Case No. 20-50867

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS; NATIONAL LEAGUE OF UNITED LATIN AMERICAN CITIZENS; LEAGUE OF WOMEN VOTERS OF TEXAS; RALPH EDELBACH; BARBARA MASON; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES; TEXAS LEGISLATIVE BLACK CAUCUS,

Plaintiffs – Appellees,

v.

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

Defendant – Appellant.

Laurie-Jo Straty; Texas Alliance for Retired Americans; BigTent Creative,

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 Western District of Texas, Austin Division

LULAC PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR EMERGENCY STAY

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CERTIFICATE OF INTERESTED PARTIES

1. No. 20-50867; *Texas League of United Latin American Citizens; National League of United Latin American Citizens; League of Women Voters of Texas; Ralph Edelbach; Barbara Mason; Mexican American Legislative Caucus, Texas House of Representatives; Texas Legislative Black Caucus, v. Ruth Hughs, Texas Secretary of State; Laurie-Jo Straty; Texas Alliance for Retired Americans; BigTent Creative v. Ruth Hughs, Texas Secretary of State.*

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.

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INTRODUCTION

The Supreme Court, this Circuit, the Texas Supreme Court, and the State have all cautioned against "tinkering with looming elections" so as to avoid confusing voters and undermining confidence in election outcomes. *See e.g.*, *Thomas v. Bryant*, 938 F.3d 134, 176 (5th Cir. 2019) (Willet, J., dissenting). Nevertheless, five days *after* voters started returning their voted ballots, Governor Abbott unilaterally changed the rules for voters and election administrators. The Governor's October 1 Proclamation ("Order") restricts voters' ability to return their absentee ballots by limiting in-person ballot drop-off locations to one-per-county. Based on a virtually uncontested record, the district court determined as a matter of conclusive fact that the purported "ballot security" rationale asserted by the Governor was mere "pretext." County clerks in Harris, Travis, and Fort Bend counties confirmed that removing the additional drop-off locations would impede security rather than improve it. Appellant did not rebut this evidence. The district court therefore enjoined the limit on ballot drop-off locations, reverting to the rules in place when voting started.

A stay would not preserve the status quo ante but would freeze into place the Governor's unjustified and untimely attempt to reset the rules for the election midstream. Appellant fails to show why this extraordinary relief is warranted. The stay should be denied.

FACTUAL BACKGROUND[1]

On July 27, 2020, Governor Abbott suspended the portion of the Texas Election Code restricting county election officials from receiving marked absentee ballots in person prior to Election Day. Op. 3-4. Relying on the July 27 Order, Texas's county election officials, including in Harris, Travis, and Fort Bend counties—three of the state's most populous and diverse counties—made and implemented plans to utilize multiple annex offices to receive voted absentee ballots, as permitted by statute and authorized by State officials. *Id.* at 5-6. By October 1, Harris County had opened eleven annexes, Travis County, four, and Fort Bend was set to open multiple annexes. *Id*. at 5. Thousands of voted absentee ballots were received at these sites in the four days they were open. Hollins Supp. Decl., 51-1 at 2.

Each annex operates under identical procedures for verifying absentee voters' identities and receiving their ballots. Op. 13. Moreover, use of these annexes to receive absentee ballots is *more* secure than reliance on the postal mail, Op. 13-14, which—other than contract or common carrier mail—is the *only* other means by

[1] The district court made substantial factual findings in support of the injunction. Substantial deference is due to those factual findings, which "are reviewed for clear error." *Thomas v. Bryant*, 919 F.3d 298, 312 (5th Cir. 2019); *Texas v. U.S.*, 787 F.3d 733, 747 (5th Cir. 2015).

which absentee voters can return their ballot. TEX. ELEC. CODE § 86.0006. Unsurprisingly, no security issues were identified in the four days that the annexes were open prior to the October 1 Order. Op. 38-39. Nor were any security issues identified months earlier, when Harris County operated multiple annexes to receive absentee ballots on the day of the primary runoff in July.

On October 1, 2020, Governor Abbott announced that counties could provide only one in-person ballot drop-off location, and unilaterally ordered the annexes closed without notice to voters or election officials. *Id.* at 6. The only justification offered was "the need to add ballot security protocols." *Id.* The only "protocol" announced was the clarification that poll watchers must be allowed at all drop-off locations. Oct. 1 Order, 15-3 at 3. This portion of the Order is unaffected by the injunction entered below.

Prior to the October 1 Order, Appellant represented to the Texas Supreme Court that these annexes are *explicitly* permitted under Texas statute. Op. 39. Indeed, Appellant concedes that the one-per-county limit does not apply on Election Day itself. *Id*. at 14, 39.

LEGAL STANDARD

A stay pending appeal is an "extraordinary remedy." *Belcher v. Birmingham Tr. Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968). To prevail, Appellant must show: (1) a likelihood of success on the merits; (2) that she will suffer irreparable injury

absent a stay; (3) that Plaintiffs will not be substantially harmed; and (4) that the stay will serve the public interest. *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992). "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). Appellant carries the burden to satisfy the four factors. *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir.1982). When a district court's injunction "merely maintains the status quo while the court considers the issue, a stay pending appeal is far from justified." *Texas v. U.S.*, 787 F.3d 733, 768 (5th Cir. 2015).

ARGUMENT

I. Plaintiffs Do Not Object to Appellant's Dismissal From This Case, Mooting Her Appeal.

Appellant argues that she is not a proper party to this case because "she neither implements nor enforces either section 86.006(a-1) or gubernatorial proclamations," Mot. 14, and Plaintiffs have not shown she is "likely to enforce this order," which she asserts "imposes no duties on the Secretary," *id*. at 10. But if Appellant has no connection to the Order, and is unaffected by the injunction, it necessarily follows that she cannot establish irreparable harm. This alone merits denial of her stay application. *See Ruckelshaus v. Monsanto Co.,* 463 U.S. 1315, 1317 (1983)

("Likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay").

Plaintiffs do not object to this Court dismissing Appellant from this action and concomitantly vacating the injunction insofar as it applies to her. Appellant cannot object to dismissal given she has requested it. The remainder of her stay application and appeal would then be moot and should be dismissed as such. The district court's injunction would continue to bind and be in effect against defendant county officials (who did not appeal the District Court's injunction and who do not dispute that they are proper defendants). *See Cabral v. City of Evansville, Ind.*, 759 F.3d 639, 643 (7th Cir. 2014) ("[A] judgment will not be altered on appeal in favor of a party who did not appeal [even if] the interests of the party not appealing are aligned with those of the appellant.").

On the merits, however, *Texas Democratic Party* forecloses Appellant's *Ex Parte Young* argument, and is binding on this motions panel. *Tex. Dem. Party v. Abbott*, 2020 WL 5422917 *6 (5th Cir. September 10, 2020). When the relief requested is "to require the Secretary of State to cease enforcing" a state law, "[t]he Secretary has both a sufficient connection and special relationship to the Texas Election Code . . . that sovereign immunity does not bar suit against the Secretary." *Id.* Moreover, Appellant is statutorily obligated to "obtain and maintain uniformity in the application, operation, and interpretation . . . of the election laws *outside* this

code." Tex. Elec. Code § 31.003 (emphasis added). And, Appellant is empowered to "'correct the offending conduct' and 'seek enforcement [by] the attorney general." Op. 29 (citing Tex. Elec. Code §§ 31.003, 31.005). The Order at issue governs the conduct of elections and provides that "failure to comply with any executive order issue during the COVID-19 disaster . . . may be subject to regulatory enforcement." *Id.* at 29-30. Appellant has authority to enforce the Order.

Ex Parte Young merely requires "some scintilla of 'enforcement' by the relevant state official with respect to the challenged law." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019); *see also Fusilier v. Landry*, No. 19-30665, 2020 WL 3496856, at *2 (5th Cir. June 29, 2020). Appellant holds clearly defined responsibilities relating to election law enforcement and has "demonstrated her willingness to enforce Governor Abbott's recent executive orders" because she has "recently advised county officials on how to comply" with the Governor's July 27 proclamation on ballot receipt annexes. Op. 30.

Further, because Appellant has the authority and will to enforce the Order, Plaintiff's injuries are traceable to her and the injunction redresses their injury.

II. Preservation of the *Status Quo Ante* Requires Denial of Appellant's Stay Application.

"[T]he maintenance of the status quo is an important consideration in granting a stay." *Barber*, 833 F.3d at 511 (quoting *Dayton Board of Education v. Brinkman*, 439 U.S. 1358, 1359 (1978)). The weight given this factor is heightened in election

cases decided in the run-up to an election. *See Texas Alliance for Retired Americans v. Hughs* ("*TARP*"), 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) ("[W]e recognize the value of preserving the status quo in a voting case on the eve of an election."); *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (noting that in election cases, "the value of preserving the status quo . . . is much higher than in most other contexts"). Courts typically should not countenance "changes of election laws close in time to the election," so as to ensure that voting can proceed under a predictable, and pre-established, set of rules. *TARP*, 2020 WL 5816887, at *2.

Here, the status quo—*i.e.*, the rules of the election in place when voting started on September 27—was established by Texas statute, which permits county election officials to designate multiple in-person absentee ballot return locations,[2] and the Governor's July 27 Order, which suspended the prohibition on accepting absentee ballots in person prior to Election Day. Op. 3-5. This status quo was upended by *the Governor* when he issued the pretextual and precipitous Order. Op. 14, 39. The injunction merely *restored* the status quo ante, and reverted to the rules in place when voting commenced. *See* Op. 33.

[2] All parties agree that the Texas Election Code authorizes counties to establish more than one absentee ballot return location. Op. 14 ("[T]he State authorizes counties to use satellite ballot return centers on Election Day without regard to those ballot security concerns."); Mot. 4 (acknowledging that "[t]he Governor's Proclamations . . . do not address or affect what the Election Code allows on Election Day itself").

Nevertheless, in a stunning example of projection Appellant opens her argument by proclaiming that "[t]he district court impermissibly altered election rules on the eve of an election." Mot. 7. Appellant has it backwards. The Governor overrode the Legislature and altered the election rules. And not just on the eve of an election, but *after the election had begun*.

Because the injunction simply re-established the status quo while an election was underway, a stay is not warranted. Indeed, a stay order would cause the very "judicial alteration of the status quo" that this Court's, and the Supreme Court's, precedents have repeatedly cautioned against. *See TARP*, 2020 WL 5816887, at *1 (quoting *Nken v. Holder*, 556 U.S. 418, 429 (2009)). To the extent this Court is indeed committed to the principle that the election's rules should not be altered on its eve, it must apply that principle consistently and deny a stay.

Instead, Appellant treats the mid-election timing of the Governor's Order as her ace-in-the-hole. Invoking *Purcell*,[3] Appellant contends that the Governor, a non-election official acting by fiat, can change election rules in "real time," Mot. 8 n.2, and federal courts are powerless to reach "the merits" of a lawsuit filed on the eve of an election. *Id.* at 7. But *Purcell* is not a jurisdictional limitation on courts; Article III has no black-out period for adjudicating cases and controversies. *Purcell* is a

[3] *See* Mot. 7 (citing *Purcell v. Gonzales*, 549 U.S. 1 (2006) and *RNC v. DNC*, 140 S. Ct. 1205 (2020)).

prudential principle aimed at reducing "voter confusion and the consequent incentive to remain away from the polls," *Purcell*, 549 U.S. at 5, that election-eve litigation "ordinarily" may cause, *RNC*, 140 S. Ct. at 1207. If it applies at all, it cautions in favor of the district court's order.

Appellant cites zero cases in which a court has applied *Purcell* to block judicial review of a state's decision to change the rules mid-election. It would be dangerous to reflexively apply *Purcell* equally regardless of when the challenged law or practice was adopted. Doing so would forecast to states a "Constitution-free period" where election laws and practices can be altered without judicial consequence. It might not always yield the same electoral consequence.

For example, Texas may decide on October 1, 2024 that, beginning the next day, absentee voting will only be offered as an option in the state's five most populous counties. Such a rule could be defended as officials "weigh[ing] competing concerns regarding costs and benefits," Mot. 8 n.2, and determining that the added cost of facilitating absentee voting only makes sense in urban counties where it reduces the congestion at the polls. Or Texas officials might abruptly decide that Texas's congressional districts should be treated equally, and each should be permitted the same number of polling locations, regardless of geographic size. Such a rule could be defended as "increase[ing] uniformity" among the districts. *Id.* at 15.

Indeed, under Appellant's twisted conception of *Purcell*, mid-election changes would be judicially unrevieweable. Instead, the timing of the Governor's abrupt decree, coupled with its "pretextual" justifications, warrants *more* searching judicial scrutiny and dictates a return to the status quo ante, as the district court ordered.

III. The Injunction Serves the Public Interest and Will Not Irreparably Harm Appellant.

A. The State's interest in ensuring orderly and secure elections is not injured by the injunction.

Appellant asserts that the Order serves the State's interest in ensuring ballot security and protecting the integrity of the elections. Appellant further asserts that the Order is justified as an exercise of the Governor's authority to address the ongoing health emergency. The unrebutted evidence demonstrates that the interests asserted by the state, though weighty in the abstract, are illusory in fact. Thus, the district court correctly found—based on a virtually undisputed evidentiary record—that the State's asserted interest in election integrity is merely pretext, and that the Order was not aimed at responding to the pandemic, ensuring ballot security, or protecting the integrity of the elections. Because the Order does not, in fact, serve any State interest, the State is not injured by the injunction and a stay is unwarranted.

First, Appellant failed to rebut the overwhelming evidence that limiting the number of ballot return centers impedes rather than ensures ballot security. *See* Op.

13. Each annex is governed by security protocols identical to those that apply to the single location allowed under the Order, and to the multiple locations allowed on Election Day. Op. 13, 42. These protocols are uniform both within and across counties because they are set by state law. Op. 13. Appellant has offered no evidence to rebut these facts, nor argued that these protocols are in fact insufficient to ensure ballot security. Instead, Appellant asserts without evidence that ballot security is enhanced where election officials are allowed "to focus their resources and attention on a single [location], rather than having to spread those resources" to multiple locations. Mot. 14. But there is *no* evidence in the record that election officials lack the necessary resources to operate multiple sites, and indeed the district court found as fact that the Order imposes additional burdens on elections officials, rather than relieving them. Op. 11-12. Moreover, any concern about the stretch of administrative resources is surely at its height on Election Day itself, when Appellant concedes that multiple locations are permitted.

Second, the unrebutted evidence demonstrates that allowing voters to return their absentee ballots at the annexes is "more secure than returning [ballots] by mail" because there is no risk that ballots returned at the annexes can be tampered with or lost between the time the voter drops them off and their arrival to the county election office. Op. 14-15. Additionally, voters are required to sign in with elections officials and present identification when returning their ballot at the annexes, neither of which

is required when returning ballots by mail. *Id.* Given the State's adamancy that voter identification increases security, *see Veasey v. Abbott,* 830 F.3d 216 (5th Cir. 2016) (en banc), Appellant's insistence on limiting voting opportunities that require ID in the name of "ballot security" rings hollow.

Third, the Order's one-size-fits-all policy does not serve any State interest in uniformity. Again, the unrebutted evidence shows that the limit does not have any impact on the uniform practices and procedures required by statute and employed by elections officials in operating the annexes, but it does disparately affect *voters* based solely on where they live. Op. 40-41. Indeed the "uncontested testimony from the organizational Plaintiffs and their members shows that absentee voters living in larger, more populous counties are necessarily treated differently than other similarly situated voters in smaller, less populated counties under the October 1 Order." *Id.* at 41. Thus, the Order "is self-evidently not neutrally applicable; it restricts the rights of some voters, those who qualify to vote absentee in larger, more populous counties and not others." *Id.* at 42.

Finally, the Order was not motivated by a need to address the ongoing public health emergency, and did not articulate how it would. Mot. 5, 7, 22. Appellant never explains how limiting each county, regardless of its population or size, to one ballot drop-off location bears any relationship to protecting Texans' public health. Indeed,

the district court found as a matter of fact that the Order was not intended to address the ongoing public health emergency. Op. 39-40.

As discussed *infra,* the Order will threaten Texans' public health, not protect it; and it will undermine confidence in elections, not promote it. Because Appellant has not asserted any legitimate interest in sustaining the Order—and because she disclaims any connection to the Order—she will not be harmed by a stay denial.

B. The injunction serves the public interest.

"It is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Organization v. Currier*, 760 F.3d 448, 458 n. 9 (5th Cir. 2014) (quotation and citation omitted). Where there is a status quo to preserve, "an injunction does 'not disserve the public interest [if] it will prevent constitutional deprivations.'" *In re Abbott*, 954 F.3d 772, 791 (5th Cir. 2020) (citing *Jackson*, 760 F.3d at 458 n.9). The Order violates Plaintiffs' First and Fourteenth Amendment rights and thus the injunction is in the public interest. Furthermore, the public's "strong interest in exercising the fundamental political right to vote . . . is best served by . . . ensuring that qualified voters' exercise of their right to vote is successful." *Obama for America v. Husted*, 697 F.3d 423, 436-437 (6th Cir. 2012) (citing *Purcell* 549 U.S. at 4; *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 244 (6th Cir. 2011)).

The Order also undermines confidence in elections by confusing voters and creating concern that their votes (which they may now have to cast by mail) may not count. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. The injunction resolves voter confusion: "[I]t is apparent that closing ballot return centers at the last minute would cause confusion, especially when those centers were deemed safe, authorized, and, in fact, advertised as a convenient option just months ago." Op. 33. And allowing each county to determine the number of annexes it needs, as the elected Legislature prescribed, rather than arbitrarily and discriminatorily limiting each county to one location, will restore these voters' confidence in the integrity of the November election.

Finally, limiting the number of ballot-drop off locations to one per county unnecessarily forces voters and election workers to risk their health. Absentee voters in Texas are almost exclusively elderly or disabled voters, two populations that are particularly vulnerable to COVID-19 and face a greater risk of serious complications or death if they are exposed to the virus. Op. 35. Voting in person would require them to risk unnecessary exposure. *Id*. Similarly, forcing particularly vulnerable voters to drive or take public transportation to a stand-alone, crowded ballot return location further away from their home than necessary is likely to cause substantial pain and fatigue and create unnecessary risk of COVID-19 exposure. Op. 11. The

public interest is best served by allowing these voters to vote at ballot annexes closer to their homes and less crowded than a single location for their entire county.

IV. Appellant Is Not Likely To Succeed On the Merits.

A. Plaintiffs Are Likely To Succeed On Their Equal Protection Claim.

"Our Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote]." *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964). As such, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. v. Virginia Bd. of Elections,* 383 U.S. 663, 665 (1966); *see also Bush v. Gore*, 531 U.S. 98, 105 (2000).

It is "well settled" that doling out electoral opportunity based on county lines violates Equal Protection. Op. 40 (citing *Moore v. Ogilvie*, 394 U.S. 814, 818–19 (1969)); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (noting that elections are governed by the choices of voters, "not trees or acres" or "farms or cities or economic interests."). The Constitution guarantees "equality among citizens in the exercise of their political rights," regardless of where they live. *Moore*, 394 U.S. at 819. Applying a "rigid, arbitrary formula to sparsely settled and populous counties alike" violates that principle. *Id*. at 818. The Order imposes, by fiat, just such a rigid

and arbitrary formula, untethered to the Texas Elections Code[4] and without regard for the counties' relative size or population. In so doing, it arbitrarily limits electoral opportunity based solely on where a voter resides. *See* Op. 41 (noting that "[t]his disparate treatment is evident in the increased distance, increased wait time, and increased potential for exposure to the coronavirus experienced by absentee voters living in larger, more populous counties"). As such, it "discriminates against the residents of the populous counties" and those that are geographically dispersed, and therefore "lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment." *Moore*, 394 U.S. at 819.

B. Plaintiffs Are Likely To Succeed on Their Claim that The Order Unduly Burdens their Right to Vote.

1. Plaintiffs' Have a Right To Vote Absentee.

Plaintiffs have a right to vote absentee under Texas law. *See* Tex. Elec. Code § 82.003. As such, the Defendant's reliance on *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-09 (1969) is inapposite.[5] Further, the Supreme Court has abandoned the reasoning in *McDonald* that the right to vote is only denied or abridged by classifications that limit access to absentee voting where there is no

[4] Defendant has acknowledged and indeed repeatedly affirmed that Tex. Elec. Code § 86.000(a-1) permits multiple drop-off locations. *See* Op. a 37-78.

[5] *McDonald* dealt with the question of when the right to vote absentee must be extended to voters who are not already entitled to that right under state law. *Id*. Here, all affected voters have a right to vote absentee.

alternative method of casting a ballot. *See Am. Party of Tex. v. White*, 415 U.S. 767 (1974). In *American Party*, the Court considered a Texas statute that precluded minor party voters from voting absentee while allowing major party voters to do so. *Id.* The Court rejected its previous reasoning that regulations on absentee ballots do not implicate the right to vote unless the State "precludes voting by other methods," Mot. 12, finding that although minor party supporters could vote in person, the restriction violated Equal Protection. *Am. Party*, 415 U.S at 767 (citing *Goosby v. Osser*, 409 U.S. 512 (1973) and *O'Brien v. Skinner*, 414 U.S. 524 (1974) as evidence of the Court's retreat from *McDonald*); *see also Texas Democratic Party v. Abbott*, -- F.3d --, 2020 WL 5422917 at *17 (5th Cir. Sept. 10, 2020) (rejecting the prior stay panel's reliance on *McDonald* due in part to its failure to wrestle with *American Party* and declaring "that the holdings in the motions panel opinion as to *McDonald* are not precedent").

2. The Order Unduly Burdens Plaintiffs' Right to Vote.

The *Anderson-Burdick* standard applies to Plaintiffs' undue burden claim. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the

extent to which those interests make it necessary to burden the plaintiff's rights.'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). The Order "imposes a burden on an already vulnerable voting population that is somewhere between 'slight' and 'severe.'" Op. 36. As such, the limit must be justified by a "sufficiently weighty interest."[6] *Burdick*, 504 U.S. at 434.

The District Court correctly found that the Order imposes at least a moderate burden on the right to vote. Op. 35. This is because "[a]bsentee voters in Texas are particularly vulnerable to the coronavirus because they are largely elderly or disabled, and thus face a greater risk of serious complications or death if they are exposed to the virus." *Id*. at 35. And, the option to mail their ballot rather than returning it in person is illusory for many. *See id.* at 36 ("Texas state voting deadlines are currently 'incongruous' with USPS guidelines on how much time is needed to timely deliver ballots, absentee voters who request mail-in ballots within the Texas timeframe cannot be assured that their votes will be counted."). This is particularly true for voters who wish to exercise their right to "account for last-minute developments, like candidates dropping out . . . , targeted mailers and other information disseminated right before the election," and thus do not have the option

[6] Because the Order discriminates against voters arbitrarily based on where they live, *see supra*, it must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But Appellant's failure to put forward any credible justification for the Order means it fails under any level of scrutiny.

of timely delivering their ballot by mail. *See Veasey*, 830 F.3d at 255 (holding that mail delivery of a ballot is not an acceptable alternative in such circumstances). Under the Order, these vulnerable voters "must travel further distances to more crowded ballot centers where they would be at an increased risk of being infected by the coronavirus in order to exercise their right to vote and have it counted." Op. 35. These burdens are more than "slight."

Nonetheless, "Defendants have not presented any credible evidence that their interests outweigh these burdens." *Id*. at 38. Indeed, the State's interests are illusory. *See supra* Part III.A. Merely invoking "the pretextual talisman of promoting ballot security in imposing burdening restrictions on vulnerable voters," Op. 39, is insufficient. Here, "voter fraud . . . is uncommon in Texas in the context of hand-delivered ballots," Op. 38, but "*[m]ail-in* ballots are particularly vulnerable to fraud." Attorney General Ken Paxton, Press Release, Oct. 10, 2020, https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-emergency-appeal-secure-ballot-hand-delivery-locations (emphasis added). Nonetheless, the Order necessarily reduces the number of ballots returned in person with voter identification, while increasing the number returned by mail without such identification. Although "[a] State indisputably has a compelling interest in preserving the integrity of its election process," the assertion of such an interest does not require the Court to rubber stamp state action where it does not actually serve

(and in this case, actually impedes) any purported interest. *Eu v. San Francisco Cty. Democratic Cent. Commission*, 489 U.S. 214, 231 (1989).

V. Pullman Abstention Is Unnecessary and Inappropriate.

The decision of a district court to abstain or not is reviewed for abuse of discretion, even where the *Pullman* factors are met. *Parm v. Shumate*, 513 F.3d 135 (5th Cir. 2003). The district court did not abuse its discretion. Indeed, Appellant has failed to make even a cursory showing of the elements required for a court to exercise its discretion to abstain under *Pullman.*

Specifically, Appellant fails to articulate "an unclear issue of state law" that would render this case unnecessary. The Order is unambiguous and does not require state court interpretation—the parties agree on what it means. Plaintiffs do not challenge Appellant's contention that Governor has authority to change the election rules under the Texas Disaster Act of 1975. Op at 29. Despite repeated challenges, state courts have declined to find the Governor's Orders unlawful under the Disaster Act, including in cases related to elections. Not once has the Texas Supreme Court taken the bait. There is no reason to believe they will do so here.

Appellant's invocation of *Texas Democratic Party v. Abbott,* 961 F.3d 389 (5th Cir. 2020), fails. In *Texas Democratic Party*, the majority declined to abstain and thus any musings on abstention are dicta. Further, the state law issue at issue in that case was due to be finally decided by the Texas Supreme Court any day, such

that abstention would not have presented any real threat to the parties' interests. That is not the case here, where no hearing in the trial court has even occurred in the state court case, and a later determination that the Order violates state law as well as the Constitution will not redress the ongoing harm to Plaintiffs in the interim.[7]

The more applicable cases, which the District Court relied upon, are the Supreme Court's opinions in *Baggett v. Bullitt*, 377 U.S. 360, 376 (1964) and *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). In each of those voting cases, the Supreme Court declined to abstain. In *Harman*, the Court held: "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction." *Id.* at 534-35. The Order is not fairly subject to an interpretation that allows the relief sought here. The district court was correct to decline to abstain, as the Supreme Court did in *Baggett*, because doing so would "'delay[] ultimate adjudication on the merits' in such a way as to 'inhibit the exercise of First Amendment freedoms.'" Op. 31 (*citing Baggett,* 377 U.S. at 379–380).

[7] Furthermore, state law prohibits suits in state district court against the Governor, the only defendant in the state court case; and, therefore, the state has a ready defense likely to lead to immediate dismissal. *See* TEX. GOV'T. CODE § 22.002(c). Thus it is highly likely that the pending state court case will be resolved without impacting this action.

CONCLUSION

The motion for a stay should be denied.

October 12, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

/s/ Chad W. Dunn
Chad W. Dunn

Counsel for Appellees

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Chad W. Dunn

Counsel for Appellees

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This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,199 words, excluding the parts exempted by rule; 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 Times New Roman) using Microsoft Word (the same program used to calculate the word count).

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