UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC; TERRELL BLODGETT,

Plaintiffs,

v.

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

Defendant.

Civil Action

Case No. 1:19-cv-01063

ORAL ARGUMENT REQUESTED

PLAINTIFFS' OPPOSED APPLICATION FOR A PRELIMINARY INJUNCTION AND MOTION TO CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH TRIAL ON THE MERITS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

CASES **PAGE**

I. INTRODUCTION

Texas has long provided local officials with the flexibility to use "mobile" or "temporary" polling places, enabling them to offer early voting at a minimal cost and ensure equal opportunity to cast a ballot for citizens who, because of their personal circumstances, would otherwise find the burden of traveling to a polling place especially difficult. And it worked: in 2018, for example, widespread mobile voting helped account for a dramatic increase in the number of Texans who cast a ballot, including a significant increase in participation by young voters.

Texas House Bill HB 1888 ended that success story, stripping away the discretion that allowed local election officials to increase voting opportunities using mobile voting sites. Through HB 1888, the legislature *mandated* that every early voting location have the same hours and days of operation as the county's main early voting location, which of course most counties cannot begin to afford. The result is entirely predictable: disenfranchised voters and decreased voting opportunities in all elections going forward. The Secretary seeks to justify the impact on the voting opportunities by pointing to a narrow problem with "gamesmanship" that may have existed in a few specialized, local elections years ago, ignoring that HB 1888 has burdened and disenfranchised voters across the state. The First and Fourteenth Amendments do not permit such a mismatch between the legislature's stated goal and its impact on voting rights. Moreover, and perhaps even worse, HB 1888's burdens fall most heavily on young voters who already face unique hurdles to voting. Concerns over the impact on younger voters were front and center as the bill progressed into law. HB 1888's obvious flaws and overbreadth went unaddressed because decreasing voting opportunities for young Texans is not an inadvertent side effect of HB 1888, but its very intent, in violation of the Twenty-Sixth Amendment.

For these reasons, plaintiffs respectfully request that the Court enjoin HB 1888.

II. BACKGROUND

In the seven years since *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013), removed the requirement that Texas and other covered jurisdictions under Section 4(b) of the Voting Rights Act obtain "preclearance" before changing voting procedures, Texas has closed over 750 polling places, more than any other state.[1] HB 1888 is the latest law to drastically reduce opportunities for in-person voting in Texas. And it was *designed* to eliminate a successful means of providing early voting opportunities that, particularly in recent years, had helped to pull Texas out of decades of abysmal youth turnout rates by facilitating on-campus voting. As at least a collateral consequence of HB 1888's goal of suppressing the youth vote, others have gotten caught in the crosshairs, including elderly and disabled voters. The present pandemic only exacerbates these already significant burdens, as HB 1888 eliminates one of Texas elections officials' best tools to prevent the spread of COVID-19 by limiting the number of voters at any single polling location.

A. Early voting has had a dramatic, positive impact on voter participation in Texas.

Readily accessible early voting is critical for young voters. These voters are less likely than others to have access to reliable transportation while navigating demanding and inflexible school and work schedules *and* the elections system, with which they have less experience than older voters. The percentage of 20 to 24-year-olds possessing driver's licenses has decreased over the last 35 years, while the percentage for other age groups has remained higher. *See* Michael Sivak & Brandon Schoettle, *Recent Decreases in the Proportion of Persons with a Driver's License Across All Age Groups* (Jan. 2016), http://www.umich.edu/~umtriswt/PDF/UMTRI-2016-4.pdf. Those who do have licenses often do not have easily accessible or reliable vehicles. Thus, young

[1] Benjamin Wermund, *Texas has closed more polling places than any other state, report shows, Houston Chronicle* (Sept. 10, 2019), https://www.houstonchronicle.com/politics/texas/article/Texas-has-closed-more-polling-places-than-any-14429443.php.

voters often must rely on public transportation or rides from others to access early voting, making the distance to the nearest site a particularly critical factor for this demographic. Younger voters (particularly first-time voters) are also less likely to know where to vote or how Texas's voting process works. Peter Levine Expert Report ("Levine Rpt.") at 3.

It is thus not surprising that young voters were among the populations best served by temporary early voting locations. At Southwestern University, for example, over half of the student population voted at the temporary voting site set up on campus. Michael Wines, *The Student Vote is Surging. So Are Efforts to Suppress It.*, THE NEW YORK TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html. This was far from an anomaly. In Tarrant County, 11,000 people voted at temporary early voting locations on campuses in 2018. Bud Kennedy, *11,000 College Votes Turned Tarrant County Purple in 2018. Now Campus Voting May End*, FORT WORTH STAR TELEGRAM (Sept. 28, 2019), https://www.star-telegram.com/news/politics-government/ article235524697.html. Likewise, Cameron County opened three temporary sites on college campuses in 2018, where 2,800 votes were cast. Wines, *supra*. These voters helped Texas's youth early voting turnout rise by 508 percent statewide from 2014 to 2018. Ana Orsini, *Voter Turnout of Young Adults Up 500 Percent in Texas*, KCBD (Nov. 2, 2018), https://www.kcbd.com/2018/11/03/voter-turnout-young-adults-up-percent-texas/.

Dr. Peter Levine, the founding director of the Center for Information and Research on Civic Learning and Engagement, a professor at Tufts University, the author of several peer-reviewed articles on state policies for civic engagement, and an expert on youth political participation whose report about youth early voting was credited in *League of Women Voters of Fla., v. Detzner*, 314 F. Supp. 3d 1205, 1218 (N.D. Fla. 2018) (where the court found that banning early voting on college campuses violated young voters' Twenty-Sixth Amendment rights), explains in his expert

report that, before HB 1888, "[a]t numerous campuses in Texas, more than 7 in ten students who voted in 2018 opted to vote early in-person, making that by far the preferred method of participating in the election." Levine Rpt. at 3. Dr. Levine further concludes that, "voting at early voting locations on or near their campuses was convenient for students, as it reduced their transportation challenges and costs," and that "the presence of early voting locations on or near campus likely improved students' access to information about the election, including making it easier for them to know that the election was taking place and where to vote." *Id.*[2]

Indeed, broadly available early voting increased turnout among *all* Texans. Allyson Waller, *Texas sees huge voter turnout on first day of early voting*, The Texas Tribune (Oct. 22, 2018), https://www.texastribune.org/2018/10/22/texas-early-voting-turnout/. The state's larger counties saw about double the first-day turnout between the 2014 and 2018 elections, and smaller counties saw even greater increases. *Id.* Texas had the second highest percentage point increase in early voting and voting by mail nationally between 2014 and 2018. Jordan Misra, *Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014*, The U.S. Census Bureau (April 23, 2019), https://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html.

B. HB 1888 has burdened and will continue to burden the right to vote.

As a result of HB 1888, there will be far fewer early voting locations in Texas going forward. For example, "[i]n 2018, Travis County offered 61 mobile voting sites for a combined

[2] The Secretary's expert witness, Dr. James Gimpel, does not contradict, or even address Dr. Levine's analysis or conclusions in his report or those of Plaintiffs' other expert, Dr. Jonathan Rodden. Rather, his report stands for the unremarkable propositions that turnout rises in higher interest elections, like presidential elections, and that suburban voters, who tend to have more resources and access to transportation, vote in greater numbers than urban voters. *See* Levine Reply Rpt. at 8-9; Rodden Reply Rpt. at 14-15.

cost of approximately $50,000." Decl. of Dana DeBeauvoir, ECF No. 29-3, ¶ 15. But, "[t]he County does not have enough money to offer—nor are the populations in these regions large enough to demand—permanent early voting locations" at each of the 61 previous mobile voting sites. DeBeauvoir Decl. ¶ 14. In Travis County, it is estimated that the cost of operating all 61 prior mobile voting sites for the full early voting period would be around one million dollars. DeBeauvoir Decl. ¶ 15; DeBeauvoir Dep. Tr. 98:10-13. Moreover, "many of the temporary early voting locations . . . used in the past could not possibly be used as permanent early voting locations, because these locations would not be able to offer [their] space for the full early voting period." DeBeauvoir Decl. ¶ 16. The end result for Travis County is devastating, as the County will be able "to add only one or two permanent early voting locations in place of the 61 or more sites that will no longer offer early voting." *Id.* And that's just one county's story. Other Texas counties are also struggling to find ways to ensure their residents are still able to vote without the flexibility of mobile polling. Alexa Ura, *Texas ended temporary voting locations to curb abuse. Now rural and young voters are losing access*, The Texas Tribune (Oct. 10, 2019), https://www.texastribune.org/2019/10/10/texas-temporary-voting-access-young-rural-voters/. For example, Lubbock County coordinated rides for elderly voters to polling stations in November 2019 since they could no longer vote at mobile voting sites at senior living centers. *Id.* HB 1888 has already sharply limited the number of early voting locations available and will continue to reduce the number of in-person locations in Texas.

HB 1888 has also already burdened voters. Plaintiff Terrell Blodgett, a 96-year-old veteran who spent a lifetime in government service, was unable to vote in November 2019 because the mobile polling location that had historically been present at his assisted living center disappeared, a fact that he did not realize until it was too late to apply for an absentee ballot. Blodgett Dep. Tr.

19:2-15; 74:19-75:7; 87:16-88:2 (also testifying he did not feel well on election day and available transportation was not conducive to his disabilities). Mr. Blodgett has otherwise voted in every election that he could remember, including when he was young. Now, Mr. Blodgett, who suffers from various ailments and mobility impairments, will no longer be able to vote in person at his assisted living facility. Blodgett Dep. Tr. 19:2-15; 74:19-21; 74:19-75:7. While Mr. Blodgett can vote absentee in the future because he is over 65 years old, many Texans cannot. *See TDP v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020) (staying injunction permitting all Texans to vote absentee pending appeal).

Mr. Blodgett's situation also demonstrates the significant voter confusion that HB 1888 will inevitably engender among an untold number of voters. Mr. Blodgett was disenfranchised in November 2019, an off-year election with low turnout, due to his understanding that the early voting location he had previously used in his nursing home would be available again for that election. Blodgett Dep. Tr. 16:14-17:3; *id.* at 18:2-4; *see also* Complaint, *Blodgett v. Hughs*, 1:19-cv-01154-LY, ECF No. 1 ("Blodgett Compl."), at ¶¶ 17-18. Mr. Blodgett mistakenly assumed that his polling location would remain open because it had been there for multiple previous elections, as numerous mobile voting locations have been statewide, and made his plan to vote based on that assumption, missing the deadline to apply to vote absentee. Blodgett Dep. Tr. 18:2-14; Blodgett Compl. ¶18. This sort of confusion is, unfortunately, likely for an untold number of voters in November 2020. As the Secretary's expert correctly notes, presidential general elections enjoy much higher turnout than the off-year election in which Mr. Blodgett was disenfranchised, *see supra* at 4 n.2, and most voters are not like Mr. Blodgett in one important regard: they do not vote in every single election, and thus will not have had an opportunity prior to November 2020 to realize that HB 1888 has forced the closure of the voting site where they previously voted.

Plaintiff Emily Gilby is another example of a voter who will be impacted in November 2020. Ms. Gilby, who does not drive or own a car, will be unable to vote on her college campus and instead will have to travel off campus, either on foot or by asking someone for a ride, in order to cast her ballot in the November 2020 General Election. Gilby Dep. Tr. 27:25-28:4; 64:1-3.

Mr. Blodgett and Ms. Gilby are just two examples of voters who will face confusion about the location of their polling place, transportation hurdles, and increased travel time to vote because of HB 1888, including members and supporters of the TDP, DSCC, and DCCC (the "Organizational Plaintiffs"). HB 1888 hurts voters across Texas because it deprives election officials of the flexibility and discretion to "provide access to the franchise for as many voters . . . as possible, based on the specific needs of [the] voters, and within the bounds of the limited resources at [at each county's] disposal," an option that is "essential" to election officials' "making access to the franchise fair and as equally accessible as is practicable." DeBeauvoir Decl. ¶ 14.

Expert analysis confirms this point. Through cartographic and quantitative analysis, Dr. Jonathan Rodden, a tenured political science professor at Stanford who has testified and been found credible in numerous voting rights cases, including *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1218, quantifies HB 1888's burden with regard to travel times, finding it will "have a notable impact on access to early voting if it [leads] to the closure of the temporary early voting locations which existed in the 2018 general election." Rodden Rpt. at 30. This is certain to be the case. *See e.g.*¸ DeBeauvoir Decl. ¶ 11. Dr. Rodden concludes that in Williamson, Travis, Hays, Nacogdoches, Angelina, Cameron, and Brewster Counties, specifically, such closures will have a substantial impact on the accessibility of early voting for individuals without automobiles. Rodden Rpt. at 30. "The largest impact w[ill] be felt by those living in college dormitories as well as senior citizens, disabled veterans, and disabled individuals more generally." *Id.*

Dr. Rodden's demographic maps identify the changes in travel time upon removing temporary early voting locations, concluding that "[t]he removal of temporary early voting locations would have a relatively large impact on voters . . . in more urban and suburban areas facing limitations on their mobility, such as lack of automobile ownership, a prominent concern for students among others, or disability," and that, in many counties, "the end of this practice would have substantial implications for senior citizens and disabled veterans, who appear in many cases to be the targets of election administrators' outreach efforts." Rodden Rpt. at 23.

Dr. Rodden also concludes that there are "statistically significant effects for several groups: seniors, disabled people, disabled veterans, those without cars, and dormitory dwellers. In each case, as the size of the group in the population gets larger, the increased travel time associated with the closure of temporary voting locations also gets larger." *Id.* at 25. Specifically, Dr. Rodden concludes that "[t]he average increase in travel time associated with the closure of temporary early voting locations for those without cars in [census] block groups with relatively low senior populations is around 8 minutes, but for [census] block groups with relatively high senior populations, the increase is almost four times larger: 31 minutes." Rodden Rpt. at 28; *id.* at Table 1. "For [census] block groups with relatively low disabled populations, the increase in travel time is around 8 minutes, but for those with relatively high disabled populations, it is more than three times larger: 32 minutes. We see something very similar for disabled veterans." Rodden Rpt. at 28; *id.* at Table 1. In dorm-dominated census block groups, the increase in non-auto transit time was on average 22 minutes as compared to the 18 minute increase in those census block groups without dorms. Rodden Rpt. at 29; *id.* at Table 1.

Notably, Dr. Rodden explains, these averages "mask considerable heterogeneity in burdens. For instance, a student without a car or bike at Texas State University would experience

an estimated travel time increase of 46 minutes," and "would go from being able to use an early voting location on campus to requiring a 30-minute walk to the nearest permanent location." Rodden Rpt. at 29-30. Similarly, "[a] carless senior living in Heritage Pointe complex, rather than voting downstairs, would need to negotiate a walk to the bus stop and over 25 minutes of public transit." *Id*. In sum, Dr. Rodden finds that "[t]he estimated increased travel time is 40 minutes for someone living in rural Northwest Travis County, 30 minutes for someone living in rural Southwest Cameron County, and 30 minutes for anyone living along the Northern border of Williamson County," and that "[t]he impact is even larger . . . in rural Brewster County." *Id.* Dr. Rodden concludes that "HB 1888 imposes a significant burden on college students, seniors, and disabled individuals without access to automobiles." Rodden Reply Rpt. at 5. This burden is only magnified by the pandemic, during which taking public transportation involves significant health risk.

Dr. Levine further illustrates how detrimental HB 1888 will be to youth turnout going forward. Specifically, Dr. Levine opines that voting at early voting locations on or near campuses "reduced [students'] transportation challenges and costs," and that "the presence of early voting locations on or near campus likely improved students' access to information about the election, including making it easier for them to know that the election was taking place and where to vote." Levine Rpt. at 3. With these important opportunities for young people to vote on or near campus eliminated by HB 1888, young voter participation is almost certain to take the biggest hit: young voters "tend to have certain characteristics that make them uniquely vulnerable to restrictive voting rules that exacerbate any additional burdens placed on their right to vote." *Id.* at 7.

C. The TDP, DSCC, and DCCC are also directly harmed as a result of HB 1888.

In addition to harming Ms. Gilby and Mr. Blodgett, HB 1888 also harms the Organizational

Plaintiffs in at least two ways.[3] *First*, HB 1888 burdens the voting rights of the Organizational Plaintiffs' members, whose ranks include Ms. Gilby, Mr. Blodgett, and some of the "[m]ore than 28,000 people" who voted at one of the "sixty-one rotating polling sites in Travis County in 2018," DeBeauvoir Decl. ¶ 11, as well as untold other Texas voters who must find a new place to vote.

Second, the Organizational Plaintiffs are harmed by HB 1888 because it has required them to divert resources to combatting the effect of, and educate about, the impact of HB 1888, and to retool their campaign plans in response to the law's effects. *See, e.g.*, *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 390 (5th Cir. 2018) (explaining that a "change in plans [that is] in response to a reasonably certain injury imposed by the challenged law" "can itself be a sufficient injury to confer standing."). For DCCC, for example, it is "inevitable" that it will have to spend significant resources on voter education, information, and Get-Out-the-Vote ("GOTV") efforts because of HB 1888, *see* Newman Dep. Tr. 33:4-16, diverting resources from other programs and increasing what it otherwise would spend in Texas. *Id.* 32:2-12; *id.* 44:22-45:4. DCCC estimates it will have to spend between $500,000 and $1 million *because of* HB 1888. *Id.* 90:12-18. DSCC also will have to spend more resources on GOTV in areas that will likely be harmed by HB 1888, *see* Schaumburg Dep. Tr. 53:18-54:2, which will require diverting funds from other efforts. *Id.* at 56:14-22. And the TDP will have to divert resources to educate college students, senior citizens, and others about where to vote now that their mobile polling place will be gone. Maxey Dep. Tr. 28:11-24.

D. The Legislature knew HB 1888 would burden the right to vote.

The Legislature passed HB 1888 aware of the harm it would inflict on youth voters, as well as elderly and disabled voters. While bills proposing similar restrictions on mobile voting gained little traction over the previous four years, *see* Texas Legislature Online, *Legislative History of*

[3] Plaintiffs further detailed these harms in opposition to the Secretary's motion to dismiss, which they incorporate by reference here. *See* Gilby Pls.' Resp.in Opp. to Mot. to Dismiss, ECF No. 28.

H.B. 2725 (2015), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=HB2725; Texas Legislature Online, *Legislative History of H.B. 1462* (2017), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=HB1462, the legislature rapidly passed HB 1888 in the face of 2018's record-breaking youth turnout, *see supra* Section II.A. Representative Bonnen, HB 1888's sponsor, admitted that concerns about its anticipated effect on young voters had been raised "more than once." Bonnen Dep. Tr. 311:6-22. Numerous legislators noted these concerns on the floor of the legislature, offering proposed amendments to the bill to mitigate its worst effects. *See* Turner Dep. Tr. 122:17-123:9; Bucy Dep. Tr. 98:18-99:6, *id*. 102:8-12; H.J. of Tex., 86th Leg., R.S., 60, 81-91 (2019); S.J. of Tex., 86th Leg., R.S., 58, 100-01. Three amendments were offered that would have excepted college campuses from HB 1888's duration and hours requirements. H.J. of Tex., 86th Leg., R.S., 60, 81-84, 88-91 (2019) (amendments introduced by Rep. Bucy and Turner); S.J. of Tex., 86th Leg., R.S., 58, 100-01 (amendment introduced by Sen. Rodriguez). But, like every other amendment to the bill, these were rejected, and HB 1888 passed without amendment. H.J. of Tex., 86th Leg., R.S., 60, 96-97 (2019); S.J. of Tex., 86th Leg., R.S., 58, 101.

III. ARGUMENT

A party seeking preliminary injunctive relief must establish that: (1) they are highly likely to succeed on the merits; (2) there is a substantial threat of irreparable injury if an injunction is not issued; (3) the harm outweighs any injury to the Secretary because of an injunction; and (4) an injunction is in the public interest. *See, e.g.*, *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).[4]

[4] Recognizing that Plaintiffs Motion to Determine Case by Papers or, in the Alternative, for a Remote Trial, ECF No. 91, is pending, but that Plaintiffs need immediate relief and the Secretary has not produced additional, responsive documents, *see generally* ECF No. 98, with this motion Plaintiffs move for a preliminary injunction and to consolidate the hearing on the motion with trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2), and request the opportunity to supplement the

A. HB 1888 unconstitutionally burdens Plaintiffs fundamental right to vote.

Under the *Anderson-Burdick* test applied to challenges to election laws brought under the First and Fourteenth Amendments, courts must "weigh the character and magnitude of the asserted injury to [voting rights] against the precise interests put forward by the State as justifications for the burden imposed by its rule," *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996), "taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). It is a "flexible" sliding scale, where "the rigorousness of [the court's] inquiry depends upon the extent to which [the challenged law] burdens [voting rights]." *Id.* A "severe" burden on voting rights "must be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 280 (1992). Less severe burdens remain subject to balancing: "[h]owever slight" the burden on voting rights "may appear," "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman*, 502 U.S. at 288–89).

HB 1888 severely burdens Plaintiffs' fundamental rights. It is beyond dispute that, as a result of HB 1888, counties where temporary early voting was previously offered will be able to offer far fewer locations going forward. DeBeauvoir Decl. ¶ 16. Plaintiffs Terrell Blodgett and Emily Gilby are just two examples of the thousands of Texas voters who will be burdened, and Mr. Blodgett has *already* been disenfranchised. *See Veasey v. Perry*, 29 F. Supp. 3d 896, 919 (S.D. Tex. 2014) ("Our jurisprudence recognizes that the distance of polling places affects voter turnout.") (citing *Perkins v. Matthews*, 400 U.S. 379, 388 (1971)). The COVID-19 health crisis

---

record as needed once the Secretary finally complies with this Court's order, producing the required documents and scheduling her continued 30(b)(6) deposition. This motion does not address Plaintiff Blodgett's Americans with Disabilities Act claim. *See* Blodgett Compl. ¶32.

has only exacerbated the burdens imposed by HB 1888 for Plaintiffs and all other in-person voters, as the reduction in the number of in-person polling places will surely result in more crowding, less social distancing, longer lines, and the requirement that voters travel further to vote in person.

HB 1888 strips local election officials of an important tool that allowed them to make voting more accessible. Temporary early voting locations provided county election officials with the flexibility and discretion to affordably reach as many voters as possible, and account for voters' unique circumstances. Courts have struck down election laws, like HB 1888, that deprive local officials of the discretion to make nuanced determinations as to how best to meet the needs of the diverse voters they serve. *See, e.g.*, *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1224-25 (holding that stripping Florida's election supervisors of *discretion* to place early voting locations on college campuses violated the First, Fourteenth, and Twenty-Sixth Amendments and ordering that local officials must retain *discretion* to place early voting on college campuses based on the unique needs of their voters.).[5]

For example, in *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012), the Sixth Circuit affirmed a district court's restoration of local Ohio boards of elections' *discretion* in setting hours and days for early voting. *Id.* at 437 (noting district court's "order clearly restores . . . discretion to local boards of elections"). In doing so, the court enjoined the Secretary of State "from preventing [non-military] voters from participating in early voting." *Id.* at 437; *see also id.* at 427 (describing how Secretary of State's directive "eliminated the local boards' *discretion* to be open on weekends during" the three days before Election Day).

[5] *See also League of Women Voters of Fla. v. Detzner*, 354 F. Supp. 3d 1280, 1286 (N.D. Fla. 2018) (rejecting state's argument that an order restoring discretion to local election officials, rather than compelling a certain action by local election officials, undermined the redressability prong of plaintiffs' standing under Article III).

It only makes sense that courts have held that depriving local election officials of their discretion in how to meet the voting needs of their constituents burdens the right to vote. Successful and fair elections administration is not a one-size-fits-all operation; different communities of voters have unique needs, and local elections officials are in the best position to determine how best to meet those needs. *See e.g.*, *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (noting that, when it comes to elections, "[o]ne size need not fit all."). HB 1888 strips an important tool from local elections officials because it prohibits them from offering early voting in a nuanced manner that best meets the needs of the greatest possible numbers of voters. DeBeauvoir Decl. ¶ 14. And voters, like and including Ms. Gilby and Mr. Blodgett, pay the price, because the burden falls on them to work harder in order to vote early and in person.

What is perhaps most remarkable here is that officials in the Secretary's office were both aware of—and concerned about—these precise issues when the legislature considered eliminating temporary polling locations. Specifically, the Secretary acknowledged through her 30(b)(6) representative that a 2015 bill (HB 2725) would have implemented the same changes HB 1888 does, Ingram Dep. Tr. 161:12-163:8, and documents show that members of the Secretary's Elections Division expressed many of the same concerns about HB 2725 that Plaintiffs raise here. *See generally* ECF 84-3. Caroline Geppert, a staff attorney in the Elections Division in 2015, explicitly noted that HB 2725 "does definitely harm all the counties (both small and large) that like to help accommodate their relatively less agile voters (elderly/disabled, for example)" and that, as to temporary voting locations in these types of facilities, "[t]here is no need for such locations to be open the whole time, and it's unlikely those locations will want to host an early voting site the entire early voting period." *Id.* at STATE007905. Or, as Melanie Best—another staff attorney in the Elections Division—put it more succinctly, "[t]his hurts so many options than

the thing they are trying to fix." *Id.* at STATE007904. Similarly, as HB 1888 was proceeding through the legislature, Elections Division employees proposed potential changes to the law that would have exempted residential care facilities and general elections, or focused on smaller elections. *See* ECF No. 84-2 at STATE002614-STATE002616. In other words, they sought to limit the law's overbroad reach and focus it on the legislature's purported concerns.[6] All of those efforts failed.

Plaintiffs anticipate that, like the Secretary argued in her Motion to Dismiss, ECF No. 21, she will assert that Plaintiffs do not allege a cognizable burden on the right to vote because they do not allege *total deprivation* of their right to vote. *See id.* at 15-17. But that argument is premised on a fundamental misconception of the controlling legal standard. *Anderson-Burdick* requires the Court to "weigh 'the character and magnitude of the asserted injury to the rights … that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (1992) (quoting *Anderson*, 460 U.S. at 789 (1983)). "Total deprivation" of the right to vote is not required, as burdens falling short of a complete denial of the right to vote have repeatedly been found sufficiently burdensome as to be unconstitutional. *See, e.g.*, *Obama for Am.*, 697 F.3d at 425 (holding burden imposed by

[6] And these are the documents of which Plaintiffs are aware. As this Court knows, the Secretary has improperly withheld hundreds more. *See* ECF No. 96. Likewise, because the Secretary improperly asserted privilege at the Secretary's Rule 30(b)(6) deposition, Plaintiffs were unable to question the Secretary's representative about any of these concerns or whether they were made known to the Legislature. Despite repeated requests by Plaintiffs' counsel the Secretary has refused to comply with the Court's order and now seeks reconsideration. *See* ECF No. 97. Plaintiffs have therefore redacted reference to these documents. Plaintiffs request that the Court deny the Secretary's motion and order the Secretary to produce the documents at issue and make Mr. Ingram available for a deposition immediately. Plaintiffs also request that they be permitted an opportunity to supplement the record in support of this motion based on any further information contained in those documents or revealed in Mr. Ingram's continued deposition.

prohibiting in-person early voting in the three days before election day unconstitutional); *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1209 (holding burden imposed by prohibiting on-campus early voting unconstitutional); *Common Cause Ind. v. Marion Cty. Election Bd.*, 311 F. Supp. 3d 949, 977 (S.D. Ind. 2018) (holding burden imposed by not providing satellite early voting locations unconstitutional), *vacated on other grounds* 925 F.3d 928 (7th Cir. 2019); *Pavek v. Simon*, No. 19-CV-3000 (SRN/DTS), 2020 WL 3183249, at *1 (D. Minn. June 15, 2020) (holding that placing candidates of one political party first in all races on the ballot imposed undue burden on the right to vote). Any other result would render *Anderson-Burdick* meaningless.

Finally, "[d]isparate impact matters under *Anderson-Burdick*." *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1216–17. In addition to its burdens on all Texans, HB 1888 will impose disproportionate burdens on college students, senior citizens, disabled veterans, and disabled individuals, which is directly relevant to the *Anderson-Burdick* analysis. *See supra* Section II.B. In *Crawford v. Marion County Election Board*, a majority of the Supreme Court agreed that in evaluating burdens, courts should consider not only a given law's impact on the general electorate, but also its impact on identifiable subgroups, for whom the burden may be more severe. *Id.* at 199-203 (plurality opinion); 553 U.S. at 210-23, 237 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting). Lower courts have followed these instructions. *See, e.g.*, *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (explaining *Crawford* instructs that "courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"); *League of Women Voters of Fla*, 314 F. Supp. at 1216-17 (Although "[a]t first blush, Plaintiffs' burdens appear slight," the lopsided impact on younger voters impermissibly created "a secondary class of voters" and warranted preliminary injunction.); *Veasey v. Perry*, 71 F. Supp. 3d 627, 686 (S.D.

Tex. 2014) ("*Anderson* and *Burdick*, as well as the lead opinion in *Crawford*, [] require balancing the state's interest against the burdens impose upon the subgroup [of voters most impacted by the challenged law]."), *vacated in part on other grounds*, 830 F.3d 216 (5th Cir. 2016) (en banc).

Accordingly, Plaintiffs have shown that HB 1888 will significantly, if not severely, burden their right to vote and significantly diminish their ability to utilize early voting, mandating, at minimum, heightened scrutiny under *Anderson-Burdick*.

B. HB 1888's burdens are not justified by any legitimate state interests.

Having considered the statute's burdens, *Anderson-Burdick* requires the Court to weigh those burdens against the state's *specific* justifications. *See Crawford*, 553 U.S. at 190 ("[A] court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."). And, perhaps most importantly here, the Court must consider whether the interests "justify the specific restriction . . . at issue." *Anderson*, 460 U.S. at 796. None of the state's hodgepodge of interests comes close to justifying the significant burdens HB 1888 places on the right to vote.

The Court should reject any assertion that HB 1888 prevents gamesmanship and promotes public confidence in the integrity and reliability of elections. Representative Bonnen, the author of the bill, testified that purported "gamesmanship" formed the crux of his basis to propose HB 1888 and similar bills, and he described this "gamesmanship" as the "selective harvesting of targeted voters." Bonnen Dep. Tr. 233:7-15. In his deposition, however, he was unable to recall any specific elections where such gamesmanship occurred other than a few minor school bond and hospital district elections, and certainly none in the context of a general election. *Id.* 86:14-22; 233:16-234:3; 259:4-11. Not one.

The one thing Representative Bonnen *was* clear on, under repeated questioning, was that he had only ever heard of any issues in school board and hospital bond elections, and he was not

aware of any purported "gamesmanship" in November general elections. *See, e.g.*, id. 163:22-164:7; 240:1-9; 246:18-247:1. What he referred to as "gamesmanship," moreover, reflected merely questions about the placement of early voting locations without any basis for the assertion of nefarious intent. Further, unlike in the context of school bond or hospital elections—where Representative Bonnen could readily identify what he meant by gamesmanship and "targeted votes," as turnout is low and specific groups of voters benefit from the tax at issue—Representative Bonnen was unable to identify how those principles would even apply in the context of a general election, where turnout is high and interests are more generalized. *Id.* 235:9-236:19. Representative Bonnen's testimony serves as an acknowledgement that the state passed a far overreaching bill—which touches on every election, including high-turnout presidential year primary and general elections, and which will make it harder for thousands of voters to exercise their right to vote—to address a problem admittedly confined almost exclusively to low turnout local elections, to the extent it exists at all.[7]

This lack of specificity and justification repeated itself with the Secretary's 30(b)(6) representative, Keith Ingram. Mr. Ingram, too, spoke about concerns of gamesmanship, Ingram Dep. Tr. 221:12-19, but admitted that, like Representative Bonnen, "I can't recall any specific instances." *Id.* 222:3. Mr. Ingram similarly believed gamesmanship was theoretically possible in a general election, but admitted he had only ever heard concerns of it in the limited instances of

[7] The State also offered Cruz Quintana to supposedly underscore this point, but Mr. Quintana is a citizen who merely testified to his concerns about the placement of voting locations in a hospital bond election in Hidalgo County in 2016 and a resultant lawsuit he was a part of regarding this issue which was decided against him. Quintana Dep. Tr. 74:20-21. Any other "evidence" he offered was hearsay. In any event, as evidence of "gamesmanship" in that election, Mr. Quintana relied on the location of the polling sites and also recalled that an elections administrator may have testified in the case, but could not recall any specifics of her testimony. *Id.* 95:2-13.

school board elections and healthcare districts. *Id*. 234:15-19. The Secretary failed to produce any evidence in discovery demonstrating any relationship between preventing gamesmanship and promoting integrity and reliability of elections on the one hand, and the significant burdens HB 1888 places on college-age and senior citizens in general elections on the other.

Second, the Secretary claims that HB 1888 avoids voter confusion, increases opportunities to vote, and reduces search costs for Texas voters. *See* Defs.' Objs. And Resps.to Pls.' Third Set of Interrogs. at 6-7. But state interests are not incantations the Secretary can merely utter and make into reality. They must be justified by evidence, and here the Secretary falls utterly short. *See*, *e.g.*, *People First of Ala. v. Sec'y of State*, No. 20-12184, slip op. at 19 (11th Cir. June 25, 2020) (holding state's interest in photo ID and witness requirements do not outweigh burdens on voters where no evidence to show that state has "found itself in recent years to have a significant absentee-ballot fraud problem"); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1036 (9th Cir. 2020) (en banc) (rejecting fraud-based justification for ballot collection ban where "there "has never been a case of voter fraud associated with ballot collection charged in Arizona" (citation omitted)).

The Secretary has provided no evidence of any individual who was confused by the fact that temporary early voting locations are only open for a limited period of time. Representative Bonnen recalled that in the legislative record from 2015 there was testimony from Alan Vera, a witness before the committee, that some *other unidentified* individuals did not know where to vote in a school bond election run by the local authority, Bonnen Dep. Tr. 147:19-148:5, 185:20-187:11, and Mr. Ingram recalled there had been similar testimony before the legislature in 2013 from Kara Sands about *other unidentified* voters purportedly expressing concerns to her in a 2010 school

bond election. Ingram Dep. Tr. 134:2-136:15.[8] But these triple-hearsay reports of possible confusion of certain unidentified third-party voters related to the location of early voting in local elections hardly demonstrate any real issue with confusion and mobile voting. Instead, HB 1888 will likely *lead* to significantly greater confusion and even potential disenfranchisement when voters suddenly discover that they are no longer able to vote at mobile locations they have previously relied upon. Indeed, this is the only type of confusion for which there is any evidence in the record, as it is what happened to Mr. Blodgett. *See supra* at 6.

Similarly, the Secretary offers no evidence that HB 1888 will increase opportunities to vote other than the unsurprising observation that, were *every* previous temporary voting location to be converted into a permanent location, voting opportunities would increase. Bonnen Dep. Tr. 264:17-265:11. Of course that's both true and quite irrelevant because the legislature failed to provide funding to underwrite such an outcome and, as a result, the record demonstrates that the practical (and predictable) effect of the law is quite the opposite. Travis County, for example, will be left with 59 fewer voting locations due to HB 1888. DeBeauvoir Decl. ¶¶ 14, 15; DeBeauvoir Dep. Tr. 98:10-13. And Dr. Rodden's work shows that the result will be increased travel times for young dorm-dwellers and elderly, disabled voters. Rodden Rpt. at 30. Finally, the Secretary has produced no evidence, through discovery, witnesses, or otherwise, that HB 1888 reduces search costs for Texas voters. Her only basis for this is theoretical and speculative. She ignores that, for voters like Mr. Blodgett and Ms. Gilby, their polling locations were, before HB 1888, right in the

[8] Other than these rumors of complaints of confusion, the Secretary's 30(b)(6) representative testified that the most common question their office receives every election is voters asking where they should vote, but acknowledged there was no way to know whether those calls were in any way related to temporary early voting locations, Ingram Dep. Tr. 136:16-138:6. While he asserted this call volume was less post-H.B. 1888, he acknowledged he did not have any basis to assert any reduction was due to the law. *Id.* at 138:17.

area where they lived or attended college and could not be easier to find. *See* Blodgett Dep. Tr. 18:2-14; Blodgett Compl. ¶ 18; *see also* Gilby Dep. Tr. 37:6-21.

Ultimately, the Secretary asks this Court to hold constitutional a law that has significant, demonstrated burdens on voters such as Mr. Blodgett, Ms. Gilby, and—based on the testimony of Plaintiffs' experts—untold thousands more, based on suppositions about hypothetical interests the law fails to serve. Of even more concern, the state justifies the detrimental impact of the law on thousands of voters during the general election based on a few local school bond elections that happened years ago, which—if truly of legitimate concern—could have been dealt with in any number of ways that would have been significantly less burdensome on the right to vote. *See supra* Section II.D. Because HB 1888 imposes significant burdens on voting rights without advancing correspondingly significant state interests, Plaintiffs are highly likely to succeed on their claims.

C. HB 1888 was passed with the intent to discriminate based on age.

The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age." U.S. Const., amend. XXVI, § 1. This language forbids abridging or denying the voting rights of young voters by singling them out for disparate treatment. *See Jolicoeur v. Mihaly*, 5 Cal.3d 565, 575 (1971); *see also Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (holding Twenty-Sixth Amendment violated by statute that required heightened standard for individuals under 21 to establish residency for voting); *U.S. v. Texas*, 445 F. Supp. 1245, 1257 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105 (1979) (same); *Worden v. Mercer Cty. Bd. of Elections*, 61 N.J. 325, 348 (1972) (same). The Amendment's text reflects that its historical goal "was not merely to empower voting by our youths but . . .affirmatively to encourage their voting, through the elimination of unnecessary burdens and

barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions." *Worden*, 61 N.J. at 345 (emphasis added). The Twenty-Sixth Amendment has "particular relevance for the college youth who comprise approximately 50 per cent of all who were enfranchised by this amendment." *Walgren v. Howes*, 482 F.2d 95, 101 (1st Cir. 1973) (citing 117 Cong. Rec. 5817, 5825).

Consistent with its historical goal of eliminating barriers to youth voting, the Twenty-Sixth Amendment tracks the language of the Fifteenth Amendment, which forbids intentional efforts to deny or abridge the right to vote on account of race. *Id.*; *compare* U.S. Const. amend. XXVI, *with* U.S. Const. amend. XV. Thus, just as a state cannot target voters of a certain race with special burdens to vote, so too it cannot constitutionally target young voters with special burdens that make it harder for them access the franchise. *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 512 (2000) ("'If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be.'") (quoting *U.S. v. Reese*, 92 U.S. 214, 218 (1876))

As in the well-trod analysis of Fifteenth Amendment challenges, there is "[a] consensus . . . emerging" among courts that have recently considered Twenty-Sixth Amendment challenges that, when a law does not facially limit voting opportunities "on account of age," courts should apply the standard from *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977), to determine whether the law was motivated by discriminatory intent. *See League of Women Voters of Fla.*, 314 F. Supp. 3d at 1221 (citing cases). Under *Arlington Heights*' multi-factor analysis, courts consider whether the defendant's actions were motivated by a discriminatory purpose by examining (1) statistics demonstrating a "clear pattern unexplainable on grounds other than" discriminatory ones, (2) "[t]he historical background of the decision," (3) "[t]he specific sequence of events leading up to the challenged decision," (4)

the defendant's departures from its normal procedures or substantive conclusions, and (5) relevant "legislative or administrative history." *Arlington Heights*, 429 U.S. at 266-68. "Legislative motivation or intent is a paradigmatic fact question." *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000) (citing *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999)). As the Fifth Circuit has repeatedly made clear, "'discrimination need only be *one purpose, and not even a primary purpose*,' of an official action for a violation to occur." *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (emphasis added) (quoting *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009)).

Courts have looked to Fifteenth Amendment cases for guidance in evaluating Twenty-Sixth Amendment claims not only for the test under which to analyze claims, but also for the analysis itself. *See League of Women Voters of Fla.*, 314 F. Supp. 3d at 1222 (finding a 2014 Florida policy that "did not identify college students by name" violated the Twenty-Sixth Amendment and comparing it to a 1910 Oklahoma constitutional amendment "'contain[ing] no express words' targeting African-Americans" that violated the Fifteenth Amendment) (quoting *Guinn v. United States*, 238 U.S. 347, 364 (1915)). Under this analysis, "direct evidence" is neither required nor typical to prove discriminatory intent. *See Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *Veasey*, 830 F.3d at 235. This Court may consider either "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions." *Brown*, 561 F.3d at 433 (quotations omitted). As the Fifth Circuit has recognized, "[t]o require direct evidence of intent would essentially give legislatures free rein to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions. This approach would ignore the reality that neutral reasons can and do mask racial intent." *Veasey*, 830 F.3d at 235-36 (citing employment discrimination case law to support its use of circumstantial evidence). The same is true regarding discrimination against youth.

Here, the strength and quality of circumstantial evidence vividly demonstrates that the Legislature acted with the intent to suppress the youth vote in enacting HB 1888. There is no dispute that youth early voting, including on college campuses, surged in the 2018 general election. *See* Am. Compl. ¶ 4 ("Youth early voting rates rose by a whopping 508 percent statewide as compared with 2014"). Nor is there a dispute that young voters in Texas tend to vote for Democratic candidates. *See e.g.*, Levine Rpt. at 4-5 (noting that Democratic candidate for U.S. Senate in 2018 won 71% of the 18-29-year old vote; "Texas' young voters have tilted to the Democratic side for some time."); Joey Garrison and Rebecca Morin, *'I think they will decide the race': Can young voters again push Democrats to victory in 2020?*, USA TODAY (Nov. 8, 2019), https://www.usatoday.com/story/news/politics/elections/2019/11/04/election-2020-young-voters-key-democrats-path-beating-trump/2458445001/ (noting that young Texans, in particular, turned out in higher numbers and overwhelmingly supported Democratic candidates and issues). As the then-President of the North Hays County Republican Party wrote in an October 2018 email to supporters, he opposed extending or expanding voting opportunities on the Texas State campus because providing more opportunities for on-campus voting "favors Democrats." CBS Austin, *Democratic candidates accuse Hays Co. GOP of trying to suppress student voting at TXST*, CBS Austin (Oct. 25, 2018), https://cbsaustin.com/news/local/democratic-candidates-accuse-hays-co-gop-of-trying-to-suppress-student-voting-at-txst/.

As a matter of political necessity and common sense, the legislative leadership that pushed HB 1888 through the Legislature was fully aware of the disproportionate and rapid growth of youth early voting, a particular partisan preference among youth voters, and the consequential threat to their remaining in power. *See Veasey*, 830 F.3d at 241 (confirming fact that a law was passed "in the wake of a 'seismic demographic shift' . . . such that . . . the party currently in power [was]

'facing a declining voter base and [could] gain partisan advantage' through [that law]" could support a finding of discriminatory intent) (quoting *Veasey*, 71 F. Supp at 700); c*f. N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (noting "polarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them"). As countless courts have held in the racial discrimination context, discrimination as the means to a partisan end is unlawful. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 n. 1, 1473 n. 7 (2017) (explaining that using race as a proxy for party is just as inexcusable as using race for its own ends); *LULAC v. Perry*, 548 U.S. 399, 440-41 (2006) (finding exclusion of Latino voters from redrawn district because they were likely to vote against incumbent bore "the mark of intentional discrimination").

With regard to the "historical background of the decision," Texas has repeatedly used unconstitutional discrimination to entrench political control. *LULAC*, 548 U.S. at 439 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994)) ("'Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process.'"); *Veasey*, 830 F.3d at 240 ("In every redistricting cycle since 1970, Texas has been found to have violated the [Voting Rights Act] with racially gerrymandered districts."); *see also OCA Greater Houston v. Texas*, No. 15-cv-679-RP, 2016 WL 4597636, at *2 (W.D. Tex. Sept. 2, 2016) (holding that Texas election laws restricting limited-English proficient voters' use of an interpreter at the polls violated the Voting Rights Act). That HB 1888 aims its discrimination at young voters does not diminish the relevance of this historical background; rather, it shows that, in the wake of new data about young voters, the Legislature has simply targeted different voters for disfavored treatment.

Furthermore, the "legislative . . . history" of HB 1888 itself reveals a "specific sequence of

events" and procedural subsequent departures that further support a finding of discriminatory purpose. HB 1888's proponents knew that the bill would disproportionately deny or abridge the rights of young voters on college campuses yet failed to take steps to tailor the legislation to address the ostensible state interests (gamesmanship in local elections) without these collateral consequences. As noted above, Representative Bonnen confirmed that concerns about the effect of HB 1888 on students and young voters had been raised "more than once." Bonnen Dep. Tr. 311:6-22. And multiple amendments were offered that would have shielded young voters from the bill's burdensome impacts. *See supra* Section II.D. But rather than address those concerns, the proponents pushed the legislation, as drafted, through to final passage without change. The failure to tailor the legislation to the identified problem demonstrates its true target: the youth vote.

Indeed, despite the fact that Representative Bonnen and others had previously introduced bills addressing concerns about locating polling places in politically-motivated geographic locations (sometimes called "rolling polling"), Representative Bonnen introduced HB 1888 as a renewed priority during the 2019 cycle, immediately following the youth early voting surge in the 2018 election. Rather than compromise with opponents of the legislation with regard to mobile voting on college campuses—which had increased turnout among a traditionally low-turnout demographic and, notably, had never come up in discussions of rolling polling previously—HB 1888's proponents specifically rejected opportunities to design the bill in ways that would minimize the disparate impact on young voters. *See Veasey*, 830 F.3d at 239 ("Against a backdrop of warnings that SB 14 would have a disparate impact on minorities and would likely fail the (then extant) preclearance requirement, amendment after amendment was rejected."), *see also Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 717 (S.D. Tex. 2017) ("Ignoring clear and supported objections about the racially disparate impact of a proposed law is probative of a lack of

responsiveness to minority concerns."). Specifically, proponents of HB 1888 rejected three amendments that would have excepted college campuses from HB 1888's duration and hours requirements. H.J. of Tex., 86th Leg., R.S., 60, 81-84, 88-91 (2019) (amendments introduced by Rep. Bucy and Turner); S.J. of Tex., 86th Leg., R.S., 58, 100-01 (amendment introduced by Sen. Rodriguez). In fact, the bill passed through the legislature without amendment, a procedural anomaly. *See* Bonnen Dep Tr. 229:7-230:18.

These amendments would not have undermined the Legislature's purported interests in preventing gamesmanship, avoiding voter confusion, increasing opportunities to vote, and increasing the integrity of the election process. Allowing college students to vote on campus would, if anything, increase both opportunities to vote and the integrity of the election process. Rejecting these amendments is not consistent with the stated goals of the bill. It is, however, perfectly consistent with a desire to abridge the right to vote of young Texans.

The disconnect between the law's broad scope and the narrow conduct it was purportedly meant to solve strongly supports the inference that the proffered justifications were mere pretext. None of the legislators who offered testimony in this case could recall another instance where the Legislature had targeted a local elections problem with sweeping legislation that applied to all elections. Bonnen Dep. Tr. 327:7-328:7. Indeed, Representative Bonnen's testimony serves as an acknowledgement that the state passed a far overreaching bill—which touches on every single election—to address a problem confined almost exclusively to a handful of exceedingly low turnout local elections. Unlike in school bond or hospital elections—where Representative Bonnen could readily define gamesmanship and "targeted votes" (i.e. locating polls in the communities that would benefit from the passage of certain taxes)—Representative Bonnen was unable to identify how those principles would apply in the context of a general election. Bonnen Dep. Tr.

235:9-236:19. His inability to respond is understandable: they don't. *See Veasey*, 830 F.3d at 241 ("It is likewise relevant that [HB 1888's] proponents refused to answer why they would not allow amendments to ameliorate the expected disparate impact of [HB 1888].").

By passing a law that applied in circumstances whose connection to the identified problem was inarticulable, and by rejecting opportunities to narrow the bill, the Legislature revealed that HB 1888 was a "solution[] in search of a problem." *N.C. NAACP*, 831 F.3d at 238. This Court need not "simply accept that legislators were really so concerned with this almost nonexistent problem" of rolling polling. *Cf. Veasey*, 830 F.3d at 239. Put simply, there was no need to eliminate mobile polling in primary and general elections, particularly at college campuses, unless the intent was to do something *other* than address gamesmanship. That intent—to suppress the youth vote—is clear from the record. As a result, Plaintiffs are highly likely to prevail on the merits.

D. Plaintiffs will suffer irreparable injury absent an injunction.

Harm to the right to vote is, by definition, irreparable if not remedied in advance of an election. That is because, once an election has passed, the injuries imposed cannot be "undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Obama for Am.*, 697 F.3d at 436. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C.*, 769 F.3d at 247. A burden on the fundamental right to vote constitutes irreparable harm even if it does not result in an outright denial of the right to vote. *See, e.g.*, *Obama for Am.*, 697 F.3d at 436 (finding irreparable harm where statute prohibited non-military voters from casting in-person early ballots during the three days before the November 2012 election); *see also League of Women Voters of N.C.*, 769 F.3d at 247 (finding irreparable harm where election law eliminated same-day registration and out-of-precinct voting). Here, Ms. Gilby, Mr. Blodgett, and the millions of voters among the Organizational

Plaintiffs' membership will have to work harder to cast their ballots early. Because of HB 1888, they will have to travel farther to vote and there will be far fewer polling places in Texas.

This is especially troubling in the context of COVID-19 (which is currently ranging in Texas and shows no signs of stopping), when polling place closure comes with severe collateral consequences to the health of voters and poll workers. Indeed, multiple courts have found irreparable harm where laws burdens the right to vote during the COVID-19 pandemic. *See, e.g.*, *Democratic National Committee v. Bostelmann*, No. 20-cv-249-WMC, 2020 WL 1320819, at *8 (W.D. Wis. March 20, 2020) (finding irreparable harm where election laws imposed burdens on ability to vote during COVID-19 pandemic); *Thomas v. Andino*, No. 3:20-cv-1552-JMC, 2020 WL 2617329, at *21-22 (D.S.C. May 25, 2020) (finding irreparable harm where absentee voting witness requirement would pose serious health risks due to COVID-19 pandemic).

E. The balance of the equities and the public interest favor an injunction.

The public interest and the balance of the equities also weigh heavily in Plaintiffs' favor. As a general matter, a preliminary injunction preventing the enforcement of an unconstitutional law serves the public interest. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). The public interest is particularly served by issuing an injunction in a case where voting rights are at issue because "[t]he public has a 'strong interest in exercising the fundamental political right to vote.'" *League of Women Voters of N.C.*, 769 F.3d at 248 (citations omitted).

HB 1888 is just the newest float in a parade of measures designed to reduce in-person voting opportunities in Texas.[9] Before HB 1888, Texas had already closed more than 750 polling places in the last seven years. HB 1888 will further limit the number of in-person polling places,

[9] *See* The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closure and the Right to Vote* (Sept. 2019), http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.

forcing the closure of 59 locations in Travis County alone. *See* DeBeauvoir Decl. ¶ 15. That HB 1888 was designed to target young voters only underscores the public interest in its revocation.

F. The Court should alternatively enjoin HB 1888 as applied to colleges and senior homes.

HB 1888 is facially unconstitutional but, even if it were not, it is unconstitutional as-applied to prohibiting mobile early voting on college campuses and at senior living centers. If the Court is not inclined to enjoin the law entirely and give discretion back to local officials, it should issue limited relief—enjoining the enforcement of HB 1888 regarding temporary voting locations at colleges, universities, and senior facilities—to alleviate the burdens on those most affected by HB 1888. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied challenges . . . is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint."); *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 536 (5th Cir. 2013) (affirming district court's as-applied injunction to specific political committee related to enforcement of statutes prohibiting certain political contributions); *Libertarian Party of Arkansas v. Thurston*, 394 F. Supp. 3d 882, 921 (E.D. Ark. 2019), *aff'd* 962 F. 3d 390 (8th Cir. 2020) (enjoining Secretary of State from restricting political party's ballot access and from enforcing law that required signatures exceeding 3% of votes cast in preceding election to be certified as a political party as-applied to that party only). As noted above, *supra* Section III.B, the Secretary has provided no interest to justify the particularly significant burdens caused by the prohibition on mobile voting locations in these locations.

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant the proposed order. Alternatively, Plaintiffs respectfully request that the Court enjoin HB 1888's enforcement as applied to prohibiting temporary voting locations at universities, colleges, and senior living facilities.

Dated this 23nd day of July, 2020.

Respectfully submitted,

By: /s/ *John M. Geise*
John M. Geise

John Hardin
TX State Bar No. 24012784
PERKINS COIE LLP
500 N. Akard St., Suite 3300
Dallas, TX 75201
Telephone: (214) 965-7743
Facsimile: (214) 965-7793
JohnHardin@perkinscoie.com

Marc E. Elias*
John M. Geise*
Alexi M. Velez*
Jyoti Jasrasaria*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
jgeise@perkinscoie.com
avelez@perkinscoie.com
jjasrasaria@perkinscoie.com

Kevin J. Hamilton*
Amanda J. Beane*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
khamilton@perkinscoie.com

Counsel for the Plaintiffs Gilby, Texas Democratic Party, DSCC, and DCCC

Chad W. Dunn
TX State Bar No. 24036507
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746

Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

Robert Leslie Meyerhoff
Texas Democratic Party
314 E. Highland Mall Blvd. #508
Austin, TX 78752
Telephone: 512-478-9800
rmeyerhoff@txdemocrats.org

Counsel for Plaintiff Texas Democratic Party

** Admitted Pro Hac Vice*

/s/ *Renea Hicks*
Renea Hicks
Attorney at Law
Texas Bar No. 09580400
LAW OFFICE OF MAX RENEA HICKS
P.O. Box 303187
Austin, Texas 78703-0504
(512) 480-8231
fax (512) 480-9105
rhicks@renea-hicks.com

/s/ *Michael Siegel*
Michael Siegel, Esq.
P.O. Box 2409
Austin, TX 78701
(737) 615-9044
siegellawatx@gmail.com

Counsel for Plaintiff Terrell Blodgett

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 23, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ *John M. Geise*
John M. Geise*

PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
jgeise@perkinscoie.com

Counsel for the Plaintiffs Gilby, Texas Democratic Party, DSCC, and DCCC

**Admitted pro hac vice*