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

EMERGENCY MOTION FOR STAY PENDING APPEAL AND TEMPORARY ADMINISTRATIVE STAY

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Certificate of Interested Persons

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,

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,

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee, as a governmental party, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
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Introduction and Nature of Emergency

Late last night, merely four days before in-person early voting begins, the district court below enjoined the implementation and enforcement of a proclamation issued by Texas Governor Greg Abbott to broadly expand mail-in voting options prior to Election Day while maintaining safeguards to ensure electoral integrity. The proclamation is part of a series of executive orders advancing Texas's "response to a public health crisis." *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020). Among other things, these orders propound public-health measures related to the election—including expanded opportunities for eligible voters to hand-deliver their mail-in ballots. Although the Texas Election Code normally disallows mail-in ballots to be hand-delivered before Election Day, Governor Abbott has invoked his authority under the Texas Disaster Act to suspend those limitations and allow eligible voters to hand-deliver mail-in ballots to their local county's designated office at any time over several weeks leading up to Election Day, thereby providing voters with unprecedented voting options.

Yet the district court below faulted Governor Abbott for not expanding voting options *even more*. The district court instead ordered the Texas Secretary of State to allow voters to return a mail-in ballot to *any* county annex or satellite location—not just a single office, as Governor Abbott determined would be prudent policy. The district court's injunction thus "usurp[s] the power of the governing state authority," "pass[es] judgment on the wisdom and efficacy" of the Governor's public policy decisions, *id.* at 783, 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*) (granting stay pending appeal).

The district court's injunction rests on many of the same flaws that have recently led this Court to stay numerous election-related injunctions pending full review. *Id.*; *see Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020) (*TDP I*); *see also Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) (granting stay); *A. Philip Randolph Inst. of Ohio v. LaRose*, No. 20-4063, slip op. (6th Cir. Oct. 9, 2020) (Ex. K) (same). It further exceeds the district court's jurisdiction: Plaintiffs lack standing, their claims against the Secretary are barred by sovereign immunity, and the district court had a duty to abstain under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). And in any event, Plaintiffs' claims fail on the merits because the Proclamation does not *implicate*, much less burden, the right to vote. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 89 (1969).

The Secretary therefore moves for an emergency stay pending appeal. Because mail-in voting is already underway, and because at least one county has already publicly proclaimed that it will not comply with the Governor's Proclamation (*see* Ex. L), **the Secretary respectfully requests a stay pending appeal no later than 9:00 a.m. on Tuesday, October 13. In addition, the Secretary respectfully requests an immediate administrative stay while the Court considers this motion.** *E.g.*, *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2616080, at *1 (5th Cir. May 20, 2020); *In re Abbott*, 954 F.3d at 781.

STATEMENT OF FACTS

I. The COVID-19 Emergency Prompts Governor Abbott's Unprecedented Expansion of Early Voting.

The coronavirus pandemic represents a "public health crisis of unprecedented magnitude." *In re Abbott*, 954 F.3d at 787. Texas law charges the Governor with "meeting" the "dangers to the state and people presented" by such a crisis, Tex. Gov't Code § 418.011(1), and allows him to issue executive orders and proclamations with the "force and effect of law," *id.* § 418.012.

In responding to the COVID-19 disaster, the Governor has taken numerous actions to protect public health. As relevant here, on July 27, the Governor issued a proclamation extending early voting for the November general election. Ex. B. The Governor found that "in order to ensure that elections proceed efficiently and safely . . . it is necessary to increase the number of days in which polling locations will be open" so "that officials can implement appropriate social distancing and safe hygiene practices." Ex. B at 2. The July 27 Proclamation suspended section 85.001(a) of the Texas Election Code to allow "early voting by personal appearance [to] begin on Tuesday, October 13, 2020." *Id.* at 3. The Proclamation also suspended section 86.006(a-1) "to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early[-]voting clerk's office prior to and including on election day." *Id.*

Before the July 27 Proclamation, voters could cast a mail-in ballot in one of two ways: (1) mail it in; or (2) hand-deliver it "in person to the early voting clerk's office only while the polls are open on election day." Tex. Elec. Code § 86.006(1)-(2), (a-

1). Voters choosing the latter option must present a valid form of identification along with the marked ballot. *Id.* § 86.006(a-1).

The vast majority of Texas voters are not eligible to vote by mail, *see* Tex. Elec. Code §§ 82.001 *et seq.*, and the small subset who are eligible usually rely on the postal service to deliver their marked ballot. This case thus involves only a small subset of voters who are eligible to vote by mail and could rely on the postal service yet simply prefer to hand-deliver their marked ballot.

II. The Governor Clarifies His Earlier Proclamation.

While many counties have only one location at which mail-in ballots may be hand-delivered, several counties, including Harris, Travis, and Fort Bend, recently announced plans to open multiple mail-in ballot delivery locations at satellite offices or annexes. But it soon became clear that these counties would not provide adequate election security, including poll watchers, at these annexes. Ex. D ¶ 14. These inconsistencies impede the uniform conduct of the election and introduce a risk to ballot integrity, such as by increasing the possibility of ballot harvesting. *See* Tex. Elec. Code § 33.051.

To address these disparate and potentially dangerous practices, the Governor issued a proclamation on October 1, 2020, to clarify that the suspension of section 86.006(a-1) applies only if the county (1) provides a single designated delivery location, which (2) can be monitored by poll watchers. Ex. C at 4. The Governor's Proclamations add substantially more time in which eligible voters can hand-deliver mail-in ballots leading up to Election Day, and do not address or affect what the Election Code allows on Election Day itself.

III. The District Court Holds that By Modifying His Own Order Expanding Early Voting, the Governor Has Abridged the Right to Vote.

Immediately following the October 1 Proclamation, several organizational and individual plaintiffs brought two lawsuits challenging the Proclamation under a variety of state- and federal-law theories.[1] The Individual Plaintiffs are three registered voters. Ex. E ¶ 16, Ex. F ¶¶ 22-23. The Organizational Plaintiffs include non-profit organizations who describe their missions as including promoting civic engagement through the election process. Ex. E ¶¶ 17-18; Ex. F ¶ 10-21.

Plaintiffs do not claim that the Constitution requires multiple drop-off sites—or any sites. *E.g.*, Ex. G at 15 n.14. And none challenge the poll-watcher requirement. Instead, they claim that the Governor's clarification to his unprecedented expansion of voters' options to return marked ballots prior to Election Day has burdened their right to vote and violated the Equal Protection Clause of the Fourteenth Amendment. Ex. E ¶¶ 56-71. Plaintiffs sought declaratory and injunctive relief that election officials should be permitted to decide the number of locations "at their discretion." *Id.* at 19.

The district court consolidated the *LULAC* and *Straty* matters for purposes of a preliminary injunction hearing on October 8. Late last night, the district court issued a consolidated preliminary injunction in both cases. The order enjoins the Secretary "from implementing or enforcing the following paragraph on page 3 of the October 1 Order: '(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the

[1] A third lawsuit raising state-law claims is pending in state court. Ex. H.

return of marked mail ballots under Section 86.006(a-1) and this suspension.'" Ex. A at 46.

Pursuant to Rule 8, the Secretary asked the district court to stay any injunction pending appeal. *Straty* ECF No. 34 at 34; *LULAC* ECF No. 34 at 34. The district court did not act on—and thus implicitly denied—that request. Because time is of the essence, the Secretary now moves this Court for a stay pending appeal and a temporary administrative stay. *See* Fed. R. App. P. 8(a)(2).

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court granted a preliminary injunction; and under the collateral order doctrine of 28 U.S.C. § 1291 because the district court denied the Secretary's motion to dismiss on the ground of sovereign immunity.

Argument

The Secretary is entitled to a stay because (1) she is likely to succeed on the merits; (2) she will suffer irreparable harm absent a stay; (3) Plaintiffs will not be substantially harmed by a stay; and (4) the public interest favors a stay. *See Nken v. Holder*, 55 U.S. 418, 426 (2009).

I. The Secretary Is Likely to Succeed on Appeal.

The Secretary is likely to succeed on appeal for at least four reasons: (1) the district court impermissibly altered election rules on the eve of an election; (2) the district court lacked jurisdiction; (3) the district court should have abstained in light of

parallel state litigation; and (4) Plaintiffs failed to meet their burden of proof to be entitled to such extraordinary relief.

A. The district court impermissibly altered election rules on the eve of an election.

Just ten days ago, in *TARA*, this Court reaffirmed the bedrock principle that district courts may not "interfere[] with state election laws on the eve of an election," and when they do so, the Secretary has necessarily "made a strong showing that she is likely to succeed on the merits of her appeal." 2020 WL 5816887, at *2 (citing *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020), and *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). And a district court's violation of that principle makes a stay pending appeal warranted without any additional showing of error. As *TARA* explained: "[W]e need not reach [standing, sovereign immunity, and the merits] because the Secretary has made a strong showing that she is likely to succeed on the merits of her appeal on the argument that the district court improperly interfered with state election laws on the eve of an election." 2020 WL 5816887, at *2.

Indeed, *TARA* has already rejected as "deeply flawed," *id.*, the exact reasoning the district court relied on below. The district court admitted (at 33) that its "injunction to reinstate the ballot return centers does potentially cause confusion," yet believed such confusion was "outweighed by the increase in voting access." The *TARA* district court said the same thing. *See Tex. All. for Retired Americans v. Hughs*, 5:20-CV-128, 2020 WL 5747088, at *16 (S.D. Tex. Sept. 25, 2020) (finding "the fundamental political right to vote" outweighs any "confusion" created by an

injunction because the district court "must react to burdens imposed on Constitutional rights, especially during this public health crisis"). And this Court summarily rejected that reasoning for overlooking binding Supreme Court authority and downplaying the possibility of confusion. 2020 WL 5816887, at *3.

The district court's "injunction openly defies the Supreme Court's instruction, discussed above, not to interfere with state election laws on the eve of an election." *Id.* at *2. That is sufficient reason to grant a stay. *See id.*[2]

B. The district court lacked jurisdiction.

1. Plaintiffs lack standing.

The injunction is also improper because Plaintiffs have not clearly shown they have standing to sue. To invoke federal jurisdiction, a plaintiff must show (1) an actual or imminent injury in fact, that (2) is fairly traceable to the defendant's conduct, and (3) is likely to be redressed by a favorable decision. *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010). Because this is a preliminary injunction, Plaintiffs must make a "clear showing" that they have standing. *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017).

Plaintiffs' alleged injuries are neither traceable to the Secretary's conduct nor redressable by the injunction below. The Secretary does not enforce the Election

[2] It is no answer to suggest the Governor's October 1 Proclamation changed the status quo. Elected officials must have leeway in a public-health disaster to weigh competing concerns regarding costs and benefits and make policy decisions in real time. Federal courts may not override those sensitive policy choices, *In re Abbott*, 954 F.3d at 786, especially not on the eve of an election, *TARA*, 2020 WL 5816887, at *3.

Code writ large and does not enforce section 86.006(a-1) in particular. *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972). Local early-voting clerks do, Tex. Elec. Code § 83.001, and refusal to comply may be prosecuted by local prosecutors. Tex. Gov't Code §§ 418.012, 418.016. The Secretary similarly does not enforce the Governor's Proclamations. Ex. C at 3 (requiring only that Secretary "take notice" and "transmit" Proclamation to local authorities).[3].

Because the district court's injunction against the Secretary does not impact Plaintiffs' alleged injuries, it exceeds the district court's jurisdiction.

Plaintiffs also lack standing to sue the local defendants, who are not adverse parties. Plaintiffs want the local officials to have more "discretion." Ex. E at 19. They "are not arguing that the Constitution requires any individual county to provide multiple ballot return locations," Ex. G at 15 n.14, so local compliance with the Proclamation is not the source of any injury they claim.

2. Plaintiffs' claims are barred by sovereign immunity.

The Secretary is also likely to show that the preliminary injunction is barred by sovereign immunity. "[T]he principle of state-sovereign immunity generally precludes actions against state officers in their official capacities, subject to an established exception: the *Ex parte Young* doctrine." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (citation omitted). *Ex parte Young* applies only

[3] *See also In re Hotze*, No. 20-0739, 2020 WL 5934190 (Tex. Oct. 7, 2020) (Blacklock, J., concurring); Tex. Gov't Code § 418.173; State of Texas Emergency Management Plan at 9 (Feb. 2020), https://tdem.texas.gov/wp-content/uploads/2019/08/2020-State-of-Texas-Basic-Plan_WEBSITE_05_07_gs.pdf.

when the defendant enforces the challenged statute in violation of federal law. The Secretary's "general duty"—if any—"to see that the laws of the state are implemented" is insufficient. *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quotation marks omitted). Instead, the named defendant must have "the particular duty to enforce the statute in question *and* a demonstrated willingness to exercise that duty." *Id.* (emphasis added).

Sovereign immunity thus bars Plaintiffs' claims against the Secretary because she neither implements nor enforces either section 86.006(a-1) or gubernatorial proclamations. *See supra* pp. 8-9. Moreover, even if the Secretary *could* enforce section 86.006(a-1), that would not satisfy *Ex parte Young*. As this Court recently emphasized, even where a state official "has the authority to enforce" a law, a plaintiff must further allege that the state official "is likely to" enforce the law in a way that would "constrain" the plaintiff. *City of Austin v. Paxton*, 943 F.3d 993, 1001-02 (5th Cir. 2019). Far from showing that the Secretary is likely to enforce this order, Plaintiffs assert that the Secretary has previously advised local election officials that mail-in ballots could be returned to any early-voting clerk office, which is what Plaintiffs want. Ex. E at 19; Ex. F at 20. Any contrary advice or requirement comes not from the Election Code but from the October 1 Proclamation, which the Governor wrote and which imposes no duties on the Secretary.

C. The district court should have abstained under *Pullman*.

Because the validity of the October 1 Proclamation is currently being litigated in Texas state court, the district court should have held off on issuing any injunction. *Pullman* abstention is warranted where a case presents (1) "an unclear issue of state

law" that (2) "if resolved, would make it unnecessary for [the Court] to rule on the federal constitutional question." *Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009) (alteration omitted). "The second factor is flexible—it is satisfied if the constitutional questions will be substantially modified, or otherwise presented in a different posture." *TDP I*, 961 F.3d at 397 (cleaned up).

Both requirements are met here. The Governor's authority under Texas state law to issue the October 1 Proclamation is currently the subject of a pending challenge in Texas state court, Ex. H, and a hearing is set on a requested temporary injunction on Tuesday, October 13, Ex. I. This lawsuit challenges whether the October 1 Proclamation exceeds the Governor's statutory authority or the Texas Constitution. Ex. H. If the state court were to enjoin the challenged provision, its ruling would put Plaintiffs' claims "in a different posture," *TDP I*, 961 F.3d at 397 & n.13, if not moot them entirely. The Secretary is thus likely to show this is "a textbook case for *Pullman* abstention." *Id.* at 417-18 (Costa, J., concurring); *see also id.* at 418 ("Plaintiffs' main push back against all of this is to argue that *Pullman* does not apply to voting rights cases. But we have applied *Pullman* to First and Fourteenth Amendment challenges in the related context of election disputes.").

D. Plaintiffs failed to show a likelihood of success on the merits.

The district court concluded that Plaintiffs are likely to succeed on their undue-burden and equal-protection claims, but the Secretary is likely to show the opposite on appeal. Plaintiffs do not assert a right under either the Constitution or Texas law to hand-deliver their ballots before Election Day. Nor do Plaintiffs assert that if the Governor had simply issued an order allowing one delivery location per county, that

such an order would be unlawful. Instead, they fault the Governor for not expanding voting options *even more*. That argument is not cognizable, and in any event, the Governor's executive orders do not *become* unlawful merely because the Governor expanded voters' options to return marked mail-in ballots prior to Election Day then modified that expansion to ensure electoral integrity.

1. The October 1 Proclamation does not implicate—let alone burden—the right to vote.

The district court first found Plaintiffs were likely to prevail on their primary claim that the Governor's suspension of section 86.006(a-1) abridges their right to vote. On that score, the injunction fails for at least three reasons.

First, the October 1 Proclamation does not implicate the right to vote at all. The Constitution does not include a freestanding right to vote in whatever manner Plaintiffs deem most convenient. *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *10 (5th Cir. Sept. 10, 2020) (*TDP II*). The law distinguishes "the right to vote" from the "claimed right to receive absentee ballots." *McDonald*, 394 U.S. at 807. The inability to vote by mail does not implicate the right to vote unless the State "preclude[s]" voting via other methods. *Id.* at 808. That holding dooms Plaintiffs' undue-burden claim. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.").

Second, even if the right to vote were implicated, the Governor's suspension of section 86.006(a-1) does not abridge that right; it simply permits additional options not otherwise authorized by Texas law. As this Court explained just last month, to "abridge" the right to vote, a state action must "create[] a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative" to existing state law. *TDP II*, 2020 WL 5422917, at *10. Here, the Governor has *expanded* voting options beyond what the Legislature has traditionally provided. Texas law ordinarily permits the in-person delivery of marked mail-in ballots only on Election Day. Tex. Elec. Code § 86.006(a-1). The October 1 Proclamation suspends that limitation provided that the county follows certain protocols. Ex. C. Plaintiffs might prefer even looser rules, but that does not establish any abridgement of the right to vote. *LaRose*, *supra* at 4 ("[A] limitation on drop boxes poses at most an inconvenience to a subset of voters (those who choose to vote absentee and physically drop-off their absentee ballot).").

Third, the October 1 Proclamation easily satisfies the *Anderson-Burdick* test. Plaintiffs' own evidence demonstrates that any burden is *de minimis*, and the restrictions on delivery of mail-in ballots advances weighty State interests. To apply the *Anderson-Burdick* test, a court must "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Then the Court "must identify and evaluate the precise interest 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." *Id.* (quoting *Anderson*, 460 U.S. at 789). When a state election-law provision imposes only "reasonable, nondiscriminatory restrictions" upon the rights of voters, "the state's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788.

As discussed above, the Governor's executive orders have *expanded* Plaintiffs' early-voting options. *See supra* at 2-3. Furthermore, Plaintiffs have provided no proof that any voter will be unable to return their ballots by the deadline on account of the October 1 Proclamation. Indeed, Plaintiff Straty complains she will have to drive twenty minutes rather than five to turn in her ballot in person—while acknowledging that she retains the right to mail in her ballot or vote by personal appearance. Ex. E ¶ 16. This type of "inconvenience" will not support a constitutional claim. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016).

The State's interests more than justify the supposed burden placed on voters. Vote-by-mail election fraud, has proven to be a frequent and enduring problem, *Crawford*, 553 U.S. at 196 n.12 (plurality op.), including in Texas, *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc). In the last Legislative Session, the Texas Legislature heard testimony from district attorneys and law enforcement about coordinated efforts to steal and harvest ballots. Ex. J.

Limiting the number of in-person delivery locations reduces the risk of these criminal acts succeeding by allowing personnel to focus their resources and attention on a single location, rather than having to spread those resources to scrutinize the delivery process at up to a dozen locations over the course of a 40-day period. For

example, poll watchers at delivery sites will help to alleviate unlawful pressure on voters by campaigns, *id.* at 18, which can lead to election contests, *cf. O'Caña v. Salinas*, No. 13-18-00563-cv, 2010 WL 1414021, at *1-2 (Tex. App.—Corpus Christi-Edinburg Mar. 29, 2019, pet. denied). And "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196.

Finally, limiting the number of in-person delivery locations reduces the threat of disparate treatment for Texas voters. The historical practice has been not to allow in-person delivery of mail-in ballots, Ex. D ¶ 7, or to limit such deliveries to one location per county, *id.* ¶ 9. By continuing that limit, the October 1 Proclamation increases uniformity among early-voting clerks in interpreting and implementing section 86.006(a-1) and prevents disparate treatment among Texas voters. *Cf. id.* ¶¶ 9-10 (reporting that only four counties allow multiple delivery locations); Jacob Vaughn, *Abbott's Limits on Drop-off Locations for Mail-In Ballots Won't Affect Dallas County Directly*, Dallas Observer (Oct. 5, 2020), https://www.dallasobserver.com/news/trumps-diagnosis-flings-more-doubt-in-coronavirus-debate-11949951 (reporting that heavily populated Dallas County has one location). It is well-established that the State has an acute interest preserving uniformity and public confidence in the election. *See Purcell*, 549 U.S. at 4-5. When combined with the need

to prevent voter fraud, these interests more than justify the incidental burden required for voters to drive a few extra minutes to hand-deliver their ballots.[4]

2. The Secretary is likely to prevail on the "arbitrary disenfranchisement" claim.

The district court further held that Plaintiffs are likely to succeed on their equal-protection claim on the ground that the October 1 Proclamation arbitrarily disenfranchises voters. Again, the Secretary is likely to show the opposite on appeal.

As an initial matter, Plaintiffs do not assert that the October 1 Proclamation distinguishes based on any suspect classification. They cannot. The Proclamation does not regulate individual voters at all; it simply declares a general rule of law applicable to all 254 counties across the State.[5] Such a limitation is subject to rational-basis review unless it imposes a severe burden on the right to vote. *See, e.g.*, *Phillips v. Snyder*, 836 F.3d 707, 719 (6th Cir. 2016); *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 363 (D.C. Cir. 2007). As discussed above, the October 1 Proclamation easily meets the rational-basis test.

To avoid this conclusion, Plaintiffs have relied on two cases, neither of which demonstrates that the Proclamation is unconstitutional.

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[4] Hours before the district court issued its injunction, the Sixth Circuit stayed a similar injunction prohibiting Ohio officials from limiting the number of locations to hand-deliver ballots. *LaRose*, *supra.* As the Sixth Circuit explained, *Anderson-Burdick* precludes the district court's order in this case.

[5] For that reason, the district court's reliance (at 40-41) on cases where a State treated voters differently based on their counties of residence misstates the record.

First, Plaintiffs cannot state a claim under *Bush v. Gore*, 531 U.S. 98 (2000). From the day it issued, *Bush* has been limited to its facts. *LULAC v. Abbott*, 951 F.3d 311, 317 (5th Cir. 2020); *accord Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011) (expressing "concerns" about the arbitrary "review of provisional ballots by local boards of elections"). Those facts do not exist here: In *Bush*, the State was trying to intuit the subjective intent of the voter based on standards that "might vary not only from county to county but indeed within a single county." 531 U.S. at 106. Here, the Proclamation is trying to *eliminate* disparate treatment driven by the subjective preference of election officials by establishing a single, statewide rule that is easily administrable.

Second, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008), involved: inadequate voting machines that lead to twelve-hour wait times and caused 10,000 people to not vote, poll workers refusing to assist disabled voters, and ballot irregularities that caused "22% of the provisional ballots cast to be discounted." Here, Plaintiffs make only vague allegations that some voters *may* have longer wait-times. But no one posits that there would be constant twelve-hour wait-times every day prior to Election Day.

Taken separately or together, no authority casts doubt on the conclusion that the Proclamation is subject to and would survive rational-basis review because it supports the twin goals of ensuring uniformity and preventing election fraud. *Crawford*, 553 U.S. at 196 (plurality op.).

II. The Remaining *Nken* Factors Favor a Stay.

Because Plaintiffs are unlikely to demonstrate either that the district court had jurisdiction or a likelihood of success on the merits, the Court need not reach the remaining *Nken* factors. Nevertheless, they too support a stay pending appeal.

A. The Secretary will be irreparably harmed absent a stay.

Enjoining the Governor's Proclamation will have serious adverse effects on both the State and the public. Texas has a weighty interest in the equal, fair, and consistent enforcement of its laws. *Cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The "inability [for a State] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).[6] The State "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Accordingly, it would inflict a significant injury on the State if the Court were to prevent the State from prescribing the conduct of its elections. *See Maryland*, 567 U.S. at 1303.

These interests are heightened here, as the challenged Proclamation also reflects the State's determination on how to respond to an ongoing health emergency. "[T]he Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." *Andino*, 2020 WL 5887393, at *2

[6] Though the district court enjoined a Proclamation, not a statute, the same principle applies. Moreover, if the Court were to conclude that the Proclamation is improper, the appropriate remedy would be to enforce the statute and not permit voters to hand-deliver ballots before Election Day. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2352-53 (2020) (plurality op.).

(Kavanaugh, J., concurring) (cleaned up). As a result, a State'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.'" *Id.* (citation omitted).

B. A stay will not harm Plaintiffs.

A stay pending appeal will not irreparably harm Plaintiffs because voters will retain more options to vote in the upcoming election than would ordinarily be permitted by Texas law. A preliminary injunction requires a showing of "irreparable harm" that is *likely*, not merely possible. *E.g.*, *Winter v. NRDC*, 555 U.S. 7, 22 (2008). And the threatened harm must be "imminent." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). Plaintiffs have not shown that. Indeed, the October 1 Proclamation does not even implicate their right to vote. *See supra* p. 12.

C. The public interest strongly favors a stay.

"Because the State is the appealing party, its interests and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). For the reasons discussed above in Part II.A, both the Secretary and the public interest are likely to be harmed by the injunction.

III. The Court Should Enter an Immediate Temporary Administrative Stay While It Considers this Motion.

For the reasons discussed above, the Secretary is entitled to a stay pending appeal. The Secretary further respectfully requests an immediate administrative stay while the Court considers this motion. Such administrative stays are both routine,

e.g., *TDP I*, 391 F.3d at 396, and necessary to avoid further disruption to the electoral process. *See* Ex. L (advising Harris County voters minutes after the injunction issued, that they may hand-deliver ballots to any of "12 county offices").

Conclusion

The Court should immediately enter a temporary administrative stay while it considers this motion, then stay the district court's injunction pending appeal.

Respectfully submitted.

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Certificate of Service

On October 10, 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.

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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 5,189 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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