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

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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Reply in Support of Motion for Emergency Stay

Governor Abbott's proclamations have offered eligible mail-in-ballot voters the most generous and expansive array of delivery options in Texas history—far beyond what is ordinarily provided by the Texas Legislature. Before Governor Abbott's proclamations, an eligible mail-in-ballot voter had only two ways to return his marked ballot: the postal service, or hand-delivery *on Election Day*. Now, as part of his comprehensive strategy to combat the COVID-19 public-health emergency, the Governor has given voters the additional option to hand-deliver their ballot to their county's designated location between now and Election Day. That decision is the product of competing policy considerations related to public health and election integrity. Governor Abbott's proclamations fall squarely within the power conferred on him by the Texas Disaster Act, and federal courts may not "second-guess [his] policy choices in crafting emergency public health measures." *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905)). The district court's injunction violates that bedrock principle and "openly defies" "the Supreme Court's repeated emphasis that courts should not alter election rules on the eve of an election." *Tex. All. for Retired Ams. v. Hughs*, No. 20-40643, 2020 WL 5816887, at *1 (5th Cir. Sept. 30, 2020) (*TARA*). And it does so even though the challenged proclamations do not even implicate, much less burden, the right to vote. Accordingly, the injunction should be stayed pending appeal.

Plaintiffs' responses misunderstand these principles. They explicitly question the proclamations' "relationship to protecting Texans' public health," LULAC Resp. 12, despite *In re Abbott*'s contrary instruction, *see* 954 F.3d at 784. But the

proclamations *on their face* reflect that they are part of the State's comprehensive response to the COVID-19 threat, *see* Mot. Exs. B, C, and ample evidence confirms as much. On July 27, Governor Abbott expanded mail-in voting options to unprecedented levels, then fine-tuned that expansion on October 1 to account for competing concerns relating to election integrity. Mot. 4, 14, 15 (citing authorities). In particular, Governor Abbott reasonably concluded that it would be difficult to effectively staff multiple delivery locations with adequate poll-watchers over a 40-day period. *Id.* So he charted a sensible course protecting public health and combating voter fraud: eligible mail-in-ballot voters may hand-deliver their ballots before Election Day if they wish to do so, but only to a single, well-staffed county office. *Id.*; *see also Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc) ("[M]ail-in voting . . . is far more vulnerable to fraud," a "prevalent issue."). Under *In re Abbott*, Plaintiffs may not second-guess that determination.

Plaintiffs further resist a stay by claiming that the October 1 Proclamation has caused the type of disruption that *TARA* and *Purcell* seek to avoid. *E.g.*, LULAC Resp. 1, 6-10. But that overlooks the *status quo ante* here: Texas's Election Code does not allow mail-in ballots to be hand-delivered before Election Day. If the Governor's proclamations suspending the Code are unlawful, then all a federal court may do is revert to the statutory baseline, not pick and choose which parts of Governor Abbott's orders to retain and which to discard.

At core, Plaintiffs believe their right to vote has been burdened. But binding authority says otherwise. The proclamations do not implicate the right to vote at all. And in any event, the proclamations *expand* voting options. Plaintiffs cannot deny

that they have more options today than they had on July 26—and more options than the Election Code confers. The injunction should be stayed.

ARGUMENT

I. The Secretary Is Likely to Prevail on Appeal.

Plaintiffs' responses confirm that the district court lacked jurisdiction to enter its injunction. The *LULAC* Plaintiffs affirmatively acquiesce (at 4-6) to the dismissal of their suit against the Secretary on that basis. The *Straty* Plaintiffs argue that jurisdiction exists over the Secretary, but their argument would expand *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), beyond what this Court's subsequent cases allow. On the merits, Plaintiffs cannot defend the injunction below because Governor Abbott's proclamations—which *expand* mail-in-ballot options—do not implicate the right to vote, do not burden voting, and rest on real-time policy judgments during a public-health emergency that cannot be second-guessed.

A. The district court lacked jurisdiction.

1. In an effort to moot this appeal, LULAC agrees that the Secretary should be dismissed, and argues that because the Counties have not appealed, the injunction would remain in effect as to them. They are wrong for at least two reasons.

First, LULAC ignores that state officials have a strong interest in ensuring local officials comply with state law, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018), and appellate standing to defend the constitutionality of state law, including when relief is directed against local officials, *Moore v. Morales*, 63 F.3d 358, 360-61 (5th Cir. 1995). It is settled that state officials "have standing to contest the preliminary

injunction issued against" defendants "who have not appealed" because they are "aggrieved by the decision appealed," which would make state law effectively unenforceable in those counties. *Goldie's Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466, 468 n.2 (9th Cir. 1984); *accord GuideOne Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ*, 687 F.3d 676, 682 n.3 (5th Cir. 2012).

Second, the Secretary's dismissal would eliminate federal jurisdiction over this entire action, as there is no case or controversy between Plaintiffs and the county officials *who have actively supported the injunction*. Straty App.285-304. Indeed, both LULAC and the district court treated evidence from these defendants as equivalent to evidence of the plaintiffs. *E.g.*, Ex. A at 13 ("The State did not rebut the County Clerks' evidence or attorney argument."); LULAC Resp. 1 (substantively same). As a result, the Secretary's dismissal would require that the injunction be vacated and the case dismissed for lack of subject-matter jurisdiction. *E.g.*, *United States v. Johnson*, 319 U.S. 302, 304-05 (1943) (per curiam).

2. Though the *Straty* Plaintiffs do not acquiesce to dismissing their claims against the Secretary, their response demonstrates why their claims are barred by sovereign immunity. Plaintiffs do not dispute that "for a state official to have the requisite 'connection' to apply the *Young* exception, the official must have 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (plurality op.)). To show such a connection, however, the *Straty* Plaintiffs primarily point (at 11) to this Court's prior ruling in *OCA* and the Secretary's compliance with the Governor's

requirement that she "take notice" of the July 27 Proclamation. Neither establishes jurisdiction.

First, *OCA* involved the "facial invalidity of a Texas election statute," *TDP II*, 2020 WL 5422917, at *6. This case does not. It is true that a proclamation has the force of law *while it is in effect*. *See* Tex. Gov't Code § 418.12. But nothing indicates that the Secretary's general duty to maintain the uniformity of Texas election law extends to a superseded proclamation that was superseded precisely because it led to inconsistent application of Texas election law. Tex. Elec. Code § 31.003. Nor do Plaintiffs explain how this Court could expand *OCA* to every "statewide election policy" without violating the limits of *Ex parte Young* recognized in *City of Austin.* Straty Resp. at 9.

Second, the Secretary's guidance regarding the July 27 Proclamation does not constitute "enforcement" within the meaning of *Ex parte Young.* The Proclamation requires the Secretary to transmit a copy to local officials, Mot. Ex. B, and she did that. But that does not meet this Court's definition of "enforcement" because sending an email does not constrain the Plaintiffs in any way. *K.P. v. LeBlanc*, 627 F.3d 115, 124-25 (5th Cir. 2010). In any event, the Secretary has already transmitted that copy, so there is no basis to seek *prospective* relief. *Freedom from Religion Found. v. Abbott*, 955 F.3d 417, 425-26 (5th Cir. 2020).

B. The injunction is substantively unlawful.

Governor Abbott's proclamations reflect careful policy trade-offs in an evolving public-health emergency that are not subject to second-guessing by the federal judiciary. In any event, the proclamations do not implicate the right to vote at all. And

even if they did, the proclamations have *expanded* voting, not burdened it. The district court's contrary conclusions ignore binding authority and impermissibly interfere with a State's policy choices on the eve of an election.

1. The Secretary's motion illustrated (at 1, 3, 8) that the proclamations at issue are part of a coordinated, comprehensive statewide response to a once-in-a-century public-health emergency. In particular, Governor Abbott has offered eligible mail-in-ballot voters unprecedented voting options while combating voter fraud by preventing the possibility that some delivery locations may be unable to have poll-watchers every day for 40 days. *See* Mot. 4, 14, 15. As such, "courts may not second-guess the wisdom or efficacy of the measures" unless they are "arbitrary or oppressive." *In re Abbott*, 954 F.3d at 785. Governor Abbott's proclamations are the antithesis of "arbitrary"; they reflect a careful and studied effort to balance the competing policy interests described above. And they cannot be "oppressive," as they expand mail-in voting options to unprecedented levels. That should be the end of the matter. *See id.*

The *Straty* Plaintiffs ignore *In re Abbott* entirely, and the *LULAC* Plaintiffs mention it (at 13) only in passing. It thus is no surprise that they engage in exactly what *In re Abbott* disallows: second-guessing Governor Abbott's decisions on how best to mitigate a public-health crisis. *E.g.*, LULAC Resp. 12-13. But both the July 27 and October 1 Proclamations explicitly assert their intention to "ensure an effective response" to the COVID-19 "public health disaster." Mot. Exs. B, C. The Secretary's Motion and the authorities it relies on demonstrate (at 4, 14, 15) that, consistent with *In re Abbott*, the July 27 and October 1 Proclamations reflect an ongoing effort to respond in real-time to an unprecedented crisis. The Court should thus reject

Plaintiffs' invitation to question whether these proclamations "bear[] any relationship to protecting Texans' public health." LULAC Resp. 12.

2. Even if *In re Abbott* did not establish the Secretary's likelihood of success on appeal, Plaintiffs still cannot prevail because the proclamations do not implicate the right to vote. *McDonald v. Board of Election Commissioners* established that any supposed right to receive a mail-in ballot does not implicate the right to vote. 394 U.S. 802, 807 (1969) ("[T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots."). Plaintiffs claim that the Supreme Court has "abandoned the reasoning in *McDonald*" (LULAC Resp. at 16), but *TDP I* held otherwise (Mot. at 12-13), and *TDP II* expressly relied on *McDonald* to reach its conclusion that the right to vote is not "abridged" unless the State "creates a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the status quo." 2020 WL 5422917, at *10, *16. Here, no such barrier exists, and Plaintiffs have more voting options today than they had on July 26.

Plaintiffs further misunderstand *Anderson-Burdick*. The only putative burden they identify attributable to the October 1 Proclamation is that—assuming they choose not to mail their mail-in ballots—some voters might have to drive farther to hand-deliver their ballots. Straty Resp. 17. But this is the type of incidental inconvenience that will not support a constitutional claim. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008); *A. Philip Randolph Inst. of. Ohio v. Larose*, 2020 WL 6013117, at *2 (6th Cir. Oct. 9, 2020). Plaintiffs try to avoid this conclusion by

asserting that the October 1 Proclamation will cause "unnecessary risk of COVID-19 exposure." *E.g.*, LULAC Resp. at 14, 18. But the October 1 Proclamation does not create that risk; the *voter*'s choice to hand-deliver his marked ballot rather than mail it does. Defendants cannot be charged with unconstitutional activity based on Plaintiffs' own private decisions. *See Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020) (per curiam).

3. The Secretary's motion demonstrated (at 7-8) that *TARA* and the cases it relied on require the entry of a stay because federal courts may not micromanage voting rules on the eve of an election. In response, Plaintiffs claim it is the Governor, not the district court, that caused the confusion *Purcell* and *TARA* seek to avoid. They further claim that the Secretary's argument would lead to a "constitution-free period" in the run-up to any election. These arguments are wrong for multiple reasons.

First, the *status quo ante* is the Texas Election Code. The Code controls except to the extent the Governor has suspended it, and federal courts cannot order the Governor to suspend the Election Code more broadly than he has. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949); *Ex parte Young*, 209 U.S. 123, 148 (1908). The Governor has suspended section 86.006(a-1) only insofar as Counties comply with the number-of-locations requirement. If a federal court prohibits compliance with the number-of-locations requirement, then the conditions of the suspension are not met—and the Election Code governs.

Second, Plaintiffs' hypothetical "constitution-free period" does not exist. The proclamations at issue arise in the context of a public-health emergency, and thus are

governed by *In re Abbott* and the cases it relied on. As set out above, *In re Abbott* contemplates that courts may enjoin the enforcement of emergency public-health measures that are "arbitrary or oppressive," even in the days leading up to an election. *In re Abbott*, 954 F.3d at 784-85 (citing *Jacobson*, 197 U.S. at 38). As the Sixth Circuit recently recognized, "limitation on drop boxes" is *not* an extreme case because it "poses at most an inconvenience to a subset of voters." *Larose*, 2020 WL 6013117, at *2; *see also Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring) ("[A] State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (cleaned up)).

II. The Remaining Stay Factors Favor the Secretary.

It is black-letter law that the public interest favors a stay precisely "[b]ecause the State is the appealing party." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). Plaintiffs assert that a different rule should apply because this case involves the constitutional right to vote. Straty Resp. 13; LULAC Resp. 20. But that is true of all election cases, and this Court has routinely entered the type of stay the Secretary now seeks. *E.g.*, *TARA*, 2020 WL 5816887, at *2-3.

Equally off-base is LULAC's argument (at 4-5) that because the Secretary does not enforce the Proclamation, she is not harmed. That overlooks settled law that the injunction below "is effectively against the state itself," *In re Abbott*, 956 F.3d at 708-

09, and it inflicts a distinct "institutional injury" that is by definition "irreparable." *Texas v. EPA*, 434 (5th Cir. 2016).

Conclusion

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

Respectfully submitted.

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Certificate of Service

On October 12, 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/ Kyle D. Hawkins
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,587 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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