No. 20-40643

In the 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 THE TEXAS SECRETARY OF STATE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Laredo Division

REPLY BRIEF FOR DEFENDANT-APPELLANT RUTH HUGHS

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INTRODUCTION

Plaintiffs' attempt to enjoin Texas's HB 25 and impose straight-ticket voting across the State "rests on shaky factual and legal ground." *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 568 n.1 (5th Cir. 2020) (per curiam) ("*TARA*"). Plaintiffs brought this lawsuit once before and lost on standing grounds. Issue preclusion alone suffices to decide this case.

Preclusion aside, plaintiffs' anticipated injury—contingent on a chain of hypothesized future events—remains too speculative to confer Article III standing. Plaintiffs compounded their jurisdictional errors by suing the Texas Secretary of State, who is protected by sovereign immunity, rather than the local officials who enforce HB 25. Each of these independent defects deprived the district court of jurisdiction, which it wrongly exercised.

What's more, plaintiffs have an evidence problem: specifically, they have none. To obtain a preliminary injunction, plaintiffs were required to make a clear showing—with evidence—of standing to protect their members' voting rights. Yet there is no evidence that plaintiffs' membership includes even one Texas voter. On the merits of their undue-burden claim, plaintiffs offered a report which contains basic mistakes about the workings of voting in Texas and whose author admits to making up some of the numbers. It is therefore beside the point that the State's interests in passing HB 25 are sufficiently important to outweigh any burden—because plaintiffs are unable to prove any burden to begin with. The Court should reverse the preliminary injunction and direct the district court to dismiss the case.

ARGUMENT

I. Plaintiffs Cannot Demonstrate Standing.

The attenuated connection between HB 25's elimination of straight-ticket voting and plaintiffs' imagined harms is "too speculative for Article III purposes." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019). As explained in *Bruni v. Hughs*, plaintiffs' first bite at the apple, "all of Plaintiffs' alleged injuries hinge on the occurrence of their five predicted 'effects' of HB 25." 468 F. Supp. 3d 817, 823 (S.D. Tex. 2020). Those effects are:

> (1) increased lines at polling places, (2) increased roll-off at polling places,[1] (3) increased voter confusion at polling places, (4) reduced Democratic-party turnout at polling places, either because Democratic-party voters will [disproportionately] leave polling-place lines or fail to show up all together, and (5) due to these predicted effects, fewer votes at polling-places for Democratic-party candidates.

Id.

Plaintiffs will be injured only "if *all* of these predicted effects—in a compounding fashion"—come to pass. *Id.* at 824 (emphasis altered). But "[t]he possibility, that maybe, in the future, if a series of events occur, [plaintiffs] might suffer some injury[,] is clearly too impalpable to satisfy the requirements of Art[icle] III." *Trinity Indus., Inc. v. Martin*, 963 F.2d 795, 799 (5th Cir. 1992); *see Bruni*, 468 F. Supp. 3d at 824. "Given the numerous suppositions that must occur before Plaintiffs might suffer any harm," the *Bruni* court "f[ound] that Plaintiffs' injuries [we]re not certainly impending and fail[ed] to satisfy Article III." 468 F. Supp. 3d at 824.

[1] "Roll-off" refers to a voter's failure to complete an entire ballot. Blue Br. 5.

Rightly so. But the district court bolstered its conclusion with additional observations: The possibility of mitigating measures by state and local officials "further weaken[ed]" "the certainty of Plaintiffs' predicted effects," *id.* at 826; the pandemic "significantly amplif[ied] the uncertainty over Plaintiffs' allegations," given that "many Texans [would] endure longer lines at polling-places indefinitely," "*regardless* of HB 25's enforcement," *id.*; and "the occurrence of [plaintiffs'] injuries remain[ed] in the hands of Texas voters." *Id.* at 827. Yet "[a] claim of injury generally is too conjectural or hypothetical to confer standing when the injury's existence depends on the decisions of third parties not before the court." *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009); *see Bruni*, 468 F. Supp. 3d at 827.

Because nothing materially changed between *Bruni*'s June 2020 dismissal and the September decision, plaintiffs are precluded from relitigating their lack of standing. Even still, plaintiffs continue to lack standing—and that, too, is fatal.

A. Plaintiffs are precluded from demonstrating standing.

Plaintiffs do not dispute that the Secretary has satisfied the elements usually required to establish issue preclusion. *See* Blue Br. 18. And neither purportedly new facts nor the addition of another Democratic-party-affiliated plaintiff, *see* Red Br. 15-25, alters this outcome.

1. The controlling facts in *Bruni* have not changed.

Although plaintiffs point to "post-[*Bruni*] factual developments," Red Br. 17, plaintiffs cannot "avoid [*Bruni*'s] preclusive effect" by "show[ing] merely a change in facts." *E.E.O.C. v. Am. Airlines, Inc.*, 48 F.3d 164, 168 (5th Cir. 1995). Plaintiffs' appeals to changed facts are beside the point, as none of the developments plaintiffs

identify—the worsening pandemic, the State's response to it, and its effect on the July 2020 primary elections, *see* Red Br. 17-18—change facts that controlled *Bruni*'s conclusion that plaintiffs' "numerous suppositions" were too speculative to confer standing. *Bruni*, 468 F. Supp. 3d at 827; *see American Airlines*, 48 F.3d at 168. The changes also have no effect on *Bruni*'s finding that the decisions of third parties—Texas voters—"provide[d] an additional reason that Plaintiffs lack standing." *Bruni*, 468 F. Supp. 3d at 827. Because plaintiffs' new developments do not alter *Bruni*'s principal lack-of-standing holding or its alternative third-party-decision holding, they are not "[c]hanges in facts essential to [the] judgment." Red Br. 15.

Plaintiffs struggle to show otherwise. Consider their claim that "the pandemic's virality, lethality, and durability proved to be far worse than it appeared to the court in June." *Id.* at 18. This is impossible to square with *Bruni*'s description of COVID-19 as a "highly contagious [] virus which can cause serious illness and sometimes death," and which would impose "serious, and arguably unprecedented, burdens in exercising the[] right to vote in-person." 468 F. Supp. 3d at 826. The COVID-19 pandemic has indeed proven dangerous and long-lasting—but the district court already recognized that fact. It is hardly a changed circumstance.

And *Bruni* did more than assume "the pandemic would [] impact[] Texas's election administration in *some* way." Red Br. 19-20. The court explained that the pandemic "significantly amplif[ied] the uncertainty over Plaintiffs' allegations" because lines would be longer "*regardless* of HB 25's enforcement" and it was impossible to predict how individual voters would react to the risk of voting during the pandemic. 468 F. Supp. 3d at 826-27. The purported change—a "new wave of infections" and

heightened "voter anxiety about exercising their voting rights in person," Red Br. 19—was not a change at all, but confirmation that *Bruni* correctly found that the pandemic *added* uncertainty to plaintiffs' theory of harm. Contradicting *Bruni*, the court below found the opposite—that lengthier lines attributed in *Bruni* to the pandemic were in fact attributable to the State and made plaintiffs' claims *less* speculative. *See* Red Br. 17-18. That was error. *DeShazo v. Nations Energy Co.*, 286 F. App'x 110, 116 (5th Cir. 2008) (per curiam).

The district court's speculation as to the adequacy of the State's pandemic-mitigation measures was also insufficient to preclude preclusion. *Cf.* Red Br. 17-18. Although the district court characterized the Governor's six-day extension of early voting as "inadequate," ROA.1672, it had no evidence on which to base its conclusion: Plaintiffs' line-modelling expert did not discuss the pandemic or early voting. *See* Part I.B.1, *infra*. And the elections administrator on whose declaration the district court and plaintiffs relied, *see* ROA.1393, ROA.1672, said nothing about the extension. *See* ROA.57-59. Plaintiffs' guess as to the impact of the early-voting extension is not "a significant change in the controlling facts." *American Airlines*, 48 F.3d at 167.

Further, these attempts to rely on the pandemic to escape issue preclusion miss the point: the factual changes on which plaintiffs wish to rely contradict their theory of harm. They claim that pandemic-related longer lines were "[c]rucial to the court's [preclusion] analysis." Red Br. 19. But, later, they also defend their expert's failure to account for the effects of the pandemic on the basis that the pandemic (and the State's response to it) "determine[d] the *severity* of HB 25's impact, not its

likelihood." *Id.* at 29. If the effects of the pandemic were "crucial," plaintiffs' expert report contains a crucial omission. Conversely, if the pandemic did not alter the likelihood of plaintiffs' injuries, the pandemic cannot be a "[c]hange[] in facts essential to" *Bruni*'s holding as to the likelihood of those injuries. *Id.* at 15.

Plaintiffs suggest that because the district-court judge—who wrote *Bruni* and the decision below—had "intimate familiarity with the reasoning that animated the outcome in *Bruni*," she was best placed to know "the facts had significantly changed." Red Br. 16. That is cause for reversal, not "deference." *Id.* Issue preclusion turns on what the first court *wrote*, not its subjective impressions at the time of writing. That is why "a court does not usually get to dictate to other courts the preclusion consequences of its own judgment." *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011). What matters is that the *Bruni* opinion expressly contemplated the events plaintiffs describe as developments. Having received an adverse ruling and failed to appeal it, plaintiffs are not free to simply try again anew.

2. TARA is precluded from independently establishing standing.

Plaintiffs ask the Court to treat TARA as an entirely new party, rather than another member of the Texas Democratic Party's mix-and-match set of plaintiffs. Red Br. 20-21. But TARA's claims are precluded because it was "adequately represented by someone with the same interests who [wa]s a party to [*Bruni*]." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (quotation marks omitted; first set of brackets in original). Specifically, "'TARA's interests 'are aligned' with those of the *Bruni* Plaintiffs," and "the [*Bruni* Plaintiffs] understood [themselves] to be acting in a representative capacity.'" Red Br. 21 (brackets in original) (quoting *Taylor*, 553 U.S. at 898, 900).

The organizational plaintiffs in *Bruni* asserted standing on behalf of their "members and constituents—Democratic candidates and voters throughout Texas." MTD Opp. at 14, *Bruni v. Hughs*, 468 F. Supp. 3d 817 (S.D. Tex. 2020) (5:20-CV-35), ECF No. 47. That means the *Bruni* plaintiffs "understood [themselves] to be acting in a representative capacity for the benefit of [their] individual members," constituents, and candidates. *Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs.*, 533 F.3d 634, 641 (8th Cir. 2008). Plaintiffs "clearly intended to represent" those groups "and prosecuted th[e] case accordingly." *Id.*; *see Bruni*, 468 F. Supp. 3d at 822. They lost.

Enter TARA, an arm of the Texas Democratic Party. *See* Blue Br. 23. Plaintiffs scoff at the "meandering web" that links the organizations, Red Br. 22, but they do not deny that it is a web of their own making. *See id.* at 20-25. Nor could they. TARA has asserted claims "on behalf of its members and constituents," and bases its injuries on the "threaten[ed] . . . electoral prospects of its endorsed candidates." ROA.16 ¶ 21. As the complaint shows, these members, constituents, and candidates are the Democrats who were represented in *Bruni*. Count II, for example, alleges on behalf of all plaintiffs that HB 25 would violate their "fundamental right to political association" by "mak[ing] it harder for Democratic voters, organizations, and candidates to advance their political interests." ROA.48. So too with Count V. *See* ROA.52.

More than just "close associates" "shar[ing] the same lawyer[] and purs[uing] identical claims," then, Red Br. 23, TARA is another Democratic Party organization purporting to represent, deriving associational standing from, and resting its theories

of harm on the same members, constituents, organizations, and candidates that were represented in *Bruni*. What's more, both lawsuits "assert[] identical interests" "in nearly identical language." *Midwest Disability Initiative v. JANS Enters., Inc.*, 929 F.3d 603, 608 (8th Cir. 2019); *see* Blue Br. 9-10. Under these facts, it requires no "expan[sion]" of the "adequate-representation exception," Red Br. 24, to treat TARA as adequately represented in *Bruni*. *See Midwest Disability*, 929 F.3d at 608.

B. Plaintiffs' theory of harm is too speculative to establish standing.

Even were they permitted to litigate standing anew—and they are not—plaintiffs still cannot establish standing. As in *Bruni* before, plaintiffs lack any caselaw support for a theory of standing predicated "on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). Indeed, plaintiffs had eight months between *Bruni* and their appellees' brief to find supporting authority. That they have returned empty-handed tells the Court everything it needs to know about the propriety of resting standing on a series of contingent and cumulative hypotheticals. Beyond that, their theory of harm is *factually* deficient, too, as they must "make a 'clear showing' of standing to maintain [an] injunction." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020) ("*TDP*").

1. Plaintiffs' theory that straight-ticket voting will cause longer lines rises and falls on their expert report. They chose an "expert" whose report rests on guesswork and a misunderstanding of Texas straight-ticket voting. *See TARA*, 976 F.3d at 567 n.1. "The straight-ticket option [] required in-person voters to scroll through the entire ballot, page by page, at the voting machine in order to cast their ballot," allowing voters to "confirm each of their individual choices or change the selection for any of

the individual contests." *Id.* Plaintiffs insist that "[n]othing in Dr. Yang's declaration suggests" he did not know this. Red Br. 28. His report tells a different story.

Yang started from the premise that "[straight-ticket] voters need make only one selection to cast votes in each partisan election." ROA.363. Nowhere in his calculations does he account for the time it took straight-ticket voters to scroll through the ballot and deliberate on or change their individual choices. Rather, he assumed "that a voter who chooses the STV option does not override this choice with votes in any of the individual partisan elections," ROA.1124 ¶ 51, even though his "declaration provide[d] no evidence at all in support" of this assumption. ROA.1124 ¶ 52. It is also unclear how Yang *could* have personally known about Texas straight-ticket voting, given that he relied on others to gather data for him, ROA.354-55, and reviewed a study that used "machine logs from the 2016 general election in South Carolina." ROA.363.

Then there's Yang's admission he "d[id] not have empirical data" as to how much longer voting would take without the straight-ticket option. ROA.364. So, "for purposes of th[e] declaration," he "considered the possible scenarios of 10 and 15 seconds." ROA.364. He offered no rationale or supporting authority for these "possible scenarios," even though they formed the basis of his calculations. *See id.*; *but see Clapper*, 568 U.S. at 409 ("[A]llegations of *possible* future injury are not sufficient." (quotation marks omitted)). Additionally, plaintiffs concede that Yang's analysis focused on 2016 data and did not "predict what occurs in 2020." ROA.1391; *see* ROA.361-62. There was therefore no analysis as to the effect of the extension of early voting or of the pandemic on waiting times.

Plaintiffs' retort—that "November's turnout rate would determine the *severity* of HB 25's impact, not its likelihood"—misses the point. Red Br. 29. Backward-looking data "does not, by itself, demonstrate a substantial risk" of the occurrence of future events. *Stringer*, 942 F.3d at 722. Because the report made no attempt to predict the likelihood of plaintiffs' asserted future injury, was founded on assumptions pulled from thin air, and was entirely removed from the realities of voting in Texas, it can hardly be considered evidence of those future injuries at all.

Plaintiffs try to bolster the report by asking the Court to review for "clear[] error[]" the district court's "finding[s]" about Yang's guesswork. Red Br. 26-27. But the court only considered whether plaintiffs had *pleaded* sufficient factual allegations to overcome a Rule 12(b)(1) motion to dismiss—not whether plaintiffs had made the "clear showing of standing required to maintain a preliminary injunction" through the submission of evidence. *TARA*, 976 F.3d at 567 n.1 (quotation marks omitted); *see* ROA.1665; ROA.1681. There are no preliminary-injunction-stage findings about standing. So there is nothing to review for plain error.

2. The Yang report is not plaintiffs' only problem. They now claim their theory of standing was a "simple" one, premised on "a substantial risk" of plaintiffs' "millions of members and constituents" having to "wait in longer lines." Red Br. 29. Not so. As plaintiffs and the district court recognized below, lengthier lines caused by HB 25 were just the first of many predictions that had to be realized for plaintiffs' injuries to materialize. *See* ROA.46; ROA.1664-65; ROA.1667. Plaintiffs still had to present evidence that their four other contingent events would occur. *See Bruni*, 468 F. Supp. 3d at 824. There is no such evidence.

Take, for example, the risk of Democratic voters leaving lines at higher rates than other voters. *See id.* at 823. Relying on three declarations from Texas voters, the district court found "[i]ncreasing wait times at the polls [] could cause more Texans to leave polling place lines before they have [voted]." ROA.1701; *see* ROA.394-95; ROA.397-98; ROA.400-01. All three declarants, however, voted in past elections *despite* long lines. *See* ROA.394; ROA.397; ROA.400. Granted, all three "personally observed many people leave the line without voting." ROA.395; ROA.398; ROA.401. But if these observations are supposed to show HB 25's effect on voters leaving lines, it is hard to see how.

More damaging for plaintiffs' theory of standing, there is no indication that any of the line-leavers were Democrats or that Democrats left in greater numbers than others. At most, the declarations show that Texans may *generally* leave long lines. But "[p]laintiff-specific evidence is needed before Plaintiffs' claims can be properly characterized as an attempt to remedy an imminent injury to Plaintiffs instead of a generalized grievance available to all Texans." *Stringer*, 942 F.3d at 722. Thus, even if plaintiffs can show that HB25 causes longer lines, their theory of harm remains predicated on a string of speculation lacking in evidentiary support—the kind of theory for which "[f]ederal courts consistently deny standing." *Prestage Farms, Inc. v. Bd. of Supervisors of Noxubee Cnty.*, 205 F.3d 265, 268 (5th Cir. 2000).

C. There is no record evidence of plaintiffs' alleged injuries.

The preliminary injunction rested on a finding of associational standing, *see* ROA.1677, which in turn required evidence that (1) plaintiffs' members would have standing; (2) "the interests the association[s] seek[] to protect are germane to the

purpose of the organization[s]"; and (3) "neither the claim asserted nor the relief requested requires participation of individual members." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006).

No such evidence exists—only unverified pleadings. *See* Blue Br. 23-24. And unverified pleadings are not evidence. *Id.* at 24. As this failure is case-dispositive, plaintiffs ask for the second time to supplement the record with evidence of standing. Red Br. 32. The Court should again decline the invitation. The Secretary's brief in opposition to the motion to supplement shows that disputed standing evidence may not be received on appeal, remand is inappropriate, and there is nothing unfair about the Court's refusal to fix plaintiffs' foreseeable and avoidable mistake. *Contra id.* at 31.

Plaintiffs cannot sidestep this failure by noting that preliminary injunctions are "granted on the basis of . . . evidence that is less than complete than in a trial." *Id.* at 33 (ellipsis in the original). The issue here is not the evidence's completeness, but its complete absence. Nor can plaintiffs rely on "the enormity of [their] memberships," *id.*, to skirt their obligation to identify "evidence in the record showing that a specific member" will be injured. *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010).

Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254 (2015) ("*ALBC*"), and the out-of-circuit decisions plaintiffs cite, *see* Red Br. 33, do not alter that obligation. In *ALBC*, there *was* testimony about the plaintiff's membership. *See* 575 U.S. at 269. In *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam), the Sixth Circuit said nothing about inferences from an empty

record, instead finding associational standing because of evidence there were members who would vote in the election. *See id.* at 574. And the Ninth Circuit opinion in *National Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir. 2015), related to a motion to dismiss, *see id.* at 1041, where a plaintiff benefits from inferences unavailable at the preliminary-injunction stage. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Without record evidence of "the enormity" of plaintiffs' memberships, there is nothing from which to infer harm to any one member. "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation marks and citation omitted). Plaintiffs are therefore asking the Court to do the impermissible: "[A]ccept[] the organization's self-description of the activities of its members," and assume "there is a statistical probability that some of those members are threatened with concrete injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Plaintiffs also have no record evidence to show "standing on the basis of resource diversion" or through supposed harms to the "electoral prospects of DSCC and DCCC's candidates." Red Br. 34 (quotation marks omitted). Plaintiffs' "logic[]," *id.*—that long lines for *all* Texans will necessarily harm Democratic voters—is unavailing for reasons already given: standing may not be premised on "generalized grievance[s] available to all Texans." *Stringer*, 942 F.3d at 722.

II. Sovereign Immunity Bars Plaintiffs' Claims.

Although plaintiffs concede that local officials enforce HB25, they have chosen instead to sue the Secretary, a state official protected by sovereign immunity. *Ex parte Young*'s narrow exception does not apply here because plaintiffs have not shown that the Secretary has "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *TDP*, 978 F.3d at 179.

A. The Secretary does not have a particular duty to enforce HB 25.

To determine whether a defendant has a particular duty, the Court turns to the statute itself, "first consider[ing] whether" a "state actor or agency is statutorily tasked with enforcing the challenged law." *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019). Where one state actor is so tasked, "and a different official is the named defendant, [the] *Young* analysis ends" and the case must be dismissed. *Id.* "Where no state official or agency is named in the statute in question," only then does the Court look more broadly to "consider whether the state official actually has the authority to enforce the challenged law." *Id.*

This approach makes quick work of the case. Plaintiffs challenged HB 25's elimination of straight-ticket voting. Local officials are statutorily tasked with enforcing HB 25's elimination of straight-ticket voting by preparing ballots without the straight-ticket-voting option. *See* Blue Br. 28. But the Secretary, a different official, is the named defendant. Plaintiffs' claims must be dismissed.[2] Plaintiffs agree that

[2] Because the Court has jurisdiction over the denial of the motion to dismiss under the collateral order doctrine, *see* Blue Br. 2-3, the Court may direct the district

locals officials are responsible for preparing ballots. Red Br. 49; ROA.1017-18. They agree that *City of Austin* controls. Red Br. 44, 47. But they have nothing to say about its two-part test or the dispositive nature of the test's first prong in this case.

Instead, plaintiffs move onto *City of Austin*'s second step (despite its inapplicability here), listing various provisions of Texas law that also fall short of connecting the Secretary to enforcement. Red Br. 45-48. The requirement that the Secretary provide notice to local officials "that straight ticket voting has been eliminated pursuant to H.B. 25," Tex. Elec. Code. § 31.012(b-1), is not enforcement for *Young* purposes because it does not involve "compulsion or constraint." *TDP*, 978 F.3d at 179; Blue Br. 30. Plaintiffs have no response. *See* Red Br. 45. The Secretary's duty to "adopt rules and establish procedures" "to ensure that voters and county election administrators are not burdened by [HB25's] implementation," Tex. Elec. Code. § 31.012(d), is not enforcement because the power to promulgate a regulation or procedure "is not the power to enforce it." *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467 (5th Cir. 2020); *see* Blue Br. 30-31. Plaintiffs have nothing to say about that either. *See* Red Br. 45.

Plaintiffs continue to rely on the Secretary's position as "chief election officer." Tex. Elec. Code § 31.001; Red Br. 46; *see* Blue Br. 29. They assert "[t]he Secretary is incorrect to suggest that this Court's decision in *OCA*," which mentioned the job title during a discussion of standing, "is inapplicable." Red Br. 47 (citing *OCA*-

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court to dismiss on sovereign-immunity grounds *or* for lack of standing. *See City of Austin*, 943 F.3d at 1003 n.3; *contra* Red Br. 26 n.5.

Greater Houston v. Texas, 867 F.3d 604, 613 (5th Cir. 2017)). That "suggest[ion]" was in fact a holding of the Court that this job title does not, in the context of *Ex parte Young*, supply a "sufficient connection between the official sued and the statute challenged." *TDP*, 978 F.3d at 179; *see* Blue Br. 29-30.

Plaintiffs also point to sections 31.003 and 31.005 of the Code. Red Br. 46-48. Plaintiffs did not discuss section 31.005 in the district court and have therefore forfeited the opportunity to do so now. In any event, neither is a sufficient connection to enforcement. The Secretary's duty to "maintain uniformity in the application" of the Code, Tex. Elec. Code § 31.003, is nothing more than a "general dut[y]," *TDP*, 978 F.3d at 180, which "is insufficient" for *Young* purposes. *Id.* at 181; *contra* Red Br. 46 & n.8. Plaintiffs do not explain how this general duty creates a specific duty to enforce HB 25, instead falling back on *OCA*'s inapposite holding. Red Br. at 47.

Section 31.005's grant of discretion to "take appropriate action to protect" voting rights, Tex. Elec. Code § 31.003(a), "merely *authoriz[es]* the Secretary to take some action." *Lightbourn v. County of El Paso*, 118 F.3d 421, 429 (5th Cir. 1997) (emphasis added). It "do[es] not confer a legal *duty* on [her] to take the contemplated action." *Id.* (emphasis added). So this general provision cannot be a "specific and relevant duty" to enforce HB 25 either. *TDP*, 978 F.3d at 179.

No surprise, then, that this Court has already disposed of arguments that sections 31.001, .003, and .005 connect the Secretary to provisions of the Election Code. *Compare* Br. for Plaintiffs-Appellants at 51, *Mi Familia Vota v. Abbott*, No. 20-50793, 2020 WL 5759845, at *51 (5th Cir. Sept. 18, 2020) (arguing that the Secretary "is

indisputably connected to enforcement of the Texas Election Code" because of those three provisions), *with Mi Familia*, 977 F.3d at 468 (holding that the Secretary was not sufficiently connected to the enforcement of the printing and use of paper ballots).

Plaintiffs also forfeited their argument that the Secretary's power to "prescribe the form of various ballot types" connects her to local officials because, in *TDP*, the Secretary's duty "to design the application form for mail-in ballots" connected her to enforcement of a different law. Red Br. 45-46. In any event, this argument reflects a misunderstanding of *TDP*. There, the plaintiffs challenged section 82.003, which provides in its entirety that "[a] qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day." Tex. Elec. Code § 82.003; *see TDP*, 978 F.3d at 179. Because the law did not statutorily task an official with its enforcement (as the law does in this case), the first *City of Austin* step was non-dispositive and the Court had to consider other parts of the Texas Election Code. *TDP* did not signal or sanction a departure from the *City of Austin* test, *contra* Red Br. 49-51—nor could it under the rule of orderliness.

B. There is no evidence the Secretary is likely to enforce HB 25.

Plaintiffs do not dispute that they forfeited the chance to argue that the Secretary is likely to enforce HB 25. *See* Blue Br. 32; Red Br. 51. They merely cite a page of their complaint and claim it shows "the Secretary would exercise her responsibilities to implement the law." Red Br. 51 (citing ROA.10). That page does not mention the Secretary, although the page after alleges that "on September 1, 2020, Secretary of State Hughs will order the elimination of the STV option from all Texas ballots

pursuant to House Bill 25." ROA.11. This appears to be a reference to plaintiffs' mistaken belief that the Secretary had to take some action for HB 25 to take effect. *See* Blue Br. 31. To the contrary, straight-ticket voting was eliminated on September 1 "[b]y operation of law and without any action by the Secretary." *Id.*

To fill their evidentiary void, plaintiffs reference non-record material (which is currently the subject of a motion to strike). Red Br. 51-52. The election advisory they mention was issued after the commencement of the case. *Id.* at 52 n.9. Plaintiffs cannot "retroactively create[]" an exception to sovereign immunity through reliance on facts "that did not exist at the outset." *Lujan*, 504 U.S. at 569 n.4. And as its name suggests, the election advisory contains non-binding advice, which cannot be said to compel or constrain anyone. *See In re Stalder*, 540 S.W.3d 215, 218 n.9 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Plaintiffs have no argument to the contrary.

C. *Ex parte Young* does not permit the injunctive relief awarded here.

An order prohibiting the Secretary from enforcing HB 25 "still would not *require* counties" to reintroduce straight-ticket voting. *Mi Familia*, 977 F.3d at 468. Because suing the Secretary "would not afford the Plaintiffs the relief that they seek," "the Secretary of State is not a proper defendant." *Id.* (quotation marks omitted); *see* Blue Br. 33-34. Plaintiffs contend that "[i]f the Secretary is enjoined from implementing or enforcing [HB 25], the Election Code would again require STV to be made available." Red Br. 50-51. They do not explain how, given that straight-ticket voting has already been eliminated from the Code. And an injunction against the Secretary does not bind the local officials who *do* implement and enforce HB 25. *See Mi Familia*, 977 F.3d at 468; Blue Br. 34.

In passing, plaintiffs argue that the Voting Rights Act has abrogated sovereign immunity. Red Br. 52. But only two of the five claims in this case were brought under the Voting Rights Act. *See* ROA.45-53. The preliminary injunction rested on neither. Even assuming a valid abrogation, plaintiffs still could not secure injunctive relief against the Secretary. *Mi Familia*, 977 F.3d at 470. Because she does not enforce HB 25, plaintiffs concede that the Secretary would have to compel local officials to reintroduce straight-ticket voting. *See* Red Br. 47-48. Regardless of the availability of sovereign immunity, however, "court-ordered-relief [] requir[ing] the . . . Secretary of State to issue an executive order or directive or to take other sweeping affirmative action" "would violate principles of federalism." *Mi Familia*, 977 F.3d at 470.

Plaintiffs' last resort—policy arguments—do not move the needle. Plaintiffs' protest that they have no-one to sue, *see* Red Br. 51, would carry more weight if they explained why they chose not to sue local officials, as they have previously. *See TDP*, 978 F.3d at 174. And when plaintiffs warn of "a sea change" in the law, Red Br. 48-49, what they mean is that reversal will be required of the cited district-court decisions in which plaintiffs convinced lower courts to ignore the lessons of *City of Austin*, *TDP*, and *Mi Familia*. *See id.* Just so. As for their Fifth Circuit citations, *see id.* at 48, sovereign immunity was at issue in none of them.

III. Plaintiffs Are Unlikely To Succeed on the Merits of Their Undue-Burden Claims.

Plaintiffs "b[ore] a heavy burden of persuasion" on the merits of their undue-burden claim. Blue Br. 35 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008) (plurality op.)) Plaintiffs did not come close. And their attempt to

downplay the State's interests in enforcing HB 25 repeats errors the Court has recently warned litigants against making.

A. Plaintiffs cannot show anything more than a minimal burden.

Plaintiffs failed to prove HB 25 burdened their members' voting rights. First, the bulk of plaintiffs' evidence is the ill-thought-out Yang report. *See* Red Br. 37-39; Part I.B.1, *supra*. Their fallback expert, an elections administrator, *see* Red Br. 37, can only guess that "the increase in average voting time caused by" HB 25 "will produce a significant increase in wait times at the polls." ROA.346. He does not say by how much, or proffer the factual basis for his opinion. He seems to base his views on the prevalence of straight-ticket voters in Fort Bend County, *see* ROA.346, even though there is no reason to believe his experience is fairly representative of the State as a whole. *Cf.* ROA.364 (20% fewer people used straight-ticket voting in Travis County).

Without reliable evidence, plaintiffs cannot meet their heavy burden of demonstrating "the character and magnitude of the[ir] asserted injury." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013). Plaintiffs' asserted injury is not longer lines but the effect of those lines on the exercise of the franchise. Even if the Yang data were reliable, plaintiffs offer only vague, anecdotal evidence about the incidence of voters leaving after a long wait. *See* Part I.B.2, *supra*.

So when plaintiffs insist HB 25 will impose "a greater than minimal burden on Texans' right to vote," Red Br. 36, the Court has no way of knowing if that is correct. "[A] plaintiff's assertion" alone will not do. *Richardson v. Tex. Sec'y of State,* 978 F.3d 220, 236 n.33 (5th Cir. 2020). And a Pennsylvania-district-court decision notwithstanding, *see* Red Br. 39, the general "inconvenience" of waiting in line "does

not qualify as a substantial burden on the right to vote." *Crawford*, 553 U.S. at 198 (plurality op.); *see* Blue Br. 36. As a result, any burden "is at most a minimal one." Blue Br. 36; *contra* Red Br. 37 ("The Secretary does not dispute that long polling-place lines impose a significant burden on voters.").

Second, the effects of the pandemic have no place in plaintiffs' facial challenge, which "can only succeed" "by establish[ing] that no set of circumstances exists under which the Act would be valid." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (alteration in original); Blue Br. 38-39. Plaintiffs brush off the differences between facial and as-applied challenges, and suggest that the district court looked past "the precise terminology used by the parties." Red Br. 38 n.7. But the pandemic enjoyed a central role in the district court's decision. Eliminating the pandemic from the decision below "[w]ould transform the appeal into a constitutional argument that has little relevance to the district court's reasons for granting a preliminary injunction." *TDP*, 978 F.3d at 177. And regardless of the "terminology used by the parties," the court itself treated the challenge as a facial one. *See* Blue Br. 38; ROA.1678.

B. The State's regulatory interests outweigh any burden.

A state's important interests "are sufficient to justify" restrictions on voting "if the burden of the voting restriction is not severe." *Richardson*, 978 F.3d at 239. These interests are well-documented. *See* Blue Br. 41-42. Plaintiffs do not quibble with the importance of the interests, and have yet to show a severe burden—the district court itself found only a "greater than minimal" one. ROA.1700. As a matter of law, then, the State's important interests outweigh the purported burden. *See Richardson*, 978

F.3d at 235. Plaintiffs' response contains "at least two errors: It (1) incorrectly suggest[s] that Texas needed to provide evidence" in support of its interests; "and (2) erroneously impose[s] a narrow-tailoring requirement on the state." *Id.* at 240.

HB 25 "reflect[s] a deliberate determination that it is better if voters are . . . required to make individual assessments of candidates, rather than mass choices." *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 346 (6th Cir. 2018). It is *this* requirement—not a hypothesized "require[ment] [that] voters [] spend more time voting" or standing in line—that furthers the State's interests in "qualified candidates[,] better campaigns, [and] more informed voting." Red Br. 40 (quotation marks omitted); *see* Blue Br. 41-43. And although the State has supplied evidence that HB 25 will achieve these goals, *see* Blue Br. at 43-44, it is under no obligation to "demonstrat[e] empirically the objective effects of [its] election laws." *Richardson*, 978 F.3d at 240; *see* Blue Br. 42.

The district court disregarded this holding and "erred in scrutinizing whether [HB 25] furthered [the State's] interests." *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 147 (5th Cir. 2020) ("*LULAC*"); *see* Blue Br. 42-43. Intent on doing the same, plaintiffs argue that the State's interests will go unrealized. Red Br. 40-42. But plaintiffs' mere disagreement "comes nowhere close to rendering Texas's [] ballot system constitutionally inadequate." *LULAC*, 978 F.3d at 146.

Plaintiffs also opine that some of the State's goals could be achieved in "less burdensome" ways. Red Br. 41. Faulting the State for not "fashion[ing] its regulations in a less burdensome manner" assumes a "narrow tailoring requirement." *Richardson*, 978 F.3d at 241. "But the *Anderson/Burdick* framework imposes a

narrow-tailoring requirement only on restrictions that constitute *severe* burdens." *Id.* Again, absent a severe burden, plaintiffs' preferences are irrelevant.

IV. The Other Preliminary-Injunction Factors Weigh in Favor of the State.

Plaintiffs' failure to make out a meritorious case infects the other preliminary-injunction factors. The assertion that "the record demonstrate[s]" irreparable harm to "Plaintiffs, their members and constituents," Red Br. 42, fails because there is *no* record evidence about "Plaintiffs, their members, and constituents." As for the balance of the equities, the State retains its strong interest "in ensuring the proper and consistent running of its election machinery," *TARA*, 976 F.3d at 569, despite "the action of a single District Judge declaring [HB25] unconstitutional," *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers)—an action that was swiftly stayed. Plaintiffs' contrary position ignores "the immense burden" that would be required to undo HB25, which took three years to implement. *TARA*, 976 F.3d at 568. And plaintiffs cannot deny that the State's interests merge with those of the public. *See id.*

Conclusion

The Court should reverse the preliminary injunction and direct the district court to dismiss plaintiffs' claims.

Respectfully submitted.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,432 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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