

No. 20-40643

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

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 Southern District of Texas
(No. 5:20-cv-00128)

PLAINTIFFS-APPELLEES' MOTION TO SUPPLEMENT THE RECORD

Marc E. Elias
Bruce V. Spiva
Lalitha D. Madduri
Daniel C. Osher
Stephanie I. Command
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
(202) 654-6200

Skyler M. Howton
PERKINS COIE LLP
500 North Akard St., Suite 3300
Dallas, TX 75201-3347
(214) 965-7700

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS

No. 20-40643, *Texas Alliance for Retired Americans, et al. v. Hughs*

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

Plaintiffs-Appellees

- a. Texas Alliance for Retired Americans: no parent corporation or stock
- b. Sylvia Bruni
- c. DSCC: no parent corporation or stock
- d. DCCC: no parent corporation or stock

Other Parties

- a. Texas Democratic Party
- b. Jessica Tiedt

The following attorneys have appeared on behalf of Plaintiffs-Appellees either before this Court or in the District Court:

Marc E. Elias

Bruce V. Spiva

Lalitha D. Madduri

Daniel C. Osher

Stephanie I. Command

Emily R. Brailey

PERKINS COIE LLP

700 Thirteenth Street, N.W., Suite 800

Washington, D.C. 20005-3960

(202) 654-6200

Skyler M. Howton
PERKINS COIE LLP
500 North Akard St., Suite 3300
Dallas, TX 75201-3347

Defendant-Appellant

a. Ruth Hughs, Texas Secretary of State

The following attorneys have appeared on behalf of Defendant-Appellant either before this Court or in the District Court:

Ken Paxton
Jeffrey C. Mateer
Ryan L. Bangert
Patrick K. Sweeten
Todd Lawrence Disher
William T. Thompson
Kyle D. Hawkins
Matthew H. Frederick
Brent Webster
Judd E. Stone

Office of the Texas Attorney General
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548
Tel.: (512) 936-1414

/s/ Skyler M. Howton
Skyler M. Howton
PERKINS COIE LLP
500 North Akard St., Suite 3300
Dallas, TX 75201-3347
(214) 965-7700

Attorney of Record for Plaintiffs-Appellees

MOTION

Pursuant to Federal Rules of Appellate Procedure 10(e) and 27, Plaintiffs-Appellees respectfully request leave to supplement the record by filing the attached declarations, which demonstrate the district court had the requisite subject-matter jurisdiction to issue its preliminary injunction.

In this appeal, the Secretary argues for the first time that the district court's preliminary injunction was erroneous because Plaintiffs had not repackaged certain standing-related allegations into declarations. Appellant's Br. 23-24. Despite that the parties engaged in two independent rounds of briefing over Plaintiffs' two separate motions for preliminary injunction in the district court, not once did the Secretary even suggest that the district court lacked jurisdiction because Plaintiffs did not offer documentary evidence demonstrating their associational and organizational standing. To be sure, the Secretary argued that the allegations in Plaintiffs' complaint, taken as true, did not demonstrate their standing to challenge HB 25. ROA.887-89, 1583-87; *see also* Def.'s Mot. to Dismiss or Transfer Venue, *Bruni v. Hughs*, No. 5:20-cv-35 (S.D. Tex. Apr. 10, 2020, May 8, 2020), ECF Nos. 32, 52 (making same arguments). The district court rejected these arguments, finding Plaintiffs had sufficiently alleged associational standing. ROA.1675-77. But never did the Secretary argue, in response to Plaintiffs' motions for preliminary injunction, that the district court lacked jurisdiction because Plaintiffs had not repackaged their

standing-related allegations into declarations. Rather, the Secretary simply incorporated by reference her standing arguments from her motions to dismiss. ROA.970; *see also* Def.’s Resp. in Opp. to Pls.’ Mot. for Prelim. Inj., *Bruni v. Hughs*, No. 5:20-cv-35 (S.D. Tex. June 6, 2020), ECF No. 57, at 5.

Because the Secretary did not make this argument to the district court, that court did not consider this issue. ROA.1675-77. While the Secretary claims the “district court gestured to the differing requirements for standing in the motion to dismiss and preliminary injunction contexts,” Appellant’s Br. 23-24 (citing ROA.1696-97), that is not true. Nothing in the district court’s decision discussed, or even “gestured” at, this issue.

The U.S. Supreme Court has instructed that when a standing-related issue—such as the Secretary’s newfound argument here—is not raised by the defendant below, “elementary principles of procedural fairness require[]” an appellate court to provide the plaintiff an opportunity to provide evidence in response. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 270-71 (2015). Here, the Court has two options: it may (1) remand to the district court for consideration of such evidence, or (2) consider such evidence on appeal. To facilitate the latter option, Plaintiffs offer this Motion and the attached declarations, which confirm the allegations that the district court found sufficient to confer Plaintiffs with standing in this case. The Court has wide discretion to consider this evidence. *Ouachita Watch League v.*

Jacobs, 463 F.3d 1163, 1170-71 (11th Cir. 2006) (noting the court’s discretion to “consider evidence that the parties did not submit in the district court,” and that it should do so “when [it] is in the interests of justice and judicial economy”). Indeed, courts routinely consider standing-related evidence under similar circumstances. *E.g., id.* (allowing plaintiff to supplement the record with standing-related evidence due to defendants’ having raised the standing issue for the first time on appeal); *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164-65 (10th Cir. 2012) (allowing appellant to submit standing-related declaration with reply brief); *Deerfield Plantation Phase II-B Prop. Owners Ass’n, Inc. v. U.S. Army Corps of Eng’rs*, 501 F. App’x 268, 274 (4th Cir. 2012) (granting similar motion when standing issue was raised for the first time on appeal, “[g]iven the timing of the standing challenge”). The Court should do the same here.

For these reasons, Plaintiffs respectfully request that the Court grant them leave to supplement the record with the attached declarations.

Dated: February 10, 2021

Respectfully submitted,

Marc E. Elias
Bruce V. Spiva
Lalitha D. Madduri
Daniel C. Osher
Stephanie I. Command
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9996

/s/ Skyler M. Howton
Skyler M. Howton
PERKINS COIE LLP
500 North Akard St., Suite 3300
Dallas, TX 75201-3347
Telephone: (214) 965-7700
Facsimile: (214) 965-7799

Attorneys for Plaintiffs-Appellees

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CERTIFICATE OF CONFERENCE

On February 10, 2021, before filing this motion, counsel for Plaintiffs-Appellees contacted opposing counsel to advise them of Plaintiffs-Appellees' intent to file this motion. Counsel stated Defendant-Appellant opposes the motion and intends to file a response.

/s/ Skyler M. Howton
Skyler M. Howton

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because this document contains 618 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Skyler M. Howton
Skyler M. Howton

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 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 CM/ECF system. I certify that counsel for the Defendant-Appellant are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Skyler M. Howton
Skyler M. Howton

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ATTACHMENTS

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**IN THE UNITED STATES COURT OF APPEALS
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Texas Alliance for Retired Americans, Sylvia
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Plaintiffs,

v.

RUTH HUGHS, in her official capacity as the Texas
Secretary of State,

Defendant.

No. 20-40643

DECLARATION OF ANTHONY PADILLA

Pursuant to 28 U.S.C. § 1746, I, Anthony Padilla, testify that:

1. I am currently the President of the Texas Alliance for Retired Americans (“TARA”). TARA is incorporated in Texas as a 501(c)(4) nonprofit, social welfare organization under the Internal Revenue Code. It is a chartered state affiliate of the Alliance for Retired Americans. TARA’s mission is to ensure social and economic justice and the full civil rights that retirees have earned after a lifetime of work.

2. TARA has over 145,000 members composed of retirees from public and private sector unions, community organizations, and individual activists. TARA has chapters in various major cities throughout Texas, including Austin, Dallas, Fort Worth, Houston, Beaumont, Corpus Christi, and San Antonio.

3. TARA’s members pay a yearly membership fee to support TARA. TARA is led by an elected president, treasurer, and secretary. TARA holds a statewide convention every two years to elect those officers. TARA is governed by an Executive Board, which is composed of these three elected leaders, as well as local chapter presidents, and others. Each local chapter

president is elected by the respective chapter's members. Most chapters have a similar leadership structure to the statewide organization, including a president, secretary, and treasurer. These elections are held yearly. TARA members also vote on statewide and local chapter actions.

4. To ensure that our members will have their voices heard in Texas elections, TARA and its individual members spend resources on voter registration, phone banking, and get-out-the-vote ("GOTV") activities, as well as activities aimed at expanding TARA itself, such as recruiting new members, opening new chapters, and making presentations to members' groups and seniors' groups. GOTV efforts traditionally consist of making phone calls to members, writing postcards to members, and knocking on doors to encourage members to vote.

5. HB 25 frustrates TARA's mission because it will burden—and in some cases entirely deprive—TARA's individual members of the right to vote, threatens the electoral prospects of its endorsed candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and makes it more difficult for TARA and its members to associate to effectively further their shared political purposes.

6. More than five percent of TARA's membership is under the age of 65, making them too young to qualify to vote by mail under Texas Election Code § 82.003. Those members will have to vote in person. Many of them also have preexisting conditions that put them at a heightened risk of serious illness from COVID-19 infection.

7. Many of our members will vote in person this year. HB 25 threatens to force these members to wait in long lines in order to vote, subjecting them to a serious and prolonged risk of contracting COVID-19.

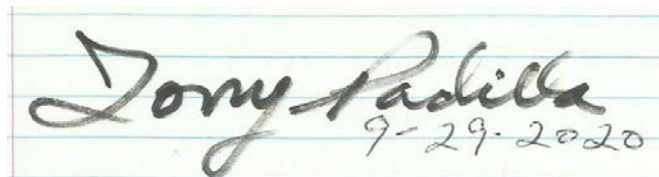
8. Because of HB 25's threat of long lines, and the increased danger of COVID-19 infection it creates, TARA has diverted, and will continue to divert, resources from furthering its

other activities towards educating people on how to safely vote in person despite long lines. One such recent effort is TARA's statewide campaign called "Step Out of Line for Democracy." This campaign educates TARA's members about vote by mail options and how to vote safely in person. This is a direct response to the lines that we expect at the polls this fall, in part as a result of HB 25.

9. TARA does not have limitless resources. Our efforts to ensure our members are not disenfranchised by HB 25 will reduce the time and resources that we have to educate TARA's members and Texas legislators on public policy issues critical to TARA's members, including the pricing of prescription drugs and the expansion of Social Security and Medicare and Medicaid benefits, among many other of our priorities. It will also reduce the time and resources available to track and monitor legislation that impacts our members.

10. If not for HB 25, TARA would be investing more resources into other efforts such as voter registration and promoting its substantive policy campaigns.

Executed on September 29, 2020.



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Anthony Padilla

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DECLARATION OF SARA SCHAUMBURG

Pursuant to 28 U.S.C. § 1746, I, Sara Schaumburg, testify that:

1. I am over the age of 18, am competent to testify, and declare the following facts based on my own personal knowledge.
2. I am currently the Director of Voter Protection & Deputy Policy Director for DSCC.
3. DSCC's mission is to support and elect Democratic Senate candidates across the country, including in Texas. DSCC has a vested interest in the turnout of voters who can cast ballots to support Democratic candidates for U.S. Senate.
4. DSCC represents the interests of Democratic voters and donors in Texas and considers them to be its constituents or supporters. Democratic voters provide financial support in the form of political contributions to DSCC and candidates supported by DSCC on a regular basis, as demonstrated by publicly available FEC filings. In addition, Democratic voters help elect the leadership of DSCC by electing candidates to the United States Senate. And Democratic voters participate in DSCC's strategy by responding to surveys and polls.

5. HB 25 frustrates DSCC's mission because it will burden—and in some cases entirely deprive—DSCC's constituents and supporters of the right to vote, threatens the electoral prospects of its endorsed candidate whose supporters will face greater obstacles casting a vote and having their votes counted, and makes it more difficult for DSCC and its constituents and supporters to associate to effectively further their shared political purposes.

6. Many of DSCC's constituents and supporters are under the age of 65, are not sick or disabled, will be in the county during early voting or on Election day, and are not confined to jail. Those constituents and supporters will have to vote in person. Many of them also have preexisting conditions that put them at a heightened risk of serious illness from COVID-19 infection. HB 25 threatens to force these constituents and supporters to wait in long lines in order to vote, subjecting them to a serious and prolonged risk of contracting COVID-19.

7. Additionally, HB 25 will impact DSCC's allocation of funds and time both in Texas and nationwide. In 2018, DSCC made contributions and expenditures in the tens of millions of dollars to persuade and mobilize voters to support Democratic Senate candidates. DSCC expects to invest a significant amount of those funds to win the Senate race in Texas, including by making significant contributions to the Texas Democratic Party ("TDP") and to the campaign committee of M.J. Hegar, Republican Senator John Cornyn's Democratic opponent in the 2020 U.S. Senate general election in Texas. To date, DSCC has already spent over \$1.25 million in Texas for the current election cycle.

8. To combat the impacts of HB 25, DSCC must redirect funding towards TDP's efforts to educate voters on how to vote in-person safely during the COVID-19 pandemic despite the polling place congestion HB 25 will create. Those additional voter education efforts require additional spending in Texas on get out the vote ("GOTV") and voter education activities. DSCC

also plans to transfer additional funds to TDP as part of its coordinated campaign, a program through which DSCC works collaboratively with the state party committee and other national Democratic party committees to elect Democrats up and down the ticket within the state, to help combat the impact of HB 25.

9. If the State complied with constitutional and statutory requirements, some of the funds DSCC transfers to TDP could be spent on other mission-critical efforts in Texas and nationwide. Instead of contributing additional funding to TDP's GOTV and voter education activities, DSCC could allocate those funds, for instance, to polling it conducts in Texas. Additionally, DSCC has concentrated its limited resources on various battleground states, and in the past has spread its limited budget among various states and Senate races. But now, DSCC must expend many of those resources—including funds and time originally allocated to other battleground states—to address the numerous burdens that HB 25 places on voting in Texas.

10. HB 25 directly harms DSCC by imposing unnecessary barriers to the casting of Democratic votes, which frustrates DSCC's mission of, and efforts in, electing the Democratic Party candidate to the U.S. Senate, and forces DSCC to divert additional funds and resources to GOTV activities in Texas to ensure that Democratic voters are not prevented from casting a ballot in the upcoming election.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2020.

DocuSigned by:

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Sara Schaumburg
Director of Voter Protection & Deputy Policy
Director DSCC

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DECLARATION OF JACQUELINE NEWMAN

Pursuant to 20 U.S.C. § 1746, I, Jacqueline Newman, testify that:

1. I am over the age of 18, have personal knowledge of the facts below, and can competently testify to their truth.
2. I currently serve as the Deputy Executive Director and Chief Operating Officer of the DCCC. The DCCC's principal mission is to support Democratic House candidates across the country, including in Texas.
3. DCCC represents the interests of Democratic voters and donors in Texas and considers them to be its constituents. In addition, Democratic voters and constituents provide financial support in the form of political contributions to DCCC and candidates supported by DCCC on a regular basis, as publicly available FEC filings demonstrate. This includes specifically contributions to the Blue Texas Fund, a joint fundraising committee including Colin Allred for Congress, and Elizabeth Pannill Fletcher for Congress. Democratic voters help elect the leadership of the DCCC by electing candidates to the United States House of Representatives. And Democratic voters participate in DCCC's strategy by responding to surveys and polls.

4. HB 25 frustrates DCCC's mission because it will burden—and in some cases entirely deprive—DCCC's constituents of the right to vote, threatens the electoral prospects of its endorsed candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and makes it more difficult for DCCC and its constituents to associate to effectively further their shared political purposes.

5. Many of DCCC's constituents are under the age of 65, are not sick or disabled, will be in the county during early voting or on Election Day, and are not confined to jail. Those constituents will have to vote in person. Many of them also have preexisting conditions that put them at a heightened risk of serious illness from COVID-19 infection. HB 25 threatens to force these constituents to wait in long lines in order to vote, subjecting them to a serious and prolonged risk of contracting COVID-19.

6. Additionally, HB 25 will impact DCCC's allocation of funds, personnel, and time both in Texas and nationwide. DCCC has invested significant resources in Texas. In funding alone, DCCC invested over \$3.1 million in Texas in the 2014 election cycle, over \$6 million in the 2016 election cycle, and over \$6.7 million in the 2018 election cycle. In this election cycle, DCCC has spent over \$5.6 million in Texas. On top of that, DCCC has transferred nearly \$2.5 million to the Texas Democratic Party ("TDP").

7. Because of HB 25, DCCC has diverted additional funds, personnel, and time from its efforts to expand its activities and reach more voters and constituents, to educating its staff, consultants, and voters on how to vote safely during the COVID-19 pandemic, particularly in light of the polling place congestion HB 25 will create. This is money DCCC would otherwise spend in other states or in Texas on other activities in support of its mission unrelated to mitigating the effects of HB25.

8. Because of HB 25, DCCC has also diverted additional funds to the coordinated campaign in Texas. DCCC works collaboratively with the state party committee and other national Democratic party committees to elect Democrats up and down the ticket within the state. DCCC will need to invest additional funds in Texas to support TDP's field program in light of the barriers to Democratic voting caused by HB 25, particularly on down-ballot races. These are funds DCCC would otherwise spend in other states or in Texas on other activities in support of its mission unrelated to mitigating the effects of HB25.

9. As a direct result of Defendant's conduct, Democratic voters have been (and will be) denied the ability to vote in support of DCCC's candidates. HB 25 harms DCCC's electoral prospects because it makes it more difficult for DCCC's constituents and supporters to vote for Democratic candidates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2020.

DocuSigned by:
Jacqueline Newman
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Jacqueline Newman
Deputy Executive Director and COO
DCCC