No. 20-40643

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

RUTH R. HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Laredo Division

EMERGENCY MOTION FOR STAY PENDING APPEAL AND ADMINISTRATIVE STAY

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Certificate of Interested Persons

No. 20-40643

Texas Alliance for Retired Americans; Sylvia Bruni; DSCC; and DCCC,

Plaintiffs-Appellees,

v.

Ruth R. Hughs, in her official capacity as Texas Secretary of State,

Defendant-Appellant.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee, as a governmental party, need not furnish a certificate of interested persons.

/s/ Matthew H. Frederick
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Introduction and Nature of Emergency

On September 25—after ballots had been mailed and eighteen days before in-person early voting begins—the district court enjoined enforcement of HB 25, which eliminates straight-ticket voting in Texas. The district court's last-minute injunction threatens to disrupt the 2020 election. According to county election officials, complying with the injunction at this point would be "catastrophic" and "devastating." App.1284-85. In Bexar County alone, reinstating straight-ticket voting would require officials to reprogram and retest 1,200 ballot styles on more than 3,000 voting machines. App.1284. That "would severely affect our ability to efficiently, fairly, and accurately administer the 2020 general election." App.1285; *accord* App.1288. One election official warned that "some voters might be turned away from the polls on the day early voting in person is supposed to begin." App.1291. To avoid those consequences, the Texas Secretary of State respectfully requests an immediate administrative stay and, after the Court considers this motion, a stay pending appeal.

The district court found HB 25 unconstitutional on its face. It held that the Constitution requires Texas to offer a straight-ticket voting option because the need to mark a ballot for each individual race imposes an undue burden on the right to vote. Forty-three other States do not offer straight-ticket voting.[1] "None of [these States' laws] have ever been declared unconstitutional." *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 355 (6th Cir. 2018) (Kethledge, J., concurring).

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[1] National Conference of State Legislatures, Straight Ticket Voting States (Mar. 25, 2020), https://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx (last visited Sept. 28, 2020).

The district court should not have reached the merits in the first place because Plaintiffs lack standing. The district court reached that very conclusion just three months earlier when it dismissed a nearly identical suit for lack of standing. Plaintiffs' alleged injuries are just as speculative today as they were in June. In fact, Plaintiffs introduced no evidence of standing—not a single declaration from a single plaintiff—so there is no evidence that Plaintiffs are even membership organizations, much less that any member faces a certainly impending injury.

Even if the district court had jurisdiction, its injunction openly defies the Supreme Court's repeated instruction that federal courts must not interfere with state election laws on the eve of an election. *See Purcell v. Gonzalez,* 549 U.S. 1 (2006) (per curiam). The 2020 election is already underway. The Secretary has certified candidates, and counties have sent thousands of mail-in ballots that do not include a straight-ticket option. The Secretary presented the district court with declarations from multiple county election officials explaining that changing ballots and reprogramming voting machines to reinstate straight-ticket voting creates a risk of jeopardizing the fairness, efficiency, and accuracy of the election . The district court ignored those warnings and denied the possibility of any burden on election officials, commenting that its injunction "merely allows a century-old practice to remain in place for one more election." App.39.

Because the district court's injunction attempts to change the status quo after the election has begun, **the Secretary requests a stay as soon as possible, and no later than Wednesday, September 30, at 5:00 p.m.** Because the injunction is effective immediately, the Secretary respectfully requests an immediate administrative

stay while the Court considers this motion. *E.g.*, *Richardson v. Hughs*, No. 20-50774 (5th Cir. Sept. 11, 2020) (per curiam); *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2616080, at *1 (5th Cir. May 20, 2020) (per curiam); *In re Abbott*, 954 F.3d 772, 781 (5th Cir. 2020).

Statement of the Case

House Bill 25 brought Texas's voting practices in line with 43 other States by eliminating the one-punch straight-ticket voting option. HB 25 was signed into law on June 7, 2017. The bill's effective date was delayed until September 1, 2020, to give voters and election officials time to adjust. Yet Plaintiffs decided to wait until March 5, 2020, to file their original lawsuit. The district court dismissed that case for lack of standing on June 23, 2020. *See Bruni v. Hughs*, No. 5:20-cv-35, 2020 WL 3452229 (S.D. Tex. June 24, 2020). The district court identified four major categories of uncertainty that prevented Plaintiffs from plausibly alleging standing.

First, the Court determined that "all of Plaintiffs' alleged injuries fail to satisfy the imminence requirement of Article III because they are premised on numerous predicted 'effects' of HB 25 which are uncertain to occur." *Id.* at *5. The Court enumerated "numerous suppositions that must occur before Plaintiffs might suffer any harm," *id.*, explaining that "Plaintiffs' injuries only *might* occur":

- "*if* the Bill causes longer lines at polling-places";
- "*if* the Bill causes increased roll-off at polling-places";
- "*if* the Bill causes voter confusion at polling-places";

- "*if* these predicted effects cause Democratic-party voters—and not voters of other political affiliations—to leave lines at polling-places or fail to show up at polling-places altogether";
- "*if* these predicted effects cause voters who would have voted for . . . Democratic-party candidates to engage in roll-off at polling places; and"
- "*if* all of these predicted effects—in a compounding fashion—cause Democratic-party candidates . . . to lose votes at polling-places that would have otherwise been cast for them."

Id.

Second, the Court noted governmental actions could alter the effects of HB 25. Plaintiffs had improperly "assume[d] 'local officials will not use their state-law authority to ameliorate the situation' at polling-places." *Id.* at *6. Similarly, "[t]he Secretary's ability to provide . . . notice [about the elimination of straight ticket voting] to all Texans further weakens the chance that HB 25 will cause voters to be confused, ill-equipped, or uneducated about the Bill." *Id.*

Third, the Court stressed that "the nation's current public-health crisis" "significantly amplif[ied] the uncertainty over Plaintiffs' allegations." *Id.* "As the virus continues to spread, the pandemic is projected to transform in-person voting at polling-places *regardless* of HB 25's enforcement." *Id.* "All things considered, 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." *Id.*

In addition, the Court emphasized an independent reason Plaintiffs lacked standing: "the occurrence of [Plaintiffs'] injuries remains in the hands of Texas voters." *Id.* at *7. Texas voters have choices. As the Court recognized, they "may choose to wait in line at polling places or not, to engage in roll-off or not, or to manually vote for all members of their desired political party or not." *Id.*

Plaintiffs could have asked the district court to reconsider, *see* Fed. R. Civ. P. 59(e), or immediately appealed and sought relief from this Court, *see* Fed. R. App. 8. Instead, after waiting *fifty days*, Plaintiffs started over with a new lawsuit.

Plaintiffs filed this case on August 12, 2020. *See* ECF 1.[2] Because Plaintiffs had hardly changed their allegations, the Secretary moved to dismiss based on the district court's previous reasoning. App.1106, 1123-31. But the district court changed course. It held that Plaintiffs' injuries, which had been "speculative" in June, were "certainly impending" in September. App.14-15 To explain the change (and its decision that Plaintiffs' claims were not precluded), the court pointed to the pandemic, which it previously characterized as "significantly amplifying the uncertainty over Plaintiffs' allegations," *Bruni*, 2020 WL 3452229, at *6, as evidence that "the facts underlying the claims have changed significantly." App.11.

[2] Plaintiffs in the second lawsuit were the Texas Alliance for Retired Americans ("TARA"), the national senatorial committee of the Democratic Party ("DSCC"), the national congressional committee of the Democratic Party ("DCCC"), and Sylvia Bruni, the chair of the Webb County Democratic Party. ECF 1 at 7-10. TARA is the only Plaintiff not named as a plaintiff in the first lawsuit.

In its standing analysis, the court concluded that Plaintiffs had adequately alleged that unidentified "members and constituents" of TARA, DSCC, and DCCC would be injured by HB 25. App.18. The court recognized the need for evidence "at later stages of litigation" but ruled that "for now, at the pleading stage, such proof is not required." *Id.*

In the same order, the district court granted Plaintiffs' motion for a preliminary injunction. Even though the case had progressed beyond "the pleading stage," the court did not address Plaintiffs' lack of evidence to support their standing allegations. It granted preliminary relief on Plaintiffs' "undue burden claims." App.40. The court reasoned that under HB 25 "Texans will have to make individual selections for the candidates they wish to vote for," so "the amount of time it will take to complete a ballot will increase," which "will cause incrementally longer wait times and congestion at the polls." App.41. Finally, the district court concluded that "[f]orcing Texas voters to stand in longer lines and increasing their exposure to a deadly virus burdens the right to vote." App.42. The court dismissed the State's interests in HB 25 because they allegedly were "not supported by any evidence, only by a belief." App.43.

The court entered a preliminary injunction to "take effect immediately": "Defendant, her officers, agents, servants, employees, successors, and all persons in active concert or participation with them are **ENJOINED** from taking any action to implement or enforce HB 25." App.45. The district court did not clarify whether it intended to enjoin the local officials who implement and enforce HB 25. They are not parties to the case. On September 26, the Secretary moved for a stay pending

appeal in the district court, requesting a ruling by 12:00 p.m. today. App.1281. The district court has not acted on that motion at the time of filing.

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's preliminary injunction and under 28 U.S.C. § 1291 to review the district court's rejection of the Secretary's sovereign-immunity defense.

Argument

Courts consider four factors in assessing whether to stay a district court order pending appeal. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). The two "most critical" factors, *Nken*, 556 U.S. at 434, are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits," and "(2) whether the applicant will be irreparably injured absent a stay." *Id.* at 426. Less "critical" are "whether issuance of the stay will substantially injure the other parties interested in the proceeding," and "where the public interest lies." *Id.* at 426, 434. Each factor favors a stay here.

I. The Secretary Is Likely to Succeed on Appeal.

The Secretary is likely to succeed on appeal for at least two independent reasons. First, the district court lacked jurisdiction to entertain plaintiffs' claims and grant the relief they requested. Plaintiffs lack standing, and they cannot overcome sovereign immunity. Second, the burden imposed by the challenged statute—voting for individual candidates—is minimal and justified by the State's legitimate interests.

A. The district court lacked jurisdiction.

1. Plaintiffs lack standing to sue the Secretary.

When it first considered Plaintiffs' claims, the district court dismissed their nearly identical complaint for lack of jurisdiction. It held that "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. The district court should not have allowed Plaintiffs to relitigate the issue in the first place, but nothing in the pleadings or the record justifies the district court's about-face. Plaintiffs lack standing.

The Secretary is likely to succeed on appeal because the record contains no evidence to support Plaintiffs' standing. In fact, the record contains no evidence of any kind about Plaintiffs. No Plaintiff offered so much as a declaration. App.96-98 (listing exhibits attached to preliminary-injunction motion); App.1056-57 (same for reply).

As a result, the district court found standing based entirely on the allegations in Plaintiffs' complaint. *See* App.17-18. That was erroneous. "In the preliminary-injunction context, plaintiffs must make a 'clear showing' of standing to maintain the injunction." *Tex. Democratic Party*, 2020 WL 5422917, at *4 (quoting *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017)). Of course, this requires "evidence in the record of an injury-in-fact." *Barber*, 860 F.3d at 355. Plaintiffs' failure to introduce evidence of standing is sufficient to show the Secretary is likely to prevail on appeal.

But even if Plaintiffs' allegations were taken as true, they fall short of establishing standing. The district court concluded that "Plaintiffs' injuries are certainly

impending" because (1) "even small increases in the time it takes to vote could have exponentially greater impacts on the wait times at polling places," and (2) "the passage of time, the further spread of the COVID-19 pandemic, and the events of the Texas July 2020 runoff election all demonstrate that Texas is unlikely to successfully mitigate the certainly impending harm caused by HB 25." App.15-16. But the district court cited no evidence (or even allegations) that wait times will increase despite mitigation efforts *at Plaintiffs' polling places*. And Plaintiffs' proffered expert neither analyzed the effect of the pandemic nor made any prediction about voter turnout in 2020. App.134-35, 623-25. He analyzed only 2 of Texas's 254 counties, and he did not even consider early voting. App.626-27. The district court improperly relied on the bare possibility of injury to Plaintiffs, but the Supreme Court has "repeatedly reiterated" that "[a]llegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted). The district court's conclusion is just as speculative as it was in June, when it correctly found 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.

The district court held that Plaintiffs satisfied Article III because the organizational plaintiffs "adequately pled associational standing." App.17. But that is wrong for at least two reasons. First, the organizational plaintiffs failed to "identify members who have suffered the requisite harm" to demonstrate injury-in-fact. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); *see also Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.) (dismissing complaint under Rule 12(b)(1) because plaintiff failed to identify a member with the requisite injury); *NAACP v. City of Kyle*,

626 F.3d 233, 237 (5th Cir. 2010) (requiring evidence of "a specific member"); *Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008) (concluding that plaintiff did not establish associational standing because its "Complaint does not identify any . . . disabled student with standing to bring suit"). Second, the organizational plaintiffs did not identify members who elect leaders, serve as leaders, or "participate in and guide the organization's efforts." *Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994). Individuals who do not satisfy those membership requirements cannot support associational standing. *See, e.g.*, *Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002). Those are "essential elements" of Plaintiffs' claims, and they "remain constant through the life of a lawsuit." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

2. Sovereign immunity bars Plaintiffs' claims.

The Secretary is also likely to succeed on appeal because Plaintiffs' claims are barred by sovereign immunity. *Ex parte Young* provides an exception to sovereign immunity only when the defendant has "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014); *see Ex parte Young*, 209 U.S. 123, 157 (1908); *City of Austin v. Paxton*, 943 F.3d 993, 1001-02 (5th Cir. 2019). Neither requirement is satisfied here.

The Secretary lacks the necessary connection to enforcement of HB 25 because she does not implement the elimination of straight-ticket voting; local officials do when they prepare ballots. *See* Tex. Elec. Code §§ 52.002. Under HB 25, the

Secretary is directed to provide information about the elimination of straight-ticket voting to the public and local officials, *see* Tex. Elec. Code § 31.012(a), (b-1), and "adopt rules and establish procedures as necessary for the implementation of the elimination of straight-party voting to ensure that voters and county election administrators are not burdened by the implementation," *id.* § 31.012(d). But Plaintiffs do not challenge those provisions of HB 25, and neither provision gives the Secretary authority to prevent implementation of the statute.

Even if the Secretary had a connection to enforcement of HB 25, "a mere connection to a law's enforcement is not sufficient—the state officials must have taken some step to enforce." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020). The district court did not identify any step toward enforcement by the Secretary, much less a step that threatened Plaintiffs. Rejecting the Secretary's sovereign-immunity defense without identifying "some step to enforce" conflicts with this Court's precedent. *See In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020); *City of Austin*, 943 F.3d at 1002. Because the Secretary understands that she *cannot* coerce local officials in these circumstances, she is not "likely to do [so] here." *City of Austin*, 943 F.3d at 1002.

B. The absence of one-punch straight-ticket voting does not unconstitutionally burden the right to vote.

The district court based its preliminary injunction on Plaintiffs' claim that HB 25 is facially invalid because the absence of one-punch straight-ticket voting imposes an undue burden on the right to vote. App.43 & n.9. That claim rests on the premise

that selecting individual candidates takes more time than voting a straight ticket, and extra time spent by each voter will add up to longer lines at the polls.

Whether a state law imposes an undue burden on the right to vote is analyzed under the *Anderson/Burdick* balancing test, which considers "the character and magnitude of the asserted injury" and the "the precise interests put forward by the State." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). When an election law imposes only "reasonable, nondiscriminatory restrictions" upon the Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). But if the burden is "severe," the law must be "narrowly drawn to advance a state interest of compelling importance." *Id.*

To prevail on a facial challenge, Plaintiffs must show that HB 25 lacks a "plainly legitimate sweep," *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202 (2008) (plurality op.), and "that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987). To grant a preliminary injunction based on Plaintiffs' facial challenge to HB 25, the district court therefore had to find that the absence of one-punch straight-ticket voting likely imposes an unconstitutional burden on all voters in all circumstances. That conclusion is untenable. HB 25 easily satisfies *Anderson/Burdick* for at least two reasons, and the district court's decision to the contrary misunderstands both that standard and *Crawford*. First, HB 25 does not burden the right to vote of any person, let alone every voter in the State. Second, the State's regulatory interests are more than sufficient to justify any alleged burden.

1. HB 25 does not create a burden on the right to vote. It merely requires each voter to affirmatively choose a candidate in each contested election. To the extent having to make individual selections is a burden, it is nothing more than "the usual burdens of voting." *Crawford*, 553 U.S. at 198 (plurality op.); *id.* at 209 (Scalia, J., concurring in the judgment). Requiring voter identification before voting does not unduly burden the right to vote, *Crawford*, 553 U.S. at 202-03 (plurality op.), nor does complying with a deadline to register to vote, *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020). If those prerequisites to voting do not impose an undue burden, there is no plausible argument that the act of voting itself imposes an undue burden. A voter's decision not to cast a ballot, for whatever reason, does not amount to disenfranchisement, nor does it prove that the burden of voting is severe. *See Crawford*, 553 U.S. at 198 (plurality op.); *id.* at 209 (Scalia, J., concurring in the judgment).

At any rate, the record undermines Plaintiffs' undue-burden claim because it shows that the lack of a one-punch straight-ticket option does not even impose the burden that Plaintiffs allege. The district court assumed incorrectly that the one-punch straight-ticket option enabled voters to "mark a single bubble," and that eliminating that option would force voters "to make individual selections"; therefore, "the amount of time it will take to complete a ballot will increase." App.41. That is not how one-punch straight-ticket voting worked. Voters who selected the straight-ticket option still had to go through each individual race on the electronic voting machine to confirm (or change) their vote. App.665, 689-90, 705-06. Removal of the straight-ticket option simply means that candidates of one party will not be pre-selected in advance for any voter. But under straight-ticket voting, as the Bexar County

Election Administrator testified before the House Committee on Elections, "you 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." App.690. In short, the straight-ticket option does not allow voters to hit one button and be done. The Secretary is therefore likely to succeed on appeal because the premise of the district court's holding—that HB 25 will necessarily increase the time it takes to vote and cause longer lines at the polls—is invalid.

Even if there were evidence that HB 25 would result in longer lines at *some* polling places (there is not), the Secretary would be likely to succeed on the merits of Plaintiffs' facial undue-burden claim. The burden of any voting law must be considered "categorically," not in "the peculiar circumstances of individual voters." *Crawford*, 553 U.S. at 206 (Scalia, J., concurring in the judgment). And Plaintiffs have not alleged or proven that HB 25 necessarily burdens the right to vote in all applications or lacks a plainly legitimate sweep—as they must to sustain a facial challenge. The Secretary is therefore likely to succeed on the merits of her appeal.

2. The district court improperly disregarded the State's legitimate interests on the ground that the Secretary failed to prove that HB 25 would actually promote the Legislature's goals. App.43 ("[T]he Secretary has not demonstrated how eliminating [straight-ticket voting] will reduce voter confusion and unintentional roll-off."). That violates clear Supreme Court authority. The Court has repeatedly explained that States do not bear "the burden of demonstrating empirically the objective effects" of their election laws. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)

("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications."). In *Crawford*, the Supreme Court upheld Indiana's voter-identification law even though the record contained "no evidence of [in-person] fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194 (plurality op.). This Court has likewise held that "Texas need not show specific local evidence of fraud in order to justify preventive measures." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013). Other circuits have also upheld voting laws despite the absence of evidence supporting the State's interest. *See, e.g.*, *Tripp v. Scholz*, 872 F.3d 857, 866 (7th Cir. 2017) (finding "speculative concern" sufficient to justify ballot-access limitation); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 632 (6th Cir. 2016) (holding that when a regulation is "not unduly burdensome," a State does not have to "*prove*" its interest with evidence). Faulting the Secretary for failing to prove that HB 25 will serve the State's interests was improper.

It was also incorrect because the Secretary provided evidence that eliminating one-punch straight-ticket voting would promote the State's articulated interests. For example, the Secretary presented testimony confirming that HB 25 promotes the State's interest in reducing unintentional rolloff—a phenomenon in which voters who select the straight-ticket option do not realize that they have failed to vote in down-ballot races such as non-partisan contests or referenda. *See One Wis. Ins., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016) (recognizing this interest as a reasonable justification for eliminating straight-ticket voting). In addition, HB 25 reduces the likelihood of voter confusion through "emphasis voting," in which voters select the straight-party option, then "emphasize" or "confirm" their vote for a

particular candidate by marking their ballot again. Rather than confirm the vote, marking the ballot again leads to "the candidate being de-selected," which causes confusion, frustration, and—if the voter happens to notice the error—additional time to correct the ballot. App.665, 689-91. The district court did not even address that evidence.

* * * * *

The State has a legitimate interest in having voters consider every issue on the ballot, including non-partisan issues such as bond elections and constitutional amendments. That is why 44 States have 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. The burden of choosing a candidate for each office is indistinguishable from the ordinary burdens of voting, and it does not outweigh States' legitimate interest in preventing roll-off, fostering competitive elections, and reducing voter confusion. That is why no State has had one-punch straight-ticket voting forced upon it by judicial order as a constitutional mandate. *See id.* at 355 (Kethledge, J., concurring). The Secretary is likely to succeed on the merits of her appeal because the district court erred in finding HB 25 facially unconstitutional under the Fourteenth Amendment.

II. The Secretary Will Be Irreparably Harmed Absent a Stay, and a Stay Serves the Public Interest.

The Secretary satisfies *Nken*'s irreparable-harm prong. It is black-letter law that "the inability to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *Tex. Democratic Party*,

961 F.3d at 411; *Veasey*, 870 F.3d at 391. The district court dismissed the threat of harm to the Secretary and the public, reasoning that Plaintiffs "seek[] to maintain the status quo," and "the requested injunction would not impose such an onerous burden on election officials" because it "merely allows a century-old practice to remain in place for one more election." App.39.

But that reasoning overlooks binding Supreme Court authority and misunderstands the consequences of the preliminary injunction. Plaintiffs' requested injunction does not "maintain the status quo." Plaintiffs' lawsuit seeks to alter the status quo by imposing a straight-ticket voting option that the Legislature has not provided. Disrupting the status quo now is certain to cause irreparable harm because the 2020 election is already underway. The injunction upends election procedures that local officials have relied on to prepare ballots and program voting machines after thousands of mail-in ballots have been delivered and only eighteen days before in-person early voting commences. As one elections administrator explained, "It is by no means as simple as 'flipping a switch' to include the STV option on Texas electronic voting machines." App.663. Indeed, imposing that requirement now "would be catastrophic to the administration of the 2020 general election." App.1284.

The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). In *Purcell v. Gonzalez*, 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." 549 U.S. 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.*

As this Court recently held in staying a similarly unlawful election-related injunction, "an order *requiring* Texas to institute [new election policies] against its will presents significant, irreparable harm, which is precisely why the Supreme 'Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.'" *Tex. Democratic Party*, 961 F.3d at 411-12 (quoting *Republican Nat'l Comm.*, 140 S. Ct. at 1207). It follows that the public interest favors a stay. When a state official sued in her official capacity appeals, her "interest and harm merge with that of the public." *Veasey*, 870 F.3d at 391.

III. Plaintiffs Face No Irreparable Harm

The district court reached the sweeping conclusion that "HB 25 will cause irreparable injury to Plaintiffs and ALL Texas voters in the upcoming election." App.44. Plaintiffs did not prove that they would suffer irreparable injury. As explained in Part I(A)(1), *supra*, they cite only a hypothetical, speculative injury to themselves. That is no reason to deny a stay. *See, e.g.*, *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs did not even try to prove that every Texas voter would be irreparably injured in the absence of injunctive relief. That the district court nonetheless assumed a certainly impending injury to *every Texas voter* underscores that the preliminary injunction is an abuse of discretion.

Conclusion

The Court should immediately enter a temporary administrative stay while it considers this motion, then stay the district court's injunction pending appeal.

Respectfully submitted.

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Certificate of Compliance with Rule 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Appellant contacted the clerk's office and opposing counsel to advise them of Appellant's intent to file this motion. Opposing counsel stated that they oppose the motion and intend to file a response.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested as soon as possible, but **no later than Wednesday, September 30, at 5:00 p.m**. In the alternative, the Secretary requests an immediate temporary administrative stay while the Court considers this motion.
- True and correct copies of relevant orders and other documents are attached in the Appendix to this motion, filed separately.
- This motion is being served at the same time it is being filed.

/s/ Matthew H. Frederick
Matthew H. Frederick

Certificate of Conference

On September 28, 2020, Matthew H. Frederick, counsel for Appellant, conferred by e-mail with Lalitha D. Madduri, counsel for Appellees, who stated that Appellees oppose the relief requested in this motion and intend to file a response.

/s/ Matthew H. Frederick
Matthew H. Frederick

Certificate of Service

On September 28, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that:

(1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Matthew H. Frederick
MATTHEW H. FREDERICK

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,955 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Matthew H. Frederick
MATTHEW H. FREDERICK