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

LINDA JANN LEWIS, MADISON LEE, ELLEN SWEETS, BENNY ALEXANDER, GEORGE MORGAN, VOTO LATINO, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND TEXAS ALLIANCE FOR RETIRED AMERICANS,

Plaintiffs,

v.

RUTH HUGHS, in her official capacity as the Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577-OLG

Related to *Gloria et al. v. Hughs et al.*, No. 5:20-cv-00527

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The Secretary takes the remarkable position—during a once-in-a-century pandemic that has made voting by mail the primary means of accessing the franchise—that voting by mail is simply a luxury; Texas's state officials have no responsibility to ensure that voters can effectively cast mail ballots; and even if those officials could help, this Court has no power to make them do so. Not only this, the Secretary argues that the Court should dismiss Plaintiffs' claims on the pleadings without Plaintiffs having the opportunity to have their claims *heard*. These arguments ignore reality and are directly contrary to binding precedent. The Constitution does not allow Texas to operate a vote-by-mail regime that is guaranteed to burden and disenfranchise an untold number of voters, particularly in the coming election in which the severity of the burden of the Postage Tax, Ballot Receipt Deadline, Signature Match Requirement, and Voter Assistance Ban (collectively, the "Vote By Mail Restrictions") will be exacerbated and impact a broader number of voters as many shift to mail voting due to COVID-19. Notably, the Secretary's Motion outright ignores that ongoing health crisis. *Nowhere* in the Motion do the words "COVID," "health," or "virus" appear. The *single mention* of the word "pandemic" is a quote from Plaintiffs' Complaint. Plaintiffs wish they could—as the Secretary seems to try to do—will the current pandemic away. But they cannot. And while it is not the basis for Plaintiffs' claims, it provides important factual context, outside of which Plaintiffs' claims cannot be accurately apprised. The Secretary's decision to ignore that context is reason alone to look skeptically on her motion to dismiss.

The Secretary lodges both jurisdictional objections and arguments that Plaintiffs have failed to plead plausible claims. The Secretary is wrong on both counts. *First*, the Secretary's argument that sovereign immunity bars claims like Plaintiffs' has been *rejected* by the Fifth Circuit applying the *Ex parte Young* doctrine. *Second*, all Plaintiffs have standing. The Secretary's argument that Plaintiffs Linda Jann Lewis, Madison Lee, Ellen Sweets, Benny Alexander, and

George Morgan (collectively, "Voter Plaintiffs") face injuries that are too speculative ignores the applicable standard of review and facts pled in Plaintiffs' complaint that are supported by declarations attached to this opposition. Voto Latino, the Texas State Conference of the National Association for the Advancement of Colored People ("NAACP"), and the Texas Alliance for Retired Americans (the "Alliance") (collectively, "Organizational Plaintiffs") possess Article III and statutory standing to prosecute this suit under theories of both organizational and associational standing. The Secretary's half-hearted arguments to the contrary fail to withstand even cursory examination, and most were recently dispensed with by this Court in an order denying a motion to dismiss in *Richardson v. Hancock*, Case No. 5:19-cv-00963-OLG, (W.D. Tex. Dec. 23, 2019) at ECF No. 41 ("*Richardson* Order) (Ex. A at Appx. 1-33).

And *finally*, although the Secretary argues that Plaintiffs do not state a valid claim for relief under their four causes of action—(1) undue burden on the right to vote, (2) violation of equal protection, (3) violation of procedural due process, and (4) impermissible poll tax—the Secretary is wrong at every turn. Plaintiffs do not have to prove their case in a Complaint. They need only plead plausible claims for relief. Here, Plaintiffs have alleged facts, which must be accepted as true, demonstrating that the Vote By Mail Restrictions challenged here impose a heavy burden on the right to vote that far outweighs any purported State interest. This alone is fatal to the Secretary's arguments at the pleadings stage. But rather than accept the facts as alleged, the Secretary argues them, claiming that because she says any burden is minimal, Plaintiffs are not entitled to substantive judicial review of their claims. This is not how Rule 12(b)(6) works, and the risk of disenfranchising thousands of Texans in the midst of a global pandemic is anything but minimal. Plaintiffs' Complaint sets forth more than sufficient grounds for this Court to proceed to the merits. The Secretary's motion fails in its entirety and should be denied.

ARGUMENT

A. Sovereign immunity does not bar Plaintiffs' claims.

The Secretary argues, ignoring controlling legal authority, that sovereign immunity bars Plaintiffs' claims. She is wrong for the reasons most recently discussed in *Texas Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2982937, at *6-8 (5th Cir. June 4, 2020) ("*TDP*").[1] Under *Ex parte Young*, sovereign immunity poses no bar to plaintiffs who (1) seek prospective injunctive relief (2) against a state actor who has "some connection" to the challenged law's implementation and enforcement. *K.P. v. LeBlanc*, 627 F.3d 115, 124-25 (5th Cir. 2010). Plaintiffs seek prospective injunctive relief, so the question is whether the Secretary has "some connection" to the Vote By Mail Restrictions. The Secretary argues she does not. Nonsense. The *Ex parte Young* doctrine provides an exception to sovereign immunity when the defendant enforces a challenged statute "by virtue of his office." *Id.* at 124. That is precisely the case here.

The Secretary focuses solely on the fact she does not *personally* provide ballot carrier envelopes, reject mail ballots for signature or delivery date issues, or prosecute individuals for voter assistance.[2] *See* Dkt. 17 at 2-3. This misapplies *Ex parte Young* and ignores binding precedent. Plaintiffs establish a sufficient "connection to the enforcement" when the official "effectively ensures the [statutory] scheme is enforced" or engages in actions, per the statute, that constrain the plaintiffs. *Air Evac EMS v. Texas, Dept. Of Ins.*, 851 F.3d 507, 519 (5th Cir. 2017).

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[1] *TDP* considered a stay of a preliminary injunction pending appeal, so it did not rule on the substance of the parties' arguments, but instead opined on the likelihood of their success. *TDP*, 2020 WL 2982937, at *8.

[2] Worth noting is the troubling implications of the Secretary's argument. Although county election officials have no power to ignore the statutory provisions challenged here, the Secretary effectively argues that no one can challenge state law without joining 254 counties in a lawsuit. This is not required, and would be a recipe for unmanageable proceedings and a grossly inconvenient and unnecessary burden on county officials hauled into court far from their local jurisdiction. The standing doctrine ensures that the Court is resolving real disputes between parties. It does not operate as a roadblock to be deployed by a State that does not wish to have its laws challenged.

Texas Election Code § 31.003 unequivocally states that the Secretary "shall obtain and maintain uniformity in the application, operation, and interpretation of [the Election Code] and of the election laws outside th[e] code." Although the Secretary attempts to distance herself from her statutory duty to ensure uniform enforcement of the election code, the statute's use of the word "shall" makes clear these duties are mandatory. *See Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001). The Secretary therefore has the requisite connection to the challenged Vote By Mail Restrictions for *Ex arte Young* to apply. *See TDP*, 2020 WL 2982937, at *8 ("[O]ur 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 . . . suggest[] that *Young* is satisfied.").

Finally, the Secretary's attempt to exclude "injunctions directing 'affirmative action'" from *Ex parte Young*'s reach is plainly wrong. Many cases have applied the doctrine in suits imposing mandatory injunctions.[3] "Under *Ex parte Young*, 'a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law,'" *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (quoting *Quern v. Jordan*, 440 U.S. 332, 337 (1979)), including by undertaking affirmative obligations.[4] The Secretary ignores this binding precedent in favor of cherrypicked quotes from cases that did

[3] *See, e.g.*, *Verizon Md., Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 640; *Air Evac EMS*, 851 F.3d at 521; *Green Valley Special Util. Dist. v. Walker*, 324 F.R.D. 176, 182 (W.D. Tex. 2018); *Hall v. Louisiana*, 983 F. Supp. 2d 820, 835 (M.D. La. 2013).

[4] *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (rejecting state's assertion of sovereign immunity concerning requirement that state pay for future educational components of relief); *Thomas ex rel. D.M.T. v. School Bd. St. Martin Parish*, 756 F.3d 380, 387-88 (5th Cir. 2014) (noting school board "remained subject to affirmative obligations" by permanent injunction issued by court to remedy constitutional harms).

not apply the rule she advances.[5] That inapposite authority does not advance the Secretary's cause. Sovereign immunity does not bar Plaintiffs' claims.

B. All Plaintiffs have standing.

The Voter Plaintiffs and the Organizational Plaintiffs have standing to challenge the Vote By Mail Restrictions. To establish Article III standing, a plaintiff must show (1) an "injury in fact" (2) that is "fairly traceable" to the challenged conduct and (3) can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because Plaintiffs seek injunctive relief, only one party must have Article III standing for the case to proceed. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Texas v. United States*, 945 F.3d 355, 377–78 (5th Cir. 2019). That threshold is clearly surpassed here by the allegations in Plaintiffs' Complaint, as detailed below. It is axiomatic that, in ruling on a motion to dismiss, the Court must accept Plaintiffs' allegations as true, including as related to Plaintiffs' standing. *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001) (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)).

1. All Plaintiffs allege sufficient injury to confer standing.

"To be an injury in fact, a threatened injury must be (1) potentially suffered by the plaintiff . . . , (2) concrete and particularized, not abstract, and (3) actual or imminent, not conjectural or hypothetical." *Stringer v. Whitley*, 942 F.3d 715, 720–21 (5th Cir. 2019) (quotation marks omitted). "For a threatened future injury to satisfy the imminence requirement, there must be at least a 'substantial risk' that the injury will occur." *Id.* at 722. That substantial risk is present here. *See, e.g.*, *Delisle v. Boockvar*, No. 95 MM 2020 (Pa. May 29, 2020) (Wecht, J., concurring)

[5] *See, e.g.*, *Zapata v. Smith*, 437 F.2d 1024, 1025-26 (5th Cir. 1971) (reversing district court because United States not properly joined as a party); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704-05 (1949) (considering injunction to prohibit agency from entering into new contract on principles of sovereign immunity).

("[U]nder the current extraordinary circumstances [caused by COVID], the potential for impairment of the ability of voters to cast a valid ballot by mail is real and substantial, and the stakes are high."). All Plaintiffs can show the requisite injury.

a. The Voter Plaintiffs' alleged injuries are not speculative.

The Secretary's argument that the Voter Plaintiffs' injuries are speculative because they are not "certainly impending," and because "Plaintiffs do not allege they *will be* prevented from voting," Dkt. 17 at 4, 6, misses the mark. For an individual plaintiff's injury to be sufficient to confer standing, the Fifth Circuit requires "some evidence that the plaintiff intends to take the [injury-causing] action again." *Stringer*, 942 F.3d at 722. *Stringer* held that individual plaintiffs lacked standing where they sued to challenge aspects of a voter registration option only available when individuals changed their place of residence in part because no plaintiff had "expressed any intention to move in the future." *Id.* But here, there is no question that the Voter Plaintiffs intend to vote by mail in the upcoming election. *See* Compl. ¶¶ 13-19. Because they do, and because their health conditions and socioeconomic status put them at high risk for both COVID-19 and disenfranchisement as a result of the Vote By Mail Restrictions—which indisputably apply to them—their injuries are not speculative. Rather, the Voter Plaintiffs' injuries are impending since, for example, Ms. Lewis's and Ms. Lee's signatures continually change due to their respective vision disorder and rheumatoid arthritis, putting them at a severe risk of being disenfranchised as a result of the Signature Match Requirement. *Id.* ¶¶ 13-14; *see also* Linda Jann Lewis Decl., Ex. B at Appx. 35-36 ¶ 6 (disability affects vision and signature); Ellen Sweets Decl., Ex. C at Appx. 40 ¶ 7 (fatigue from severe asthma affects handwriting); Benny Alexander Decl., Ex. D at Appx. 43 ¶ 5 (lightheadedness from congestive heart failure affects signature). And Mr. Morgan's poverty and serious health condition prevent him from being able to venture out safely to buy a stamp to vote—as is required by the Postage Tax—which, in addition to the mail disruptions he has

experienced due to the pandemic, puts him at serious risk of disenfranchisement due to the Ballot Receipt Deadline, particularly in concert with the Voter Assistance Ban that prohibits him from asking a friend to deliver his ballot. Morgan Decl., Ex. E at Appx. 47-48 ¶¶ 7-9; *see also* Lewis Decl. Ex. B at Appx. 36 ¶ 7 (limited income strains ability to purchase stamps, which she would hesitate to do now regardless because of the health risk that going out to buy stamps would pose).

Plaintiffs need not show it is certain that they will be disenfranchised by the Vote By Mail Restrictions to have standing to challenge them. Rather, the "threatened future injury (disenfranchisement) more than satisfies the standing necessary for injunctive relief." *Stringer v. Pablos*, No. SA-16-CV-257-OG, 2020 WL 532937, at *8 (W.D. Tex. Jan. 30, 2020). "[I]ndividual plaintiffs should not be forced to wait and suffer a constitutional deprivation" when relief through this Court is available. *Id.* (citing *Texas v. United States*, 809 F.3d 134, 173 n.137 (5th Cir. 2015), *as revised* (Nov. 25, 2015)). "Simply put, a voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote." *People First of Alabama v. Merrill*, No. 2:20-cv-00619-AKK, 2020 WL 3207824 at *6-7 (N.D. Ala. June 15, 2020) (citing *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009)).

Likewise, "[t]he inability of a voter to pay a poll tax . . . is not required to challenge a statute that imposes a tax on voting." *Common Cause*, 554 F.3d at 1352 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966)). *Cf. OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) ("*OCA*") (noting that injury need not be "large" or "substantial"; indeed, "it need not measure more than an identifiable trifle").

Finally, the Secretary insultingly suggests that the harms posed to Plaintiffs by the Vote By Mail Restrictions are no big deal because "only 1.4 percent of mail-in ballots were rejected nationwide." Dkt. 17 at 5. This shows the Secretary's brazen disregard for the constitutional rights

of the *more than 9,000 Texas voters* whose ballots were actually rejected as a result of those restrictions, even in non-pandemic conditions,[6] and ignores well-established precedent. Disenfranchisement, even for a small number of people, imposes severe burdens on voting rights.[7] In any event, the Voter Plaintiffs' serious medical conditions and physical ailments that affect their signatures and put them at high risk for COVID-19 when venturing out to buy stamps or deliver a ballot that they cannot receive assistance in delivering provide the "Plaintiff-specific" allegations needed for standing because they show "that there is a substantial risk that they will suffer the potential future injury absent their requested relief." *Stringer*, 942 F.3d at 722.

b. The Organizational Plaintiffs face associational injury.

The Secretary argues that the Organizational Plaintiffs do not identify members sufficient to confer associational standing. Again, the Secretary misconstrues or simply misapprehends binding precedent. The individual participation of an organization's members is "not normally necessary when an association seeks prospective or injunctive relief for its members," as do Plaintiffs here. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (citation omitted); *see also Richardson* Order, Ex. A at Appx. 12-13 (complaint sufficiently pled associational standing based on injuries allegedly suffered by organizational plaintiffs' members).[8] Because the Complaint alleges that the Organizational

[6] Notably, the report cited by the Secretary confirms that the rejection rate for mail ballots in Texas in the 2018 election was 1.76%, which is higher than the national average of 1.4%. U.S. Election Assistance Commission, *2018 Election Administration and Voting Survey*, (June 2019) https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report. pdf at 30.

[7] *See, e.g.*, *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("[T]he basic truth that even one disenfranchised voter—let alone several thousand—is too many."); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591-93 (6th Cir. 2012) (law likely unconstitutional that affected only 0.248% of ballots cast).

[8] *See also Hancock Cty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) (association need not "set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on a lack of associational standing"); *Democratic Nat'l*

Plaintiffs are membership organizations and the Vote By Mail Restrictions place undue burdens on their members' right to vote, the Complaint sufficiently alleges associational injury. *See* Compl. ¶¶ 20-25. The Secretary also repeats her position that, for the Voter Plaintiffs who are members of the NAACP and Alliance, their alleged individual injury is not sufficient to confer standing. Dkt. 17 at 6. But that argument falls flat for the reasons detailed above. *See supra* B.1.a.

c. The Organizational Plaintiffs face direct organizational injury.

Organizational Plaintiffs also allege sufficient injury for direct organizational standing based on controlling Fifth Circuit precedent that the Secretary simply ignores. An organization suffers an Article III injury when it must divert resources from its usual activities to lessen the harm caused by an act that frustrates its mission. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). All three Organizational Plaintiffs satisfy this standard.

First, Voto Latino will need to divert significant funds from its voter registration efforts, get out the vote efforts, and digital advertising budget to educate voters on how to avoid the burdens imposed by the Vote By Mail Restrictions, which frustrate its mission. *See* Compl. ¶ 21; Maria Teresa Kumar Decl. Ex. F at Appx 51-53 ¶¶ 6-10. Second, the Restrictions will frustrate the NAACP's mission "to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons," which it achieves by "engag[ing] in voter education and registration activities." Compl. ¶ 23. But because of the Vote By Mail Restrictions, the NAACP "must divert additional time and resources to educate its members and constituents to make sure that they are able to obtain the postage necessary to mail their ballots; that they are aware of the Ballot Receipt Deadline and will be able

Comm. v. Bostelmann, No. 20-CV-249-WMC, 2020 WL 1320819, at *3 (W.D. Wis. Mar. 20, 2020) (party had associational standing based on allegation that the challenged laws "place[d] undue burdens on [its] members' right to vote").

to mail their ballots in time for them to be received timely . . . ; and to make sure they are aware of the Signature Match Requirement and the need to contact county elections officials to ensure that their ballots have not been rejected on the basis of signature mismatch," *Id.* ¶ 24, none of which it would have to do but for the Restrictions. Gary Bledsoe Decl., Ex. H at Appx 61-62 ¶ 7. And finally, the Alliance has diverted resources from its voter registration, phone banking, and get out the vote activities to education on how to avoid the pitfalls that the Restrictions impose. Compl. ¶ 25; Judy Bryant Decl. Ex. G at Appx 56-58 ¶¶ 5-6, 9. At the pleading stage, these allegations are sufficient to establish standing. *Lujan*, 504 U.S. at 560-61.

The Secretary's assertion that these allegations are insufficient ignores controlling case law. In *Havens Realty*, the U.S. Supreme Court held that plaintiffs' allegations that the defendants' "racial steering practices" frustrated their "efforts to assist equal access to housing through counseling and other referral service" by forcing them "to devote significant resources to identify and counteract the defendant[s'] racially discriminatory steering practices" were sufficient to withstand a motion to dismiss. 455 U.S. at 379; *see also Richardson* Order, Ex. A at Appx. 10-12 (complaint sufficiently pled organizational standing by alleging organizational plaintiffs must expend "additional resources" to provide "instruction and support on mail-in ballots"); *Bostelmann*, 2020 WL 1320819, at *3 (same).[9]

Plaintiffs' well-pled factual allegations clearly suffice; a point reinforced by cases from beyond the pleading stage. For example, in *OCA*, the organizational plaintiff's mission was "to

[9] Relatedly, the Fifth Circuit has made clear that the impact to an organization's activities or resources does not need to be large or described in minute detail to establish standing. *See OCA*, 867 F.3d at 610-12 (injury requirement is "qualitative, not quantitative, in nature" and injury need not be large). The Secretary attempts to heighten that standard by citing *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) and non-binding precedent, Dkt. 17 at 8-9, but the Fifth Circuit expressly rejected a similar attempt in *OCA*. 867 F.3d at 612.

promote civic participation and provide civic education, which it carrie[d] out through a 'Get Out the Vote' initiative." 867 F.3d at 609. Because the challenged law impeded "some" of the plaintiff's members from voting, the plaintiff "redirected some of its efforts toward educating its members and other members of the public about" the challenged law. *Id.* at 609-10. The Fifth Circuit held this was clearly sufficient for purposes of organizational standing because these voter education efforts "consumed [plaintiff's] time and resources in a way they would not have been spent." *Id.* at 612. Thus, because the Vote By Mail Restrictions will cause the Organizational Plaintiffs to divert resources away from their normal programs to combat the effects of the Restrictions, they have standing to challenge them.[10]

Unable to explain away the long line of similar cases conferring standing on similar organizations in similar voting rights cases, the Secretary largely bases her theory of organizational standing on a D.C. Circuit decision which found that a labor union lacked standing to challenge the constitutionality of the Line Item Veto Act. Dkt. 17 at 7-8 (suggesting plaintiffs must show a "direct conflict" between their mission and the defendant's conduct, citing *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423 (D.C. Cir. 1996)). The comparison the Secretary tries to draw is inapt. It is one thing to suggest that an Act concerning the President's line item veto power is insufficiently related to a labor union's mission for standing purposes, but to apply that reasoning to a nonprofit organization challenging laws that burden the very voters who those organizations serve, and that causes those organizations to divert their resources to activities addressing and attempting to ameliorate those burdens, is a logical leap that simply contradicts well-settled

[10] *See also Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (state party had standing because ID law caused it to "devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote"); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006) (holding party had standing to challenge state action based on diversion of resources).

precedent. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). Organizational Plaintiffs' allegations are sufficient to establish direct organizational injury.

2. Plaintiffs' claims are caused and redressable by Defendant.

The Secretary argues that she does not cause Plaintiffs' injuries (and therefore, she asserts, cannot redress them) because it is local election officials, not her, who decide whether to count or reject a mail-in ballot, and local prosecutors, not her, who pursue charges for violations of the Voter Assistance Ban. *See* Dkt. 17 at 9. But, as a motions panel of the Fifth Circuit reiterated just weeks ago, *OCA* forecloses that argument. *See TDP*, 2020 WL 2982937, at *5-6 (reasoning that *OCA* "poses a significant obstacle" to the same causation and redressability argument the Secretary advances here) (citing *OCA*, 867 F.3d at 613).

Plaintiffs do not challenge local election officials' decisions, but instead, the election laws the State requires them to follow. In *OCA*, plaintiffs similarly challenged a Texas law that prohibited counties from allowing unregistered individuals to interpret local election officials' communications with voters. 867 F.3d. at 607-08. There, as here, the Secretary argued that the plaintiffs should have sued the local officials who implemented that law. *Id.* at 612-13. The Fifth Circuit rejected that argument. It reasoned that, because the Secretary is Texas's Chief Election Officer and is required to "obtain and maintain uniformity in the application, operation, and interpretation of" Texas's Election Code, the Court held that the Secretary was positioned to redress the plaintiffs' injuries caused by a generally applicable election law. *Id.* at 613 (citing Tex. Elec. Code § 31.003). So too here.[11]

[11] As relevant here, the Secretary's description of her statutory authority ignores portions of the Texas Election Code that empower her to "take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the states[']electoral processes," and "order" local officials to "correct offending conduct" when performing official functions "in a manner that impedes the free exercise of a citizen's voting rights." Tex. Elec. Code.

The Secretary attempts to avoid *OCA*'s inescapable application by asserting that it only reaches facial, rather than as applied, constitutional challenges, Dkt. 17 at 10 n.4, but that distinction is a red herring, and is undermined by a very recent decision from a motions panel of the Fifth Circuit. Nothing about *OCA*'s reasoning was premised exclusively on the fact that plaintiffs brought a facial challenge. And indeed, a Fifth Circuit motions panel recently applied *OCA's* reasoning in a suit challenging the constitutionality of Texas's mail voting rules *as applied* during COVID-19 pandemic. *See TDP*, 2020 WL 2982937.

The Secretary next tries to distinguish *OCA* by relying on *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001), to argue that *OCA* does not apply because the Texas Election Code provides a private right of action for enforcement of the challenged statute, as did the statute in *Okpalobi*. *See* Dkt. 17 at 10 n.2 (citing Tex. Elec. Code § 221.003). *Okpalobi* involved a law providing unlimited liability against doctors in suit by patients for damages caused by abortion procedures. The court concluded that the doctor plaintiffs' injuries were caused by those private suits, not state officials who had no "enforcement connection to the challenged statute." 244 F.3d at 427 & n.35. It was thus the statute directly at issue in *Okpalobi* that contained the private right of action that *OCA* relied on in distinguishing *Okpalobi*.

But here, none of the Vote By Mail Restrictions contain a private right of action. The statute the Secretary relies on is the election contest statute, which requires a plaintiff to show the *result* of the election was different than that reported. Tex. Elec. Code § 221.003. Here, the question is

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§ 31.005. Indeed, the Secretary's authority to issue orders to protect voting rights is accompanied by its own enforcement scheme: if an official "fails to comply, the secretary may seek enforcement . . . by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general." *Id*. Thus, in addition to being the chief election official responsible for maintaining uniformity in the application and interpretation of the Election Code, Texas law expressly authorizes the Secretary to remedy the voting rights violations identified in Plaintiffs' suit and to implement their requested relief. *See id*.

entirely different—whether specific provisions of state law violate the U.S. Constitution. No state law provides a private right of action on that question. Indeed, under the Secretary's logic, the Fifth Circuit's decision in *OCA* was wrong: that case also involved an election law, and the private right of action statute that the Secretary now cites as supposedly barring proceedings against the Secretary regarding election laws *was in effect* when *OCA* was decided. *OCA* controls.

Finally, the Secretary's invocation of *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020) is also inapposite. That decision rested on specific features of Florida law that made the injury flowing from a ballot order statute not redressable by or traceable to Florida's Secretary of State. *Id.* at 1207. But the Fifth Circuit expressly held in *OCA* that the Texas Secretary of State's designation as "chief election officer" establishes standing for plaintiffs who sue the Secretary in election-law contexts in Texas, as do Plaintiffs here.

3. The Organizational Plaintiffs have statutory standing.

Finally, the Secretary ignores binding precedent to argue that 42 U.S.C. § 1983 does not permit Organizational Plaintiffs to challenge laws burdening the right to vote because organizations are third parties that do not themselves have the right to vote. *See* Dkt. 17 at 10-11. Yet again, this argument has already been rejected by the Fifth Circuit, and for good reason. The statutory standing inquiry asks courts "to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). The deprivation of rights alleged by Organizational Plaintiffs are those guaranteed by the First, Fourteenth, and Twenty-Fourth Amendments to the U.S. Constitution, which are squarely within the zone of interests encompassed by § 1983.

The Secretary's position that organizations are barred from suing under § 1983 contradicts settled law. The Fifth Circuit has expressly interpreted § 1983 to allow suits by organizations that

have established associational standing. *See, e.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010) (nonprofit had associational standing to assert § 1983 claims on members' behalf in seeking prospective declaratory and injunctive relief).[12]

So too for direct organizational standing. Courts often find that organizations have direct standing under. § 1983 to bring civil rights claims based on a diversion of resources injury alone—in part because a claim based on an organization's direct injury vis-à-vis its frustration of mission and diversion of resources due to an unconstitutional law is *not* a third-party claim.[13] Accordingly, even if the Organizational Plaintiffs only had direct organizational standing vis-à-vis their diversion of resources and the frustration of their missions (as opposed to *both* direct and representational standing, as is the case here), they would still have standing under § 1983.

The Secretary relies on cases that merely illustrate the general prohibition on individual, third-party standing—i.e., the standing of an *individual* seeking to assert a claim on behalf another individual—but all are inapposite because they do not involve *organizations*. *See* Dkt. 17 at 10-11 (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) (mother and daughter could not assert the third-party deprivation of husband and father's constitutional rights); *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011) (judge's secretary lacked standing to challenge constitutionality of her judge's and employer's suspension); *Conn v. Gabbert*, 526 U.S. 286, 287 (1999) (attorney lacked standing to challenge infringement of constitutional rights of client)). As explained above,

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[12] *See also Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1278-79 (5th Cir. 1981) (church had representative standing in § 1983 action); *see also Jornaleros de Las Palmas v. City of League City*, 945 F. Supp. 2d 779, 800 (S.D. Tex. 2013) (organization was authorized to sue under § 1983 on behalf of its members).

[13] *See, e.g.*, *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1258 (N.D. Ga. 2018) (plaintiffs have "organizational standing" under § 1983 based on need to "divert personnel and resources"); *Inclusive Cmtys. Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 496 (N.D. Tex. 2010) (finding organizational plaintiff suffered an injury to its resources, and this was enough to establish standing to bring a claim under § 1983).

see supra B.1.b-c, Plaintiffs have demonstrated both associational and organizational standing, which forecloses the Secretary's "statutory standing" defense and easily distinguishes this case from the authorities the Secretary cites.

C. Plaintiffs' Complaint validly states four claims for relief.

The Secretary attempts to litigate the merits of this case by delving into the intricacies of each of Plaintiffs' claims under the guise of Rule 12(b)(6). *See* Dkt. 17 at 11-27. But the only question at this stage is whether the allegations in Plaintiffs' Complaint state valid claims for relief, which they unequivocally do. *See Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (dismissal under Rule 12(b)(6) "is appropriate only if the complaint fails to plead enough facts to state a claim to relief that is plausible on its face," and is "viewed with disfavor and is rarely granted"); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (dismissal only appropriate if court determines it is "beyond doubt" that the claimant cannot prove a plausible set of facts that support the claim and would justify relief). In evaluating the Secretary's challenge, moreover, the Court must (1) accept Plaintiffs' factual allegations as true, and (2) view them in the light most favorable to Plaintiffs. *See Martin K. Eby Const. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004). Because the Secretary's Motion is a premature attempt to litigate plausibly pleaded claims and block them from having their day in court, it should be denied.

1. *Anderson-Burdick* claim (all four Vote By Mail Restrictions)

The Secretary's argument that Plaintiffs have not sufficiently alleged an undue burden on the right to vote misunderstands the law and ignores the ample facts plead in Plaintiffs' Complaint. Plaintiffs' undue burden claim, which is evaluated under the familiar *Anderson-Burdick* test, encompasses all four Vote By Mail Restrictions—the Ballot Receipt Deadline, Signature Match Requirement, Voter Assistance Ban, and Postage Tax—and is based on Plaintiffs' allegations that, even in ordinary times, those Restrictions burden the right to vote, and that the pandemic has

helped exacerbate those burdens to a point that outweighs the government's interest in them (to the extent it even has one). *See, e.g.*, Compl. ¶¶ 114-121. Under *Anderson-Burdick*, a court considering such a challenge to a state election law must carefully balance the character and magnitude of injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Where, as here, "plaintiffs have plausibly alleged that each of the challenged provisions imposes a burden on voters that is not justified by the state's interests," the "allegations are sufficient to survive a motion to dismiss." *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 3077047, at *5 (W.D. Wis. June 10, 2020); *see also Miller v. Doe*, 422 F. Supp. 3d 1176, 1185-86 (W.D. Tex. 2019) (refusing to dismiss claim subject to *Anderson-Burdick* test where plaintiffs alleged ballot access provisions were unconstitutional); *League of Women Voters of Florida, Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1288 (N.D. Fla. 2018) ("It is sufficient for a 12(b)(6) motion that Plaintiffs have alleged [that the challenged laws] have burdened their voting rights."). Here, Plaintiffs have alleged that all four Vote By Mail Restrictions impose undue burdens on the right to vote, and that these burdens will be all the more severe due to the pandemic, which is nearly certain to limit voters' ability to vote in person and otherwise escape the burdens imposed by the Restrictions. *See, e.g.*, Compl. ¶¶ 114-121. Plaintiffs have also alleged that no state interest justifies these burdens. *See id.*

First, Plaintiffs allege that the Postage Tax imposes a burden on the right to vote because, at best, it requires Texans "to pay to vote by mail so that they can avoid exposing themselves to

the virus while exercising their right to vote," and at worst, "disenfranchises the millions of Texans who cannot risk exposure to COVID-19 but who also cannot obtain postage to mail their ballots." *Id.* ¶ 114; *see also id.* ¶¶ 70, 73-74, 76. They also allege that "[t]he Secretary can offer no justification that outweighs the significance of the burden under these circumstances." *Id.* ¶ 115.

Second, Plaintiffs allege that the Ballot Receipt Deadline burdens the right to vote because it subjects ballots timely mailed by voters to arbitrary disenfranchisement due to the vagaries of the USPS, which is facing grave difficulties and delays in the face of the global pandemic. *Id.* ¶¶ 79-83, 87-90, 93-95, 116. Plaintiffs further allege that this burden is not outweighed by any State interest since the Secretary already counts other ballots—those from overseas voters—if received by the sixth day after the election, and that "any administrative costs are dwarfed by the constitutional injury to the Texans completely disenfranchised because the USPS did not timely deliver a ballot timely mailed by the voter." *Id.* ¶ 117. To be sure, burdens on voting rights are especially serious when voters are harmed through no fault of their own. *See, e.g.*, *Husted*, 696 F.3d at 597 (holding that an Ohio law that rejected ballots cast in the wrong precinct but the correct polling place solely because of poll worker error imposed "substantial" burdens on voters).

Third, Plaintiffs allege that the Signature Match Requirement burdens voters because it subjects them to an arbitrary and error-prone process if their ballot signature is deemed to be a mismatch, which may thus result in disenfranchisement without their agency, knowledge, or any opportunity to cure any purported problems with their lawfully cast ballot. Compl. ¶¶ 96-104, 118. They go on to allege that "[t]he administrative burden of notifying voters of signature mismatch is no different before the election than it is after the election, when counties are now required to notify voters that their ballots were rejected," and the Requirement "does not serve an interest in

fraud that could not otherwise be achieved without the disenfranchisement of countless Texas voters," particularly since a cure process would satisfy any anti-fraud interest. *Id.* ¶ 119.

Fourth, Plaintiffs allege that the Voter Assistance Ban burdens the right to vote because it effectively disenfranchises voters who require assistance in *mailing* their ballots but lack a family member or roommate to assist, and also disenfranchises voters who are understandably concerned that unpredictable USPS delays will otherwise disenfranchise them, but are either unwilling or unable to venture out to *deliver* their ballots due to public health concerns. *Id.* ¶¶ 105-11, 120. Plaintiffs further allege that this burden is "heavier on poor, minority, and rural voters who generally have less access to postal services, are less likely to have access to personal and reliable transportation, and are less able to bear the costs of waiting in long lines to vote or exposing themselves to health risks in order to submit a mail ballot in person." *Id.* ¶ 107. Finally, Plaintiffs allege that the State's interest in enforcing the Ban "cannot justify disenfranchising voters who require assistance to timely deliver their ballots," especially since Texas laws already criminalizes any exercise of undue influence or voting fraud that might be captured by the Ban. *Id.* ¶ 120.

These alleged burdens on voters and lacking state interests more than adequately state an undue burden on the right to vote claim sufficient to withstand the Secretary's motion to dismiss. *See Miller*, 422 F. Supp. 3d at 1185-86. Moreover, as Plaintiffs also allege, these burdens are all but certain to increase as the COVID-19 crisis continues, and as Texas voters are increasingly required to rely on mail ballots to protect their health. *See generally* Compl.

Although the Secretary asserts a number of justifications for the Vote By Mail Restrictions, they do nothing to undermine the sufficiency of Plaintiffs' *allegations*—which is all that is at issue at the pleadings stage. For example, the Secretary points to a 2003 Indiana case to suggest that the specter of fraud outweighs the Restrictions' burdens on Plaintiffs. Dkt. 17 at 26. But that

argument—with which Plaintiffs, of course, disagree, *see* Compl. ¶ 120—does not show that Plaintiffs' undue burden claim is *implausible*. Likewise, the fact that the Secretary thinks she may have defenses to Plaintiffs' undue burden claim does not mean that it fails as a matter of law. The Secretary can raise her substantive arguments at a later point in the case. But because Plaintiffs' allegations, when taken as true, demonstrate that the Vote By Mail Restrictions present an undue burden on the right to vote that is not outweighed by any State interest, Plaintiffs have more than adequately pled a plausible undue burden claim to survive the motion to dismiss.

Rather than take Plaintiffs' allegations as true—as the Court is required to do here—the Secretary asks this Court to dismiss Plaintiffs' undue burden claim without the robust perspective that a developed record would provide. But undue burden claims necessarily require factual development to determine whether the State's interests outweigh the burden on voters. As courts across the country have held, dismissal of a claim subject to the *Anderson-Burdick* standard is not appropriate at the motion to dismiss stage because it requires weighing of the evidence and balancing of the relevant factors. *See, e.g.*, *Bostelmann*, 2020 WL 3077047, at *5; *Detzner*, 354 F. Supp. 3d at 1288. Indeed, circuit courts across the country have *reversed* the dismissal of claims subject to the *Anderson-Burdick* standard before the evidentiary record was developed. *See, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) ("[W]ithout any factual record at this stage, we cannot say that the Secretary's justifications outweigh the constitutional burdens on [plaintiff] as a matter of law."); *Price v. New York State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (explaining, in reversing lower court's dismissal, that while plaintiffs offered little evidence about the burden that election law imposed, "[f]or our initial purposes, it is important only that there is at least some burden on the voter-plaintiffs' rights"); *Wood v. Meadows*, 117 F.3d 770, 776 (4th Cir. 1997); *Duke v. Cleland*, 5 F.3d 1399, 1405-06 & n.6 (11th Cir. 1993) (noting that it was

"impossible for [the Court] to undertake the proper" *Anderson-Burdick* analysis without a record). The same factual development is necessary here. This Court cannot properly dismiss Plaintiffs' undue burden claim without considering an evidentiary record demonstrating the magnitude of the alleged burden on the right to vote. Tellingly, the Secretary has not cited a single case dismissing a claim subject to the *Anderson-Burdick* test on a motion to dismiss. Not one.

The Secretary's assertion that the burdens imposed by the Vote By Mail Restrictions do not implicate the right to vote is plainly wrong. *See* Dkt. 17 at 13-14 (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969)); *see also id.* at 17, 27. The Secretary cites no persuasive—much less controlling—support for this position, instead relying on an equal protection (*not* undue burden) case decided *twenty years prior* to *Anderson* and *Burdick* concerning whether inmates of a county jail had a right to receive absentee ballots.[14] Moreover, the Secretary ignores the plain fact that courts across the country routinely employ the *Anderson-Burdick* balancing test to evaluate challenges to laws that circumscribe how citizens vote. *See, e.g.*, *Lee v. Virginia State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (applying *Anderson-Burdick* to challenge concerning voter ID law); *Obama for Am. v. Husted*, 697 F.3d 423, 429-30 (6th Cir. 2012) (applying *Anderson-Burdick* to challenge concerning early voting). The Secretary's argument that "[t]he Constitution does not include a freestanding right to vote in whatever manner Plaintiffs deem most convenient" is an obvious strawman. Dkt. 17 at 13. There is neither a constitutional right to vote by mail nor a constitutional right to vote in person at a polling place on

[14] Although *TDP* discussed *McDonald* with regard to whether the right to vote is implicated by the Twenty-Sixth Amendment, that discussion is inapplicable here based on the different focus of this case. Moreover, *TDP* is non-precedential and, as discussed in *Gloria v. Hughes*, Case No. 5:20-cv-00527-OLG, ECF No. 15 (June 15, 2020 W.D. Tex.), has flawed reasoning as to when and whether the right to vote is implicated. *TDP*'s reasoning as to sovereign immunity and standing, as discussed above, is uncontroversial based on *OCA*.

Election Day; there is only "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). If signing of a referendum merely seeking a statewide vote on an issue "implicate[s] the fundamental right to vote," *Lemons v. Bradbury*, 538 F.3d 1098, 1102 (9th Cir. 2008), then surely restrictions on how that vote is cast do too. Plaintiffs' Complaint plausibly alleges that the right to vote effectively is burdened by the Vote By Mail Restrictions.

The Secretary's related suggestion that Plaintiffs cannot state an undue burden claim because they do not allege total deprivation of their right to vote can also be dismissed out of hand. *See, e.g.*, Dkt. 17 at 12 ("[A]ny Texas voter who finds voting by mail inconvenient is free to vote in person."). The *Anderson-Burdick* standard hardly requires the denial of the right to vote for a state election law to be unconstitutional. It instead requires the Court to "weigh 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789 (1983)). Under this standard, burdens falling short of a complete denial of the right to vote have not merely been found sufficient to state a claim, but sufficiently burdensome as to be unconstitutional. *See, e.g.*, *Obama for Am.*, 697 F.3d at 467-37 (eliminating early voting for non-military voters held unconstitutional, even though polls were still open to them on Election Day); *League of Women Voters of Florida, Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1209 (N.D. Fla. 2018) (eliminating early voting at university building held unconstitutional, even though students could vote elsewhere both before and on Election Day). Under the grave circumstances of the COVID-19 pandemic—which

the Secretary does not acknowledge in her 27 pages of briefing—her suggestion that voting by mail is simply a luxury or convenience is out of touch with reality, and the law.

Finally, the Secretary's insistence that the Vote By Mail Restrictions are lawful because some other states have similar restrictions is a red herring that violates *Anderson-Burdick*'s basic inquiry. States' election laws are not fungible. Instead, each state's law must be considered individually, taking into account the burden on that state's voters. *Anderson-Burdick*'s balancing test "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions"; the "results of [the] evaluation will not be automatic" because "there is 'no substitute for the hard judgments that must be made.'" *Anderson*, 460 U.S. at 789-90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1983)). In each case, courts must make the "hard judgment" our Constitution demands, based on the specific injuries plaintiffs suffer as a result of the challenged laws, the specific justifications offered by the State for the laws, and whether the laws advance those interests sufficiently to justify the injuries to the plaintiffs' right—none of which, it bears noting again, can be done without a factual record. *See Crawford*, 553 U.S. at 190 (controlling op.) (citing *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Thus it is "not enough for [Texas] to simply rely on [similar provisions] in other states; the necessary question is how [the Vote By Mail Restrictions] interact[] with other voting practices in [Texas], and the burdens th[ese] law[s] place[] on voters who vote within [Texas's] electoral framework." *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 665 (6th Cir. 2016).

To put a finer point on it, the Supreme Court has emphasized that when assessing the severity of a burden, courts must consider the effects of the restriction on those voters who are actually impacted by the law. *Crawford*, 533 U.S. at 198, 201 (controlling op.) (explaining that "[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible

to vote but do not possess a [photo ID]," not the burdens on all voters). Thus, for example, the Secretary's argument that the Ballot Receipt Deadline is not burdensome because a large percentage of voters are able to comply with it is not persuasive. That some voters can comply with the Vote By Mail Restrictions, or that other states also have such deadlines, is of no import to the decision that this Court must make —*i.e.*, how the Texas voters affected by these Restrictions are burdened—and is certainly insufficient to warrant dismissal at the pleading stage. Because Plaintiffs adequately allege that the Restrictions place an undue burden on the right to vote that is not outweighed by state interests, dismissal of their undue burden claim is not appropriate.

2. Equal protection claim (Ballot Receipt Deadline & Signature Match)

The Secretary garbles the legal standard under which this Court must evaluate Plaintiffs' equal protection claim. First, she incorrectly asserts that the Ballot Receipt Deadline component of Plaintiffs' equal protection claim will only be subject to (and in her view, cannot overcome) rational basis review. *See* Dkt. 17 at 20. Second, she wrongly suggests that Plaintiffs must show intentional discrimination to support the Signature Match part of their equal protection claim, and argues that it must fail because "Plaintiffs do not even assert, let alone plausibly allege, discriminatory intent." *Id.* at 25. Neither are correct.

Where, as here, "a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, [courts] review the claim using the 'flexible standard' outlined in [*Anderson*] and [*Burdick*]." *Obama for Am.*, 697 F.3d at 429-30 (6th Cir. 2012). Courts across the country have confirmed that claims alleging equal protection violations in the voting context are properly evaluated under *Anderson-Burdick*. *See, e.g.*, *Republican Party of Ark. v. Faulkner Cty.*, 49 F.3d 1289, 1293 n.2 (8th Cir. 1995) (*Anderson* sets out proper method for balancing equal protection concerns); *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992) ("[E]qual protection challenges to state ballot-access laws are considered under the *Anderson* test."); *Rosen*

v. Brown, 970 F.2d 169, 178 (6th Cir. 1992) ("utilizing the *Anderson* balancing test" in a challenge based on equal protection); *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *1, *3, *6 (N.D. Fla. Oct. 16, 2016) (applying *Anderson* framework to equal protection claim targeting mail vote signature laws). No part of the *Anderson-Burdick* assessment requires a showing of intentional discrimination. For the same reasons detailed above, *see supra* C.1, Plaintiffs' allegations that the Signature Match Requirement and "Ballot Receipt Deadline, as applied, treat[] Texans different depending on where they live," Compl. ¶ 123—in concert with their allegations regarding those Restrictions' burdens on the right to vote, *id.* ¶ 124—are sufficient to state an equal protection claim to be evaluated under the *Anderson-Burdick* framework.[15]

3. Procedural due process claim (Signature Match)[16]

The Secretary's reliance on *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) to argue that Plaintiffs' Signature Match due process claim cannot succeed is misplaced, as recently distinguished by this court in the *Richardson* Order, Ex. A at Appx. 24 n.16. At issue in *Lemons* was the process for verifying referendum petition signatures. The process to determine signature matches in *Lemons* drastically differed from that at issue here. In *Lemons*, the Oregon Secretary of State "sponsor[ed] signature verification training sessions, and county elections officials regularly attend these sessions and use the materials provided." *Id.* at 1106. But in Texas, there is no such process because "the county officials that verify signatures are untrained." Compl. ¶ 97. *Lemons* is also inapposite as to the process afforded after a signature mismatch is determined.

[15] The Secretary contends that *Bush v. Gore*, 531 U.S. 98 (2000) does not advance Plaintiffs' equal protection claim, Dkt. 17 at 20, 24, but that argument goes to the merits of Plaintiffs' case. It does not speak to the sufficiency of Plaintiffs' allegations, which is all that is at issue here.

[16] Plaintiffs do not pursue a procedural due process claim with respect to the Voter Assistance Ban. The substance of Plaintiffs' Third Claim for Relief, Compl. ¶¶ 125-127, only addresses the Signature Match Requirement. The mention of "Voter Assistance Ban" in the heading is inadvertent. While Plaintiffs do not believe doing so is necessary, they could amend their complaint at the Court's direction upon resolution of this motion to resolve any ambiguity.

Lemons did not, as the Secretary asserts, suggest that no notice or cure process was needed to address a signature mismatch determination *for votes*. *See* Dkt. 17 at 24. Rather, the plaintiffs in *Lemons* argued that the 'cure' process that applied to mail-in ballots in Oregon should apply to the petition signatures at issue in *Lemons*, which the Ninth Circuit said was unnecessary. But the Court said nothing about whether the cure process for *ballots* determined to have a signature mismatch provided due process. "Unsurprisingly, courts have held that the lack of an opportunity to cure mail-in ballot rejections, which disenfranchises thousands of voters, is a serious burden on the right to vote." *Richardson* Order, Ex. A at Appx. 22 (quotation marks omitted) (citing cases).

Here, the interest Plaintiffs allege is affected by the Signature Match Requirement is the liberty interest in voting and in having one's vote counted, Compl. ¶¶ 126-127, which cannot be denied without due process. *See United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *aff'd*, 384 U.S. 155 ("[I]t cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause."); *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 215 (D.N.H. 2018) ("[A] voter has a sufficient liberty interest once the State permits voters to vote absentee.") (quotation marks omitted). "[O]nce the state creates an absentee voting regime, they 'must administer it in accordance with the Constitution.'" *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (quoting *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006)). Plaintiffs validly state a due process claim to determine whether that is occurring here.

Ultimately, a procedural due process claim is not appropriate for disposition at the pleading stage because. "[M]ost of the Secretary's arguments for dismissal would require the Court to balance and evaluate the parties' associated burdens, interest and justifications," but doing so at the motion to dismiss stage "would be improper" since "the Court must accept Plaintiffs' factual

allegations as true as part of the 12(b)(6) analysis, and no factual record has been developed at this stage." *Richardson* Order, Ex. A at Appx. 22.

4. Poll tax claim (Postage Tax)

The Secretary wrongly argues that Plaintiffs cannot state a postage tax claim because there is no postage tax. Her cavalier assertion that "any Texas voter who finds voting by mail inconvenient is free to vote in person," Dkt. 17 at 11, turns a blind eye to the real physical limitations some voters face and the grave public health concerns gripping our entire nation during the ongoing pandemic. There is an unavoidable monetary cost to vote for voters who are not able to vote in person or hand deliver their ballots, including individuals who are disabled or incapacitated from COVID-19 or otherwise. For those voters, neither in-person voting nor hand delivery of mail ballots is a realistic option. The Secretary does not dispute this, nor does she seriously dispute that it costs money to cast an absentee ballot as a general principal.

The Supreme Court has unequivocally held that "voting cannot hinge on ability to pay . . . for it is a 'fundamental political right . . . preservative of all rights.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 n.14 (1996) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). This analysis is the same regardless of whether a voter can pay, which undermines the Secretary's de minimis burden argument. *See Harper*, 383 U.S. at 668 (holding that poll taxes, even if not burdensome for the average voter, violate Fourteenth Amendment because of burdens they impose on poor voters). And finally, the Secretary's assertion that the Postage Tax surely must be constitutional because other states have similar requirements defies reason: that rationale would not have fared any better for anti-miscegenation laws in the 1970s as it should here. Plaintiffs have stated a poll tax claim.

CONCLUSION

Plaintiffs respectfully request that the Court deny the Secretary's Motion to Dismiss.

Dated: June 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 17, 2020, and that all counsel of record were served by CM/ECF.

/s/ *Skylar M. Howton*