**No. 20-40643**

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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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.*

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On Appeal from the United States District Court
for the Southern District of Texas
(No. 5:20-cv-00128)

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# BRIEF OF APPELLEES TEXAS ALLIANCE FOR RETIRED AMERICANS, SYLVIA BRUNI, DSCC, AND DCCC

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## CERTIFICATE OF INTERESTED PERSONS

No. 20-40643, *Texas Alliance for Retired Americans, et al. v. Hughs*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

**Plaintiffs-Appellees**

a. Texas Alliance for Retired Americans: no parent corporation or stock
b. Sylvia Bruni
c. DSCC: no parent corporation or stock
d. DCCC: no parent corporation or stock

**Other Parties**

a. Texas Democratic Party
b. Jessica Tiedt

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## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary to decide this appeal. The Secretary's appeal of the district court's preliminary injunction order is moot and lacks merit, and the Secretary's sovereign immunity arguments fail under this Court's case law.

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## INTRODUCTION

In enacting HB 25, Texas ended a century-old tradition of allowing voters to use a straight-ticket voting (STV) option. Because Texas' effort to end STV unjustifiably and discriminatorily burdened the fundamental right to vote, Plaintiffs alleged, among other things, that the Secretary's implementation of HB 25 violated the United States Constitution and the Voting Rights Act. The record before the district court strongly demonstrated HB 25 would burden Texans' right to vote. As a result, the district court acted well within its discretion in issuing a preliminary injunction.

On appeal, the Secretary's primary argument is that the district court was foreclosed from doing so because of the outcome in *Bruni v. Hughs*, 468 F. Supp. 3d 817 (S.D. Tex. 2020), a decision involving different litigants and issued under different factual circumstances. The Secretary is wrong. As the district court reasonably found, it was inequitable to apply issue preclusion because the facts underlying Plaintiffs' claims had materially changed since *Bruni*. But even if that were not the case, the district court could not have precluded Plaintiff Texas Alliance for Retired Americans (TARA) from seeking a preliminary injunction because TARA was not a litigant in *Bruni*. The Secretary did not, and could not, prove any of the limited exceptions to the time-honored rule that a party may not be bound by a case in which it did not participate.

The Secretary's other arguments also fail. The record demonstrated HB 25 had injured Plaintiffs and would continue to injure them, as well as their members and constituents. Plaintiffs offered unrebutted evidence that HB 25 would increase lines at polling places, that local officials were severely constrained in their ability to mitigate that effect, and that the State had chosen not to take meaningful actions to lessen HB 25's harms. As a result, nothing about the district court's standing conclusion relied on a "chain of assumptions." Appellant's Br. 2.

Nor can the Secretary avoid this litigation by attempting to disclaim her central role in the process of Texas' elections. HB 25 tasks the Secretary with a concrete role in its implementation. The *Ex parte Young* exception squarely applies, and sovereign immunity does not bar Plaintiffs' claims.

In the end, there is no reason to reverse the district court's ruling. Its conclusions were grounded in the plethora of evidence Plaintiffs offered. Instead of attempting to rebut that evidence, the Secretary offered irrelevant expert reports that relied on the wrong data and criticized methodologies that Plaintiffs' experts did not use. While the Secretary may regret that strategic choice, that is not a basis for reversing the decision below.

## ISSUES PRESENTED

1. Did the district court abuse its discretion by concluding issue preclusion was inappropriate due to changes in the facts underlying the court's standing

decision in *Bruni*?

2. Did any of the plaintiffs in *Bruni* understand themselves to be litigating on TARA's behalf so as to permit application of the adequate-representation exception to the rule against nonparty preclusion?

3. Did the district court properly conclude, in the context of granting its preliminary injunction, that Plaintiffs had standing?

4. Did the district court otherwise abuse its discretion in granting its preliminary injunction?

5. Did the district court err by rejecting the Secretary's argument that she lacked a connection to HB 25, a Texas election law that applies statewide, so as to entitle the Secretary to sovereign immunity from Plaintiffs' constitutional claims?

## STATEMENT OF THE CASE

### I. HB 25's Elimination of Straight-Ticket Voting in Texas

This suit challenges HB 25, which during the November 2020 election ended a "100-year-old practice" in Texas of allowing voters to use a straight-ticket voting (STV) option. ROA.1662. STV allowed "a voter to efficiently cast her votes by making an initial selection corresponding to her preferred party, which [] automatically selects the party's nominee in each race," after which the voter can "modify her choice in any individual race." ROA.1662-63. "Texas voters and

election administrators ha[d] come to rely on STV as an integral component of the State's elections." ROA.1663-64. This was in part due to the State's "exceptionally lengthy ballots, which sometimes list as many as 95 races in a single county." ROA.1663-64. In recent elections, the vast majority of Texans relied on STV: in 2018, "approximately two-thirds of voters—over 5.6 million Texans—used STV to cast their ballots." ROA.1663-64. Eliminating STV would force those millions of voters to take longer to complete their ballots, ROA.345-46, in turn dramatically increasing the time voters waited at the polls, ROA.351-82. Although the Legislature was well aware of these significant concerns, it provided no funding or tools to mitigate this effect. ROA.27, 438-39.

HB 25's projected increase in polling-place lines was the product of the "non-linear relationship between voting time and average wait times": "even small increases" in voting time produce "exponentially greater impacts on the wait times at polling places." ROA.68, 1674. In Travis County, for example, a mere 79-second increase in average voting time would have *tripled* the amount of time the average voter waited at the polls on Election Day in 2016. ROA.1684. And if voters who previously used STV took just 10 extra seconds on each partisan race, the average voter would have waited more than 45 minutes in line, far more than the 9-minute average when STV was available. ROA.76-78.

HB 25's timing could not have been worse. The law was set to take effect on

September 1, 2020, as the ever-increasing American death toll from COVID-19 was nearing 200,000. ROA.1671. At the time the district court issued its preliminary injunction, epidemiologists agreed the virus would become even more transmissible during the November 2020 election. ROA.105-06. "[A]nything that extend[ed] the time a voter must stay in line before voting, or increase[d] the amount of time a voter must stand at the voting booth, [would] increase risk of transmission." ROA.102. As a result, not only would HB 25 force voters to wait in longer lines, but in the 2020 election, each additional minute of waiting translated into more potential exposure to a deadly virus.

The pandemic enhanced HB 25's detrimental effects by severely restricting election officials' ability to mitigate the lines HB 25 would produce. Social distancing requirements prevented adding voting machines inside polling places, and in many instances required *decreasing* the number of such machines. ROA.58, 1675. Venues were increasingly unwilling to serve as polling locations, forcing more voters into fewer locations. ROA.58, 294-95. Willing poll workers became extremely scarce, reducing the number of polling places even further. ROA.58-59. And because municipal elections scheduled for the spring were postponed until the fall because of the virus, ballots would be even longer than usual in the November 2020 election. ROA.58, 1672.

The concern that HB 25 would dramatically increase polling place lines was presented to and ignored by the Texas Legislature, which passed HB 25 almost precisely along party lines, with Republicans in support and Democrats opposed.[1] Numerous legislators raised concerns about increased lines. One observed:

> Long waits at polling places already are huge problems in some parts of Texas, especially in urban areas where many voters line-up to vote for many races on the ballot. . . . [E]liminating the straight-party option would only make things worse and cause many either to skip down-ballot races altogether or not go to the polls at all. The effect would be to suppress voting and voter turnout.

ROA.165. Election officials similarly testified that HB 25 would cause longer lines, require increased budgets, and hit largest counties the hardest. ROA.165-66. HB 25's supporters offered no response to these arguments, admitting they had not reviewed any study regarding these effects. ROA.149-50. When asked who would cover the costs HB 25 would impose on counties, Rep. Ron Simmons—HB 25's author and chief proponent—claimed he was "not advised as to what [those costs] would be or wouldn't be," despite Dallas County election officials' testimony that it would cost them nearly a million dollars. ROA.143-44.

[1] Below, the Secretary falsely claimed that nine Democrats supported HB 25's elimination of STV. *See* ROA.876, 1480 (explaining this mischaracterization). She implies the same here. Appellant's Br. 5. In fact, almost no Democrats supported HB 25. *See* House Journal, May 6, 2017, at 2841-42, https://journals.house.texas.gov/hjrnl/85r/pdf/85RDAY65FINAL.PDF#page=81.

HB 25's proponents also ignored how Texas' uniquely lengthy ballots would exacerbate HB 25's burdens, particularly in Texas' largest counties with large minority populations. During a 2017 legislative session, Rep. Simmons explicitly disregarded the fact that ballots in Dallas and Harris Counties can have nearly 100 items. ROA.170. Not concerned that HB 25 would cause some voters not to complete their ballots or even skip voting entirely, he stated: "[o]f course, it's obviously their choice as to how they want to handle that." ROA.170.

Meanwhile, the justifications HB 25's proponents gave for passing the law were nothing more than the unsubstantiated speculation of a few legislators. Proponents hypothesized HB 25 would lead to a more informed electorate, but they offered no evidence suggesting this was true. Rep. Simmons admitted he was unaware of "any empirical data" supporting this claim. ROA.151-52. And when another proponent of HB 25 was asked if he was aware of "any [such] studies or any evidence," he could not point to a single source; instead, he simply stated that, "there's a lot of belief" in this hypothesis. ROA.152. Proponents also claimed the law would produce better candidates and campaigns, but, again, not a single one of them could point to anything supporting their supposition. ROA.153-56.

## II. The Proceedings in *Bruni v. Hughs*

In early March 2020, Sylvia Bruni, the Texas Democratic Party (TDP), DSCC, DCCC, and Texas House District 20 candidate Jessica Tiedt (together, the

"*Bruni* Plaintiffs") filed suit in the U.S. District Court for the Southern District of Texas challenging HB 25 on the ground that, among other claims, the law would unjustifiably burden Texans' fundamental right to vote. *Bruni v. Hughs*, 5:20-cv-35 (S.D. Tex.). On June 23, the district court dismissed the *Bruni* Plaintiffs' complaint, concluding that, at that time, too many variables were at play to infer that HB 25 would injure those plaintiffs. *Bruni*, 468 F. Supp. 3d 817. Although the *Bruni* Plaintiffs had also sought a preliminary injunction, the district court's ruling was based solely on the complaint; it did not consider the evidence the *Bruni* Plaintiffs had offered with their motion for preliminary injunction. As a result, the court addressed only the complaint's mere *allegation* that HB 25 would increase polling-place lines, which the district court declined to accept as true. *Id.* at 824 n.5. The court also emphasized that, at the time, it was still yet to be seen whether state or local election officials would take measures to mitigate HB 25's harms, and that because Texas had not yet held an election during the pandemic, it was still unclear how it would impact the State's elections. *Id.* at 825-27.

## III. The Proceedings in this Case

After *Bruni*, Texas held its July 14, 2020, primary election, its first election to take place in the pandemic. As the district court would later find, that election demonstrated "the amplifying effect the pandemic has on the problems caused by HB 25." ROA.1671. Voters faced "the abrupt closure of voting facilities," "a

dwindling number of volunteer poll workers," and "the need to reduce the number of voting machines at each polling place to maintain adequate social distancing." ROA.1671-72. It also became clear state officials did not intend to take any meaningful action to reduce the longer lines caused by HB 25. ROA.1672.

Based on these new developments, TARA, Bruni, DSCC, and DCCC filed this suit on August 12, 2020, ROA.9-55, and immediately sought a preliminary injunction, ROA.278-318. Among other claims, Plaintiffs asserted that HB 25 would unconstitutionally burden Texans' fundamental right to vote and violate Section 2 of the Voting Rights Act by causing disproportionately long lines in areas with high Black and Hispanic populations. Plaintiffs advanced drastically different factual allegations compared to *Bruni*, detailing the actual impact the pandemic was having on Texas' election administration, as well as state officials' decisions not to take meaningful actions to mitigate HB 25's harms.

Unlike in *Bruni*, Plaintiffs attached to their Complaint a substantial amount of evidence proving their allegations. ROA.56-261. In particular, they offered evidence that the pandemic would continue, and likely worsen, into the fall, ROA.99-108, and that mounting election administration issues would severely limit officials' ability to mitigate HB 25's harms, ROA.57-59. They also submitted a report by elections lines expert Dr. Muer Yang. ROA.61-92. Although Dr. Yang submitted a report in support of the *Bruni* Plaintiffs' motion for a preliminary injunction, the court did not

consider it when ruling on the sufficiency of the *Bruni* complaint. In addition, Dr. Yang's report in this case was dramatically revised compared to his report in *Bruni*. In preparing this new report, Dr. Yang gathered a new set of data and utilized completely different methodology in response to criticisms the Secretary's opposing expert, Dr. Stephen C. Graves, had previously lodged in *Bruni*. ROA.61-92.

The Secretary did not offer any meaningful evidence in response to Dr. Yang's report in this case. Instead, she submitted a copy of the same June 3, 2020 report by Dr. Graves submitted in *Bruni*, which responded to methodology Dr. Yang no longer used and also relied on the wrong data. ROA.1115-1149.

After careful consideration of the extensive record, the district court granted a preliminary injunction and denied the Secretary's motion to dismiss. ROA.1661-1704. Based on Dr. Yang's analyses, the court found HB 25 would increase voting time and thus expand lines at the polls. ROA.1700. It found that long wait times burden voters, causing them to "leave polling place lines before they have exercised their fundamental right to vote," particularly when HB 25 would "increas[e] their exposure to a deadly virus." ROA.1701. Because HB 25's justifications were "underwhelming, especially when weighed against the risk of disenfranchisement and the risk to voters' health," ROA.1701, the court found HB 25 would violate Texans' fundamental right to vote in the November election. In denying the motion to dismiss, the district court concluded the Secretary was "sufficiently connected to

[HB 25's] enforcement" to invoke the *Ex parte Young* exception to sovereign immunity. ROA.1679.

### IV. This Appeal

The Secretary immediately appealed the rejection of her assertion of sovereign immunity and the district court's preliminary injunction. She also sought a stay of the preliminary injunction pending this appeal, which this Court granted. *Tex. All. for Ret. Ams. v. Hughs*, 976 F.3d 564 (5th Cir. 2020).

The Secretary's appeal of the district court's preliminary injunction has since become moot. The district court clarified that its preliminary injunction was intended to apply only to the November 2020 election. Order, *Tex. All. for Retired Ams. v. Hughs*, No. 5:20-cv-127 (S.D. Tex. Oct. 26, 2020), ECF No. 49. To streamline this appeal, Plaintiffs moved to dismiss the Secretary's appeal of the preliminary injunction as moot. Pls.' Mot. to Dismiss Appeal as Moot, Doc. No. 00515643282, Nov. 18, 2020; Pls.' Reply in Support of Mot. to Dismiss, Doc. No. 00515664619, Dec. 7, 2020. That motion remains pending.

## SUMMARY OF ARGUMENT

There is no basis for reversing the district court's preliminary injunction or its rejection of the Secretary's assertion of sovereign immunity.

**I.** The district court did not abuse its discretion in refusing to apply issue preclusion to prohibit Plaintiffs from establishing their standing in this case. This

would be true even if the litigants here were identical to those in *Bruni*. The district court reasonably decided that, in light of changed circumstances, it was inequitable to prevent Plaintiffs from asserting their standing by applying issue preclusion.

But even if the district court had abused its discretion by permitting the *Bruni* Plaintiffs to prove their standing in this case, it could not have applied issue preclusion against TARA, which was not a litigant in *Bruni*. Black letter law instructs that a litigant cannot be "bound by a judgment to which she was not a party." *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008). The Secretary failed to prove any exception to this rule.

**II.** The district court correctly concluded, for purposes of its preliminary injunction, that Plaintiffs had standing. TARA, DSCC, and DCCC have both associational and organizational standing to challenge HB 25. Plaintiffs' expert testimony demonstrated HB 25 would increase lines at the polls, injuring Plaintiffs. The Secretary offered no evidence to the contrary; instead, she offered an outdated expert report that relied on the wrong data and criticized a methodology Plaintiffs' expert did not use.

**III.** The district court's decision to grant the motion for a preliminary injunction was not an abuse of discretion. HB 25 was set to impose a significant burden on Texans by forcing them to wait in longer lines, exposing them to a deadly virus. Likewise, the Secretary's "underwhelming" reasons for HB 25 failed to justify

these burdens. ROA.1701.

The remaining factors relevant to the preliminary injunction analysis also supported relief. Plaintiffs demonstrated a constitutional violation, which constitutes irreparable harm. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). Texas has no interest in enforcing an unconstitutional law, *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006), and it is in the public interest when such a law is enjoined, *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996).

In any event, for the reasons described in Plaintiffs' Motion to Dismiss, the Secretary's appeal of the preliminary injunction is moot. Thus, the Court need not (indeed, cannot) address that aspect of this appeal.

**IV.** Finally, the district court correctly rejected the Secretary's invocation of sovereign immunity. The Secretary has a more than sufficient connection to HB 25's enforcement to trigger the *Ex parte Young* exception to sovereign immunity. HB 25 requires the Secretary to educate voters and election officials on the law's the implementation, Tex. Elec. Code § 31.012(a)-(b-1), and to adopt rules and procedures to ensure the effective implementation of HB 25, *id.* § 31.012(d). Moreover, various Election Code provisions delegate to the Secretary responsibilities related to instructing and influencing how voters make selections on their ballots, *id.* § 62.011, and prescribing the contents and form of various ballots,

*id.* §§ 105.002(c), 52.075, 124.006. Those responsibilities sufficiently connect the Secretary to HB 25's enforcement for the purposes of *Ex parte Young*, even without considering the Secretary's general duties to enforce Texas election law. But those general responsibilities, too, require rejection of the Secretary's position. "The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010).

Finally, and regardless of whether *Ex parte Young* applies, the Secretary cannot invoke sovereign immunity against Plaintiffs' claims under the Voting Rights Act, through which Congress "validly abrogated state sovereign immunity." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017).

## STANDARD OF REVIEW

This Court reviews the district court's choice to grant a preliminary injunction for abuse of discretion, its factual findings for clear error, and its legal determinations de novo. *Texas v. United States*, 809 F.3d 134, 150, 172 (5th Cir. 2015). The district court's choice of whether to apply issue preclusion is reviewed for abuse of discretion, *Aguillard v. McGowen*, 207 F.3d 226, 228 (5th Cir. 2000), with legal determinations underlying that decision de novo, *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997). The district court's sovereign immunity determination

is reviewed de novo. *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 513 (5th Cir. 2017).

## ARGUMENT

### I. The district court did not abuse its discretion by refusing to apply issue preclusion to the question of Plaintiffs' standing.

The district court operated well within its discretion in deciding not to preclude Plaintiffs from asserting their standing in this case. Because issue preclusion is an equitable affirmative defense, *Taylor*, 553 U.S. at 906-07; *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1423 (5th Cir. 1995), it was the Secretary's burden to show both that issue preclusion could and should apply. The Secretary failed to make either showing.

#### A. The changed facts since *Bruni* made it inappropriate to preclude Plaintiffs from proving their standing.

The facts underlying Plaintiffs' claims had changed significantly since the June 24 decision in *Bruni*. These changes made issue preclusion both inappropriate and inequitable. *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 479 (5th Cir. 2002) ("[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." (quoting *Montana v. United States*, 440 U.S. 147, 159 (1979))).

Texas' July 14 primary run-off election—its first election during the pandemic—caused local election officials to realize their ability to mitigate HB 25's

harms during the November 2020 election was severely constrained. Moreover, by September, it was clear what steps state officials planned to take (and, more importantly, what steps they planned *not* to take) to mitigate HB 25's harms. These facts eliminated a crucial pillar of the court's decision in *Bruni*: that, as of June 24, there was no indication of what state and local election officials were going to do to alleviate HB 25's harms. ROA.1674-75.

The district court did not abuse its discretion in concluding, under these circumstances, that it would be inequitable to preclude Plaintiffs from demonstrating their standing, notwithstanding the court's earlier decision in *Bruni*. The court's choice here is particularly worthy of deference given that it was considering the preclusive effect of its *own* prior decision. Having intimate familiarity with the reasoning that animated the outcome in *Bruni*, the court determined that the facts had significantly changed such that issue preclusion "should not apply." ROA.1670. The court did not reach this conclusion lightly: it expressly acknowledged that it had recently dismissed similar claims. ROA.1670. Yet, the court found that the factual developments were "so compelling" that they "warrant[ed]" permitting Plaintiffs to prove HB 25's effects. ROA.1670-71.

The court's conclusion was reasonably premised on the fact that, since *Bruni*, it had become clear how the pandemic, and Texas' response to it, would shape in-person voting in the November 2020 election. These facts were not apparent to the

court when it issued *Bruni*, by which time Texas had not yet attempted to hold an election during the pandemic. *Bruni*, 468 F. Supp. 3d at 826. That picture had come into vivid focus by the time the court issued its decision below, driving the court to conclude that "HB 25 will exacerbate the problem of long lines at polling places and infringe the rights of Texans to exercise their political views by casting their ballot this November." ROA.1671.

The post-June 24 factual developments that prompted the court to reach this conclusion fall into three categories. First, Texas' July 14 election demonstrated that the worsening pandemic would severely hamstring local election officials' ability to mitigate the increase in lines HB 25 would cause. These new facts altered the conclusion in *Bruni* that, by June 24, it was still unclear how (if at all) local election officials might "use their state-law authority to ameliorate" HB 25's long lines. 468 F. Supp. 3d at 825. After that decision, local election officials discovered several pandemic-induced complications that constrained their ability to do so. ROA.1671-72. Social distancing requirements within polling places severely limited counties' ability to increase the number of voting machines in each polling place and in many instances required deploying "far fewer voting booths than usual." ROA.36-37, 58. Prior polling-place venues began refusing to host voters during the pandemic, causing the number of available polling places to decrease. ROA.37, 58. And widespread fears over COVID-19 caused a serious poll worker shortage, requiring

not only a decrease in the number of polling places, but also reliance on less experienced and less efficient substitute poll workers. ROA.38, 58-59.

Second, after June 24 it became clear state officials were not planning to take meaningful action to mitigate HB 25's harms. ROA.1672. This too fundamentally altered the premise of the *Bruni* decision, in which the court emphasized the State's power to "take appropriate action to protect Texans' voting rights." 468 F. Supp. 3d at 825-26 (quoting *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 399 (5th Cir. 2020)). By September, it had become clear state officials were going to keep mail-in voting limited to the small fraction of voters over the age of 65 or with a disability that prevented them from voting in person. Tex. Elec. Code §§ 82.001-82.004. Indeed, the only statewide mitigation measure the Secretary could point to was the Governor's extension of early voting by just six days. The court reasonably found that inadequate, explaining that this small extension would, at best, "barely cancel out" the longer lines caused by pandemic-related complications. ROA.1672.[2]

Third, the pandemic's virality, lethality, and durability proved to be far worse than it appeared to the court in June. ROA.1670-71. Reflecting on its decision in *Bruni*, the court explained that, at that time, it was not clear the pandemic "would

[2] The Secretary notes that the Governor also permitted *absentee* voters to personally deliver their own ballots during early voting as an alternative to mailing them. Appellant's Br. 39. Of course, that policy had no effect on in-person voting, particularly when the universe of voters who could vote by mail remained so small.

have such a far reaching impact." ROA.1671. After *Bruni*, Texas experienced an overwhelming surge in COVID-19 infections. ROA.11, 105, 787. And, according to Plaintiffs' unrebutted expert evidence, a new wave of infections was set to occur in the fall. ROA.105.[3] As a result of these developments, "voter anxiety about exercising their voting rights in person" had reached levels "higher than at any time in recent memory." ROA.1671. The court reasonably concluded these circumstances justified allowing Plaintiffs to present their claims.

Asserting otherwise, the Secretary's brief mischaracterizes the district court's analysis. The Secretary claims the district court refused to apply issue preclusion solely due to an "impression that the COVID-19 pandemic significantly worsened" since its decision in *Bruni*. Appellant's Br. 21. As just explained, that is not true. Crucial to the court's analysis were the events that occurred after *Bruni*—specifically, the problems county election officials faced in July and state officials' decision not to take meaningful action—that demonstrated "HB 25 will exacerbate the problem of long lines at polling places." ROA.1671.

The Secretary's only response to this aspect of the district court's analysis is to assert that Plaintiffs should have known that the pandemic would have impacted

[3] The Secretary's comparison of infection rates between June and September, Appellant's Br. 21, misses the point. What mattered was the predicted infection rate at the time of the election, not at the time of court's decision. The Secretary offered no evidence rebutting Plaintiffs' expert's conclusion that a wave of new infections was likely to occur during the November election.

Texas' election administration in *some* way. Appellant's Br. 22. She cites no evidence in support of this argument, despite that it was her burden to prove. In any event, what mattered was not whether the pandemic would impact elections, but *how* it would, and how that would exacerbate HB 25's harms. The answers to those latter questions arose only after *Bruni*.

Intimately aware of the reasoning applied in *Bruni*, the district court determined the circumstances had changed and clarified enough to warrant allowing Plaintiffs to assert their standing. This was not an abuse of discretion.

### B. The Secretary failed to prove issue preclusion could apply to the Texas Alliance for Retired Americans.

Even if the district court had abused its discretion in declining to preclude DSCC, DCCC, and Bruni from asserting their standing, issue preclusion could not have been properly applied to TARA, which was not a litigant in *Bruni*. Time and again, the Supreme Court has "emphasize[d] the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." *Taylor*, 553 U.S. at 898. Precluding TARA from asserting its standing would "run[] up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 892-93 (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)).

In *Taylor*, the Supreme Court surveyed the six "discrete exceptions" to the rule against nonparty preclusion, emphasizing that they apply only "in 'limited

circumstances.'" *Id.* at 898 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)). The Secretary failed to prove any of these exceptions.

The Secretary did not meet her burden of proving TARA was "adequately represented" by the *Bruni* Plaintiffs. "[I]n certain limited circumstances, a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Taylor*, 553 U.S. at 894 (quoting *Richards*, 517 U.S. at 798). Prototypical examples of this exception are "properly conducted class actions" and "suits brought by trustees, guardians, and other fiduciaries." *Id.* For this exception to apply, the Secretary must have proven, "*at a minimum*": (1) TARA's interests "are aligned" with those of the *Bruni* Plaintiffs; *and* (2) "either the [*Bruni* Plaintiffs] understood [themselves] to be acting in a representative capacity or the original court took care to protect the interests of [TARA]." *Id.* at 900 (emphases added).

Regardless of whether TARA's interests in this litigation align with those of the *Bruni* Plaintiffs, the Secretary did not—and could not—prove any party in *Bruni* understood itself to be litigating on TARA's behalf. *See Richards*, 517 U.S. at 796 (holding the adequate-representation exception could not apply even when nonparty and prior litigant's "respective interests were 'essentially identical'"). There are two ways this requirement could have been met. First, the district court in *Bruni* could have adopted "special procedures to protect [] nonparties' interests" during that

litigation. *Taylor*, 553 U.S. at 897. There can be no question that this did not happen: there was no effort to certify a class, and the court did not suggest nonparties could be bound by its judgment.

Second, the Secretary could have shown that at least one of the *Bruni* Plaintiffs had "an understanding" that it was asserting claims "in a representative capacity" on behalf of TARA. *Taylor*, 553 U.S. at 897. She did not do so. The Secretary incorrectly argues that TDP must have understood itself to be asserting claims on TARA's behalf because TDP asserted claims on behalf of "Democratic candidates and voters [throughout] the State of Texas." Appellant's Br. 23. But TDP's assertion of claims on behalf of *candidates* and *voters* says nothing about TARA, an organization that can neither run for office nor vote in Texas elections.[4]

Rather than explaining how TARA could be considered a Democratic candidate or voter, the Secretary changes course and attempts to connect TDP and TARA through a meandering web of alleged affiliations. According to the Secretary, TDP must have silently intended to litigate on TARA's behalf because it "is a 'constituency group' of the Texas AFL-CIO," and the Texas AFL-CIO, in turn, is

[4] On appeal, the Secretary has chosen not to pursue her argument below that TARA should be precluded from pursing claims on behalf of its own members because those members were represented by TDP in *Bruni*. *See* ROA.884. The Secretary's choice to forfeit that issue is sensible: as Plaintiffs explained below, the Secretary made no effort to show that all of TARA's members were Democratic voters. ROA.1396-97.

an "auxiliary organization of the Texas Democratic Party." Appellant's Br. 23. Despite bearing the burden on this issue, the Secretary offered no evidence that her hopscotch compels the conclusion that TDP understood itself to be litigating on TARA's behalf. Indeed, the Secretary did not even bother to define these terms. The Secretary's silence speaks volumes: nothing about the undefined affiliations between TARA and Texas AFL-CIO, and, separately, Texas AFL-CIO and TDP, suggest TDP understood itself to be representing TARA in *Bruni*, particularly when it is undisputed that TDP made no statement suggesting such an understanding.

The Supreme Court's holding in *Taylor* confirms that the adequate-representation exception cannot be applied against TARA. Indeed, the facts of that case are remarkably similar to those here. In *Taylor*, less than a month after the first plaintiff lost his suit, a second plaintiff hired the first plaintiff's lawyer and brought a separate suit asserting the same claim and seeking the same relief. 553 U.S. at 886-88. Despite that the two plaintiffs were "friends" and "close associates," belonged to the same organization, shared the same lawyer, and pursued identical claims, the Court held that preclusion could not apply because the first plaintiff did not understand himself to be asserting his suit *on the second plaintiff's behalf*. *Id.* at 905. The Secretary relies on a strikingly similar set of facts: TDP and TARA have the same lawyer, they each independently interact with a third party in a manner that has nothing to do with this case, and TARA asserts the same claims that TDP did.

Appellant's Br. 22-23. Under *Taylor*, those facts do not indicate TDP understood itself to be suing on TARA's behalf and cannot invoke issue preclusion.

The Secretary asks this Court to expand the adequate-representation exception in the same manner the Supreme Court refused to do in *Taylor*. Just as the *Taylor* defendants did, the Secretary asserts issue preclusion should be available whenever a party and nonparty share litigation-related interests and have "*some kind* of relationship." 553 U.S. at 901 (emphasis added). The Supreme Court rejected this exact argument, explaining that permitting this expansion would create, "in effect, a common-law kind of class action . . . . shorn of the [necessary] procedural protections" that due process requires, such as those mandated by Federal Rule of Civil Procedure 23. *Id.* Because "[n]othing in the record indicates that [the *Bruni* Plaintiffs] understood [themselves] to be suing on [TARA]'s behalf, that [TARA] even knew of [the *Bruni* litigation], or that the [*Bruni* court] took special care to protect [TARA]'s interests," the *Bruni* Plaintiffs' "representation was not 'adequate.'" *Id.* at 905.

In a single sentence in her brief, Appellant's Br. 23, the Secretary invokes a different exception to the rule against nonparty preclusion: when a party to an earlier suit seeks to relitigate an issue in separate litigation "through a proxy." *Taylor*, 553 U.S. at 895; *see id.* at 898-99 (emphasizing that the exceptions to the rule against nonparty preclusion must be kept "discrete"). The record contains no evidence that

TARA is acting as TDP's "designate representative" or "agent." *Taylor*, 553 U.S. at 895. To the extent the Secretary asserts TARA is acting as an "undisclosed agent" for TDP in "a collusive attempt to relitigate" *Bruni*, that assertion fails because she did not even attempt to prove TARA "is subject to the control of" TDP or the plaintiffs in this case. *Id.* at 906. That TARA and TDP hired the same counsel and assert the same claims does "not suffice." *Id.*

In sum, the Secretary has failed to prove any exception to the rule that TARA cannot be bound by the judgment in *Bruni*.

## II. The district court properly concluded Plaintiffs had standing for purposes of the preliminary injunction.

The Secretary's arguments that the district court erred in concluding that Plaintiffs sufficiently demonstrated standing at this stage of the case are meritless and should be rejected. First, the Secretary is wrong to suggest that the court's conclusion that Plaintiffs had standing was based on speculation; to the contrary, it was broadly supported by substantial (and almost entirely unrefuted) evidence. But even if that were true, there were substantial alternative bases for finding Plaintiffs adequately established standing at this stage in the proceedings. As a result, the district court did not err in concluding Plaintiffs had sufficiently demonstrated a "substantial risk" of injury to support the preliminary injunction. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*,

568 U.S. 398, 414 n.5 (2013)).[5]

### A. Plaintiffs' injuries were not speculative.

The district court's conclusion that Plaintiffs' injuries were not speculative and were redressable was supported by a substantial amount of evidence, none of which the court considered in *Bruni*. This evidence included the report from Plaintiffs' lines expert, Dr. Yang, who demonstrated that if HB 25 increased average voting time by just a small amount, lines at the polls would grow dramatically. ROA.61-92.

As explained, while the *Bruni* Plaintiffs offered a report from Dr. Yang with their preliminary injunction motion, the court's decision dismissing that case was based solely on the complaint, which merely alleged HB 25 would have this effect. The court declined to accept that allegation as true. *Bruni*, 468 F. Supp. 3d at 824 n.5. When Plaintiffs filed their Complaint in this case, they attached a new and entirely revised report by Dr. Yang, which broadly supported Plaintiffs' allegations. ROA.61-92.

After considering Dr. Yang's analyses for the first time, the court concluded

[5] It is worth emphasizing that the Court must ignore any suggestion by the Secretary that the district court should have *dismissed* Plaintiffs' claims for lack of standing. The district court's denial of the Secretary's motion to dismiss on standing grounds is not at issue in this appeal. Nor could it be: that determination was not immediately appealable, and the Secretary has not sought its review. As a result, this Court has no power at this time to instruct the district court to dismiss Plaintiffs' claims for lack of standing.

there was sufficient evidence to find HB 25 would increase polling-place lines and burden the right to vote. ROA.1674. That finding was not clearly erroneous, particularly given that there was no evidence rebutting Dr. Yang's conclusions: the only evidence the Secretary offered was an expert report that used the wrong data and responded to methodology Dr. Yang did not use. ROA.1115-1149.

Having concluded HB 25 would force Texans to stand in longer lines, the court considered the other variable unknown at the time it decided *Bruni*: whether state or local officials would take actions to mitigate HB 25's harms. As already explained, *supra* 15-20, events occurring after *Bruni* made clear that (1) local officials would not be able to counteract the increased lines caused by HB 25 in November, and (2) state officials had decided against using their authority to take measures to counteract HB 25's harms. ROA.1675.

The Secretary's brief confuses the record (and this Court's words) by incorrectly claiming Dr. Yang should not have "assumed" that STV removed Texans' need to "mark many more bubbles" in the partisan portion of their ballot. Appellant's Br. 26 (citing *TARA*, 976 F.3d at 567 n.1). But that is precisely what the STV option did. When a voter selected the STV option, the machine selected or "marked" each candidate from the chosen party in every partisan race on the ballot. A voter who used STV did not need to "mark any more bubbles" on the partisan portion of the ballot unless she wished to change one of those selections. This

Court's stay decision said nothing to the contrary. There, the Court identified the *different* fact that, to reach the non-partisan portion of their ballot, Texans who used STV needed to "scroll through" the partisan portion of the ballot on which the STV mechanism had already applied votes. *TARA*, 976 F.3d at 567 n.1 (emphasis added). That fact in no way suggests, as the Secretary claims, that voters had to "mark" additional bubbles in the partisan portion of the ballot after selecting the STV option. Appellant's Br. 26.

Nothing in Dr. Yang's declaration suggests he believed voters who used STV did not need to scroll through the ballot pages on which STV had applied votes. Instead, Dr. Yang premised his analysis on the undisputable fact that, without STV, voters must "make individual *selections* in each of the partisan items on the ballot in which they wish to cast a vote," which they did not have to do when using STV. ROA.363 (emphasis added). When STV is not available, voters must "read, deliberate, and execute the vote (if they ultimately decide to do so) on each of these partisan items." ROA.364. Those who used STV in the past did *not* have to perform such actions as to the partisan section of the ballot when they scrolled through those pages. It was this fact on which Dr. Yang relied to reasonably conclude that eliminating STV would cause voters to spend "additional time" in the voting booth, even if by just a small amount. ROA.364. Indeed, based on his long career in election administration, Fort Bend County Elections Administrator John Oldham agreed with

Dr. Yang, explaining that eliminating STV would "cause a significant increase in the average amount of time Texas voters [] spend casting their votes." ROA.345-46. Dr. Yang then demonstrated that, even if this increase in average voting time was small, it could "cause disastrous wait times at polling places." ROA.381.

With this record, Plaintiffs' standing did not rely on any "series of assumptions." Appellant's Br. 25. Plaintiffs' theory was simple: because HB 25 would increase lines at the polls, there was a substantial risk it would force at least some of Plaintiffs' millions of members and constituents to wait in longer lines. Contrary to the Secretary's assertion, *id.*, this injury did not require any particular level of turnout. November's turnout rate would determine the *severity* of HB 25's impact, not its likelihood. Because "the injury in fact requirement under Article III is qualitative, not quantitative," Plaintiffs needed to show only that HB 25 would impose an "identifiable trifle." *OCA*, 867 F.3d at 612 (quoting *Ass'n of Comty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 357-58 (5th Cir. 1999)). Dr. Yang's unrebutted analyses showed that.[6]

### B. Plaintiffs have standing to challenge HB 25.

While the district court properly concluded Plaintiffs satisfied the

[6] In any event, even if the possibility of reduced turnout in November was relevant to Plaintiffs' standing, it would not have altered the outcome. As the district court explained, ROA.1675, record turnout rates during Texas' July 2020 election indicated the pandemic would not meaningfully lower in-person turnout in November.

requirements of associational standing, ROA.1675-77, Plaintiffs also demonstrated their standing through other theories as well, including that HB 25 forced them to divert resources to mitigate the law's harms, and that HB 25 injured the electoral prospects of DSCC and DCCC's candidates. Because all Plaintiffs sought the same relief, just one needed standing to support the preliminary injunction. *Texas v. United States*, 945 F.3d 355, 377-78 (5th Cir. 2019).

*First*, TARA, DSCC, and DCCC each satisfied the requirements for associational standing: (1) their "members would independently meet the Article III standing requirements"; (2) the voting rights interests at stake are "germane" to each organization's purpose; and (3) "neither the claim[s] asserted nor the relief requested required participation of individual members." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). As the district court explained, the increased polling-place lines caused by HB 25 were bound to injure at least one of TARA's 145,000 members, many of whom "are too young to qualify to vote by mail." ROA.1676-77. This injury was germane to TARA's purpose of advocating for policies that "ensure social and economic justice and full civil rights" for retirees and electing candidates who will advance those policies. ROA.1676. Nothing about this litigation required the participation of TARA's individual members. The same result held for DSCC and DCCC, at least some of whose millions of voters and

constituents were bound to stand in a longer line because of HB 25. ROA.1399.

Below, the Secretary moved to dismiss and opposed Plaintiffs' motion for preliminary injunction on the sole ground that Plaintiffs' standing allegations, taken as true, were inadequate to confer standing. ROA.887-88, 970. In her memorandum opposing Plaintiffs' preliminary injunction motion, the Secretary made no argument relating to standing other than what she argued in her motion to dismiss. ROA.970. For the reasons just explained, the court properly rejected these arguments. ROA.1676.

For the very first time, the Secretary now argues that the district court should not have issued its preliminary injunction because Plaintiffs did not repackage some of their standing allegations, which the Secretary does not appear to dispute, into declarations. Appellant's Br. 23-24. Because the Secretary did not raise this issue below, the district court did not consider it. ROA.1675-77. The Secretary falsely claims that "the district court gestured to the differing requirements for standing in the motion to dismiss and preliminary injunction contexts [but] ultimately ignored that distinction." Appellant's Br. 23-24 (citing ROA.1696-97). That is not true. Nothing in the district court's decision discussed—or even "gestured" at—this issue.

The Supreme Court has instructed that, like here, when a defendant fails to raise a standing argument before the district court, "elementary principles of procedural fairness require[]" the appellate court to give the plaintiff an opportunity

to offer relevant evidence. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 270-71 (2015). This Court thus has two options: it can remand to the district court for consideration of this issue in the first instance or, in the interest of judicial economy, it can permit Plaintiffs to supplement the record on appeal. *Id.* at 271. To facilitate the latter option, Plaintiffs have filed with this brief a Motion to Supplement the Record containing declarations, signed on September 29, 2020, which confirm Plaintiffs' standing-related allegations. TARA has over 145,000 dues-paying members who elect the organization's statewide and chapter leadership, vote on programs and activities, and participate in day-to-day efforts. Padilla Decl. ¶¶ 2-4. More than five percent of its members are under 65, making them too young to vote by mail in Texas. *Id.* ¶ 6. Similarly, DSCC and DCCC represents the interests of the millions of Democratic voters and donors in Texas who provide financial contributions to DSCC, DCCC, and their candidates and help elect the leadership of both organizations by electing candidates to federal office. Schaumberg Decl. ¶ 3; Newman Decl. ¶ 4.

The Secretary is also wrong to assert that Plaintiffs had to identify specific members whom HB 25 would harm. Appellant's Br. 24. As an initial matter, the Secretary misreads the case law by suggesting that, to demonstrate standing at trial, organizations must always identify such a member. When it is "highly likely" that at least one of an organization's members will be injured by the law being

challenged, the organization need not identify a specific member who would have standing to sue on her own. *Ala. Legis. Black Caucus*, 575 U.S. at 269-70; *see also Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (explaining that when "it is relatively clear" a member "will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury," there is "no purpose to be served by requiring an organization to identify by name the member or members injured"). That is the case here.

But even if Plaintiffs will have to name an individual *at trial* whom HB 25 will harm, they did not need to do so at the preliminary injunction stage. The "manner and degree of evidence required" to support a plaintiff's standing depends on "the successive stage[] of litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And preliminary injunctions are "customarily granted on the basis of . . . evidence that is less complete than in a trial." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). For purposes of their preliminary injunction motion, it was sufficient that the enormity of Plaintiffs' memberships and constituencies made it inevitable that one of them would stand in a longer line because of HB 25. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2005) (rejecting challenge to preliminary injunction on this basis because it was "inevitable" that a voter would be harmed by challenged policy).

*Second*, TARA, DSCC, and DCCC all independently have standing on the basis of resource diversion. To suffice for standing, such diversions need not be "large" or "substantial," and the efforts to which resources are diverted need not fall outside Plaintiffs' central initiatives. *OCA*, 867 F.3d at 610-12. Here, TARA, DSCC, and DCCC all had to divert resources to counter HB 25's harms. Padilla ¶¶ 8-10; Schaumberg ¶¶ 7, 8, 10; Newman ¶¶ 6-9. TARA diverted resources away from voter registration and promoting policy campaigns, instead putting it towards educating members on voting in-person safely despite the longer lines HB 25 would create. Padilla ¶¶ 8-10. DSCC and DCCC redirected funding from other states to "educate [Texas] voters on how to vote in-person safely during the COVID-19 pandemic despite the polling place congestion HB 25 will create." Schaumberg ¶ 8; *see also* Newman ¶ 7.

*Third*, regardless of whether this Court considers the declarations contained in Plaintiffs' Motion to Supplement the Record, there was more than enough evidence for the district court to conclude HB 25 would injure the "electoral prospects" of DSCC and DCCC's candidates. *Benkiser*, 459 F.3d at 587. As explained, HB 25 would force voters to stand in longer lines, increasing their exposure to a deadly virus. The logical result of this effect was that at least some Texans who would have voted for DSCC and DCCC's candidates would be discouraged from voting due to the long lines. This effect would be most severe

among Black and Hispanic voters who disproportionately live in high-density areas of the State, used STV at disproportionately high rates, and are disproportionately susceptible to adverse health outcomes from COVID-19. ROA.296-98, 787-89, 1465-68. Because those voters overwhelmingly support Democratic candidates in Texas, ROA.797-800, HB 25 would disproportionately disadvantage DSCC and DCCC's candidates.

There is no basis for reversing the district court's preliminary injunction on standing grounds.

## III. The district court did not abuse its discretion in granting the preliminary injunction.

HB 25's elimination of the STV option—which was set to force two-thirds of the electorate to spend more time completing their ballots—was likely to force Texans to wait in dramatically longer lines, threatening their wellbeing. The district court did not abuse its discretion in issuing a preliminary injunction to prevent that result.

### A. HB 25 was likely to unjustifiably burden Texans' right to vote in the November 2020 election.

The district court correctly concluded HB 25 was likely to unjustifiably burden Texans' fundamental right to vote. In evaluating Plaintiffs' claim, the district court properly "weigh[ed] the character and magnitude of the asserted injury to" Texans' fundamental right to vote. *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th

Cir. 1996). Because the record indicated HB 25 would impose severe burdens on voters, it had to "be narrowly tailored to advance a compelling state interest." *Id.* But even if its burdens were not severe, HB 25 must have been supported by state "interest[s] sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). No matter the burden, the court must have taken "into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The fact that other states may or may not have STV is not dispositive. *Anderson*, 460 U.S. at 789-90 (emphasizing this inquiry "cannot be resolved by any 'litmus-paper test'"); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 665 (6th Cir. 2016) (refusing to consider State's argument that other states did not offer STV).

**1. The record demonstrated HB 25 would at least significantly burden voters by subjecting them to longer lines in the midst of a pandemic.**

The district court did not clearly err in finding HB 25 would impose a more-than-minimal burden by forcing voters to wait in longer lines, exposing themselves to a deadly virus. As the court explained, eliminating STV "will cause incrementally longer wait times and congestion at the polls" imposing "a greater than minimal burden on Texans' right to vote and right to associate." ROA.1700; *see League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (recognizing

long voting lines burden the right to vote).

The Secretary does not dispute that long polling-place lines impose a significant burden on voters, or that they would have exposed voters to a deadly virus in 2020. Instead, she baldly claims that forcing millions of Texas voters who previously used STV to make individual selections in the partisan section of their ballot somehow would not increase the average amount of time they spent in the voting booth. *See, e.g.*, Appellant's Br. 36-37. Not only does this position challenge common sense, it ignores the evidence.

The partisan portion of ballots in Texas can reach extreme lengths. In 2018, voters in Harris County were asked to make choices in *90 to 95 partisan races*. ROA.1663. As explained above, *supra* 27-29, when the STV option was available, voters did not have to make individual selections in each of those races. After HB 25, they do. Regardless of the fact that voters who previously used STV had to scroll through ballot pages after selecting the STV option, the need to make individual selections in each partisan race would force voters to take more time completing their ballots than when STV was available. For this reason, Fort Bend County Elections Administrator John Oldham explained that eliminating STV "will cause a significant increase in the average amount of time Texas voters will spend casting their votes." ROA.345-46. The Secretary offered no evidence to the contrary.

Dr. Yang's analysis demonstrated that the increase in voting time caused by HB 25, even if small, could produce massive increases in wait times. ROA.1684. As the district court found, if average voting time in 2016 among Travis County voters had increased by just *79 seconds*, the countywide average wait time would have *tripled*, forcing nearly a quarter of Election Day voters to wait in line for more than half an hour. *Id.* (emphasis added). The Secretary offered no evidence rebutting these conclusions: as explained, the expert report she offered in response used the wrong data and responded to methodology Dr. Yang did not use. ROA.1115-49.

Making matters worse, HB 25 provided counties no resources to mitigate the lines it would produce. Indeed, the Secretary informed county officials that they would receive no funds or additional resources to handle HB 25's effects. ROA.291. And as discussed, the COVID-19 pandemic further restricted the availability of remedial measures. ROA.1700-01.[7] The district court properly noted that each of the allegedly ameliorative options to which the Secretary pointed were in short supply.

[7] The Secretary is wrong to suggest that the district court improperly considered the effects of the pandemic because Plaintiffs asserted a facial constitutional challenge. Appellant's Br. at 38-39. The "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Courts consider the facts and evidence before them regardless of the precise terminology used by the parties. *Jacobs v. The Fla. Bar*, 50 F.3d 901, 905 n.17 (11th Cir. 1995). And in situations like this, an "equal protection claim would logically include within it an as-applied challenge." *Ramos v. Town of Vernon*, 353 F.3d 171, 174 n.1 (2d Cir. 2003).

ROA.1672, 1700-01. And because the vast majority of Texans are ineligible to vote absentee, the fact that the Governor allowed absentee voters to drop their ballots off, Appellant's Br. 39, made no difference to HB 25's effects on polling-place lines.

Courts agree that excessive lines at the polls impose serious burdens on voters. There "come[s] a point when the burden of standing in a queue ceases to be an inconvenience or annoyance and becomes a constitutional violation because it, in effect, denies a person the right to exercise his or her franchise." *Nat'l Ass'n for the Advancement of Colored People State Conf. of Pa. v. Cortés*, 591 F. Supp. 2d 757, 764 (E.D. Pa. 2008). This imposes an injury "of the gravest magnitude and will give rise to a violation of at least the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 765. For this exact reason, Texas itself has claimed an interest in reducing the time voters spend completing their ballots. *See Cotham v. Garza*, 905 F. Supp. 389, 399 (S.D. Tex. 1995) (noting the State's argument that increasing the time "voters spend marking their ballots" would cause "other voters [to] be discouraged from voting"). And due to the pandemic, standing in longer lines would increase voters' "exposure to a deadly virus[,] burden[ing] the right to vote." ROA.1701. The district court properly found that the burden HB 25 would impose was "greater than minimal." ROA.1700

**2. The record did not support HB 25's purported justifications.**

Regardless of the severity of the burdens HB 25 imposes on voters, they are

not justified by the law's purported purposes. The Court must take "into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Even if the State's interests could be considered important, the Secretary "fail[ed] to explain the relationship between these interests" and the elimination of STV. *See Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992). As evidenced by the district court's thoughtful order, it carefully considered each of the justifications offered by the Secretary and found none outweighed "the risk of disenfranchisement and the risk to voters' health" HB 25 would create. ROA.1701.

First, while the Secretary claims HB 25 would make voters more informed and increase candidate quality, she does not explain how it would achieve these lofty goals. The Secretary seems to base her argument on the unsupported premise that eliminating STV would eliminate voters' reliance on party affiliation in determining candidate quality. Appellant's Br. 43. But as the district court explained, "[e]liminating STV does not prevent voters from casting a ballot exclusively for Democrats or exclusively for Republicans." ROA.1702. That is to say, "requiring voters to spend more time voting and more time waiting in line at polling places, [and] in turn, increasing voters' potential exposure to a deadly virus," does not "encourage more qualified candidates[,] better campaigns," or more informed voting. ROA.1702-03. The Sixth Circuit has agreed, explaining "it is far from

evident that" requiring voters "to look, at least briefly, at each section of the partisan ballot in order to identify and fill in the desired bubble" will "foster[] an engaged electorate," because, like in Texas, the "party affiliation of each partisan candidate will still appear beside the candidate's name." *Mich. State A. Philip Randolph Inst.*, 833 F.3d at 665-66. "[A] voter desiring to vote for all of the candidates of his or her desired political party may still do so without reading any of the candidates' names, without knowing the office for which the candidate is running, and without knowing a single fact about either." *Id.* This reasoning is particularly apt in Texas, where the STV option allowed voters to alter their choices in individual races *after* selecting the STV option. Tex. Elec. Code § 65.007(c).

Next, the Secretary argues that some unknown number of voters have unintentionally skipped nonpartisan items on the ballot or mistakenly canceled votes by "emphasizing" them after selecting the STV option. Appellant's Br. 43-44. But the Secretary has never explained how these preventable voter mistakes "make it necessary" to *eliminate STV altogether*, subjecting millions of voters to the burdens of long lines and endangering their wellbeing. *Burdick*, 504 U.S. at 434. And the Secretary still cannot explain why such mistakes cannot be prevented by the much less burdensome option of warning voters about these issues when they use STV. Eliminating the century-old STV option upon which two-thirds of Texas' voters have come to rely, and subjecting voters to hours-long lines as a result, is by no

means an appropriately tailored response to these avoidable mistakes.

Last, the Secretary's claims HB 25 will lead to more competitive races for independent candidates. Appellant's Br. 42. The record indicated the opposite: ticket-splitting "favors incumbent and well-funded candidates," enhancing the electoral advantage they already enjoy. ROA.153-56. Indeed, the chair of the Texas Libertarian Party testified that HB 25 would *not* make Texas elections more competitive for third-party candidates. ROA.155-56.

The district court "appl[ied] the relevant constitutional test to the challenged statute" and properly determined HB 25 would likely violate Texans' fundamental right to vote. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124 (10th Cir. 2012).

**B. The remaining factors supported a preliminary injunction.**

The "deprivation of a constitutional right" constitutes irreparable harm. *Opulent Life Church*, 697 F.3d at 295 (quoting 11A Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 2948.1 (2d ed. 1995)). That is particularly so when the right to vote is involved: "once the election occurs, there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (noting "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury"). Because the record demonstrated HB 25 would violate the fundamental constitutional rights of Plaintiffs, their members and constituents, and other Texans, the district court properly found HB 25 would

cause Plaintiffs irreparable harm.

The district court also correctly found that the equities favored an injunction. While Texas may have an interest in enforcing its laws, Appellant's Br. 46, that interest evaporates when the law at issue is unconstitutional. *KH Outdoor*, 458 F.3d at 1272. The timing of this suit, Appellant's Br. 46, does not change that fact. And the Secretary's complaints about the administrative burden of keeping STV on Texas' ballots—which would have added just "an extra day or two" of work—was far too exaggerated. ROA.1535-36.

For the same reasons, the injunction benefitted the public interest. Injunctions against unconstitutional laws serve the public interest. *Ingebretsen*, 88 F.3d at 280; *KH Outdoor*, 458 F.3d at 1272. And because HB 25's "benefits" are illusory, *supra* 39-42, the district court's injunction did not disserve the public interest.

## IV. Sovereign immunity is no bar to this suit.

The district court properly rejected the Secretary's request to dismiss this suit on sovereign immunity grounds. ROA.1678-79. Plaintiffs' constitutional claims fall squarely within the *Ex parte Young* exception. The *Ex parte Young* analysis asks two questions: first, the "straightforward inquiry" of "whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (alterations incorporated), and second, whether the official in question has

"'some connection" to the enforcement of the challenged law and "threaten[s] to exercise that authority." *Air Evac EMS*, 851 F.3d at 517. That analysis confirms *Ex parte Young*'s application here, where Plaintiffs seek declaratory and injunctive relief against ongoing constitutional violations, and the Secretary has a more than sufficient connection to HB 25's enforcement.

In any event, regardless of the applicability of *Ex parte Young*, the Secretary has no sovereign immunity against Plaintiffs' Voting Rights Act claim because that legislation "validly abrogated state sovereign immunity." *OCA*, 867 F.3d at 614.

### A. The Secretary's connection to HB 25 is sufficient to satisfy *Ex parte Young*.

The district court correctly concluded that the Secretary has a sufficient connection to HB 25's implementation to satisfy *Ex parte Young*. That exception to sovereign immunity "allows private parties to bring suits for injunctive or declaratory relief against individual state officials acting in violation of federal law" whenever a "state official, by virtue of his office," has "*some connection* with the enforcement of the [challenged] act." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (quotation marks omitted) (emphasis added). "Enforcement" in this context means that the Secretary has "responsibilities" in HB 25's implementation or that she "effectively ensure the [statutory] scheme is enforced." *Air Evac EMS*, 851 F.3d at 519; *K.P.*, 627 F.3d at 124-25. For purposes of this analysis, a statute need not contain any magic language: just a "scintilla" of connection between the

Secretary and HB 25 "will do." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (quoting *Austin*, 943 F.3d at 1002).

The Secretary is clearly responsible for much more than a "scintilla" of HB 25's enforcement. Various provisions in the Election Code delegate to the Secretary responsibilities related to how voters make selections on their ballots. For example, she is responsible for prescribing the form and content of the instruction poster that explains how voters should make selections on the ballot. Tex. Elec. Code § 62.011. Several other provisions of the Code require the Secretary to prescribe the content and form of various ballot types. *See id.* §§ 105.002(c), 52.075(a), 124.006.

Most significantly, HB 25 puts the Secretary squarely at the forefront of its implementation by requiring her to ensure county election administrators understand the elimination of STV. Tex. Elec. Code § 31.012(b-1). It also makes the Secretary responsible for informing voters that STV would no longer be available. *Id.* § 31.012(a). On top of ensuring voters and election officials understand HB 25's implications, the law also obligates the Secretary to "adopt rules and establish procedures" to ensure voters and election officials are not burdened by the STV's elimination. *Id.* § 31.012(d).

These responsibilities track others that this Court has found sufficient to satisfy *Ex parte Young*. Just as the Secretary has "the specific and relevant duty to design the application form for mail-in ballots," *Tex. Democratic Party*, 978 F.3d at

179 (citing Tex. Elec. Code § 31.002(a)), the Secretary must prescribe the form of various ballot types to allow voters to cast a vote in federal, state, and local races, *see, e.g.*, Tex. Elec. Code §§ 105.002(c), 52.075, 124.006. And just as the Secretary must distribute those forms to local officials, *Tex. Democratic Party*, 978 F.3d at 179-80 (citing Tex. Elec. Code § 84.013)), HB 25 obligates the Secretary to ensure that local officials follow HB 25's command to remove the STV option, Tex. Elec. Code § 31.012(b-1).

In addition to those specific responsibilities, the Secretary has expansive duties requiring her to enforce the Texas Election Code.[8] The Secretary—Texas' "chief election officer"—is responsible for the enforcement of each provision of the Texas Election Code. *See* Tex. Elec. Code § 31.003. The Code requires the Secretary to "obtain and maintain uniformity in the application, operation, and interpretation of" Texas' election laws. *Id.*; *see Tex. Democratic Party*, 978 F.3d at 180 (explaining that § 31.003 "requir[es] the Secretary to take action with respect to elections").

[8] The Secretary mischaracterizes this Court's decision in *Texas Democratic Party* to assert that her general duty to oversee implementation of Texas' election laws is irrelevant to *Ex parte Young*. Appellant's Br. 29 (citing 978 F.3d at 181). The language she quotes refers to the "*Attorney General's* general duty to enforce and uphold the laws of Texas," not the Secretary's specific duty to implement the Election Code. *See Tex. Democratic Party*, 978 F.3d at 180 (emphasis added); *see also id.* at 181. As for the *Secretary's* connection to the law at issue, the *Texas Democratic Party* panel did not need to address the Secretary's broad authorities over the Election Code because her "specific duties" relating to the challenged statute were sufficient to invoke *Ex parte Young*. *Id.*

Indeed, in *OCA*, this Court held that the "invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the . . . Secretary of State, who serves as the 'chief election officer of the state.'" 867 F.3d at 613 (quoting Tex. Elec. Code § 31.001(a)). The Secretary is incorrect to suggest that this Court's decision in *OCA* is inapplicable. Appellant's Br. 29-30. "[C]aselaw shows that a finding of standing tends toward a finding that the *Young* exception applies to the state official(s) in question." *Austin*, 943 F.3d at 1002.

The Secretary also has the responsibility of taking "appropriate action to protect" voting rights "from abuse by the authorities administering the state's electoral processes," including "order[ing] the person to correct the offending conduct." Tex. Elec. Code § 31.005(a)-(b). This responsibility comes with an enforcement scheme: if an official "fails to comply" with the Secretary's commands, she "may seek enforcement . . . by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general." *Id.* § 31.005(b). These are not merely theoretical powers. *See Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 831 (S.D. Tex. 2012) (noting the Secretary's admission that she may "bring a suit in her name to obtain a writ of mandamus against any county official who refuses to follow her interpretations of the voting laws"), *rev'd on other grounds by Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013). Thus, the Secretary is not just the chief election officer tasked with maintaining uniformity of the laws.

The law *expressly authorizes* her to remedy the voting rights violations identified in this lawsuit and to implement Plaintiffs' requested relief. *See* Tex. Elec. Code § 31.005(b). That is, on its own, a form of enforcement that satisfies *Ex parte Young*. *See Russell v. Harris Cnty.*, No. CV H-19-226, 2020 WL 6585708, at *20 (S.D. Tex. Nov. 10, 2020) (finding *Ex parte Young* applied against "felony judges [who] issue the bail determination rules, policies, and procedures and have ultimate authority over each bail determination").

The Secretary's arguments, if adopted, would bring about a sea change in how civil litigation operates in this Circuit. For decades, this Court has permitted similar suits against the Secretary. *See Voting for Am.*, 732 F.3d 382 (concerning volunteer deputy registrars); *Benkiser*, 459 F.3d 582 (concerning whether party officer can declare candidate ineligible); *Tex. Indep. Party*, 84 F.3d 178 (concerning declaration of intent to run for office). District courts in this Circuit have for decades followed this signal. *E.g.*, *Tolpo v. Bullock*, 356 F. Supp. 712, 713 (E.D. Tex. 1972) (noting the Secretary is "responsible for the enforcement of the Texas election laws"), *aff'd*, 410 U.S. 919 (1973); *see also Gilby v. Hughs*, Case No. 19-CV-1063 (W.D. Tex. Aug. 11, 2020), ECF No. 107 (rejecting identical sovereign immunity argument because it was "based upon Hughs's improper assertion that the Secretary . . . does not enforce Texas election law"); *Miller v. Hughs*, 471 F. Supp. 3d 768, 775 (W.D. Tex. 2020) (same); *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 854 (W.D.

Tex. 2020) (same); *Hall v. Louisiana*, 983 F. Supp. 2d 820, 832 (M.D. La. 2013) (same).

### B. County election officials' role in preparing ballots does not negate the Secretary's connection to HB 25.

The distribution of responsibility relating to ballot preparation does not negate the Secretary's connection to HB 25. For *Ex parte Young* to apply, the Secretary need not be responsible for "direct enforcement" of HB 25; she need only be responsible for "effectively ensur[ing]" that HB 25 "is enforced." *Air Evac EMS*, 851 F.3d at 519. The Secretary claims *Ex parte Young* should not apply because the Election Code "tasks local officials with enforcing HB 25[]," such as local election officials' role in "prepar[ing]" the ballot. Appellants' Br. 28 (citing Tex. Elec. Code § 52.002). But this Court has rejected this exact argument, explaining that *Ex parte Young* applies even when "some duties fall on other officials." *Tex. Democratic Party*, 978 F.3d at 180 (citing Tex. Elec. Code § 86.001(a)). At issue in *Texas Democratic Party* was the question of whether certain mail ballot applications should be accepted. Despite the fact that the Election Code requires early voting clerks to "review each application for a ballot to be voted by mail" and determine whether "the applicant is entitled to vote an early voting ballot by mail," Tex. Elec. Code § 86.001(a)-(b), the Court concluded "the Secretary has the needed connection" to the process of accepting and rejecting of mail ballot applications to invoke *Ex parte Young*. *Tex. Democratic Party*, 978 F.3d at 180.

The same reasoning applies here. Although the Election Code charges local officials with printing ballots, it does not authorize them to alter the manner by which voters may mark their ballots. In contrast, the Secretary is tasked with prescribing the ballot form, *see* Tex. Elec. Code §§ 105.002(c), 52.075, 124.006, educating election officials and voters about the elimination of STV, *id.* § 31.012(a)-(b-1), and ensuring the effective removal of STV from ballots, *id.* § 31.012(d). Inevitably, "some duties fall on other officials," *Tex. Democratic Party*, 978 F.3d at 180, but that does not disconnect the Secretary from HB 25's enforcement.

This Court's opinion in *Mi Familia Vota v. Abbott*, 977 F.3d 461 (5th Cir. 2020), on which the Secretary relies, does not hold otherwise. At issue in that case was a provision in the Election Code that prohibited certain counties from providing voters with the option of using paper ballots. *Id*. at 468. The plaintiffs sought to require all counties to offer voters both electronic voting devices and paper ballots. *Id.* at 465. But the Court concluded that enjoining the Secretary from enforcing the provision at issue would not result in the relief plaintiffs sought, because striking the provision's prohibition against using paper ballots would not *require* counties to offer paper ballots. *Id*. at 468. Here, the circumstances are the opposite: HB 25 eliminated provisions of the Election Code that *required* ballots to include an STV option. *E.g.*, Tex. Elec. Code § 124.001, *repealed by* Acts 2017, 85th Leg., ch. 404 (H.B. 25), § 8 effective Sept. 1, 2020. If the Secretary is enjoined from implementing

or enforcing that provisions, the Election Code would again require STV to be made available.

The Secretary's *Ex parte Young* theory would render the doctrine useless. State statutes would be entirely immune from federal constitutional review simply because the legislature did not think to include language explicitly delegating responsibility to a single state official. *Ex parte Young* was not intended to be so exclusive. *See Air Evac EMS*, 851 F.3d at 517 ("Despite these restrictions, the Court has reinforced *Ex parte Young*'s being a 'straightforward inquiry' and specifically rejected an approach that would go beyond a threshold analysis."). The Court should decline the invitation to rewrite this doctrine and affirm the district court's denial of the Secretary's assertion of sovereign immunity.

### C. The Secretary has demonstrated a willingness to exercise her authority to implement HB 25.

As Appellees alleged in their complaint, there could be little doubt that, if HB 25 took effect, the Secretary would exercise her responsibilities to implement the law. ROA.10. To the extent the Secretary argues Plaintiffs must have offered evidence of the Secretary's intent to do so, Appellant's Br. 32, that evidence was not available to Plaintiffs until after the parties briefed this issue. On September 17, 2020—ten days after all briefing concluded and just eight days before the district court issued its decision—the Secretary issued her first guidance relating to HB 25, in which she *required* local election officials to place notices at polling places and

election offices describing HB 25's elimination of STV and *prohibited* local election officials from placing "instructions for casting a straight-party vote" on ballots.[9] These mandatory instructions by the Secretary confirm her central role in HB 25's implementation.

* * *

*Ex parte Young* precludes the Secretary from asserting sovereign immunity in this case. But even if it did not, the Secretary has no claim to sovereign immunity over Plaintiffs' Voting Rights Act claim. *OCA*, 867 F.3d at 614.

## CONCLUSION

As explained in Plaintiffs' Motion to Dismiss, the Secretary's appeal of the district court's preliminary injunction is moot. To the extent the Court reaches the merits of the preliminary injunction, it should affirm. The Court should also affirm the district court's rejection of the Secretary's assertion of sovereign immunity.

[9] Tex. Sec'y of State, Election Advisory No. 2020-29 (Sept. 17, 2020), https://www.sos.state.tx.us/elections/laws/advisory2020-29.shtml.

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## CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for the Defendant-Appellant are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ Skyler M. Howton*
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