IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI; DSCC; and DCCC,

Plaintiffs,

v.

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

Defendant.

CIVIL ACTION NO. 5:20-cv-128

TEXAS SECRETARY OF STATE RUTH R. HUGHS'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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SUMMARY OF THE ARGUMENT

Five months ago, Plaintiffs asked this Court to declare unconstitutional the predominate method of selecting candidates used in the United States. The Court refused to even consider Plaintiffs' request for a preliminary injunction because Plaintiffs lacked standing. *Bruni v. Hughs*, No. 5:20-cv-35, 2020 WL 3452229 (S.D. Tex. June 24, 2020). Plaintiffs did not seek reconsideration of this Court's decision, and they failed to appeal. Plaintiffs are now barred from relitigating whether the Court has jurisdiction over their claims, but even if Plaintiffs could relitigate that point, this case suffers from the same defects as their earlier effort. *See* Mot. to Dismiss, ECF 26.

Given the timing of Plaintiffs' duplicative request, this second attempt to achieve the same result is problematic for a new reason as well. From the perspective of the 254 county election officials—the officials charged with creating the ballots and administering the elections—the 2020 general election has already begun. *See* Ex. 1 ¶ 4. As soon as they knew the results of the July 2020 primary runoffs, county election officials began laying out the paper ballots and programing the software on the electronic voting machines to accommodate for the tens of thousands of different ballot combinations that will serve millions of Texas voters. *Id.* ¶ 5. On August 28, 2020, Secretary Hughs issued final certification of the candidates who will appear on the ballots. Tex. Elec. Code § 142.010. Paper ballots will be at the printers this week, and the electronic voting machines are undergoing thorough testing to ensure their accuracy. *Id.* ¶¶ 6–10. Some counties will start mailing out ballots this week, Ex. 2 at 33:12–20, and the first deadline to do so is just 17 days from now. Tex. Elec. Code § 86.004(b). Because of the Governor's recent expansion of early voting to allow voters more flexibility, in-person voting begins on October 13, 2020. Ex. 3.

Requiring counties to include a one-punch, straight-ticket voting ("STV") option on the ballot at this point would be "devastating to the administration of the 2020 general election in Texas." Ex. 1 ¶ 4. Counties would have to re-proof and re-print tens of thousands of paper ballots to include the

STV option. Ex. 1 ¶ 6. Voters who have already received their mail-in ballots would either have to receive a second ballot or vote on ballots different from the rest of Texans. On the electronic voting machines, the STV option is required to be the first item on the ballot. Ex. 1 ¶ 10; *see also* Ex. 4 at 45:8–11. Therefore, every possible ballot combination would have to be re-programed and re-tested, a process that usually takes several weeks to accomplish. Ex. 1 ¶ 9.

Texas county election officials—and Texan voters—have had three years to prepare for the end of the STV option. Plaintiffs' request to cause such turmoil at this late hour runs headlong into *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), which bars such disruptive changes on the eve of an election. *See also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

Moreover, Plaintiffs make this extraordinary request in the face of the strong consensus against the use of a one-punch, straight-ticket voting ("STV") option in Texas elections. Their motion says nothing about the concerns raised by: long-tenured election administrators from both Republican and Democratic controlled counties; multiple chief justices of the Texas Supreme Court; federal courts of appeals; legislators from both major political parties; third-party candidates; independent voters; newspaper editorial boards; and academic researchers that Plaintiffs themselves cite—not to mention the collective wisdom of 43 other States.

In the face of such overwhelming criticism of the STV option, Plaintiffs ask this Court to declare it a constitutional right. No State has ever had an STV option forced upon it by judicial order. *See Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 355 (6th Cir. 2018) (Kethledge, J., concurring). And the record before this Court falls far short of justifying such relief, particularly on the eve of an election.

NATURE AND STAGE OF THE PROCEEDINGS AND ISSUES TO BE RULED UPON BY THE COURT

More than three years ago, on June 7, 2017, Governor Abbott signed HB 25 into law, which brought Texas's voting practices in line with 43 other states by repealing the STV option. A delayed effective date, September 1, 2020, gave everyone time to adjust.[1]

Yet Plaintiffs decided to wait until March 5, 2020, to file their original lawsuit. When the Court dismissed the case for lack of standing, *Bruni*, 2020 WL 3452229, Plaintiffs could have quickly asked the Court to reconsider, *see* Fed. R. Civ. P. 59(e), or immediately appealed and sought emergency relief from the Fifth Circuit, *see* Fed. R. App. 8. Instead, Plaintiffs waited *fifty days* before starting over with a new lawsuit.

Now, election operations are already well underway. Hundreds of staff members for county election administrators and the Secretary of State have been working diligently for months to prepare for the upcoming election. Ex. 1 ¶ 5. The 2020 general election is fast approaching, but Election Day (November 3) is not the only relevant deadline. Counties have finalized their ballots and are printing them this week, as the Secretary already certified the final list of candidates last week. *Id.* ¶ 6. Some counties send out ballots as soon as 60 days before the election, which this year is September 4, 2020—in other words, this Friday. Ex. 2 at 33:12–20; 71:5–13; 92:22–93:5. Certain military and overseas ballots must be mailed by September 19. *See* Tex. Elec. Code § 86.004(b) ("the 45th day before election day").

As for the voting machines, Texas counties need to program the software to account for the thousands of different ways voters could cast their ballots. Counties started that programing and testing even before Secretary Hughs issued her final certification of the candidates on the ballot, and

[1] *See* TEX. LEGISLATURE ONLINE, https://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB25.

that process will continue for the next few weeks. Collin County alone will have 138 ballot styles to use in its 239 precincts in the 2020 general election. Ex. 1 ¶ 4. Counties will have to run multiple tests using every possible combination of votes on each of the different ballots to ensure that the machines are marking and tallying the votes properly. *Id.* ¶ 9. That means running at least 10,000 test ballots through the voting machines in Collin County alone. *Id.* That test is done twice, once internally and once for the public. *Id.* Mandating the use of the STV option would require the reordering of every item on each ballot, require the retesting of each ballot, and increase the chance for errors. *Id.* ¶ 10. "There is simply not enough time to reprogram the voting machines and conduct enough testing to ensure the accuracy before in-person voting begins." *Id.*

Plaintiffs ask this Court to undo all of that work and have counties start over, all because Plaintiffs waited until August 12, 2020, to lodge their second attempt against the repeal of the STV option. ECF 5.

A motion for a preliminary injunction must satisfy four "prerequisites":

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Libertarian Party of Tex. v. Fainter, 741 F.2d 728, 729 (5th Cir. 1984).

"The burden of persuasion on all of the four requirements for a preliminary injunction is at all times upon the plaintiff." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). That burden is heavy. It requires "*a clear showing*." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). "A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements." *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008) (quotation omitted).

This Court has already poured out Plaintiffs once, and the Court has already ruled that

Plaintiffs' alleged injuries are too speculative—even on the face of their pleadings. Plaintiffs' motion wholly ignores the threatened harm and disservice to the public interest that an injunction would do to the administration of the 2020 general election. And, even if they could get there, Plaintiffs would not likely succeed on the merits of their claims.

ARGUMENT

I. Threshold Procedural and Jurisdictional Issues Preclude Injunctive Relief

A. Plaintiffs Without Standing Cannot Seek Relief

As the Court has already, held Plaintiffs do not have standing to seek any relief. *Bruni*, 2020 WL 3452229, at *1. For the reasons explained in the Secretary's motion to dismiss, Plaintiffs cannot relitigate that issue. ECF 26 at 7–12. Even if they could, the Court's prior reasoning that Plaintiffs' alleged injury is too speculative still bars their claims. ECF 26 at 12–13. In fact, Plaintiffs appear to have agreed with one of the underpinnings of this Court's analysis in the first case. *Bruni v. Hughs*, No. 5:20-cv-35, ECF 62 at 4 ("[O]ne can only guess as to how many voters will arrive at a given polling place on a given day in a future election."). And that logic applies perhaps even more strongly now that Plaintiffs have doubled down on their arguments regarding the effect of COVID-19 on the administration of the 2020 general election. As this Court previously ruled, and particularly in light of the pandemic, "in-person voting at polling-places is wrought with uncertainty, which means that Plaintiffs' injuries—predicated on their predicted 'effects' of HB 25 *at polling-places*—are far from certainly impending." *Bruni*, 2020 WL 3452229, at *6. And Plaintiffs lack standing for other reasons as well. ECF 26 at 13–17. Secretary Hughs incorporates all of those arguments by reference, which defeat their motion for a preliminary injunction. *See Freedom from Religion Found., Inc. v. Perry*, No. 4:11-cv-2585, 2011 WL 3269339, at *6 (S.D. Tex. July 28, 2011).

B. Sovereign Immunity Bars Injunctive Relief

The Secretary moved to dismiss based on sovereign immunity. Plaintiffs cannot bring a claim

under *Ex parte Young* because the Secretary does not enforce HB 25. Local officials, not the Secretary, implement the Legislature's command to eliminate straight ticket voting when they prepare ballots. *See* ECF 26 at 17–22. Again, the Secretary incorporates that argument by reference, and the Secretary presses her sovereign immunity defense here because sovereign immunity precludes the granting of a preliminary injunction. *See Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016).

Moreover, *Ex parte Young* does not authorize an injunction ordering the Secretary "to ensure that all Texas voters have the option to vote straight ticket." ECF 26 at 21. It is limited to injunctions "prevent[ing] [a state official] from doing that which he has no legal right to do." 209 U.S. at 159. It does not authorize injunctions directing "affirmative action," *id.*, including "affirmative action by the sovereign," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949), or an "acti[on] in an official capacity." *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971).

C. Injunctive Relief Cannot Issue from an Improper Venue

The Secretary's motion to dismiss explained why venue is improper, and those arguments are incorporated here by reference. None of the events giving rise to Plaintiffs' claims occurred in the Southern District. *See* 28 U.S.C. § 1391(b)(2). The Secretary has not, and will not, take any actions regarding HB 25 in the Southern District. *See* ECF 26 at 22–23. Nothing in the Plaintiffs' motion for preliminary injunction alters the venue analysis.

Secretary Hughs renews her challenge to venue because "[c]ourts faced with an argument that venue is improper must resolve that issue prior to addressing the merits of any claim, including a preliminary injunction." *Proctor & Gamble Co. v. Ranir, LLC*, No. 1:17-cv-185, 2017 WL 3537197, at *4 (S.D. Ohio Aug. 17, 2017) (collecting cases). A district "court would lack authority to grant [preliminary injunctive] relief if . . . venue was improper." *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1135 (9th Cir. 2005); *see Half Price Books, Records, Magazines, Inc. v. Riepe*, No. 3:98-cv-585, 1998 WL 329383, at *1 (N.D. Tex. June 12, 1998).

II. Equitable Considerations Preclude Relief at This Late Date

Even if Plaintiffs were to get past this Court's prior ruling and reasoning, their sought relief is time-barred by equitable concerns. "[I]njunctive remedies are equitable in nature," so "equitable defenses may be interposed." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Here, Plaintiffs' requested injunction would throw the 2020 general election into turmoil.

A. This Court Should Not Enjoin Election Officials on the Eve of an Election

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). In *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), the Court relied on "considerations specific to election cases" to caution against federal court interference with impending state elections. It explained that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5. To account for those risks, a federal court considering a request to enjoin state election laws must consider potential conflicts with the timing of elections and appellate proceedings. *See id.* The Fifth Circuit declined to grant immediate relief on a Voting Rights Act claim even though several months remained before the general election. *See Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (en banc) (instructing the district court in July 2016 to "take the requisite time to reevaluate the evidence" and fashion a remedy to apply after the November 2016 election).

The 2020 general election is fast approaching. On August 28, Secretary Hughs certified the candidates who should appear on the ballot and transmitted that certification to local officials. *See, e.g.*, *id.* § 161.008(a)–(b). As explained above, ballots will soon be sent ballots to the printers, and some will begin mailing ballots to Texas voters this week. Exs. 1, 2. In-person early voting begins October 13, and county election officials have spent weeks programing and testing the electronic voting machines.

Ex. 1.

Plaintiffs' years-long delay in filing suit has left this Court with a preliminary injunction motion on the eve of an election. This Court should deny preliminary injunctive relief for the upcoming general election, an election that is already "in progress." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (explaining "where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief"); *see Veasey*, 830 F.3d at 243 (instructing the district court in July 2016 to "take the requisite time to reevaluate the evidence" and fashion a remedy to apply after the November 2016 election).

B. Plaintiffs' Delay Bars Equitable Relief

Laches bars injunctive relief because Plaintiffs have inexcusably waited years to bring this suit. Laches "is founded on the notion that equity aids the vigilant and not those who slumber on their rights." *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 708 (5th Cir. 1994) (quotation omitted). It applies to claims for prospective relief, including in election-law cases. *See, e.g.*, *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737, 748–49 (1929); *White v. Daniel*, 909 F.2d 99, 102–03 (4th Cir. 1990). "The defense consists of three elements: (1) a delay on the part of the plaintiff in instituting suit; (2) that is not excused; and (3) that results in undue prejudice to the defendant's ability to present an adequate defense." *Id.* All three elements are met here.

The Governor signed HB 25 on June 1, 2017. Plaintiffs could have sued then. Instead, they waited two years and nine months to bring their first lawsuit. *See White*, 909 F.2d at 103. They decided not to appeal or seek reconsideration of this Court's dismissal. Instead, they waited another two months—two months closer to the election and more than three years after the signing of HB 25 into law—to file this second lawsuit.

Sophisticated parties represented by sophisticated counsel, Plaintiffs have no excuse for their

delay. *Cf. Nat'l Ass'n of Gov't Emps.*, 40 F.3d at 709. In the previous case, Plaintiffs suggested they were waiting for clarity regarding "whether the Secretary would provide counties funding to mitigate [HB 25's] expected harms." No. 5:20-cv-35, ECF 47 at 38. That is implausible. The Legislature, not the Secretary, determines funding. Plaintiffs knew the Legislature had declined to "provide[] more election funding" to local governments. No. 5:20-cv-35, ECF 16 ¶ 45. In any event, the news article Plaintiffs cite as clearing up their supposed confusion was published in 2018. *See id.* ¶ 46 (citing an October 7, 2018, article from the Cleburne Times-Review). Plaintiffs thus have no excuse for the subsequent *nearly two-year delay*.

That delay has prejudiced the Secretary. "Delay and prejudice are a complimentary ratio: the more delay demonstrated, the less prejudice need be shown." *Marshall v. Meadows*, 921 F. Supp. 1490, 1494 (E.D. Va. 1996); *see also White*, 909 F.2d at 103 ("Given that plaintiffs' delay is inexcusable and unreasonable, the County need not show the degree of prejudice that would be required if the delay had been less aggravated."). But in this case, the prejudice is serious. DSCC, DCCC, and TARA have filed numerous lawsuits against the Secretary in recent months.[2] Trying to cram so many cases into a compressed timeframe before an election taxes public resources and creates inefficiencies.

Moreover, the Secretary has already explained the benefits HB 25 gives the State. ECF 26 at 26–28. Losing those benefits would be prejudice enough, but a last-minute change in the rules would have costs of its own. Candidates have already begun campaigning for the 2020 general election. Political campaigns can make different choices based on whether ballots will include an STV option. Changing the rules mid-campaign would undoubtedly disadvantage candidates and other political

[2] *See, e.g., Gilby v. Hughs*, No. 1:19-cv-1063 (W.D. Tex. Oct. 30, 2019); *Miller v. Hughs*, 1:19-cv-1071 (W.D. Tex. Nov. 1, 2019); *Stringer v. Hughs*, No. 5:16-cv-257 (W.D. Tex. Dec. 20, 2019); *Tex. Democratic Party v. Hughs*, No. 5:20-cv-8 (W.D. Tex. Jan. 6, 2020); *Tex. Democratic Party v. Abbott*, No. 5:20-cv-438 (W.D. Tex. Apr. 7, 2020); *Gloria v. Hughs*, No. 5:20-cv-527 (W.D. Tex. Apr. 29, 2020); *Lewis v. Hughs,* No. 5:20-cv-577 (W.D. Tex. May 11, 2020); *Tex. Democratic Party v. DeBeauvoir*, No. D-1-GN-20-001610 (Tex. Dist. [Travis] Mar. 20, 2019).

actors who have already invested resources in strategies that depend on the lack of straight ticket voting. If Plaintiffs had sued earlier, these harms probably would have been lessened. Of course, the prejudice to local election officials discussed above is relevant to laches as well.[3]

III. Plaintiffs Are Not Likely to Succeed on the Merits Because Federal Law Does Not Mandate Straight-Ticket Voting

Even if Plaintiffs could overcome the Court's prior ruling and the enormous burden and disruption that an injunction at this late hour would cause, their evidence fails to show a likelihood of success on the merits of any of their claims. Perhaps most glaringly, Plaintiffs failed to present any evidence of how the STV option actually operates in Texas elections. Had they done so, the Court would have learned that the STV option does not allow voters at Texas polling locations to skip over any races on the ballot. Voters who select the STV option still must go through each individual race on the electronic voting machine to confirm (or change) their vote. Ex. 1 ¶ 17; Ex. 4 at 44:13-45:14, 60:21-67:7. Removal of the STV option simply means that candidates of one party will not be pre-selected in any race for any voter.

Plaintiffs also failed to mention any evidence—including the evidence highlighted by the Harris and Bexar county election officials during the legislative process—of the concerns that the STV option has had a long history of causing voter confusion and frustration. Ex. 1 ¶ 18; Ex. 4 at 45:22–46:10, 60:21-63:20. During the process of confirming their selections, voters who may feel particularly strongly about one candidate often wish to confirm or emphasize their choice for that candidate. Ex. 1 ¶ 18; Ex. 4 at 45:22–46:10, 60:21-63:20. However, in selecting the box that has already been selected for them by the STV option, voters mistakenly de-select their desired candidate, cancelling their desired vote. Ex. 1 ¶ 18; Ex. 4 at 45:22–46:10, 60:21-63:20. This problem is referred to as "emphasis

[3] Because the Secretary is a defendant in her official capacity, her "interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam).

voting" and is well-known among Texas election administrators and one of the prior plaintiffs, the Texas Democratic Party—which filed a mandamus petition on that very issue. Ex. 5. The removal of the STV option will forever end the problem of emphasis voting in Texas.

A. Plaintiffs' *Anderson-Burdick* Claim Fails

1. Plaintiffs Have Not Proven HB 25 Will Increase Wait Times

The Court has already concluded that whether HB 25 will "cause[] longer lines at polling places" is "uncertain" and speculative. *Bruni*, 2020 WL 3452229, at *5. Plaintiffs seemingly agreed in their reply brief in support of their first motion for a preliminary injunction. *Bruni v. Hughs*, No. 5:20-cv-35, ECF 62 at 4. ("[O]ne can only guess as to how many voters will arrive at a given polling place on a given day in a future election."). Plaintiffs' evidence before the Court does not move the needle. Their theory depends on the expert declaration of Muer Yang. *See* ECF 6-2 at 6.[4] But Dr. Yang's limited analysis cannot help Plaintiffs for four reasons. First, Dr. Yang's analysis says nothing of actual vote times in Texas. He did not even consider how long it takes any Texan to vote or how the STV option operates on Texas voting machines. Second, Dr. Yang did not estimate voting time in future elections. He considered only how the 2016 election might have been different without straight ticket voting, assuming nothing else changed, leading him to ignore the effects of the pandemic. Third, Dr. Yang did not analyze the State as a whole. He considered polling places in only 2 of Texas's 254 counties. Fourth, even if Plaintiffs were right about lines to vote, Dr. Stephen Graves—an expert from the Massachusetts Institute of Technology on designing and implementing polling places—demonstrates that any problems could be solved through reallocating voting machines rather than mandating the STV option.

[4] The three declarations from individual voters recount unfortunate but idiosyncratic problems at particular polling places during a previous general election, when STV was still available, and primary elections, when STV is inapplicable. They provide no evidence of wait times in general or the effect of repealing STV. *See* ECF 6-3 (Pls.' Exs. 5–7).

a. Correcting Dr. Yang's Unwarranted Assumptions Shows that Eliminating Straight Ticket Voting Does Not Meaningfully Increase Wait Times

Time and again, Dr. Yang chose to make unrealistic assumptions rather than gather empirical data. Those assumptions undermine his conclusions.

For example, Dr. Yang does not know how long it takes an average Texan to vote. He did not observe any Texas election to measure the time spent voting, *see* Ex. 6 at 40:2–12 (Yang Dep.),[5] despite acknowledging that doing so would have been "a plus" for his analysis. *Id.* at 40:21. Dr. Yang also did not "interview local election officials to obtain their estimates of voting time," *id.* at 41:8–14, even though he had done so in a previous case, *see id.* at 18–25. Dr. Yang cites to an online article offering an unsupported and purely speculative estimate of how ending the STV option may allegedly affect wait times in Fort Bend County. ECF 6-2 ¶ 51. That quote comes from an interview with a county official in 2019 as part of a lobbying effort to get more funding to update Fort Bend County's 15-year-old voting machines. *Id.* n.11. Yet Plaintiffs fail to note that, in 2020, the Commissioners Court of Fort Bend County did exactly that, voting unanimously to purchase 1,700 new state-of-the-art voting machines with touch screens. Exs. 26, 27. Thus, Dr. Yang's cited prediction—a prediction that is also hearsay and improper expert opinion from an unqualified and undesignated witness—is pure speculation based on what might have happened with voting machines that are no longer in use. It has no relevance on what will happen in Fort Bend County in 2020.

Nor did Dr. Yang review any academic literature about the time it takes to vote in actual Texas elections. As Dr. Graves explains, two academic articles, one of which studied Texas voters, estimated voting time per voter at about 3 minutes. *See* Ex. 7 ¶¶ 152–55 (Graves Decl.). Dr. Yang also failed to analyze whether wait times increased in other States that eliminated the STV option. *See* Ex. 6 at 135:3–

[5] The depositions excerpts of Plaintiffs' experts come from the discovery period in their first-filed case. The cited portions apply equally to the newly offered reports, which are in large part similar to the prior reports.

6. In North Carolina, which Plaintiffs previously cited "as a comparator," No. 5:20-cv-35; ECF 18-1 at 11, wait time in 2016, after it eliminated the STV option, was *shorter* than in 2008. *See* Ex. 19. Plaintiffs do not cite to North Carolina's experience in the motion currently pending in front of the Court.

Similarly, Dr. Yang made erroneous assumptions about voting machines in Texas. Dr. Yang believes that "[t]he time required for a voter to cast a ballot depends on . . . the voting technology being used," but he acknowledged that he is "not an expert on those voting technologies." Ex. 6 at 45:20–22, 46:5–15. In this case, Dr. Yang's lack of knowledge about Texas voting machines led him to erroneously assume that choosing a straight ticket voting option would save a voter a significant amount of time because it would allow the voter to skip the rest of the partisan ballot items. That is not true. "[M]arking the STV option does not allow voters to skip over any of the pages for any of the individual ballot items." Ex. 1 ¶ 17. "[E]ven with the use of the STV option, voters must still scroll through the entire ballot, page by page, at the voting machine in order to cast their ballot." *Id.* That process gives voters the opportunity "to 'confirm' each of their individual choices" or "change the selection for any of the individual contests." *Id.*

Correcting some of Dr. Yang's unrealistic assumptions, Dr. Graves created a "descriptive model" to estimate wait times. Ex. 7 ¶ 73. He then applied the descriptive model to each of the polling places Dr. Yang used in his first report. The results show very short wait times. In Travis County, 18 out of 19 polling places had wait times of 2.1 minutes or less. *See id.* at 16, Table 1. In Fort Bend County, all 9 polling places had wait times of 30 *seconds* or less. *See id.* at 26, Table 7. Such short wait times cannot be more than a *de minimis* burden.

b. Dr. Yang Does Not Analyze Future Elections and Ignores the Pandemic

Dr. Yang's analysis cannot support prospective relief because it does not even purport to predict wait times for future elections. Instead, Dr. Yang attempted to analyze what wait times *would*

have been in 2016 if there had been no straight ticket voting. He does not analyze what wait times *will be in 2020*. This distinction is crucial.

Wait times are highly sensitive to variables that will not be the same in 2020 and 2016. Dr. Yang admits that "the three key factors" affecting wait times "are (1) the number of voters who arrive at a polling place, (2) the average voting time, and (3) the number of voting machines." ECF 6-2 ¶ 13. But Dr. Yang has no opinion about two of those factors—voter turnout and the number of voting machines—for any future Texas election.

Consider turnout. Overall voter turnout may go up or down in 2020, but despite the relevance of voter turnout to his model, Dr. Yang testified that "predicting turnout is not [within] the scope" of his work, Ex. 6 at 30:12–13, and it appears nowhere in his report. Dr. Yang's model depends on the number of voters who turn out in person on Election Day. *See id.* at 17:13–15. If the number of Election Day voters decreases, then the "arrival rate" and "the wait time" would "decrease." *Id.* at 23:1–5, 38:10–11. Thus, decreased Election Day turnout could offset the supposed effects of eliminating straight ticket voting. Yet Plaintiffs admit that "one can only guess as to how many voters will arrive at a given polling place on a given day in a future election." *Bruni v. Hughs*, No. 5:20-cv-35, ECF 62 at 4.

There is good reason to believe that Election Day turnout will decrease in 2020. Due to the COVID-19 pandemic, some voters who normally vote on Election Day are likely to shift to voting by mail. Indeed, Plaintiffs' counsel represents some such voters in another lawsuit. *See* Complaint, *Lewis v. Hughs*, No. 5:20-cv-577, ECF 1 ¶ 4 (May 11, 2020 W.D. Tex.) (alleging "a significant increase in eligible voters who . . . will choose to vote by mail"). The Court has already recognized that some "Texans will experience *shorter* lines given that voters have been encouraged to steer clear from in-person voting where possible." *Bruni*, 2020 WL 3452229, at *6. Plaintiffs provide no reason to believe that in-person turnout in 2020 will precisely mirror in-person turnout in 2016, as Dr. Yang assumes.

The same is true for early voting. For the July primary runoff elections, Governor Abbott extended the early voting period. *See* Ex. 8. He has done so for the 2020 general election as well. Ex. 3. And the Secretary has reminded local officials of their statutory authority to extend early-voting hours. *See* Ex. 9. Moreover, voters wishing to socially distance may well choose to vote in the middle of the early voting period, during which polling places are emptier. *See* Ex. 1 ¶ 20. Thus, increased availability and the desire to avoid the rush of Election Day may shift more voters to early voting.

Now consider voting machines. Dr. Yang did not analyze the number of voting machines Texas counties will have for future elections. *See* Ex. 6 at 109:11–110:5. Nor does he know how any Texas county will allocate its voting machines between polling places. *See id.* at 111:15–112:4. Dr. Yang has not talked with "any election officials in Texas about the deployment of voting resources." *Id.* at 17:9–12. Thus, he cannot opine on how many voting machines any given polling place will have.

But the numbers in 2020 will not match the numbers in 2016. Local election officials allocate voting machines between polling places based on "turnout . . . in prior elections" and "forecast[ed] turnout for the upcoming election." Ex. 1 ¶ 13. "If one location had a particularly high volume of voters compared to the number of machines in a prior election, [local officials] will often make sure to add more machines in that location for the upcoming election." *Id.* For example, in the 2016 election, Travis and Fort Bend Counties both had locations with literally zero voters on Election Day. *See* Ex. 6 at 23:21–24:1, 27:9–16. Surely those counties will adjust their allocation of voting machines for 2020.

In the end, Dr. Yang did not and cannot estimate the wait time to vote in 2020. Even for the select polling places in the two counties he considered, Dr. Yang does not have any opinion about turnout or the number of voting machines going forward. His counterfactual 2016 calculations cannot tell the Court anything useful about 2020, unless one assumes that the conditions in 2020 will match the conditions in 2016. But such an assumption would be unjustifiable, especially in light of the

pandemic, and Dr. Yang has not even attempted to justify it.

c. Dr. Yang Analyzed Only Election Day Voting at Select Polling Places in Two Counties

Dr. Yang disregarded the vast majority of votes cast in Texas. He limited his analysis in two key ways, both of which makes his results unreliable.

First, Texas has 254 counties, but Dr. Yang analyzed only 2 of them. Dr. Yang did not "analyze data from any Texas county other than Travis and Fort Bend." Ex. 6 at 18:11–13. Nor did he analyze whether those two counties are similar to the rest of the State. *See id.* at 18:18–21. Dr. Yang even admitted that he "wish[ed] [he] had more data from other counties." *Id.* at 18:24. But Plaintiffs' lawyers did not provide it for him. *See id.* at 19:3–15.

Even taking Dr. Yang's declaration at face value, Plaintiffs have no evidence that eliminating straight ticket voting would increase wait times in 252 of Texas's 254 counties. But Plaintiffs seek statewide injunctive relief. *See* ECF 5-1. Evidence predicting longer wait times in "two instances" is "a patently inadequate basis for a conclusion of [state]wide violation and imposition of [state]wide relief." *Lewis v. Casey*, 518 U.S. 343, 359 (1996) (holding that potential problems in two prisons could not justify equitable relief affecting the entire prison system); *id.* at 392–93 (Thomas, J., concurring) (explaining "[s]ystemwide relief is never appropriate in the absence of a systemwide violation"). "[O]nly if there has been a systemwide impact may there be a systemwide remedy." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977). Without evidence to support a finding of statewide constitutional violations—which Plaintiffs do not have—they cannot receive a statewide remedy.

Second, Dr. Yang considered Election Day voting only. He did not find any evidence of wait times for early voting. Thus, Plaintiffs have no evidence of a burden on the right to vote *per se*. Instead, Plaintiffs' evidence centers on alleged problems with voting in person on Election Day. Because Plaintiffs do not challenge the adequacy of voting early or voting by mail, they cannot state a right-to-vote claim. *See McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). Early voting is "an

acceptable substitute" for Election Day voting. *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016) (en banc). Many voters prefer it. Ex. 1 ¶ 20 ("In 2018, 83% of [Collin County] voters who voted in-person did so during the early voting period, and only 17% of in-person voters voted on election day.").

McDonald's reasoning applies here. No one is "specifically disenfranchised." 394 U.S. at 808. Everyone agrees that early voting in person is legally available to all eligible Texas voters. *See* Tex. Elec. Code § 82.005. Plaintiffs do not even present evidence that early voting is *practically* unavailable. Because Plaintiffs here have other options for voting, they are necessarily asserting a right to vote using a particular method, not "the right to vote." *McDonald*, 394 U.S. at 807. That precludes any *Anderson-Burdick* claim.

d. Any Long Lines Could Be Shortened by Reallocating Voting Machines Rather Than Mandating Straight Ticket Voting

Finally, even if Plaintiffs had proven Texans would face unconstitutionally long lines to vote, that would not support enjoining enforcement of HB 25. As the Court has already recognized, local officials have "state-law authority to ameliorate" any problems with lines "at polling-places." *Bruni*, 2020 WL 3452229, at *6. Plaintiffs cannot simply "assume local officials will not" do so. *Id.* (quotation omitted).

As Dr. Graves explains in his declaration, "even if the removal of STV leads to increased wait times, as suggested by [Dr. Yang's] declaration, the predicted increase in wait times can be mitigated by a reallocation of the voting machines." Ex. 7 ¶ 28. On Plaintiffs' own theory, long lines would be expected in only some polling places, not everywhere. Reallocating machines from less-busy locations to more-busy locations can dramatically decrease waiting time, as Dr. Yang's previous work has shown. *See* Ex. 6 at 110:6–24 (discussing an article that found a "71 percent improvement" by changing methods of allocating voting machines).

In this case, Dr. Graves found that even the polling places that Dr. Yang estimated to have very long lines would have very short lines if local officials simply reallocated a few machines from

less-busy locations. "[T]here is minimal waiting at any of the polling sites after removing STV, even with the unrealistic vote times assumed in [Dr. Yang's] declaration, as long as the local election officials can reallocate the voting machines." Ex. 7 ¶ 85.

2. Plaintiffs Have Not Proven HB 25 Will Burden Minority Voters

Plaintiffs urge the Court to apply the *Anderson-Burdick* burden analysis to "identifiable subgroups." ECF 6 at 13. That would be legally improper. *Anderson-Burdick* applies "categorically." *See* ECF 26 at 25–26.

But even accepting Plaintiffs' erroneous legal theory, HB 25 does not burden minority voters in particular. Dr. John Alford—a professor at Rice University with decades of experience analyzing Texas elections—used Plaintiffs' own numbers to show that "non-Hispanic Whites make up the majority of STV voters in Texas." Ex. 11 at 7 (Alford Decl.).

Estimated Straight Ticket Votes by Race/Ethnicity

2016	2016 CPS est. in 1,000s	Palmer 2016 ER estimates	Estimated 2016 STV in 1,000s	Estimated 2016 STV %
non-Hispanic White	5905	0.548	3235.9	54.1%
non-Hispanic Black	1417	0.847	1200.2	20.1%
non-Hispanic Asian	356	0.803	285.9	4.8%
Hispanic	1938	0.651	1261.6	21.1%
2018	2018 CPS est. in 1,000s	Palmer 2018 ER estimates	Estimated 2018 STV in 1,000s	Estimated 2018 STV %
non-Hispanic White	5394	0.611	3295.7	55.4%
non-Hispanic Black	1231	0.824	1014.3	17.1%
non-Hispanic Asian	354	0.787	278.6	4.7%
Hispanic	1907	0.712	1357.8	22.8%

See id. at 7, Table 2. Even if eliminating straight ticket voting were a burden, it would be a burden imposed on more white voters than minority voters.

Plaintiffs argue that a higher *percentage* of minority voters than white voters used straight ticket

voting. *See* ECF 6 at 14. Again, that does not show there is a disproportionate burden. But even if percentages were relevant, Dr. Palmer's analysis was too limited to be meaningful. Dr. Palmer analyzed only 10 of Texas's 254 counties for two election and then 26 counties for one election. ECF 6-14 at ¶ 11. He did not separate out the results from any of those counties, reporting instead averages across the group of counties. As Dr. Alford explained, "[t]hese ten counties . . . are not in any sense representative of the broader local context of Texas voters in general." Ex. 11 at 3. Even with that limited data, race was a relatively weak explanation for variations in straight ticket voting, and the results were driven largely by just three counties: Harris, Dallas, and Tarrant. *See id.* at 3.

An expanded data set highlights Dr. Palmer's errors. When one analyzes the 48 (rather than 10 or 28) largest counties in Texas, the results are markedly different. "There is little apparent relationship between the proportion of eligible minority population and the proportion of STV utilization." Ex. 11 at 6. Webb County, for example, has a very high percentage of minority voters, but it has a relatively low percentage of straight ticket voting. *See id.* at 6, Figure 1.

Plaintiffs' fallback position seems to be that, even if HB 25's effects are "uniform," minority voters will be disproportionately affected because of lower "socioeconomic status." ECF 6 at 15. This is just a generalized assertion. It is a far cry from cases like *Veasey*, in which plaintiffs provided specific declarations explaining why they could not obtain photo identification. 830 F.3d at 254–55. Here, Plaintiffs have not identified a single individual who will be "prevented from voting" as a result of the repeal of the STV option. *Id.* at 255. And having failed to establish that anyone will be prevented from voting, Plaintiffs certainly have not shown that people prevented from voting would be disproportionately racial minorities.[6]

[6] Dr. Lichtman suggests that minority voters tend to wait in longer lines than white voters do, but his declaration acknowledges that "the white/minority comparison for 30 mins+" wait times is not "statistically significant." ECF 6-5 at 25–26, Table 7.

Moreover, even if Plaintiffs were right that increases in wait time are least tolerable for minority voters, it would not state a constitutional claim. "[A]ny number of policy decisions might influence the length of time it takes an individual voter to vote, in addition to, obviously, each voter's own decisions." *Mich. State*, 749 F. App'x at 345. "Having non-partisan elections, which cannot be affected by the choice to have straight-ticket voting or not, adds to the time to vote." *Id.* "Having judicial elections [also] increases" the time needed to vote. *Id.* But federal courts surely would not strike down laws requiring non-partisan and judicial elections on the theory that some voters cannot devote the time necessary to vote in such elections. Having such elections, like eliminating straight ticket voting, is a "policy choice[] a state may legitimately make, and yet all would be subject to attack if individual voting time were a consideration that courts could use to strike down legislation." *Id.*

In addition, to the extent any voters, including minority voters, "already wait in longer lines," ECF 6 at 14, that issue should be raised with the local election officials in charge of establishing polling places, procuring voting machines, allocating those machines, and overseeing the voting process. *See* ECF 26 at 17–22. Even if the potential for long lines were not as speculative as it is here, it would not justify enjoining enforcement of HB 25 when any number of other factors, including many under the control of local officials, affect the time it takes to vote.[7]

3. Plaintiffs Have Not Proven HB 25 Will Burden Democrats

Plaintiffs argue that HB 25 disproportionately burdens Democrats. As an initial matter, this claim is derivative of Plaintiffs' intentional racial-discrimination claim. Plaintiffs assert that Democrats are burdened only because minority voters are allegedly burdened and because minority voters tend to prefer Democratic candidates. *See* ECF 6 at 15–16. But as shown above and below, HB 25 does

[7] For example, Plaintiffs cite to the length of Harris County ballots. ECF 1 at 14. However, that is a result of a policy choice to allow voters to hold a wide range of officials accountable at the ballot. And, again, the use of the STV option would not allow voters to skip over any of those races. *See*, *e.g.,* Ex. 1 ¶ 17. And as for the long lines experienced by voters in the most recent Harris County primaries, the Harris County election administrator took responsibility for those lines, citing a breakdown in machines. *See* ECF 26 at 18–19.

not disproportionately burden minority voters. *See supra* Part III.A.2; *infra* Part III.B.

In any event, the evidence does not support Plaintiffs' theory. "[N]on-Hispanic Whites make up the majority of STV voters in Texas." Ex. 11 at 7; *see supra* Part III.A.2. And Plaintiffs' own evidence shows that more straight ticket votes are cast by Republicans than Democrats. In every presidential election from 2000 to 2016, the Republican percentage of the straight ticket vote exceeded the Democratic percentage. *See* ECF 6-1 at 12, Figure 2. The same was true for every gubernatorial election from 1998 to 2018. *See id.* at 12, Figure 3. Of course, Democrats receive a higher percentage of the straight ticket vote in urban counties, *see id.* at 14, Table 1, but Republicans receive a higher percentage in suburban and rural counties, *see id.* at 14–15, Tables 2–3; Ex. 11 at 4 ("[I]n the more suburban counties outside these urban cores of these two metropolitan areas the majority of the STV votes are Republican STVs.").

Plaintiffs cannot credibly claim that the Legislature eliminated an option used mostly by white voters and Republicans in order to spite minority voters and Democrats. Consider *Personnel Administrator of Massachusetts v. Feeney*, in which the plaintiffs challenged a hiring preference given to veterans as discriminatory against women. 442 U.S. 256 (1979). The Supreme Court rejected that claim because the group disadvantaged "is not substantially all female." *Id.* at 275. The fact that "significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage" precludes "the inference that the statute is but a pretext for preferring men over women." *Id.*; *see also Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1291 (7th Cir. 1977) (holding that the defendant's action affecting "a significantly greater percentage of the nonwhite people in the Chicago area than of the white people in that area" was not enough to establish a disparate impact). In the end, "[t]oo many [white voters and Republicans] are affected by [HB 25] to permit the inference that the statute is but a pretext for preferring [white voters and Republicans] over [minority voters and Democrats]." *Feeney*, 442 U.S. at 275.

4. Texas's Interests Justify Any Burden

Texas, like forty-three other states, decided "that it is better if voters are encouraged or required to make individual assessments of candidates, rather than mass choices." *Mich. State*, 749 F. App'x at 346 (6th Cir. 2018) (Boggs, J.). "That choice is not an arbitrary one." *Id.* It "is supported by good policy reasons." *Id.* at 355 (Kethledge, J., concurring).

Reducing Unintentional Rolloff: Unintentional rolloff occurs when voters do not realize they are not participating in down-ballot races. Straight ticket voting "causes voters to miss out on casting votes in nonpartisan races or propositions." Ex. 10. After selecting a party at the top of the ballot, some voters think they have cast a vote in all races. But the end of the ballot often contains nonpartisan races and propositions to which a straight party ticket does not apply.[8] As a Harris County elections official explained to the Legislature when it was considering the repeal of the STV option, this has been a problem in Texas elections. "We had numerous voters come to us after they had voted realizing that they didn't go all the way down the ballot and look for that school board race that wanted to come back and vote for that school board race." Ex. 4 at 63:8-12. However, once a ballot is cast, it cannot be undone. *Id.* Not only was the STV option causing voter confusion, "it was basically disenfranchising them, because they didn't know to look all the way down the screen to vote for that school board race." *Id.* at 63:14-16.

While voters should be free to choose the races in which they want to cast votes, Texas seeks to ensure voters exercise that right *intentionally*. Eliminating STV reduces the risk that voters will *unintentionally* fail to vote in down-ballot races. "[T]he danger is there: in elections with referenda or non-partisan races, a voter who uses a straight-ticket option could overlook some items on a ballot." *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016). "This justification [for

[8] *See, e.g.*, Hidalgo County Sample Ballot 145-05 for the November 2018 General Election, https://www.hidalgocounty.us/DocumentCenter/View/31392/145-05_Style64_English_Electronic.

eliminating straight ticket voting] is reasonable." *Id.*

Reducing Voter Confusion: The combination of straight ticket voting and electronic voting machines led to voter confusion. As one election administrator explained, "the STV option can and does cause voter confusion and frustration through what is called 'emphasis voting.'" Ex. 1 ¶ 18. "Some voters," after selecting a straight party option, "will try to 'emphasize' or 'confirm' their vote for a particular candidate by touching the box next to the candidate's name on the page for that particular race." *Id.* But that leads to "the candidate being de-selected," meaning "the voter inadvertently de-selected that candidate." *Id.* To the extent voters do not review their selections before final submission, their attempts to vote in those races will be unsuccessful. To the extent they do review their selections, they "think that their votes had been lost or changed." *Id.* "When this happens, the voters will then speak with election officials to go through various corrective procedures, which takes additional time." *Id.* "Thus, in some cases, the elimination of the STV option will serve to decrease voter confusion and the time to vote in certain circumstances." *Id.*

Other election officials gave similar testimony to the Legislature. Jacquelyn Callanen, the Bexar County elections administrator, confirmed that the review process can and does lead to the problem referred to as "emphasis voting" in Mr. Sherbet's declaration. Ex. 4 at 45:15–46:10. She agreed that emphasis voting led to voters being concerned about vote manipulation. *Id.* Ed Johnson, an elections employee with the Harris County Clerk's Office, echoed the testimony of Ms. Callanen (and the declaration of Mr. Sherbet). *Id.* at 61:4–7 ("And they will go back down and push the button again for that candidate to make sure their vote is counted, but what they just did was cancel their vote for that candidate."). He testified that this problem "caused a great panic in Harris County" and made national news. *Id.* at 61:10–15. Mr. Johnson informed the Legislators that, because of emphasis voting, the use of the STV option often increased the time it took for voters to cast their ballots. *Id.* at 61:25–62:24. Once people started hearing concerns about the machines not counting their votes properly, "people

were spending a lot longer on the preview screen validating whether or not the machine was working correctly." *Id.* at 62:8–11. And, in fact, this led to another form of voter confusion because the STV option selected candidates that the voters did not recognize. *Id.* at 62:12–17. In sum, "we saw that the straight-party actually caused confusion and slowed down the lines in some cases." *Id.* at 62:19–21.

More-Informed Voting: "Democracy depends on a well-informed electorate." *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976). Straight ticket voting undermines that interest. It "pulls a voter's attention away from down-ballot candidates for certain offices that most directly affect the voter" and "discourages a voter from researching all the candidates on the ballot."[9] With straight ticket voting, a voter chooses numerous candidates based on only a single piece of information: party affiliation. But there is more to a candidate than party affiliation. Under HB 25, more voters will consider additional information, like relevant news coverage and campaign materials.

Better Qualified Candidates: Straight ticket voting helps unqualified candidates. First, it sometimes leads voters to select a candidate who they would not have selected if they had considered the race individually. Second, straight ticket voting discourages qualified candidates from running for office in the first place. With straight ticket voting, relatively few voters give any consideration to the qualifications of individual down-ballot candidates. And to the extent qualifications for office are not helpful to winning election, better qualified candidates have less reason to run.

Making Elections More Competitive: HB 25 also benefits Texans by making third-party and independent candidates more viable. Representatives from the League of Independent Voters, the Green Party of Texas, and the Libertarian Party all testified in favor of HB 25. *See* Ex. 4 at 18:9–28:13. As Representative Justin Amash, an Independent, explained, "Straight-ticket voting makes it

[9] Bill Analysis, Tex. House Committee Report, https://www.legis.state.tx.us/tlodocs/85R/analysis/pdf/HB00025H.pdf.

prohibitive to run outside of the major parties."[10] Thus, the elimination of the STV option is beneficial for the voters who prefer third-party and independent candidates. It also helps everyone else. HB 25 makes incumbents more susceptible to challenges, which increases their accountability to voters.

Plaintiffs' unsupported assertion that the Legislature acted with partisan intent is both untrue and irrelevant. *See* ECF 1 ¶ 49. "[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." *Crawford*, 553 U.S. at 204 (plurality).

Repealing straight ticket voting imposes no serious burden on voters but advances important state interests. That is why numerous courts have upheld laws like HB 25. For the reasons explained in her motion to dismiss, the Secretary urges the Court to follow the unbroken line of precedents refusing to mandate straight ticket voting. *See Mich. State*, 749 F. App'x at 349; *One Wis. Inst.*, 198 F. Supp. 3d at 945–46; *Woodruff v. Herrera*, No. 1:09-cv-449, 2010 WL 11505703, at *2 (D.N.M. Feb. 1, 2010); *McDonald v. Grand Traverse Cty. Election Comm'n*, 255 Mich. App. 674, 676–77 (2003); *Orr v. Edgar*, 298 Ill. App. 3d 432, 436–37 (1998).

No state law eliminating straight ticket voting has "ever been declared unconstitutional." *Mich. State*, 749 F. App'x at 355 (Kethledge, J., concurring). This Court should not be the first to take such a momentous step.

B. Plaintiffs' Section 2 Claim Fails

The legal flaws in Plaintiffs' Section 2 claim are laid out in the motion to dismiss. *See* ECF 26 at 30–34. Those arguments are incorporated here by reference. But even if Plaintiffs could plausibly allege a Section 2 violation, Plaintiffs' evidence does not prove that the repeal of the STV option will deny minority voters an equal opportunity to participate in Texas's political process "on account of

[10] Matt Welch, *Justin Amash: "Straight-Ticket Voting Makes it Prohibitive to Run Outside of the Major Parties"*, REASON (Aug. 30, 2018), https://reason.com/2018/08/30/justin-amash-straight-ticket-voting-make/.

race or color."

As explained above, the repeal of the STV option does not disparately impact African-American and Hispanic Texans. In 2016 and 2018, a majority of all Texas voters used the STV option, and a majority of STV votes were cast by white voters. Ex. 11 at 7, Table 2. That alone should end the Court's analysis under Section 2.

Further, Plaintiffs' evidence proves, at most, that African American and Hispanic voters used the STV option at a higher rate than white voters in the aggregate averages over a limited set of Texas Counties. ECF 6-14 at 19; Ex. 12 at 71:11–19; 76:20–25; 79:21–80:1; 120:16–20 (Palmer Dep.). But looking at a broader set of counties, there is no clear pattern in the use of the STV option among racial or ethnic groups. Ex. 11 at 6, Figure 1. Eliminating the STV option will not dramatically increase wait times. *See* Section III.A.1. Indeed, eliminating the STV option will likely reduce rolloff in nonpartisan races and reduce voter confusion and frustration, which will make voting faster for many Texans. Ex. 1 ¶ 18; Ex. 4 at 44:13–45:14, 60:21–67:7.

Even if Plaintiffs' Section 2 claim could survive its legal flaws, and even if Plaintiffs could prove a discriminatory effect of repealing the STV option, their offered evidence does not prove that the repeal of the STV option in Texas would somehow deny African Americans and Hispanics the right to vote "on account of race or color" in light of the totality of the circumstances as Plaintiffs claim under the Senate Factors.

Factor One: Plaintiffs have not linked any contemporaneous history of official discrimination in voting to the use or repeal of the STV option

Plaintiffs offer evidence of historical discrimination dating back to 1845, such as the all-white primaries, poll tax, and literacy tests. "[U]nless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987); *see Lopez v. Abbott*, 339 F. Supp. 3d 589, 611 (S.D. Tex. 2018).

For recent examples, Plaintiffs cite various district court decisions related to the latest round

of legislative redistricting in Texas. None of those decisions cited are final judgments, and all are related to repealed statutes that were never used for any election in Texas. Tellingly, Plaintiffs are wholly silent on the last word from the U.S. Supreme Court in that case. The Supreme Court found that the district court "committed fundamental legal error" in its finding of intentional discrimination after the Texas Legislature repealed the original maps and enacted maps that mirrored the interim remedy. *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018). "When the congressional and state legislative districts are reviewed under the proper legal standards, all but one of them, we conclude, are lawful." *Id.* at 2313–14. And the one district that did not withstand the Supreme Court's review failed because the Texas Legislature made impermissible changes "at the behest of *minority groups*, not out of an intent to discriminate. That is, [the chair of the redistricting committee] was *too* solicitous of changes with respect to HD90." *Id.* at 2329 n.24 (emphasis in original). Similar to the redistricting cases cited by the plaintiffs challenging Texas's voter identification law, this evidence "form[s] a thin basis for drawing conclusions regarding contemporary State-sponsored discrimination." *Veasey*, 830 F.3d at 232.

Additionally, Plaintiffs cite to court decisions related to a later-revised voter identification statute. But, again, Plaintiffs fail to mention that the Fifth Circuit twice rejected the district court's discriminatory intent holding in that case. *Id.* at 242; *Veasey v. Abbott*, 888 F.3d 792, 802 (5th Cir. 2018). And Plaintiffs omit any citation to the latest opinion from the Fifth Circuit finding that the district court abused its discretion in issuing a preliminary injunction against the revised statute that cured whatever discriminatory effect existed in the original statute. *Veasey*, 888 F.3d at 802.

Plaintiffs mention an advisory issued by the Secretary of State's office related to non-citizens potentially on the Texas voting rolls. Of course, non-citizens are not eligible to vote in Texas, and the Secretary of State is obligated to provide counties with information to help them maintain accurate voter rolls. *See* Tex. Elec. Code § 18.061. After a multi-day evidentiary hearing, the judge did not find that the Secretary acted with any discriminatory intent. *Tex. LULAC v. Whitley*, No. SA-19-CA-074-

FB, 2019 WL 7938511, at *1 (W.D. Tex. Feb. 17, 2019). Instead, he found that the problems stemmed from a "good faith effort to transition from a passive process of finding ineligible voters" to a proactive process. *Id.* The Secretary voluntarily withdrew that advisory when its errors came to light, took responsibility for the errors, and apologized for the mistake. *Id.* And, ultimately, as Plaintiffs previously acknowledged, that case settled with the plaintiffs agreeing to a refined process by which the Secretary of State can proactively identify non-citizen voters. *See Bruni v. Hughs*, No. 5:20-cv-35; ECF 19-2 at 14 n.20.

Finally, Plaintiffs cite election bills that failed in the Texas Legislature. But the success rate of any piece of legislation filed in the Texas House or Senate is exceedingly low, about 20%. Ex. 13. As Plaintiffs' expert had to admit, there are many reasons why a bill does not pass, and he has not analyzed why any of those specific bills cited in his report failed. Ex. 14 at 72:2-75:19 (Lichtman Dep.).

In *Lopez v. Abbott*, Judge Ramos faulted a group of plaintiffs for presenting very similar evidence under this Senate Factor. 339 F. Supp. 3d 589, 611 (S.D. Tex. 2018). They failed to identify any specific history of official discrimination related to the challenged election practice at issue. *Id.* So too here. Plaintiffs have not put on any evidence of a specific history of official discrimination directly related to Texas's use of the STV option. In fact, some judges have suggested that STV, not its absence, could "reinforce minority voters' unequal access to the political process." *LULAC v. Clements*, 999 F.2d 831, 912 (5th Cir. 1993) (en banc) (King, J., dissenting).

Factor Two: Plaintiffs have not proven legally significant polarized voting in Texas's general elections.

Plaintiffs' rubric for analyzing racially polarized voting has been soundly rejected by the en banc Fifth Circuit. *See LULAC*, 999 F.2d at 850. Plaintiffs' expert who performed their racially polarized voting analysis, Maxwell Palmer, summed up his methodology as follows: "Evidence of racially polarized voting is found when minority group voters and White voters support different parties." ECF 6-14 at 22. In other words, if a strong majority of minority voters supported the

Democratic candidate but a strong majority of whites supported the Republican candidate, that constitutes evidence of racially polarized voting under Dr. Palmer's analysis.[11] Ex. 12 at 157:12–158:21.

But that is not enough to prove legally significant racially polarized voting in Texas. The Fifth Circuit could not have been clearer on this point:

> In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat.

LULAC, 999 F.3d at 850. Instead of looking at mere losses of minority-preferred candidates to white-preferred candidates, the Fifth Circuit in *LULAC* required courts to consider "whether racial bias or partisan politics better explains the voting patterns." *Lopez*, 339 F. Supp. 3d at 604. In *Lopez*, Judge Ramos held that statewide races showing that minority voters tend to support Democrats and white voters tend to support Republicans "shine little light on this nuanced issue." *Id.* at 612. "The two-major-party general election contests and their uniform results facially support equal inferences in favor of racial polarization and partisan polarization." *Id.*

Yet that is the information on which Plaintiffs stake their racially polarized voting analysis. Palmer admits that he made no attempt to divide race and partisanship in his racially polarized voting analysis. Ex. 12 at 160:2–22. In fact, he thinks that doing so is impossible. *Id.* at 137:12–138:14. Thus, his analysis sheds no light on the inquiry required by the Fifth Circuit's en banc precedent.

Following the Fifth Circuit's guidance, courts will often analyze the level of support received by candidates who share a party affiliation but have a different racial or ethnic background. *See*

[11] While Plaintiffs' witness Allan Lichtman offers impermissible legal opinions about the Senate Factors in his declaration, he relied solely on Dr. Palmer's ecological inferences, the standard way to conduct a racially polarized voting analysis. Ex. 14 at 255:2–25. Interestingly, Dr. Lichtman's non-traditional analysis of primary voting patterns using polling data is confined to races for Democratic nominations. ECF 6-5 at 39–40 & ECF 6-6 at 4–8. As flawed as his analysis is, even on its face it purports to show that the race of the candidate somehow matters only to the constituents of the Democratic Party, allegedly represented by the plaintiffs to this case. Such analysis says nothing about legally significant racially polarized voting among Republican voters in Texas.

LULAC, 999 F.2d at 861; *Lopez*, 339 F. Supp. 3d at 612. If the levels of support received by white candidates from one party are similar to the levels of support received by minority candidates from the same party, partisan politics is driving the results, not racial biases. As the Fifth Circuit held time and again in analyzing voting patterns in various Texas counties:

> We repeat. The race of the candidate did not affect the pattern. White voters' support for black Republican candidates was equal to or greater than their support for white Republicans. Likewise, black and white Democratic candidates received equal percentages of the white vote. Given these facts, we cannot see how minority-preferred judicial candidates were defeated "on account of race or color." Rather, the minority-preferred candidates were consistently defeated because they ran as members of the weaker of two partisan organizations.

LULAC, 999 F.3d at 879.

Dr. Palmer did not consider the race of the candidate in his analysis or the levels of support received by candidates of different races. Ex. 12 at 162:5–16; 163:1–7. He did not do that analysis because he considered it unnecessary, despite the Fifth Circuit's binding precedent. *Id.* at 163:8–10.

In *Lopez v. Abbott*, Dr. Alford did a similar analysis for each of the 34 statewide judicial elections from 2002 through 2016 in which there was both a Republican and Democratic candidate. Ex. 11 at 12–13. Dr. Alford's results are stark. The Hispanic Democratic candidates for statewide judicial office received on average *more* support from white voters than white Democratic candidates. *Id.* And the same is true for Republicans. *Id.* Hispanic Republican candidates for statewide judicial office received a higher percentage of votes from white voters as compared to white Republican candidates. *Id.* As Judge Ramos found, "whether running as Democrats or Republicans, Hispanic candidates for high judicial office have tended to slightly outperform non-Hispanic candidates with non-Hispanic voters." *Lopez*, 339 F. Supp. 3d at 613.

One example from the 2016 election perfectly illustrates this point. Justice Eva Guzman ran for reelection against Savannah Robinson for Place 9 on the Texas Supreme Court. Ex. 11 at 9–10. For Place 5 on the same court, Justice Paul Green ran for reelection against Dori Contreras Garza. *Id.*

Justice Guzman received 63.3% of the white vote, while Justice Green received only 63.0% of the white vote. *Id.* Due in part to that increased level of support from white voters, Justice Guzman was (and still is to this day) the candidate to receive the most votes for any statewide office in Texas history. *Id.* Thus, Judge Ramos found that "partisan polarization better explains results in recent Texas statewide elections for high judicial office." *Lopez*, 339 F. Supp. 3d at 614.

To further emphasize that point, Dr. Alford conducted a similar analysis of all Texas statewide races in the 2016 and 2018 elections. Ex. 11 at 8–12, Tables 3 & 4. That same partisan pattern held across all of the statewide elections. *Id.* Thus, Judge Ramos's finding that statewide judicial races are driven by partisan polarization applies equally to all statewide races in Texas. This Senate Factor does not support Plaintiffs' claim.[12]

Factor Three: The two voting practices cited by Plaintiffs do not enhance the opportunity for discrimination

Under the third Senate Factor, Plaintiffs cite only two voting practices that allegedly enhance opportunities for discrimination: at-large voting and the use of large legislative districts. As for the first, Plaintiffs specifically claim that at-large election of Texas's highest judges is a practice that enhances discrimination. But Plaintiffs ignore the recent failed challenge to those at-large statewide elections under this very same cause of action. *Lopez*, 339 F. Supp. 3d at 589. After considering much of the same evidence cited by Plaintiffs in this case during a four-day bench trial, Judge Ramos ruled that "given the totality of the circumstances, Plaintiffs have not satisfied their burden to show that the

[12] Plaintiffs rely on *Perez v. Perry*, 253 F. Supp. 3d 864, 946 (W.D. Tex. 2017), to say the existence of racially polarized voting is "undisputed," ECF 6 at 20, but the court was talking about whether "people of different races vote differently from one another," as it later clarified. *Perez v. Abbott*, 390 F. Supp. 3d 803, 820 n.11 (W.D. Tex. 2019). But, as explained above, whether minority voters tend to prefer a different candidate from white voters does not answer the only relevant question under Fifth Circuit precedent: whether polarized voting rises to the level of legal significance. Likewise, *Veasey v. Abbott*, 830 F.3d 216, 258 (5th Cir. 2016), is no help to Plaintiffs because the defendants in that case did not brief this issue. And subsequent cases have required plaintiffs to prove legally significant racially polarized voting under the Fifth Circuit's *LULAC* framework. *Lopez*, 339 F. Supp. 3d at 614.

[statewide election of Texas's highest judges] results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* at 619. The plaintiffs took nothing on their claim for relief under Section 2 of the Voting Rights Act.[13]

As for the size of Texas's districts, that is a function of Texas's geography and its growing population. As noted by Judge Ramos in response to the same argument under the same Senate Factor, "the challenges of physically covering the entire state are shared by all candidates." *Lopez*, 339 F. Supp. 3d at 614. So too with legislative districts within Texas. Dr. Palmer's analysis shows that minority voters tend to prefer Democratic candidates. ECF 6-14 at 23, Figure 4. Plaintiffs have not presented any evidence that Democratic candidates face geographic or demographic hurdles that Republican candidates do not, much less that minority candidates face geographic or demographic hurdles that white candidates do not.

Factor Four: There is no candidate slating process in Texas

Plaintiffs omit the fourth Senate Factor from their analysis. There is no candidate slating process in Texas, so minority voters cannot suffer discrimination from its use.

Factor Five: Turnout data in Texas shows that effects of discrimination do not impair African American and Hispanic Texans' ability to participate in the political process

Whatever socioeconomic disparities may exist between minority voters and white voters, those disparities do not affect the ability to participate in the political process. In most of the metrics cited by Plaintiffs, the metrics appear worse for the African American population as compared to the Hispanic population. ECF 6 at 21. However, voter registration rates among eligible African Americans is much higher than registration among eligible Hispanic voters. Ex. 15. Likewise, registered African

[13] Plaintiffs also cite an at-large election system for nonpartisan city council seats in one Texas city. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 681 (S.D. Tex. 2017). What happens in one jurisdiction's elections for non-partisan seats has no relevance on Plaintiffs' claims related to the use of the STV option statewide, which by definition only applies in partisan contests.

American voters turn out at the polls in much higher numbers than registered Hispanic voters. *Id.* Indeed, the registration rate and turnout rate among African Americans is little different than the rates among the white population in Texas. *Id.*

Factor Six: Plaintiffs do not cite any racial appeals made by any candidate who then voted on the legislation challenged in this case

Plaintiffs' section on racial appeals in campaigns cites to statements from a handful of speakers ranging from Ted Nugent to a candidate for a seat on the Dallas County Board of Commissioners. ECF 6 at 22. None of those alleged speakers voted on HB 25 in 2017, and some of them were not even elected officials. *Id.* Plaintiffs cited only two candidates as allegedly making racial appeals, but they fail to mention that both of them lost their respective races.[14]

Factor Seven: African American and Hispanic candidates are regularly elected to statewide office—so long as they run as Republicans

Section 2 of the Voting Rights Act does not guarantee "a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 10301. Thus, Plaintiffs use the wrong metric for this Senate Factor.

Likewise, Plaintiffs fail to recognize the partisan makeup of Texas over the last three decades. Republicans have controlled every single statewide office since 1999.[15] During this period of Republican control, Hispanic and African American candidates have enjoyed statewide electoral success—so long as they run as Republicans. In addition to the examples provided by Plaintiffs of Republican minorities being elected in Texas, Plaintiffs ignore the elections and re-elections of Chief Justice Wallace Jefferson and Justice Dale Wainwright, both of whom are African American and ran

[14] Pete Sessions lost to Colin Allred in the 2018 race for the 32nd U.S. congressional district. *See* https://elections.sos.state.tx.us/elchist331_state.htm. Likewise, the candidate for Dallas County Commissioner cited by Plaintiffs lost in the Republican primary. *See* https://elections.sos.state.tx.us/elchist326_local57.htm.

[15] All of the statewide election results from 1992 to present are available on the Secretary of State's website at https://elections.sos.state.tx.us/index.htm.

as Republicans, to the Texas Supreme Court. Ex. 11 at App'x 3. And they ignore the elections and re-elections of Latinas Judge Elsa Alcala to the Texas Court of Criminal Appeals and Justice Eva Guzman to the Texas Supreme Court. *Id.* Indeed, as explained above, minority Republicans running for statewide office in Texas receive essentially the same support from white voters as white Republican candidates (and sometimes even more). *Id.*

Once again, faced with similar evidence analyzed under the same Senate Factor, Judge Ramos held: "When the issue is whether race or partisanship explains the pattern of electoral outcomes, rather than whether or not there is vote dilution, this factor's significance evaporates." *Lopez*, 339 F. Supp. 3d at 616.

Factor Eight: Plaintiffs make no attempt to tie the repeal of the STV option to the responsiveness of Texas's elected officials to the minority needs

Plaintiffs baldly assert that Texas officials are "not responsive to the needs of its minority communities." ECF 6 at 23. Many minority Texans disagree. In a recent poll asking about Governor Abbott's job performance, Hispanic Texans approved 48% to 31%. Black Texans approved 40% to 39%, and Asian Texans approved 64% to 33%. Ex. 16.[16] The Supreme Court disagrees too. In the last round of redistricting litigation, the Supreme Court found only one district unconstitutional, and that was because the Texas Legislature made impermissible changes "at the behest of *minority groups*, not out of an intent to discriminate. That is, [the chair of the redistricting subcommittee] was *too* solicitous of changes with respect to HD90." *Perez*, 138 S. Ct. at 2329 n.24 (emphasis in original). In any event, officials across the political spectrum support abolishing the STV option, including Congressman Henry Cuellar, a Hispanic Democrat from South Texas who has introduced federal legislation to end

[16] Exhibit 16 is an excerpt from the April 2020 poll conducted by the University of Texas and Texas Tribune. The entire results can be accessed here: https://static.texastribune.org/media/files/106994040476875e025e88ab87077a52/ut-tt-2020-04-xtabs.pdf.

the practice, Ex. 17,[17] and African American, Hispanic, and white Democrats who voted for HB 25. *See infra* Section III.C.6.

> Factor Nine: Once again, Plaintiffs wholly ignore the policy rationales offered by members of every party, circuit courts of appeal, and scholars they themselves cite—not to mention how elections operate in 43 other States

Astonishingly, Plaintiffs claim that "*no* legitimate governmental interest justifies HB 25's elimination of STV." ECF 6 at 24 (emphasis added). And they claim that every stated justification were "blatantly pretext." *Id.*

Plaintiffs ignore the body of public opinion decrying the use of an STV option. Scholars, judges, election administrators, and legislators of all political affiliations recognize the problems inherent in the use of an STV option. *See* Sections III.C.2, III.C.3, III.C.6. Plaintiffs' refusal to engage with those critics proves the weakness of their claims.

Forty-three other States require their voters to select each and every candidate they wish to vote for. Ex. 18. Texas's desire to have the same level of voter engagement does not deprive anyone the right to vote "on account of race or color."

C. Plaintiffs' Intentional Discrimination Claim Fails

HB 25 must be given a "presumption of legislative good faith" rather than a presumption of discriminatory intent. *Perez*, 138 S. Ct. at 2325. Without confronting this presumption, Plaintiffs claim that discriminatory intent was a "substantial" or "motivating" factor when the Texas Legislature brought Texas voting laws in line with the vast majority of the country. Plaintiffs bear the burden of proving that legislators voted for HB 25 "because of, not merely in spite of, [the statute's] adverse effects upon an identifiable group." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quotation omitted). But

[17] People Before Party Act of 2016, H.R. 4679, § 2, 114th Cong., 2d Sess. ("[N]o State may provide a voter with the opportunity to indicate the selection of a political party as a representation of the selection of an individual candidate").

they affirmatively pled the opposite. Having alleged that legislators "ignored" concerns about disparate impacts and acted without knowing "whether repealing STV would disparately impact minorities," Plaintiffs cannot now claim that legislators acted "because of" a purported disparate impact. ECF 1 ¶¶ 38–39; *see also* ECF 6 at 28 (arguing "that no one had examined HB 25's racial impact").

As explained in the motion to dismiss, Plaintiffs' claim is legally barred. Those arguments are incorporated here by reference. *See* ECF 26 at 35–37. But one bears repeating, particularly in light of the evidence now in front of the Court.

1. Plaintiffs' claimed inference of discrimination cannot survive the fact that a majority of STV voters are white

Plaintiffs concede that the STV option is used by a majority of voters from all racial or ethnic groups in Texas. Moreover, their own estimates suggest that white voters account for the majority of the votes cast with the STV option. Ex. 11 at Table 2. As explained above, the U.S. Supreme Court in *Feeney* rejected a claim of gender discrimination when the group allegedly harmed included a substantial number of both women and men. 442 U.S. at 275. That the affected class included both a high percentage of men and women precluded "the inference that the statute is but a pretext for preferring men over women." *Id.*

Plaintiffs' evidence is even weaker. Not only did the users of the STV option include a substantial number of white voters, the *majority* of the users of the STV option were white voters, even before HB 25's passage in 2017. Ex. 11 at Table 2. The Texas Legislature did not intend to discriminate against minorities by ending a practice that was used predominately by white voters.

2. Plaintiffs' intent analysis ignores the legitimate policy justifications expressed by a diverse group of stakeholders

Plaintiffs ask the Court to find that the repeal of the STV option "blatantly pretextual." ECF 6-1 at 30 (emphasis added). And they claim that the stated reasons for the repeal "were based *solely* on the unsubstantiated, personal opinions of a few legislators." ECF 6-1 at 30 (emphasis added). That is

simply not true.[18]

For example, during the public hearing on HB 25 in the Texas House Committee on Elections, the Texas Legislators heard testimony from Jacquelyn Callanen, the Bexar County elections administrator, and Ed Johnson, an elections employee with the Harris County Clerk's Office. Ex. 4 at 44:13–46:10, 60:6–64:6. Both provided information about the detrimental real-world effects of the STV option in Texas elections, and Ms. Callanen testified affirmatively in support of the repeal of the STV option. *Id.* at 44:15–16. They confirmed that the arguments about increasing wait times ignore what actually happens with the STV option. *Id.* 45:3-6 ("[Y]ou still must see every single page. You can't hit the button and go to the end. You still have to go through 25 pages. You still have to see every race."). And they confirmed that the review process does lead to the problem referred to as "emphasis voting" in Mr. Sherbet's declaration.

But the Legislature did not hear from just county election officials. It also heard from the League of Independent Voters, a group supporting independent candidates running outside of the major parties. *Id.* at 18:14–21:7. Their delegate supported the repeal of the STV option for the sake of "good government and getting the best-qualified people for the race," *id.* at 18:20–22, and to avoid the partisan "sweeps" that occur in down-ballot races, resulting in well-qualified candidates losing elections simply because of their partisan affiliation, *id.* at 19:4–10. The Legislature heard support for the repeal from the Green Party, the Libertarian Party, and other third parties. *Id.* at 21:16–28:13. Those parties likewise expressed concern that the STV option was decreasing voter participation in nonpartisan ballot items. *Id.* And they expressed concern that the STV option was a hurdle for their candidates to be placed on the ballot at all in future elections. *Id.* Ending the STV option "would signal

[18] HB 25's author expressed those legitimate reasons in both the House committee hearing and the floor debates, as well as in other material related to the bill. Exs. 4, 10. However, this response brief focuses mainly on statements from other sources that support those reasons, given Plaintiffs' claim that those stated reasons were "blatantly pretextual" and "solely based on the unsubstantiated, personal opinions" of the bill's supporters.

that Texas continues to be a state that embraces competition, celebrates the individual, and looks primarily to one's character and one's ideas." *Id.* at 26:7–10.

A former district court judge in Harris County testified in support of HB 25. *Id.* at 29:10–35:23. Before taking the bench, she tried 33 cases to verdict as an attorney. *Id.* at 29:25. Running as a Republican incumbent, she received endorsements from the Houston Chronicle, the Mexican-American Bar Association, and the Houston Lawyers' Association—in part because her Democratic opponent had never tried a jury trial before running for trial court judge. *Id.* at 30:4–8. She claimed that voters who did not use the STV option chose to reelect her by a 55% to 45% margin. Yet she lost 51% to 49%. *Id.* at 31:20–23.

But it does not stop with just the testimony that the Legislators heard on the challenged bill. During the 2017 legislative session, *The Dallas Morning News* ran an editorial titled "Why Texas needs to abolish one-punch straight-ticket voting." Ex. 21. According to the editors, the STV option "assumes that party affiliation automatically ensures competency—a dangerous hypothesis on either side of the aisle, up and down the ticket." *Id.* They concluded: "The more informed the voters, the better our democracy. Getting that information may not always be convenient, but improving our governance is worth the effort." *Id.*

Likewise, during the 2017 session, the Chief Justice of the Texas Supreme Court called on the Legislature to end the STV option for judicial races in Texas. Ex. 22. The partisan sweeps of the judiciary resulting in part from the STV option "are demoralizing to judges and disruptive to the legal system." *Id.* at 9.

Given that chorus echoing the statements made by the Legislators who supported the repeal of the STV option, Plaintiffs' claim that HB 25 was "based solely on the unsubstantiated, personal opinions of a few legislators" is not true. To claim that the Legislators' statements were "blatantly pretextual" requires giving no weight to those statements from diverse sectors of public life.

3. The calls to end the STV option did not begin in 2017

In 1990, at least 20 States allowed voters to use the STV option. Ex. 18. By 2017, Texas was one of just eight states that still allowed its use. *Id.* The calls to end the STV option in Texas did not start in 2017. The Texas Legislature heard the plea to end the STV option in many prior sessions, including from Democratic legislators. Ex. 23 (analysis for bill introduced by Democratic representative claiming that the STV option causes voter confusion, and "a voter should know each candidate and the office the candidate is seeking when casting a vote"); *see also* ECF 26 at 3 n.3 (sample of bills introduced in prior sessions to repeal the STV option).

Likewise, Chief Justice Hecht was not the first to point out the problems with the STV option in down-ballot races. He followed a long tradition of the Texas judiciary calling on the Legislature to end the use of the STV option for judicial candidates. Chief Justice John Hill told them so as far back as 1985,[19] and those concerns continued with Chief Justice Wallace Jefferson.[20]

Plaintiffs' own evidence establishes a long-running understanding among political scientists of the harm that the STV option causes. For example, in Plaintiffs' exhibit titled *Studies of Political Statistics: The Effects of Eliminating Straight-Ticket Voting in Texas*, the authors note: "The percentage of sweeps in Texas district courts is especially troubling to political scientists and legal scholars." ECF No. 6-15 at 8. They note that the goal of Texas's partisan judicial elections is to keep state court judges accountable to the voters. *Id.* Yet, legal scholars have worried that STV defeats that purpose: "By incorporating straight-ticket voting, voters who use the straight-ticket option abdicate their responsibilities to the political parties who nominate the candidates. As a larger percentage of voters choose the straight-

[19] Chief Justice John L. Hill, Jr., *The State of the Judiciary Message* (Jan. 22, 1985), https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-1985.pdf (noting a committee's recommendation of "[b]allot changes to prevent straight-party voting in judicial races").

[20] Chief Justice Wallace B. Jefferson, *State of the Judiciary* (Feb. 23, 2011), https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2011.pdf; Chief Justice Wallace B. Jefferson, *The State of the Judiciary in Texas* (Feb. 11, 2009) https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2009.pdf ("So long as we cast straight ticket ballots for judges, the fate of all judges is controlled by the whim of the political tide.").

ticket option, the principle of accountability is jeopardized." *Id.* at 9 (citation omitted). This scholarship long pre-dated the Texas Legislature's consideration of HB 25 in 2017, and it is entirely inconsistent with Plaintiffs' claim that legitimate policy concerns were "based solely on the unsubstantiated, personal opinions of a few legislators."

4. In the face of such overwhelming opposition to the STV option, the only allegations of HB 25's discriminatory impact were unsubstantiated claims offered by the bill's opponents

Plaintiffs claim that the Legislators "knew STV repeal would have a disproportionate impact on African American and Hispanic voters." ECF 6 at 27. But the only allegations of such an impact came from the bill's opponents, and those members provided no data to support their claims. "It should go without saying that we do not judge the intention of a bill's supporters by the characterization of its opponents." *Mich. State*, 749 F. App'x at 351; *see also NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964). That concern is even more acute in this case, as those opponents are members of one of the plaintiffs in this very lawsuit.

When the Legislature opened testimony to outside groups during the committee hearings, no outside group presented data related to the harms alleged by Plaintiffs in this case. Plaintiffs claim legislators should have consulted with certain minority legislative and advocacy groups before passage of HB 25, but only one of those groups even testified on the bill. Ex. 4 at 67:12–71:24. Although the NAACP offered perfunctory testimony in opposition, it provided no data on the impact of repealing the STV option, and it has not filed a lawsuit. The complete absence of activity from the other groups (either in legislative testimony or court challenges) is even more telling.

5. Plaintiffs' review of the Legislature's procedure to repeal the STV option is simply inaccurate

Plaintiffs claim that the Legislature "failed to include *any* measures that would address HB 25's burden on counties." But that is not true. The Legislature adopted an amendment to delay the implementation of HB 25 for three years. Ex. 24. That allowed counties, candidates, and voters more

time to prepare for the repeal of the STV option.

Likewise, it is not true that HB 25 did not have a "meaningful" fiscal note. In fact, it had three fiscal notes.[21] Plaintiffs' expert tasked with reviewing the legislative record has no knowledge of who prepares fiscal notes or how they are prepared. Ex. 14 at 193:19–194:7. Fiscal notes are prepared by the Legislative Budget Board pursuant to the House rules.[22]

Plaintiffs' ignorance of the fiscal note process is not surprising. Their expert did not bother to read the rules that governed proceedings in the Texas House or Senate in 2017. Ex. 14 at 195:5–196:11, 197:1–16. If he had done so, it would have explained away one of Plaintiffs' other alleged procedural deviations. While the Texas House committees have defined subjects within their jurisdictions (including a specific Elections committee), the Texas Senate committees do not.[23] There is no rule that requires a bill to go to any particular Senate committee, and there is no specific Senate committee on election matters. In other words, the fact that HB 25 went to the Senate Business & Commerce Committee is by no means a procedural deviation, even if the Senate sponsor of the bill inadvertently referred to himself as the "author." Likewise, bills are required to have one committee hearing in the House and one committee hearing in the Senate. There is no requirement that the Legislature conduct field hearings, and Plaintiffs cannot point to a single instance of such a hearing on any bill during the 2017 Legislative session—because such hearings almost never happen in the midst of a Legislative session.[24]

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[21] Texas Legislature Online, H.B. 25, 85th Leg., Reg. Sess., https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=85R&Bill=HB25 (last visited June 6, 2020).

[22] *See* Rule 4, Section 33 of the Texas House Rules, 85th Legislature 2017, available at https://www.lrl.texas.gov/scanned/rules/85-0/85_House_Rules.pdf (last visited June 6, 2020).

[23] *Compare* Rule 3 of the Texas House Rules, 85th Legislature 2017, https://www.lrl.texas.gov/scanned/rules/85-0/85_House_Rules.pdf, *with* Rule 11 of the Texas Senate Rules, 85th Legislature 2017, https://lrl.texas.gov/scanned/rules/85-0/85_senate_rules.pdf.

[24] Paradoxically, Plaintiffs' expert tasked with noting procedural deviations said that how many other bills had field hearings in 2017 "is not relevant to his analysis." Ex. 14 at 198:4–10. One cannot note procedural deviations without comparing the processes used for other bills.

6. Plaintiffs failed to even consider the most basic information related to the passage of the challenged bill—the final vote tally

Perhaps most egregiously, Plaintiffs never once mention the final vote tally on the decision to repeal the STV option in Texas. Indeed, Plaintiffs' expert claims that he is not attempting to analyze the intent of the Legislature as a whole or even the majority of the Legislature that cast the final vote to repeal the STV option. *Id.* at 188:3–7. He claims that there may have been a few "outliers" who voted for the repeal but did not harbor a discriminatory intent. *Id.* at 190:4–191:11. However, he cannot identify those outliers. *Id.* He admits that he is not attempting to "psychoanalyze" the intent of any particular Legislator. *Id.*

Eight Democratic members voted in favor of HB 25 on its final vote. Ex. 25. Those Democratic members include Senfronia Thompson, an African American Representative from Houston. "Mrs. T," as she is referred to by her colleges, is an "acknowledged civil rights leader" and a member of the Texas Women's Hall of Fame.[25] She is currently serving her 24th term and is both the longest-serving woman and the longest-serving African American in the Texas House. *Id.* Democratic Representatives who also voted for HB 25 on final passage include: Herbert Vo from Houston, Terry Canales from Hidalgo County, Ryan Guillen from South Texas, Ina Manjarez from San Antonio, René Oliveira from Brownsville, Mary Ann Perez from Harris County, and Joseph Pickett from El Paso. Ex. 25.[26] Such broad and diverse support among the Texas Representatives for the repeal of the STV option cannot be attributed merely to a few "outliers."

D. Plaintiffs' Partisan-Fencing Claim Fails

Plaintiffs' cannot succeed on their "partisan fencing" claim. As an initial matter, this claim is derivative of Plaintiffs' intentional racial-discrimination claim. Plaintiffs theorize that "the true

[25] https://www.house.texas.gov/members/member-page/?district=141.

[26] These legislators' party affiliations and districts can be confirmed at https://www.lrl.texas.gov/sessions/sessionsnapshot.cfm?page=members&legSession=85-0.

motivations behind HB 25 were to depress political turnout of racial and ethnic groups due to their political beliefs." ECF 6 at 33. But as shown above, that is not true. HB 25 was passed for legitimate, non-discriminatory reasons. *See supra* Part III.C. Thus, it could not have targeted "racial and ethnic groups" at all, much less "due to their political beliefs."

In any event, Plaintiffs' own evidence contradicts their theory. According to Plaintiffs' Exhibit 1, more straight ticket votes are cast by Republicans than Democrats. In every presidential election from 2000 to 2016, the Republican percentage of the straight ticket vote exceeded the Democratic percentage. *See* ECF 6-1 at 12, Figure 2. The same was true for every gubernatorial election from 1998 to 2018. *See id.*, Figure 3. Of course, Democrats receive a higher percentage of the straight ticket vote in urban counties, *see id.* at 14, Table 1, but Republicans receive a higher percentage in suburban and rural counties, *see id.* at 14–15, Tables 2–3.

Plaintiffs cannot credibly claim that the Legislature eliminated an option used mostly by Republicans in order to spite Democrats. *See supra* Part III.A.3.

Plaintiffs' claim fails not only on the facts but also on the law. *See* ECF 26 at 37–39. They rely on the 1965 decision in *Carrington v. Rash*, 380 U.S. 89 (1965). "Recent cases, however, have approached partisan fencing claims skeptically." *Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1094 (D. Ariz. 2016). First, *Carrington* does not apply because "none of the challenged provisions categorically bar any citizen of [Texas] from voting." *One Wis. Inst.*, 198 F. Supp. 3d at 928. "*Carrington* dealt with an outright prohibition on voting." *Id.* Second, even if Plaintiffs could bring a *Carrington* claim, it would be subject to "the *Anderson-Burdick* balancing framework." *Feldman*, 208 F. Supp. 3d at 1094; *see One Wis. Inst.*, 198 F. Supp. 3d at 928–29; *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 767 (S.D. Ohio), *rev'd on other grounds*, 834 F.3d 620 (6th Cir. 2016). Plaintiffs cannot satisfy *Anderson-Burdick* for the reasons explained above. *See supra* Part III.A.

Plaintiffs claim to divine "the true motivations" of Texas legislators, albeit without citing any

evidence. ECF 6 at 33. But even if they could prove that legislators voted for political reasons, it would be irrelevant. "[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." *Crawford*, 553 U.S. at 204 (plurality). "[A] provision is not unconstitutional if the legislators who passed it were partly motivated by partisan gain, so long as there were sufficient valid justifications." *One Wis. Inst.*, 198 F. Supp. 3d at 929; *see also Mich. State*, 749 F. App'x at 350; *id.* at 355 (Kethledge, J., concurring).

Finally, Plaintiffs ask this Court to decide a non-justiciable political question. The Secretary explained this principle in her motion to dismiss. *See* ECF 26 at 38–39.

CONCLUSION

Secretary Hughs respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

Date: September 2, 2020

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General
Texas Bar No. 24045446
Southern District of Texas No. 641892

PATRICK K. SWEETEN
Associate Deputy for Special Litigation

/s/ Todd Lawrence Disher
TODD LAWRENCE DISHER
Deputy Chief, Special Litigation Unit
Attorney-in-Charge
Texas Bar No. 24081854
Southern District of Texas No. 2985472

WILLIAM T. THOMPSON
Special Counsel
Texas Bar No. 24088531
Southern District of Texas No. 3053077

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548
Tel.: (512) 936-1414
Fax: (512) 936-0545
ryan.bangert@oag.texas.gov
todd.disher@oag.texas.gov
will.thompson@oag.texas.gov

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

/s/ Todd Lawrence Disher
TODD LAWRENCE DISHER