No. 20-40643

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

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

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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Introduction

"The 2020 general election has already begun." App.1285. Reinstating straight-ticket voting now would be a "logistical nightmare," would "increase the chance for mistakes or errors," and would "severely affect [counties'] ability to efficiently, fairly, and accurately administer the 2020 general election." *Id.* Plaintiffs cannot justify that result. Their response effectively concedes that they failed to prove standing, and their expert testimony does not prove that HB 25 imposes anything but a minimal burden. The motion to stay should be granted.

Argument

I. The Secretary Is Likely to Succeed on Appeal.

A. The district court lacked jurisdiction.

1. Plaintiffs lack standing to sue the Secretary.

Plaintiffs do not dispute that the record contains no evidence of standing. *See* Resp. 8 n.2. Nor do they dispute that a district court cannot grant a preliminary injunction without "evidence in the record of an injury-in-fact." *Barber v. Bryant*, 860 F.3d 345, 355 (5th Cir. 2017) (reversing a preliminary injunction); *see also Johnson v. City of Dallas*, 61 F.3d 442, 444 (5th Cir. 1995). Instead, they attempt to introduce new evidence on appeal, effectively conceding their failure to establish standing.

Plaintiffs still have not identified an injured member or even shown that they have members. *See* Mot. 9-10; *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377, at *7 (11th Cir. Sept. 3, 2020). Plaintiffs cannot obtain relief when "there is no evidence in the record showing that a specific member" is injured. *NAACP v.*

City of Kyle, 626 F.3d 233, 237 (5th Cir. 2010); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (holding plaintiffs must "identify members who have suffered the requisite harm").

Plaintiffs argue that their standing is not speculative because someone, somewhere is likely to be injured. Resp. at 11-13. That is not true, but even if it were, "future injury to others is irrelevant." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019). "[P]laintiffs seeking injunctive relief must show a continuing or threatened future injury *to themselves*." *Id.* (emphasis added). The "requirement of naming the affected members has never been dispensed with in light of statistical probabilities." *Summers*, 555 U.S. at 498-99. Even when "it is certainly possible—perhaps even likely—that one" member would have standing, "that speculation does not suffice." *Id.* at 499. Here, Plaintiffs disclaim any effort "to demonstrate that HB25 would increase lines at a specific polling place to which one of Plaintiffs' members or constituents will arrive." Resp. 13. They cannot satisfy *Stringer* and *Summers*.

Plaintiffs' attempt to shift focus to organizational standing also fails. At most, that would suggest vacatur and remand for reconsideration of jurisdiction. *See Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 478 (5th Cir. 2020) (en banc) ("[W]e are a court of review, not of first view."). But Plaintiffs have not demonstrated harm to "the electoral prospects of their candidates." Resp. 8. In fact, the district court already rejected this theory, holding it was "uncertain" whether HB 25 would "cause Democratic-party candidates . . . to lose votes at polling-places that would have otherwise been cast for them." *Bruni*, 2020 WL 3452229, at *5; *cf. Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (rejecting jurisdiction based on "group

political interests"). Nor can Plaintiffs establish injury based on diversion of resources. Resp. 9-10; App.1135. *See City of Kyle*, 626 F.3d at 238; *see Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). Again, the district court rejected this argument when it dismissed Plaintiffs' first suit. *See Bruni*, 2020 WL 3452229, at *5 (quoting *Zimmerman*, 881 F.3d at 390).

2. Sovereign immunity bars Plaintiffs' claims.

Plaintiffs' discussion of sovereign immunity demonstrates the district court's error. Relying on *Texas Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *6 (5th Cir. Sept. 10, 2020) ("*TDP*"), they argue that "the Secretary's 'close statutory connection to the Texas Election Code' satisfies *Ex parte Young* in a suit challenging one of its provisions." Resp. 14. But that skips a step of the analysis. Under this Court's precedent, *Ex parte Young* applies if the state official (1) has "some connection" to enforcement of the challenged state law and (2) has "taken some step to enforce" it. *Texas Democratic Party v. Abbott*, 961 F.3d 389, 400-01 (5th Cir. 2020); *see also Morris v. Livingston*, 739 F.3d 740, 742 (5th Cir. 2014). *TDP* departed from that precedent by collapsing *Ex parte Young*'s two requirements—it reasoned that as "chief election officer of the state, the Secretary is charged at least in part with enforcement of the Texas Election Code," so "there exists a scintilla of enforcement." 2020 WL 5422917, at *6 (quoting *City of Austin*, 943 F.3d at 1002 (quotation marks omitted)).

Plaintiffs assume (as *TDP* did) that the Secretary's designation as "chief election officer" establishes both the ability to enforce and the likelihood of enforcement. It establishes neither. But the Secretary's status as "chief election officer" is not an

implied "delegation of authority to care for any breakdown in the election process." *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (Reavley, J.). And even when a state official has the undisputed power to enforce a statute through litigation, this Court still asks whether he is likely to do so against the plaintiff. *See City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019); *cf. In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020). *TDP* did not ask that question at all, and it did not identify any act of enforcement by the Secretary—not even a potential act of enforcement. Neither did the district court, and neither do Plaintiffs.

B. The Secretary is likely to succeed on the merits.

1. HB 25 does not impose an undue burden.

Plaintiffs argue that HB 25 imposes an undue burden because expert evidence allegedly shows that "small increases in voting time *can* produce significant increases in wait times." Resp. 12 (quoting App.132) (emphasis added). Plaintiffs' expert evidence falls far short of the mark. Plaintiffs do not dispute that their expert (1) based his calculations on 2016 conditions without adjusting for the very different 2020 conditions, Resp. 12; App.735, (2) analyzed Election Day voting without considering early voting. Resp. 12; App.735, (3) took no independent empirical measurements of how long it takes Texans to vote, and (4) evaluated only 2 of Texas's 254 counties. Resp. 12; App.736. Plaintiffs argue that those two counties "need not be perfectly representative of other Texas counties," Resp. 12, but their expert did not analyze whether they were representative at all. App.736 ("Q. Does your declaration analyze how similar Travis and Fort Bend counties are to the rest of the counties in Texas?

A. No."). That evidence says nothing about the burden on Plaintiffs, much less voters across the State.

This deficiency is glaring in light of unrebutted evidence that eliminating straight-ticket voting will *shorten* wait times for some voters. According to a Harris County election official, straight-ticket voting "actually caused confusion and slowed down the lines in some cases." App.1007. This happens when voters select the straight-ticket option, then try "to emphasize or confirm" a choice, which "inadvertently de-select[s] that candidate," App.665, leading voters to "speak with election officials to go through various corrective procedures, which takes additional time." App.665. "Thus, in some cases, the elimination of the STV option will serve to decrease voter confusion and the time to vote in certain circumstances." App.665. That is consistent with North Carolina's experience, which saw *shorter* wait times in the first presidential election after it repealed straight-ticket voting. App.900.

Plaintiffs also ignore steps that state and local officials have taken to expand access to the polls. The Governor has increased the number of early voting days by nearly 50%, moving the start of early in-person voting to October 13, three weeks before election day. App.683. And election administrators are using more polling locations, including sports stadiums. App.1250. Bexar County, for example, will have more early-voting locations in 2020 than it did in 2016. App.1285.

Plaintiffs also misinterpret the Secretary's argument about the burden of proof in a facial challenge. Even if a facial challenge did not require proof that the statute is invalid in every possible application, it would at least require proof that the statute lacks "a plainly legitimate sweep." *Crawford v. Marion Cty. Election Bd.*, 553 U.S.

181, 202 (2008) (plurality op.). A facial challenge fails if "the statute's broad application to all [Texas] voters . . . 'imposes only a limited burden on voters' rights.'" *Id.* at 202-03 (quoting *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)). Plaintiffs' facial challenge fails under that standard.

HB 25 imposes a limited burden: voters must make an individual choice in each contest on the ballot. Choosing a preferred candidate in every contested election—i.e., voting—does not impose an undue burden on the right to vote. At most, Plaintiffs have raised the possibility that the aggregate effect of HB 25, among hundreds or thousands of voters, *might* impose a secondary burden on *some* subset of voters *if* several contingencies occur. But even if Plaintiffs had proven that these circumstances will exist for any identifiable subset of voters (they have not), that would not justify wholesale invalidation of HB 25. *See id.* at 203 (plurality op.).

In their effort to defend the district court's analysis, Plaintiffs only highlight its error. Plaintiffs disclaim any effort to "demonstrate HB25 will violate the rights of every single voter in Texas." Resp. 19. But that now-undefended theory was the basis of the district court's ruling: "HB 25 will cause irreparable injury to Plaintiffs and ALL Texas voters in the upcoming general election." App.45. The evidence does not support that finding.

2. The State's interests outweigh HB 25's minimal burden.

As the Secretary explained in her motion, the district court improperly required the State to empirically justify the Legislature's interests in passing HB 25. Mot. 14-15. Plaintiffs have no response. They simply repeat the same arguments, faulting the Secretary for failing to prove that it was "necessary" to eliminate one-punch

straight-ticket voting or explain why the Legislature could not have accomplished its goals by different means. Resp. 18. But state legislatures are entitled to take preventive measures that they deem necessary. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013) ("Texas need not show specific local evidence of fraud in order to justify preventive measures."); *Tripp v. Scholz*, 872 F.3d 857, 866 (7th Cir. 2017) (finding "speculative concern" sufficient to justify ballot-access limitation). And States are not required to prove in court that the legislature's judgment was correct.

Nevertheless, the Secretary has shown that HB 25 responds to legitimate concerns. The problem of "emphasis voting," for example, is well-documented—it has even resulted in litigation by the Texas Democratic Party against local election officials. *See* App.725-26. And straight-ticket voting has a destructive effect on the state judiciary. As the Chief Justice of the Texas Supreme Court has lamented, "partisan sweeps," which commonly turn experienced judges out of office "solely because voters in their districts preferred a presidential candidate in the other party," are "demoralizing to judges and disruptive to the legal system." App.918; *see also* App.973-75. The Secretary has not "abandoned" any of the other justifications for HB 25 (Resp. 17); but these particular examples are more than sufficient to prove that the law serves legitimate state policy goals.

In dismissing the State's interests, Plaintiffs only highlight their own failure of proof. They brush aside the threat of voter confusion and unintentional roll-off, arguing that the Secretary has proven only "some unknown number of voters have unintentionally skipped nonpartisan items on the ballot or mistakenly canceled votes by 'emphasizing' them." Resp. 17. But Plaintiffs' own claim is based on the

argument that some unknown number of voters *might* face longer lines at the polls *if* HB 25 increases each voters time to vote and *if* election officials are unable to provide an adequate number of voting machines. The Secretary does not bear the burden of proof; Plaintiffs do. They have not carried it here.

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

To illustrate the consequences of the district court's injunction, Secretary Hughs offered declarations from four county election administrators—the local officials charged with implementing HB 25 and preparing ballots for the 2020 election. These declarations confirm that programing and testing the ballots to ensure accuracy "takes weeks to accomplish." App. 1284. That is so because voting machines must be programmed to process multiple ballot styles. "A ballot style is a combination of contests and propositions" unique to each precinct or sub-precinct in a county. App.1290. Bexar County has 1,200 different ballot styles, each of which must be programmed "into 2,500 standard voting machines, 320 ADA-accessible voting machines, and 320 tabulators." *Id.* And each voting machine must be programmed individually. *Id.*

Election administrators explained that reprogramming every voting machine for every ballot style at this point in the election would be a "logistical nightmare," App.1285, and would "drastically affect our ability to administer a fair and accurate election," App.1288. Dismissing the views of officials who conduct elections, Plaintiffs insist that taking the necessary steps to reimplement the straight-ticket option would "add only 'an extra day or two of effort.'" Resp. 6. That quote comes from a

computer science professor who has never administered an election in Texas. App.1101–03.

Plaintiffs attempt to downplay the burden by arguing that the district court's injunction does not apply to mail-in ballots. Resp. 6 & n.1. But if that is the case, it makes the burden even more severe. If counties have one set of ballots for in-person voting and another set of ballots for mail-in voting, that doubles the number of ballot styles in each county. That is so because the straight-ticket option must go first on the ballot, which shifts every other ballot item and requires reprograming all tabulation machines. App.1294. Because they list ballot items in a different order, ballots with the straight-ticket option cannot be tabulated on machines programed to count ballots without the straight-ticket option. To tabulate two sets of ballots, the counties would have to reprogram every tabulation machine—320 in Bexar County alone. App.1284. And it is unclear whether those tabulation machines can be reprogrammed during the election, meaning counties may have to hand-count thousands of ballots. That would produce two different sets of election results—one with the straight-ticket option and one without—forcing counties to somehow add the numbers together. Mail and in-person ballots are intended to be "part of one overall system." App.1290. Requiring different ballots would split that system in two.

Plaintiffs refuse to recognize that reality, and they reject the principle of *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). They assume, like the district court, that HB 25 can be eliminated with the stroke of a pen, and the State will simply "go back" to straight-ticket voting. But election officials have created ballots and programmed voting machines according to HB 25. Reinstating straight-ticket voting requires

election officials to start from scratch. Federal courts must consider the practical impact on local officials and voters who have to live with the consequences of a last-minute change to election laws. Only by ignoring those consequences can Plaintiffs suggest that changing the rules "weeks before an election," Resp. 20, is the routine business of federal courts.

Conclusion

The Court should stay the district court's injunction pending appeal.

Respectfully submitted.

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Certificate of Service

On September 30, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Matthew H. Frederick
Matthew H. Frederick

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,584 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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