 Filed May 19, 2020]
Plaintiffs,	§	Civil Action No. 5:20-CV-00438-FB
v.	§	
Greg Abbott, Governor of Texas, Ken Paxton, Attorney General of Texas, Ruth Hughs, Texas Secretary of State, Dana Debeauvoir, Travis County Clerk, and Jacqueline F. Callanen, Bexas County Elections Administrator,	§	
Defendants.	§	

STATE DEFENDANTS' NOTICE OF APPEAL

Defendants Greg Abbott, Governor of Texas, Ruth Hughs, Texas Secretary of State, and Ken Paxton, Attorney General of Texas, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Court's Order Regarding Plaintiffs' Motion

for Preliminary Injunction (Doc. 90), entered on May 19, 2020.

Respectfully submitted.

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