No. 20-40643

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

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

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR STAY

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CERTIFICATE OF INTERESTED PERSONS

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

2. 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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INTRODUCTION

The district court's order properly recognizes that, in the midst of a pandemic, eliminating the straight-ticket voting ("STV") option from Texas's ballots will force upon voters the unacceptable choice between their fundamental right to vote and their health. Because the pandemic prevents county officials from mitigating the increase in polling-place lines that HB25 will cause, and because state officials have "done little to address" the serious "concerns about the viability of an election where nearly every voter must, during a pandemic caused by an airborne virus, vote in person," App.13, the district court determined its intervention was necessary. In doing so, the court gave full consideration to the Secretary's evidence meant to show it is too late to include the STV option on ballots for the upcoming election, but the court ultimately found the Secretary's concerns were exaggerated. There is no reason to disturb the court's decision while the Secretary pursues this appeal.

STATEMENT OF THE CASE

I. HB25's Impact This Fall

This suit challenges HB25, which will end a "century-old practice" in Texas of allowing voters to use a STV option. App.3. STV "allows 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." App.3-4. STV is a crucial part

of Texas elections, particularly due to its "exceptionally lengthy ballots, which sometimes list as many as 95 races in a single county." App.4, 62. In recent elections, the vast majority of Texans have relied on STV: in 2018, "approximately two-thirds of voters—over 5.6 million Texans—used STV to cast their ballots." App.4, 102. If STV is eliminated, those voters will take a significantly longer amount of time to complete their ballots, App.119-20, which in turn will dramatically increase the time voters wait at the polls, App.125-56. HB25 includes nothing to mitigate this effect.

HB25's effect results from the "non-linear relationship between voting time and average wait times," App.132, in which "even small increases" in voting time have "exponentially greater impacts on the wait times at polling places," App.15. In Travis County, for example, an increase in average voting time of just 79 seconds resulting from the elimination of STV would have *tripled* the amount of time the average voter waited at the polls on Election Day. App.140-41. And if voters who previously used the STV option took just 10 extra seconds on each partisan race, the average voter would have waited more than 45 minutes in line, despite that the average wait when STV was available would have been under 9 minutes. App.140-42.

Under normal circumstances, HB25 will impose significant burdens on voters. But in the context of a widespread pandemic that has killed more than 15,000 Texans, its burdens are simply unacceptable. Epidemiologists agree the virus will

become even more easily transmissible in the fall. App.560-61. "[A]nything that extends the time a voter must stay in line before voting, or increases the amount of time a voter must stand at the voting booth, will increase risk of transmission." App.557. By producing both of those effects, HB25 will quite literally put voters in danger.

These effects will hit African Americans and Hispanics the hardest. App.70-72. African American and Hispanic Texans disproportionately live in high-density areas with the longest ballots and polling-place lines, App.199-201, 239-41; use STV at a disproportionately high rate, App.566-70; are more susceptible to COVID-19 infection and experience worse health outcomes, App.561-62; and, due to the widespread effects Texas' long history of racial and ethnic discrimination, have less ability to take the time to stand in a long polling-place line, App.266-73.

What is more, election administration issues caused by the pandemic severely restrict election officials' ability to mitigate the lines HB25 will produce, and will even enhance HB25's detrimental effects. Social distancing requirements prevent officials from adding voting machines inside polling places, and in many instances require *decreasing* the number of such machines. App.67-68, 120. Venues are increasingly unwilling to serve as polling locations, which reduces the number of polling places available to voters. App.68-69, 120. The State is experiencing a severe shortage of pollworkers, which also reduces the number of polling places. App.120-

21. And because municipal elections were postponed until this fall, voters' ballots will be longer than usual in the upcoming election. App.70, 121.

II. Proceedings Below

In early March, Plaintiffs Bruni, DSCC, DCCC, and others filed suit challenging HB25 on the ground that, among other things, eliminating STV would unjustifiably burden Texans' fundamental right to vote by forcing them to wait in excessive lines at polling places. On June 23, the district court dismissed this complaint, concluding that, at that time, there were too many variables at play to infer HB25 would have this effect. *Bruni v. Hughs*, No. 5:20-cv-35, 2020 WL 3452229 (S.D. Tex. June 24, 2020). In particular, it was still yet to be seen how the ongoing coronavirus pandemic would impact Texas's elections—the State's primary runoff election, set for July 14, had not yet occurred—or whether the Secretary or county officials would take measures to mitigate HB25's harms. *Id.* at *6-7.

But the July primary, held after the court's decision in *Bruni*, confirmed the plaintiffs' fears and demonstrated "the amplifying effect the pandemic has on the problems caused by HB25." App.12. Voters faced "the abrupt closure of voting facilities," "a dwindling number of volunteer poll workers, who are often older and more vulnerable to the virus," and "the need to reduce the number of voting machines at each polling place to maintain adequate social distancing." App.12-13. Because these issues will recur this fall, and because "[s]ince that election, Texas

has done little to address these logistical challenges," App.13, Plaintiffs filed this suit and sought a preliminary injunction. App.47-603.

Plaintiffs offered evidence that the pandemic will continue, and likely worsen, into the fall, App.554-63, and that the election administration issues discussed above will severely limit county officials' ability to mitigate HB25's harms, App.119-21. The Secretary offered nothing in response. Plaintiffs also offered a completely revised expert declaration by Dr. Muer Yang, who demonstrated that HB25 would dramatically increase polling place lines. App.125-61. Instead of responding to that declaration, the Secretary submitted the outdated expert declaration she offered in *Bruni*, which analyzed a methodology that Dr. Yang no longer used and also used the wrong data. App.1066-68.

The district court granted Plaintiffs' motion for preliminary injunction. The court found HB25 will increase voting time, and, "in turn," expand lines at the polls. App.41. It explained that while under normal circumstances, long wait times burden voters and cause them to "leave polling place lines before they have exercised their fundamental right to vote," in the upcoming election HB25 will also "increas[e] their exposure to a deadly virus." App.42. And because the HB25's justifications are "underwhelming, especially when weighed against the risk of disenfranchisement and the risk to voters' health," App.42, the court found HB25 would violate Texans' fundamental right to vote this fall.

In finding the other relevant factors weighed in favor of an injunction, the court found the Secretary had exaggerated the administrative burden that including the STV option on ballots would entail. App.44. With respect to reprogramming voting machines, the single declaration offered by the Secretary described only what this process would entail, and conspicuously failed to indicate how long that process would take. App.662-63. In response, Plaintiffs' expert explained that this process would add only "an extra day or two of effort," and including the STV option on machines this fall was "entirely feasible." App.1102-03. Weighing this competing testimony, the court found itself "[un]convinced the burden on the state to recalibrate its machines, all of which have been used in the past with an STV option and which will be programmed and operated by officials familiar with the STV option, will be as onerous as Texas claims." App.44. As for paper ballots used for in-person voting, the court noted that re-printing ballots would "take little more than a week." *Id.* And because "the question before the Court [wa]s HB25's effect on those who, by state law, may only vote in person at the polls," counties would not need to include STV on mail-in ballots. *Id.*[1]

[1] The Secretary appears to believe that the court's injunction requires that STV be included on mail-in ballots. Mot. 17. But the passage just quoted makes clear that the court did not intend that result. To the extent this Court understands the injunction to require STV's inclusion on *all* ballots, Plaintiffs do not object to a partial stay such that STV will be included on ballots used for *in-person voting only*, but not ballots used for mail-in voting.

ARGUMENT

A stay inappropriate because the Secretary has not demonstrated (1) "a strong showing [s]he is likely to succeed on the merits," (2) "the applicant," that is, the Secretary, "will be irreparably injured absent a stay," (3) "issuance of a stay will [not] substantially injure the other parties interested in the proceeding," or (4) "the public interest" favors a stay. *Wood v. Collier*, 836 F.3d 534, 538 (5th Cir. 2016) (quoting *Nken v. Holder*, 556 U.S. 418 426 (2009)).

I. The Secretary will not succeed on the merits of her appeal.

A. The district court had jurisdiction to issue the preliminary injunction.

1. Plaintiffs have standing.

Neither of the Secretary's standing arguments demonstrate—let alone make a strong showing—that Plaintiffs lack standing.

a. Plaintiffs TARA, DSCC, and DCCC have organizational and associational standing.

HB25 has injured, and will continue to injure, each of the three organizational Plaintiffs. Because Plaintiffs seek injunctive relief, only one party need have standing for the case to proceed. *Texas v. United States*, 945 F.3d 355, 377-78 (5th Cir. 2019), *cert. granted sub nom. Texas v. California*, 140 S. Ct. 1262 (2020).

First, "[v]oluminous persuasive authority" holds that political party organizations like DSCC and DCCC have standing to challenge state laws that

threaten the electoral prospects of their candidates. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 & n.4 (5th Cir. 2006). DSCC and DCCC's missions are to elect Democratic candidates; they have been achieving that goal in part by educating constituents and supporters about how to vote safely in person despite HB25.[2] *See* Pls.-Appellees' Mot. to Supplement the Record, at Schaumberg ¶¶3-5 (explaining DSCC efforts to educate its supporters about lengthy polling place lines and the burdens HB25 places on voters who would otherwise support DSCC's senatorial candidate); Newman ¶¶2, 4, 7 (same for DCCC's candidates); Schaumberg ¶7 (DSCC has spent nearly $1 million in Texas this cycle); Newman ¶6 (DCCC has spent more than $8 million in Texas this cycle). HB25 makes it exponentially harder to vote for Texans who would support Democratic candidates, and thus directly threatens DSCC and DCCC's candidates. *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 543-44 (6th Cir. 2014); *LaRoque v. Holder*, 650 F.3d 777, 786 (D.C. Cir. 2011); *Smith v. Boyle*, 144 F.3d 1060, 1061–63 (7th Cir. 1998); *Schulz*

[2] As explained in Plaintiffs-Appellees' simultaneously filed Motion to Supplement the Record, Plaintiffs alleged all of the following facts in their Complaint. The district court denied the Secretary's motion to dismiss, which asserted that these facts were insufficient to demonstrate standing. The Secretary now argues, for the very first time, that the district court should not have granted a preliminary injunction because Plaintiffs did not repackage their allegations into declarations. Mot. 8. Not once during the two separate rounds of preliminary injunction briefing below did the Secretary assert this argument. As a result, Plaintiffs offer these declarations to demonstrate the district court clearly had jurisdiction to issue its injunction.

v. Williams, 44 F.3d 48, 53 (2d Cir. 1994); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981); *Schiaffo v. Helstoski*, 492 F.2d 413, 417 (3d Cir. 1974).

Second, HB25 forces TARA, DSCC, and DCCC, to divert resources toward efforts to lessen the harm caused by HB25, which causes injury to all three Plaintiffs' missions, as well as their members or constituencies. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977). In this context, the diversion of resources need not to be large; just a slight impairment is sufficient. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610-12 (5th Cir. 2017). An organization suffers injury "when a statute 'compel[s]' it to divert more resources to accomplishing its goals," and "'[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury.'" *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (citations omitted). And the efforts to which the resources are diverted need not fall outside the scope of the organization's central initiatives to suffice. *OCA*, 867 F.3d at 610.

DSCC, DCCC, and TARA have diverted resources to counter HB25, and if the injunction is stayed, they will be forced to divert more. Schaumberg ¶¶7, 8, 10; Newman ¶¶6-9; Padilla ¶¶8-10. For example, instead of efforts aimed at engaging lawmakers on issues central to TARA's mission, TARA has diverted resources to educate members on how to vote in person safely despite long lines created by HB25.

Padilla ¶¶8-10. Likewise, HB25 has forced DSCC to redirect 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 HB25 will create." Schaumberg ¶8. The same for DCCC. Newman ¶7.

Last, TARA, DSCC, and DCCC have standing to sue on behalf of their members and constituents, whom HB25 harms. *Benkiser*, 459 F.3d at 587. An organization need not have a formal membership structure to assert this sort of claim. *Hunt*, 432 U.S. at 345. In any event, TARA has over 145,000 members across Texas. Padilla ¶2. TARA's members pay yearly dues, elect leadership, vote on programs and activities, and participate in day-to-day efforts. *Id.* ¶¶2, 4. More than five percent of members are under 65, making them too young to vote by mail in Texas. *Id.* ¶6. Those members, many of whom have preexisting conditions putting them at a heightened risk of serious illness from COVID-19, will have to vote in person. *Id.* ¶¶6-7. TARA's members will thus be injured when HB 25 forces them to stand in long lines at the polls.

DSCC and DCCC represent the interests of Democratic voters and donors in Texas. Schaumberg ¶3; Newman ¶4. These constituents provide financial contributions to DSCC, DCCC, and their candidates, and help elect leadership of both organizations by electing candidates to federal office. *Id.* Democratic voters also participate in both organizations' strategy by responding to surveys and polls.

Id. Courts have repeatedly held that political party committees like DSCC and DCCC have associational standing on behalf of its voter and candidate constituents to challenge laws burdening the right to vote. *Crawford v. Marion Cnty Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *Ga. Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018), *cert. denied sub nom. N.Y. Republican State Comm. v. Sec. & Exch. Comm'n*, 140 S. Ct. 908 (2020); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004). Contrary to the Secretary's assertions, Mot. 9-10, Plaintiffs need not name a specific voter whose rights will be burdened by HB 25. All that is required is that Plaintiffs demonstrate a sufficient likelihood that HB25 will injure some of their members or constituents. *See Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (holding plaintiff had standing despite that it "ha[d] not identified specific voters" who would have been injured by challenged action); *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1163 (11th Cir. 2008) (NAACP had standing despite not identifying a member who was disenfranchised by challenged law).

b. Plaintiffs' injuries are not speculative.

The Secretary argues the district court was required to find Plaintiffs' claims speculative simply because they are similar to those asserted in *Bruni*. But as the court explained, Plaintiffs here offered significantly more evidence relevant to

standing than that in *Bruni*, and "several developments" had occurred since the court's decision that altered the relevant analysis. App.11, 15-16. Plaintiffs provided newly revised expert testimony—to which the Secretary did not even bother to respond—demonstrating that HB25's elimination of the STV option would lead to "exponentially greater impacts on the wait times at polling places." App.15; App.125-56. Plaintiffs also offered undisputed evidence that "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 HB25." App.16; App.119-21, 554-63. This evidence demonstrated a "substantial risk" that HB25 will injure at least one of Plaintiffs' members or constituents by forcing them to wait in a longer line at the polls. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 454 (5th Cir. 2017).

The Secretary's attempts to limit Dr. Yang's analyses fare no better here than they did in the district court. Dr. Yang's analyses were meant to demonstrate how "small increases in voting time can produce significant increases in wait times." App.132. As a result, Travis and Fort Bend Counties need not be perfectly representative of other Texas counties, Mot. 9, nor did Dr. Yang need to examine early voting, *id.*, for one to understand the implications of his opinions. For the same reason, the Secretary's claim that Dr. Yang did not make "prediction[s] about voter turnout in 2020" is meaningless. Mot. 9. Dr. Yang demonstrated how even small

increases in voting time resulting from eliminating STV causes significant increases in wait times at the polls. The Secretary had the opportunity to rebut this evidence with her own expert testimony. Instead, she submitted a declaration responding to irrelevant methodology and using wrong data.

Attempting to move the goalposts, the Secretary now invents a rule that Plaintiffs were somehow required to demonstrate that HB25 would increase lines at a specific polling place to which one of Plaintiffs' members or constituents will arrive. Mot. 9. Unsurprisingly, the Secretary offers no authority to support her assertion. Just as Plaintiffs are not required to identify a specific member that will be harmed by HB25 (as discussed above) they did not need to demonstrate HB25 would increase the lines at a specific polling place. Instead, they were required to demonstrate a "substantial risk" that at least one of their members would encounter a longer line as a result of HB25. *Planned Parenthood*, 862 F.3d at 454. Because Plaintiffs did so, the court properly concluded the standing-related evidence was sufficient at this stage.

2. Sovereign immunity is no bar to this suit.

The Secretary has not made a strong showing that sovereign immunity bars this suit. *Ex parte Young* applies here. 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) (emphasis added).

This Court has clearly held that the Secretary's "close statutory connection to the Texas Election Code" satisfies *Ex parte Young* in a suit challenging one of its provisions. *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *6 (5th Cir. Sept. 10, 2020) ("*TDP*"). HB25 "applies to every election held in the state of Texas," and therefore "falls squarely within the Secretary's duty to 'obtain and maintain uniformity in the application, operations, and interpretation of' the Texas Election Code." *Id.* at *5 (quoting *OCA-Greater Houston*, 867 F.3d at 613). Beyond the Secretary's broad duties to enforce election laws, HB25 obligates her to educate voters and election officials regarding the elimination of STV and to "adopt rules and establish procedures as necessary for the implementation of the elimination of straight-party voting." Tex. Elec. Code § 31.012(a), (b-1), (d).

The Secretary attempt to redefine *Ex parte Young*'s "some connection" requirement fails. She points out, for example, that Plaintiffs do not challenge a provision outlining the Secretary's duties to implement and enforce HB25, or that HB25 does not explicitly give the Secretary authority to prevent its implementation. Mot. 11. But *Ex parte Young* requires neither of those things. A connection is sufficient under *Ex parte Young* "when such duty exists under the general authority of *some* law, even though such authority is not to be found in the particular act." 209

U.S. 123, 158 (1908) (emphasis added). It is also sufficient if the Election Code delegates "some enforcement authority" to the Secretary, even "implicitly." *K.P. v. LeBlanc*, 627 F.3d 115, 125 (5th Cir. 2010). Between the Secretary's obligation to "obtain and maintain uniformity" in the application of the election code generally, Tex. Elec. Code § 31.003, and to "adopt rules and establish procedures" for HB25's implementation, *id.* § 31.012(d), the Secretary is obligated to ensure that HB25 is enforced. *See Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017). As the district court explained, the Secretary cannot "disown[] her role as the chief election officer of Texas" to avoid this suit. App.19. Because the Secretary has "pervasive enforcement" of Texas's Election Code, *Air Evac EMS*, 851 F.3d at 519, she enjoys at least "a scintilla of enforcement . . . and a duty to see that [HB 25 is] implemented." *TDP*, 2020 WL 5422917, at *5.

B. HB25 will unjustifiably burden Texas voters in the upcoming election.

Under normal circumstances, HB25's elimination of the STV option—which would force more than 5.6 million Texans to spend significantly more time completing their ballots—would cause a massive disruption to Texas's elections. In the midst of a pandemic that significantly limits election administrators' ability to soften HB25's blow, the result will be disaster.

By drastically expanding polling-place lines, HB25 will unjustifiably burden Texans' fundamental rights to vote. In evaluating this claim, the district court followed the proper standard, "weigh[ing] 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 burdens HB25 will impose on voters in this election are severe, the law "must be narrowly tailored to advance a compelling state interest." *Id.* But even if its burdens are non-severe, it must be 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 take "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 other states may or may not have STV is irrelevant to this analysis. *Anderson*, 460 U.S. at 789-90 (emphasizing that this inquiry "cannot be resolved by any 'litmus-paper test'").

The Secretary does not dispute that long polling-place lines impose significant burden on voters, or that they will expose voters to the coronavirus this fall. Instead, she baldly claims HB25 will not increase lines at the polls. According to the Secretary, forcing more than 5.6 million Texas voters who previously used the STV option to make individual selections in every partisan race somehow will not increase the average amount of time voters spend in the voting booth. Mot. 13-14.

Not only does this position defy common sense, it ignores Plaintiffs' evidence. Fort Bend County Elections Administrator John Oldham explained that based on his long career in election administration, eliminating STV "*will cause* a significant increase in the average amount of time Texas voters will spend casting their votes." App.119-20 (emphasis added). The Secretary offered no evidence in response to this declaration. And while voters who use STV must still "see every race" on the ballot, Mot. 14, that surely does not mean those voters spend the same amount of time completing their ballot with STV as they would if they had to make individual *selections* in every single one of those races.

Regardless of the severity of the burdens HB25 will impose on voters, they are not justified by the law's purported purposes. Below, the Secretary claimed eliminating STV would make voters more informed and would increase candidate quality. But as the district court explained, Texas voters who use the STV option are free to change their votes in individual races: simply "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 and better campaigns" or more informed voting. App.42-43. Apparently abandoning those interests here, the Secretary's motion focuses only on the fact 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. Mot. 14-15. But the Secretary still is yet to explain 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 along the way. *Burdick*, 504 U.S. at 434. And the Secretary still cannot explain why such mistakes cannot be prevented by the much less burdensome policy of warning voters about these issues when they choose the STV option.

Finally, the Secretary simply gets the law wrong in asserting that the district court had to find "no set of circumstances exists under which [HB25] would be valid" to issue its injunction. Mot. 12 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The Supreme Court has explained that "[t]o the extent we have consistently articulated a clear standard for facial challenges, it *is not* the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself." *City of Chi. v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) (emphasis added). Instead, the Court "has repeatedly considered facial challenges simply by applying the relevant constitutional test to the challenged statute, without attempting to conjure up whether or not there is a hypothetical situation in which application of the statute might be valid." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124 (10th Cir. 2012) (collecting cases).

This is particularly so with respect to an *Anderson-Burdick* claim. In response to the facial challenge in *Crawford v. Marion County Election Board*, a majority of

the Supreme Court agreed that courts should consider the impact a law has on identifiable subgroups for whom the burden may be most severe. 553 U.S. 181, 199-203 (2008) (plurality opinion); *id.* at 212-23, 237 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting). Lower courts have followed this instruction. *E.g.*, *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016). That analysis is directly inconsistent with the Secretary's unsupported claim that Plaintiffs must demonstrate HB25 will violate the rights of every single voter in Texas.

Ultimately, the district court "appl[ied] the relevant constitutional test to the challenged statute" and properly determined the HB25 will likely violate Texans' fundamental rights if implemented this fall. *Doe*, 667 F.3d at 1124.

II. The Secretary has not demonstrated that the balance of the harms or the public interest weigh in favor of granting a stay.

The only injury that the district court's preliminary injunction imposes on the Secretary is her "inability to enforce" HB 25. Mot. 16. But just as it is "black-letter law" that the inability to enforce state law amounts to injury, *id.*, it is equally axiomatic that the loss of constitutional rights does too. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). And while the Secretary claimed below that local election officials would encounter burdens to reprogram voting machines before in-person voting commences, Mot. 17, Plaintiffs' expert demonstrated that doing so was "entirely

feasible," App.1103, and that the Secretary's warnings of "catastrophe" are exaggerated. As a result, the district court did not simply "dismiss" the threat of harm. Mot. 16. Rather, it weighed the evidence presented by both parties and concluded that Plaintiffs' evidence was stronger. App.44.

The Secretary's reliance on decisions suggesting that federal courts should not impose *entirely new election rules* on the eve of an election does not support her position. Mot. 17. *Purcell v. Gonzalez*, 549 U.S. 1 (2006), does not counsel against the relief granted here. To the contrary, *Purcell* urged courts to take careful account of considerations unique to the specific state's election context before intervening, such as whether the change is likely to broadly confuse voters. 549 U.S. at 4. As the district court noted here, "*eliminating* a practice that Texan voters have been accustomed to for 100 years is more likely to cause confusion among voters than [maintaining] it would." App.43.

Further, courts regularly hear and grant motions for preliminary injunctions to protect voting rights weeks before an election. *E.g*., *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016); *Fla. Democratic Party v. Detzner*, No. 16-CV-607, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016); *Bryanton v. Johnson*, 902 F. Supp. 2d 983 (E.D. Mich. 2012).

In addition to providing evidence that rebutted the Secretary's claims regarding administrative burden, Plaintiffs demonstrated that HB25's enforcement would irreparably harm Texas voters. HB25 risks not only widespread disenfranchisement, but also voters' health and safety. Making matters worse, Texas has failed "to take the steps necessary to mitigate the risks caused by COVID-19 and HB25," App.13, despite that the pandemic prevents county officials from mitigating HB25's harms. At stake now is "the viability of an election where nearly every voter must, during a pandemic caused by an airborne virus, vote in person." App.13. Balancing that basic viability of the election against the administrative burden of adding the STV option, the district court determined, accurately, that intervention was necessary.

CONCLUSION

The district court's preliminary injunction should not be disturbed.

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Respectfully Submitted,

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I hereby certify that on September 29, 2020, 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.

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