No. 20-20574

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STEVEN F. HOTZE, M.D.; WENDELL CHAMPION; HONORABLE STEVE TOTH; and SHARON HEMPHILL,

Plaintiffs-Appellants,

v.

CHRIS HOLLINS, in his official capacity as Harris County Clerk,

Defendant-Appellee,

ANDREA CHILTON GREER; YEKATERINA SNEZHKOVA; JOY DAVIS-HARASEMAY; DIANA UNTERMEYER; MICHELLE COLVARD; KAREN VIDOR; MALKIA HUTCHINSON-ARVIZU; ANTON MONTANO; HELEN SHELTON; ELIZABETH FURLER; ALAN MAUK; JENN RAINEY; BRIAN SINGH; MARY BACON; KIMBERLY PHIPPS-NICHOL; NYGUEN GRIGGS; NELSON VANEGAS; JESSICA GOODSPERO; AMY ASHMORE; RICHARD FRANKEL; ELAINE FRANKEL; RYAN FRANKEL; CELIA VESELKA; SERGIO ALDANA; RUSSELL "RUSTY" HARDIN; DOUGLAS MOLL; CAREY JORDAN; CHRISTINA MASSARA; JERELYN M. GOODEN; STANLEY G. SCHNEIDER; MARY CURRIE; CARLTON CURRIE, JR.; JEKAYA SIMMONS; DANIEL COLEMAN; DAVID HOBBS; BETTYE HOBBS,

Intervenor Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas
Houston Division – No. 4:20-cv-03709

BRIEF OF INTERVENOR DEFENDANTS-APPELLEES JOY DAVIS-HARASEMAY, DIANA UNTERMEYER, MICHELLE COLVARD, KAREN VIDOR, MALKIA HUTCHINSON-ARVIZU, ANTON MONTANO, HELEN ANICE SHELTON, ELIZABETH FURLER, ANDREA CHILTON GREER, and YEKATERINA SNEZHKOVA

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CERTIFICATE OF INTERESTED PERSONS

1. No. 20-20574;

2. The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges may evaluate possible disqualification or recusal.

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March 12, 2021

Respectfully submitted,
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STATEMENT OF ORAL ARGUMENT

Because this appeal involves the straightforward application of longstanding principles, it is Intervenor Defendants-Appellees position that oral argument would not significantly aid the Court in resolving the appeal. *See* Fed. R. App. P. 34(a)(2). If, however, this Court determines that oral argument would assist the Court in resolving the appeal, Intervenor Defendants-Appellees request leave to participate.

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COUNTER-STATEMENT OF THE ISSUES

Intervenor Defendants-Appellees' counter-statement of the issues is as follows:

1. Whether the district court properly dismissed the complaint for lack of jurisdiction?

2. Assuming jurisdiction, whether the district court's dismissal of the complaint was proper because Plaintiffs failed to state a claim?

3. Whether Intervenor Defendants-Appellees were required to cross-appeal the district court's advisory statements regarding how it would rule on the merits if reversed on jurisdiction?

JURISDICTIONAL STATEMENT

The Jurisdictional Statement in the brief Plaintiffs-Appellants submitted is incomplete and inaccurate. Specifically, Intervenor Defendants-Appellees dispute that the district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs have not asserted injuries sufficient to invoke the jurisdiction of a federal court or pled viable federal claims. Since the lower federal court lacked jurisdiction, this Court has jurisdiction on appeal, "not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (cleaned up).

STATEMENT OF THE CASE

I. DRIVE-THRU VOTING IN HARRIS COUNTY

In June 2020, the Harris County Clerk[1] first announced the possibility of drive-thru voting for the November 2020 General Election, as he launched his plan for a secure, accessible, fair, and efficient election ("S.A.F.E. Plan") in response to the COVID-19 pandemic. ROA.907, 724–25. In July, the Texas Secretary of State approved the program, ROA.691, 727, and Harris County piloted the program for the primary run-off elections, ROA.907, 731. This implementation of drive-thru voting sites was never challenged. Subsequently, the Harris County Commissioners Court allocated funding for the program, ROA.734–35, and approved a list of ten early voting locations that would offer drive-thru voting, ROA.908, 727–28.

[1] Chris Hollins, who was the Harris County Clerk when this case was filed, is no longer in that position. *See* Gina Gaston, *Former Harris County Clerk Chris Hollins Reveals His Next Move,* ABC 13 (Nov. 25, 2020), https://abc13.com/chris-collins-harris-county-clerk-hollins-houston-texas-instagram-who-is/8264468/. A new County Clerk has now taken office. *See* Press Release, Teneshia Hudspeth Cnty. Clerk, Teneshia Hudspeth Sworn in as Harris Cnty. Clerk (Nov. 17, 2020), https://www.cclerk.hctx.net/PressReleases/Teneshia%20Hudspeth%20Sworn%20in%20as%20Harris%20County%20Clerk.pdf. In addition, the Harris County Commissioners Court has named an Elections Administrator, creating a new office to take over the responsibility previously held by the Clerk. *See* Shelby Stewart, *This Houstonian Is Making Voting Better in Harris County,* Hous. Chron. (last updated Dec. 29, 2020), https://www.chron.com/news/houston-texas/article/harris-county-elections-isabel-longoria-15776502.php.

The early voting period for the General Election, including drive-thru voting, ran from October 13 to October 30, 2020. ROA.908. Each drive-thru polling place was located under tents or in parking structures abutting a brick-and-mortar polling site, and allowed space for election clerks to work and poll watchers to watch. *See, e.g.*, ROA.44–45; ROA.729. To access these polling locations, voters lined up in their cars. ROA.41. When voters entered the line, an election clerk instructed them to turn off their cell phones, checked their identification, asked them customary questions about their current address, and made sure they were on the voter roll. ROA.43. If the voter's eligibility was confirmed, the clerk handed the voter a voting machine and the voter cast a ballot as if they were voting at a walk-in polling place. ROA.44, 728–29. Nearly 127,000 voters cast their ballots this way during the early voting period. ROA.908.

II. PROCEDURAL HISTORY

On October 15, 2020, after the early voting period began, two of the plaintiffs in this case (Stephen Hotze and Sharon Hemphill) filed a petition for a writ of mandamus and motion for stay in the Texas Supreme Court seeking to compel Defendant Hollins to end drive-thru voting. ROA.837–88. The court denied that petition. *In re Hotze*, No. 20-0819 (Oct. 22, 2020); ROA.636–37. The four plaintiffs in this case then filed a second petition seeking to block Harris County from operating the drive-thru voting program. ROA.362–401. The Texas

Supreme Court denied the emergency petition for a writ of mandamus. *In re Hotze*, No. 20-0863, Order Denying Pet. (Nov. 1, 2020).

Denied relief twice in state court, Plaintiffs filed this suit on October 28, 2020, four months after Harris County announced the S.A.F.E. Plan, three months after the County piloted drive-thru voting during the primary run-off election, two weeks into the early voting period for the general election, and three weeks after the Texas Supreme Court rejected a petition for a writ of mandamus. Plaintiffs Steven Hotze, Sharon Hemphill, and Wendell Champion are registered voters in Harris County (the "Voter-Plaintiffs"). ROA.19–20; Br. 12. Plaintiffs Hemphill and Champion were also candidates on the November 3, 2020 general election ballot in Harris County (the "Candidate-Plaintiffs"). ROA.19–20. Plaintiff Steve Toth is a member of the Texas House of Representatives, representing District 15, which is not in Harris County.[2] ROA.20. Plaintiffs' complaint alleges that Harris County's implementation of drive-thru voting is inconsistent with the Texas Election Code and as a result violates Article 1, section IV, clause 1 of the U.S.

[2] Rep. Toth's district, District 15, is solely within Montgomery County. *See* Texas Legislative Council, *State House Districts, 87th Legislature 2021-2022,* Texas Redistricting, https://redistricting.capitol.texas.gov/docs/87th_House_Tabloid_2021_01_12.pdf (last visited Mar. 11, 2020); *see also Texas House Member: Rep. Toth, Steve*, Texas House of Representatives, https://house.texas.gov/members/member-page/?district=15 (last visited Mar. 11, 2020). The Court may take judicial notice of this fact. *See, e.g.*, *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (taking notice of a fact published on a government agency website).

Constitution (the "Elections Clause"). ROA.18. The complaint also alleges that Harris County violates the Equal Protection Clause of the U.S. Constitution by being the only county in Texas to implement drive-thru voting. ROA.28–29.

Plaintiffs sought a permanent injunction blocking drive-thru voting sites unless "such scheme is specifically adopted by the Texas Legislature" and ordering the Harris County Clerk to "comply with his ministerial duties under the Texas Election Code." ROA.34. Plaintiffs also requested that the district court "reject any votes" the court found were cast in violation of state law. *Id.* In addition, Plaintiffs moved for a preliminary injunction barring the continued use of drive thru voting and requiring the Harris County Clerk's Office to "secure[] and not enter[] or download[]" the memory cards recording votes cast with drive-thru voting while the case proceeded. ROA.33.

Between October 30, 2020, and November 2, 2020, several individual voters who had already voted using drive-thru voting in Harris County moved to intervene, including Intervenor Defendants-Appellees Joy Davis-Harasemay, Diana Untermeyer, Michelle Colvard, Karen Vidor, Malkia Hutchinson-Arvizu, Anton Montano, Helen Anice Shelton, Elizabeth Furler, Andrea Chilton Greer, and Yekaterina Snezhkova. ROA.93–104, 551–65, 951–66. At least one of those voters, Diana Untermeyer, voted for Candidate-Plaintiff Sharon Hemphill using drive-thru voting. ROA.977. Several groups, including the League of Women

Voters of Texas and the Texas NAACP, moved to intervene as well. ROA.93–104, 551–65, 951–66. The district court ultimately granted intervention to the individual voters who had already voted, including the Intervenor Defendants-Appellees listed here. ROA.1448.

On November 2, 2020, the district court held a hearing on the proposed preliminary injunction. As it explained in its subsequent Order, the district court concluded that Plaintiffs lacked standing to sue to enjoin the drive-thru voting program. ROA.1428. Specifically, the court found that Plaintiffs alleged "only a 'generalized grievance about the conduct of government,'" *id.* (citation omitted); that their lack of particularized harm was "fatal" to their equal protection claim, *id.*; and that the claimed Elections Clause violation rested on an "interest in [election] . . . 'common to all members of the public,'" ROA.1429–30 (citation omitted).

Though Plaintiffs lacked standing, the district court addressed the merits. ROA.1430. The court explained that if it "had plaintiffs with standing," *id.*, it would have still declined to enjoin drive-thru voting during the early voting period but would have granted Plaintiffs' relief as to Election Day. ROA.1431–35. The court based that distinction on its reading of the Texas Election Code, which provides that early voting locations must be located in a "movable structure," *see* Tex. Elec. Code § 85.062(b)—a term that the court held could include the tents

used for drive-thru voting—while Election Day polling sites must be located in a "building," Tex. Elec. Code § 43.031(b)—a term that is undefined in the Texas Election Code, but which the court held likely does not include the drive-thru voting tents. ROA.1433–34.

As to Plaintiffs' early voting claims, the district court further held that the relevant equitable factors weighed against Plaintiffs. It found Plaintiffs' suit untimely, as they could have brought it "[a]t virtually any point" between summer and Election Day, but waited until "the last day of early voting," after approximately 120,000 votes had already been cast at drive-thru voting locations. ROA.1432. Moreover, Plaintiffs' claimed "generalized interest," the court found, did not outweigh the public interest in preventing the disenfranchisement of "over 120,000 voters who voted as instructed." ROA.1433.

Plaintiffs immediately appealed and filed an emergency motion for injunctive relief to issue a preliminary injunction banning drive-thru voting on Election Day, November 3, 2020. A panel of this Court denied the emergency motion later that night on November 2, 2020. ROA.1436.

SUMMARY OF THE ARGUMENT

Plaintiffs disagree with the way Harris County implemented the Texas Election Code. After twice failing to get relief from the Texas Supreme Court, Plaintiffs tried to frame a garden variety dispute over administration of state law as

a federal constitutional violation. The district court correctly rejected Plaintiffs' third attempt to block Harris County's use of drive thru polling locations because Plaintiffs lack standing to bring their claims. Because Plaintiffs show no legal error in the district court's ruling that they lack standing, and regardless have no well-pled federal claims, this Court should affirm for several, independent reasons.

First, Plaintiffs failed to establish an injury-in-fact. Plaintiffs allege that drive-thru voting violates the Texas Election Code and that votes cast that way (1) "hurt[] . . . the integrity and the reported outcomes of the election," and (2) "could dilute or otherwise diminish" any "legal vote," in violation of the Equal Protection Clause. ROA.21. The district court correctly ruled that those alleged harms are insufficient injury to establish standing. ROA.1428–29.

Plaintiffs' alleged injury from Harris County's claimed failure to follow Texas law "is a quintessential generalized grievance." ROA.1429. "[S]tanding to sue may not be predicated upon an interest . . . held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Lance v. Coffman*, 549 U.S. 437, 441 (2007). Even if Harris County drive-thru voting sites allowed some eligible Texas voters to cast valid ballots in a manner inconsistent with state election law, as Plaintiffs allege, that does not make the harm any more particularized. Complaints about "state actors counting ballots in violation of state election law—[are] not a concrete harm under the Equal

Protection Clause of the Fourteenth Amendment." *Bognet v. Sec'y of Pa.*, 980 F.3d 336, 354 (3d Cir. 2020).

Nor have Plaintiffs alleged a cognizable vote dilution injury. To have standing, vote dilution plaintiffs must show that their "votes [are] being weighed differently" than any other votes. *Id.* at 355. But under Plaintiffs' theory, in which "improperly" cast votes supposedly cancel out "properly" cast votes, "'no single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'" *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (quoting *Bognet*, 980 F.3d at 356). Plaintiffs allege no "facts showing disadvantage to themselves as individuals" from drive-thru voting other than the same weight diminution that would afflict every other Texas voter. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

Second, Plaintiffs have also failed to allege the *type* of injuries traceable to either of their two claims. Elections Clause injuries can accrue only to state legislatures or parties acting on their behalf under state law. *See, e.g.*, *Lance*, 549 U.S. at 442. Neither the Voter-Plaintiffs nor the Candidate-Plaintiffs can seek redress for injuries that only the Texas Legislature would be fit to litigate. Nor can Plaintiff Toth, an individual State legislator. The complaint alleges no facts or law supporting his authority to represent the Texas Legislature here. Nor does Toth

allege that he has "been singled out for specially unfavorable treatment as opposed to other Members" or "deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*." *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

As to the Equal Protection Clause, any injury must be traceable to "differential governmental treatment." *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017). Each Voter-Plaintiff here was a Harris County registered voter, admittedly afforded the same voting options as all other Harris County voters, and each Candidate-Plaintiff ran in districts entirely within Harris County, whose voters all had access to drive-thru voting.

Third, even if Plaintiffs had standing, their failure to state cognizable federal claims is enough to affirm the dismissal of this case. Before diving into whether Plaintiffs' construction of the Texas Election Code is correct, Plaintiffs have failed to meet a threshold matter: Accepting Plaintiffs' allegations as true, such "garden variety" disputes over a county elections official's implementation of the Texas Election Code do not give rise to a federal constitutional violation.

The Harris County Clerk's authority to implement drive-thru voting sites arises from his duties to recommend voting sites under the Texas Election Code and the parameters the State legislature set forth in the Code. Plaintiffs' claim that the Harris County Clerk still violated the Election Clause by carrying out his

Election Code-derived responsibilities rests on an overly formalistic view on the exclusive role of the state legislature in setting election rules. That view is squarely foreclosed by Supreme Court precedent and bedrock principles of federalism. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813–14 (2015). Plaintiffs' theory of liability would wreak havoc on election administration and federalize every election-related dispute, however trivial or baseless. State legislators are necessarily able to authorize county elections officials to set all manner of election administration rules and procedures, and those officials in turn, must act within the power and discretion that the state legislature affords them. If every decision a county clerk made in carrying out their responsibilities risked an Elections Clause violation, as Plaintiffs suggest, federal courts would be flooded by mine-run disputes that belong in state courts.

Plaintiffs also fail to state an equal protection violation because mere variations in the number and types of polling locations between counties alone do not give rise to such a claim, at least not without significant racial disparities. This is true regardless of whether Harris County's decision complied with the letter of the Texas Election Code. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970). Meritorious equal protection claims "require not violations of state law, but

discrimination in applying it." *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 378 (3d Cir. 2020).

Bush v. Gore, 531 U.S. 98 (2000), is not to the contrary. The per curiam opinion in that case recognized that "local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. The Court's concern centered on "varying standards" that would arbitrarily "value one person's vote over that of another." *Id.* at 104–05. Plaintiffs do not allege that Harris County applied arbitrarily differential treatment to the counting of any ballots. The County's choice to provide multiple options, including drive-thru voting, to registered voters does not implicate *Bush*'s core holding that a state may not take the votes of two voters, similarly situated in all respects, and arbitrarily count one but not the other.

Finally, even if the Court reversed the district court's determination on standing and declined to affirm on other grounds, it must remand to decide other questions in the first instance. For this same reason, Intervenor Defendants-Appellees were not required to file a cross appeal. "When the lower federal court lacks jurisdiction, [appellate courts] have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co.*, 523 U.S. at 95 (cleaned up).

The Court should affirm.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews "a district court's decision to dismiss for lack of subject-matter jurisdiction de novo." *Ordonez Orosco v. Napolitano*, 598 F.3d 222, 225 (5th Cir. 2010); *see also Hotze v. Burwell*, 784 F.3d 984, 990 (5th Cir. 2015).

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS LACK STANDING UNDER EITHER OF THEIR LEGAL THEORIES.

A. Plaintiffs Have Not Pled Any Concrete and Particularized Injuries.

Plaintiffs have not and cannot meet the pleading requirements for an injury-in-fact sufficient to establish standing. A plaintiff pleading injury-in-fact must allege an invasion on a legally protected interest that is both "concrete and particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). To establish a sufficiently "particularized" injury, the facts pled must show that the injury "affect[s] the plaintiff in a personal and individual way." *Id.* Even that may not suffice, because "an injury in fact must also be 'concrete,'" that is, the injury must be 'real,' and not 'abstract.'" *Id.* Courts have "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws" fails to plead an injury that is sufficiently particularized or concrete to confer Article III standing. *Lance*, 549 U.S. at 439; *see Bognet*, 980 F.3d at 349

("When the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as 'generalized grievances' that cannot support standing.") (quoting *United States v. Richardson*, 418 U.S. 166, 173–75 (1974)).

Plaintiffs frame their purported injury in two ways. First, they claim that drive-thru voting violates the Texas Election Code and that votes cast that way "hurt[] . . . the integrity and the reported outcomes of the election for all of the candidates and all of the voters who voted." ROA.21. They argue that gives rise to a claim under the Elections Clause. Second, Plaintiffs allege a violation of the Equal Protection Clause in terms of vote dilution, asserting that ballots cast in violation of the Texas Election Code "could dilute or otherwise diminish and cancel" any "legal vote." *Id*.

The district court correctly ruled Plaintiffs did not allege a sufficient injury to establish standing on either claim. ROA.1428–29.

1. Plaintiffs' Generalized Grievance About Harris County's Purported Failure to Follow Texas Election Law Is Not a Concrete or Particularized Injury.

Plaintiffs' alleged injury stemming from Harris County's purported failure to follow Texas law "is a quintessential generalized grievance." ROA.1429. The alleged harm affects "every citizen's interest in the proper application of the law." As the district court explained, the U.S. Supreme Court's decision in *Lance v.*

Coffman is illustrative. *Id.* In *Lance*, four Colorado voters challenged a congressional redistricting plan imposed by the state's Supreme Court, alleging that the court-imposed plan deprived the state legislature of its authority, under the Elections Clause, to draw congressional districts. 549 U.S. at 441. The Court held that the voters lacked standing because "[t]he only injury allege[d] [was] that the law—specifically the Elections Clause—has not been followed." *Id.* at 442. The Court explained that the voters' alleged injury was an "undifferentiated, generalized grievance about the conduct of government," "quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Id.*

As in *Lance*, so here. Plaintiffs' grievance about Harris County's alleged failure to follow the Texas Election Code is neither concrete nor particularized. "[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Id.* at 441 (citation omitted); *see Bognet*, 980 F.3d at 353 (holding no concrete injury where alleged election illegality "is necessarily a matter of state law, which makes any alleged harm abstract for purposes of the Equal Protection Clause."). Plaintiffs have not alleged that they were denied an opportunity to vote, or that their votes were not counted because of Harris County's actions. Plaintiffs did not allege—and do not claim

now—that any *ineligible* voters cast ballots at drive-thru polling locations, or that any fraudulent or coerced ballots were voted at those locations. The complaint did not allege that the availability of drive-thru voting would or could affect the actual outcome of any election in which the Candidate-Plaintiffs ran. ROA.20–21. Nor do Plaintiffs now claim that ballots cast at drive-thru polling locations actually or even likely affected the outcome of any relevant election. Plaintiffs alleged and reaffirm on appeal that drive-thru voting was available to "any and all Harris County registered voters." ROA.18, 23–24; Br. 24. And although they allege that drive-thru voting locations were "placed in areas that vote heavily Democratic," ROA.33, they do not contend that the drive-thru voting locations were inconvenient or otherwise inaccessible for themselves or any other voters.

The district court correctly summed up Plaintiffs' theory of injury to claim "that the Texas Election Code has been violated and that violation compromises the integrity of the voting process." ROA.1429; *accord* ROA.20–21. Plaintiffs' only grievance is that drive-thru voting's availability in Harris County may have allowed some eligible Texas voters to cast valid ballots in a manner inconsistent with state election law. But that is insufficient. These allegations do not confer standing because the mere existence of drive-thru voting in Harris County does not harm Plaintiffs "in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 n.1 (1992). Plaintiffs' claim that "the law . . . has not been

followed . . . is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332–33 (11th Cir. 2007) (citing *Baker v. Carr*, 369 U.S. 186, 207–08 (1962)); *see also Lance*, 549 U.S. at 440–41 ("a 'generalized grievance' that is 'plainly undifferentiated and common to all members of the public'" is not sufficient to confer standing).

Indeed, courts have consistently held that complaints about "state actors counting ballots in violation of state election law—[are] not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Bognet*, 980 F.3d at 354; *see also Shipley*, 947 F.3d at 1062 ("A deliberate violation of state election laws by state election officials does not transgress against the Constitution.") (quoting *Kasper v. Bd. of Election Comm'rs of the City of Chicago*, 814 F.2d 332, 342 (7th Cir. 1987)); *Powell*, 436 F.2d at 88 (rejecting Equal Protection claim based on allegations of state's erroneous counting of votes cast by voters unqualified to participate).

2. Plaintiffs' Allegations That "Legal Votes" Were Diluted by "Illegal Votes" Do Not State a Particularized Injury.

Plaintiffs' attempt to cloak their generalized grievance in the language of vote dilution fares no better. *See* Br. 13–14, 18–19 (injury is "having one's lawful

vote canceled by an unlawful one"). In the runup to and after the 2020 election, federal courts repeatedly rejected similar efforts to disguise generalized grievances as vote dilution claims. *See Bognet*, 980 F.3d at 356–567; *see also Wood*, 981 F.3d at 1314–15, *cert. denied*, No. 20-799, 2021 WL 666431 (U.S. Feb. 22, 2021); *King v. Whitmer*, No. 20-cv3134, --- F.Supp.3d ----, 2020 WL 7134198, at *13 & n.11 (E.D. Mich. Dec. 7, 2020), *appeal dismissed*, No. 20-2205, 2021 WL 688804 (6th Cir. Jan. 26, 2021); *Bowyer v. Ducey,* No. CV-20-02321-PHX-DJH, --- F.Supp.3d ----, 2020 WL 7238261, at *5 (D. Ariz. Dec. 9, 2020). They did so with good reason: "[I]f dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim . . . .'" *Bognet*, 980 F.3d at 355 (citation omitted).[3] That is "not how the Equal Protection Clause works." *Id.*

[3] *But see Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). The Third Circuit sharply criticized *Carson* on this point, illustrating the decision's unsupported break from precedent. *See Bognet,* 980 F.3d at 351 n.6 ("The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the Carson court cited none."). *Bognet* is consistent with the approach of other courts to have considered this question, *id.* at 356–57 (collecting cases), and, as noted above, courts in other circuits since the *Bognet* decision have followed the Third Circuit, and not *Carson*. *See, e.g.*, *Wood*, 981

Plaintiffs suggest that their injuries are akin to vote "dilut[ion] by ballot-box stuffing." Br. 13. But their claims bear no resemblance to such claims. As noted, Plaintiffs nowhere claim that ineligible voters actually cast ballots at drive-thru polling locations, or that the mere availability of drive-thru voting affected an election's outcome. Instead, Plaintiffs contend only that election officials erred by allowing otherwise eligible voters to cast "improper ballots" and counting those ballots. Br. 11.

Nor can Plaintiffs reasonably compare their alleged injury due to the counting of ballots cast at drive-thru sites to the harm that voters living in invidiously gerrymandered districts suffer. Br. 13–14. Plaintiffs simply cannot (and do not) plead that the counting of ballots voted at drive-thru voting sites amounts to the injury needed to have standing to bring a vote dilution claim, *i.e.*, that their "votes [are] being weighed differently" than any other votes. *See Bognet*, 980 F.3d at 355; *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) ("'[V]ote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry equal weight."). Voters challenging invidious gerrymanders who live in "packed" or "cracked" districts are injured because their membership in a disfavored group causes their votes to receive less weight compared to the weight

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F.3d at 1314–15; *King*, 2020 WL 7134198, at *13 & n.11; *Bowyer*, 2020 WL 7238261, at *5.

of ballots cast by voters belonging to favored groups. *See Bognet*, 980 F.3d at 357 ("[T]he Equal Protection Clause prohibits a state from 'diluti[ng] . . . the *weight* of the votes of certain . . . voters merely because of where they reside[],' just as it prevents a state from discriminating on the basis of the voter's race or sex.") (quoting *Reynolds v. Sims*, 377 U.S. 533, 557 (1964)). Plaintiffs correctly note that "the right to vote is personal in nature." Br. 13 (quoting *Gill*, 138 S. Ct. at 1920). But that does not relieve them from having to plead "facts showing disadvantage to themselves as individuals," instead of the same alleged reduction in weight that would afflict every other Texas voter.

Under Plaintiffs' theory, in which "improper" votes allegedly cancel "proper" votes, "'no single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'" *Wood*, 981 F.3d at 1314 (quoting *Bognet*, 980 F.3d at 356). Plaintiffs allege no facts showing that the weight of their votes was diminished compared to any other class of voters, let alone on the basis of a disfavored personal characteristic.

The relief Plaintiffs seek on appeal further confirms that they have in no way been particularly disadvantaged. Plaintiffs ask the federal courts to ban drive-thru voting for future elections. Br. 34. That would "no more directly and tangibly benefit[] [Plaintiffs] than it does the public at large . . . ." *Lance*, 549 U.S. at 439.

At most, Plaintiffs' disagreement with Harris County's administration of elections makes them equal to voters "who complain[] of gerrymandering, but [do] not live in a gerrymandered district." *Gill*, 138 S. Ct. at 1930. They both "'assert[] only a generalized grievance against governmental conduct of which [they] do not approve," which cannot establish standing. *Id.* (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995) (alteration in original)).

Ultimately, Plaintiffs fail to establish how Harris County's expansion of opportunities for all eligible voters to cast ballots harms them—or anyone at all. They also fail to engage with this Court's recent statements: to "abridg[e]" the right to vote means "creat[ing] a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the *status quo*, or unless the *status quo* itself is unconstitutional." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 192 (5th Cir. 2020). "[A] law that makes it *easier* for others to vote does not abridge any person's right to vote . . . ." *Id.* at 191; *see id*. at 190–91 (in context of Twenty-Sixth Amendment, an election law "abridges a person's right to vote . . . only if it makes voting *more difficult* for that person . . . .") (emphasis added). Plaintiffs may say that the mere availability of drive-thru polling sites somehow places "a burden on their individual votes," Br. 17 (citation omitted), but "[h]ow this expansion of voting opportunities burdens anyone's right to vote is a

mystery." *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 145 (5th Cir. 2020).

B. Plaintiffs Are Not the Right Parties to Raise Elections Clause or Equal Protection Violations.

Standing also "turns on the nature and source of the claim asserted," *Warth v. Seldin*, 422 U.S. 490, 500 (1975), meaning the harm alleged must match the type of injury produced by the legal right violated. Thus, Plaintiffs must provide facts showing that they are "proper part[ies] to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Id.* at 518; *see also Raines*, 521 U.S at 818 ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit . . . .").

Even if their alleged injuries were not generalized and speculative, Plaintiffs have failed to allege the type of injuries cognizable under either the Elections or Equal Protection Clause. Under the Elections Clause, injuries only accrue to state legislatures themselves or parties acting on their behalf under state law. As individual voters, candidates, and a single state legislator, Plaintiffs cannot assert injuries sustained only by the Texas Legislature. As to the Equal Protection Clause, any injury must be traceable to differential treatment. But each Voter-Plaintiff here was a Harris County registered voter, admittedly afforded the same voting options as all other Harris County voters. Therefore, even if Plaintiffs could

establish a concrete and particularized injury, they could not vindicate those injuries using either the Elections or Equal Protection Clauses.

1. The Elections Clause Does Not Vindicate Private Rights, Only Legislative Rights, Which Plaintiffs Cannot Assert.

The Elections Clause provides in relevant part that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." U.S. Const. art. I, § 4, cl. 1. Subject to other constitutional limitations and to Congress's legislative power, the Elections Clause "grants to the States a broad power" in enacting electoral time, place, and manner provisions. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

But it is not private Plaintiffs' prerogative to apply or decide when government officials have encroached into the State's broad power. Here, *Lance* is again instructive. In *Lance*, the Supreme Court held that four individual voters lacked standing to challenge a provision of the Colorado Constitution under the Elections Clause. 549 U.S. at 441–42. Doing so, the Court contrasted that case to two previous Elections Clause cases where the parties suing to vindicate it were "relator[s] on behalf of the State," not, as here, "private citizens acting on their own behalf . . . ." *Id.* at 442 (citing *Smiley v. Holm*, 285 U.S. 355 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916)). Moreover, the Court had never held that a "private citizen had alleged a 'concrete and particularized' injury

sufficient to satisfy the requirements of Article III." *Id.* Nor has it since. Citizens acting in their individual capacities rather than as authorized representatives of a state legislature cannot vindicate Elections Clause injuries, because such harms inure only to the state legislature and its authorized representatives. *See id.*; *see also Tex. Voters All. v. Dallas Cnty.*, No. 4:20-CV-00775, --- F. Supp. 3d ----, 2020 WL 6146248, at *12 (E.D. Tex. Oct. 20, 2020) ("[P]rivate litigants cannot derive a cause of action directly from the constitutional text of the Elections Clause.").

A spate of recent decisions—including some by courts in this Circuit—confirm that parties who do not represent state legislatures cannot bring Elections Clause claims. *See Bognet*, 980 F.3d at 349 ("[P]rivate plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause."); *Wise v. Circosta*, 978 F.3d 93, 101 (4th Cir. 2020) (en banc) (North Carolina statute granting legislative leaders authority to participate in cases challenging "validity or constitutionality of an act of the General Assembly" did not confer them standing to challenge interpretation of the State's Elections Board); *Trump v. Kemp*, No. 1:20-CV-5310-MHC, --- F. Supp. 3d ----, 2021 WL 49935, at *3 (N.D. Ga. Jan. 5, 2021) ("Plaintiff's . . . claim belongs . . . only to the Georgia General Assembly."); *Bowyer*, 2020 WL 7238261, at *4–5 (candidate plaintiffs could not establish standing to bring suit); *King v. Whitmer*,

No. 20-13134, --- F. Supp. 3d ----, 2020 WL 7134198, at *10 (E.D. Mich. Dec. 7, 2020) ("Plaintiffs' Elections Clause claims thus belong, if to anyone, Michigan's state legislature."); *Wood v. Raffensperger*, No. 1:20-CV-04651-SDG, --- F. Supp. 3d ----, 2020 WL 6817513, at *5 (N.D. Ga. Nov. 20, 2020), *aff'd,* 981 F.3d 1307 (11th Cir. 2020) (same); *see also Tex. Voters All.*, 2020 WL 6146248, at *12.

In *Bognet*, for example, the Third Circuit held that a group of voters and a candidate for office lacked standing to challenge the Pennsylvania Supreme Court's extension of a ballot-receipt deadline under the Elections Clause because the Clause "grants th[e] right [to enact time, place, and manner voting policies] to 'the Legislature' of 'each State,'" and any "Elections Clause claims thus 'belong, if they belong to anyone, only to the Pennsylvania General Assembly.'" 980 F.3d at 349–50 (quoting *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (three-judge panel) (per curiam)); *see also Wood*, 2020 WL 6817513, at *5 (holding that an individual voter could not pursue an Elections Clause claim against the Georgia Secretary of State because a claim "regarding a state government's failure to properly follow the Elections Clause of the Constitution does not confer standing on a private citizen"); *King*, 2020 WL 7134198, at *10 (rejecting standing of individuals bringing Elections Clause claims because the

Elections Clause only "grants rights to state legislatures and to other entities to which a State may delegate lawmaking authority").

Plaintiffs also wrongly suggest that Representative Toth separately has standing because "his authority was usurped as a lawmaker by Hollins' adopting and implementing a voting scheme that was not adopted by the Texas legislature." Br. 13. Rather, the Supreme Court recently held that not just "individual members" but even an entire "single House of a bicameral legislature" "lack standing to assert the institutional interests of a legislature," absent statutory authorization making them a representative of the legislature's interests in litigation. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953, 1954 (2019). And under Texas law, "[i]n general, individual legislators lack standing to sue to vindicate the Legislature's institutional prerogatives against executive-branch encroachment." *In re Hotze*, No. 20-0739, --- S.W.3d ----, 2020 WL 5919726, at *5 (Tex. Oct. 7, 2020) (Blacklock, J., concurring). Toth has not alleged any facts or cited any law supporting his authority to represent the Texas Legislature in this litigation.

To have standing as a legislator, Toth must show either that he has "been singled out for specially unfavorable treatment as opposed to other Members" or that he has "been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected

them." *Raines*, 521 U.S. at 821; *see also Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 566 (5th Cir. 2008) ("[S]tate officials lack standing to challenge the constitutional validity of a state statute when they are not adversely affected by the statute, and their interest in the litigation is official, rather than personal."). He has not done so here, and nothing in the record suggests that Harris County's drive-thru voting sites imposed any special injury that denied him a seat or targeted him. Indeed, Toth represents parts of Montgomery County and none of Harris County, so drive-thru voting sites could not affect him personally.

Plaintiffs lack standing as individuals and as an individual state legislator to assert Elections Clause claims, as those claims are reserved—if to anyone—to the Legislature or its statutorily authorized agents alone.

2. Plaintiffs Have Not Alleged Equal Protection Injuries Because They Have Not Pled Differential Treatment.

The "gravamen of an equal protection claim is differential governmental treatment . . . ." *Moore*, 853 F.3d at 250. Thus, an injury arising from denial of equal protection rests on "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

In *Moore*, for example, this Court affirmed the dismissal for lack of standing of a lawsuit brought by an African-American Mississippian alleging a denial of

equal protection based on the Mississippi state flag's inclusion of the confederate battle flag. 853 F.3d at 248. Even though the plaintiff alleged "that he personally and deeply feels the impact of Mississippi's state flag," this Court held those allegations were irrelevant for standing purposes on an equal protection claim "unless Plaintiff alleges discriminatory treatment." *Id.* at 251.

Plaintiffs ground their equal protection claim on the fact that Harris County implemented drive-thru voting sites where their voters could vote while other Texas counties apparently did not. ROA.28–29; Br. 32. But all of the Voter-Plaintiffs and Candidate-Plaintiffs voted and ran in districts entirely in Harris County.[4] ROA.19–20. Therefore, they were not subjected to disparate treatment as required for an equal protection claim. Each had the opportunity to vote using drive-thru voting and as did anyone voting in their races.

On appeal, Plaintiffs appear to abandon their equal-protection theory, and contend that their injuries as voters stem from dilution of their votes through the inclusion of "illegal votes," and as candidates because some of these "illegal votes"

[4] While Representative Toth represents District 15, which is based in Montgomery County and does not include Harris County, as alleged in the complaint, his claims appear to stem completely from his role as a state representative and not as a Texas voter in a different county. ROA.20; Br. 13 ("Representative Steve Toth is a member of the Texas legislature and was also on the November 3, 2020 general election ballot, and his authority was usurped as a lawmaker by Hollins' adopting and implementing a voting scheme that was not adopted by the Texas legislature.").

were cast against them. Br. 12–13. But as the Eleventh Circuit recently held in a similar context, while "vote dilution can be a basis for standing . . . . it requires a point of comparison." *Wood*, 981 F.3d at 1314. In the contexts in which vote-dilution claims are typically raised, such as "in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to 'irrationally favored' voters from other districts." *Id.* Plaintiffs here were not harmed compared to voters from other districts. They, like every other Harris County voter, had the opportunity to use drive-thru voting—and will continue to have that same opportunity in the future if Harris County continues to offer drive thru voting sites. A "plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Plaintiffs here have no basis to allege differential, unfavorable treatment. They lack standing to bring an equal protection claim.

C. That Plaintiffs Lack Standing to Bring the Claims Alleged in this Case Does Not Prevent Judicial Review of the Issues Raised in this Case.

There is also nothing to Plaintiffs' argument that the district court's ruling "denied judicial review." Br. 19. The Texas courts are open to Plaintiffs, and not just empowered, but best-placed to consider what is at core a garden variety disagreement with Harris County's determination that drive-thru voting sites comply with the Texas Election Code.

With recourse possible in the Texas courts—just as it was last fall—Plaintiffs are wrong that the ruling below "grant[s] . . . carte blanche" to "illegal voting." Br. 19. Plaintiffs overlook that the Texas Supreme Court *twice* rejected challenges to the drive-thru program in the runup to the November 2020 election. *See In re Hotze*, No. 20-0863; *see also In re Hotze*, 610 S.W.3d 909 (Tex. 2020). They nowhere mention that those cases called upon the Texas courts to consider the same arguments they continue to press here. Whether the Texas Election Code accommodates the drive-thru voting mechanism is a pure issue of state law. And "[a]side from the state courts' superior familiarity with [Texas] law, the federal courts' construction of state law can be 'uncertain and ephemeral.'" *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 588–89 (5th Cir. 1992) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 n.32 (1984)). Plaintiffs' claims are meritless. But if they are to be litigated yet again, comity counsels that Plaintiffs be made to ask the state courts for their next bite at the apple. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Needless [federal] decisions of state law should be avoided both as a matter of comity and to promote justice . . . by procuring for the[] [parties] a surer-footed reading of applicable law.").

III. EVEN IF PLAINTIFFS HAD STANDING, DISMISSAL WAS STILL REQUIRED BECAUSE PLAINTIFFS FAILED TO STATE A CLAIM.

Even if Plaintiffs had standing, the Court should affirm the district court's dismissal of this complaint because Plaintiffs failed to state cognizable claims. A party may argue affirmance—in this case affirmance of the lower court's dismissal—upon any grounds supported by the record, even if not that relied upon by the lower court. *See Jennings v. Stephens*, 574 U.S. 271, 276 (2015); *see also id*. at 277. This Court may affirm the dismissal on other grounds apparent in the record. *See Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992).

Here, the record makes clear that the dismissal of this case was proper because "accepting all well-pleaded facts as true and drawing all reasonable inferences in the [Plaintiffs'] favor," Plaintiffs failed to state a claim. *Franklin v. Regions Bank*, 976 F.3d 443, 447 (5th Cir. 2020). Plaintiffs suggest that if this Court were to find that the district court had jurisdiction, then it should wade directly into whether their construction of the Texas Election Code is correct. But this argument elides a necessary threshold matter that Plaintiffs' claim fails to meet: Even accepting Plaintiffs' allegations as true, such "garden variety" disputes over the interpretation and implementation of the Texas Election Code do not rise to the level of a federal constitutional violation. Dismissal of these claims is appropriate.

A. Plaintiffs Fail to State an Elections Clause Violation.

Plaintiffs allege that Harris County's choice to offer drive-thru voting violates the Elections Clause because, in their view, no entity or official other than the state legislature may take any action that is not expressly spelled out by state statutes governing a federal election, and, they argue, drive-thru voting violates the Texas Election Code. ROA.24–25; Br. 25–26. But Plaintiffs cannot manufacture federal constitutional violations out of a mere disagreement over the manner in which a county elections official has implemented the Texas Election Code.

To start, the issue in this case is not an election official's attempt to disregard the legislative scheme for federal elections. *See, e.g.*, *Democratic Nat'l Comm. v. Wisc. State Leg.*, 141 S. Ct. 28, 34 n.1 (2020) (mem.) (Kavanaugh, J., concurring) ("In a Presidential election . . . a state court's 'significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.'" (quoting *Bush*, 531 U.S. at 113 (Rehnquist, C. J., concurring))). Rather, Defendant's authority to implement drive-thru voting arises from his duties under the Texas Election Code, as set by the Legislature. Here, pursuant to his duties as early voting clerk and County clerk, Defendant, in consultation with the Texas Secretary of State, recommended voting locations—including drive thru voting sites—to the Commissioners Court, which approved those locations under its authority set by the Legislature under the Texas Election

Code, *see* Tex. Elec. Code §§ 43.002 (election day for general election); 85.062(a)(1) (early voting). ROA.739–820. That order was never appealed, and the Texas Supreme Court has twice declined to block drive-thru voting and endorse the interpretation of Texas state law that Plaintiffs advance in this case.

Plaintiffs nevertheless suggest that Harris County's implementation of drive-thru voting unconstitutionally usurps legislative authority because the Texas Election Code does not specifically authorize voting at those sites. But Supreme Court precedent and federalism principles foreclose Plaintiffs' formalistic view that the state legislature must exclusively set all or nearly all election rules.[5] Here, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), points the way. In *Arizona State Legislature*, the Supreme Court held that the Elections Clause allows a redistricting commission, rather than only the state legislature, to draw congressional districts. *Id.* at 801–09. There, the Court explained that the term "legislature" as used in the Elections Clause means

[5] Plaintiffs' theory in this case goes well beyond even the minority view that the Elections Clause is "violated when a state court holds that a state constitutional provision overrides a state statute governing the manner in which a federal election is to be conducted." *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 738 (2021) (mem.) (Alito, J., dissenting). This is not a case where the federal courts must block the "overriding [of] 'the clearly expressed intent of the legislature.'" *Id.* at 733 (Thomas, J., dissenting). Instead, Plaintiffs argue that the mere possibility that Harris County's construction of the Texas Election Code might be wrong implicates the Elections Clause and invites the federal courts to interpret state law in the first instance—even when the Texas Supreme Court did not feel compelled to do so.

the "power that makes laws" consistent with a state's constitution. *Id.* at 813. For Arizona, the "legislature" encompassed the people of Arizona's exercise of the initiative process authorized by the Arizona Constitution and their choice through that process to have redistricting set by an independent commission "just as the representative body may choose to do." *Id.* at 814. Here, the Texas Legislature has determined that polling locations are to be set by county officials. Nothing in the Elections Clause prohibits that choice or diminishes that authority—even if the county officials erred in its exercise. *See id.* at 807 (reiterating holding in *Smiley v. Holm*, 285 U.S. at 368, that "the Elections Clause . . . respect[s] the State's choice to include the Governor in [the lawmaking] process").

Plaintiffs' efforts to shoehorn their disagreements with Defendant's actions into a federal constitutional Elections Clause claim would wreak havoc on election administration and federalize trivial and baseless election-related disputes. The state legislature cannot foresee every possible circumstance that may arise or be expected to legislate every single potential detail of an election. County elections officials like Defendant can, and as a practical matter, must act within the power and discretion afforded them under state election statutes to conduct elections. As the Supreme Court has stated, the "manner" of holding elections "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors

and canvassers, and making and publication of election returns.'" *Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (quoting *Smiley*, 285 U.S. at 366). The Texas Legislature necessarily has the authority to determine that these matters will be implemented by county and local officials, as they have done here. Were it otherwise, a host of state and local regulations and policies governing the "time, place, and manner" of federal elections would be invalidated, and state legislatures would be consumed with election administration minutiae. Moreover, if any supposed misadministration of the Texas Election Code by a county clerk did create an Elections Clause violation, as Plaintiffs' position suggests here, federal courts would become inundated with mundane and petty election-administration disputes that belong in state courts.

B. Plaintiffs Fail to State an Equal Protection Claim.

Plaintiffs' equal protection claim likewise fails to rise to the level of a constitutional violation. The crux of Plaintiffs' claim is that the use of drive-thru voting sites by Harris County but not all other counties results in unconstitutionally disparate treatment. ROA.28–29 ("Harris County is the only Texas County that has adopted drive-thru voting. By using different criteria for voting and allowing a new form of voting to occur only in Harris County, Hollins is violating the Equal Protection Clause."); Br. 32 ("Hollins has implemented a form of voting that is unique to Harris County and differs from the remaining 253 counties in the state of

Texas."). Plaintiffs' theory of liability would potentially give rise to an equal protection claim any time an election practice is not uniformly implemented by all 254 Texas counties. But without more, mere variations in the number and types of polling locations between counties alone does not give rise to an equal protection violation. Were it otherwise, "few (if any) electoral systems could survive constitutional scrutiny." *Donald J. Trump for President, Inc. v. Bullock*, Nos. CV-20-66-H-DLC; C- 20-67-H-DLC, --- F. Supp. 3d ----, 2020 WL 5810556, at *14 (D. Mont. Sept. 30, 2020). Indeed, even when boards of elections "vary . . . considerably" in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635–36 (6th Cir. 2016). This is true regardless of whether or not Harris County's decision complied with the letter of the Texas Election Code. *See Shipley*, 947 F.3d at 1062; *Powell*, 436 F.2d at 88; *see also Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) ("[T]he Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations—no matter how egregious those violations may appear within the local legal framework."). Meritorious equal protection claims "require not violations of state law, but discrimination in applying it." *Donald J. Trump for President, Inc*, 830 F. App'x at 387.

Accordingly, federal courts have routinely rejected such theories and

consistently recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state. *See, e.g.*, *Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006) ("Plaintiffs do not contend that equal protection requires a state to employ a single kind of voting system throughout the state. Indeed, local variety in voting systems can be justified by concerns about cost, the potential value of innovation, and so on.") (cleaned up); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) ("A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state."); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) ("[T]he appellants' reading of the Supreme Court's voting cases would essentially bar a state from implementing any pilot program to increase voter turnout. Under their theory, unless California foists a new system on all fifty-eight counties at once, it creates 'unconstitutional vote-dilution' in counties that do not participate in the pilot plan. Nothing in the Constitution, the Supreme Court's controlling precedent, or our case law suggests that we can micromanage a state's election process to this degree."); *Green Party of State of N.Y. v. Weiner*, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) (noting *Bush v. Gore* did not question the "use of entirely different technologies of voting in different parts of the state, even in the same election"); *Donald J. Trump for President v. Boockvar*, No. 4:20-cv-02078,

--- F. Supp. 3d ----, 2020 WL 6821992, at *14 (M.D. Pa. Nov. 21, 2020), *aff'd* 830 F. App'x 377 (3d Cir. 2020) ("Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations."); *Paher v. Cegavske*, No. 3:20-CV-00243, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) ("Clark County, which contains most of Nevada's population . . . is differently situated than other counties . . . and commonsense makes it more than rational for Clark County to provide additional accommodations to assist eligible voters.").

Plaintiffs' repeated invocation of *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), does not salvage this claim. *Bush* does not stand for the proposition that any non-uniform treatment in a voting system is a problem of federal constitutional proportions. *See Donald J. Trump for President, Inc.*, 830 F. App'x at 388 ("*Bush v. Gore* does not federalize every jot and tittle of state election law."). To the contrary, the per curiam opinion recognized that "local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Bush*, 531 U.S. at 109. The Court held instead that the Florida Supreme Court violated equal protection when it "ratified" election recount procedures that allowed different counties to use "varying standards to determine what was a legal vote." *Id.* at 107. This meant that entirely equivalent *votes* might be treated differently—

i.e., that the state was arbitrarily "valu[ing] one person's vote over that of another"—in violation of equal protection. *Id.* at 104–05. Here, Plaintiffs do not—because they cannot—allege that any voters' *votes* are or risk being treated any differently by Harris County's actions. Harris County's choice to provide multiple options, including drive-thru voting, to registered voters in Harris County does not implicate *Bush*'s core holding that a state may not take the votes of two voters, similarly situated in all respects, and arbitrarily count one but not the other.

IV. INTERVENOR DEFENDANTS-APPELLEES ARE NOT REQUIRED TO CROSS-APPEAL.

The district court's judgment "begins and ends with standing." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). The "'judicial Power' is one to render dispositive judgments," not advisory opinions. *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 219 (1995); *see also Glass v. Paxton*, 900 F.3d 233, 242 (5th Cir. 2018) ("By adjudicating claims for which the alleged harm is not certainly impending, federal courts risk disregarding their constitutional mandate to limit their jurisdiction to actual cases and controversies and thereby avoid the issuance of advisory opinions."). Here, the district court denied Plaintiffs' preliminary injunction request in its entirety and dismissed the case for lack of standing. Plaintiffs recognized the totality of their loss in their Notice of Appeal, which sought appeal of the denial of the entire preliminary injunction and the dismissal of the case. ROA.1438. Thus, the only decision of the lower court which is properly

presented for review is whether dismissal and complete denial of the preliminary injunction for lack of standing was appropriate. The district court issued no other judgment.

The district court's written decision did not alter this total denial and dismissal. The written order provided reasoning for what the determination on the preliminary injunction *would have been* if the district court had subject matter jurisdiction. *See* ROA.1430. As "[a] prevailing party seeks to enforce not a district court's reasoning, but the court's *judgment*," *Jennings*, 574 U.S. at 277, there is nothing that the Defendants-Intervenors needed to—indeed, even could—cross appeal. Rather, as Defendants-Intervenors have done here, the proper course is for them to "simply raise[] [their arguments] as alternate grounds for affirmance in its opposition brief." *Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 876 F.3d 119, 127 (5th Cir. 2017).

If the Court were to reverse the lower court's determination on standing and decline the alternative grounds for affirmance, the case must be remanded to the lower court to decide other questions in the first instance and for the litigation to proceed. "When the lower federal court lacks jurisdiction, [appellate courts] have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co.*, 523 U.S. at 95 (cleaned up).

CONCLUSION

For all of these reasons, the judgment of the district court dismissing this case should be affirmed.

March 12, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, thereby serving the foregoing upon all counsel registered with that system.

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