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 HUGHS, in her official capacity as the Texas Secretary of State, Defendant.	Civil Action No. 5:20-cv-128

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Texas's choice to eliminate straight-ticket voting ("STV") through HB 25 is a calculated effort to push back against a rising tide of minority electoral strength. And if allowed to take effect, it will achieve that goal. HB 25 is poised to force more than 5.6 million Texans who used STV in the prior federal election—a significantly disproportionate number of whom are African American and Hispanic—to shift from an efficient form of voting to having to make individual selections on each ballot item. This poses a serious problem in Texas, where ballots can reach lengths of as many as 95 items. As each of those voters takes significantly longer to complete their ballot in the voting booth, the lines at polling places will increase exponentially. This effect will be worst in the most populous areas of the State, where African American and Hispanic voters disproportionately live. HB 25 offers nothing to mitigate any of these effects.

The justifications for HB 25 offered by the Legislature, and now the Secretary, are pretextual. HB 25 will do nothing to make voters more "informed" or consider candidates' qualifications any more than they would have when STV was available. Ballots in Texas include no information other than candidates' names and party affiliation. Forcing voters to briefly look at, and make individual selections in, each item on their ballots has no connection to whether those voters engage in research *prior* to coming to the voting booth. And eliminating STV is far too blunt a tool to limit voter mistakes that can be prevented through much less burdensome means.

Each of the various arguments thrown into the Secretary's motion to dismiss fails. In attacking Plaintiffs' standing, the Secretary ignores significant portions of Plaintiffs' Complaint and incorporated evidence that demonstrate a substantial risk that HB 25 will cause injury to Plaintiffs, as well as their members and constituents. The Secretary has not met her burden of proving that issue preclusion can apply based on this Court's decision in *Bruni*: Plaintiff Texas Alliance for Retired Americans ("TARA") was not a party in that prior litigation, and in any event,

material factual developments have occurred since the Court's decision. Controlling Fifth Circuit precedent compels the conclusion that the Secretary is the proper defendant in this suit and that sovereign immunity poses no bar. Venue is clearly proper in this District. The Complaint sets forth detailed allegations and evidence demonstrating plausible claims under each cause of action. And the Secretary's laches defense cannot apply in this case.

NATURE AND STAGE OF PROCEEDINGS AND ISSUES PRESENTED

On March 5, 2020, Plaintiffs Bruni, DSCC, and DCCC, and others filed suit challenging HB 25. On June 24, this Court dismissed those plaintiffs' claims without prejudice on the ground that the complaint's allegations did not support a finding of impending injury. *Bruni v. Hughs*, --- F. Supp. 3d ---, 2020 WL 3452229, at *7 (S.D. Tex. June 24, 2020). On August 12, 2020, Plaintiffs in this suit filed a new complaint supplementing those prior allegations and incorporating evidence further demonstrating that HB 25 will cause injury to Plaintiffs, as well as their members and constituents. On August 31, the Secretary filed the instant Motion to Dismiss. ECF No. 26 ("MTD"). The Motion presents the following issues:

1. Does at least one of Plaintiffs have standing to challenge HB 25?

   Yes. Plaintiffs' injury is not speculative, and the Secretary's facial attack to Plaintiffs' standing fails.

   Standard: To obtain dismissal in her facial attack on Plaintiffs' standing allegations, the Secretary must prove "that it is beyond doubt that [no] plaintiff can[] prove a plausible set of facts that support" standing. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

2. Has the Secretary met her burden of demonstrating that the Court can, and should, apply issue preclusion to the question of whether Plaintiffs' injury is speculative?

   No. TARA and its members and constituents, who were not litigants in *Bruni*, were not adequately represented by the plaintiffs in that litigation, and the underlying facts determining Plaintiffs' standing have changed since this Court's decision in *Bruni*.

   Standard: "A party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representatives are aligned; and (2) either the party understood herself to be acting in a representative capacity or the

original court took care to protect the interests of the nonparty." *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008). And "changes in facts essential to a judgment [] render collateral estoppel inapplicable in a subsequent action raising the same issues." *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 479 (5th Cir. 2002) (quoting *Montana v. United States*, 440 U.S. 147, 159 (1979)).

3. Do Plaintiffs have standing to sue the Secretary?

Yes. "The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017).

Standard: Plaintiffs have standing to sue the Secretary so long as their injury is "fairly traceable to" and "redress[able]" by the Secretary. *Gordon v. City of Houston*, 79 F. Supp. 3d 676, 680-81 (S.D. Tex. 2015).

4. Does sovereign immunity bar this suit?

No. *Ex parte Young* applies, and the Voting Rights Act ("VRA") abrogated Texas's sovereign immunity.

Standard: Sovereign immunity poses no bar to a plaintiff who (1) seeks prospective injunctive relief (2) against a state actor who has "some connection" to the challenged law's implementation. *K.P. v. LeBlanc*, 627 F.3d 115, 124-25 (5th Cir. 2010).

5. Has the Secretary met her burden of proving that venue is improper in this District?

No. HB 25 will injure Plaintiff Bruni, a resident of this District, as well as a vast number of TARA, DSCC, and DCCC's members and constituents who live in this District.

Standard: Venue is proper in any district where "a substantial part of the events . . . giving rise to the claim" will occur. 28 U.S.C. § 1391(b)(2).

6. Do Plaintiffs plausibly allege HB 25 violates the First, Fourteenth, and Fifteenth Amendments, as well as Section 2 of the VRA?

Yes. Plaintiffs state a plausible claim for each cause of action they assert.

Standard: Dismissal under Rule 12(b)(6), which is "viewed with disfavor and is rarely granted," "is appropriate only if the complaint fails to plead 'enough facts to state a claim to relief that is plausible on its face.'" *Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (quoting *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011)). In reviewing the pleadings, the Court must take Plaintiffs' "facts as true . . . and the inferences to be drawn therefrom, in the light most favorable to" Plaintiffs. *Id.* at 413.

7. Has the Secretary satisfied her burden to prove that laches warrants dismissing Plaintiffs'

case?

No. As a matter of law, laches cannot apply in this case. Even if it could, the Secretary has not met her burden.

Standard: "[L]aches may not be used as a shield for future, independent violations of the law." *Env't Def. Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981). Laches requires a defendant to prove "inexcusable delay causing undue prejudice to the party against whom the claim is asserted." *Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98, 101 (5th Cir. 1978).

ARGUMENT

I. Plaintiffs have standing to litigate their claims.

HB 25 will cause each of the four Plaintiffs concrete and particularized injuries. Because Plaintiffs all seek the same injunctive relief, however, only one needs standing to support the Court's jurisdiction. *Texas v. United States*, 945 F.3d 355, 377–78 (5th Cir. 2019).

Because the Secretary offers only a facial challenge to Plaintiffs' standing, the Court treats this motion the same as one under Rule 12(b)(6), "accept[ing] as true all material allegations of the complaint and . . . constru[ing] the complaint in favor of the complaining party." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (internal quotation marks omitted). The Court may dismiss for lack of standing only if "it is beyond doubt that [no] plaintiff can[] prove a plausible set of facts that support" their standing. *Lane*, 529 F.3d at 557.

A. Plaintiffs' injuries are not speculative.

1. Plaintiffs' additional allegations and evidence, ignored by the Secretary, demonstrate that HB 25 will increase polling place lines.

Because Plaintiffs assert their claims not only on their own behalf but also on behalf of their members and constituents, *see infra* Section I.B.1, they need only allege facts demonstrating "at least a 'substantial risk'" that HB 25 will force *one* of TARA, DSCC, or DCCC's members or constituents to encounter a longer wait time at the polls as a result of HB 25. *Lewis v. Hughs*, --- F. Supp. 3d ---, 2020 WL 4344432, at *8 (W.D. Tex. July 28, 2020), *aff'd* No. 20-50654 (5th Cir.

Sept. 4, 2020). Importantly, for purposes of evaluating standing, Plaintiffs need not show that this increase in wait times will be substantial: because "Article III's requirement is 'qualitative, not quantitative in nature,'" the "injury 'need not be substantial' or anything more than an 'identifiable trifle.'" *Id.* (quoting *OCA-Greater Houston*, 867 F.3d at 612).

Allegations and evidence included in the Complaint in this case that were not offered in the complaint in *Bruni* demonstrate a substantial risk that at least one of TARA, DSCC, or DCCC's members or constituents will have to wait in a longer line as a result of STV's elimination. The Secretary's motion does not respond to any of these new allegations or evidence. Specifically, the Secretary's motion utterly ignores the declarations of Fort Bend County Elections Administrator John Oldham and Dr. Muer Yang, both of which demonstrate that eliminating the STV option will increase wait times at the polls this November. Relying on his expertise developed during a long career in elections administration, Mr. Oldham explains that eliminating the STV option "will cause a significant increase in the average amount of time Texas voters will spend casting their votes," which will "produce a significant increase in wait times at the polls." ECF No. 1-1 ("Oldham Decl."), at ¶¶ 4-5. And as Dr. Yang explains, because of the "non-linear relationship between voting time and average wait times," even small increases in voting time can produce large increases in wait times at the polls. ECF No. 1-2 ("Yang Decl."), at ¶ 20. Dr. Yang illustrates this relationship by showing how wait times at polling places in 2016 would have increased dramatically had the average voting time increased by just small amounts. For example, in Travis County, had average voting time been just 79 seconds more, average polling place wait times would have nearly *tripled*. Yang Decl. ¶ 42. The Secretary's only response to this evidence—that Dr. Yang does not make a prediction "about 2020 in-person turnout," MTD at 13—is inapposite. The purpose of Dr. Yang analysis is not to predict what occurs in 2020, but instead to demonstrate

that even small increases in average voting time—which, in Mr. Oldham's view, will occur as a result of HB 25—have the effect of significantly increasing wait times at the polls.

The Secretary's claim that local officials can take action to mitigate the increase in wait times caused by HB 25, MTD at 12, also ignores Mr. Oldham's declaration, which explains that such officials cannot do so. The need to maintain social distancing within polling places during the upcoming general election prevents local officials from increasing the number of voting machines in polling places, and in many instances will require *decreasing* the number of machines compared to prior elections. Oldham Decl. ¶ 7. And the combination of reluctance among venues to serve as polling places and a pollworker shortage prevents counties from increasing the number of polling places—and in many instances will require *decreasing* the number of polling places—provided to voters. *Id.* ¶¶ 8-9. The Secretary's motion not only fails to respond to this evidence, it does not even acknowledge the existence of Mr. Oldham's declaration.

The Secretary's claim that the pandemic might decrease in-person turnout at certain polling places does not render speculative the assertion that HB 25 will increase wait times at the polls. As an initial matter, there is little reason to believe turnout will decrease this fall. Because Texas law allows only a tiny fraction of voters in the state to vote by mail, *see* Compl. ¶¶ 34, 61, the vast majority of Texas voters will have to vote in person. To the extent the Secretary suggests that some voters will simply forgo their right to vote due to fears over the coronavirus, it cannot be the case that the State's decision to force Texans into a choice between their vote and their health immunizes other laws that impose even more burdens on those same voters. And in any event, record turnout in Texas's July 14 election indicates that, despite the pandemic, turnout this fall—particularly during highly contested presidential and senate elections—will be even higher than

normal.[1] In Travis County, for example, turnout in July was *nearly nine times* as high as the turnout in the 2016 primary run-off, despite the ongoing pandemic.[2] But most importantly, even if turnout at certain polling places this November is lower than usual, Mr. Oldham's declaration demonstrates that whatever decrease in wait times that lower turnout would have caused will be offset by decreases in the number of polling places and voting machines made available to voters, as well as November's abnormally long ballot. Oldham Decl. ¶¶ 7-10. For the same reason, the Governor's expansion of the early voting by just six days, MTD at 25, will not measurably decrease lines at the polls, particularly when early voting in Texas *already* involves long wait times. Compl. ¶¶ 32, 40 (noting hours-long waits during early voting in past elections).[3]

As a final matter, the Secretary's motion says nothing about elections occurring after this November. As the Complaint explains, the increase in wait times caused by HB 25 will "be even more drastic in 2022" because "Texas's ballots in midterm-year elections are *much* longer than those in presidential-year elections." Compl. ¶ 58. Thus, the risk of injury resulting from HB 25 in future elections is even more substantial.

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[1] *See* Matthew Watkins, *Nearly 1 million people voted in Tuesday's Democratic Runoff. The party says it's a sign of strength to come in November*, Tex. Trib. (July 15, 2020), https://www.texastribune.org/2020/07/15/texas-democrats-primary-runoff-turnout/ (noting turnout this year was *double* the turnout in 2018); Nicholas Reimann, *Trending Blue: Texas Shatters Record for Turnout in Democratic Runoff*, Forbes (July 15, 2020), https://www.forbes.com/sites/nicholasreimann/2020/07/15/trending-blue-texas-shatters-record-for-turnout-in-democratic-runoff/#5f16d2d81fb5.

[2] Ashley Goudeau, *Texas This Week: Primary Runoff Election recap*, KVUE (July 19, 2020), https://www.kvue.com/article/news/politics/texas-this-week/texas-primary-runoff-election-results-texas-this-week/269-9a9d36fa-b36e-4ea9-8a5f-9cbd561d2af4.

[3] The fact that most polling-place lines will be *longer* than usual due to the pandemic does not immunize HB 25 from challenge, either. If lines at the polls are longer than usual, the increase in voting time caused by HB 25 will exacerbate those wait times even further, compounding the burden on voters.

2. TARA's absence from the prior litigation and intervening new facts prohibit application of issue preclusion.

The Secretary has failed to meet her burden of proving that the Court's decision in *Bruni* can and should preclude Plaintiffs from asserting their claims in this case. First, Plaintiff TARA was not involved in any way in *Bruni*, and the Secretary's tortured effort to connect TARA to the Texas Democratic Party ("TDP") is far too tenuous. Second, significant intervening facts have occurred since the Court's decision in *Bruni*—most significantly, serious election administration problems involving Texas's July 14 election—that make that decision's reasoning inapplicable.

It is the Secretary's burden to prove that issue preclusion applies under the circumstances of this case. *Taylor*, 553 U.S. at 906-07. Moreover, because issue preclusion "is an equitable doctrine," not only must the Secretary prove each requirement of the doctrine, she must also prove that the doctrine *should* be applied under the circumstances. *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1423 (5th Cir. 1995).

a. Issue preclusion cannot apply to the question of TARA's standing.

TARA was not a party in *Bruni*. Time and again, the Supreme Court has "emphasize[d] the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party," and has permitted exceptions to that rule only in "limited circumstances." *Taylor*, 553 U.S. at 898 (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 762 n.2 (1996)). The Secretary fails to prove any of these limited exceptions.

First, TARA was not "adequately represented by" TDP's participation in *Bruni*. *Id.* at 894. "A party's representation of a nonparty is 'adequate' for preclusion purposes only if, *at a minimum*: (1) The interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 900 (citation omitted and emphasis added); *see also Limon v.*

Berryco Barge Lines, L.L.C., 779 F. Supp. 2d 577, 586 (S.D. Tex. 2011) (failure to make each of these showings prevented application of issue preclusion). The Secretary has not come close to meeting her burden of proving these minimum requirements.[4]

In this context, alignment of interests is not just a temporary shared "incentive" to pursue a claim; the two parties must share "the same interest." *Id.* at 894, 897. Yet, the Secretary offers no evidence that TARA and TDP's interests are the same, other than to point out the fact that TARA is asserting the same claims in this suit as TDP did in *Bruni*, and that they share the same counsel. MTD at 10. But the Supreme Court has explicitly held such facts do *not* demonstrate an alignment of interests. *Taylor*, 553 U.S. 897 (holding the "D.C. Circuit misapprehended" Supreme Court precedent in concluding that two parties' interests were aligned because they shared a strong "incentive" to litigate identical claims and hired the same lawyer). In any event, TDP's and TARA's interests are not the same. TARA is "a 501(c)(4) nonprofit, social welfare organization" whose "mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work." Compl. ¶ 21. TDP, by contrast, "is a statewide organization representing Democratic candidates and voters" whose "purpose is to elect Democratic Party candidates." No. 5:20-cv-35, ECF No. 16 ¶ 23. These missions are fundamentally different. Indeed, as a 501(c)(4) social welfare organization, TARA *cannot* have the same mission as TDP.[5]

Nor has the Secretary proven that TDP "understood it[self] to be acting in a representative

[4] To the extent *Miller v. Wright*'s single sentence on this issue suggests that nonparty preclusion can be triggered based on lesser grounds such as mere "substantial commonality of [] interests," 705 F.3d 919, 928 (9th Cir. 2013), that out-of-circuit authority is irreconcilably inconsistent with the Supreme Court's description of the "minimum" elements of adequate representation, *Taylor*, 553 U.S. at 900, 901.

[5] IRS, *Social Welfare Organizations*, https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations (explaining that the "primary activity" of a 501(c)(4) social welfare organization cannot be partisan).

capacity" for TARA when litigating *Bruni*. *Taylor*, 553 U.S. at 900. The Secretary's only attempt at making this showing is to draw a vague, meandering line of affiliations through an additional nonparty organization, Texas AFL-CIO. According to the Secretary, because TARA is a "constituent group" of Texas AFL-CIO, and Texas AFL-CIO is an "auxiliary organization" of TDP, "surely" TDP "understood itself to be acting on" TARA's behalf in *Bruni*. MTD 10-11. But the Secretary does not bother to explain what the terms "constituent group" and "auxiliary organization" mean, let alone how or why they are legally significant, despite that it was her burden to do so. Nor does the Secretary explain why she assumes that TDP's explicit assertion of claims on behalf of Democratic voters and candidates in Texas "surely" means that it also silently intended to sue on behalf of any organization with which it was "affiliated." *Id.*

In any event, the Secretary's argument is legally insufficient to invoke nonparty preclusion. The Secretary's position would "authorize preclusion based on identity of interests and *some kind of relationship* between [TDP] and [TARA]," which is exactly the sort of "virtual representation" test the Supreme Court rejected in *Taylor*. 553 U.S. at 901. If this undefined, hopscotch connection between TDP and TARA could be the basis for denying TARA its "day in court," the limited circumstances in which nonparty preclusion is allowed would be "stretche[d]" "beyond meaningful limits." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 339 (5th Cir. 1982).

Second, the Secretary resorts to mischaracterizing Plaintiffs' allegations in making the baseless assertion that TDP and TARA's members and constituents are one and the same. MTD at 11. In *Bruni*, TDP asserted claims on behalf of its members and constituents, *i.e.*, Democratic voters and candidates. No. 5:20-cv-35, ECF No. 16 ¶ 23. Here, TARA asserts claims on behalf of its own members and constituents, *i.e.*, retired Texans. According to the Secretary, every single member or constituent of TARA must be a Democratic voter or candidate. MTD at 11.

Unsurprisingly, the Secretary offers no evidence that this is the case, despite that it was her burden to do so. Instead, she takes a quote from the Complaint *out of context*, claiming that in this case, TARA is asserting claims only on behalf of "voters who support the Democratic Party." MTD 11 (quoting Compl. ¶ 15). That is false. TARA asserts its claims on behalf of *all* of its members and constituents, Compl. ¶ 21, and the Secretary offers nothing to meet her burden of showing that every single one of those individuals is a Democrat.

Because TARA was not adequately represented by TDP in *Bruni*, the Court's decision in that case cannot be used to deny TARA its day in court.

b. The facts underlying Plaintiffs' claims have changed.

Separately, issue preclusion cannot apply to the question of Plaintiffs' standing because material events relevant to this question occurred after the Court's decision in *Bruni*. "[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Baby Dolls*, 295 F.3d at 479 (quoting *Montana*, 440 U.S. at 159). On July 14—three weeks after the Court's ruling and more than two months after briefing on the motion to dismiss concluded—Texas held its primary run-off election in the midst of the coronavirus pandemic. That effort revealed serious elections administrative problems that will repeat themselves in November and prevent election administrators from taking measures to mitigate the lines that HB 25 will produce, such as adding polling place locations or increasing the number of voting machines made available to voters. For example, "[s]hortly before voting started for the most recent July primary run-off, the operators of several buildings that previously served as Fort Bend County polling places refused to allow their spaces to be used for the election" due to fears over the pandemic. Oldham Decl. ¶ 8. Moreover, "a significant number of poll workers in Fort Bend County dropped out" due to the same. *Id.* ¶ 8-9. And the need to maintain social distancing forced local officials to significantly reduce the number of voting machines within polling places.

Compl. ¶ 14. These issues occurred throughout the state. *Id.* ¶¶ 71-73.

These new facts are highly relevant to, and alter the analysis of, the question of whether Plaintiffs' claims are speculative. In *Bruni*, the Court reasoned that Plaintiffs injuries were speculative because of the possibility that "local officials will [] use their state-law authority to ameliorate the situation at polling-places." 2020 WL 3452229, at *6 (internal quotations omitted). The intervening events surrounding the July 14 election described in the Complaint and Mr. Oldham's declaration, however, make clear that the pandemic will severely "limit Texas counties' ability to implement measures that would otherwise mitigate the increase in wait times resulting from the elimination of the [STV] option." Oldham ¶ 6. As explained, because those officials are no longer able to mitigate the increase in lines that HB 25 produces, the prospect that just one of TARA, DSCC, or DCCC's members or constituents will face an even longer line in November due to HB 25 increases significantly.

B. TARA, DSCC, and DCCC have associational and direct standing.

Plaintiffs TARA, DSCC, and DCCC (the "Organizational Plaintiffs") present classic examples of both associational and organizational standing. The Organizational Plaintiffs have standing to sue on behalf of their members, whose rights HB 25 will directly violate. HB 25 will also directly harm the Organizational Plaintiffs by frustrating their missions of turning out voters. That harm has forced, and will force, these plaintiffs to divert resources away from existing projects and towards efforts to ensure voters are not disenfranchised by the long lines HB 25 creates. HB 25 will also directly injure DSCC and DCCC by harming their candidates' electoral prospects.

1. Associational Standing

The Organizational Plaintiffs possess associational standing to challenge HB 25 on behalf of their members and constituents, who include hundreds of thousands of retirees (TARA), and

millions of Democratic voters and the candidates they support (DSCC and DCCC). Compl. ¶¶ 21, 22-23. Each organizational plaintiff easily satisfies the doctrine's three elements: (1) their "members would independently meet the Article III standing requirements"; (2) the voting rights interests at stake are "germane" to each organization's purpose; and (3) "neither the claim[s] asserted nor the relief requested requires participation of individual members." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) ("*TDP*") (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). First, there can be no question that the Organizational Plaintiffs' members and constituents—Texas retirees and Democratic candidates and voters, a substantial proportion of whom are African American and Hispanic—can challenge HB 25 based on the voting-rights injuries alleged in the Complaint. *See id.* at 587-88. Second, the ability to turn out voters in Texas are germane to the mission of each organization. For TARA, getting voters to turnout in elections is crucial to their mission of enacting legislation that "ensure[s] social and economic justice and full civil rights [for] retirees." Compl. ¶ 21. As for DSCC and DCCC, "the goal of a political party is to gain control of government by getting its candidates elected." *TDP*, 459 F.3d at 588. These missions are germane to this suit, which challenges a law that will impede Texans' ability to cast votes. And third, "nothing requires the participation" of retirees, Democratic candidates, or Democratic voters, whose interests are fully represented by the Organizational Plaintiffs.

The Secretary's assertion that Plaintiffs' complaint must "identif[y] [] specific members" that will be harmed by HB 25, MTD at 14, has no legal basis. "[N]o precedent hold[s] that an association must set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on a lack of associational standing." *Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012). Indeed, multiple federal courts in

Texas have recently rejected *exactly* this argument. *Lewis*, 2020 WL 4344432, at *10 ("Importantly, and contrary to the Secretary's assertion, the association need not set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion . . ." (internal quotation marks omitted)); *Tex. Democratic Party v. Hughs*, --- F. Supp. 3d ---, 2020 WL 4218227, at *4 (W.D. Tex. July 22, 2020) (same). This is particularly so in the voting rights context, and for political parties such as DSCC and DCCC: "political parties have standing to assert, at least, the rights of its members who will vote in an upcoming election," even when they "c[an] not identify *specific* voters that would be affected; it is sufficient that some inevitably would." *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016).[6]

Neither *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009), and *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010), support the Secretary's argument, MTD at 14, as neither case involved the sufficiency of *pleadings*; rather, they discussed what must be proven at *trial*. For the same reason, contrary to the Secretary's unsupported claim, MTD at 14-15, there is no requirement that an organizational plaintiff plead their membership structure. *Lewis*, 2020 WL 4344432, at *10 (rejecting exactly the same argument and concluding that organizational plaintiffs had associational standing based on allegations that "they are membership organizations and that the challenged restrictions injure their membership's right to vote"); *Democratic Nat'l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 763-64 (W.D. Wis. 2020) (finding state party had associational standing based only on allegation that it was a "membership organization" and the challenged laws

[6] *See also Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (holding it was unnecessary for state party to "identif[y] specific voters" impacted by challenged law); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1337 (N.D. Ga. 2018) (state party had standing to sue on behalf of its "tens of thousands" of unidentified voter members because it was "extremely unlikely" the challenged provisions would "not affect a single Democratic Party member"); *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 578 (E.D. Va. 2015) (finding *Summers* did not require state party to identify harmed members in its complaint).

"place[d] undue burdens on [its] members' right to vote").

2. Direct Organizational Standing

Separately, the Organizational Plaintiffs have sufficiently pled two forms of direct organizational injury. First, they have pled (1) a diversion of organizational resources to identify and counteract HB 25's unlawful action, and (2) frustration of their missions. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This diversion need not be "large" or "substantial," and "it need not measure more than an 'identifiable trifle.'" *OCA*, 867 F.3d at 612 (quoting *Ass'n of Comm. Orgs. For Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999)).

HB 25 will impose severe burdens on Texas voters by subjecting them to unreasonably long polling-place lines. Compl. ¶¶ 22-27. This in turn will harm the Organizational Plaintiffs' basic mission, which is to turn out voters supportive of the candidates that the Organizational Plaintiffs endorse. *Id.* ¶¶ 21, 22-23. HB 25 will force TARA to divert resources away from its normal voter registration activities, as well as activities "aimed at expanding [TARA] itself, such as recruiting new members, opening new chapters, and making presentations." Compl. ¶ 21. And it will force DSCC and DCCC to divert resources away from their normal get-out-the-vote efforts, supporting individual campaigns, and developing programs benefiting Democratic Party candidates. *Id.* ¶¶ 22-23. Those resources instead will be used by each of the parties to educate voters about HB 25's change in the law and provide assistance to voters who otherwise would be unable to withstand, or discouraged by, the unreasonably long polling-place lines HB 25 creates.

The Secretary's assertion that these allegations are insufficient again ignores controlling case law. *See* MTD at 16. At the pleadings stage, Plaintiffs need not provide detailed descriptions of the activities from which its funds will be diverted to combat the effects of HB 25. In *Havens Realty*, the Court held that plaintiffs' allegations, which stated only that defendants' "racial steering practices" frustrated their "efforts to assist equal access to housing through counseling

and other referral services" by forcing them "to devote significant resources to identify and counteract the defendant[s'] racially discriminatory steering practices," were sufficient to withstand a motion to dismiss. 455 U.S. at 379; *see also Bostelmann*, 447 F. Supp. 3d at 764 (finding complaint sufficiently pled organizational standing by alleging "the challenged provisions will require [the state party] to 'expend additional resources to assist their members and constituents to overcome [alleged] burdens to exercise their right to vote'").

In any event, even cases from beyond the pleading stage demonstrate Plaintiffs' allegations are sufficient. In *OCA*, plaintiff's mission was "to promote civic participation and provide civic education, which it carrie[d] out through a 'Get Out the Vote' initiative." 867 F.3d at 609. Because the challenged law impeded "some" of the plaintiff's members from voting, plaintiff "redirected some of its efforts and resources toward educating its members and other members of the public about" the challenged law. *Id.* at 609-10. The Fifth Circuit held this was clearly sufficient for purposes of organizational standing because these voter education efforts "consumed [plaintiff's] time and resources in a way they would not have been spent." *Id.* at 612. And the court rejected the exact argument the Secretary offers here, MTD at 16, *i.e.*, that this reaction to the challenged law was merely a continuation of the plaintiff's normal operations. Because HB 25 will force the Organizational Plaintiffs to divert resources away from other efforts, they have standing to challenge that law. *See also Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (political party had standing because challenged ID law caused it to "devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote"); *TDP*, 459 F.3d at 586-87 (holding political party had standing to challenge state action based on identical diversion of resources theory).

Second, HB 25 will independently injure DSCC and DCCC by directly harming their

candidates' electoral prospects. The "threatened loss of power" flowing from an electoral defeat is "a concrete and particularized injury sufficient for standing purposes." *Id.* at 587. A "political party's interest in a candidate's success is not merely an ideological interest," but instead a threat to the party's ability to "direct the machinery of government toward the party's interests." *Id.* Here, Plaintiffs allege HB 25 will have a disproportionate effect on African American and Hispanic Texans, who overwhelmingly support the Democratic Party. Compl. ¶¶ 53-68. Indeed, this was exactly HB 25's purpose. *Infra* Sections VI-VII. This specifically alleged disproportionate effect will harm DSCC and DCCC's candidates' electoral prospects, causing them injury "sufficient for standing purposes." *TDP*, 459 F.3d at 587.

3. The Secretary's "statutory standing" argument is baseless.

Two courts recently rejected the Secretary's argument that organizations are barred from suing under Section 1983, MTD at 16-17. *See Lewis*, 2020 WL 4344432, at *10 n.2; *Tex. Democratic Party*, 2020 WL 4218227, at *6. And for good reason: the Fifth Circuit has long held that organizations may assert Section 1983 claims under an associational-standing theory. *Ass'n of Am. Physicians & Surgeons*, 627 F.3d at 551 (group had standing to assert § 1983 claims on behalf of members); *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1279 (5th Cir. 1981); *see also Allee v. Medrano*, 416 U.S. 802, 819 n.13 (1974); *Jornaleros de Las Palmas v. City of League City*, 945 F. Supp. 2d 779, 800 (S.D. Tex. 2013).[7]

[7] The Secretary's argument confuses associational standing with third-party standing, a completely different doctrine. Her reliance on *Danos v. Jones*, 652 F.3d 577 (5th Cir. 2011), demonstrates this mistake. *Danos* involved a case considering the standing of an *individual* seeking to assert a claim on behalf another individual. That attempt invoked the "third-party standing" doctrine, which in certain circumstances allows an individual to assert a claim on behalf of another individual when the two share a close relationship and the second is hindered from asserting the suit on her own behalf. *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). That doctrine does not apply here.

C. Plaintiff Bruni

HB 25 will also directly injury Plaintiff Bruni. The injury-in-fact requirement is meant "to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). This element "is 'very generous' to claimants, demanding only that the claimant 'allege[] some specific, 'identifiable trifle' of injury.'" *Cottrell v. Alcon Laboratories*, 874 F.3d 154, 162 (3d Cir. 2017) (quoting *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982)).

Ms. Bruni alleges direct injury caused by HB 25 by way of her current position as the chair of the Democratic Party of Webb County. Compl. ¶ 21. HB 25 will directly harm Ms. Bruni because it will lead to increased polling place lines that will burden voters who would otherwise support the candidates for whom Ms. Bruni campaigns and fundraises. *See Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58, 63 (D.D.C. 2000) ("[P]olitical actors may bring suit when they are competitively disadvantaged by government action."); *TDP*, 459 F.3d at 587 (holding a threat to electoral prospects and resulting campaign expenditures are "sufficient to give a candidate standing to protest the action causing the harm").

Ms. Bruni will also have to divert her time and resources to educate voters about HB 25's alteration of a longstanding voting procedure, as well as to assist and encourage voters who otherwise would be discouraged from the polling-places lines that HB 25 will produce. Compl. ¶ 22. This diversion of resources is a separate injury that confers standing. In fact, Ms. Bruni's allegations are indistinguishable from those in *Lee*, in which the court found two individuals active in "voter registration, voter education, and Get-Out-The-Vote efforts" had standing by alleging Virginia's voter ID law would require them "to expend additional resources and effort," including "an educational component as well as the need to encourage voters to remain in line to cast[] their

votes despite the time required." 155 F. Supp. 3d at 578-79.

II. As Texas's Chief Election Officer, the Secretary is the proper defendant in this facial challenge to a law governing Texas's elections.

In just the last five months, the Fifth Circuit has twice rejected the exact arguments the Secretary offers here regarding her role in implementing HB 25, MTD at 17-22. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 399, 401-02 (5th Cir. 2020); Ex. 1 (*Lewis v. Hughs*, No. 20-50654 (5th Cir. Sept. 4, 2020)).

A. Controlling Fifth Circuit case law demands the conclusion that Plaintiffs' injuries are fairly traceable to and redressable by the Secretary.

The Secretary's effort to evade this litigation by renouncing her central role in Texas's elections is foreclosed by controlling Fifth Circuit precedent. "The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" *OCA*, 867 F.3d at 613 (quoting Tex. Elec. Code § 31.001(a)). Here, Plaintiffs bring a facial challenge to a generally applicable Texas election statute. Under *OCA*'s clear holding, Plaintiffs' injuries are "fairly traceable to and redressable by" the Secretary. *Id.* Just five months ago, the Fifth Circuit reaffirmed this principle in response to the exact argument the Secretary offers here. *Tex. Democratic Party*, 961 F.3d at 399 (rejecting argument that plaintiffs lacked standing because "local, rather than state, officials" implemented the challenged provision of the Texas Election Code).

The Secretary does not even attempt to distinguish *OCA* or *Texas Democratic Party*. She instead points to *Okpalobi*, MTD at 22, which, as *OCA* itself explains, 867 F.3d at 613-14, has no application in a challenge to an election law. *Okpalobi* involved a law providing unlimited liability against doctors in suits by patients for damages caused by abortion procedures. *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc). The court concluded plaintiffs' injuries were caused by those private suits, not state officials who had no "enforcement connection with the challenged

statute." *Id.* at 415. As *OCA* explains, *Okpalobi* has no application in a challenge to Texas's election laws because the Secretary, who is "the 'chief election officer of the state' and is instructed by statute to 'obtain and maintain uniformity in [such laws'] application, operation, and interpretation,'" sufficiently implements those laws to render her the proper defendant. 867 F.3d at 613-14 (quoting Tex. Elec. Code §§ 31.001(a), 31.003).

B. Under *Ex parte Young*, and given the VRA's abrogation of Texas's sovereign immunity, the Eleventh Amendment poses no bar to Plaintiffs' claims.

For the same reasons the Secretary is a proper defendant in this suit, the *Ex parte Young* exception to sovereign immunity applies. *Ex parte Young* permits Plaintiffs' claims against the Secretary so long as: (1) the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002), and (2) the Secretary has "'some connection' to the state law's enforcement." *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 517 (5th Cir. 2017) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). As to the first inquiry, there can be no question Plaintiffs allege that HB 25 will violate their rights under federal law and seek a prospective injunction against HB 25's enforcement.

As for the second inquiry, the Fifth Circuit has now *twice* rejected the Secretary's assertion that she does not implement the Texas Election Code sufficiently to invoke *Ex Parte Young*, MTD at 19-21. Ex. 1; *Tex. Democratic Party*, 961 F.3d at 401. In fact, the Fifth Circuit in *Lewis* summarily affirmed the Secretary's appeal of this issue on the ground that her argument lacks a "substantial question." Ex. 1. The Fifth Circuit's controlling position on this issue makes sense, particularly here, where the Secretary has much more than just "some connection" to HB 25's enforcement. "Enforcement" in this context means only that the Secretary has some "responsibilities" in HB 25's implementation or that she "effectively ensures that the [statutory]

scheme is enforced." *Air Evac EMS*, 851 F.3d at 519; *K.P.*, 627 F.3d at 124-25. Whether this connection "arises out of the general law, or is specially created by the [challenged] act itself, is not material so long as it exists." *K.P.*, 627 F.3d at 124. Here, the Secretary holds clearly defined responsibilities in HB 25's implementation. She must "obtain and maintain uniformity" in HB 25's "application, operation, and interpretation"; she must "adopt rules and establish procedures" to effectuate its elimination of STV; and when HB 25 takes effect, she must instruct counties and voters that STV may no longer be included on Texas's ballots. Tex. Elec. Code §§ 31.003, 31.012(b-1), 31.012(d).

The Secretary's argument regarding mandatory injunctions, MTD at 21, is irrelevant. Plaintiffs seek a prohibitory, not mandatory, injunction: they ask the Court to maintain the status quo by preventing HB 25's elimination of STV, which Texas has had for a century. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (prohibitory injunctions "maintain the status quo").[8]

Finally, the Fifth Circuit has squarely held that the VRA abrogates sovereign immunity. *OCA*, 867 F.3d at 614. The Eleventh Amendment thus poses no bar to Plaintiffs' VRA claim.

III. Venue in this District is proper.

Venue is proper because "a substantial part of the events . . . giving rise to [Plaintiffs'] claim[s]" will occur within the Southern District of Texas. 28 U.S.C. § 1391(b)(2). In 1990,

[8] In any event, the Secretary's argument is wrong, as demonstrated by the long line of cases applying *Ex parte Young* to impose mandatory injunctions. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (holding *Ex parte Young* permitted forcing State to remediate harms caused by prior constitutional violations); *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 387-88 (5th Cir. 2014) (noting school board "remained subject to affirmative obligations" by permanent injunction issued by court in 1974 to remedy constitutional harms); *Common Cause Ind. v. Marion Cnty. Election Bd.*, 311 F. Supp. 3d 949, 977 (S.D. Ind. 2018), *vacated on mootness grounds*, 925 F.3d 928 (7th Cir. 2019) (issuing injunction requiring county election board to establish satellite early voting centers for general election).

Congress "liberalized" § 1391(b)(2) by altering its prior focus on "the" judicial district in which such events occurred or will occur, to "a" judicial district in which such events occurred or will occur. *Udeobong v. Hawkins*, Civ. A. No. H-08-1833, 2009 WL 7326072, at *1-2 (S.D. Tex. Feb. 19, 2009). In doing so, Congress clarified that a given case will often have "more than one proper venue." *Id.* For this reason, courts in this District and several other circuit courts reject the Eighth Circuit case law relied on by the Secretary, MTD at 22 (citing *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995)), because it approaches the venue inquiry far too narrowly. *Udeobong*, 2009 WL 7326072, at *2 (collecting cases).

Contrary to the Secretary's contention, MTD at 22, "[w]hen moving to dismiss for lack of proper venue pursuant to Rule 12(b)(3) . . . , the defendant has the burden to demonstrate affirmatively that the plaintiff filed the lawsuit in an improper venue." *Bounty-Full Ent., Inc. v. Forever Blue Ent. Grp., Inc.*, 923 F. Supp. 950, 957 (S.D. Tex. 1996); *MacPhail v. Oceaneering Int'l, Inc.*, 170 F. Supp. 2d 718, 720 (S.D. Tex. 2001) (same).

Particularly in cases involving constitutional challenges, venue is appropriate in districts where the defendant's conduct will cause injury. "The Supreme Court has explained that § 1983 actions are similar to personal injury torts," for which "venue is proper where the alleged injury occurred" (or, in a case seeking injunctive relief against future injury, will occur). *Udeobong*, 2009 WL 7326072, at *2. As a result, "when challenging the actions of state government officials, proper venue lies both at the government's offices and where the effects of the decision are felt." *Id.* The Secretary's contrary approach, which considers only where she "maintain[s] an office," MTD at 23, would render § 1391(b)(2) superfluous, as § 1391(b)(1) already sets forth a separate basis for venue in "a judicial district in which any defendant resides." It would also produce the plainly incorrect result that no suit challenging a statewide election law could be litigated anywhere

but the Western District. The sheer number of such cases that have been litigated outside the Western District confirm the falsity of this unsupported theory. *E.g.*, *Lopez v. Abbott*, Civ. A. No. 2:16-cv-303 (S.D. Tex.) (statewide election of judges); *Veasey v. Abbott*, No. 2:13-cv-193 (S.D. Tex.) (statewide voter ID law); *Voting for Am., Inc. v. Andrade*, No. 3:12-cv-44 (S.D. Tex.) (statewide registration law); *Session v. Perry*, No. 2:03-cv-354 (E.D. Tex.) (statewide redistricting plan); *Vera v. Bush*, No. 4:94-cv-277 (S.D. Tex.) (statewide redistricting plan); *Cotham v. Garza*, No. 4:94-cv-4033 (S.D. Tex.) (statewide law restricting what may be brought into voting booths).

HB 25 will cause substantial injuries in this District, making it a proper venue for this case. HB 25 will violate the fundamental rights of voters throughout this District, which covers a fourth of the State, including a vast number of TARA, DSCC, and DCCC's members and constituents. Compl. ¶¶ 53-68. In fact, some of the highest rates of STV use, the longest polling place lines, and the lengthiest ballots exist in the Southern District. *Id.* ¶¶ 31, 33, 40-42. HB 25's effects will be most devastating in those areas. HB 25 will also directly impede Ms. Bruni, acting in her capacity as the Chair of the Webb County Democratic Party, from turning out Webb County voters who support Democratic candidates. *Id.* ¶ 22.

IV. Plaintiffs plausibly allege that HB 25 will unduly burden Texans' right to vote.

To challenge Plaintiffs' *Anderson-Burdick* claim, the Secretary offers her own version of the facts. But in resolving this Rule 12(b)(6) motion, the Court must accept the Amended Complaint's factual allegations "as true . . . and the inferences to be drawn therefrom, in the light most favorable to [Plaintiffs]." *Leal*, 731 F.3d at 410; *see also id.* (Rule 12(b)(6) motions are "viewed with disfavor and [] rarely granted"). The Complaint's allegations, taken as true, and the evidence offered with the Complaint demonstrate, at least plausibly, that HB 25 will impose severe burdens on Texas voters—particularly African American and Hispanic voters—through drastically longer polling-place lines. And because HB 25 does not serve any of the interests

identified by the Secretary, HB 25's burdens are unjustified.

The Secretary's insistence that HB 25 is lawful because some other States do not have STV is a red herring that violates *Anderson-Burdick*'s basic inquiry. *Anderson-Burdick*'s balancing test "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions"; the "results of [the] evaluation will not be automatic" because "there is 'no substitute for the hard judgments that must be made.'" *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1983)). It is therefore "not enough for [Texas] to simply rely on the lack of straight-party voting in other states; the necessary question is how [HB 25] interacts with other voting practices in [Texas], and the burdens this law places on voters who vote within [Texas's] electoral framework." *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 665 (6th Cir. 2016). That is particularly so here, where Texas's abnormally long ballots will exponentially amplify the burdens that eliminating STV will have in *this* state.

A. HB 25 will impose severe burdens on Texans' right to vote.

HB 25's elimination of STV will cause unreasonably long lines at Texas's polls, which will impose a severe burden on Texans' right to vote and unjustifiably subject voters to an increased risk of contracting a deadly disease. Removing STV in Texas will cause more than 5.6 million voters to switch from previously using STV to making individual selections on each ballot item, significantly increasing the amount of time each voter spends completing their ballot. Compl. ¶¶ 4, 27. "By increasing the time it takes for an individual voter to complete his or her ballot, [HB 25] will accordingly cause longer lines at polling places and increase the wait time to cast a vote." *Mich. State*, 833 F.3d at 663. And the sudden transition of *two-thirds* of Texas voters from efficiently casting ballots through STV to making individual choices in every single ballot item will drastically increase the amount of time voters wait in line, severely burdening their fundamental right to vote. *NAACP State Conf. of Pa. v. Cortés*, 591 F. Supp. 2d 757, 765 (E.D.

Pa. 2008) ("[U]nacceptably long lines . . . unduly burden and thus deprive many citizens of their right to vote.").

Contrary to the Secretary's suggestion, MTD at 25, other aspects of Texas's Election Code will not mitigate the long lines produced by HB 25. The fact that Texas already offers early voting does not resolve this issue: as the Complaint explains, eliminating STV will exacerbate the long lines that Texans already encounter on Election Day *and* during early voting. Compl. ¶¶ 5, 31-32. Nor will Texas's vote-by-mail option mitigate the long lines HB 25 will produce, because Texas law allows only to a tiny fraction of Texans to vote by mail. *Id.* ¶ 34. As already explained, the Secretary's claim that local officials will take action to mitigate any lines caused by HB 25 ignores the evidence Plaintiffs offered regarding those officials' inability to do so this fall. *Id.* ¶¶ 69-75.

The long lines HB 25 produce will most severely burden African American and Hispanic voters, which is highly relevant to this claim. *See* ECF No. 6 at 13-14. Because African American and Hispanic Texans use STV at a significantly higher rate than white Texans and also disproportionately live in high-density areas where ballots are the longest, Compl. ¶¶ 11, 38, 63-64, those voters will see the greatest increase in wait times as a result of HB 25. Making matters worse, African American and Hispanic voters' lower average socioeconomic status, caused by the State's discrimination, will amplify the burdens that long lines impose on them compared to white voters. *Id.* ¶¶ 29, 66. Moreover, the longer lines those voters will encounter due to HB 25 will also increase their already disproportionate risk of infection with, and negative health outcomes from, COVID-19. *Id.* ¶ 65.[9]

[9] Plaintiffs independently claim that HB 25's disproportionate burdens on African Americans and Hispanics will unjustifiably burden the associational rights of Democrats, given that African American and Hispanic Texans' overwhelmingly support the Democratic party. Compl. ¶¶ 67-68. The Secretary offers no argument as to this claim.

B. The interests identified by the Secretary do not justify HB 25's burdens.

Regardless of the severity of HB 25's burdens, the interests identified by the Secretary do not justify them. Plaintiffs do not dispute that the State benefits when its voters are informed or when its elections involve high-quality, competitive campaigns. But eliminating STV does not serve those interests at all, let alone in a manner that "make[s] it necessary" to cause voters to wait in hours-long lines. *Anderson*, 460 U.S. at 789. To the extent the Secretary seeks to prove otherwise, she offers only unadorned factual assertions that cannot be credited at the motion to dismiss stage.

HB 25 does not serve any of the interests that the Secretary identifies. First, there is no reason to believe that forcing a voter to make individual selections on a ballot will make her more "informed." MTD at 26. "[I]t is far from evident that" requiring each voter "to look, at least briefly, at each section of the partisan ballot in order to identify and fill in the desired bubble" will "foster[] an engaged electorate," particularly when the "party affiliation of each partisan candidate will still appear beside the candidate's name." *Mich. State*, 833 F.3d at 665-66. The Secretary's argument assumes that, if STV is not available on ballots, voters will better research candidates *before* coming to the polling place. But there is no reason to believe that will occur.[10]

Second, the claim that, without STV, voters will choose candidates based on qualification, MTD at 26, is similarly unintuitive. Texas's ballots do not describe candidates' qualifications; they include only each candidate's name and party affiliation. And the existence of STV in no way impedes voters from taking qualifications into account: after selecting the STV option, voters may change their selections in any given race. Compl. ¶ 3. Thus, if a voter selects the Republican Party

[10] The Secretary's repeated citations to HB 25's "bill analys[e]s," *e.g.*, MTD at 26 nn.23-24, does not support her assertion that HB 25 *actually* serves any of these interests. Such documents simply describe arguments that have been made for and against a given bill.

using STV but feels particular Republican candidates are unqualified, nothing about the voter's use of STV stops her from choosing the more qualified candidate in those races.

Third, the Secretary's assertion that eliminating STV will reduce unintentional roll-off and voter confusion says nothing about why eliminating STV is "necessary" to prevent such voter mistakes. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The Secretary provides no explanation, for example, as to why local officials cannot warn voters that the STV option does not apply to non-partisan ballot items, or instruct them not to "emphasize" their votes. MTD at 27.

Last, the Secretary's claim that eliminating STV will make Texas's elections more "competitive" because it makes incumbents more susceptible to third-party challenges, MTD at 27, ignores Plaintiffs' evidence to the contrary. ECF No. 1-4 at 44-46.

Put simply, the Secretary cannot obtain dismissal of Plaintiffs' *Anderson-Burdick* claims by asserting her own version of disputed facts. *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) ("[W]ithout any factual record at [the pleadings] stage, we cannot say that the Secretary's justifications outweigh the constitutional burdens on [plaintiff] as a matter of law.").

Finally, the Secretary's citations to challenges to *other* States' elimination of STV, MTD at 28-30, are both misleading and inapplicable to this Motion. After a trial, the district court in *Mich. State A. Philp Randolph Inst. v. Johnson* concluded that Michigan's elimination of STV was intentionally discriminatory, failed *Anderson-Burdick*, and imposed a disparate impact in violation of Section 2 of the VRA. 326 F. Supp. 3d 532 (E.D. Mich. 2018). The Secretary suggests the Sixth Circuit "quickly vacated" that decision out of disagreement with its reasoning. MTD at 29. That is false. The district court's judgment was vacated as moot because Michigan voters, unhappy with the State's elimination of STV, *re-instated* STV via initiative. *See Mich. State A. Philip Randolph Inst. v. Johnson*, No. 18-1910 (6th Cir. 2018), ECF No. 30-1. As for the remaining cases cited by

the Secretary, just one included a claim that eliminating STV would increase polling-place lines. There, the court found *after holding a trial* that plaintiffs' evidence was insufficient. *One Wis. Inst., Inc. v. Nichol*, 198 F. Supp. 3d 896, 945-46 (W.D. Wis. 2016). That decision has no utility here, where the Court must accept Plaintiffs' detailed allegations as true. *Leal*, 731 F.3d at 413.[11]

In sum, Plaintiffs' allegations are more than sufficient to state a claim that HB 25 will unduly burden the right to vote in violation of the First and Fourteenth Amendments.

V. Plaintiffs plausibly allege that HB 25 will violate Section 2 of the VRA.

A. Plaintiffs' allegations easily satisfy the elements of a Section 2 claim.

The Secretary's argument that Plaintiffs have not stated a Section 2 claim simply gets the law wrong. The Fifth Circuit, sitting en banc, recently announced a two-step test that governs Plaintiffs' Section 2 claim. Plaintiffs must prove: (1) HB 25 "impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and (2) that burden is "in part [] caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc). And once again, the Secretary is wrong to suggest that other State's laws are in any way relevant to this analysis, MTD at 32: Section 2 claims are "'peculiarly dependent upon the facts of each case' and require[] 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Rogers v. Lodge*, 458 U.S. 613, 621-22 (1982)).

[11] The same distinction applies to the Secretary's heavy reliance on the Sixth Circuit's unpublished order staying the district court's permanent injunction pending appeal in *Mich. State A. Philip Randolph Inst.*, which focused on plaintiffs' evidence *at trial*. *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342 (6th Cir. 2018).

The Complaint easily establishes a plausible claim under *Veasey*'s two-step test. *See* ECF No. 6 at 17-24. First, as explained, HB 25 will impose disparate burdens on African American and Hispanic voters in the form of unreasonably long polling-place lines. *Supra* Section IV.A. That effect leaves African American and Hispanic voters with an unequal opportunity to participate in Texas's political process.

In evaluating the second step, *Veasey* instructs courts to utilize the various "*Gingles* factors," also referred to as the "Senate Factors." 830 F.3d at 245-46. The Complaint includes detailed allegations weighing each of the relevant Senate Factors in favor of finding a Section 2 violation. *See* Compl. ¶¶ 80-94. The Secretary's motion does not contest that Texas has a continuing history of discrimination, including in the area of voting (Factor One), *id.* ¶¶ 80-87, that voting in Texas is severely racially and ethnically polarized (Factor Two), *id.* ¶ 92, that Texas utilizes voting practices that enhance the opportunity for discrimination (Factor Three), *id.* ¶ 94, that discrimination in Texas has produced significant socioeconomic disparities that impair minority voters' ability to participate in the political process (Factor Five), *id.* ¶¶ 88-90, that racial appeals are prevalent in Texas's politics (Factor Six), *id.* ¶ 91, that African Americans and Hispanics are woefully underrepresented in Texas public office (Factor Seven), *id.* ¶ 93, or that Texas is unresponsive to minority communities (Factor Eight), *id.* ¶ 39. And as already explained, *supra* Section IV.B, HB 25 is tenuously related to its goals (Factor Nine).

Nothing in *Veasey* or any applicable case law supports the Secretary's claim that Plaintiffs must show HB 25 will actually prevent minority voters from electing candidates of their choice. MTD at 31-32. The Secretary draws this groundless theory from vote-dilution case law, *id.* (quoting *Gingles*, 478 U.S. 47), which governs claims challenging laws that, while not impeding voters' ability to cast votes, "operate to minimize or cancel out the voting strength of racial

minorities." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991) (quoting *Gingles*, 478 U.S. at 47)). Here, Plaintiffs do not assert a vote-dilution claim; they allege that HB 25 will abridge and deny minority voters' *ability* to cast votes. As *Veasey* explains, such claims entail a different test than that governing vote-dilution claims, and do not require any showing of prior or hypothetical electoral success. 830 F.3d at 243-44. More importantly, the Secretary's theory is preposterous: if it were correct, Section 2 would allow Texas to completely prohibit minorities from voting so long as those voters were previously unable to elect their candidates of choice.

Finally, the Secretary's argument that *Veasey*'s two-step test endangers Section 2's constitutionality, MTD at 32 n.27, is foreclosed by *Veasey* itself. Calling this argument "short sighted," the court explained that the "history and text of the Fifteenth Amendment" make clear that Congress can prohibit laws that disproportionately abridge minority voters' franchise rights, regardless of intent. *Veasey*, 830 F.3d at 253. In particular, "[a]pplication of the" Senate Factors "determines whether any such abridgement is linked to social and historical conditions of discrimination such that the abridgement has occurred 'on account of race.'" *Id.* (quoting U.S. Const. amend. XV and 52 U.S.C. § 10301(a)). Thus, *Veasey*'s two-step test ensures "that Section 2's protections remain closely tied to the power granted Congress by the Fifteenth Amendment." *Id.*; *see also id.* at 253 n.47 (collecting decisions in which the Fifth Circuit "and many others have upheld the constitutionality of the Section 2 results test").

B. Plaintiffs can challenge HB 25 under Section 2.

1. HB 25 falls squarely within Section 2's protections.

The Secretary's assertion that HB 25 cannot be challenged under Section 2, MTD at 30, ignores the VRA's plain language, under which a voting "procedure" like STV—*i.e.*, how a voter chooses candidates on their ballot—is subject to Section 2's protections. 52 U.S.C. § 10301(a).

Under the VRA, "voting" is defined in part as "casting a ballot." *Id.* § 10310(c)(1). And the federal regulations accompanying Section 5 of the Voting Rights Act, which Defendant selectively cites, make clear that "a voting standard, practice, or procedure" is one that affects "balloting." 28 C.F.R. § 51.13(b). STV is clearly a method of casting a ballot and balloting.

In the only other case where a Section 2 challenge was raised in relation to a state's repeal of STV, the Sixth Circuit consistently referred to STV as a "voting practice." *Mich. State*, 833 F.3d at 665. Courts have also applied Section 2 to other balloting methods similar to STV. For example, in *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003), the Ninth Circuit evaluated whether California's use of punch-card ballots violated Section 2. This voting method, much like the option to vote straight ticket, was a procedure by which voters would cast their ballots and was thus appropriately the subject of a Section 2 challenge. *See also Stewart v. Blackwell*, 444 F.3d 843, 851 (6th Cir. 2006).

The Secretary's appeal to *Lucas v. Townsend*, 698 F. Supp. 909 (M.D. Ga. 1988), which was not a Section 2 case, is misplaced. In *Lucas*, the challenged act was not a voting procedure, but rather a substantive decision on whether to submit a bond measure for approval to the electorate and the content of that bond measure—choices Georgia law explicitly left to the discretion of school boards. *Id.* at 912. In contrast, the way by which Texans actually cast their ballots is a voting procedure appropriately the subject of a Section 2 challenge.

2. Section 2 provides Plaintiffs a right of action.

There can be no question that there is a private right of action to enforce Section 2, and that right extends to organizations like Plaintiffs TARA, DSCC, and DCCC. Suggesting otherwise, MTD at 33-34, the Secretary ignores the VRA's plain text, Congress's clear intent, binding Supreme Court precedent, and every single Section 2 case brought by private individuals and organizational plaintiffs. The Department of Justice has filed only four of the 61 actions under

Section 2 since 2013. *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 649 n.2 (11th Cir. 2020) (citing U.S. Civil Rights Commission, An Assessment of Minority Voting Rights Access in the United States 10 (2018)). Each of the other *57 actions* were initiated through a private right of action, even more than a decade after *Alexander v. Sandoval*, 532 U.S. 275 (2001), which the Secretary claims marked a change in the Supreme Court's approach to evaluating whether a statute provides a private right of action. Ignoring all of this, the Secretary puts forth a theory that has never been accepted by any court in the country.

At the outset, the Secretary mischaracterizes *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996). There, a majority of the Court (not a "minority," as the Secretary claims) agreed Section 2 may be enforced by private plaintiffs. Though *Morse* was not a Section 2 case, it considered the issue of whether there is a private right of action under a sister provision in the VRA. In discussing that question, a majority of the Court concluded Section 2 may be enforced by private plaintiffs. *Id.* at 232 (plurality opinion) (Stevens, J., joined by Ginsburg, J.); *id*. at 240 (Breyer, J., concurring, joined by O'Connor and Souter, J.J.) And as *Morse* recognized, when Congress amended the VRA in 1975, its accompanying Senate Report explained "the purpose of [one of] the change[s] was to provide the same remedies *to private parties* as had formerly been available to the Attorney General alone." 517 U.S. at 233 (emphasis added); *see* 52 U.S.C. § 10302(a) (providing remedies under the VRA where "the Attorney General *or an aggrieved person* institutes a proceeding" (emphasis added)).

It is also unquestionable that this private right of action extends to organizations. Section 2 allows suits to be instituted by "aggrieved person[s]," which includes organizations. As the Senate Report accompanying the 1975 amendments to the VRA explained:

> [a]n 'aggrieved person' is any person injured by an act of discrimination. *It may be an individual or an organization* representing the interests of injured persons. In

> enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf.

S. Rep. 94-295, 40, 1975 U.S.C.C.A.N. 774, 806 (emphasis added).

For exactly these reasons, all other courts that have considered whether organizations may bring Section 2 claims have found that they can. In rejecting the Secretary's argument here, one court explained that "[t]he word 'person' in an act of Congress is presumed to include organizations," that nothing in the VRA "suggest[s] that a cause of action under Section 2 is limited to individuals," and that the legislative history "confirms that Congress intended to confer a right to sue on organizations seeking to protect the voting rights of their members and others." *Frank v. Walker*, 17 F. Supp. 3d 837, 867 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014); *see also One Wis. Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 968 (W.D. Wis. 2016) (same); *see also Democratic Nat'l Comm. v. Ariz. Sec'y of State's Off.*, No. CV-16-01065-PHX-DLR, 2017 WL 3149914, at *4 (D. Ariz. July 25, 2017) ("Political parties and other civic organizations often are plaintiffs in constitutional and [VRA] litigation challenging state election laws and procedures."). The Supreme Court has also consistently and repeatedly heard Section 2 suits filed by private organizations. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015).

In addition to ignoring this unbroken line of decisions, the Secretary fails to mention that another court in this District rejected this exact theory. *Veasey v. Perry*, 29 F. Supp. 3d 896, 906 (S.D. Tex. 2014). There, the court found that "[o]rganizations and private parties have been permitted to enforce Section 2 of the VRA, both before and after the 2001 *Alexander* case on which Defendants rely," *id.*, and on which the Secretary again relies here, MTD at 33-34. Just as here, the Court noted that "[d]efendants [] failed to supply any case in which organizations . . . were

denied standing to bring a Section 2 challenge," and catalogued a list of federal decisions in which organizations "ha[d] been permitted to enforce Section 2 of the VRA." *Veasey*, 29 F. Supp. 3d at 906-07. This Court should not be the first in history to accept the Secretary's unfounded theory.[12]

VI. Plaintiffs plausibly allege that HB 25 was intended to impede minority political participation.

The circumstances surrounding HB 25's enactment demonstrate that its purpose was to combat increasing African American and Hispanic electoral strength. In seeking to dismiss this claim, the Secretary offers an incorrect legal standard. MTD at 35. It is Plaintiffs' burden to demonstrate only that limiting minority electoral strength was a "substantial" or "motivating" factor behind HB 25. *Veasey*, 830 F.3d at 231. This intent "need only be one purpose" behind HB 25, "and not even a primary purpose." *Id.* at 230. Once Plaintiffs make that showing, the evidentiary burden "shifts to the [Secretary] to demonstrate that the law would have been enacted without this factor." *Id.* at 231 (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)).

The Complaint offers detailed allegations supporting each of the factors relevant to determining whether discriminatory intent motivated HB 25. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977); ECF No. 6 at 24-32. First, as already explained, HB 25's burdens will "bear[] more heavily on one race [and ethnicity] than another." *Arlington Heights*, 429 U.S. at 266; *see supra* Section IV.A. Next, the "sequence of events" leading to HB 25's passage, *Arlington Heights*, 429 U.S. at 267, demonstrates that eliminating STV became a priority for the Legislature only when it was clear that doing so would impose politically expedient burdens on African Americans and Hispanic voters. As the Secretary herself admits, the Texas Legislature consistently rejected efforts to eliminate STV prior to 2017. MTD at 2-3. But in

[12] In any case, Plaintiff Ms. Bruni is a resident of Laredo Texas, and a Hispanic voter who in the past has relied on straight ticket voting. Thus, even under the State's consistently rejected theory, she may bring this claim.

2017, the Legislature decided instead that eliminating STV was appropriate. What changed? In those intervening years, minority voters, who overwhelmingly skew Democrat, increased in electoral strength and began using STV more often than white voters, who overwhelmingly skew Republican. Compl. ¶ 47-48; *see also* ECF No. 6 at 26-27. HB 25's proponents, who "fac[ed] a declining voter base[,] stood to gain partisan advantage by suppressing the . . . votes of African-Americans and Latinos" by eliminating STV. *Veasey*, 830 F.3d at 241 n.30.[13]

This strategy aligns with HB 25's "historical background," *Arlington Heights*, 429 U.S. at 267, which consists of Texas's repeated attempts to handicap "increased voting power by emerging demographic groups." *Perez v. Abbott*, 253 F. Supp. 3d 864, 959 (W.D. Tex. 2017); *Veasey*, 830 F.3d at 241 n.30; *LULAC*, 548 U.S. at 439-40. Indeed, during HB 25's debate, the bill's author stated he was too "busy" to consider three different court decisions issued in the prior three months finding Texas intentionally discriminated against minority voters. Compl. ¶ 38.

In trying to minimize this evidence, the Secretary falsely claims that "[n]ine Democratic legislators" voted to eliminate STV. MTD at 3. That is simply not true. The vote that the Secretary cites for this proposition was for an amendment to *delay* HB 25's implementation until September 2020, which opponents of eliminating STV reasonably supported. *Id.* at 3 n.8. All but one of the Democratic legislators the Secretary lists as voting "for" HB 25 voted *against* eliminating STV.[14] Indeed, Rep. Hubert Vo, who the Secretary claims supported HB 25, was a vocal opponent of

[13] That partisanship played a role in these considerations does not mitigate their racially and ethnically discriminatory nature: "[i]ntentions to achieve partisan gain and to racially discriminate are not mutually exclusive." *Id.* While "[u]sing race as a proxy for party may be an effective way to win an election," "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016).

[14] *See* House Journal, May 6, 2017, at 2841-42, https://journals.house.texas.gov/hjrnl/85r/pdf/85RDAY65FINAL.PDF#page=81 (noting "Nay" votes for all but one of the legislators the Secretary identifies as having supported HB 25).

eliminating STV, and took to the floor during debate to explain that HB 25 would "discourage[]" voters and cause them not to "participate in the process anymore." Ex. 2 at 113:22-114:10.

HB 25's proponents' steadfast refusal to examine the law's disparate effect, as well as their blanket rejection of any amendment that would have ameliorated its disparate burdens—even in the face of repeated warnings of the law's racial and ethnic effects—also indicate those burdens were the reason the law was passed. *Veasey*, 830 F.3d at 263-37 (explaining that strikingly similar behavior during Texas's enactment of its voter ID law supported a conclusion of discriminatory intent). Time and again, HB 25's proponents were told that the law would have disparate effects on minority voters. Compl. ¶¶ 37-45. HB 25's proponents flatly denied this fact, but at the same time admitted they were unaware of anything actually disputing these concerns. *Id.* ¶ 38.

HB 25's passage involved significant procedural and substantive deviations. *Veasey*, 830 F.3d at 231; *see also* ECF No. 6 at 30-31. The bill received just two public hearings. Compl. ¶ 36. In the House, the bill's author deviated from the normal approach of taking positions on proposed amendments. *Id.* ¶ 37. In the Senate, HB 25 was considered in a committee unaccustomed to reviewing election-law bills. *Id.* ¶ 36. While the Secretary suggests that these deviations were justified given that HB 25 was a "high-priority bill" that was expected to be "challenge[d] . . . in court," MTD at 37, one would expect the exact opposite: if legislators were concerned about the law's ability to withstand judicial review, they should have fully vetted the law, rather than pushing it through to avoid rigorous consideration. And by eliminating a practice that has been a part of Texas's elections for a century, HB 25 is a significant substantive deviation. Compl. ¶ 37.

The Secretary is wrong to suggest that because eliminating STV will also harm a substantial yet significantly smaller portion of white voters, it cannot have a disproportionate impact on minority voters. MTD at 36. As explained, HB 25 will disproportionately harm minority

voters not only because they utilize STV at a significantly higher rate, but also because they disproportionately live in more densely populated areas where the increase in lines will be greatest and their lower average socioeconomic status amplifies the burdens that long lines otherwise normally impose on voters. The Secretary's citations thus have no application here, where the burdens that minority voters will face as a result of HB 25 will be more *severe* than the burdens faced by white voters.[15]

Because Plaintiffs plausibly allege that a substantial and motivating factor behind HB 25's enactment was an attempt to limit minority political participation, the burden shifts to the Secretary to prove the law would have been passed absent this purpose. Aside from the fact that the Secretary cannot attempt to resolve this issue on a motion to dismiss, Plaintiffs have already explained that the justifications the Secretary offers for HB 25 were clear pretext. *Supra* Section IV.B. As a result, Plaintiffs plausibly allege that HB 25 violates the Fourteenth and Fifteenth Amendments.

VII. Plaintiffs plausibly allege that HB 25 is the product of unconstitutional viewpoint discrimination.

As just explained, HB 25's proponents wished to impose burdens on minority voters. They did so because, in Texas, African American and Hispanic voters overwhelmingly support the Democratic party. Compl. ¶¶ 67-68. In addition to constituting unlawful race discrimination, this squarely violates the First Amendment. A State may not impede the franchise rights of "a sector of the population because of the way they may vote." *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

The analysis governing this claim follows the *Arlington Heights* invidious-motive

[15] The Secretary's reliance on a sentence in a nearly 30-year-old dissent opining on the effect of straight-ticket voting in that specific case, MTD at 37 (citing *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 912 (5th Cir. 1993) (King, J., dissenting)), has no relevance to Plaintiffs' allegations here. But if anything, Judge King's point supports Plaintiffs' position in that the Legislature was unconcerned about STV's effects so long as it "reinforce[d] minority voters' unequal access to the political process," *Id.* at 912, and waited to eliminate STV only when doing so would limit minority electoral power.

framework just discussed, not *Anderson-Burdick*. Burdening individuals because of their political views is an invidious form of discrimination that strikes at the heart of the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995). Such discrimination is inconsistent with the *Anderson-Burdick* balancing test, which is reserved for "reasonable, *nondiscriminatory* restrictions upon the First and Fourteenth Amendment rights of voters." *TDP*, 84 F.3d at 182 (emphasis added). "When there is a proof that a discriminatory purpose has been a motivating factor in the [State's] decision," the "judicial deference" that *Anderson-Burdick* is meant to provide States "is no longer justified." *Arlington Heights*, 429 U.S. at 265-66. As a result, *Arlington Heights*' analysis, which guides the determination of "whether invidious discriminatory purpose was a motivating factor," applies to this claim. *Id.* at 266. [16]

As just explained, *supra* Section VI, the *Arlington Heights* analysis makes clear that HB 25's substantial and motivating purpose was to limit the electoral participation of minority voters because of their political views. Without this invidious purpose, there was no reason to eliminate STV because doing so would not have furthered any of the government interests the Secretary identifies. *Supra* Section IV.B. As a result, HB separately violates the First Amendment.

The Court should reject the Secretary's attempt to expand the Supreme Court's decision in *Rucho* beyond its logical bounds. MTD at 38-39 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)). *Rucho* held that partisan gerrymandering claims present political questions; it did not hold that federal courts lack jurisdiction to hear election-related claims relating to politics. Partisan gerrymandering claims are unlike those that can "be decided under basic equal protection principles," such as the *Arlington Heights* standard. *Id.* at 2496. The Court explained that "[p]artisan gerrymandering claims have proved far more difficult to adjudicate" because "a

[16] But even if *Anderson-Burdick* governs this claim, HB 25 is unconstitutional. *Supra* Section IV.

jurisdiction *may* engage in constitutional partisan gerrymandering." *Id.* at 2497 (emphasis added). But in no instance is it constitutionally permissible for a State to punish voters because of their political views. Thus, the mere fact that "political entities" may choose a State's ballot design, MTD at 39, does not preclude federal courts from enjoining the abuse of such power to violate constitutional rights. "The legislative power is not a Midas touch that gilds a matter on contact and insulates it from judicial review, and a decision does not become a political question merely because it is made by a political branch of government." *Jacobson v. Lee*, 411 F. Supp. 3d 1249, 1257-58 (N.D. Fla. 2019), *vacated on other grounds* 957 F.3d 1193.

VIII. Laches cannot apply in this suit.

As a matter of law, laches cannot be applied in this case, which seeks prospective relief against future constitutional and statutory violations. "[L]aches may not be used as a shield for future, independent violations of the law" because "[t]he concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective." *Envt'l Def. Fund*, 651 F.2d at 1005 n.32; *see also Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1321 (11th Cir. 2008) (laches "bar[s] only . . . retrospective damages, not [] prospective relief"). The Secretary cites no authority to the contrary.

Even ignoring this controlling law, the Secretary has not satisfied her burden of proving any element required for a laches defense: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. *Law*, 578 F.2d at 101. Because the only prejudice relevant to this inquiry is that occurring to the *Secretary*, *id.*, her references to potential prejudice to *other* actors in Texas politics, MTD at 40, offers her laches argument no support. And to the extent the Secretary vaguely complains that defending multiple voting rights lawsuits "taxes public resources and creates inefficiencies," *id.*, that is simply not enough to prove laches. *Matter of Bohart*, 743 F.2d 313, 327

(5th Cir. 1984) (requiring defendant to show prejudice "causes a disadvantage in asserting and establishing a claimed right or defense"). The costs of defending a lawsuit is not prejudice for purposes of laches. *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 808 (8th Cir. 1979) ("[W]e reject the contention that the cost of litigation . . . by itself could constitute prejudice within the contemplation of a laches defense."). The Secretary also fails to explain either why these "inefficiencies" are so severe that this case should be *dismissed*, or how they would have been different had this suit been brought at a different time. That the Secretary must defend multiple voting rights suits is an unfortunate product of the number of laws Texas has promulgated violating its citizens' voting rights.

Nor has the Secretary demonstrated any alleged delay was unjustified. While HB 25 was passed in 2017, it was not set to take effect until the November 2020 election. Compl. ¶ 8. After HB 25 was passed, it was unclear whether the Secretary would provide counties funding to mitigate the law's expected harms. Plaintiffs Bruni, DSCC, and DCCC filed suit soon after the Secretary made clear that she would provide nothing to protect voters from HB 25's burdens. *Id.* ¶ 44. Furthermore, those Plaintiffs filed suit as soon as the Democratic candidates were selected on March 3, 2020, which confirmed the identities of DSCC and DCCC's candidates on the ballot in November.

At the very least, this issue is inappropriate for a motion to dismiss. Because laches "is fact-dependent[,] . . . courts generally do not prevent a plaintiff from proceeding with his claims when very little factual information is available." *Crittendon*, 347 F. Supp. 3d at 1339. The Court should not dismiss Plaintiffs' claims simply because of bald assertions made by the Secretary.

CONCLUSION

The Court should deny Defendant's motion to dismiss.

September 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Skyler M. Howton
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