No. 20-40643

# In the United States Court of Appeals for the Fifth Circuit

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

*Plaintiffs-Appellees*,

*v.*

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

*Defendant-Appellant.*

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

## BRIEF FOR APPELLANT RUTH HUGHS


KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Texas Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

MATTHEW H. FREDERICK
Deputy Solicitor General
Matthew.frederick@oag.texas.gov

JUDD E. STONE
Assistant Solicitor General
Judd.stone@oag.texas.gov

Counsel for Defendant-Appellant
Ruth Hughs

## Certificate of Interested Persons

No. 20-40643

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

*Plaintiffs-Appellees*,

*v.*

Ruth Hughs, in her official capacity as the Texas Secretary of Texas,

*Defendant-Appellant.*

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

/s/ Judd E. Stone
Judd E. Stone
*Counsel of Record for*
*Defendant-Appellant Ruth Hughs*

## Statement Regarding Oral Argument

Oral argument is not necessary to decide this appeal. Plaintiffs sought and received an injunction against the Texas Secretary of State prohibiting enforcement of a Texas law repealing straight-ticket voting. The Secretary does not enforce that law, and recent decisions from this Court indicate that sovereign immunity bars Plaintiffs' claims and requested relief. If the Court grants oral argument, however, Defendant requests the opportunity to participate to assist the Court in resolving this appeal.

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## Introduction

Plaintiffs bring this challenge to Texas's elimination of straight-ticket voting for a second time. Plaintiffs previously advanced a series of claims against straight-ticket voting and were conclusively rejected on jurisdictional grounds. ROA.877-79; *see Bruni v. Hughs*, 468 F. Supp. 3d 817 (S.D. Tex. 2020). None appealed, and their time for seeking relief in this Court expired. ROA.879. The same plaintiffs, save one addition with demonstrable ties to the others, filed the same action in the same district court and division before the same judge, pressing materially identical arguments a second time while relying on no new material facts. ROA.879 The second time around, plaintiffs obtained a preliminary injunction against the Secretary of State. ROA.1704. If ever a litigant could be fairly described as obtaining an impermissible second bite at the proverbial apple, plaintiffs can.

Their appetite has since soured. Following both the Secretary's successful pursuit of a stay from this Court and the November 2020 election, plaintiffs suggested to this Court that the Secretary's appeal was moot. Pls.' Mot. to Dismiss Appeal as Moot at 1, Doc. No. 00515643282, Nov. 18, 2020. Consistent with their decision not to appeal their first (failed) action, plaintiffs now ask this Court to simultaneously dismiss this appeal but preserve the district court's opinion. *Id.* at 3-4. Plaintiffs seek to avoid this Court's review of the merits of their claims at every turn. This Court should not reward those attempts.

Plaintiffs seek to avoid this Court's review for understandable reasons: the district court's injunction rests on numerous untenable premises. As the district court correctly explained in plaintiffs' first lawsuit, plaintiffs lack Article III standing

because their claims rested on a lengthy and implausible chain of assumptions about then-future events. *Bruni*, 468 F. Supp. 3d at 824. Plaintiffs' claims rest on the same implausible assumptions here, and the district court should have dismissed their claims on the same grounds—both because plaintiffs continue to lack standing and because issue preclusion should have prevented plaintiffs from reasserting their same failed jurisdictional arguments. ROA.885. And even if plaintiffs could overcome *this* jurisdictional bar, they cannot overcome a separate, independent jurisdictional bar: sovereign immunity. They cannot seek *Ex parte Young* relief against the Secretary because she does not enforce Texas's straight-ticket voting law, and she has not committed to doing so—*Ex parte Young*'s twin prerequisites.

This is only the latest in a series of lawsuits incorrectly naming Secretary Hughs as a defendant to an *Ex parte Young* action against a law she neither can nor will enforce. *See, e.g.*, *Richardson v. Tex. Sec'y of State*, 978 F.3d 220 (5th Cir. 2020); *Mi Familia Vota v. Abbott*, 977 F.3d 461 (5th Cir. 2020). As this Court's most recent sovereign-immunity decisions make clear, they cannot rely on an *Ex parte Young* action against Secretary Hughs as an all-purpose avenue to challenge Texas's election laws. *See Richardson*, 978 F.3d at 242-43. This Court should put an end to this tactic more broadly and this litigation specifically by reversing the district court's preliminary injunction and ordering plaintiffs' claims dismissed on sovereign-immunity grounds.

## Statement of Jurisdiction

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. sections 1331 and 1343. ROA.15 ¶ 17. The district court entered a preliminary injunction and

denied the Secretary's motion to dismiss on sovereign-immunity grounds on September 25, 2020. ROA.1704. This Court has jurisdiction over this appeal of an order granting a preliminary injunction under 28 U.S.C. section 1292(a)(1). This Court likewise has jurisdiction over the district court's denial of sovereign immunity as an immediately appealable collateral order. *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 284-85 (5th Cir. 2000). The Secretary timely filed a notice of appeal on September 26, 2020. ROA.1705.

## Issues Presented

The district court has previously dismissed a case by nearly identical parties raising nearly identical claims as those brought below. In that case, the court concluded the plaintiffs lacked Article III standing. Plaintiffs did not appeal, and that decision is now final. Here, the district court permitted virtually the same plaintiffs invoking the same harms to raise identical claims despite no record evidence of standing. It further granted the plaintiffs a preliminary injunction against the Texas Secretary of State, preventing her from implementing or enforcing a law that she is not charged with enforcing and that she has not committed or threatened to enforce.

The issues presented are:

1. Whether plaintiffs may establish Article III standing when they have fully and finally litigated their standing based on certain harms in a previous case.
2. Whether plaintiffs can establish Article III standing for a preliminary injunction absent record evidence establishing an actual injury to their members.

3. Whether *Ex parte Young* permits a lawsuit against the Secretary where the Secretary is not charged with enforcing the challenged law and has not taken any step to enforce it.

## Statement of the Case

### I. Straight-Ticket Voting and House Bill 25

A vast majority of States do not offer straight-ticket voting. ROA.875. Many have not offered it for years. ROA.1004 Straight-ticket voting encourages partisan polarization by inviting voters to cast their ballots based on partisan affiliation alone, to the detriment of every other possible civic consideration. ROA.875 It is little wonder that recent years have seen more States ending this practice. ROA.875

Many Texas public officials have cautioned about the evils of straight-ticket voting for years, including highly respected members of the Texas judiciary. In the last decade, Chief Justices Wallace Jefferson and Nathan Hecht have each spoken about the effects of the practice on the Texas state judiciary. ROA.1004. In Jefferson's words, straight-ticket voting eliminates state judges "not for poor work ethic, not for bad temperament, not even for their controversial but courageous decisions—but because of party affiliation." ROA.875. And by no means were Jefferson and Hecht the first Chief Justices to note this problem. Chief Justice John L. Hill cited it in his report on the state of the Texas judiciary as far back as 1985. ROA.1004.

Texas legislators have worked to eliminate straight-ticket voting for decades as well. State legislators from both parties and in both houses have introduced at least 23 bills since 1999 seeking to limit or end the practice. ROA.875-76. At least five of

these bills were authored or co-authored by Democratic legislators. ROA.876. These bills have been introduced since at least the 76th Texas Legislature, and were introduced in every session from the 80th Legislature to the 85th, in 2017. ROA.876 n.3.

Those long-term efforts finally were realized in House Bill 25. Passed in 2017 with bipartisan support, HB 25 eliminated straight-ticket voting. ROA.876. Legislators recognized that the practice "pulls a voter's attention away from down-ballot candidates," that it "discourages a voter from researching all the candidates on the ballot," and that it creates unintentional voter "roll off." ROA.876. Roll off refers to the phenomenon where voters vote in up-ballot races, but fail to do so in down-ballot races. ROA.876. Straight-ticket voting often causes voters to fail to vote on nonpartisan races or propositions by leading them to believe a straight-ticket vote automatically registers a vote on every proposition or race on a ballot. ROA.876. As one Democratic legislator explained, "[i]t's a good thing to encourage voters to look down the ballot and choose candidates who have varied opinions and don't prescribe 100 percent to whichever party they are associated with during an election." ROA.877. As that same legislator stated, "I do not believe [HB 25] affects minority voting. I believe it promotes making an informed decision." ROA.877

In order to encourage an orderly transition away from straight-ticket voting, HB 25 included a significantly delayed effective date. While Governor Abbott signed HB 25 into law on June 1, 2017, HB 25 did not become effective until more than three years later, past the 2018 elections, on September 1, 2020. ROA.877.

## II. *Bruni v. Hughs*

Sylvia Bruni, the DSCC, the DCCC, and several others not present here, including the Texas Democratic Party—in other words, all plaintiffs here save the Texas Alliance for Retired Americans—sued Secretary Hughs on March 5, 2020, nearly three years after HB 25 became law. ROA.877. Bruni argued that HB 25 would "directly harm [her] by frustrating her goal of, and efforts in, turning out voters who support Democratic Party candidates in Webb County." Amended Compl. at 7 ¶ 20, *Bruni v. Hughs*, 468 F. Supp. 3d 817 (S.D. Tex. 2020) (5:20-CV-35), ECF No. 16. The DSCC claimed HB 25 would "frustrat[e] its mission of, and efforts in, turning out Texas voters who support the Democratic candidate," that it would, in response, have to "divert and expend additional funds and resources for voter education and turnout efforts in Texas," and that HB 25 would "prevent DSCC, its members, volunteers, and constituents from fully exercising their associational rights to band together and elect candidates of their choice." *Id.* at 7-8 ¶ 21. The DCCC claimed materially identical harms as the DSCC. *Id.* at 8-9 ¶ 22.

Bruni, the DSCC, the DCCC, and TDP challenged HB 25 on five grounds. First, they argued it imposed an undue burden on the right to vote "by causing drastic increases in polling-place lines," which would, in turn, disproportionately burden African-American and Hispanic voters seeking to vote. *Id.* at 32 ¶ 88. Second, they claimed HB 25 would impose "an unjustified severe burden on the First Amendment associational rights of those who support the Democratic Party." *Id.* at 34 ¶ 94. Third, they alleged HB 25 would violate section 2 of the Voting Rights Act by "disproportionately caus[ing] longer lines and waiting times among African-American

and Hispanic voters compared to non-minority voters." *Id.* at 35 ¶ 100. They likewise claimed that HB 25 would violate section 2, along with the Fourteenth and Fifteenth Amendments of the U.S. Constitution, by intentionally discriminating against African-American and Hispanic voters. *Id.* at 38 ¶ 109. They pointed to legislators' "turn[ing] a blind eye to concerns regarding [a] disparate impact on minority voters" and that the Legislature referred HB 25 to the Senate Business and Commerce Committee instead of the Senate State Affairs Committee to show this intentional discrimination. *Id.* at 38 ¶¶ 110-11. Finally, they advanced a viewpoint-discrimination claim under the First and Fourteenth Amendments, arguing that HB 25 "fenc[ed] out" a portion of the population from the franchise because HB 25 sought to benefit Republicans and harm Democrats. *Id.* at 39 ¶ 116; *id.* at 40 ¶ 118.

The district court dismissed all of Bruni's, the DSCC's, the DCCC's, and the TDP's claims for lack of Article III standing. *Bruni*, 468 F. Supp. 3d at 820. It cited four independent flaws that prevented them from asserting a "certainly impending" injury as required to show standing. First, the Court faulted Bruni, the DSCC, and the DCCC because they relied on "numerous suppositions that must occur before [they] might suffer any harm." *Id.* at 824. As the Court explained, "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.*

The district court then noted the possibility that Texas officials might ameliorate the conditions plaintiffs claimed would harm them. Specifically, the court noted that plaintiffs had improperly "assume[d] local officials will not use their state-law authority to ameliorate the situation at polling-places," should longer wait times or other similar issues arise. *Id.* at 825 (quotation marks omitted). It also highlighted that "the nation's current public-health crisis" due to COVID-19 "significantly amplif[ied] the uncertainty over [p]laintiffs' allegations." *Id.* at 826. To the court, "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.* As a result, "in-person voting at polling-places is wrought with uncertainty," making plaintiffs' claimed injuries "far from certainly impending." *Id.* at 827. Finally, the court highlighted that "the occurrence of [plaintiffs'] injuries remains in the hands of Texas voters," and thus plaintiffs' "injuries hinge[d] on decisions of third parties who are not before the court." *Id.*

The district court dismissed plaintiffs' case in its entirety on June 24, 2020. *Id.* Neither Bruni, the DSCC, the DCCC, nor the TDP sought reconsideration of the district court's decision. ROA.879. None appealed. ROA.879 Plaintiffs' time for filing a notice of appeal expired July 24, 2020. *See* Fed. R. App. P. 4(a)(1)(A).

## III. This Litigation

Instead, Bruni, the DSCC, the DCCC, and an additional organization—the Texas Alliance for Retired Americans—sued Secretary Hughs once more. TARA is an official "constituency group" of the Texas AFL-CIO, which is itself an official "auxiliary organization of the Texas Democratic Party," which was likewise a plaintiff in *Bruni.* ROA.883-84. Plaintiffs, represented by the same counsel, filed in the same district and division, and made functionally identical arguments. ROA.879; ROA.9. Bruni, the DSCC, and the DCCC claimed that HB 25 would inflict the same harms on them, doing so in word-for-word identical language. ROA.879; ROA.9. TARA asserted that HB 25 would force it to divert resources away from its "other efforts such as voter registration and promoting its substantive policy campaigns," ROA.16, similar to the TDP's assertion it would have to "divert and expend additional funds and resources in voter education and turnout efforts . . . at the expense of its other efforts in Texas," Amended Compl. at 10 ¶ 23, *Bruni, supra* (2020), ECF No. 16.

Plaintiffs likewise brought functionally identical causes of action as in *Bruni*. ROA.879. It advanced the same five claims—undue burden claims on the right to vote and the right to associate, results-based and intentional discrimination claims under section 2 of the Voting Rights Act, and a "fencing out" viewpoint-

discrimination claim—using identical language as in *Bruni*. ROA.45-53. Plaintiffs sought the same relief: a declaration that HB 25 was unconstitutional and an injunction against its implementation and enforcement. ROA.53-54.

Yet the same district court and same judge as in *Bruni* resolved the same claims by the same plaintiffs the opposite way. ROA.1674. The district court first acknowledged that it was adjudicating the same claims based on the same harms by the same parties, but decided that because "issue preclusion is an equitable doctrine," it "should not apply" to plaintiffs' reiterated claims. ROA.1669-70. It decided as much based on its perception of the COVID-19 pandemic, which it had previously characterized as "significantly amplifying the uncertainty over Plaintiffs' allegations." *Bruni*, 468 F. Supp. 3d at 826. This time, COVID-19 proved that the "the facts underlying the claims [had] changed significantly," and issue preclusion ought not apply. ROA.1670.

The district court's about-face continued with its standing analysis. It determined that the pandemic, which made plaintiffs' injuries "speculative" in June, rendered those injuries "certainly impending" in September. ROA.1670; ROA.1674. Turning to the various plaintiffs, the court concluded that the organization plaintiffs—the DSCC, the DCCC, and TARA—adequately alleged that unidentified "members and constituents" of those groups would be injured by HB 25. ROA.1677. While the court acknowledged the need for evidence supporting standing "at later stages of litigation," it concluded that "for now, at the pleading stage, such proof is not required." ROA.1677.

In the same order—and moving beyond "the pleading stage"—the district court granted plaintiffs' request for a preliminary injunction. ROA.1704. The district court neither required evidence of standing from plaintiffs nor did it address plaintiffs' lack of evidence to support standing. ROA.1699-700. Instead, the court granted relief on plaintiffs' undue burden claims, reasoning that "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." ROA.1700. As a consequence, the district court concluded, HB 25 would force "Texas voters to stand in longer lines . . . increasing their exposure to a deadly virus," which the district court reasoned burdened the right to vote. ROA.1701. The court dismissed the State's interests in HB 25 as "not supported by any evidence, only by a belief," ROA.1702, and immediately enjoined Secretary Hughs from implementing or enforcing HB 25 "pending a final judgment in this action or further order of this [c]ourt," ROA.1704.

The Secretary appealed and promptly sought a stay of the injunction, highlighting the jurisdictional defects below and the Supreme Court's clear instructions that federal courts must not interfere with state election laws on the eve of an election, arguing that Secretary Hughs was entitled to sovereign immunity, and outlining why HB 25 did not burden the right to vote. Emergency Mot. for Stay Pending Appeal, Doc. No. 00515581091, Sept. 28, 2020. While that motion remained pending, plaintiffs sought to supplement the record on appeal with evidence of their organizations' standing. Pls.' Mot. to Supplement Record, Doc. No. 00515583497, Sept. 29, 2020. This Court denied that motion to supplement the record, (Order, Doc. No.

00515584027, Sept. 30, 2020), and stayed the district court's injunction, concluding that the district court "minimize[d] the difficulty and confusion likely to result from Texas election officials having to implement a new ballot type," *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 568 (5th Cir. 2020) (per curiam) ("*TARA*"), and faulting the district court's "deeply flawed" attempts to distinguish Supreme Court precedent cautioning against last-minute electoral injunctions, *id.*

On October 23, following the stay, plaintiffs sought a "motion for clarification" from the district court to modify the preliminary injunction to last only through the November 2020 election. Pls' Mot. for Clarification at 1, *Tex. All. for Retired Ams. v. Hughs*, No. 5:20-cv-128 (S.D. Tex. Oct. 23, 2020), ECF No. 48. Even though the Secretary had already filed a notice of appeal to this Court, the district court granted that modification without a response from the Secretary. *See* Order, *Tex. All. for Retired Ams.*, *supra* (Oct. 26, 2020), ECF No. 49.

Fifteen days after the election, plaintiffs sought to dismiss this appeal as moot. Pls.' Mot. to Dismiss Appeal as Moot at 1, Doc. No. 00515643282, Nov. 18, 2020. They claimed that this Court could afford the Secretary no meaningful relief as the district court's modified injunction expired on November 3. *Id.* at 3. Nonetheless, they asked this Court not to vacate the district court's opinion, arguing its order denying sovereign immunity and granting an injunction "ha[d] no preclusive effect" between the parties. *Id.* at 3-4. The Secretary opposed dismissal, arguing that: (1) the district court's preliminary injunction lasted until final judgment; (2) the district court's attempted modification was ineffective, as the Secretary's notice of appeal divested the district court of jurisdiction over the injunction; and (3) even if the

preliminary injunction expired, the district court's order refused the Secretary's claim to sovereign immunity, and such a denial is an immediately appealable decision. Def.'s Resp. to Pls.' Mot. to Dismiss Appeal as Moot at 1-3, Doc. No. 00515655540, Nov. 30, 2020. This Court carried that motion with the case. Order, Doc. No. 00515657414, Dec. 2, 2020.

## Summary of the Argument

The district court erred first in refusing to dismiss plaintiffs' claims for lack of Article III standing and due to sovereign immunity, and it erred again when it granted a preliminary injunction on plaintiffs' jurisdictionally flawed claims. It compounded its errors when it concluded plaintiffs were likely to succeed on their undue burden claims, and did so once again by concluding plaintiffs satisfied the remaining preliminary-injunction factors. Each error independently requires reversal of the injunction, and the district court's jurisdictional errors require dismissal of plaintiffs' claims.

**I.** The district court lacked jurisdiction for several reasons that require both reversal of the preliminary injunction and dismissal of plaintiffs' claims. This Court indeed need not even resolve the jurisdictional questions here because they have already been fully and finally litigated. Issue preclusion—which applies to jurisdictional issues just as it does all others—prevents plaintiffs from relitigating the standing arguments they previously asserted in *Bruni*. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The DSCC, DCCC, and Bruni each asserted materially identical harms in *Bruni* as they did before the district court here, and the district court in *Bruni* dismissed their claims because those harms

were "far from certainly impending." ROA.878-79. That determination was necessarily part of the court's decision; indeed, it was the basis for the dismissal. *Bruni*, 468 F. Supp. 3d at 827. The DSCC, DCCC, and Bruni are therefore precluded from relitigating whether their complained-of injuries are "certainly impending" for Article III purposes, and they cannot establish standing. *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 469 (5th Cir. 2013). The addition of TARA does not require a different result, as TARA's interests were materially the same as the DSCC, DCCC, and Bruni—as TARA's litigation alongside fellow Democratic groups and its formal relationship to the other plaintiffs here illustrate. *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

Even without being precluded from establishing standing—as plaintiffs must be—plaintiffs would be unable to demonstrate standing. The district court relied exclusively on the organizational plaintiffs' standing as derived from their individual members. ROA.1677. But none of these organizations identified particular members who would be harmed by HB 25's implementation or enforcement, and none introduced evidence before the district court of any particular member who would be harmed. ROA.322-24; ROA.1489-90. Indeed, there is no evidence of standing in the district court record that could uphold the preliminary injunction. And plaintiffs' claimed harms were no more impending in September than they were at the end of June, so they lack the "imminence" required to demonstrate an injury-in-fact. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

The district court likewise lacked jurisdiction over Secretary Hughs due to sovereign immunity. While *Ex parte Young* sometimes provides plaintiffs with a vehicle

to challenge official actions, immunity notwithstanding, it does so only where a plaintiff sues a defendant who both is entitled to enforce a given law and who has committed to doing so. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) ("*TDP*"). Secretary Hughs is neither: local officials implement HB 25, and because the Secretary has disclaimed any authority to enforce HB 25, she necessarily has not committed to enforcing that law for *Ex parte Young* purposes. ROA.893-94. Nor does *Ex parte Young* enable plaintiffs to obtain a mandatory injunction against a public official in any event—so an injunction against the Secretary to compel her to compel local officials not to implement HB 25 would likewise fail. Without *Ex parte Young*, plaintiffs are back to the traditional default: that officials acting in their official capacity, such as the Secretary, enjoy sovereign immunity. *Mi Familia*, 977 F.3d at 467. That immunity deprived the district court of jurisdiction as well. *City of Austin v. Paxton*, 943 F.3d 993, 1004 (5th Cir. 2019).

**II.** The district court further erred by concluding that plaintiffs were likely to prevail on their undue-burden claims, which, as this Court noted, "rest[] on shaky factual and legal ground[s]." *TARA*, 976 F.3d at 567 n.1. The district court both overstated the burden that eliminating straight-ticket voting imposed on the right to vote as well as improperly dismissed the significant state interests served by eliminating straight-ticket voting. Eliminating straight-ticket voting does not burden the right to vote in the first place: it effectuates the "right to vote freely for the candidate of one's choice" by having voters freely select such candidates. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). But if it does burden the right to vote, such burden is no more than minimal, any more than obtaining identification to vote is. *Crawford v. Marion*

*Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality op.). The expert evidence on which plaintiffs relied is shot through with unfounded assumptions. For example, one expert admitted he lacked empirical data to base an estimate of how long a voter will have to spend voting without a straight-ticket option—so he guessed, with "no evidence at all in support" of his guess. ROA.1124. Eliminating straight-ticket voting yields numerous demonstrable benefits, however, such as reducing voter confusion, reducing unintentional omissions on the ballot, and encouraging more informed voting. ROA.987. These benefits easily outweigh any burden on the right to vote that HB 25 may impose.

**III.** The plaintiffs' other preliminary-injunction showings fare no better. Without evidence that any of their members faced an impending injury, plaintiffs necessarily cannot show an *irreparable* injury to support the district court's injunction. The balancing of equities strongly favored the State as well, given both the State's compelling interest in the enforcement of its duly passed laws and the disruption to the electoral process that the district court's injunction would have imposed. By contrast, plaintiffs—again, lacking evidence of injury to any of their specific members—faced no harm by litigating their claims to their conclusion. Indeed, their efforts to curtail the injunction after the district court had been divested of jurisdiction only highlight that the equities favored the State. And the public interest necessarily merges with the State's interest in providing stable and fair elections without the voter confusion and potential for error that a last-minute injunction would have caused. *TARA*, 976 F.3d at 569.

## Standard of Review

This Court "review[s] the district court's jurisdictional determination of sovereign immunity de novo." *City of Austin*, 943 F.3d at 997. In reviewing a motion to dismiss, the court analyzes the pleadings as well as documents that are attached or necessarily incorporated. *Jackson v. City of Hearne*, 959 F.3d 194, 204-05 (5th Cir. 2020). While this Court reviews the grant of a preliminary injunction for an abuse of discretion, it reviews underlying conclusions of law, along with mixed questions of law and fact, de novo. *Daves v. Dallas Cty.*, No. 18-11368, --- F.3d ----, 2020 WL 7693744, at *3 (5th Cir. Dec. 28, 2020).

## Argument

### I. Plaintiffs are Unlikely to Prevail Because the District Court Lacked Jurisdiction.

Plaintiffs cannot establish Article III jurisdiction. Indeed, they are precluded from trying to do so based on the harms alleged here because they already attempted to do so and failed. That previous final judgment precludes plaintiffs from basing standing on the harms alleged in *Bruni.Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978). Even if it did not, plaintiffs still failed to establish standing in *this* litigation: as organizations, they were required to identify specific members who would suffer injuries from HB 25, and to provide evidence of that standing sufficient to uphold a preliminary injunction. *TARA*, 976 F.3d at 567 n.1. They failed to do so. Further, plaintiffs' complained-of injuries were neither "certainly impending" nor fairly traceable to Secretary Hughs, because she was not responsible for enforcing, and did not enforce, HB 25. And because the Secretary

did not and could not enforce HB 25, plaintiffs cannot avail themselves of *Ex parte Young* to avoid sovereign immunity. *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014). These multiple jurisdictional defects render plaintiffs not only unlikely to succeed on their undue-burden claims, but unable to succeed on any of their claims.

### A. Plaintiffs are Precluded from Establishing Article III Standing Based on the Injuries They Asserted in *Bruni*.

Excepting TARA, each of plaintiffs previously asserted the precise harms they complained of below in previous litigation against the Secretary in the same district court. ROA.9 n.1. They cannot have a do-over merely by adding another proxy with aligned interests in subsequent litigation. The district court erred in permitting plaintiffs to do so.

Issue preclusion, also known as collateral estoppel, prohibits "the relitigation of issues actually adjudicated[] and essential to the judgment" in prior litigation between the same parties. *Kaspar Wire Works*, 575 F.2d at 535-36. With good reason: preclusion "promotes the interests of judicial economy by treating specific issues of fact or law that are validly and necessarily determined between two parties as final and conclusive," *United States v. Shanbaum*, 10 F.3d 305, 311 (5th Cir. 1994), preventing litigants from circumventing the ordinary appellate process by filing cases seriatim. A party is precluded from relitigating an issue when the issue: (1) is identical to one involved in the prior action; (2) was actually litigated in the prior action; and (3) was determined as a part of the judgment in the prior action. *In re Southmark Corp.*, 163 F.3d 925, 932 (5th Cir. 1999).

Issue preclusion applies to jurisdictional and nonjurisdictional issues alike; the Supreme Court has specified that preclusive principles "apply to jurisdictional determinations—both subject matter and personal." *Ins. Corp. of Ireland*, 456 U.S. at 702 n.9. Of course, Article III standing is a prerequisite to federal jurisdiction in the first place, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998), and is thus properly litigated in every federal-court action. The "dismissal of a complaint for lack of jurisdiction" therefore necessarily "adjudicate[s] the court's jurisdiction," and, just as in other contexts, "a second complaint cannot command a second consideration of the same jurisdictional claims." *Comer*, 718 F.3d 469. A dismissal for lack of standing, fully and fairly litigated, settles that jurisdictional issue and prohibits parties from relitigating it in a second action. 18A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4436 (3d ed. 2020) ("Wright & Miller").

The DSCC, the DCCC, and Bruni based their standing in *Bruni* and before the district court in this case on the same theories of harm; in fact, their complaints in both cases recited the same claimed harms word for word. The DSCC claimed HB 25 would "directly harm DSCC by frustrating its mission of, and efforts in, turning out Texas voters who support the Democratic candidate for U.S. Senate. First Amended Complaint for Injunctive and Declaratory Relief at 7-8 ¶ 21, *Bruni v. Hughs*, No. 5:20-CV-35 (S.D. Tex. Mar. 27, 2020), ECF No. 16 ("*Bruni* Amended Compl."); *see* ROA.18-19 ¶ 23. The DCCC likewise cited "its mission of, and efforts in, turning out Texas voters who support Democratic candidates for Congress." Amended Compl., *supra*, at 8-9 ¶ 22; *see* ROA.18-19 ¶ 24. And Bruni pointed to HB

25 "frustrating her goal of, and efforts in, turning out voters in Webb County who support Democratic Party candidates." *Bruni* Amended Compl. at 6-7 ¶ 20; *see* ROA.16-17 ¶ 22. Each of these identical quotes came in actions challenging the same law, HB 25, represented by the same attorneys and in the same district court. ROA.879; ROA.9 n.1. The jurisdictional arguments in both cases are identical because the issue before the district court was identical to the one presented in *Bruni*.

Plaintiffs litigated standing in *Bruni* exhaustively. They extensively discussed their theories of organizational and associational standing, *see* Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss at 11-16, *Bruni v. Hughs*, No. 5:20-CV-35 (S.D. Tex. May 1, 2020), ECF No. 47, including arguing whether they had to identify specific members to establish standing, and explaining why their complained-of injuries were not speculative. *See id.* at 15-16, 18-19. The district court in *Bruni* expressly considered the effects of the COVID-19 pandemic on plaintiffs' claims, and specifically on plaintiffs' alleged injuries for standing purposes. *Bruni*, 468 F. Supp. 3d at 824-27.

And as the district court itself acknowledged, its judgment in *Bruni* relied on its determination that plaintiffs lacked Article III standing. *Id.* at 827. Its analysis tracked plaintiffs' "five predicted 'effects' of HB 25," examining whether any were certain enough to present a "certainly impending" harm. *Id.* at 823-24. But it concluded that "all of Plaintiffs' alleged injuries fail to satisfy the imminence requirement of Article III because they [were] premised on numerous predicted 'effects' of HB 25 which are uncertain to occur." *Id.* at 824. These effects, the court noted, each required a long and uncertain chain of events to occur, and other, outside factors—

such as officials' discretion to ameliorate waits at polling places, and the ongoing COVID-19 pandemic—made plaintiffs' harm-claims far too uncertain to qualify as imminent. *Id* at 824, 826-27. The district court in *Bruni* dismissed all of plaintiffs' claims exclusively on this Article III standing basis—so it is plainly part of the district court's judgment, and plaintiffs should have been precluded from arguing otherwise below or here.

The district court refused to preclude plaintiffs based on its impression that the COVID-19 pandemic significantly worsened between *Bruni* and plaintiffs' second complaint. ROA.1671. As an initial matter, it is far from obvious that the district court's assumption that the pandemic worsened between its June 24 order and its September 25 order is true. Per the Texas Department of State Health Services, the State reported 5,551 new cases of COVID-19 on June 24. *See* https://www.dshs.texas.gov/coronavirus/TexasCOVID19CaseCountData.xlsx at sheet "Trends," cell C118.This was in keeping with the previous week, during which the Department reported between approximately 3,000 and 5,500 cases daily. *Id.* at cells C111-17. By contrast, the seven-day totals prior to September 25 never exceeded 4,000 new cases daily, and were at times as low as under 1,800 daily. *Id.* at cells C204-11. While the COVID-19 pandemic is undoubtedly serious, the district court's insistence that it materially worsened between its first dismissal and its issuance of the preliminary injunction appears unfounded.

Even if the district court were correct in its assumption, however, a worsening COVID-19 pandemic would not justify exempting plaintiffs from issue preclusion. It is not a changed circumstance that can relieve plaintiffs of the preclusive effects of

*Bruni*: the district court in *Bruni* expressly stated it understood that the "United States is experiencing a global pandemic involving the spread of the highly contagious COVID-19 virus," that the virus meant "that citizens will face serious, and arguably unprecedented, burdens in exercising their right to vote in-person," and that the "pandemic ha[d] already caused long lines at polling-places." *Bruni*, 468 F. Supp. 3d at 826-27. COVID-19 formed part of the basis for the court's standing analysis as well. *Id.* at 827. None of these features of the COVID-19 pandemic changed between June and September. In fact, *Bruni* listed the possibility that "the virus [would] continue[] to spread," among the factors that contributed to the uncertainty of predicting the effects of HB 25. *Id.* at 826.

Additional evidence of the harms of COVID-19 cannot justify relieving plaintiffs of the preclusive effects of *Bruni* in part because issue preclusion specifically bars "new theories, evidence, and arguments" when a proponent "had a fair opportunity to make [those] arguments" in the first place. *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 2 (1st Cir. 1983). Along with the district court and all Texans, by June, plaintiffs were well aware of the severity of COVID-19 and the possibility it could interrupt or complicate important in-person actions, such as voting. Plaintiffs were not allowed to "reopen the matter simply by stating that [they] wish[] to introduce more or better evidence" of those disruptions. *Id.*

Nor can the DSCC, DCCC, and Bruni escape preclusion merely by adding TARA as a co-plaintiff. A "nonparty may be bound by a judgment" when it was "adequately represented by someone with the same interests who was a party to the suit." *Taylor*, 553 U.S. at 894. TARA's interests are plainly aligned with plaintiffs'.

They are represented by the same lawyers, pursuing the same claims, and relying on the same evidence as in *Bruni*. ROA.879; ROA.9 n.1. Further, TARA is aligned with the Texas Democratic Party, who sued in a representative capacity on behalf of "Democratic candidates and voters on behalf of the State of Texas." TARA is a "constituency group" of the Texas AFL-CIO, an official "auxiliary organization of the Texas Democratic Party." ROA.883-84. Neither the Texas Democratic Party nor TARA's co-plaintiffs may "avoid its preclusive force by relitigating through a proxy" such as TARA. *Taylor*, 553 U.S. at 895. Plaintiffs are precluded from establishing Article III standing, and both their preliminary injunction and their claims must accordingly fail.

### B. The district court reversibly erred by concluding plaintiffs had Article III standing.

Plaintiffs' attempts to establish standing fare no better the second time around. They rely on the same claims of harm as before, which remain far from either "certainly impending" or redressable. But because plaintiff organizations relied on their alleged members' standing, they were also required to identify a particular member who would suffer the injuries the plaintiffs complained of, and, for preliminary injunction purposes, to present evidence of standing (as opposed to merely asserting it). Plaintiffs failed to do so, which is fatal to the district court's injunction; their inability to do so is fatal to their claims.

The district court found standing based on plaintiffs' complaint alone. This renders the preliminary injunction inappropriate. Though the district court gestured to the differing requirements for standing in the motion to dismiss and preliminary

injunction contexts, it ultimately ignored that distinction. ROA.1696-97. Yet it is an important one: "In the preliminary-injunction context, plaintiffs must make a 'clear showing' of standing to maintain [an] injunction," *TDP*, 978 F.3d at 178, which requires "evidence in the record of an injury-in-fact." *Barber v. Bryant*, 860 F.3d 345, 355 (5th Cir. 2017). Plaintiffs failed to offer evidence of any kind establishing that they or their members suffered an injury in fact—no declarations, no verified complaint, no empirical proof, and none of the myriad other types of proof that could suffice. Their unverified allegations are not enough, yet the district court accepted those as sufficient. *See* 11A Wright & Miller § 2949 ("Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction."). That requires reversal of the injunction.

Even if allegations alone could suffice, plaintiffs' allegations would not. The district court relied on plaintiff organizations' associational standing—that is, the organizations' attempts to derive standing from their members. ROA.1677. To assert associational standing, an organization must, among other requirements, "identify members who have suffered the requisite harm" on which it wishes to rely. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). A general statement that an organization has such a member is not enough: it must identify (and, for a preliminary injunction, prove it has) "a specific member" suffering that injury. *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010). Plaintiffs did not identify a specific member who would be harmed by HB 25, nor, again, did they offer any evidence establishing that member's membership and his impending harm.

Plaintiffs also have fundamental standing problems. To establish standing, plaintiffs must show both an injury-in-fact—that is, an injury-in-fact that is at least imminent, rather than hypothetical—as well as that such injury is redressable by the relief they seek. The district court found plaintiffs' injuries "certainly impending" because "even small increases in the time it takes to vote could have exponentially greater impacts on the wait times at polling places," and "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." ROA.1674-75.

The first of these claims rested on a lengthy series of assumptions that the district court cited in *Bruni*, including the number of voters that elected to vote in-person at any given location, whether those voters would vote for candidates that the organizational plaintiffs sought to support, whether other parties would suffer similar effects, and so on. *See Bruni*, 468 F. Supp. at 824. Nor did the court have evidence to suggest that the State would be unable to prevent or sufficiently lessen these lines even had they occurred. ROA.1581. But even plaintiffs' expert made no projection regarding the effect of the pandemic on voter turnout, much less a prediction in September regarding how widespread COVID-19 would prove in November, or how that possible scenario might interfere with in-person voting. ROA.1582-83. Instead, the district court projected that such delays were possible because of COVID-19—but that is not enough. A "*possible* future injury" is not sufficient even to survive a motion to dismiss, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), let alone to support a preliminary injunction, *see Barber*, 860 F.3d at 352.

Nor have plaintiffs provided evidence that their core claimed harm, that HB 25 will extend the amount of time it takes a voter to vote, is true. As this Court observed, plaintiffs' expert fundamentally misapprehended how straight-ticket voting in Texas operated. *TARA*, 976 F.3d at 567 n.1. Plaintiffs' expert imagined that straight-ticket voting enabled Texas voters to vote by marking a single bubble, ROA.363 ¶ 35, and therefore that eliminating straight-ticket voting would require voters to mark many more bubbles. *Id.* This, to plaintiffs' expert, would lead to delays for voters. ROA.363-64 ¶ 35. But as this Court rightly noted, straight-ticket voting in Texas still required voters to scroll through an entire ballot, confirming or changing that voter's choices through every race. *TARA*, 976 F.3d at 567 n.1. Plaintiffs offer nothing in the record to suggest that HB 25 would create substantial voting delays absent this effect—and therefore they cannot redress these nonexistent delays through an injunction against HB 25. This likewise makes it impossible for plaintiffs to establish standing.

### C. The district court reversibly erred by refusing to dismiss plaintiffs' claims due to sovereign immunity.

The district court lacked jurisdiction for an additional reason: plaintiffs cannot overcome Secretary Hughs's sovereign immunity.

Immunity is the rule: official-capacity suits are barred by sovereign immunity. *See City of Austin*, 943 F.3d at 997. *Ex parte Young*, 209 U.S. 123 (1908), is the exception, allowing plaintiffs to seek an injunction only in "th[e] precise situation" where "a federal court commands a state official to do nothing more than refrain from violating federal law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255

(2011). *Ex parte Young* therefore only permits official-capacity suits against state officials when the sued official has a "sufficient connection to enforcing an allegedly unconstitutional law. Otherwise, the suit is effectively against the state itself and thus barred by . . . sovereign immunity." *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020) (quotation marks and citations omitted). And this requirement includes two independent components: a "plaintiff at least must show" (1) "the defendant has the particular duty to enforce the statute in question and" (2) "a demonstrated willingness to exercise that duty." *TDP*, 978 F.3d at 179 (cleaned up).

They cannot, and *Ex parte Young* is unavailable for three reasons. First, Secretary Hughs does not have a duty to enforce HB 25—and so she is not a proper defendant for an HB 25 suit premised on *Ex parte Young*. By extension, because Secretary Hughs has disclaimed any ability to enforce HB 25, there is no record evidence that she has a "demonstrated willingness" to do so, and such a threat of enforcement is a prerequisite to *Ex parte Young* relief. Finally, *Ex parte Young* does not permit the injunctive relief plaintiffs seek. Each of these independent defects leaves Secretary Hughs's immunity intact—and thus requires reversal of the preliminary injunction and dismissal of plaintiffs' claims.

**1. The Secretary does not have a particular duty to enforce HB 25.**

This Court does not accept that a given state official is the proper subject of an *Ex parte Young* action on a plaintiff's mere say-so. Instead, this Court focuses on whether "a state actor or agency is statutorily tasked with enforcing the challenged law." *City of Austin*, 943 F.3d at 998. Where one is, "and a different official is the named defendant, [the] *Young* analysis ends" and the case must be dismissed. *Id.*

Even when "no state official or agency is named in the statute in question," however, the Court "consider[s] whether the state official actually has the authority to enforce the challenged law." *Id.* HB 25 confirms that plaintiffs have sued the wrong party: local officials enforce it, and the Secretary does not.

Plaintiffs take aim at HB 25's elimination of the straight-ticket-voting option on ballots. Texas Election Code section 52.071(a)—now defunct—once provided that "a square" for voting straight-ticket "shall be printed" on ballots. *See* Act of June 1, 1987, 70th Leg., R.S., ch. 472, § 15, 1987 Tex. Gen. Laws 2061, 2065 (formerly codified at Tex. Elec. Code § 52.071(b)), *repealed by* Act of May 20, 2017, 85th Leg., R.S., ch. 404, § 8, 2017 Tex. Gen. Laws 1081, 1083;*See also id.* § 52.071(b) (directing that an instruction as to how to vote straight-ticket "be added" to the ballot). Although section 52.071 speaks in the passive voice, it is directed at the "authority" "prepar[ing]" the ballot—that is, the county clerk, county chair of a political party, city secretary, or local secretary, depending on the kind of election taking place. *Id.* § 52.002; *see, e.g.*, *In re Cercone*, 323 S.W.3d 293, 294 (Tex. App.—Dallas 2010, no pet.); *In re Jackson*, 14 S.W.3d 843, 846 (Tex. App.—Waco 2000, no pet.).

The statute therefore tasks local officials with enforcing HB 25's elimination of straight-ticket voting—a conclusion borne out by the record. *See* ROA.1017 ¶¶ 5-6, 9 (declaration by county elections administrator explaining how local officials prepared ballots—that did not include a straight-ticket-voting option—for the 2020 general election); ROA.1017-18 ¶¶ 7-8, 10-11 (describing the difficulties "*counties* . . . would face" if a straight-ticket-voting option had to be added to the ballot (emphasis added)). "The Secretary," on the other hand, "is not responsible for printing or

distributing ballots." *Mi Familia*, 977 F.3d at 468. She therefore lacks the particular duty to enforce section 52.071 and HB 25. *Ex parte Young* does not apply.

The district court did not acknowledge the requirement that the Secretary have a particular duty to enforce HB 25. Instead, the court considered it sufficient that the Secretary is "the chief election officer of the state." Tex. Elec. Code § 31.001(a); *see* ROA.1678. Not so.

An *Ex parte Young* defendant must have a "particular duty" to enforce the challenged law. *TDP*, 978 F.3d at 181. A "*general* duty to enforce the law is insufficient." *Id.* (emphasis added). As the Supreme Court of Texas has recently explained, the "Secretary's title 'chief election officer' is not 'a delegation of authority to care for any breakdown in the election process.'" *In re Hotze*, No. 20-0739, --- S.W.3d ----, 2020 WL 5919726, at *6 (Tex. Oct. 7, 2020) (Blacklock, J., concurring) (quoting *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972)). As a result, this Court has held that the Secretary's job description does not sufficiently connect her to enforcement of Texas's election laws. *See TDP*, 978 F.3d at 179 ("The plaintiffs have included the Secretary of State as a defendant, understandable since the Secretary is the 'chief election officer of the state.' Still, we must find a sufficient connection between the official sued and the statute challenged.") (citation omitted).

In reaching the opposite conclusion, the district court cited two Fifth Circuit opinions, *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), and *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). ROA.1678. Neither alters the outcome here. The *OCA* decision focused on standing, did not apply *Ex parte Young*, and does not control the connection-to-enforcement analysis. *Tex. Democratic*

*Party v. Hughs*, 974 F.3d 570, 570-71 (5th Cir. 2020) (per curiam). The other decision, *Texas Democratic Party v. Abbott*, was the stay-panel opinion in *TDP*. *See* 961 F.3d at 394. Although the stay panel noted that *OCA*'s standing holding might apply in the sovereign-immunity context as well, *see id.* at 399, that view was superseded by the *TDP* merits panel's rejection of section 31.001 as a basis for establishing a connection to enforcement. *TDP*, 978 F.3d at 179-80.

Unable to rely on the Secretary's title alone, plaintiffs also relied on two provisions relating to HB 25 that mention the Secretary. ROA.20 ¶ 25 (quoting Tex. Elec. Code §§ 31.012(b-1), (d)). These too fall short of showing that the Secretary is sufficiently connected to the enforcement of the elimination of straight-ticket voting.

The first, section 31.012(b-1), directs the Secretary "[a]s soon as practicable after September 1, 2020," to "distribute electronically to each county election administrator and the county chair of each political party notice that straight ticket voting has been eliminated pursuant to H.B. 25." Tex. Elec. Code § 31.012(b-1). This section does not establish a connection to enforcement of HB 25. "Enforcement typically means compulsion or constraint." *TDP*, 978 F.3d at 179 (quotation marks omitted); *accord City of Austin*, 943 F.3d at 1000. A statement by the Secretary merely observing that a law has gone into effect cannot be said to compel or constrain anyone. *See In re Abbott*, 956 F.3d at 709; *cf. TDP*, 978 F.3d at 181.

Section 31.012(d) is similarly lacking. In its entirety, it provides: "The secretary of state shall 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." Tex. Elec. Code

§ 31.012(d). Plaintiffs suggest that these rules and procedures are the mechanism by which straight-ticket voting will be eliminated in Texas. *See* ROA.11 ¶ 8 ("[O]n September 1, 2020, Secretary of State Hughs will order the elimination of the STV option from all Texas ballots pursuant to House Bill 25"); ROA.19-20 ¶ 25 ("[T]he Secretary will act . . . to implement [HB 25's] provisions . . . [and] eliminat[e] STV."). That is incorrect.

By operation of law and without any action by the Secretary, "[HB 25's] elimination of straight-ticket voting became effective on September 1, 2020." *TARA*, 976 F.3d at 565-66; *see* HB 25 § 8 (repealing section 52.071, which required a straight-ticket-voting option on the ballot); *id.* § 9 ("This Act takes effect September 1, 2020."). Whatever rule or procedure the Secretary adopts under section 31.012(d), it will not result in "the elimination" of straight-ticket voting—straight-ticket voting is already gone. ROA.11 ¶ 8.

In any event, Plaintiffs' misreading of the section is irrelevant to the *Ex parte Young* inquiry. "The power to promulgate law is not the power to enforce it." *In re Abbott*, 956 F.3d at 709; *see Mi Familia*, 977 F.3d at 467 ("[T]he statutory authority . . . to issue, amend or rescind an Executive Order is not the power to enforce it." (footnote and quotation marks omitted)). As already explained, "[e]nforcement actions"—the preparation of ballots—"w[ill] be undertaken by local authorities." *Mi Familia*, 977 F.3d at 467. Thus, whether section 31.012(d) grants the Secretary the power to will HB 25 into law (as Plaintiffs believe) or merely to pass regulations (as the section says), it does not supply the missing connection to enforcement. And without that connection, *Ex parte Young* is not available.

### 2. The record contains no evidence that the Secretary is likely to enforce HB 25.

Even if the Secretary were statutorily tasked with enforcing HB 25, *Ex parte Young* would also require plaintiffs to show a "demonstrated willingness to exercise that duty." *TDP*, 978 F.3d at 179. They cannot make that showing because nothing in the record demonstrates that willingness. This alone precludes plaintiffs' reliance on *Ex parte Young*.

The district court failed to acknowledge this requirement for *Ex parte Young* relief, and plaintiffs did not respond to the Secretary's observation below that there was "[no] evidence of likely enforcement." ROA.893; *see* ROA.1406-07 (Plaintiffs' response to the Secretary's sovereign-immunity arguments). Given that the record lacks evidence that the Secretary is likely to enforce HB 25—indeed, plaintiffs failed to so much as argue as much below—Plaintiffs have fallen short of their burden to show that *Ex parte Young* applies. *See TDP*, 978 F.3d at 179. It is too late for them to try to make that showing now. *See Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 (5th Cir. 2002) (declining to consider plaintiff's sovereign-immunity-waiver argument because he raised it "for the first time on appeal").

### 3. *Ex parte Young* does not permit the injunctive relief awarded here.

The district court enjoined the Secretary "from taking any action to implement or enforce HB 25." ROA.1704. Sovereign immunity bars this injunction because it does not and cannot afford Plaintiffs relief on their claims. S*ee Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

The Court has rejected similar injunctions before. In *Mi Familia Vota v. Abbott*, various plaintiffs likewise sued the Secretary, challenging various voting laws and claiming that "long lines[] [and] the use of electronic voting devices rather than paper ballots" during the COVID-19 pandemic "infringe[d] upon the right to vote." 977 F.3d at 464. Plaintiffs sought an injunction against the Secretary to ensure that "sufficient numbers of . . . paper ballots" were available. *Id.* at 465.

One of the challenged laws permitted "certain counties to participate in Texas's Countywide Polling Place Program if those counties meet particular criteria, including the use of electronic voting machines, which means that those counties do not provide paper ballots." *Id.* That section placed the Secretary in charge of implementing the program and selecting participants. Tex. Elec. Code §§ 43.007(a), (d). A related provision permits the Secretary to exclude "counties whose electronic voting devices do not meet certain standards from the Program." *Mi Familia*, 977 F.3d at 468 (citing Tex. Elec. Code. § 31.014(a)).

Yet this Court rejected plaintiffs' reliance on *Ex parte Young*. "Plaintiffs' claim regarding section 43.007 [was] based on its prohibition of the use of paper ballots." *Id.*. But even if the district court "order[ed] the Secretary not to enforce that requirement[,] . . . that would still not *require* counties" in the Countywide Polling Place Program "to print and use paper ballots." *Id.* Local officials, rather than the Secretary, were "responsible for printing [and] distributing ballots." *Id.* (footnote omitted). So "[i]t would remain their choice as to whether to incur the expense of printing, distributing and counting paper ballots instead of utilizing the electronic devices they already have in place." *Id.* In any event, because "[n]o county or local

official [was] a party to the . . . suit," no injunction entered against the Secretary could bind those officials anyway. *Id.* Accordingly, "[d]irecting the Secretary not to enforce . . . section 43.007 would not afford the Plaintiffs the relief that they seek." *Id.* "[T]herefore, the Secretary of State [was] not a proper defendant." *Id.* (quotation marks omitted).

Plaintiffs fare no better here when they seek to prevent HB 25's elimination of straight-ticket voting options on ballots. ROA.54. The law requiring straight-ticket voting options on ballots has already been eliminated, and the Secretary is not responsible for preparing these ballots—local officials are. Tex. Elec. Code § 52.002. As a result, the order enjoining the Secretary "from taking any action to implement or enforce HB 25," ROA.1704, does not require local officials to prepare ballots with straight-ticket-voting options. And because those officials are not defendants in this case, the prohibitory injunction does not bind them. Thus, the injunction does "not afford the Plaintiffs the relief that they seek, and therefore, the Secretary of State "is not a proper defendant'" under *Ex parte Young*. *Mi Familia*, 977 F.3d at 468 (footnote omitted) (quoting *In re Abbott*, 956 F.3d at 709).

## II. Plaintiffs Are Unlikely to Succeed on the Merits of Their Undue-Burden Claims.

As the Supreme Court has recognized, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Courts therefore "apply a balancing test" to review "state election rule[s] [that] directly restrict[] or otherwise burden[]" the right to vote. *Voting for*

*Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013). This "*Anderson/Burdick*" test involves two inquiries: "(1) whether the [law] poses a 'severe' or instead a 'reasonable, nondiscriminatory' restriction on the right to vote and (2) whether the state's interest justifies the restriction." *Richardson*, 978 F.3d at 235 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

The district court's determination that "the State's interests do not outweigh the burdens imposed by HB 25," ROA.1702, "rests on shaky factual and legal ground." *TARA*, 976 F.3d at 567 n.1. Indeed, the district court erred at both steps. First, if HB 25 imposes *any* burden on the right to vote, it is a minimal one. Second, the State's regulatory interests are more than sufficient to justify any alleged burden on that right.

### A. Plaintiffs cannot show that the burden imposed by HB 25 is anything more than minimal.

Plaintiffs must prove the "character and magnitude" of HB 25's burden on the right to vote. *Steen*, 732 F.3d at 387-88. And where, as here, Plaintiffs "advance[] . . . a broad attack on the constitutionality" of a statute, "seeking relief that would invalidate [it] in all its applications, they bear a heavy burden of persuasion" in doing so. *Crawford*, 553 U.S. at 200 (plurality op.).

Plaintiffs cannot bear that burden. They assert that "[t]he significant increase in wait times caused by HB 25 will severely burden Texas voters' fundamental right to vote." ROA.291. But HB 25 does not burden the right to vote at all. The law merely gives effect to "[t]he right to vote freely for the candidate of one's choice" by having voters freely choose their preferred candidate. *Reynolds*, 377 U.S. at 555. Because

there is no burden, the State's interests necessarily suffice. *See Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment).

But even if the requirement that voters select their preferred candidates individually could be described as a burden, it is at most a minimal one. Like "the inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph" to obtain new photo ID, the increase in wait times caused by the elimination of straight-ticket voting "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198 (plurality op.) (footnote omitted); *see id.* at 209 (Scalia, J., concurring in the judgment) (similar). What's more, any burden imposed by HB 25 is necessarily non-discriminatory because it requires *all* voters to make individual selections.

Though the district court correctly concluded that HB 25 did not impose a severe burden, it erred twice in "find[ing] that HB 25 . . . places a greater than minimal burden on Texans' right to vote and right to associate." ROA.1700.

**1.** First, the district court relied on outright guesswork. The court "mistakenly assumed that" the former "straight-ticket voting option enabled voters to 'mark a single bubble,' that eliminating that option would force voters 'to make individual selections,' and that therefore, 'the amount of time it will take to complete a ballot [without straight-ticket voting] will increase.'" *TARA*, 976 F.3d at 567 n.1 (alteration in original) (quoting the district-court opinion, ROA.1700). The district court made these errors due to a demonstrably flawed "expert" report offered by plaintiffs. *See* ROA.351-82 (declaration of Dr. Muer Yang); ROA.363 ¶ 35. (Dr. Yang: "With the

[straight-ticket-voting] option, [straight-ticket] voters need make only one selection to cast votes in each partisan election.").

"[A]s any Texan who voted in previous elections knows, this is not how straight-ticket voting in Texas worked." *TARA*, 976 F.3d at 567 n.1; *see* ROA.978. "The straight-ticket option still required in-person voters to scroll through the entire ballot, page by page, at the voting machine in order to cast their ballot. This gave voters the opportunity to confirm each of their individual choices or change the selection for any of the individual contests." *TARA*, 976 F.3d at 567 n.1; *see* ROA.978; ROA.1019 ¶ 17.

Were that not enough to vitiate the report, other errors abound. For example, building off his flawed conception of Texas straight-ticket voting, Dr. Yang assumed that "former [straight-ticket] voters will have to spend additional time" at the ballot box. ROA.364 ¶ 35. Because he "d[id] not have empirical data" to quantify this assumption, he made it up: "I consider the possible scenarios of 10 and 15 seconds." *Id.* In fact, Dr. Yang based his "estimate [of] the average time to vote if there is no [straight-ticket voting]" *entirely* "on a series of assumptions," with "no evidence at all in support" of them. ROA.1124 ¶¶ 50-52. The district court relied on Yang's series of unsupported assumptions when evaluating HB 25's burden. *See* ROA.1700 (district court's citation to "Dkt. No. 6-2," the expert report, as support for its findings). That conclusion cannot stand.[1]

[1] *See Richardson*, 978 F.3d at 236 n.33 (explaining that it would "flout[] *Anderson*[]" to "find that a burden is severe based solely on a plaintiff's assertion that he

**2.** Second, in determining the magnitude of the burden, the district court improperly considered the effects of the pandemic.

Plaintiffs have framed their lawsuit (including the undue-burden claim) as a facial (rather than as-applied) challenge to HB 25. *See, e.g.*, ROA.273; ROA.276-77; ROA.1389; ROA.1405; Pls.' Opp'n to Mot. for Stay at 18 (Sept. 29, 2020), Doc. No. 00515583344 (acknowledging that the preliminary injunction was based on a facial challenge to HB 25).

The district-court decision mirrors this framing. *See* ROA.1678 (finding standing to sue the Secretary because "[t]he facial invalidity of a Texas election statute is . . . fairly traceable to and redressable by" her (first alteration in original)); ROA.1704 ("This Preliminary Injunction shall take effect immediately and shall remain in effect pending a final judgment in this action or further other of this Court.").

Yet plaintiffs "can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (alteration in original; quotation marks omitted). That means "the effect of the COVID-19 pandemic" is irrelevant to the undue-

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or she might be disenfranchised"); *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 345 (6th Cir. 2018) (considering the district court's characterization of the burdens of eliminating straight-ticket voting to be erroneous because the estimated "three-minute increase" in voting time was "essentially pulled out of the air"); *cf. Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 146 (5th Cir. 2020) ("*LULAC*") ("We cannot conclude that speculating about . . . delays for hypothetical absentee voters somehow renders Texas's absentee ballot system constitutionally flawed.").

burden analysis—HB 25 is facially unconstitutional only if it would still be unconstitutional *after* the pandemic. *TDP*, 978 F.3d at 176-77.

But the district court's burden analysis appears to turn on the existence of the present public-health crisis. *See, e.g.*, ROA.1700 ("The Court finds that HB 25, especially as exacerbated by the ongoing pandemic, places a greater than minimal burden on Texans' right to vote and right to associate."); ROA.1701 ("Forcing Texas voters to stand in longer lines and increasing their exposure to a deadly virus burdens the right to vote."); ROA.1702 (noting, as part of *Anderson/Burdick*'s second step, that "spend[ing] more time voting . . . increase[es] voters' potential exposure to a deadly virus"). Because these observations shed no light on the legality of HB 25 *after* the pandemic, they are insufficient to carry the heavy burden of establishing the law's invalidity.

What's more, the district court ignored the State's numerous attempts to enable individuals to vote despite the pandemic. Before the 2020 general election, the Texas Governor expanded voting opportunities, permitting Texans to "(1) vote early in-person for an expanded period starting on October 13 (as opposed to the previous early-voting period starting on October 19); (2) hand-deliver a marked mail ballot during a forty-day period starting on September 19 (as opposed to the previous *one day*—Election Day—on which this was permitted); or (3) drop an absentee ballot in the mail." *LULAC*, 978 F.3d at 145; *see* ROA.1019 ¶ 20 (election official's explanation that most in-person voters vote early and that the extended early-voting dates "offer[] voters great flexibility in finding a convenient time to cast an early ballot without waiting in any line on election day"); ROA.1037 (Governor's proclamation).

Even if the district court could rely on the current state of COVID-19 in evaluating plaintiffs' facial challenge—and it cannot—by ignoring that these expanded opportunities mitigated the burden of in-person voting on election day, "the district court vastly overstated the 'character and magnitude' of the burden allegedly placed on voting rights" by HB 25. *LULAC*, 978 F.3d at 144; *cf.* ROA.1701.

As a consequence, the district court's burden analysis is indefensible. It draws conclusions about voting and wait times from a mistaken premise about the workings of straight-ticket voting. It relies on data derived solely from the imagination of an academic who is similarly misinformed about Texas voting practice. And it ignores inherent limitations on plaintiffs' facial challenge. Pandemic or not, HB 25's burden on voting rights is no more than minimal.

### B. The State's regulatory interests outweigh any burden.

The district court likewise minimized the important State interests that HB 25 advances. Generally speaking, these interests "are sufficient to justify" restrictions on voting "if the burden of the voting restriction is not severe." *Richardson*, 978 F.3d at 239. Just so here: the State's weighty interests significantly outweigh any burden HB 25 imposes.

**1.** The elimination of straight-ticket voting "reflect[s] a deliberate determination that it is better if voters are encouraged or required to make individual assessments of candidates, rather than mass choices." *Michigan State*, 749 F. App'x at 346. That determination "is supported by good policy reasons." *Id.* at 355 (Kethledge, J., concurring). Specifically:

*Reducing voter confusion*. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Straight-ticket voting on electronic voting machines created a problem known as "emphasis voting." ROA.988. After selecting a straight-party option, some voters would "try to 'emphasize' or 'confirm' their vote for a particular candidate by touching the box next to the candidate's name on the page for that particular race." ROA.988. But that produced the opposite result—it led to the candidate inadvertently being de-selected. ROA.988. Voters that noticed this while reviewing their selections tended to "think that their votes had been lost or changed," resulting in confusion, frustration, and wasted time working through "corrective procedures" with election officials. ROA.988.

*Reducing unintentional omissions on the ballot*. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Eliminating straight-ticket voting prevents "unintentional roll-off," which occurs when a voter casts votes for some races but accidentally leaves others blank. ROA.987. Back when voting straight-ticket was an option, some voters thought that selecting a party at the top of the ballot cast a vote in all races. ROA.987. The bottom of the ballot, however, often lists nonpartisan races and propositions not covered by the straight-party ticket. ROA.987. This resulted in voters only realizing after they had left the ballot box that they had neglected to vote in those other races. ROA.987. Requiring voters to proceed race-by-race puts an end to that problem.

*More informed voting & better-qualified candidates*. *See Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) (per curiam). Voters that used straight-ticket voting chose a suite of candidates based only on a single piece of information: party affiliation. That "discourage[d] a voter from researching all the candidates on the ballot." ROA.989. HB

25 encourages voters to consider additional information about candidates. Relatedly, the reduced reliance on party affiliation boosts the election prospects for better-qualified candidates, making it more likely that they will run for office in the first place. ROA.989.

*More competitive races*. *Anderson*, 460 U.S. at 787. Similarly, straight-ticket voting can make it "prohibitive to run outside of the major parties." ROA.990. HB 25 therefore helps make independent candidates more viable, benefitting those candidates and their supporters.

**2.** Rather than engage in meaningful analysis of these interests, the district court dismissed them offhand: "The Secretary's stated reasons for HB 25 are underwhelming." ROA.1701. But the criticisms the district court levied against the State's interests are misplaced.

The district court rejected the State's interest in more-informed voting on the basis that it was "not supported by any evidence, only by a belief." ROA.1702. As the Fifth Circuit recently noted in response to a similar argument, courts "do not force states to shoulder "the burden of demonstrating empirically the objective effects" of election laws." *Richardson*, 978 F.3d at 240 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)). Rather, "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro*, 479 U.S. at 195-96. And "[a]s a logical matter" alone, elimination of straight-ticket voting at least "nudge[s]" the voter "to consider [candidates'] individual merits against a generally adverse partisan tide." *Michigan State*, 749 F. App'x at 345.

The court also quipped that it was "unclear . . . how requiring voters to spend more time voting and more time waiting in line at polling places . . . will encourage more qualified candidates and better campaigns." ROA.1702. As explained above, the premise is flawed—any increase in waiting time would be minimal. In any event, the purported lack of clarity is not a result of the record. Assuming the State bears some evidentiary burden, it has more than met it here.

The record reveals support for HB 25 from the Green Party and the Libertarian Party, ROA.1159; an editorial by *The Dallas Morning News* calling for the abolition of "[o]ne-punch straight-ticket voting" because of its "dangerous hypothesis" that "party affiliation automatically ensures competency," ROA.1262; a warning from the Chief Justice of the Supreme Court of Texas that "qualifications d[o] not drive [the] election" of judicial candidates, who are "at the mercy of the top of the ticket," ROA.1272; and several accounts of "highly competent" judges being "swept out of office" by straight-ticket voting, ROA.1321; *see* ROA.1049; ROA.1327-30. The district court did not explain what part of this record it found unclear.

Finally, the district court took the view that "the Secretary has not demonstrated how eliminating [straight-ticket voting] will reduce voter confusion and unintentional roll-off." ROA.1702. Again, that is not the Secretary's burden. *See Munro*, 479 U.S. at 194-95. But she has sustained it anyway.

The Secretary submitted a declaration from a county elections administrator who has served for over 30 years explaining how "the [straight-ticket voting option] can and does cause voter confusion and frustration through . . . 'emphasis voting.'" ROA.1019 ¶ 18; *see* ROA.1016 ¶ 1. The Harris County and Bexar County clerk's

offices identified the same problem and testified in favor of HB 25. ROA.1043-45; ROA.1059-60. A local official recounted how straight-ticket voting led to unintentional roll-off relating to a nonpartisan school board race. ROA.1061-63. And the record contains a mandamus petition filed by the Texas Democratic Party and one of their local branches, complaining that emphasis voting effectively "disenfranchise[s]" voters. ROA.1082; *see* ROA.1079.

The district court did not explain why it considered this evidence insufficient. Instead, it opined that "eliminating a practice that Texan voters have been accustomed to for 100 years is more likely to cause confusion among voters than [not] eliminating it would." ROA.1702 (emphasis omitted). This view finds no support in the record. *Cf. LULAC*, 978 F.3d at 146 (holding that "[t]his kind of speculation . . . comes nowhere close to rendering Texas's" voting laws "constitutionally inadequate"). And if correct, it would bar States from amending any election provision that had been law for long enough.

HB 25 is minimally burdensome, justified by important interests, and constitutional. In eliminating straight-ticket voting, Texas joined the 43 other states with laws that "simply require[] voters to choose candidates for each office individually." *Michigan State*, 749 F. App'x at 354-55 (Kethledge, J., concurring); ROA.968. Even though several of those states "lack[] early voting and no-excuse absentee voting," *Michigan State*, 749 F. App'x at 345, no ban on straight-ticket voting "h[as] ever been declared unconstitutional," *id.* at 355 (Kethledge, J., concurring). "To deem ordinary and widespread burdens like these" unduly burdensome would "hamper the ability of States to run efficient and equitable elections, and compel federal courts to

rewrite state electoral codes." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). The district court erred in its conclusion that the burdens of HB 25 outweigh its benefits.

## III. The Other Preliminary-Injunction Factors Weigh in Favor of the State.

The district court's irreparable-harm, equities-balancing, and public-interest analyses were likewise incorrect. Its mistaken conclusions regarding these remaining preliminary-injunction factors support reversal as well.

Plaintiffs did not show an irreparable harm precisely because they failed to prove *any* harm. Though the district court tersely concluded that HB 25 would cause an irreparable injury "to Plaintiffs and to ALL Texas voters," ROA.1703 (capitalization in original), plaintiffs offered no evidence of even a single particular Texas voter who would suffer such an injury. Part I.B, *supra*. They could not establish irreparable harm based on assertions in their complaint; they were required to prove such, as with standing, to justify a preliminary injunction. *Barber*, 860 F.3d at 352. They failed to do so: the record lacks even a single declaration, verification, or other form of proof sufficient to *prove* an irreparable harm.

Even had they identified particular voters subject to longer lines or less likely to vote for their candidates of choice, plaintiffs' injuries remained speculative. As the district court identified in *Bruni*, these harms remained subject to a long list of contingencies which may never occur. *See Bruni*, 468 F. Supp. 3d at 825. The district court's assumption of a certain injury impending to *every* Texas voter on a complete lack of record evidence was a clear abuse of discretion.

The balance of equities plainly favored the State as well, though the district court failed to even analyze that balance. The State has a strong interest in enforcing its duly promulgated laws on behalf of its citizens, and an injunction against HB 25 necessarily impedes that strong interest. *State v. Ysleta Del Sur Pueblo*, 955 F.3d 408, 415 (5th Cir. 2020), *as revised* (Apr. 3, 2020). Indeed, the strong presumption of the constitutionality of a State's laws is a factor in itself that weighed against an injunction. *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). Further, the three-year delay that plaintiffs waited after HB 25 became effective before filing this second challenge weighs against them. By contrast, the injunction would have required local election officials to suffer serious hardship in preparing to reprogram voting machines on a short timeline before the 2020 election. ROA.1709. The district court clearly abused its discretion in concluding otherwise.

Finally, because the State appeals this preliminary injunction, its interests merge with those of the public. *TARA*, 976 F.3d at 569. The public interest favors the numerous electoral benefits of eliminating straight-ticket voting: encouraging individual decisions regarding individual candidates, reducing voter confusion, and ensuring more competitive races. *See* Part II, *supra*. Given these interests, the district court abused its discretion in issuing a preliminary injunction.

## Conclusion

The Court should reverse the district court's preliminary injunction and direct the district court to dismiss plaintiffs' claims.

Respectfully submitted.


Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Texas Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General

Matthew H. Frederick
Deputy Solicitor General
Matthew.frederick@oag.texas.gov

/s/ Judd E. Stone
Judd E. Stone
Assistant Solicitor General
Judd.stone@oag.texas.gov

Counsel for Defendant-Appellant
Ruth Hughs

## Certificate of Service

On this the 11th day of January, 2021, 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/ Judd E. Stone
Judd E. Stone

## 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 12,644 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/ Judd E. Stone
Judd E. Stone